

ACME TOWNSHIP
Zoning Board of Appeals
September 8, 2005

Thursday, 7:30 p.m.
Acme Township Hall
Acme, Michigan

Meeting called to Order at 7:31 p.m.

Members present: J. Kuncaitis (Chair), L. Belcher, D. Kipley, D. Krause, D. Smith

Members excused: P. Collins

Staff present: S. Corpe, Office & Planning Coordinator/Recording Secretary
J. Jocks, Township Counsel

1. **Review and approval of the agenda, inquiry as to conflicts of interest:** Approved with no conflicts noted.
2. **Correspondence:** None
3. **Reports:** None
4. **Hearings:**
 - a) **Public Hearing for Martin Land Improvement, Inc seeking an interpretation of Section 9.2, Change of [Nonconforming] Use, and a determination whether the applicant has abandoned a nonconforming use:** Belcher read the public hearing notice into the record. Jim Pascoe, attorney for landowner Al Martin made a presentation. He provided an original and copies of an affidavit by Mr. Martin, which is included and incorporated by reference. The applicant is seeking an interpretation of the above-referenced ordinance section. Mr. Pascoe spoke to the question in reference to state law as to whether there was an intent by Mr. Martin to abandon the grandfathered nonconforming use of the site as a business office. On March 11, 1999 Mr. Martin received approval to change from the previously existing non-conforming use as a retail store to a business office use. For various reasons, the business office use was never instituted. It is Mr. Pascoe's assertion that the conversion to business office use only occurred on paper and not in actuality, and that a retail use should be allowed to occupy the property as a continuation of the grandfathered non-conforming use. Mr. Martin has been attempting to market the property for retail use and believes that this is the only realistic and appropriate use for the property. Mr. Pascoe asserted that the key issue is Mr. Martin's consistent intent to use the property for commercial purposes, and his good faith lack of understanding that after receiving approval to change from one non-conforming use to another that use as a retail store would not be possible.

Kuncaitis stated that the first question is whether or not the word "discontinued" in the ordinance is and should be construed as synonymous with "abandoned." Kuncaitis is willing to accept this premise, but is concerned because the ordinance specifies a time period after which a grandfathered non-conforming use expires which is much shorter than the 6 years that have lapsed since the

permit to change non-conforming uses was granted. Mr. Pascoe responded that case law precedent indicates that time periods during which there is a lack of activity are irrelevant if intent remains in place.

Kuncaitis noted that the “Dan Geering” referred to in the affidavit is likely supposed to be “Dan Deering,” the owner of Tom’s Food Markets. Mr. Pascoe indicated that he was uncertain as to the correct spelling.

Belcher asked if the property was being operated as a convenience store up until the day Mr. Martin purchased it; Mr. Martin responded that it had been, although perhaps not profitably.

Corpe noted that the site presents some challenges: the leading edge of the building sits at the US 31 right-of-way line; the current parking area on Yuba Road is too close to the intersection with US 31 to be safe, and the location of septic tanks in the back yard may make relocating parking a challenge. She encouraged Mr. Martin to have any potential purchasers work closely with the township through the special use permit process so that it might flow as smoothly as possible.

Krause asked if the Planning Commission had seen a special use permit proposal for this property in the recent past; Corpe replied that an organic garden goods store had sought a permit, and was deemed to fit within the allowable uses of the agricultural district. Krause asked why the permit process was discontinued; Corpe replied that she had only heard the potential buyers side of the story, and in general terms it seemed that a disagreement had arisen between buyer and seller.

Public Hearing opened and closed at 7:59 p.m., there being no public input.

Motion by Krause, support by Belcher to interpret the words “discontinued” and “abandoned” as being synonymous. Motion carried unanimously.

Discussion then turned to the intent of the action taken in 1999. The application at that time was approved to convert from retail to office use. Belcher believes that at that time there was a clear intent to abandon the retail use in favor of an office use. He feels that the area would be a fine place for a small store to serve nearby residents, but that this was clearly not the intent of the permit issued in 1999. Krause added that the Master Plan calls for a small village center to develop in Yuba in the future, and Kipley noted that at one time a village center actually existed there.

Krause believes that the building and site are challenging, and it might be difficult for a commercial use to convince the Planning Commission that their plan is appropriate. However, he does believe that commercial use is appropriate for the site.

Smith asked Mr. Martin if his intent is to market the property for commercial or business office use. Mr. Martin stated that he maintains an office in Elk Rapids that is suitable to his current needs. At the time he bought the property he had

intended to do some residential land development, which would have required the greater visibility for his business. He feels the land value is in use as a retail store, and this is what most of the people looking at his site has proposed. He is a resident of the community and would like to see it developed well. He stated that when he approached the township in 1999 it had truly been his thought that retail use would remain a possibility, and believes that a low-volume retail use would be a good fit for the community.

Discussion turned to the zoning ordinance wording stating that once a grandfathered non-conforming use is discontinued, it may not be reinstated. Kipley observed that this is where the question of intent comes into the picture, and that case law indicates that expressions of intent to continue a use weigh very strongly in the matter. In this regard he feels that the request may actually fit with the ordinance. Kuncaitis feels that if this is the case, Section 9.2 should be referred to the Planning Commission for revision accordingly.

Kipley offered the interpretation that when the applicant applied to discontinue the retail nonconforming use and substitute the business office use, it can be interpreted that there was a clear intent to abandon the retail use. Kuncaitis stated that it appears that the applicant is not asking to simply return to retail use, but to be able to retain the opportunity for either retail or office use. Mr. Martin confirmed this to be the case, stating a preference for retail space. Kuncaitis is concerned that the whole situation basically opens the door to any sort of non-conforming use. Mr. Pascoe offered the idea that whether a retail or office use, either case constitutes the same type of use: commercial.

Kuncaitis read aloud the language in the ordinance that permits one non-conforming use to be substituted with another if it is less intrusive/intensive to the community. Mr. Pascoe stated that the applicant is looking for confirmation as to whether the ability to continue a non-conforming use is still in effect, and if so what sort of non-conforming use. Perhaps a potential buyer will want to apply to the ZBA for a change in non-conforming use; this applicant is just seeking something to demonstrate that rights to a non-conforming use exist.

Krause noted that Mr. Martin made improvements to the building that seemed geared towards office use. Mr. Martin stated that he tried to make the improvements somewhat neutral. Through general discussion, most of the board seemed to feel that it had been nice to have a convenience store there, but that in 1999 the intent was clearly to change the allowed use from retail to business office only, in keeping with the ordinance language about less intense uses. In general the board feels that it might be nice if the upcoming future land use map visioning sessions lead to some zoning changes that will promote creation of a village center in Yuba as discussed in the Master Plan. In the meantime, the ZBA must be guided by the ordinances and zoning as they exist.

Motion by Belcher, support by to uphold an interpretation that in 1999 there was intent by the applicant to forgo the retail status of the property, converting it to office space. Therefore the allowed use of the property is as office space.

Mr. Pascoe asked for firm direction from the ZBA as to the period of time in which substantial progress towards an active office use must be made. The ZBA replied that if intent had not been expressed and if the ZBA did not agree that this was sufficient, they would deem that the 1999 approval has lapsed. So, there is no time constraint concern. Jocks will prepare a document the applicant can use when marketing the property to demonstrate tonight's decision.

- b) Public Hearing for LochenHeath Land Company, LLC, for a variance of Section 7.4.1(2)c., [Signs in] Residential Districts, limiting residential development identification signs to sixteen square feet.** Belcher read the hearing notice into the record. Ken Ockert from R. Clark Associates and Marc Krakow from LochenHeath were present in support of the request. The township's sign ordinance places a 16 sq. ft. limit on the size of signage for subdivisions or housing developments, as well as limitations on the size and height of the sign mounting and a prohibition against lighting. Mr. Ockert noted that ZBA decision #2005-2Z permitted 4 16 sq. ft. signs instead of 1. They are now asking for a change to 25 sq. ft. signs with lighting. He displayed the portion of the new Open Space Development (OSD) phase of LochenHeath currently in development, which includes a gatehouse, sales office, clubhouse and practice park.

Earlier this year some walls along US 31 North with entrance signs flanking the boulevard entrance set at 45 degree angles were proposed. The new plan eliminates the walls all along US 31 due to location of utilities and concerns with air drainage for Pulcipher Orchards, and proposes a short section of fence 36' from the US 31 north right-of-way and 90' from the road centerline with a curved section where the signage would be angled towards the road. A 25' area in the wall would contain the LochenHeath logo.

Belcher expressed concerns about whether the walls in which the message is set would be set back appropriately from the road. He feels they will seem quite massive. Corpe noted that the sign ordinance requires that signs be set back 10' from the right-of-way; however, Belcher feels that the wall rises above the level of a sign and becomes a structure that should be subject to standard setback requirements. A review of Section 6.11.1 of the ordinance shows that normal setbacks in the agricultural district are 50 in the front from a right-of-way; however, this project is an approved OSD per Section 8.3. Under the OSD ordinance the minimum front yard setback on a lot is 30', and the proposed setback of the walls is 36'.

Dr. Krakow gave an overview of the discussions held between LochenHeath and the signage creators regarding what could be seen well enough to allow traffic traveling at high speed along US 31 to make appropriate maneuvers. He also discussed his relationship with John Pulcipher, which involves weekly or more frequent discussions about all aspects of the development. One item that is key in the discussions is ensuring that land recontouring and improvements remain in keeping with the natural flow of the topography and the air drainage necessary for the health of the Pulcipher Orchards. The wall as originally proposed would have been detrimental to the air drainage, and the new walls will be better. They will be farther back from the right-of-way than originally proposed, so the signs need to be somewhat larger. There are also mature trees on the Music House

property that can hinder wayfinding, and the new wall and signage proposal would assist in this regard as well.

Kuncaitis asked where the entry gate to the development will be; it will be about 350' from the road and west of the gatehouse. LochenHeath is still planned to be a gated community that provides privacy for residents; nonetheless some signage is still required.

Smith asked if the 25' sign size includes just the LochenHeath lettering or also the surround in the wall; Mr. Ockert said it is just the lettering. Smith feels that it is more intuitive that the lettering surround is the sign area.

Kiplely asked if the walls would have been permitted without the signs in them; Corpe expressed confidence that the wall would have been approved with or without the signs. She stated that if the wall were a building, she would interpret the area surrounding the lettering as the sign face. Subdivisions have separate rules, but if the wall were one face of a building, a sign would be allowed to the lesser of 100 sq. ft. or 20% of the wall face.

Krause feels that there is little material difference between a 16 sq. ft. sign and a 25 sq. ft. sign. If the entire area in which the lettering appears is counted as sign area, Mr. Ockert estimated the size to be about 56 sq. ft. The actual sign, on the angle, would be about 60' from the edge of the right-of-way and more from the traveled part of the road. That is a long distance across which to see something. Belcher feels that a 32 sq. ft. sign size would be acceptable, if agreement could be reached as to what the actual area of the "sign" within the wall would be. 32 sq. ft. is the maximum sign size allowed in the township, so he would not be comfortable exceeding this amount. He believes that the sign area should be determined to be the area surrounding the lettering that is visually different from the rest of the wall.

Krause perceives that the key change in the signage is an increase in the size of the lettering, and a more elegant background. A change from 16 to 25 sq. ft. doesn't seem like much. Kiplely is concerned that the change is not an "apples to apples comparison." Smith believes that the golf course itself where visible from US 31 is advertising, and that the newly proposed sign is "overwhelming" and might prove counterproductive. Kuncaitis echoed sentiments from all of the other members, expressing especial concern that the entire area in which the letters are cut will be larger than signage otherwise allowed in the township and will trigger requests for similar treatment from other properties. He suggested one possibility of having larger signs at some points near the entrance but smaller signs at other non-entry points, but Smith still feels the problem with unfair treatment would exist. There was question over why signage is needed for a private, gated community to which the general public is not invited; it was pointed out that the residents will have guests, and tradespeople must find the site to build the homes and other improvements.

Kuncaitis expressed that a 32 sq. ft. maximum size would be consistent with the variance granted to Orchard Shores for reasons of wayfinding safety. Corpe offered the suggestion that if the walls are viewed as structures instead of freestanding sign posts, then it is important to recall that the 32 sq. ft. maximum

applies only to freestanding signs. Wall-mounted signs may be up to the lesser of 100 sq. ft. or 20% of each wall face. Krause, Kipley and Belcher felt they could work with the interpretation that the sign is mounted on the face of a structure, but Kuncaitis felt that the item in question is a freestanding sign on a large pedestal with attached wall features. He fears that by using Corpe's suggestion, any property in the township might erect walls just to have larger signage.

Belcher suggested a continuation to the hearing so that some additional thought could be given to the design to try to reduce the sign area to 32 sq. ft. so that established precedents remain unchanged. Krause felt that the size and scope of the entire project may warrant consideration of commensurate signage, and that if the ZBA forces the blank area around the letters to be squeezed too tight, both readability and aesthetics will be sacrificed.

Motion by Kipley, support by Belcher to approve a variance of the sign ordinance requirements for residential developments to permit 4 signs of up to sign up to 32 sq. ft. in size (letters and contrasting background combined).

Belcher agreed with Krause that the scope of the development does make a difference. Krause added an impression that the distance of the signage from the road and the scope of the entire wall would not make the sign design as requested seem larger than 32 sq. ft. He would hate to compromise the design.

Kuncaitis brought attention to Hull's report, which gives his opinion that the variance should not be granted because neither Basic Condition D nor any special conditions have been met in his opinion. Kuncaitis also agreed that the ZBA should not be in the business of making design decisions. Corpe noted that any motion should include verification that all Basic Conditions and at least one special condition have been met.

Mr. Ockert also noted that the variance request includes a request to upright the sign with low-voltage lighting.

Motion by Kipley, support by Belcher to approve a variance of the sign ordinance requirements for residential developments to permit 4 signs of up to sign up to 32 sq. ft. in size (letters and contrasting background combined), with the final design to be brought back to the ZBA for approval, plus low-voltage uplighting arranged so that no light sources are visible from any angle. All Basic Conditions and Special Condition B have been met based on concerns regarding signage visibility for safe turning movements based on road speed and distance of signage from roadway.

Dr. Krakow asked if the sign could be approved by the Zoning Administrator unless there were some significant concerns, but the ZBA felt strongly that because the development is significant and the variance being granted is such a large stretch from what has been approved before, they need to personally review the final design.

Motion carried by a vote of 4 in favor (Belcher, Kipley, Kuncaitis, Smith) and 1 opposed (Krause).

5. Other Business:

Belcher went to look at LochenHeath and noticed that just north of the Resort Entrance there is what looks like an 8' x 8' billboard. Corpe replied that this is a sign that has been in place for some time and is an approved part of the Resort PUD, and the sign faces have recently been changed.

Belcher also asked about the derelict houses on Five Mile Road. Corpe reported that both are on the same property and the southern house is being renovated and having a second story added. After this is done the northern house should be demolished. Corpe and Plude have made this a condition for a desired land division of the property.

Kuncaitis asked about the status of the Surfside condominium. Corpe reported that Wade-Trim has consented to measure the structure from the original grade for us, and the results should be ready soon. She has received verbal assurances from the property owner that the height of the building will be as approved from original grade, and has Brian Belcher from Metro Fire tracking the status from the fire safety perspective as well.

Bill Kurtz, Township Supervisor, congratulated the ZBA on the combined years of experience they represent. He spoke with Jocks as he exited, and Jocks was highly complimentary as to the level of professionalism he saw. Kurtz mentioned that the Board of Trustees has approved participation in court-sponsored mediation between the township, CCAT, Meijer, Inc. and The Village at Grand Traverse, LLC. Judge Kaufman of Detroit has been chosen to mediate the sessions. Kurtz has committed that action taken by the Board in or resulting from those sessions "will not usurp the authority of the Planning Commission." Care will be taken to provide for the best possible development for the Village and Meijer properties. Kurtz also mentioned that visioning sessions will begin on September 21 towards creation of a future land use map for the master plan, with work expected to be complete in November. He concluded by thanking the ZBA for their support and hard work, and mentioning again that they are well-respected in the community.

6. Approval of minutes from the August 11th, 2005 regular meeting:

Motion by Kipley, support by Smith to approve the minutes of the August 11 meeting. Motion carried unanimously.

Meeting adjourned at 10:19 p.m.