

**ACME TOWNSHIP
Zoning Board of Appeals
September 16, 2004**

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

Meeting called to Order at 7:36 p.m.

Members present: J. Kuncaitis (Chair), L. Belcher, N. Knopf, H. Smith

Members excused: P. Collins

Staff present: J. Hull, Zoning Administrator
S. Corpe, Office & Planning Coordinator/Recording Secretary
J. Christopherson, Township Counsel

1. **Review and approval of the agenda, inquiry as to conflicts of interest:** Approved with no conflicts noted. Smith stated that the proposed first hearing might or might not be lengthy, and asked if the order of the hearings should be switched. Chris Bzdok stated that he plans a brief presentation at about 5 minutes long.
2. **Correspondence:** None
3. **Reports:** None
4. **Hearings:**
 - a) **Public hearing for CCAT c/o Olson, Bzdok, and Howard, P.C., 420 E. Front St., Traverse City, MI 49686, who has requested an interpretation of §8.22.1 Statement of Intent [Mixed Use Planned Development]:** Corpe read the hearing notice into the record. Kuncaitis stated that an additional question to those posed in the filing is whether or not the township Board made an interpretation of Section 8.22.1 at their June meeting.

Question 1: Does the Zoning Board of Appeals have the authority to make an interpretation of

Section 8.22.1 and does CCAT have standing to make a request for interpretation? Kuncaitis stated that there are numerous points within the Zoning Ordinance where it is specifically stated that the ZBA and only the ZBA has the power to interpret the Ordinance. He also believes that any individual, group of individuals or the Board of Trustees or Planning Commission may request such interpretation. Knopf stated a belief that the Board of Trustees had made an interpretation that the Village at Grand Traverse was eligible to apply for MUD under Section 8.22. She also is relying on a Circuit Court statement that an ordinance is illegal if it applies to only one parcel of land within a township. She believes that the Board made an interpretation that the Village was eligible to apply under Section 8.22 and directed the Planning Commission to process the request.

Smith stated that there is the question of whether or not a MUD can take place in only a discreet geographical area. The ordinance also mentions use of the MUD

ordinance in B-3 zoned areas, but no portion of the referenced area holds this zoning designation.

Belcher recalls that at the time the ordinance was adopted there was discussion about its potential use along the M-72 corridor. He also took a 'high-school English' approach to the use of an "and" in Section 8.22.1 to support his understanding that the MUD ordinance may be used in any area where zoning designation permits.

Smith asked Christopherson for his understanding of whether or not the ZBA is empowered to rule on the interpretation of the Ordinance. Christopherson stated that he does believe that the ZBA has this power. Knopf asked if the ZBA can overturn a decision made by the Board. Christopherson stated that there are times when one municipality's Board has sued their ZBA. He read the minutes of the June Board meeting, page 4. The motion states that the application was referred back to the Planning Commission to be processed pursuant to Section 8.22. Knopf finds this to be evidence that a ruling on the matter of an interpretation of the ordinance has been given and asked why the proceeding is carrying forward this evening. Christopherson stated that CCAT has applied for hearing and he believes the application for interpretation is appropriate. CCAT also has procedural questions, and both CCAT and representatives of the Village are prepared to make presentations this evening.

Knopf stated that she is used to situations where individual property owners are seeking specific interpretations and variances, but she is not used to someone who may not own property asking for an interpretation. Kuncaitis stated that it has happened many times in the past. His chief concern is that if the Board has already made a decision, their decision customarily stands. What happens when an interpretation is subsequently requested? Christopherson does not believe an interpretation was made. The motion only says that they directed the Planning Commission to take a specific action. Smith stated that the Planning Commission asked the Board to make a determination as to whether it should proceed to process the application, and that the Board was permitted to either make this interpretation or ask the ZBA to further interpret the ordinance. He feels that question #2 raised by CCAT in their filing has been addressed, and that use of the MUD ordinance is not restricted to a specific geographic area. Therefore he finds the rest of the proceeding moot.

Kuncaitis states that the ZBA appears to be generally in accord with the concept that CCAT does have standing to request the interpretation. He opened the floor to discussion of the first question in the filing (authority for interpretation and standing to request the interpretation.)

Tom Schultz and Ken Petterson, attorneys for The Village at Grand Traverse would like to address the ZBA and asked if they will be invited to speak before or after Mr. Bzdok speaks. Mr. Bzdok stated he would be glad to speak to the first question and hear rebuttal from one of the opposing attorneys.

Mr. Bzdok, attorney for CCAT stated that he is uncertain as to the current approval status for the Village at this time. He attended the Board meeting on this subject earlier this evening and earlier this week. CCAT maintains that the ZBA

can and should make a ruling prior to any final Board action on the request. The maintains that the ZBA is the only body having the right to make the requested based on law cited in documents filed with the request and on the township Zoning Ordinance. It is their position that by sending the matter back to the Planning Commission for processing the Board made an interpretation. He cited e-mail correspondence between Corpe and Gerry Harsh, former township planner as part of his case.

Mr. Schultz, speaking to the question of the ZBA's authority, feels this is more of a legal question rather than an ordinance interpretation question which is more familiar territory for this body. It makes sense for the ZBA to be the interpreting body on certain questions such as how wall height is measured or other things that, when a person of other body makes a decision, if that decision is contested, this is the place. Mr. Schultz referenced his submission stating that the ZBA does not have any specific power granted by the township ordinance to make a decision regarding an SUP granted by the Board of Trustees. The law says that such Board action should be appealed to Circuit Court. Further, language in the ordinance talks about interpretations but the ordinance to be interpreted is not one that the ZBA will have a chance to review. Several determinations have already been made that the ordinance applies to the Village parcels: placement of the application on a Planning Commission agenda and direction from the Board that the Commission process the application as submitted. The Village's concept plan is based on the tenets of Section 8.22. Tonight the Board made a decision regarding approval of the requested permit. Now the situation appears to be a review of a Board decision which he has said he did not find to be an authority conferred on the ZBA by the township zoning ordinance.

Kuncaitis asked about how this matter might reach the Circuit Court. Mr. Schultz stated that if the SUP permit is approved, he believes that anyone who challenges that approval should take it to the Circuit Court, not to the ZBA. Kuncaitis noted that the ZBA is not here to rule on whether or not the approval should be granted. Mr. Schultz stated that one key point is whether or not the application is legal, and that he believes the Board has made that decision both previously and through a resolution this evening that it is legally permissible for Section 8.22 to be applied to the Village application.

Kuncaitis asked why Mr. Schultz has appeared if he feels the CCAT application and the ZBA have no standing. Mr. Schultz stated that he is here to raise the objection to the fact that the CCAT request for interpretation is being heard. Mr. Bzdok stated that a threat of automatic litigation against the township was made by the Village as shown in his Exhibit B to his filing. This exhibit contains a letter from Tom Schultz to Jim Christopherson. Mr. Schultz stated his understanding that the question is whether Board approval is automatically reviewed by the Circuit Court and his response is that someone would have to file suit to cause this to occur.

Knopf believes that CCAT is asking a "trick question" to try to have the ZBA overturn a Board decision based on a technicality. She believes that one goal is to try to stall the proposed development when the matter has really been resolved. She does not believe it is appropriate for the ZBA to determine whether

or not the Board took an action which was legal. Smith feels that question one has been fully addressed through discussion to this point.

Mr. Schultz asked if the portion of question 1 dealing with CCAT's standing has been addressed. Kuncaitis felt this question had been addressed by the Circuit Court when CCAT sued the township; Mr. Schultz stated that the court has not addressed this question. He also asserted that standing is relative to a situation. CCAT may have had standing to sue over a decision which has been made, but do they have standing to sue over a decision that has yet to be made? Who has the right to ask to be heard by the ZBA – at what level is your interest in something happening on someone else's property sufficient? Mr. Schultz believes that the Village development is in process. Their application fee has been taken and they have been on agendas. CCAT is trying to say that they are an "aggrieved party" and that the Village shouldn't be heard. He doesn't think that CCAT can ask to stop the process, although they might choose to try to appeal the decision once it is made.

Mr. Bzdok stated that his reasons why CCAT has standing as an organization were included in his filing.

Dan Hanna, Lautner Road, stated that CCAT has had no integrity in their dealings involving him. In a courtroom, he'd throw out their claims for this reason.

Public Hearing closed at 8:15 p.m.

Smith asked Hull what criteria he uses for bringing something to the ZBA. Hull replied that generally an individual has wanted to pursue an action or have an issue enforced, and he asks for direction when he is uncertain what the Ordinance directs him to do.

Belcher asked Christopherson if it is ever possible for the Board to proceed without the ZBA making an interpretation. Christopherson stated to the Board in June that it had two options: to refer the interpretation to the ZBA or to refer the matter back to the Planning Commission to proceed with the application. He stated that Section 5.2.2 of the ordinance and the Township Rural Zoning Act state that interpretations are made by the ZBA. Belcher asked what happens to the Board proceeding if the ZBA decides it has standing to make an interpretation and if it decides in opposition to the Board? Christopherson stated that on occasion a Board has sued its ZBA. Belcher is not happy that the ZBA is being asked for an interpretation after the fact.

Knopf asked Kuncaitis to clarify his directions. Kuncaitis is breaking question 1 into two questions for separate vote. The first question is whether the ZBA has the right in any situation to make an interpretation of the ordinance language. This question is broader than the issues between CCAT and the Village. Either the ZBA does or does not have a right to interpret ordinances now and in the future. The second question is whether CCAT has standing in this particular situation to request an interpretation.

Does the ZBA have the authority to interpret Section 8.22.1? Knopf: Yes, Smith: Yes, Belcher: Yes, Kuncaitis: Yes).

Does CCAT have standing to request such interpretation? (Smith: Yes, Belcher: Yes, Kuncaitis: Yes, Knopf: Yes).

Question 2: Does the language in Section 8.22.1 restrict MUDs to a specific geographic area of the township? Kuncaitis noted that the geographic area is not limited to Johnson's Acme Village development, although the ordinance may have been originally created with him in mind. Is MUD development pursuant to Section 8.22 limited to the area, or is it just a concern that wherever a MUD is created it not have a negative impact on the defined geographic area. Smith stated that a no vote will mean that a MUD can be anywhere within the township where it is permitted by zoning.

Public hearing opened at 8:25 p.m.

Mr. Schultz stated the applicant's position that the ordinance does not limit use of Section 8.22 to the defined geographic area. He also does not believe that the ZBA must or should answer the question because at a Board meeting earlier this evening the Board confirmed its September 7 decision that the Village application merits approval. Reviewing this issue may be tantamount to an illegal review by the ZBA of a Board action.

Mr. Bzdok stated that CCATs request was made on August 17. At that time, this application was due to be heard on September 9. The meeting was rescheduled to this evening to accommodate a special Board meeting regarding a proposed DDA. The application was made before either Board decision regarding approval of the Village application. The timing that has occurred was not set up by CCAT; they did not ask for review of a Board approval because at the time they asked no Board approval existed. He believes the Board has erred in proceeding prior to ZBA consideration.

Today by e-mail he received a staff report that he feels make good points on both sides of the issue. Hull's staff report took issue with Mr. Bzdok's submissions on page 4 as not speaking to the issue. Mr. Bzdok took exception to the document produced by the Village from an English professor because that professor's name and credentials are never given, making the document's importance questionable. That document says that a MUD may be created on any parcel when no harm will accrue to the land in the defined area. He has a problem with this type of a tenet in an ordinance. Further, the document acknowledges the poor and confusing grammatical construction. He understood Mr. Harsch's e-mail to say that the ordinance was created for Lanny Johnson, which he views important in coming to a final interpretation. He rejects the Village's assertion that Mr. Harsch's statement should be discounted because he is currently the Planner for Garfield Township, a competitor for business uses. Mr. Bzdok spoke to the court case over the previous approval process, and that during that proceeding he feels that the Village actually agreed with the position he is taking now.

Mr. Schultz stated that Judge Power did not adopt CCAT's arguments when he made his ruling in the court case. The ability to use Section 8.22 is specifically referenced in a variety of zoning districts, some of which do not exist within the define geographical area. As to timing of the various proceedings, he still

maintains that the question of how to interpret Section 8.22 was actually settled in June by the Planning Commission and Board, well before CCAT filed for this hearing in August. He feels it is CCAT that is “jockeying” for meeting dates, not the township or applicant, and that the real legal question should be fairly easy to decide.

Steve Hayward, planner for The Village at Grand Traverse, provided the grammar opinion that has been referenced. He received it from a friend as a favor, never expecting things would rise to the level of needing her name or credentials. He feels the professor’s work was careful and logical. Mr. Harsch’s recollection in 2004 was that the MUD ordinance was created for Lanny Johnson, but he didn’t say it was done *exclusively* for one parcel. It is common for ordinances to be adopted because one landowner has a need, but the ordinance is never limited to that landowner only. He also believes, as a planner, that if the geographic location was necessary it would be listed as a specific condition of application approval and not just in a general statement of intent. At close to the same time that the township adopted Section 8.22, Mr. Hayward asserts that there were some significant changes to the zoning designations in various areas of the township. He believes that MUDs being specifically allowed in B-3 districts and no B-3 zoning existing in the geographic area is one measure of proof that the MUD ordinance should not be limited to that area. He believes that obtaining a legal opinion as to whether or not the ZBA has standing to make a ruling would be prudent before making any decision.

Kuncaitis asked Christopherson for his opinion as to whether a Board approval of a PUD/SUP can be appealed to the ZBA, and he doesn’t believe that this is the question at hand. Kuncaitis agreed that the ruling requested is whether or not MUDs are limited to one specific geographic area. That ruling could have been requested and ruled on at any time, absent the Village’s request. Mr. Schultz says that the Board has already ruled on this point and permitted the Planning Commission to process the application. The question for him is: can the proposed development be on a certain piece of property.

Public Hearing closed at 8:48 p.m.

Smith believes the question is simple: does the language in Section 8.22.1 restrict the area in which an MUD can be created? Based on Section 6.8, which permits MUDs, that they can be in any properly zoned geographical area of the township. Belcher believes that the area described was the traditional core area of “downtown” Acme, and that it isn’t unreasonable to think that when the ordinance was adopted it was intended to say that whatever happened next should not have a negative impact on this area.

Kuncaitis called question 2: Does the language of Does the language in Section 8.22.1 restrict MUDs to a specific geographic area of the township? Smith: No, Belcher: No, Kuncaitis: No, Knopf: No.

A five minute recess was declared.

- b) Public hearing for Danny M. Hanna, 7239 N. Lautner Rd., Williamsburg, MI 49690, for a non-use variance of §6.11.1, Schedule of Regulations, which**

requires a minimum width of 330 feet for a front yard in A-1 Agricultural zoning districts: Corpe read the public hearing notice into the record. Mr. Hanna was present to support his application, and has provided a partial drawing of his property and how he proposes to divide it. Kuncaitis asked a question about a line on the drawing that appeared to be a small easement; Mr. Hanna stated that this an area of land that would actually be added to an existing small parcel of land through a lot line adjustment to straighten out a lot line that currently has a jog in it. Kuncaitis noted that variances similar to the one requested have been granted in the past where proposed lot width to depth ratios are maintained and it would be needlessly onerous for the applicant to extend a road easement for no reason other than for a lot to have frontage on it. An ample cul-de-sac is proposed. Mr. Hanna stated that he would decrease the size of the cul-de-sac if permitted.

Belcher agreed that the point of the road frontage requirements for parcels is to maintain width to depth ratios and not for the sake of the frontage itself. He would not be averse to a reconfiguration of the cul-de-sac.

Public Hearing opened 9:04 p.m.

Chuck Walter hopes the application will be approved and likes the idea of being flexible regarding the cul-de-sac

Nels Veliquette feels that due to the location of the parcel of land, he feels that the parcel should be rezoned for commercial use. He recently sat through a public meeting where representatives from American Farmland Trust where the current 5-acre minimum lot size for agriculturally zoned parcels was decied. He believes the practice leads to sprawl and the destruction of farmland at rapid rates for few residents, and hopes the township will address the zoning regulations.

Public Hearing closed at 9:06 p.m.

Smith observed that Mr. Hanna did seek rezoning for his parcel and was approved by the township but defeated by referendum. He also believes that the five-acre minimum requirement constitutes undesirable sprawl. Kuncaitis noted that the only reason Mr. Hanna is here is because he doesn't want to needlessly expand a cul-de-sac. Mr. Veliquette stated that if the zoning lot minimums for agricultural land aren't changed, this type of sprawling land division development which seems contrary to the public's desires as expressed through visioning sessions and the Master Plan, will continue and accelerate. Soon someone will ask to break up a 200-acre parcel in 80 5-acre parcels and people will truly understand the danger. Belcher noted that the ZBA does not have the ability to address this question. Smith stated that there has been discussion of eliminating 5-acre lot minimums and encouraging clustering of homes. Corpe stated that the township does have an ordinance that permits clustering of homes on smaller portions of land to leave more open, but people aren't using it because they experience too much grief at the hands of the public.

Motion by Belcher, support by Smith to waive the 330' frontage requirements and that the boundaries between lots B & C and lots B & E

shall intersect the widest part of the cul-de-sac all Basic Conditions and Special Conditions A & B having been met. Motion carried unanimously

- c) **Public Hearing for East Bay Medical Properties, LLC, 3229 Scenic Hills, Williamsburg, MI 49690 for an extension of a nonconforming use under §9.5 Extension of Nonconforming Use of Structure:** Corpe read the public hearing notice into the record. Kuncaitis stated his understanding that the existing structure violates front yard setback requirements. John Kerridge, architect for the applicant, was present to support the application. He stated that the main footprint of the structure would remain relatively unchanged, but access to the property is being moved from US 31 to Shore Road. As such the definition of the lot's front yard will change from US 31 to Shore Road

Public Hearing opened and closed at 9:18, there being no public comment.

Kuncaitis feels that the reduction in non-conformance and the proposed other improvements are a public benefit.

Motion by Belcher, support by Smith, to approve the application extending non-conforming use pursuant to the site plan as presented, having found that the proposed improvements will enhance public health, safety and welfare.

5. **Other Business:** None.

6. **Approval of minutes from the June 10, 2004 regular meeting:**

Motion by Knopf, support by Belcher to approve the minutes of the June 10, 2004 regular meeting as presented. Motion carried unanimously.

Meeting adjourned at 9:21 p.m.