

Town of Porter
Board of Zoning Appeals
Meeting Minutes
December 17, 2003

A. The meeting was called to order at 7:00p.m.

B. Pledge of Allegiance

Present: Mr. Beckman, Mr. Childress, Mr. Chemma, Mr. Niepokoj, and Mr. Bell.
Quorum was established. Also present were Mr. Mandon, Mr. Hearn, and Mr. Whisler.

C. Consideration of minutes from previous meeting.

Consideration of minutes was postponed until January 2004.

D. Old Business

Findings of Fact: Lagestee Petition

Motion to adopt the findings of fact as written for the Lagestee petition made by Mr. Bell; second by Mr. Chemma.
Motion carried 5 – 0. (See attached).

E. Audience Participation

None

F. Preliminary Hearings

None

G. Public Hearings

Dale Brewer, 161 Bote Drive, Porter: An appeal of Building Commissioner's decision regarding construction at 171 Bote Drive, Porter.

The public hearing was opened at 7:07 p.m.

The petitioner's stated their case first.

Mr. Gordon Etzler, attorney, made a presentation on behalf of his client Dale Brewer.

1. Made a brief statement on his client's concerns, his views on what this BZA meeting was about, and what he was going to present.
2. Asking that the building permits be revoked.
3. No site plan or scale drawing of the building submitted as required by the ordinance.
4. The existing building was abandoned, damaged, and then razed from the property which requires that the setback and other requirements must be met.
5. Front-, side-, and rear-yard setbacks.
6. Parking for two cars on the lot.
7. Can't expand a non-conforming use.
8. Can't increase cubic foot space.
9. Must add a new septic system as old one was destroyed.
10. Does not believe it is a matter of fault or blame; it is a matter of law and fact. The petitioner believes that there was a misinterpretation of the zoning ordinance provisions and that the property owner relied upon these misinterpretations when she should not have. She had the advice of many professionals in this matter and chose not to follow their advice.
11. Concerning any claims that the Town of Porter or its employees or representatives made a mistake, there is governmental immunity; the government is not liable and cannot be sued.
12. There will be claims of hardship being created. Today's issue does not concern hardships, which are issues for variances. Today we are talking about building permits.

13. There must be an exhaustion of administrative remedies. The law states when you review the requirements for a building permit you must have strict compliance. There is no “substantial” compliance – it is yes or no; there is no in-between.
14. Concerning the building permit application:
15. It has a requirement that says the application must be accompanied by a site plan of the premises showing size and location of all existing and proposed structures and that the owner and contractors will abide by State and Town codes.
16. State code states that a building permit shall not be issued in violation of the provisions of this chapter [of State code].
17. Concerning a site plan drawn to scale:
18. Presented the reasons for a need of site plan based upon our own zoning ordinance, comprehensive plan, subdivision regulations, and building codes.
19. The drawing in the BZA file was not drawn to scale; it was hand-drawn with no technical information included.
20. Concerning the previous structure:
21. The cottage was an existing, non-conforming use.
22. Read the restrictions involving replacing, repairing, or maintaining an existing, non-conforming use structure.
23. It is the petitioner’s contention that these restrictions in our own codes were not adhered to.
24. Presented the physical facts of the property:
25. Estimates of both building permits.
26. Copies of photos of old cottage in disrepair.
27. Hand-made drawing of plans of the new home.
28. Depositions of Mr. Whisler and Ms. Schoenfelt.
29. Plat of survey.
30. History of cottage being damaged by fire and termites.
10. Original intent was to remodel the structure yet even that should not have been allowed under Town ordinances.
 - a. Made change in plans in October due to the condition of the building and the septic field.
 - b. Petitioner contends that all work should have stopped at this point.
 - c. Instead, they filed for second building permit and their contractor began working 10 hours a day, seven days a week.
 - d. No room for new septic system and no input/permit from Porter County on new system.
11. Spoke [again] on petitioner’s interpretation of the situation and following strict enforcement of our Town codes, not just substantial enforcement.
 - a. Enforcement of laws cannot be based on conditions of friendship with neighbors.
 - b. It does not matter who is for or against it.
 - c. Hardships concern existing structures, not those created by someone building a new structure.
 - d. A Town is not stopped from enforcing its Zoning Ordinance by the issuance of a building permit.

Mr. Jim Wieser, attorney, made a presentation on behalf of his client Martyn Dobrzynski (lives directly north of 171 Bote). Also, he stated the notice for public hearing was properly published; Ed Hearn will review.

1. Wants the BZA members to understand though it is difficult to separate emotions from facts in cases such as this that is what they must do – base their decision on the law and not on feelings or perceived hardships.
2. The BZA has three choices per statute: They may affirm, reverse, or modify the determination of the Building Commissioner.
3. We contend that however well intentioned this may have been at the start the fact of the matter is the building permits were issued and a home was constructed clearly in violation of the law.
4. Setback requirements are not close to being met.
5. Parking requirements are not close to being met.
6. The documents that are required by our own ordinance were inappropriate and did not meet Town requirements.
7. Presented survey of his client’s property and described how setbacks are not proper relative to his client’s southern property line.
8. Other important issue is how our ordinance defines a non-conforming use and what is required.
9. Our law prohibits the current home that is being built.
10. The proper course would have been to pursue variances.
11. Found a case that was decided by this BZA in a very similar situation several years ago where the building permit was not issued and the homeowner had to apply for variances (a non-conforming home had burned down and the owner wanted to rebuild as non-conforming). This is a precedent set in our own town.
12. Our contention is thus that the decision to issue the building permits should be reversed by this Board.

Mr. Jeffrey Gunning, attorney for the respondent, made a presentation on behalf of his client Suzanne Schoenfelt.

1. Stated many of the remarks made by the petitioner attorneys were contradictory on the facts of the case.
2. The BZA must judge each case presented to them on a case-by-case basis on the facts of that case alone, not based on precedents set in other cases.
3. Mr. Etzler made suppositions from Ms. Schoenfelt’s deposition. In fact, the many professionals she contacted did give her an indication that she could remodel and restore the dwelling and use it residually; that the septic system and well would not be a problem for her. Referring to the deposition of the Building Commissioner he expressed the opinion that the house could be remodeled and used as a residence.
4. Some of the case law that was presented as binding precedent is not binding.
5. The BZA is to review the facts of this case and determine if the terms of the appeal are factually correct.
6. The Building Commissioner states that those items the petitioners say are required to issue building permits are not required therefore he issued them.

7. The Town has no jurisdiction over septic systems therefore all the talk about septic systems is irrelevant.
8. The petitioners allege the issuance of the building permits and the commencement of construction of a single-family residence violates the zoning ordinance.
9. There is a setback requirement assertion made but they have no facts to support that. We assert that these claims are not applicable in this case because the Building Commissioner interpreted the codes that he helped write and that he knows the intention of as allowing these permits to be issued. The point being that laws are written with many ambiguities and that Building Commissioners (as the Administrator and enforcement officer of the ordinance) are allowed to examine the intent of the law and act accordingly.
10. The appeal states that the violation of the terms and conditions of the ordinance will cause injury to the adjoining property owners and that it will be injurious to the health, safety, and welfare of the community.
11. Referred to the statement by the BZA President that the BZA does not get many appeals of this nature. [We contend] that speaks to the correctness and accuracy with which the Building Commissioner has served Porter.
12. The petitioners have the burden of proof. They must first prove non-conforming use and the respondent asserts that they have not done that.
13. The new structure is an enhancement to the community. We heard no facts of injury to the adjoining property owners.
14. The respondent believes there is a fourth option open to the BZA besides affirming, reversing, or modifying the Building Commissioner's decision. That being that if the BZA judges that some or all of the petitioner's assertions are valid concerning non-conforming use, they may include in their decision a variance allowing the zoning ordinance construction changes. We formally request such a variance if necessary.
15. Placed into record:
16. Deposition of the Building Commissioner.
17. The complaint document from the Clerk-Treasurer's office.
18. Letter from Mr. Etzler regarding placing this issue on the BZA agenda.
19. Newspaper and Internet articles on the situation.
20. Photos of site showing damage since the stay of construction was issued.
21. A request that the stay of construction be lifted on three specific items if the decision should go against them.
22. Shingling of the roof.
23. Facial soffets and siding.
24. Allow tarp or plastic application to the porch.

Suzanne Schoenfelt spoke on her own behalf.

1. Presented photos to prove the alleged removal of footings was not true.
2. We covered the home with sheeting.
3. Had every intention of rehabbing the home.
4. Never intended to build new construction.
5. The home was not "razed" as Mr. Etzler contended.
6. Cleaned and vetted the home.
7. Intended to use the existing framing, floorboards, and foundation.
8. Plans were not included with the application because they weren't done.
9. Spent lots of money on repairs and improvements to old structure that shows intent to rebuild not build new.
10. One wall needs to be left of old structure to be considered remodeling and we did leave one wall up. It came down later when Mr. Whisler recommended to her nephew that they should take it down because it was not in the best condition.

Mr. Mandon asked her if any part of the original structure was actually used in fact, not in intent. Her answer was yes, some of the footings.

Mr. Gunning retook the floor.

1. Stated these photos show the absence of fact in the petitioner's assertions.
2. The non-conforming use provisions apply due to assertion of abandonment of use. The use is residential and that was never abandoned.
3. There was fire damage in 1996. They assert the April 2003 ordinance provision of 50% loss or destruction must apply. We assert the laws in 1996 apply and must be grandfathered and are applicable in this case.
4. Allege something is 8' outside of footprint and thus not allowed. We assert we relied on the Building Commissioner's interpretation of the ordinance and that it was okay.
5. The foundation has the same shape as the previous one.
6. The drawings on file were conceptual drawings only.
7. Made the point the well and septic system issues are irrelevant.
8. Presented for consideration a set of proposed findings of fact that outlines the respondent's general argument. He requested Ed Hearn administer an oath to Ms. Schoenfelt (which was done). Stated under oath by Suzanne Schoenfelt of 700 Waverly Road #205, Porter, Indiana, 46304 to the question, "Are the statements and representations you made here tonight in this meeting truthful, true and accurate to the best of your knowledge?" Answer: "Yes, they are."

Mr. Gunning gave a final statement:

The BZA must act as a safety valve from which a landowner can obtain relief from the strict applications of the Town Zoning Ordinance and Codes and provide legal assurance that these are administered fairly and equitably. Also, that the Town codes are properly interpreted and do not cause excessive hardship. I believe the facts you have heard and will hear later show that when the Building Commissioner issued the

permits it was correctly and lawfully done. If you should find that any condition of the ordinance was not followed but that circumstance can be remedied by granting a variance, I request the variance be granted. Finally, the stay of work order is not consistent with law and should be lifted if the decision goes against his client. Also requested to bring up a point of order prior to the time when the Board makes its decision.

10 minute recess

Proponents (those in favor of revoking the building permits):

Linda Hodges, 470 E. Oak Hill Road, spoke under proponents even though she is still neutral on the issue. Asked if any of the dunes were torn apart by the remodeling. Was this lady given the wrong direction and who is ultimately responsible?

Opponents (those against revoking the building permits):

Dean Boldin, 2901 Glacier Trail. Stated the structure is appealing. Has a concern about revocation of permits and will that happen again. This situation needs to be resolved without abandoning or destroying the new house; the system needs to be fixed so this won't happen again.

Claudia Heilke, 240 Roskin Road. As a neighbor it will increase property values especially compared to old structure. If they were going to be denied the permits should have been denied before substantial and unrecoverable investment was made.

Jerry Waechter, 3025 Dearborn. There are many buildings in Porter Beach like this property's old one that need something done to them. If they stay right within their foundation lines you'll have a bunch of tall, skinny structures. Porter needs to show flexibility so it can develop attractive housing at Porter Beach.

Miff Woosley, 220 Roskin Road. I have lived at Porter Beach for 25 years and the old structure has been an eyesore that entire time. Perhaps there might have been a better way to handle it but both Suzanne Schoenfelt and Mr. Whisler acted in good faith.

Charlene Race, 907 Fox Point Drive, Chesterton. Sister of respondent. Porter Beach improved as a result of this structure which improves the tax base. The BZA must stand by their Building Commissioner and decide what is best for Porter. Why were these concerns brought up after all the hard work and investment was made. You cannot separate the costs from the facts of law.

Allen Seruya, Chicago, Illinois. Fiancée of respondent. An indication was made that Suzanne was notified of these concerns in October; this is not true. She was notified by a summons in November, three days before the court appearance. The home is a benefit for Porter. What's best for the town is to have this home there. Concerning the septic system, we met with professionals from Free-flow Environmental who state an on-site wastewater system is feasible.

Gilbert Lehmann, 2828 Market Street. A resident here for 25 years. You have to make exceptions due to the terrain at the beach. Sad to see that neighbors couldn't work this out amongst themselves.

Public Hearing closed at 9:50 p.m.

Mr. Beckman read the following correspondence into the official record:

From Bill Lukach, 2841 Market Street. Issues to consider are threat of lawsuit should not affect decision, permit allows only one bathroom, valid septic permit must be obtained, parking issue must be resolved.

Keith Letta, Porter County Health Department Administrator. No Health Department permit has been issued. The property owner is in violation. No application has been submitted as promised in October. I have serious concerns regarding [this property's] adequacy for sewage disposal and would question whether the site could be brought into compliance.

Mr. Wieser presented final remarks on the petition.

1. To say any Building Commissioner can tell us what an ordinance intends [is incorrect]. Some things you can interpret and some things you just know.
2. The facts of the front- and side-yard setback violations.
3. The non-conforming use provisions apply.
4. Specific plans need to be submitted and there was only a sketch.
5. It is not correct to say that even though the owner has not applied for variances that the BZA can and should grant them if the issue is decided against them.

Staff Reports

Mr. Jim Mandon, Town Planner

1. Section 204-C [of Porter Zoning Ordinance] does not apply. This is about non-conforming use, which was mentioned but does not apply.
2. Section 205-A. This is a non-conforming structure based on the fact that it does not comply with setback requirements and there may be

other reasons why it is non-conforming.

3. Section 205-B. Statements were made concerning the 50% provision of the fair market value of the building. It is very difficult and argumentative as to whether or not this is to be applied in this case because of the unknown home values at certain times of the home's existence – before the fire, after the fire, or before most of the structure was recently removed.
4. As far as Mr. Gunning's request you consider this a public hearing for a variance, he is out of line.
5. We are here for a specific purpose which is to decide did the Building Commissioner interpret the zoning ordinance correctly as it relates to a non-conforming structure and if he should have issued a building permit to allow the structure to be built as proposed without first having the petitioner obtain a developmental standards variance from the BZA.
6. If, in fact, the structure in question was lawful at time of construction but currently does not comply with the applicable standards, then by definition it is a legal, non-conforming structure. Thus section 205-A, page 92 in our zoning ordinance says no such non-conforming structure may be enlarged or altered in any way that increases its non-conformity.
7. The issue is whether adding more square footage within the current setback requirements, but no closer than the original structure, constitutes enlarging or altering this structure in a way that increases its non-conformity. I think increasing the amount of building which is non-conforming does constitute enlarging or altering this structure in a way that increases its non-conformity.
8. I therefore recommend that you find that the Building Commissioner should not have issued the building permits for this structure until first requiring the landowner to obtain a developmental standards variance from the BZA.

Mr. Ed Hearn, Town Attorney

1. The BZA stands as both the judge and the ultimate interpreter of the zoning ordinance for the municipality. There is only one provision that is at issue here and that is section 205-A. Section 205-B contemplates damage from a specific event and Mr. Mandon's summary of that issue was correct.
2. There was an argument raised with respect to the septic permit. That is the jurisdiction of Porter County.
3. The considerations of hardship are not relevant to appealing the issuance of a building permit by the Building Commissioner.
4. The only authority the BZA has is to affirm, reverse, or modify the building permits. There hasn't been a request to modify it so the issue is to affirm or deny them.
5. There is some authority in Indiana that suggests the BZA may issue a variance even though the request is an appeal. That authority is very unclear. I feel you have some options if you feel the building permits were not properly issued and one would be to blaze a new trail and issue the variance or instruct the property owner to follow procedure that's already here.
6. There was an argument made on whether the Building Commissioner can interpret the zoning ordinance. When the zoning ordinance is clear and unambiguous, no the Building Commissioner may not interpret it. Where it is ambiguous the Building Commissioner may interpret it and what the Building Commissioner has interpreted in the past thus becomes important.
7. There was an argument made with respect to the Town's liability. That is something that should not be considered by the BZA.

Mr. Don Whisler, Town Building Commissioner

1. I did not use the terminology of non-conforming use.
2. I disagree with Mr. Mandon's interpretation of section 205-A. There are many non-conforming structures at Porter Beach that have been issued permits to remodel, not to encroach any further [on non-conforming setbacks] but to go parallel with the encroachment that they have.

Questions and Comments by BZA Members

Mr. Childress:

Commented on the language of section 205-A and he believes it means anyone seeking remodeling of this nature needs to come before the BZA for a variance and that is what should have occurred here yet it didn't. Stated he believes it still can be. The BZA should reject the building permits and allow the property owner to apply to the BZA for a variance to allow the structure to be completed.

Motion by Mr. Childress to find that the house was a non-conforming structure previously, that section 205-A has not been complied with because the square footage of the house was increased which increased the non-conformity and the building permit should be rejected.

There was no second.

Mr. Bell:

Question to Mr. Whisler: Is it customary to get the occupancy permit at the time they get the building permit? Answer: No, it is just paid for at that time as part of the application process.

Question to Ms. Schoenfelt: On 7/28/03 you received a building permit. Did you decide between then and October that this was going to cost you a lot more money? Answer: My plans were not all that concrete and I was trying to stay within a budget. I had not been through this process before.

Mr. Bell: So you made a \$100,000 mistake? Answer: No. Mr. Whisler assessed that the costs would be \$143,000 based on square footage. I did not anticipate all the extra costs.

Mr. Bell: Did any of this extra \$100,000 occur because you had to tear down a little more of the other building? Answer: No. It was just a stab in the dark asking for a \$40,000 permit to get started and then Mr. Whisler applying a formula to get the \$143,000 figure.

Question to Mrs. Brewer: Should we make her tear this place down? Answer: Her attorney stated that is not a consideration today.

Mr. Chemma:

Question to Mr. Whisler: Between 7/18/03 and 10/24/03 did you inspect the foundation and find it to be unsuitable?

Answer: In early October.

Mr. Hearn interjected that the only issue is whether or not section 205-A is met or not met and is there an ambiguity in that section.

Mr. Bell: Was there anything that was discovered during the first \$40,000 that resulted in part of the extra \$100,000?

Answer by Mr. Whisler: When they tore part of the drywall off the walls were found to be inferior. They were going to have to re-roof anyway so I told them that they should put new studs in.

Mr. Mandon once again pointed out what the issue is: Do you agree with Mr. Whisler's interpretation or mine? That is the only issue to decide.

Mr. Childress: There is also an overhang that makes it closer. Answer: The overhang is actually less than it was before on the old structure. Mr. Bell also stated that overhangs don't count.

At the President's request, Mr. Childress restated his motion to see if there is a second at this time. Motion died for lack of a second.

Motion by Mr. Bell that the petition to repeal the building permits be denied.; second by Mr. Chemma.

Comment by Mr. Childress:

If we do this we might as well throw out the non-conforming section of the code. Anyone with a non-conforming structure can do whatever he or she wants.

Point of order made by Mr. Gunning:

Requested Mr. Childress recuse himself from the vote based on bias because of campaign contributions from petitioner Dale Brewer.

Ed Hearn stated each member is obligated to make a decision.

Motion carried 4 – 1 with Mr. Childress voting no.

F. Other Business

None

I. Adjourn

Motion by Mr. Childress to adjourn; second by Mr. Bell. Meeting adjourned at 10:50 p.m.

John Beckman
Chairman

Lisa Liebert
Secretary