

**OSHTEMO CHARTER TOWNSHIP
ZONING BOARD OF APPEALS**

MINUTES OF A VIRTUAL MEETING HELD NOVEMBER 17, 2020

Agenda

VARIANCE: JEREMY, 5359 SWEET BRIAR DRIVE
FRANK H. AND M. JAMIE JEREMY REQUESTED RELIEF FROM SECTION 50.60 OF THE ZONING ORDINANCE WHICH GOVERNS SETBACKS FOR STRUCTURES IN RESIDENTIAL ZONING DISTRICTS IN ORDER TO CONSTRUCT AN 18 FOOT X 36 FOOT IN-GROUND POOL AND ASSOCIATED CONCRETE DECKING IN THE REQUIRED FRONT YARD.

A virtual meeting of the Oshtemo Charter Township Zoning Board was held Tuesday, November 17, 2020, called to order at approximately 3:02 p.m.

PRESENT: Neil Sikora, Chair
Fred Antosz
Cheri Bell
Fred Gould
Anita Smith, Vice Chair

ABSENT: Ollie Chambers
Micki Maxwell

Also present were Iris Lubbert, Planning Director, Karen High, Zoning Administrator, James Porter, Township Attorney and Martha Coash, Meeting Transcriptionist.

One guest, applicant M. Jamie Jeremy was present.

CALL TO ORDER AND PLEDGE OF ALLEGIANCE

Chairperson Sikora called the meeting to order and invited those present to join in reciting the "Pledge of Allegiance."

APPROVAL OF AGENDA

Chairperson asked if there were changes to the agenda. Hearing none, he asked for a motion.

Ms. Smith **made a motion** to approve the agenda as presented. Mr. Gould **seconded the motion. The motion was approved unanimously.**

APPROVAL OF THE MINUTES OF AUGUST 25, 2020

The Chair asked if there were any additions, deletions or corrections to the minutes of August 25, 2020. Hearing none, Chairperson Sikora asked for a motion.

Ms. Bell **made a motion** to approve the Minutes of August 25, 2020 as presented. Ms. Smith **seconded the motion**. **The motion was approved unanimously.**

Chairperson Sikora moved to the next agenda item and asked Ms. Lubbert for her presentation. Ms. Lubbert indicated Ms. Karen High, Zoning Administrator would be presenting to the Board.

VARIANCE: JEREMY, 5359 SWEET BRIAR DRIVE FRANK H. AND M. JAMIE JEREMY REQUESTED RELIEF FROM SECTION 50.60 OF THE ZONING ORDINANCE WHICH GOVERNS SETBACKS FOR STRUCTURES IN RESIDENTIAL ZONING DISTRICTS IN ORDER TO CONSTRUCT AN 18 FOOT X 36 FOOT IN-GROUND POOL AND ASSOCIATED CONCRETE DECKING IN THE REQUIRED FRONT YARD.

Ms. High indicated the applicant was requesting relief from Section 50.60 of the Zoning Ordinance which governs setbacks for structures in residential zoning districts in order to construct an 18 foot x 36 foot in-ground pool and associated concrete decking in the required front yard.

Section 50.60 of the Zoning Ordinance requires that all primary structures located within the R-2 district have a 30 foot front yard setback. Required side setback is 10 feet and required rear setback is 15 feet.

She explained 5359 Sweet Briar Drive is a 0.50-acre corner lot in Rose Arbor plat No. 2. The lot is approximately 150 feet wide by 150 feet long and also fronts Fountain Square Drive. Though the required front setbacks are 30 feet, the house, built in 2002, is approximately 44 feet from each right of way line. The side and rear yards are somewhat narrow, at approximately 35 foot and 40 feet wide respectively.

The applicant submitted a property sketch showing the proposed layout in more detail. Though not shown on the plan, they state that required fencing will meet all ordinance and building code requirements. The applicant provided the following rationale for this variance request:

- The entire pool structure will be built below grade, surrounded by a fence with nothing above ground to impede the character of the neighborhood except enhanced landscaping and plantings. The pool will not be readily visible to anyone driving by; it will appear to be a fenced-in yard.

- A 10 foot side and 15 foot rear setback is provided, which shows a good faith effort to meet the side and rear setback requirements for lots not located on a corner.
- There is no other practical or safe location for a conventional pool on the property.
- A house in the neighborhood, also on a corner lot, was permitted to have a pool in the front yard.
- Several houses in the neighborhood have pools in the side and rear yards. Many of these pools would not be permitted if on any corner lot.

Ms. High indicated public input was received from six residents of the neighborhood, none of which objected to the variance request. Copies of their statements are attached to these minutes.

She urged the board to consider the larger picture. Does the Township wish to allow in-ground pools within required front yard setbacks? Should corner lots be considered differently? Should other structures be allowed as well? This is the first case of this nature under the current ordinance. By approving this case, a precedent would be set allowing in-ground pools or structures in a front yard, which could have negative impacts if not properly justified.

STANDARDS OF REVIEW - STAFF ANALYSIS

Ms. High noted the Michigan courts have applied the following principles for a dimensional variance, which collectively amount to demonstrating a practical difficulty:

- Special or unique physical conditions and circumstances exist which are peculiar to the property involved and which are not generally applicable to other properties in the same district.
- Strict compliance with the standard would unreasonably prevent the landowner from using the property for a permitted use; or would render conformity to the ordinance unnecessarily burdensome.
- The variance is the minimum necessary to provide substantial justice to the landowner and neighbors.
- The problem is not self-created.

Staff analyzed the request against these principles and Ms. High offered the following comments.

Standards of Approval of a Nonuse Variance (practical difficulty):

*Standard: Unique Physical Circumstances
Are there unique physical limitations or conditions which prevent compliance?*

Comment: The topography around this site is flat. Because it is located on a corner, a 30 foot front setback is required along each street frontage. This is a

larger setback than is required of properties not located on a corner, where a 10 foot side yard setback is required on each side. Usable yard space is reduced by approximately 20 feet' along the Fountain Square Drive street frontage.

*Standard: Conformance Unnecessarily Burdensome
Are reasonable options for compliance available?
Does reasonable use of the property exist with denial of the variance?*

Comment: It is the applicant's desire for a pool that triggered this variance request. A pool is not a required or necessary amenity. A smaller or differently shaped pool might fit on the property without the need for a variance.

*Standard: Minimum Necessary for Substantial Justice
Applied to both applicant as well as to other property owners in district.
Review past decisions of the ZBA for consistency (precedence).*

Comment: In researching past Zoning Board of Appeals decisions regarding setback relief for a pool in a front yard setback, Planning Department staff identified one comparable case. Further research revealed that interpretation of required setbacks for pools has varied over time. In a cursory review of the Township using aerial photos, staff found two in-ground pools in front yards. In addition, it should be noted that the zoning ordinance was amended in 2011 to require a setback for pools in the side and rear yard. These findings are described below.

1. Latoskewski, 405 Clubview, 10/20/1997: The applicant sought relief from the Zoning Board of Appeals to allow construction of a 17 foot x 35 foot pool in the required 40 foot front setback of Shadywood Drive. Located on a corner lot, the property also fronted Club View Drive. The Zoning Board of Appeals approved the variance request of 40 feet based on the following reasons: that conformance was unnecessarily burdensome in that the pool could not be located in compliance with all setbacks, that substantial justice would be served by the variance, and that the spirit and intent of the Ordinance would be met because the pool would be below ground and included no pool house or other structure.
2. 4970 Fountain Square, 10/9/01: A building permit for an in-ground pool in the required front yard was approved with no setback. This property is also on a corner lot. A letter in the file from Planning Department staff indicated that "placement of an in-ground pool is not subject to setbacks from the abutting streets." This is consistent with statements in meeting minutes from that time period that 'buildings' were required to meet setback requirements but 'structures' were not.
3. 6488 Killington Drive, 2008: A building permit was issued for an in-ground pool at this address, also on a corner lot. The pool is located

approximately 15 feet from the right of way line. Planning Department staff approved the building permit application.

4. Zoning Code text amendment to Section 64 – Setback and Side Line Spacing, 2/24/2011: The zoning ordinance was amended to require a minimum front yard setback of 30 feet rather than 40 feet. Minimum rear yard setback, formerly 10 feet, was increased to 15 feet. In addition, text was added requiring that pools and decks (attached or detached) conform to applicable rear and interior side setbacks. According to the staff report, reasoning was that “this will prevent decks and pools from being too close to property lines.” Added text for pools and decks follows in bold:
 - a. “The minimum setback distance between any building and any interior side property line in the "AG" Agricultural Districts, "RR" Residence Districts, "R-1" Residence Districts, "R-2" Residence Districts, and "R-3" Residence Districts shall be ten feet for all buildings, **pools, and associated decks whether attached or detached** unless a larger setback is otherwise required in the Township Zoning Ordinance.
 - b. The minimum setback distance between any building, **pools, and associated decks whether attached or detached** and any rear property line in the "AG" Agricultural Districts, "RR" Residence Districts, "R-1" Residence Districts, "R-2" Residence Districts, and "R-3" Residence Districts shall be not less than 15 feet unless a larger setback is otherwise required in the Township Zoning Ordinance.”

Text adopted in 2011 for front yard setbacks was as follows: “there shall be a setback from all street right of way lines and outlots and/or planned future public street extensions of not less than 30 feet for all buildings unless a larger setback is otherwise required.”

This is essentially the same as language in the current ordinance, which states “front yard setbacks for primary structures: a setback of 30-feet shall be required from all street rights-of-way and outlots and/or planned future public street extensions.” Because the code sets forth a side and rear setback for pools but does not mention a front setback, the generally accepted interpretation is that no pools are permitted in front of a house.

Standard: Self-Created Hardship
Are the conditions or circumstances which resulted in the variance request created by actions of the applicant?

Comment: The home at 5359 Sweet Briar Drive was built near the center of the property. The lot lines and setbacks for the property have not changed since its construction. There may be room in the rear yard for a much smaller or irregularly shaped pool that meets setback requirements. It is

the applicant's desire for a pool that has triggered this variance request. A pool is not a required or necessary amenity.

Ms. High indicated approving the requested variance would not negatively affect safety and welfare.

She indicated possible motions for consideration:

1. Based on past precedence, **motion to approve** the variance request, allowing the applicant to construct an 18 foot x 36 foot in ground pool with a 10-foot front yard setback.

If the Zoning Board of Appeals were to choose this motion, staff requested a condition be attached requiring the property owner to complete the building permit process via the Southwest Michigan Building Authority. In addition staff also suggested a request be sent to the Planning Commission to consider an update to the code to provide some flexibility to pools on corner lots.

2. **Motion to deny** the requested variance based on the findings of fact presented under 'Support of variance denial.'

Chairperson Sikora thanked Ms. High for her presentation and asked if there were questions from Board Members.

Mr. Sikora asked about required fencing.

Ms. High said a fence is required by building code for all pools. The applicant has stated fencing will meet zoning requirements, with no variance needed.

Hearing no further questions from Board Members, Chairperson Sikora asked if the applicant wished to speak.

Ms. Jamie Jeremy, 5359 Sweet Briar Drive, thanked Township staff for their guidance through the variance request process, ZBA members for their service to the Township and their consideration of the request, and her neighbors for their support.

She said when their house was built in 2003, they never dreamed they would want a pool, and if they had they would have positioned the house differently. Now, 17 years later, they very much want to add a pool. They were unaware of the second "front" yard with much greater setback requirements than for a normal yard. They wish to commit to undertaking a project that will not detract from their or their neighbors' homes. They will follow the example of the landscaping done at 4970 Fountain Square so that you will hardly know there is a pool there.

The Chair thanked Ms. Jeremy for her comments and asked if there were questions for her from Board Members.

Ms. Smith asked why the pool could not be located west of the deck.

Ms. Jeremy said there is a retaining wall there at a 15 foot setback from the property line. A pool would have to be located very close to it. The landscaper who installed the retaining wall said that could impact the integrity of the wall.

Ms. Smith wondered how a pool located west of the deck would impact a retaining wall.

Ms. Jeremy said the retaining wall is dug down underground at the basement level and holds land back from the lower level windows. Another alternative would have to be figured out. She also noted the pool would not be a part of the yard visually off the sun porch and that a traffic pattern from the house to the pool from the deck flows as it is designed. There is no access currently from that part of the yard. The retaining wall is an eight-foot drop and a safety factor. The fence would need to be closer than if dealing with the property lines.

Ms. High noted she measured using the GIS feature and that a pool this size would not meet the setback requirements if located in the rear corner to the west. It might still require a different type of variance.

Hearing no more questions, the Chair asked if there were any comments from the public. He determined there were no members of the public present and moved to Board Deliberations.

The Chair asked why in the summary of review this particular corner lot is considered a “unique physical circumstance?”

Ms. High said all corner lots are constrained because there is less usable space which puts corner lots at a disadvantage.

Chairperson Sikora said the 1997 variance was approved partially because the pool placement was restricted due to drainage and the septic system location.

Ms. High agreed that was one of the factors discussed in 1997.

Chairperson Sikora said this is the first time since the ordinance was changed in 2011 that a variance has been sought for this purpose and wondered if the circumstances are different. Frontage on two streets comes into play for other cases, such as how assessments are determined for two front yards.

Attorney Porter said sewer and water assessments for corner lots (two front streets) are capped so that a corner lot is not penalized. They cannot be taxed at a different rate; assessment is based on fair market value. A corner lot may be seen as

worth more, but there is no disparity in rates between corner and interior lots. That would be improper.

Ms. Bell noted the 1997 variance for a pool at 405 Clubview was granted prior to the ordinance change in 2011. The similar in-ground pools for 4970 Fountain Square in 2001 and for 6488 Killington Drive in 2008 were approved without variance.

Ms. High noted the 1997 variance granted by the ZBA included language suggesting the Planning Commission should look at and consider amending the ordinance regarding front yard setbacks for pools, but she was unable find any evidence that had occurred.

Attorney Porter said that could have happened as an unintended difference in interpretation.

Ms. High noted the same people signed off on the building permits in 2001 and 2008, but that interpretations evolve and change over time and that may be what occurred.

Ms. Smith wondered how much smaller the pool would need to be if built to the west without encroaching on the retaining wall.

Ms. Lubbert did a rough calculation and thought it could be about 12 feet wide by 15 feet, not including the cement apron decking needed.

Mr. Gould said he has been a pool owner for more than 50 years in two locations. He said 18' x 36' is basically the ideal size for a pool for entertaining, especially for children, who jump, run and need enough space on the deck and around the pool for activities. He heard no opposition to the variance request from neighbors. The ZBA has granted 3-4 site exceptions. He would like to see the Jeremys be able to use and enjoy their property to the fullest. His only question would be concern for anyone moving in later and not finding the variance a problem, though he did not see that as a concern. He cited past precedent and neighbor approval as positives for approval of the variance.

Ms. Bell said she appreciates the tough questions posed by Board Members. There is ambiguity regarding the interpretation of what is and what is not a structure, which should go to the Planning Commission for consideration. Variance was allowed for similarly situated pools in the past which would provide substantial justice in this case and there is strong neighborhood support. Once a variance is granted there will be no problem with later owners. This is a unique circumstance as it is a corner lot. She said she could support approval of the variance request.

Chairperson Sikora was not convinced the criteria for setback relief has been met. He did not feel conformance was burdensome, setbacks granted in the past were

under different circumstances, apples were not being compared to apples, substantial justice doesn't apply with a corner lot, and the problem is self-created.

Attorney Porter said the Board must make a motion and decision as a body whether to grant or deny the variance. If it is felt there is inconsistency in the ordinance regarding corner lot definitions of side and front yards and the definition of "structures," the issue can be referred to the Planning Commission for their consideration.

The Chair said he would support suggesting the Planning Commission consider defining front and side yards for corner lots.

Ms. Smith said she feels the request for variance in this case is a self-created hardship, but would also like to have the Planning Commission look at the side/front yard issue for corner lots which would provide a better opportunity to get the pool where it is wanted.

Ms. Bell asked Attorney Porter whether all five criteria need to be met in order to grant the variance.

Attorney Porter said some would say yes, but he does not agree. Courts do not agree nor does the statute. Practical difficulties are not defined; case law is not clear. People view things differently. It comes down to how ZBA members determine the facts. The ZBA is the jury – you determine the facts.

Chairperson Sikora said he was trying to stick to the variance request form. Sending a request to the Planning Commission will take time. He asked Ms. Jeremy what the timeline is for installing the pool.

Ms. Jeremy said they were looking at the spring of 2021.

Chairperson Sikora asked if someone wished to make a motion.

Ms. Bell **made a motion** to approve the variance as requested, based on the fact that the two front lots are a unique physical circumstance, previous decisions have not been treated in the same way – two pools in the front yard were approved without variance, one with variance, substantial justice is met, reasonable use is not available to place a pool in the rear yard, fencing and screening will maintain safety and welfare.

Per Staff request, a condition will be attached requiring the property owner to complete the building permit process via the Southwest Michigan Building Authority.

A request will be sent to the Planning Commission to consider an update to the code that provides some flexibility to pools on corner lots, particularly addressing side vs. front lots for corner properties and the definition of "structures."

Mr. Antosz **seconded the motion. The motion was approved 3-2 by roll call vote, with Chairperson Sikora and Vice Chairperson Smith dissenting.**

Public Comment

Chairperson Sikora determined there were no members of the public present and moved to the next agenda item.

Other Updates and Business

Ms. Lubbert provided a schedule of meeting dates for 2021 consideration.

Zoning Board of Appeals
Fourth Tuesday of every month @ 3:00 p.m.
2021 Meeting Dates

1/26
2/23
3/23
4/27
5/25
6/22
7/27
8/24
9/28
10/26
11/16*
12/14*
1/25/2022

*Dates shifted to avoid holidays or for consistency with the Development Schedule of Applications

Mr. Gould **made a motion** to approve the Zoning Board of Appeals Meeting Date Schedule as presented. Ms. Smith **seconded the motion. The motion was approved unanimously.**

Ms. Lubbert told the Board public meetings will continue to be held virtually through December by order of the governor. It is likely that order will be extended further. She will keep the Board updated as more information is known.

She indicated she expects there to be two site plans for consideration at the December 15 meeting.

Attorney Porter said he felt the variance request discussion was one of the best the Board has had. It included tough questions and members focused on the issues at

hand, debating head to head on the facts, which is exactly what the ZBA should be doing. He said “the facts are what you say they are.”

Ms. Bell said the new Township Board will be sworn in Friday, November 20 at noon and will include two new Trustees and a new Treasurer. She encouraged Board Members to introduce themselves and welcome Trustees as they look forward to getting to work.

Adjournment

Hearing no further comments, Chairperson Sikora noted the Zoning Board of Appeals had exhausted its Agenda. There being no other business, he adjourned the meeting at approximately 4:15 p.m.

Minutes prepared:
November 18, 2020

Minutes approved:
December 15, 2020