

APPROVED
GLEN ARBOR TOWNSHIP ZONING BOARD OF APPEALS
Tuesday, January 9, 2024 —3:00 p.m.
Glen Arbor Township Office, 6394 W. Western Ave., Glen Arbor, MI 49636

MINUTES

PRESENT: Bill Freeman, Denny Becker, Andy Dotterweich, Alternate Dan Semple, Zoning Administrator Tim Cypher, Township Legal Counsel Tom Grier

ABSENT: Don Lewis (recused), Harvey Warburton (excused)

GUESTS: 4

Call to Order/Pledge of Allegiance. Chairman Denny Becker called the meeting to order at 3:05 pm.

Approval of Agenda. – A draft agenda was presented for approval. **Motion to approve agenda as presented by Dotterweich, second by Freeman. All in favor, motion carried.**

Declaration of Conflict of Interest – None

Approval of Minutes—June 22, 2023 – Harvey Warburton had previously sent an email to the Board which stated:

“I believe that the minutes would more accurately represent how the "conflict of interest" issue unfolded with the following proposed changes:

- Delete “Grier stated that in the packet...”. If this comment was actually made by Grier, it was later, and it was in the context of the challenge by McKellar.
- Put the heading “Conflict of Interest”, or “Alleged Conflict of Interest” ahead of “Marc McKellar, the applicant’s attorney...” and delete “Conflict of Interest” immediately preceding “Lewis stated...”.
- Change “Marc McKellar, the applicant’s attorney **has** requested...” to “Marc McKellar, the applicant’s attorney requested...”. As I recall, McKellar made the request directly to the board, Grier did not tell the board that McKellar made the request.

On page 4, there is a comment “Warburton stated that it would have been better...”. That comment might have been made, but I am quite certain it was not made by me.”

After a brief discussion it was determined to approve the minutes with the following changes:

-Change PC to ZBA in the last sentence of the first paragraph

-Move **CONFLICT OF INTEREST** title up, just below Approval of Agenda

-Change the first two sentences of the first paragraph under **CONFLICT OF INTEREST** to the following:

“It was noted that in the packet there are three affidavits from former Zoning Administrators, including Don Lewis. Marc McKellar, the applicant’s attorney, requested that consideration be given to Lewis recusing himself, as he is a fact witness in this case.”

-Delete the third and 4th sentences of the 5th paragraph on page 4 beginning with “Warburton stated that...”

Freeman moved to approve the June 22, 2023 minutes as amended; second by Semple. All in favor, motion carried.

Public Comment – Scott Tucker from the National Park Service spoke about the Park’s continued support for actions by the township and encouraged members support the ZA’s position and to oppose any type of use requested.

A. Continuation of Public Hearing (due to time lapse between meetings)

1. 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** - Mr. McKellar spoke at length regarding the background and the request. He supplied briefs in support of overturning the ZA’s decision. He also brought up comments that in a previous meeting, a few of the ZBA members noted what may be a possible use that would be satisfactory to them. He continued his discussion regarding his briefs that were submitted and spoke to how the interpretation / application of the ordinance had been viewed in the past and how he believed that was not a correct manner of enforcement. Mr. McKellar argued that the Zoning Ordinance language was not ambiguous with respect to the acreage requirements for farms, single family homes and other uses within the Agricultural District. He commented that the Township’s collective actions could have the effect that nothing can occur on the Connells’ property with corresponding legal consequences to the Township.

He said that the Connells chose a different alternative and wanted to use their property as compared with the other landowners on the Miller Hill ridge which ended up selling their property to the National Park. He said that the Connells, the National Park and the Township should work on a consent agreement that would allow the Connells to use the property.

b. ZBA Questions/Discussion with Applicant –

Freeman questioned applicant’s attorney about their hardship and the attorney responded that they were not given the opportunity to have the property bought back from them because that was prior to their position in the chain of title.

c. Public Comment - None

d. Applicant’s Response to Public Comment - Richard Connell stated the they just want to develop the property with a house for their family and children to use. They did not understand why the township was not allowing it. The development of the property being surrounded by the National Lakeshore land would not increase density. Mr. Connell spoke to the lack of the support of the township to provide relief and stated that this matter will be taken to court if things don’t go their way.

e. ZBA Discussion with Staff Attorney or Zoning Administrator –

Mr. Grier summarized the process and the meeting protocol for the ZBA noting the umbrella Memo to the ZBA, dated September 17, 2023. He further noted that two alternate sets of Findings were available for the ZBA to choose from. Set 1 would affirm Zoning Administrator (ZA) Tim Cypher's decisions. Set 2 would reverse ZA Tim Cypher's decisions.

ZBA member Dotterweich said that he had spent time researching the definition of "contractor" in an effort to determine how it could be reconciled with the Zoning Ordinance, and found a lot of ambiguity in the Ordinance. Dotterweich went over a number of the sections of the ordinance in question.

- Dotterweich noted terms are undefined especially when it comes to what "Contractors and Excavators" means. Neither contractor(s) nor excavator(s) are defined. We don't know if these were meant to be separate terms or a singular term referring to a company like Popp Excavating that may have a gravel pit on farm land. Contractor can refer to anyone who performs work under contract for another like the applicant, a consultant or a factory building products for another company under contract. Likewise the applicants request to build a "Contractor Building" does not state what the use of that building would be. It might include a named use that is allowed in another zoning district but not allowed in this district by not being enumerated as an allowed use.
- Dotterweich noted the ordinance is very clear that a minimum of 3 acres are needed for a farm use in the district and slightly more is needed for a residence at 131,000 square feet.
- Dotterweich also noted that the definition of a Farm goes beyond just agriculture and is very broad with the inclusion of "and for other things and/or uses not named for which such lands are generally used.
- Dotterweich said he felt this included all of the allowed uses listed which did not specify a minimum land area.

Mr. Dotterweich then questioned the text in Set 1 of the Findings, page 5, which states:

"As a further basis for the denial, on May 16, 2023, the Township Board adopted an amendment to ZO Article IX to clarify that the minimum land area for any use in the Agricultural District shall be three (3) acres, consistent with the historical application of the prior language within ZO Article IX."

Mr. Dotterweich questioned this language with respect to whether the ZBA's denial of the Connell's appeal was to be based upon the new amendment adopted on May 16, 2023 which clarified the area acreage requirement for all uses in the ZO Agricultural District.

Mr. Grier responded that the May 16, 2023 amended language for the Agricultural District was in no way intended to be a basis for the ZBA's decision in the sense that it would replace the prior language in Article IX of the ZO for the Agricultural District. Mr. Grier clarified that the amended language was just evidence of the ambiguity of the prior language in Article IX of the ZO for the Agricultural District. Mr. Grier further responded that the argument presented in the "Finding No. 2 Overturning ZA Tim Cypher's Decision" was misplaced if it implied that the ZA Tim Cypher was now relying on the May 16, 2023 amended language as the basis for his decision.

f. ZBA Deliberation / Findings of Fact. –

In order to correct any misunderstanding about the language on page 5 of Set 1 of the Findings (affirming ZA Tim Cypher's decision), Mr. Dotterweich asked to delete the last three paragraphs on page 5 of Set 1 of the Findings.

Freeman commented on the history and previous ZBAs decisions on matters regarding this property. Freeman emphasized that it was important that the ZBA properly enforce the zoning requirements of the township, making it clear to the community that zoning laws need to be followed. Becker reinforced Freeman's comment, stating that there are times we're sympathetic with an applicant's request but zoning requirements must be followed.

Becker commented regarding the farm uses listed in the ordinance and agreed with Dotterweich on his assessment. Semple noted the difficulty with this property and the history that has proceeded this application.

g. ZBA Motion / Action - Dotterweich moved to confirm the ZA's determination with the Set 1 Proposed Decision brief previously provided by Grier with the understanding that on Page Five, the last three paragraphs would be removed. Seconded by Freeman. Roll Call vote: Becker (yes), Freeman (yes), Dotterweich (yes), Semple (yes). All in favor, motion carried.

See attached for Set 1 of the proposed Findings with deleted language struck out.

h. Close Public Hearing – The public hearing was closed.

Other Business – Retention of digital recordings. The Members present discussed the matter of the retention of digital records. Township Clerk Pam Laureto had distributed the Michigan Townships Association position on the retention of digital recordings, which is what the Township Board follows, which states:

"If the tape was made for the purpose of transcribing the official minutes of the meeting, the tape must be retained until the minutes of that meeting are approved. At that time, the tape may be erased, taped over or destroyed, unless a Freedom of Information Act (FOIA), Public Act 442 of 1976 (MCL 15.231, et seq.) request has been received for a copy of the tape. Recordings made for the purpose of transcribing the official minutes are subject to disclosure under the FOIA. Recordings made by board members or the public for a purpose other than transcribing the official minutes are not subject to FOIA disclosure. Once the FOIA request has been completed, the tape may be destroyed. The exception to this rule is when a tape is made of a closed session held during a public meeting. Although it is questionable whether it is appropriate to make a tape of a closed session (since the minutes of a closed session are limited to the time closed session begins and ends, a list of who is present, and the purpose of the session), if a tape is made, it must be sealed with the minutes of the closed session and retained for one year and a day after the meeting at which the minutes are approved. After that it may be destroyed, along with the closed session minutes."

Dotterweich move to adopt the township policy for the retention of digital recordings as outlined by the Township Clerk. Freeman seconded. Roll Call vote: Becker (yes), Freeman (yes), Dotterweich (yes), Semple (yes). All in favor, motion carried.

Brief discussion was also held on the timely approval and members requested a Doodle be sent out to schedule a meeting to approve the minutes after the draft minutes have been completed.

Public Comment – None

ZBA/Zoning Administrator Comment - ZBA Member Dotterweich then asked Parks Superintendent Scott Tucker whether the Parks could exercise condemnation power with respect to the Connell property in the Miller Hill area of the National Park. Mr. Tucker said that the Parks could not exercise condemnation power with respect to the Miller Hill properties, but said that these properties are governed by a “Willing Buyer” protocol instead.

Next Meeting/Adjournment – With no further business and no objection, Becker adjourned the meeting at approximately 4:30 p.m.

Findings - Set 1

ZBA interpretation affirming Zoning Administrator Tim Cypher's Decision

By applying the General Rules above, ZA Tim Cypher *determined that there was an ambiguity* within ZO Article IX for the AG District with respect to the minimum area required for a “Contractor’s Building”. For example, with respect to the minimum area required for a farm or single-family home, there is a clear three-acre requirement:

SECTION IX.3 REQUIRED LAND AREA

A parcel of land to qualify as a farm under this District shall consist of not less than three (3) acres.

SECTION IX.4 THE MINIMUM LAND PER DWELLING

Each single-family dwelling with its accessory buildings shall be located on a legally described parcel of land of not less than one hundred thirty-one thousand (131,000) square feet of area, if it is not built as a part of the main farm dwelling, with minimum road frontage of two hundred (200) feet.

By contrast, with respect to the other permitted uses under Section IX.1. – Nurseries and greenhouses, Riding Stables, Mining, Cemeteries, Ice manufacturing plants and Contractors and Excavators - there is no express reference to the minimum parcel size.

Because there was such an ambiguity, Tim Cypher then applied the second and third general rules, respectively, to determine the *intention* of the AG zoning including consideration of its *historical application*.

Tim Cypher stated that it has been his practice as ZA, and the consistent practice of three predecessor zoning administrators, to require a minimum land area of three acres for any of the permitted land uses within the AG District. He explained that the reason for this is that the other permitted uses in the AG District - private forests with such harvesting equipment as saw mills, maple syrup reducing plants and charcoal plants, nurseries and greenhouses, riding stables, mining, including

extracting of sand, gravel or other natural resources, cemeteries, ice manufacturing plants and contractors and excavators - are all more, or can be more, intensive uses than either single family homes or farms.

Tim stated that it would be nonsensical, and contrary to the clear intent of the ZO, to only apply the three-acre parcel requirement just to single family homes and farms, and not to these other permitted uses.

In support of the interpretation requiring a three-acre minimum parcel area for all of the permitted uses in the AG District, Tim cited the affidavits of the former Township zoning administrators Robert L. Hawley (Exhibit 1 to his letter), Robert C. Price (Exhibit 2) and Donald J. Lewis (Exhibit 3).

ZA Tim Cypher emphasized that these affidavits show the Township has consistently applied the ZO Article IX AG provisions to require a three-acre parcel size for of the permitted uses in the AG District, not just for farms or single-family homes for almost 50 years.

For an historical perspective, with respect to the intent of the three-acre uniform parcel size requirement, ZA Tim Cypher noted the Affidavit of Donald J. Lewis, Exhibit 3, paragraphs 10 and 11, which stated that the AG minimum parcel sizes contained in the 1968 ZO were increased to three acres in the 1975 ZO co-incident with the development of the Sleeping Bear Dunes National Park. The larger parcel sizes within the AG District were intended to help preserve the Township's open and rural character in the eastern areas of the Township near the Park.

The ZBA agrees with the foregoing analysis of Zoning Administrator Tim Cypher and adopts that analysis by reference.

The ZBA has considered the argument provided by Connells/Manfield claiming that the AG terms within ZO Article IX are *not ambiguous* and instead must be *applied as written*. The Connells argue ZO AG Section IX.2. clearly *cross references* the building area requirements for residential property in ZO

Article V, and that the 15,000 square foot parcel size in the R-1 district should apply, and not the three-acre requirement of the AG district.

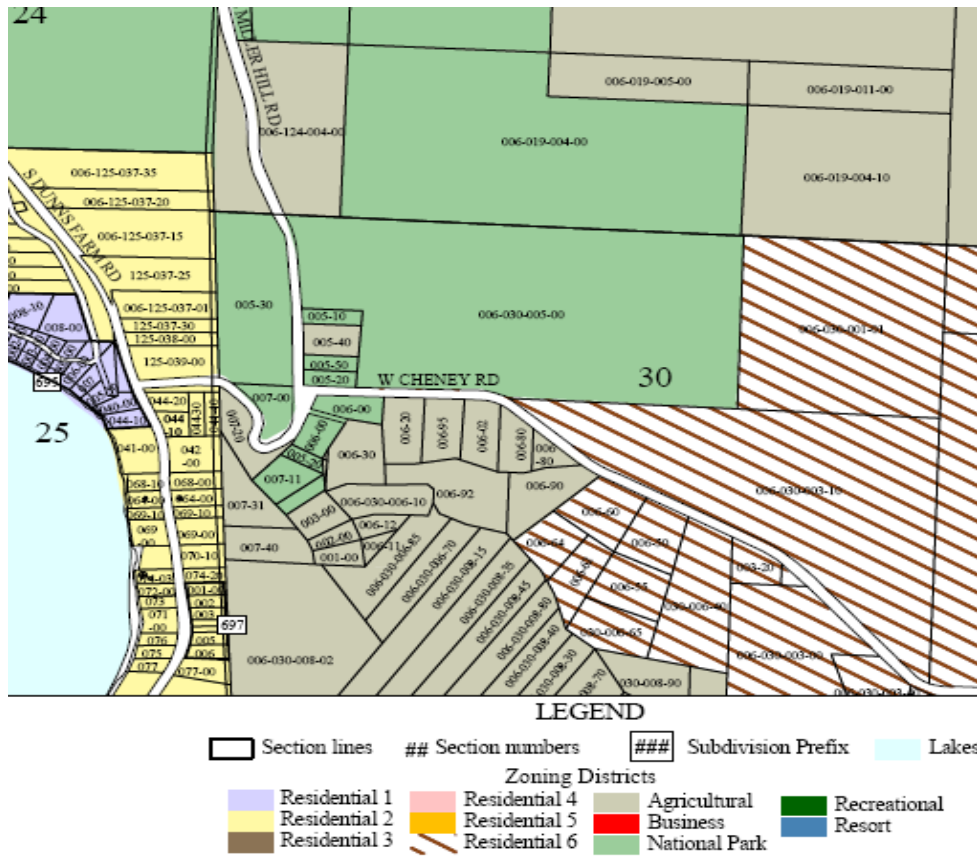
The ZBA disagrees with this argument. ZO AG Section IX.2 does not apply to the land use permit application from Connell/Mansfield.

ZO AG Section IX.2 states:

SECTION IX.2 CONTIGUOUS ZONE

Where any other Zone is contiguous to a farm located in an Agricultural District and forms a part of the farm, all farm uses and activities permitted in the Agricultural District may be carried on such contiguous land, except that any buildings constructed shall conform to the requirements of ARTICLE V (Residential).

The Applicability of Section IX.2 is limited only to split zoned parcels, where the farm parcel is located within two separate zoning districts. Part of the Township's "East Side" regional Zoning Map is inset below. The Map shows the Connell Parcel 005-40 is located wholly within the Agricultural District. The parcel is not split zoned. The parcel is further surrounded by land within the National Park.



A full copy of the East Side Zoning Map is attached as Exhibit 1.

ZO AG Section IX.2 applies **only** to “split zoned” property. Split zoning¹ is where one parcel is located within two or more different zoning districts. For example, the northern five acres of a ten-acre parcel is located within the Agricultural District and the southern five acres of the same ten-acre parcel is located within the Residential District. The two zoning districts “split” the parcel.

ZO AG Section IX.2 states: “Where any other Zone is contiguous to a farm located in an Agricultural District and forms a part of the farm, all farm uses and activities permitted in the Agricultural District may be carried on such contiguous land, ...” This simply means that farm uses and activities are permitted in the other contiguous zoning district, even though zoned differently.

ZO AG Section IX.2 Continues: “except that any buildings constructed shall conform to the requirements of ARTICLE V (Residential).” This means that buildings constructed in the split-zoned parcel follow the requirements of ZO Article V.

It is ultimately unnecessary to consider this argument because the Property is not split-zoned. The parcel is located within the Agricultural District only. Additionally, ZO AG Section IX.2 requires a farm. The Connells' land use application seeks to construct a Contractor's Building and there is no proposal to use the Property for a "farm."

Additionally, the Connells' claim that the 15,000 square foot area requirement applies otherwise lacks foundation. Predicate to such a claim would, at least, be facts showing that part of the split-zoned parcel is zoned Residential 1 ("R-1") which has the 15,000 square foot lot area requirement. By contrast, R-4 zoning requires a 60,000 square-foot lot area requirement. Article V contains both R-1 and R-4 zoning. You could not make the distinction unless it is known what the underlying residential zoning applies to the balance of the split parcel.

~~In summary, there is no need to proceed with such a strained analysis because 1) the Connell Property is not being used as a farm 2) and the Property is not divided between two zoning districts. The Property lies entirely within the ASG district.~~

~~As a further basis for the denial, on May 16, 2023, the Township Board adopted an amendment to ZO Article IX to clarify that the minimum land area for any use in the Agricultural District shall be three (3) acres, consistent with the historical application of the prior language within ZO Article IX.~~

~~Further, Mansfield and/or the Connells have not yet conducted any actual construction work, in reliance on any land use permit, that would grant to them any vested rights to proceed with the Contractor Building identified in their application prior to the new ZO amendment taking effect. See *City of Lansing v. Dawley*, 247 Mich 394 (1929).~~

For the foregoing reasons, the Zoning Board of Appeals hereby affirms ZA Tim Cypher's March 15, 2023 denial of the Connells/Manfield land use permit application for the Property at issue.

Dated: _____

ZBA Chair _____

ⁱ 1. See Reid v. Lincoln Charter Township, No. 287002 (Mich. App. 3/2/2010) (Mich. App. 2010), where the Court, in its recital of the facts said: “The 7.14-acre parcel is long and narrow, and has been split-zoned since 1947. The eastern three acres, the land abutting the Red Arrow Highway, is zoned C-3; the western four acres are zoned R-1.