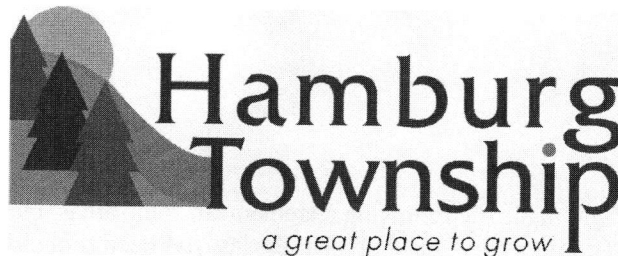


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**Supervisor:** Pat Hohl  
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**Treasurer:** Jason Negri  
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Jim Neilson

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**Hamburg Township  
Zoning Board of Appeals Minutes  
Hamburg Township Board Room  
Wednesday, February 13, 2019 Minutes  
7:00 P.M.**

**1. Call to order:**

The meeting was called to order by Chairperson Priebe at 7:00 p.m.

**2. Pledge to the Flag:**

**3. Roll call of the Board:**

Present: Auxier, Neilson, Priebe, Rill & Watson,

Absent: Bohn

Also Present: Amy Steffens, Planning & Zoning Administrator & Brittney Stein, Zoning Coordinator

**4. Correspondence:** None

**5. Approval of Agenda:**

Motion by Auxier, supported by Watson

To approve the agenda as presented

Voice vote: Ayes: 5   Nays: 0   Absent: 1   MOTION CARRIED

**6. Call to the public:**

Chairperson Priebe opened the hearing to the public for any item not on the agenda. There was no response. The call was closed.

**7. Variance requests:**

ZBA 2019-001

Applicant: Stephen and Deborah Nash

Location: Downing Drive Hamburg MI 48139

Parcel ID: 15-28-402-010

Parcel owner: Greg and Kimberly Attwood

Request: Appeal of Zoning Administrator's issuance of land use permit 18-0584 that would permit the installation of 70 linear feet of a six-foot tall fence at parcel 15-28-402-010.

Mr. Stephen Nash, applicant, made the following statement: In some areas, building a “spite wall” is prohibited because of the doctrine of abuse rights. In Michigan, the law has been settled since at least 1895. A right ends where an abuse begins. The free standing construction for the Atwood vacant property located across from 4831 Downing Drive is in a secure neighborhood where crime is nearly non-existent. Yet, the developers of that site needlessly began construction of a six-foot high by 70 foot long solid white plastic wall that invites urban blight into this otherwise natural setting and intentionally blocks the lake views of existing neighboring homes that have been enjoying that view for centuries. How do we know that the wall is being erected for malicious purposes? Look to the representations in the permit application. The developers represented that the fence was a 42 inch open split rail design to be open on all sides and allow complete visibility of adjacent properties. If the developer had a legitimate purpose, there would not be a need for deception. They represented that the fence would be the same or similar to other decorative fences that can be seen throughout the neighborhood. What they actually installed was quite different. This is an important distinction for this particular community because other owners of properties do not block views. They do not interfere with neighbor’s quiet enjoyment or decimate property values. Such abuse is a prohibited public nuisance because it serves no legitimate purpose to the developer and it unreasonably interferes with the use and enjoyment of existing property owners. Indian Gardens is a very unique community because even though Hamburg Township enjoys an abundance of natural resources, existing residents in Indian Gardens are like-minded people who agreed to covenants and restrictions that would ensure the legacy of Strawberry Lake and the Huron River for perpetuity. Residents here protect and respect the natural environment and have developed a way of life that minimizes human intrusion to preserve natural habitat. Their common understanding is as guardians of this natural beauty, residents have learned to cooperate and negotiate petty differences with respect for each other and for the unique way of life we have all come to enjoy. No one who has risen from a night’s sleep to have a cup of coffee on their front deck while watching the geese, sandhill cranes and the ducks walk across the park would contemplate shutting off their neighbors from such enjoyment. Indian Gardens offers peace and tranquility with common community fire pits and children playing in the park in a setting of unparalleled harmony with natural splendor. For over 100 years neighbors respected each other and the beauty nature brought to this unique community. We ask that before you attempt to continue to endorse the land use permit for the white plastic barrier to separate the once undivided community, you re-visit your initial decision. I urge you to stand where the Indian Gardens community stands, look out at the cove, the Huron river and the lake and consider just how many communities in America exist like this and how many people in the world who are not millionaires afford to give such a life to their families and their children. I ask that before you permanently take this precious way of life away from the residents of our community, that you ask yourself to what end will it accomplish. The answer is manifest; there is no legitimate purpose. In your discretion as an individual and ZBA Board Member, sometimes all that needs to be done is to respect what has been accomplished by those that came before us. We ask that you simply allow the residents of Indian Gardens to continue life on the lake as it has been without the intrusion of an unnecessary and monstrously conceived eyesore in the form of what is legally described as a “spite wall” and is outlawed in Michigan.

Mr. Roger Meyers, Attorney for Mr. Nash presented a number of exhibits. He stated that they are appealing the decision granting the land use permit for the construction of the fence. The basis on which they are seeking to reverse the decision is Section 8.14.1 (f) of the Township’s Zoning Ordinance which provides that a fence shall not be erected where it would prevent or unreasonably obstruct the use of adjacent properties or use of an existing driveway or other means of access of adjacent properties. The focal point of their appeal is that this fence would unreasonably obstruct the use of the adjacent property. The question is what is the key element of the use of the Nash’s property and all of their neighbors? The quintessential use of these properties is the natural, unobstructed views of the lake which has been enjoyed for hundreds of years. He believes that it will be clear that the permit and construction of the fence will unreasonably obstruct the use of those properties. He explained the notification to the property owner that they would pursue this course of action. He gave a history of the Downing’s Subdivision and Indian Gardens plats. He discussed the private restrictions that were imposed on the properties restricting the building of any boat house or plant any trees thereon so as to obstruct the view of the lake now or at any future time for any owners or occupants of property in said subdivision and a restriction that said no fence or building shall be erected on said premises and this shall be a perpetual restriction. He stated that this entire area

was deed restricted for everyone's benefit and against everyone's property. He showed the continuation of the deed restrictions that had been in place since the 1930s.

Mr. Meyers reviewed that application for the fence. He stated that there is a blatant misrepresentation where it says "matches existing". There was no existing fence that this fence is replacing. Further, the survey provided indicates "No title work was supplied by client". This fence should not have been lawfully allowed because it clearly violates the deed restrictions. This was a deliberate omission because they did not want to alert the surveyor or Township in submitting the application for the land use permit. He presented a number of photographs from the Nash's deck including the construction of the fence. He gave a definition of Spite fence: A fence of no beneficial use to person erecting and maintaining it on his land and maintained solely for purpose of annoying owner of adjoining land. There is no other purpose for this fence other than to obstruct not only the Nash's view but all of the adjacent property owners in the Indian Garden Subdivision. Not only is it a spite fence but it is in clear violation of all of the deed restrictions and contrary to the quintessential use of these properties and that is the beauty and unobstructed views. Based on all of this information, he would submit that the issuance of the land use permit and construction of the fence does constitute a violation of Section 8.14.1(f) of the Township's Zoning Ordinance. He would request that the ZBA reverse the decision granting the permit.

Mr. Nash presented a video of the construction of the fence including the auger close to the trees possibly causing damage to the trees.

Ms. Elizabeth Hodges representing Deborah Nash read a letter from Mrs. Nash:

I regret that an unforeseen medical condition prevents me from attending the February 13, 2019 meeting personally. The matter of the Attwood construction is a matter of critical importance to me and so many others in our community who have invested their life savings to live in this unique environment. This letter is written for your consideration before any final decision is rendered. I feel strongly that the Attwood's, as developers, must be prohibited from further damaging our community because the wall they are building is needlessly and negatively impacting neighboring properties in Indian Gardens. Michigan state law forbids erecting a spite wall. The right to use property as one sees fit ends where abuse begins. The Attwood's proposed 6' by 70' solid white plastic wall invites urban blight into an otherwise natural setting and intentionally blocks the lake views of existing neighbors - without any functional purpose.

It is difficult to understand the motive for such actions unless we accept that the Attwood's simply do not respect the community from which they seek to profit. Numerous indicators of malicious nuisance exist. For example, representations in the permit application are missing or inaccurate. Plans submitted to the Township fail to provide required information such as easements and deed restrictions. Without such information, permits cannot be properly considered. The developers also represented that their permitted fence would be a 42" open split rail design that was open on all sides, like the one existing with the adjacent home. That fence allows complete visibility between adjacent properties and stops short of interfering with the root systems of established trees. Although they represented that the fence to be installed was the same or similar to other small decorative fences that could be seen throughout Indian Gardens, what they actually installed was quite different. This is a material distinction for this particular community because by design other properties do not block views, interfere with neighbor's quiet enjoyment or decimate property values. To accomplish construction of the wall, developers intentionally brought in approximately 10"-12" augers that bore 4' X1' deep holes into the root system of established trees on our property without permission. These developers made no effort to minimize the impact their ill-founded activities had on the community and they failed to consider any less intrusive actions. If the developers had a legitimate purpose, there would not have been a need for deception and they would have worked with the community to achieve mutual goals. Such abuses are prohibited because they serve no legitimate purpose to the developers and instead they unreasonably interfere with the use and enjoyment of existing property owners. Indian Gardens is a unique community because even though Hamburg Township enjoys an abundance of natural resources, existing residents in Indian Gardens have agreed to covenants and restrictions that would ensure the legacy of Strawberry Lake and the Huron River for perpetuity. No one who has risen to have a cup of coffee on their front deck while watching the geese walk across the park or ducks splash with their young would contemplate shutting off their neighbors from such enjoyment. For over a hundred years neighbor; other and the

beauty nature brought to this unique community. We ask that you revisit your initial decision and revise recommendations in your staff report to protect and preserve the natural and historic character of this extraordinary community. The white plastic wall serves no functional purpose and, instead senselessly conflicts with the natural harmony of the existing environment. Sometimes all that needs to be done is to respect what has been accomplished by those who came before us. Township founders had it right when they set up the park setting with surrounding homes. The small waterfront parcels of the Indian Gardens community are particularly susceptible and their character will be lost forever without your protection.

Chairperson Priebe stated that we have received three emails from neighbors opposed to the fence. We have also received one letter from another neighbor in support of the fence as well as a letter from the Attwoods.

Amy Steffens, Planning & Zoning Administrator stated that this is not the typical variance request. Referring to the Staff Report for ZBA 19-001, she gave a project description. Stephen and Deborah Nash have filed an appeal of the zoning administrator's issuance of land use permit (LUP)18-0584 to permit the installation of 70 linear feet of a six-foot tall fence at parcel 15- 28-402-010, lot 8 of the Supervisor's Plat of Indian Gardens. Lot 8 fronts onto Downing Drive to the east; Strawberry Lake is to the south; the site is improved with an existing 1,196-square foot garage. On December 11, 2018, Greg Attwood, owner of lot 8, applied for a land use permit through his representative, Chris Hewison, to construct approximately 70 linear feet of a six-foot tall board-on-board vinyl fence along the north property boundary of the site. When Mr. Hewison submitted the land use permit application, staff verified the location of the fence on the survey and highlighted the area included in the application. It should be noted that the writing on the fence drawing is staff writing as our own internal note. The application proposed a 6-foot tall vinyl fence. The applicant did not apply for a 4 foot split rail fence and did not indicate anything other than what was permitted and partially constructed. On December 14<sup>th</sup> & 17<sup>th</sup> we conducted site visits to verify the application. She reviewed Section 3.3 of the Zoning Ordinance which governs Land Use Permits and application and issuance of those. She discussed what is required when you apply for a permit and the information provided for the application for the fence. She stated that deed restrictions are not required to be shown on either the plot plan or survey. The Township does not enforce private deed restrictions or easements. If there is an easement for a sanitary sewer line, we require that to be shown because that is something the Township has an interest in. Section 3.3.3 requires evidence of ownership. We have a warranty deed on file for lot 8 with the Township Assessor which shows that Greg and Kimberly Atwood are the owners. We knew that we had everything to initiate a review of the land use permit application. Zoning Coordinator Brittany Stein conducted a site inspection on December 14 to verify that lot conditions were as shown on the survey. She found that the survey stakes were installed, the location of the proposed fence was indicated, and the survey accurately depicted the site conditions. Zoning Administrator Amy Steffens and Code Enforcement Officer Mike Sumeracki conducted a second site inspection on December 17 to confirm the existing site conditions matched the owner's permit application. The owner's survey does show that the site is within the AE floodplain. Staff confirmed with the Michigan Department of Environmental Quality that the fence would not require a DEQ permit under Part 301. In a telephone conversation with Donna Cervelli on December 18, 2018, staff confirmed with Donna Cervelli, DEQ floodplain engineer, that the proposed fence would not constitute a hazard if properly anchored. The DEQ also confirmed that no Part 301 permit was necessary.

Steffens presented the application showing the request for a permit for a 6 foot tall fence approximately 70 linear feet as well as the survey and fence detail. She discussed Section 8.14.1- Fences, Walls and Screens of the Zoning Ordinance which was applied when reviewing Mr. Attwood's fence permit application. Section 8.14.2 is in addition to the standards of Section 8.14.1 that applies to all fences, walls or other screening structures within the residential zoning district. This property is located within the WFR zoning district. She reviewed those additional standards. The zoning administrator determined that Mr. Attwood had submitted an administratively complete land use permit application that included a boundary survey, fence details, and application. Section 8.14 permits a six-foot fence at the location as shown on the application. On December 21, 2018, the zoning administrator issued LUP 18-0584 for a "six-foot tall vinyl privacy fence along only the north property line, extending from the existing fence to the rear property line. Approximately 70 linear feet. Fence posts shall be designed and anchored to prevent flotation, collapse, or lateral movement of the fence panels. On January 8, 2109 Stephen and Deborah Nash filed an appeal of the issuance of Land Use Permit 18-0584. That same day, the

Zoning Administrator contacted Mr. Greg Atwood and advised him of the appeal and that a stop work order was being placed on the property. January 22, 2019 a stop work order was placed on lot 8. It is not a requirement to place a stop work order, but she chose to do so as a courtesy to the property owner as well as adjacent properties.

Steffens stated that Article 6 of the Zoning Ordinance governs the activities of the Zoning Board of Appeals. Section 6.4. of the Zoning Ordinance specifies the appeal process for a decision of the zoning administrator. She reviewed Section 6.4. She stated that Section 6.5 grants the Zoning Board of Appeals the authority to hear and decide appeals where it is alleged there is an error of law in any order, requirement, decision or determination made by the Zoning Administrator in the enforcement of this Zoning Ordinance. The applicants believe that the fence permit violates Section 8.14.(F): "A fence shall not be erected where it would prevent or unreasonably obstruct the use of adjacent property or the safe use of an existing driveway or other legal means of access to adjacent property." The permitted fence does not obstruct access to the Nash property, as it is entirely on lot 8 and does not block the right-of-way of Downing Drive, which is the legal access to the Nash's property. Furthermore, the permitted fence would not prevent or unreasonably obstruct the use of any adjacent properties for the intended, zoned, and developed purpose of single-family residential use. The permitted fence does not obstruct Nash's adjacent property's access to the water, as the Nash property to the north has direct, platted access to the water. She reviewed the applicant's grounds of appeal:

1. The application for the fence permit contained material misrepresentations that there was existing fence on the subject property and proposed fence "matches existing." Staff comment: Staff wrote the notation on the survey indicating that there was an existing fence on a neighboring property, not on lot 8, and that the proposed fence on lot 8 would be even with the fence on the adjacent property. Whether or not there was an existing fence on lot 8 does not change the application of Section 8.14. to lot 8 and the permit application for a fence. Permit review contemplates the proposed project and how it relates to existing site conditions. The permitted fence complies with the height and location requirements of the Zoning Ordinance. It is not clear by the applicant's appeal letter how "matches existing" is a material misrepresentation of the fence permit application. Determining whether or not the permitted fence "matches existing" fence materials either on lot 8 or on an adjacent property is not contemplated by the Zoning Ordinance.
2. The privacy fence will completely obstruct the waterway and riverway views of Applicant's property and neighboring properties thereby adversely altering the entire unique character of this established neighborhood of properties with natural, unobstructed views of the lake. Staff comment: The intent of the Zoning Ordinance requirement of the 50-foot setback from the ordinary high water mark of a waterbody is to preserve aesthetic views. The permitted fence complies with the required 50-foot setback from the OHM. Providing, maintaining, and guaranteeing an unobstructed view of a waterway when all Zoning Ordinance requirements are met is not contemplated or addressed by any provision of the Zoning Ordinance.
3. The installation of the posts for the privacy fence will cause irreparable damage to the root structure of the large mature hardwood trees that are an integral part of the overall character of the neighborhood and which will create a safety hazard for adjacent properties. Staff comment: Neither the Zoning Ordinance nor the zoning administrator can address damage to a neighboring property. Any damage caused by the installation of the fence is a civil matter between property owners.
4. The privacy fence is contrary to existing easements, right-of-ways, plat restrictions and deed restrictions. Staff comment: The fence is not located in the right-of-way of Downing Drive. Easements and plat and deed restrictions are civil matters between property owners. As previously indicated to Mr. Nash, the Township has the authority to regulate land use through the Zoning Ordinance, not deed restrictions, under the Michigan Zoning Enabling Act.
5. Blatant trespassing on and malicious destruction of Applicant's property in furtherance of the construction of the privacy fence. Staff comment: Neither the Zoning Ordinance nor the zoning administrator can address trespassing. The applicant has been previously advised to contact the Hamburg Township Police Department.

Steffens reviewed MCL 125.3201 which is where the Township derives its Zoning authority. She stated that we do not ask for deed restrictions or easements on surveys because the township can regulate land use only through the zoning ordinance. Those are things that need to be taken up between property owners through the courts. The applicants have also raised the issue of a spite fence. Again, that is something that needs to be addressed through the courts, and is not something that the Zoning Administrator or the ZBA can find that it rises to the level of a spite fence.

Chairperson Priebe opened the public hearing.

Chris Hewison, partner with Greg Atwood, stated that they applied for the permits and did everything they were supposed to do. Many of the things that the attorney said were untrue and ridiculous. He had plans to erect a house on that property for his family. It is a very peaceful area, which is why he wanted to put up a house.

There being no further comment, the public hearing was closed.

Ms. Hodges asked if the Township does not enforce the restrictions and covenants, then who is responsible. Chairperson Priebe stated that the Township enforces its Zoning Ordinance. Deed restrictions are a civil matter, and we have no jurisdiction.

Mr. Meyers stated that he would agree that the Township does not have any legal authority to enforce deed restrictions, however the Township has an obligation to enforce the provision of its Zoning Ordinance. The provision is that fences shall not be erected where it would prevent or unreasonably obstruct the use of adjacent properties. Ms. Steffens defined use as it is zoned for single family residential use. He does not believe that it should be interpreted that broadly. There are property uses that are inherent other than it is just single family residential. There are other uses that any property owner makes and is part of the enjoyment of their property. The law is to promote the public health, safety and welfare. The peaceful enjoyment of property and ability to continue to have unobstructed views of the lake is an inherent part of these properties. The deed restrictions are just a manifestation of that. He is not asking the Township to enforce those. You have the authority to recognize they are a foundation of what is an inherent use of all of these properties.

Member Auxier stated that guaranteeing a view via the ordinance is a challenging situation. We have the 50 foot setback. An argument could be made that if there is a vacant lot across the street that if a house is built, then it would obscure their view of the lake. You need to draw the line and we have a line drawn in the ordinance, which is 50 feet back from the high water mark. The ordinance is clear and the law is clear, and that is the role of the ZBA.

Chairperson Priebe agreed with Auxier and stated that again she feels that this will be decided as a civil matter.

Steffens stated that this may be a topic that could be discussed at our upcoming joint meeting. We could look at how other communities address preservation of views beyond the 50 foot setback. She further stated that there is communication from the Township Attorney with regards to this matter as well.

Member Watson suggested that possibly the property owner could take another look at the fence and bring it down to make it agreeable to other neighbors.

Mr. Nash further discussed that there is no other purpose for this fence. Generations have grown up enjoying the scenery. He discussed the Detroit Tigers using the park back in the 1930s-1940s. Chairperson Priebe stated that the permit was granted based on our ordinance. Spite fences are not addressed in our ordinance.

Mr. Nash asked if the Township has an ordinance to allow a spite fence which State Law says is illegal.

Motion by Auxier, supported by Neilson

To make the following decision on the issue raised by Stephen and Deborah Nash. Stephen and Deborah Nash are not a person aggrieved by the issuance of the December 21, 2018 land use permit to Greg and Kimberly Attwood for the construction of 70 linear feet of six-foot tall privacy fence on their property on Downing Drive, being appealed. To deny the appeal because Stephen and Deborah Nash have not shown that they have suffered special damages so as to be a person aggrieved by and having a right to appeal the decision under Section 6.4. of the Township Zoning Ordinance and MCL 125.3604(1). This decision is based on the statement of appeal not identifying any special damages, and the special damages identified in the January 18, 2019 application from Stephen and Deborah Nash and the presentation at this hearing being generalized concerns that would be shared by other property owners that are speculative in nature and not establishing any unique particular or other interest that will be directly affected by the Zoning Board of Appeals decision. The Board furthermore agrees with the zoning administrator's interpretation of Sections 3.3.2.(E) and 8.14.1.(F).

Voice vote: Ayes: 5 Nays: 0 Absent: 1 MOTION CARRIED

**8. New/Old business**

a) Approval of January 9, 2019 minutes and memo of findings for ZBA 18-014

Motion by Auxier, supported by Watson

To approve the January 9, 2019 minutes and memo of findings for ZBA 18-014 as written

Voice vote: Ayes: 5 Nays: 0 Absent: 1 MOTION CARRIED

Planning & Zoning Administrator Steffens reminded the Board of the joint meeting that will be held on Wednesday, February 27<sup>th</sup> at 7:00 p.m. This will be a year in review as well as our work session with the Planning Commission and Township Board and Parks and Recreation Committee. Discussion was held on adding discussion of views to that agenda. Member Auxier suggested that we take some time to think about it individually. He stated that he cannot think of another area on the Chain of Lakes that has this scenario. We need to think about making a change that may only apply to a very small number.

**9. Adjournment:**

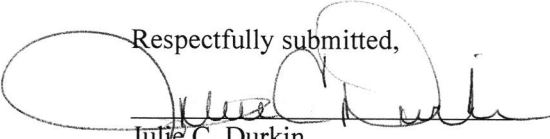
Motion by Neilson, supported by Watson

To adjourn the meeting

Voice vote: Ayes: 5 Nays: 0 Absent: 1 MOTION CARRIED

The meeting was adjourned at 8:33 p.m.

Respectfully submitted,

  
Julie C. Durkin  
Recording Secretary

The minutes were approved as presented/Corrected: 3-13-19

  
Chairperson Priebe