

MEMORANDUM

TO: Tom Laureto, Supervisor and Glen Arbor Township Board

FROM: Richard J. Figura, Attorney at Law

DATE: July 16, 2021

RE: Glen Arbor Township Planning Commission; Conflict of Interest Allegations

You have provided us with a copy of a letter from attorney Kathleen King O'Brien dated June 18, 2021 in which she makes various assertions about some members of the Glen Arbor Township Planning Commission (GAPC) having participated in certain GAPC matters while having an undisclosed conflict of interest. Attorney King alleges that these actions were illegal and demands that those members be removed from their positions and that the actions taken by the GAPC at its May 6 and June 3 meetings be deemed null and void.

Due to the nature and extent of attorney King's claims, considerable research is required for us to adequately analyze the accuracy and legitimacy of those claims. Accordingly, we are unable to complete that analysis in time for the township board's July 20 meeting, but will be able to do so by the board's August meeting.

A cursory review of attorney King's letter does, however, enable us to draw certain early conclusions regarding her claims and procedural issues which we believe need to be addressed. Those early conclusions and issues which need to be addressed include, without limitation, the following:

1. We note attorney King's letter seeks board action but is only addressed to three members of the township board. We are unaware of any legal requirement that claims of a conflict of interest regarding a board members should not be made to the entire township board rather than to just 3 members who are not targets of the claims. **All** members of the township board are entitled to receive any communications made to board members, especially when the communication calls for some board action.

2. Her assertion that the township board is **required** to remove certain members from the GAPC is a stretch from the provisions of the Michigan Planning Enabling Act (MPEA) and the Michigan Zoning Enabling Act (MZEAE). Both the MEPA and the MZEA provide for removal of a member of a planning commission for "misfeasance, malfeasance or nonfeasance." In such a case, both the MZEA and the MPEA require that removal be based on written charges and a public

hearing, and the MPEA states that the township board **may** remove a member after such a public hearing. Thus, the statutory removal mechanism provides the member whose removal is sought with the basic rudiments of due process.

In any event, before even considering going down that road, the township board should investigate the allegations made and have legal counsel opine as to whether the complained of activity meets the legal status of misfeasance, malfeasance or nonfeasance.

If the township board finds that a member of the GAPC has committed misfeasance, malfeasance or nonfeasance, it is not required to remove that person, but it **may** do so.

3. We are unable to say without further research and analysis that any member actually had a conflict of interest as charged by attorney O'Brien. Certainly, there are facts which might give an observer the appearance of a conflict. That is quite often the case in such matters. We have found that what *appears* to be a conflict, however, more often than not turns out *not* to be one as a matter of law.

While we are unable to say without further research and analysis that any member actually had a conflict of interest as charged by attorney O'Brien, we nevertheless think that the GPAC's bylaws should be updated to comply with the MPEA on this score. The MPEA provides that, unless the township has an ordinance which defines conflict of interest, the planning commission should provide such a definition in its bylaws. We have been unable to find a township ordinance which defines conflict of interest for the purposes of the MPEA, and the latest version of the GAPC's bylaws which we reviewed does not contain such a definition.

We recommend that the GAPC's bylaws be amended to include such a definition. We also recommend that the GAPC's bylaws be amended to mandate that every meeting agenda include a point at which members must disclose **any** potential conflicts of interest and have the other members of the GAPC determine if the member actually has a conflict or not. If the other members decide that the member has a conflict, he or she should not be permitted to participate in the matter for which he or she has a conflict.

Having practiced planning and zoning law for more than four decades, we find that these basic best practices involving potential conflicts of interest are frequently glossed over and unintentionally forgotten. For that reason, we often recommend that planning commissions revisit their bylaws and particularly their conflict of interest substantive and procedural requirements on an annual basis.

4. On June 22, 2021, the Leelanau County Planning Commission (LCPC) addressed the zoning amendment sent to them by the GAPC. There was a discussion about whether there was a

conflict of interest as alleged by attorney O'Brien. Two members thought Mr. Ihme had a conflict of interest because he owned property in the business district but one member (M. Lautner) disagreed stating (correctly I believe) that mere ownership of property affected by a rezoning does not in and of itself constitute a conflict of interest. She said, "You have to look at the meaning of the conflict. There has to be a very direct intentional benefit." She has a valid point and underscores the problem that there is no conflict of interest provision in the bylaws of the GAPC.

The LCPC did not reach any conclusion regarding the conflict of interest claim, stating (correctly, I believe) that it was an issue to be addressed by the township's legal counsel. As indicated in this communication, we are in the process of doing just that.

5. A review of the draft minutes of the June 22 LCPC meeting do not show where the GAPC provided a statement of findings of fact in support of its recommendation to permit the rezoning. While the draft minutes of the GAPC meeting show that members gave reasons for their support of the zoning ordinance amendment, no formal findings of fact were adopted. Formally adopting such findings of fact is a best practice which should also be addressed in the GAPC's bylaws.

We recommend that the township board send the proposed zoning ordinance amendment back to the GAPC for consideration of adopting findings of fact to support its recommendation.

CONCLUSION

In conclusion, we recommend that the GAPC revisit the issue of the proposed zoning ordinance amendment at its next meeting (in September). In addition, we recommend that the GAPC review its bylaws to include a definition of what constitutes a conflict of interest as well as a process for disclosing potential conflicts. Such a move, we think, will go a long way to making the GAPC more transparent and avoiding controversial actions.

Meanwhile, we will continue our analysis of the conflict claims made by attorney O'Brien and will advise the township board of our conclusions at your August 17 meeting.