

PENINSULA TOWNSHIP
2nd Regular Township Board Meeting
August 23, 2016

Meeting called to order at 7:00 p.m.

Roll Call

Present: Rosi, Avery, Weatherholt, Hoffman, Witkop, and Byron

Absent: Correia (excused)

Also Present: **Jim Young**, Township Attorney; **Michelle Reardon**, Director of Planning and Zoning, and **Deb Hamilton**, Recording Secretary

MOTION: Witkop/Byron to appoint Hoffman as chair. **MOTION PASSED**

Approve Agenda

MOTION: Weatherholt/Byron to approve the agenda as presented. **MOTION PASSED**

Brief Citizen Comments – for items not on the Agenda

Marilyn Elliot, 18811 Whispering Trail, said my trust in the integrity of Byron and Rosi is absolute. My expectation is that all Township Board members resolve any and all, real or perceived conflicts of interest that they have apprised themselves of any and all alternative, defensible findings of fact and they will present these findings to the public. My hope and firm belief is that all Board members will conduct the Township's business in a manner that will not bring their integrity into question.

Conflict of Interest

Hoffman said she will not be voting on the first item. **Byron** asked Young if she can participate since Business Item 2 has already been approved. **Young** said this is legally a continuation so to speak of the first public hearing. If Byron was disqualified as the Judge ruled from participating from that first public hearing. Byron is equally disqualified to participate. **Byron** asked if she can speak as a citizen. **Young** said absolutely. **Rosi** said she wrote letter to the Record Eagle and Mr. Settles questioned whether or not she could separate herself from her vote that occurred a year ago. She thinks we are moving on and feels strongly she can look at the issues in terms of the final resolution on how to make this project work. She would like to not recuse herself. **Young** said after checking on some background facts that letter is consistent on how Rosi voted at a prior hearing. As long as today Rosi is able to vote the issues the Judge has remanded to us based upon the facts as presented at this hearing and not based upon any prior beliefs Rosi may have had, he is confident Rosi does not have a conflict. On the other hand, if Rosi believes so strongly that this project does not comply with the Master Plan that Rosi would vote not compliant with any standards regardless of the facts then due process requires a fair hearing in front of an impartial body. If someone is bias because of a prior decision and could not hear things fairly they would have to recuse themselves. **Rosi** said the issues being talked about tonight are not about the larger issues she was concerned about. **Young** said exactly, however if a person however said I still believe it and will always vote negatively no matter the evidence that is a problem. Rosi indicated earlier that she was prepared to make a decision based upon the facts presented today regardless of any prior votes at prior hearings as long as that is the case and Rosi votes upon what she believes the evidence shows tonight there is not a conflict. Rosi simply needs to make that commitment on the record. **Rosi** said there seems to be a fine line in terms of sincerity. In Byron's case she has to recuse herself because she did originally at the beginning. In my case I could recuse myself because I have a bias that pervades my decision. **Young** said if Rosi is indicating that she has a bias that pervades her decision making. Image a judge making a decision that way in a courtroom. **Rosi** said her bias is not really a bias it is an opinion regarding on how best to deal with the two issues we are dealing with now. **Young** said the two issues are the two issues remanded by the court. If Rosi's prior belief

that this project was not consistent with the Master Plan is going to influence Rosi's ability to objectively evaluate the information presented tonight Rosi has a conflict and he recommends Rosi recuse herself otherwise it is not fair to anyone no matter how the hearing comes out. On the other hand if regardless of Rosi's prior decision she is objectively able to evaluate the facts and apply them to the standards then a fair hearing would result. **Rosi** asked if she chooses to participate and she errs then what happens. **Young** said if a judge determines there was a conflict of interest and Rosi voted and Rosi's vote was decisive then Rosi's voted would not be counted or the judge may remand. He has seen both happen. At an Ethics meeting with the Board it was explained that due process requires a fair hearing in front of an impartial body. An impartial body means no preconceived strong bias that would adversely impact the ability to evaluate the facts. **Rosi** said she chooses to recuse herself because tonight we are talking about two things - the Fire Department and access and the standards for soil erosion, grading and storm water. I do not believe they have been met. Those issues of storm water and drainage are related directly to the movement of land and she is very concerned about that and the reduction of trees. They tie together don't they? There were remarks from the audience. **Weatherholt** said this is Rosi's decision to make. **Rosi** said I will not recuse myself and I will vote my conscience as I see it in terms of this development. **Young** said understand it is not a question about voting your conscience. It is a question about deciding which facts are the most creditable or the strongest and applying those facts to the standards in the ordinance. That is what a judge has to do in a court case. **Rosi** asked does the judge also consider the Master Plan. **Young** said the Zoning Ordinance is supposed to reflect the Master Plan. None of the standards that have been remanded indirectly relate to the Master plan. None of the standards specifically require a finding of compliance with the Master Plan. The standards specifically say to find a certain aspect of the project complies or does not comply with the Master Plan. What you apply are the standards. The standards are the key. If you do not think the standards in the ordinance accurately reflect the Master Plan you do not change them after the fact. Look at amending the ordinance and make sure they properly reflect the Master Plan. That is the proper way to do it. **Rosi** said she chooses not to recuse herself.

Business

1. Appoint Clerk to Fill Vacancy

Hoffman recused herself for this item.

MOTION: Byron/Witkop to appoint Weatherholt to act as chair. **MOTION PASSED**

Weatherholt said Hoffman has chosen to leave her appointment on September 8, 2016. Weatherholt spoke with Joanne Westphal and she has offered to start on September 9, 2016.

MOTION: Byron/Witkop to appoint Joanne Westphal as Clerk. Appointment will start on September 9, 2016.
MOTION PASSED

MOTION: Byron/Witkop to bring Hoffman back as chair. **MOTION PASSED**

2. The 81 on East Bay – Public Hearing

Young said zoning, by law in Michigan, is not a popularity contest. It is a decision based upon the facts of the proposed development and all the relevant factors as applied to standards in the Zoning Ordinance. There are specific standards that are applicable tonight. The judge has remanded the case. **Reardon** read from the judge's decision to understand what the Board has to decide tonight. "The Board implemented the flowing conditions on August 11, 2015: (1) The Development shall meet adequate safety standards for fire protection subject to the Peninsula Township Fire Department review and approval including the provision of an additional egress for emergency purposes at either Trevor Rd or with The 81 proper. If provided within the 81 proper staff shall be allowed to permit a reduction in lot size as warranted and based on the mathematical calculation for open space under the ordinance. The second egress should it be provided with [sic] The 81

proper shall be gravel or paved per review of Peninsula Township Fire Chief. (6) Detailed grading plans shall be supplied to the Township Engineer for the Township engineer's review and approval prior to SUP issuance." **Young** said those were the conditions set forth by a majority vote at a prior hearing. **Reardon** read the judge's final statement from the decision. "The issues delegated to the Peninsula Township Fire Department and the Township Engineer for review and approval, including the location and functionality of the emergency access road, and whether the standards for soil erosion, grading and storm water have been met, are remanded to the Board for further proceedings consistent with this decision and order." **Young** said by order of the court these are the only issues that the Township Board can lawfully consider. Any other issues or standards that the court did not specifically remand have been decided. **Rosi** asked does that mean the Board should be looking at grading and erosion and whether or not the proposal is satisfactory or appropriate for this location. **Young** said yes.

Philip Settles, 5168 US 31 North, said he is the lawyer for the applicant. He did not plan on doing the presentation tonight. Mansfield's planner was going to do the presentation but something came up a couple hours ago relating to the road on east 81 not the fire access road. Apparently it just came up that the road east 81 is 20 feet wide. Section D 107 of the fire code states that road would be described as a dead-end fire apparatus road. If you look at Chief Rittenhouse's 2nd letter to the Board on page 3 it shows the width of a fire apparatus road should be 26 feet. The applicant thought that had been approved by Chief Ronk however we do not have that modification in writing or the reasons for that modification. The Board cannot make decisions based on a flat recommendation from the Fire Chief. The Chief has to provide the Board with reasons for a variance from the 26 feet. We do not have that today. The road we are talking about is the road that goes down to the beach. That road shows 20 feet. According to our fire expert (Taylor) there are exceptions to that when you do not have fire hydrants and when you do not have three story buildings alongside the road. However, Taylor does not have the research with him today to give the Board evidence of those exceptions to give the Board the basis to form a decision. The Board cannot just take his word for it. It would not be good findings. Therefore Mr. Settles asks the Board to adjourn this again so the applicant can either widen the road and make the lots smaller and provide that for open space calculation or provide the Board with the exceptions to the code that would be appropriate for rural type fire lanes like this.

Young said they are asking for an adjournment of the hearing. For the record the last paragraph of the judge's order says "issues delegated to the Peninsula Township Fire Department and the Township Engineer for review and approval, including the location and functionality of the emergency access road." It does not say limited to but including. Mr. Settles is correct. The applicant submitted an independent fire report. If any fire expert is going to approve less than 26 feet under the fire code, it is like a variance or like an exception. The section in the International Fire Code that allows making that variance needs to be cited and explain if the variance is going to be granted and why a variance is justified under the fire code. **Young** is glad the applicant did not ask for a variance and make this a condition, assuming all the standards have been met, because would have the same problem that we had after the first hearing. The Board cannot delegate to a Fire Chief or anyone else decision making the Board has to make. The request to adjourn the hearing is a wise one. As a matter of law he does not see how the Board could complete the hearing. It is not fair to do 90% and then adjourn one issue. **Hoffman** asked if the Board adjourns the hearing would the Board then recommend this go back to the Planning Commission. **Reardon** said her suggestion would be to wait and see what the solution is before recommending sending it back to the Planning Commission. **Hoffman** asked should it be adjourned to the next meeting or until the applicant brings back a solution. **Young** said it is his recommendation to adjourn the hearing until the applicant brings back modified plans.

MOTION: Avery/Witkop to adjourn to until the applicant brings a plan to the Planning Department and will be put on a future agenda.

Witkop asked about the Planning Commissions involvement at this point. **Young** said we are not providing a decision on that right now because research needs to be done to see what plan is submitted. **Witkop** asked it

may end up in front on the Planning Commission before it comes back to the Township Board. **Young** said it might. The Judge's order is these issues are remanded to the Township Board not the Planning Commission however the Planner and Young will decide once the plans are submitted.

MOTION PASSED

Byron returns to Board.

Citizen Comments

Christopher Grobbel, Grobbel Environmental and Planning Associate, said in addition to being a professional planner and working for a number of townships, he is a professor for MSU Citizen Planner Program. he recommended the Board tighten up conflict of interest issues. If there is a conflict, it needs to be clearly stated. If it is financial, it is conflict. If it is about belief, it is not. If have a conflict, remove yourself from table during the discussion of that matter. There are a whole host of issues that relate to soil erosion, storm water and grading that the Board is going to put off now for another 2-3 months because the Board is not listening to the public tonight. That is not good community/public process. It is easy to continue a public hearing. An entire meeting does not have to be adjourned because one road needs three more feet of width requirement on each side. That is a mistake and not community process. Mr. Young believes all the information needs to be in front of the public before the Board makes a decision but a six foot extension on an access road is a minor revision. It is not something that goes back to the Planning Commission or adjourn a meeting for. Mr. Grobbel would like to work with the Board on this matter and he would like to be heard. There are a whole host of issues in the letter he submitted yesterday/today and last July that need to address in terms of grading, storm water and soil erosion. He was the Planner for Acme Township during fiasco and one of the reviewers of the Moorings. The Board should allow the public to speak toward these issues.

David Taft, 952 Neah Ta Wanta Rd., said he wants to address each of the constituents tonight of The 81 project. Mansfield Consultants – learn from the 35 units at Bowers Harbor, the 40 unit The Orchards project and the Old Moorings that all failed. No one wants to live in a dense subdivision 10-15 miles from Traverse City. Respect our Master Plan. Township Board – the Township's disavow of financial responsible for the planned community septic is a hollow agreement. If the development or septic fails; the Township, to meet its responsibility to protect the health and safety of the residents, will be forced to take over operations of this community septic. The recent election removes four Board members from township positions in late November partly because they failed to listen carefully to the residents' concerns about this project last year. Taft asked the Board to weigh carefully when listening to the residents and the remanded issues. Listen carefully to the legal staff proposals and carefully deliberate in your minds whether or not the massive contouring of this proposal meets the spirit of the Master Plan and our Zoning Ordinance. Land Developer –If the developer suspects a property is contaminated willing assess and conduct an independent environmental analysis before working on the property. If the developer does not, they will be in legal trouble. Since the 2015 Board approval it has been learned that The 81 property routinely used arsenic, lead and other toxic pesticides. With this knowledge the developer has the due care responsibility and due care obligation according to the Michigan DEQ guidelines to undertake an independent soil analysis of the property to determine if there is contamination. With the plan and massive grading if residents, neighbors or workers are exposed to contamination in dust or run off , the developer will have significant legal consequences if they knowingly proceed to develop this property without a environmental analysis.

Pat Trnka, 17068 Peninsula Dr., said she would like to address concerns about contamination of land in Peninsula Township. In 2009, with public support, the township acquired Pelizarri Park, in 2013 The Old Mooring Place and recently land for the expansion of Bowers Harbor Park. These are parcels that are knowingly contaminated. We are willing to expose and actually encourage the public to use this property but when a potential private development is found to have elevated levels of farming residue some residents oppose the use of this land. Why the double standard? Trnka would also like to thank those board members who were

not re-elected to office as well as Mark and Mary Avery, Sally Akerley and Michelle Reardon for their dedicated service to the township. They have been/are committed public servants and even in the face of false accusations published in pre-election flyers and incessant verbal attacks at board meetings, they have maintained their dignity and continued to perform with the integrity required of their positions. She hopes the public appreciates the long hours and devotion they have given to this township.

Nancy Davy, 14713 Shipman Rd., said some years ago driving down Center Road, she passed a cherry orchard where the owner was spraying his cherry trees. A wind was blowing in just the right direction and with just enough strength that she was forced to turn on her windshield wipers in order to see the road as the spray drifted onto her car. It was at that moment that she was jolted into awareness of the serpent in the garden. In this case the chemicals that are generously applied to fruit trees. Dr. Komendera has on several occasions supplied information to Board members as to the types, levels and concentrations of carcinogenic substances that are detected in soil previously used by cherry farmers. Dr. Komendera and other community members have recommended that guidelines be enacted by Peninsula Township requiring developers to have soil analyzed. She has often heard that cancer rates are very high for Leelanau County because of heavy agricultural use. After hearing Dr. Komendera's suggestions, she did a bit of research on her own. She searched on the internet to see where Grand Traverse County ranks for diagnosed cancers within the State of Michigan. According to the website for the Michigan Cancer Surveillance program, of the 83 counties in the State of Michigan, Grand Traverse County ranks 16th or in the top 5th when looking at raw data but when adjusted for age, it is 4th in the State ahead of Midland, Wayne, Genesee or Saginaw Counties. At the recent meeting of the Park Committee studying ideas for a plan for the extension of Bower's Harbor Park, the representative from Beckett and Raeder, the consulting firm assisting in the development of a plan, cited the soil tests for that location as having elevated levels of lead and arsenic and discussed the impact of the presence of toxic chemicals. She frequently used the terms "removal" and "encapsulation" as necessary ways of handling the soil for different activities. She also pointed out that the dangers are considerably less in an area such as the park than it would be for the residential use of an abandoned cherry orchard as it is more likely that residents in a home would be exposed on a daily basis to these chemicals. Davy has been told that responsible developers take the extra precautions of having soil tests done on areas that might have potential carcinogenic substances because of previous uses. She also understands that soil testing can be quite expensive as there is a disincentive for developers to do so. Current residents of this area, have a responsibility to enact procedures whereby developers are required to review previous uses of land and when advisable to do soil testing and further to take appropriate actions when advisable to insure the safety and health of our future residents.

Anne Griffiths, 14548 Buff Rd., said just a couple procedural notes –She has been trying to follow the meetings by following the minutes. She would like to suggest more detail in the reports of public comment. She encourages the Board to make the minutes more informative. She does not want to be argumentative or unkind but she understands that Hoffman submitted letter of resignation. Was that to the Board or the Township and its constituents? Griffiths thinks the Township and the constituents deserve that information as well as the Board. The constituents are the ones that received her excellent services. There needs to be more information on the website. We have been well aware of the arsenic and other farm residue contamination at Bowers Harbor. That is why it was not developed. All the park considerations have no digging or exposing of that land. It has not been ignored. Thank you all sincerely.

Mark Nadolski, 10 McKinley Rd., President of Protect the Peninsula, said he wholeheartedly concurs with David Taft's and Grobbel's comments. The Boards tend to get too fine tuned as to what they are looking at instead of looking at the broader picture. In my mind the broader picture is the Master Plan and from that comes the ordinance not the other way around. The Master Plan is what the people want their community to be and you create ordinances to reflect that. As far as the soils, as a realtor he was involved the project on Bluff Road. BEAs were required on that property. The property had to be sold as an agricultural use. The DEQ required a baseline environmental audit done on each lot. There are documents that need to be passed on and put into the

deeds of each of those parcels. There should be soil erosion tests, chemical tests and everything else before people and families are allowed to live on The 81 parcels.

Brit Eaton, 1465 Neah Ta Wanta Rd., said we see an overhead of The 81 site. What we do not see is the water view looking back at the property. In the Master Plan it says clearly that the vision of Peninsula Township is to preserve and protect the unique and scenic nature of Old Mission is critical to the Master Plan. There was a survey of the public. 92.9 % supported maintaining the scenic view of the Bays. 81% supported preservation of the natural shoreline. The 81 will have a huge dock with many boat slips and lights which is not preserving the natural shoreline. 74.5% supported the preservation of views from the water surrounding the peninsula. This project does not fulfill any one of those.

Ann Rogers, 1236 Peninsula Dr., Northern Michigan Environmental Action Committee Co-Chair, said the Northern Michigan Environmental Action Council (NMEAC) is opposed to the ill-conceived 81 on East Bay development and believes a complete environmental assessment and impact statement are needed before any approvals by Peninsula Township. This is a very unique property which included steep, forested ridge lines running along the shore of Grand Traverse Bay. The proposed development calls for removing the ridge lines and cutting all of the trees which has the potential to send large amounts of sediment into the Bay. In addition, the property is a former cherry/fruit orchard operation and the soils are likely contaminated. NMEAC suggests this issue be tabled until the new Township Board is seated in November. There are too many questions that still need to be answered about this development and the additional time could be used for an environmental assessment and impact statement.

Gordon Hayward, 17777 Shii Take Trail, said he raised the issue at the last Township Board meeting regarding the condominium subdivision section of the ordinance Section 6.9. He believes it does apply in this case. When it is sent back to the Planning Commission they should address all the issues related to Section 6.9. He has discussed this with staff various times. It seems the Township Attorney has advised the Township to ignore Section 6.9. All the issues being raised here about the environment would be addressed if the condominium subdivision section of the ordinance was used. Hayward said he has not received a response from the Township as to how and why that happened but it sounds like the attorney has amended the zoning ordinance. If condominium subdivision section is not legal as it currently stands, what is necessary to make it legal? If sending this back to the Planning Commission that should be addressed. The Township Attorney should write an opinion as to why Section 6.9 is not used. The zoning ordinance cannot just be ignored. The Township Attorney is not the Township Board. The Zoning Enabling Act gives that right to the Township and the public. The Condominium Act was amended to assure no discrimination against condominiums. The current ordinance does not discriminate against condominiums. The definition of a condominium project in the State law and in the Condominium Subdivision Act is exactly the same -any two lots that apply for condominium applies to state law and the township ordinance. Hayward would like a response. He has not requested a FIOA yet. He will wait to see if he get a response otherwise a FIOA is appropriate to find out what happened. Who decided that section of the ordinance not be used?

Jeffrey Goodman, 16254 Smokey Hollow Rd., said we share 500-700 feet with the easement on Trevor Road. He and his wife are concerned about many things about this development. If Trevor Road ends up being used as a fire service road, they are concerned about the amount of traffic, noise and runoff and watershed if Trevor Road is paved. He is also concerned about Trevor Road being used for construction trucks, the environmental repercussions from turning up the soil, the quality of water (wells) and aesthetic change in the area.

Jim Komendera 4168 Rocky Shore Trail, President of Preserve Old Mission, said he will not go into the soil contamination. It has been done many times. He wanted to mention a previous comment about Pelizzari park and the fact it was contaminated. There was some remedial work done before that park was opened. The other point is they did not dig into Pelizzari Park 20 feet like the developer is going to dig into these slopes and they

did not take down 50% of the trees like the developer is going to do on this property. There is a difference with the abrupt change of the soil in this land and how it may affect the Bay and the neighbors down the slope. The contamination is accentuated with the amount of grading of the landscape of The 81.

Board Comments

None

Adjournment

MOTION: Byron/Weatherholt to adjourn at 7:56 pm **MOTION PASSED**

Respectfully submitted by Deb Hamilton, Recording Secretary

These minutes stand to be approved at the next meeting scheduled for September 13, 2016