

DRAFT

MEETING

GLEN ARBOR TOWNSHIP ZONING BOARD OF APPEALS

Thursday, June 22, 2023 at 3 pm

Glen Arbor Township Offices

**PRESENT:** Don Lewis, Bill Freeman, Denny Becker, Andy Dotterweich, Harvey Warburton, Alternate Dan Semple, Zoning Administrator Tim Cypher, Recording Secretary Dana Boomer, Township Legal Counsel Tom Grier

**ABSENT:** None

**GUESTS:** 3

**CALL TO ORDER:** Chairman Denny Becker called the meeting to order at 3:00 p.m. with the Pledge of Allegiance.

Becker first stated that a substantial amount of new information was received from the applicant and their attorney the day before the meeting. Township Legal Counsel Grier recommended that the hearing be held, and then the matter be tabled before a decision is made to allow counsel to provide a response to the new information. The PC briefly discussed and determined that they will proceed with the hearing through point e (ZBA discussion with attorney/zoning administrator) and then will likely table the conversation at that time.

**APPROVAL OF AGENDA:** Dotterweich moved, Freeman seconded to approve the agenda as presented. All in favor, motion carried.

Grier stated that in the packet there are three affidavits from former Zoning Administrators, including Don Lewis. Marc McKellar, the applicant's attorney, has requested that consideration be given to Lewis recusing himself, as he is a fact witness in this case. Grier recommended that Lewis consider stepping aside on this matter and letting the alternate take his place.

**CONFLICT OF INTEREST:** Lewis stated that he has been involved in this issue since the 1970s as a Zoning Administrator, Planning Commission member, and ZBA member. He continues to believe he doesn't have a conflict of interest, but instead brings a large amount of institutional knowledge to this case. Cypher read the portion of the ZBA Bylaws related to conflict of interest.

McKellar stated that his position is that Lewis has a signed affidavit in this case substantiating a position he took on the property as the township Zoning Administrator and that makes him a fact witness for this case. Traditionally, fact witnesses cannot be decision makers in cases of this sort. There is a conflict regardless of which way the case goes, as either aggrieved party could argue that Lewis had bias in the case. Lewis argued that the affidavit only covers facts of his tenure as Zoning Administrator, and should not disqualify him from acting as a decision making on this case. McKellar stated that portions of the affidavit speak to why Lewis interpreted the Zoning Ordinance in certain ways, and therefore is not just fact. This is a quasi-judicial body and he feels this is an important point, and so his objection to Lewis acting as a decision maker stands. Warburton asked for Grier's opinion on the subject. Grier asked for a

brief sidebar to speak with Cypher – this was granted. The meeting was on a brief break; when Grier and Cypher returned, Grier stated that Lewis has given detailed input on this case through his affidavit. Grier believes the safe thing to do would be for Lewis to step aside and let the alternate sit on the board for the decision. Lewis agreed to recuse himself for the Connell ZBA case. The ZBA discussed whether Lewis should recuse himself from the ZBA case. Grier clarified that the objection is not that Lewis has a classic conflict of interest, but that Lewis is conflicted as a historical fact witness. He believes Lewis is able to vote on other items on the agenda.

**Warburton moved that the ZBA accept the recommendation of Grier regarding the Connell case.**

**Dotterweich seconded.** Dotterweich then stated that Lewis has provided the facts as he interpreted them up through now. This case is regarding whether the current interpretation of the Zoning Ordinance is correct. Dotterweich stated that the ZBA is being asked to consider a possible ambiguity in the Zoning Ordinance, which may have already been cleared up by actions of the Planning Commission and Township Board. Dotterweich believes Lewis should be available through the process until the board reaches the point of deliberation and decision and only recuse himself at that point. He doesn't believe the decision will be changed regardless of Lewis' participation. Lewis asked Grier for his recommendation on whether it was possible for him to participate in the discussion until the point of deliberations and decision is reached. He does not want to put the township in a poor position. Grier stated that the cleanest way to resolve this is for Lewis to step aside completely on the matter, having contributed valuable historical facts through his affidavit. Staying on through any portion of the case process would open up the process to accusations of bias or undue influence. Lewis stated that he will be stepping aside for the Connell case. **Vote: Freeman: No, Warburton: Yes, Dotterweich: Yes, Becker: Yes. Motion passed, 3-1.**

At this point, 3:32 pm, Mr. Lewis left the meeting and Alternate Don Semple joined the meeting. Mr. Semple has no conflict of interest.

**APPROVAL OF MINUTES: Freeman moved, Warburton seconded to approve the minutes of June 9, 2022 as presented.** Warburton suggested adding one sentence on page 3: *"Lewis further stated that the entire township board unanimously disagrees with the proposal to lengthen the time for which the ZBA recordings are retained."* **Freeman and Warburton agreed to amend their motion to approve the minutes of June 9, 2022 as amended. All in favor, motion carried.**

**PUBLIC COMMENT:** None

**ELECTION OF OFFICERS:** The officers of the previous year are Denny Becker as chair, Andy Dotterweich as vice-chair, and Bill Freeman as secretary. The ZBA briefly discussed. **Semple moved to continue the current officer slate; Warburton seconded. All in favor, motion carried.**

The public hearing was opened at 3:37 pm.

**ZBA Case #2023-01** - Richard V. and Julia A. Connell request a review of a decision of the Zoning Administrator, dated March 15, 2023, to deny a land use permit application for a 4,100 square foot contractor building on their property. The property is zoned Agricultural; Tax ID 45-006-030-005-40. The parcel is located at 6335 S. Miller Hill Road, Maple City, MI, 49664, Section 30, T29N, R13W, Leelanau County, Michigan.

- a. Presentation by Applicant – Marc McKellar presented as the attorney for the applicant. He summarized the history of the case, and summarized the brief that he had distributed to the Planning Commission yesterday. McKellar stated that in the previous ZBA case, it was opined that the restriction on building a single-family residence on a farm on less than three acres could not be considered a taking because there were other options for building on the property, such as a contractor building. As Mr. Connell is a contractor, he determined that he could use the property for his contractor business. At that time, the Zoning Ordinance did not state that a contractor business required three acres.

McKellar stated that after the Connell's application for a contractor building was filed with the Township, the Planning Commission acted to recommend to the Township Board to amend the Zoning Ordinance to require that all building uses require 3 acres in the agricultural district, and the Zoning Administrator based his decision to deny the Connell application in part on affidavits submitted by previous Zoning Administrators stating that this was how the Zoning Ordinance had always been interpreted to extend the three-acre minimum to all buildings in the Agricultural District. McKellar said only the Agricultural District was amended to clarify this, the Business District retains language that only gives a minimum area for dwellings, not other uses, so this clarification to the Agricultural District was obviously made because of the Connell matter. McKellar summarized the lot size requirements for the various zoning districts in the township, and read the definitions from the Zoning Ordinance that are applicable to the case.

McKellar stated that the applicant is looking to have a viable building project on the property, and believe that their application meets the standards that were present in the Zoning Ordinance when the application was submitted. He feels that the amendment to the Zoning Ordinance shows that this standard was not originally present and therefore their application should have been accepted. The applicants would have liked to build a home on the property, but as they were denied, they would like to build something on the property. He does not deny the affidavits stating that Cypher's interpretation had a historical consensus, but it seems that there is some interest on the part of the township to keep the property empty because of the wishes of the National Park Service.

- b. ZBA Questions/Discussion with Applicant – Warburton asked McKellar about his statement that at some point in time a ZBA member had made the comment that other uses may be allowed. Dotterweich stated that he made the statement that other uses may be allowed, but not from a Zoning Administrator's interpretation. McKellar agreed that Dotterweich's statement was what he was referring to, and Semple concurred with Dotterweich's statement – this discussion was in the May 2022 meeting.

Freeman stated the ZBA has a responsibility to abide by the Planning Commission's Zoning Ordinance. And the PC has made it clear that it was their intent to have the three acre minimum apply to all uses. Warburton stated that it is not clear to him that, if the intent was originally to have the three acre minimum apply to all uses, why the Zoning Ordinance originally specifically only associated the 3 acre minimum with farms, rather than applying to all. McKellar doesn't

disagree that the Zoning Ordinance has been interpreted to require a three acre minimum for all uses in the past, but that doesn't mean the interpretation is correct.

c. Public Comment (limited to three minutes per person unless extended by ZBA) – A letter was submitted from Superintendent Scott Tucker with the National Park Service continuing to oppose the building of any structures on the Connell property.

d. Applicant's Response to Public Comment – Mr. McKellar stated that it would be a taking of property rights to force this land to remain open space based on the National Park Service opinion.

e. ZBA Discussion with Staff (if required) – Cypher stated that his letter to the applicant stands as presented. Becker asked whether Cypher or Grier would respond to Freeman's comment regarding accepting the PC clarification of the Zoning Ordinance. Cypher stated that when he came on board with the township, he sat down with the previous Zoning Administrator, and this issue has been on the radar since he began in 2012. Due to other pending issues, the vague wording was never addressed by the Planning Commission. The affidavits from the previous Zoning Administrators show clearly that his interpretation is supported by the historical record. Grier stated there are some legal cases presented by both Cypher and McKellar, and there is some ambiguity in the language. Grier will be developing a brief on the subject after the meeting today.

Warburton asked if there have been other properties where this issue has been discussed, or whether this has been a theoretical discussion in the past. Cypher stated a combination of the two. Warburton stated that it would have been better for this to have been addressed by the PC in the past. Cypher agreed, but this frequently only happens when a specific issue needs to be addressed. Dotterweich stated that the ambiguity has been resolved in the new amendments to the ordinance, so going forward this is not an issue. Dotterweich asked whether there are other properties effected by this amendment to the ordinance. McKellar stated he submitted a FOIA on that topic and no other properties would be affected by this change to the ordinance. Dotterweich reminded the ZBA that this was not a legally created lot, which is likely the reason that no other properties are affected by this property. McKellar stated that the term ambiguous has a very specific legal meaning. They are not arguing that the language was legally ambiguous, they are arguing that there was a lack of clarity regarding non-residential/farm uses in the agricultural district. He reiterated that they are arguing that the ordinance language should be interpreted to mean that non-residential/farm uses should be allowed on less than three acres.

**Dotterweich moved to defer the further discussion of point e, as well as points f and g, until a future meeting after further information is received from staff. Semple seconded.** Warburton clarified that future discussions will be held at public meetings. **All in favor, motion carried.**

The public hearing was closed at 4:12 pm.

The applicant and all legal counsel left the meeting at this time.

**OTHER BUSINESS:** Warburton wants to continue the discussion of how long recordings of meetings are maintained. At the last meeting, Lewis made a point regarding the state's recommendations to Township Clerks on record retentions. The ZBA is a quasi-judicial entity, not an administrative entity. The decisions can be challenged in a court. He doesn't believe that the administrative standards should be applied to ZBA records. He thinks the ZBA should be interested in preserving the actual record for at least as long as a decision can be appealed. Why should the ZBA be in a hurry to get rid of recordings?

**Warburton moved that recordings be retained for at least 60 days. Freeman seconded.** Freeman doesn't understand the 60 day limitation. Warburton said this is the length of time that an appeal is allowed. However, if an appeal is made, the recording should be kept longer. **Warburton amended his motion to retain recordings of the ZBA for a year. Freeman seconded.** Dotterweich is uncomfortable with voting on this until more information is received from the township. Becker agrees. Boomer recommends that a legal opinion be sought on whether records retention is an item on which the ZBA is able to making a binding decision, given the statutory requirement for Township Clerks to maintain all township records. **Vote: Warburton (yes), Dotterweich (no), Freeman (no), Semple (no), Becker (no). Motion failed.**

Dotterweich asked for the Township Clerk and township legal counsel to be present at the next meeting to discuss records retention for the ZBA. The PC had consensus to place this item on the agenda for the next meeting and request the presence of the Township Clerk and township legal counsel to discuss the matter.

**PUBLIC COMMENT:** None

**ZBA COMMENT:** Freeman asked whether residential quarters could be allowed in the contractors building. Cypher stated mixed use is not allowed at this time.

**ADJOURNMENT:** With no further business, Becker declared the meeting was adjourned at 4:26 p.m.

Respectfully submitted,

Dana Boomer

Recording Secretary