

## Michelle Reardon

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**From:** Karla Gerds <karla@envlaw.com>  
**Sent:** Tuesday, August 23, 2016 11:23 AM  
**To:** Michelle Reardon (planner@peninsulatownship.com); David Weatherholt, Treasurer; Jill Byron, Trustee; Mark Avery, Trustee; Monica Hoffman, Clerk; Penny Rosi, Trustee; Pete Correia, Supervisor; Wendy Witkop, Trustee  
**Cc:** Scott Howard  
**Subject:** Proposed Condominium Subdivision for The 81 on East Bay  
**Attachments:** 2016-08-23 Letter to Peninsula Twp Board.pdf; The 81 Supplemental Planner's Report - Grobbel 8\_22\_16.pdf

Dear Supervisor Correia, Township Trustees and Planner Reardon,

For the Planning Commission Special meeting tonight:

Attached please find a letter from attorney, Scott Howard on behalf of Preserve Old Mission, and a supplemental report by Dr. Christopher Grobbel regarding environmental concerns with this project.

Thank you,

Karla Gerds  
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Olson, Bzdok & Howard  
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OLSON, BZDOK & HOWARD

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August 23, 2016

Peninsula Township  
Supervisor and Trustees  
13235 Center Road  
Traverse City, MI 49685

via Email to :  
planner@peninsulatownship.org

**ATTORNEYS**

**PARTNERS:**

James M. Olson  
Christopher M. Bzdok  
Scott W. Howard  
Jeffrey L. Jocks  
Ross A. Hammersley  
Kate Redman

**OF COUNSEL:**

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**Re: Proposed Condominium Subdivision for  
The 81 on East Bay  
Our File N<sup>o</sup> 6079.00**

Dear Supervisor Correia and Township Trustees:

This letter is to follow up on my May 10, 2016 correspondence. As you are aware, I represent Preserve Old Mission, a non-profit entity dedicated to preserving what is unique about the peninsula and its community. The purpose of this letter is to urge that you deny the PUD request for the 81 on East Bay. As we have explained in the past, the development proposal, as it stands, turns the Township's open space preservation principles on their head. The proposal seeks to pack in all of the homes along two sensitive ridgelines, with a density much greater than would otherwise be allowed by the Zoning Ordinance. The proposal significantly re-grades the unique topographical features on the land while at the same time clear-cutting half of the trees on the property. In doing so, the project creates substantial soil erosion concerns that violate the standards in your ordinance.

In order to highlight the environmental impact of this proposed project, we have retained Dr. Christopher Grobbel to provide an independent analysis of the project plans. Dr. Grobbel reviewed the project initially, and has also reviewed the most recent plans submitted to the Township. As Dr. Grobbel's supplement report indicates, there are numerous environmental concerns with this project. Of particular note is the incredible amount of earthwork proposed in the plan and a high risk for erosion based on removal of tree cover and the types of soils on the property. This is compounded by the concern that, if the project were to fail, there would be an enormous scar on the land at the end of bluff road with no natural protection to prevent substantial erosion both on and off the property. Finally, we note that the County's soil erosion program is currently under probation from the State of Michigan. This probation highlights the need for the Township to independently review any and all soil erosion issues with strict scrutiny. We urge you to give these concerns careful consideration as you reevaluate this project.

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### **Substantive Consideration of Items and Standards on Remand**

As a preliminary procedural matter, we point out that consideration of the items on remand should be vetted by the Planning Commission prior to being presented to the Township Board. The Township's Zoning Ordinance sets up a clear structure where the Planning Commission is to review and make recommendations for any proposed PUD prior to consideration by the Township Board. While the Board certainly retains ultimate decision making authority, the Township is skipping a critical step in the review process by not including the Planning Commission in review of the new information presented to the Township. See Section 8.1.2(c) of the Township's Zoning Ordinance. The Board should not be taking action until the Planning Commission has reviewed and provided a recommendation on the new information submitted to the Township.

We also point out that you have been given a single set of proposed findings supporting an approval of the project by your staff. This one-sided document seems to suggest that the Township is only able to approve the project. We strongly disagree that this is the only course of action for the Township to take, and we respectfully suggest that the evidence in the record actually requires the opposite decision. The fact that the proposed findings only support an approval of the project seems to indicate that the decision on remand from the Circuit Court is a fait accompli, and that the purpose of the remand was to simply check off a procedural box rather than a substantive consideration of the actual evidence presented under the standard provided in the Zoning Ordinance. We emphatically urge the Township to follow the proper procedure outlined in the Zoning Ordinance and to take a substantive look at the evidence before it. If the Board does this, we believe it will be compelled to deny the project.

### **Alternative Proposed Findings of Fact**

Since the Board has only been provided with draft findings of fact to support an approval of the project, we have compiled draft findings of fact to support a denial. These proposed findings were originally shared with you in May but have been updated to reflect the recently submitted revisions to the plans. We believe the evidence compels the Board to deny the proposed PUD, and the following findings can be adopted to support a denial:

**8.3.1(1) General Standards:** The Town Board shall review each application for the purpose of determining that each proposed use meets the following standards, and in addition, shall find adequate evidence that each use on the proposed location will:

(c) Be served adequately by essential facilities and services, such as highways, streets, police, fire protection, drainage structures, refuse disposal, water and sewage facilities, or schools.

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- i. The Board finds that the Applicant has failed to provide the Township with evidence that it has access for the location of the new proposed emergency access drive to Smokey Hollow Road.
- ii. The Board finds that the Developer has not procured a Part 41 permit for the proposed community septic system. The Board finds that the information is incomplete and lacks evidence in support due to the lack of State or County approval of the wastewater treatment plans for the development.
- iii. The Board finds that, in order for the development to have essential services and facilities, the development proposal includes a new emergency access road, a storm sewer detention basin and community septic system that cannot be counted as "open space" for purposes of the PUD development. These items, when removed from the calculation for preserved open space presented by the Developer, reduce the amount of preserved open space well below the required 65% for an open space PUD. (Exhibit B to May 10, 2016 correspondence)

**This standard HAS NOT been met.**

**8.3.1(3) Specific Requirements:** In reviewing an impact assessment and site plan, the Town Board and the Planning Commission shall consider the following standards:

(d) That the plan meets the requirements of Peninsula Township for fire and police protection, water supply, sewage disposal or treatment, storm drainage and other public facilities and services.

- i. The Board finds that the Applicant has failed to provide the Township with evidence that it has access for the location of the new proposed emergency access drive to Smokey Hollow Road.
- ii. The Board finds that the Developer has not procured a Part 41 permit for the proposed community septic system. The Board finds that the information is incomplete and lacks evidence in support due to the lack of State or County approval of the wastewater treatment plans for the development.
- iii. The Board finds that, in order for the development to have essential services and facilities, the development proposal includes a new

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emergency access road, a storm sewer detention basin and community septic system that cannot be counted as "open space" for purposes of the PUD development. These items, when removed from the calculation for preserved open space presented by the Developer, reduce the amount of preserved open space well below the required 65% for an open space PUD. (Exhibit B to May 10, 2016 correspondence)

**This standard HAS NOT been met.**

(e) That the plan meets the standards of other governmental agencies where applicable, and that the approval of these agencies has been obtained or is assured.

- i. The Board finds that the Developer has not procured a Part 41 permit for the proposed community septic system. The Board finds that the information is incomplete and lacks evidence in support due to the lack of State or County approval of the wastewater treatment plans for the development. (Township Exhibit 2)
- ii. The Board finds that County Soil Erosion Control's review is contingent on grading and stabilization plans for the bluff and topographical features that have not been submitted. The Board further finds that the County identifies the potential for storm water to be directed onto neighboring properties as a result of grading activities on the site. No Part 91 permit has been procured by the Developer. (Township Exhibits 7 and 8.)

**This standard HAS NOT been met.**

(h) That the soil conditions are suitable for excavation and site preparation, and that organic, wet or other soils which are not suitable for development will either be undisturbed or modified in an acceptable manner.

- i. The Board finds that the soils map indicates that the majority of the property to be developed is classified LKE2 (Leelanau-Kalkaska loamy sands, 12 to 18 percent slopes, moderately eroded) and LKF2 (Leelanau-Kalkaska loamy sands, 25 to 45 percent slopes, moderately eroded). The plan focuses development on sandy steep slopes and unique topographical features on the property.
- ii. The Board finds that the development plan calls for the removal of "approximately half of the tree cover" on the property "to accommodate

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- grading and earthwork for the project." (Application at 23). The Application itself points out the importance of these trees for soil and slope stability (Application at 10). According to Dr. Christopher Grobbel, this will likely cause substantial erosion on the property due to a loss of stabilizing trees on steep slopes. (Grobbel Report and supplemental report)
- iii. The Board finds that the plan calls for regrading of steep slopes and topographical features on the property cutting some 15 vertical feet of the bluff and filling equivalent areas (see Application at 24). Some 27 acres of the property, or 33% of the land, will be denuded and re-contoured with heavy equipment.
  - iv. The Board finds that County Soil Erosion Control's review is contingent on grading and stabilization plans for the bluff and topographical features that have not been submitted. The Board further finds that the County identifies the potential for storm water to be directed onto neighboring properties as a result of grading activities on the site. No Part 91 permit has been procured by the Developer. (Township Exhibits 7, 8.)
  - v. The Board finds that the Developer has not procured a Part 41 permit for the proposed community septic system. The Board finds that the information is incomplete and lacks evidence in support due to the lack of State or County approval of the wastewater treatment plans for the development. The Board further finds that the proposed community septic system is in the vicinity of wetlands and soils that are not suitable for wastewater treatment. (Township Exhibits 2, 3)
  - vi. The Board finds that evidence has been presented at the public hearing of historic use of pesticides on the property containing compounds like lead and arsenic. These compounds stay in the soil and could there is a high likelihood that they exceed acceptable state criteria. The developer has not provided any information on the environmental condition of the soils on the property, including any Phase I, Phase II or BEA studies done in conjunction with the property. The developer has not provided an approved or proposed "due care plan" for the property. Therefore, it is unclear whether the project will disturb contaminated soils and increase exposure risk to those contaminated soils. (See Part 201, MCL 324.20101, *et. seq.*)

**This standard HAS NOT been met.**

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- (i) That the proposed development will not cause soil erosion or sedimentation problems.
- i. The Board finds that the soils map indicates that the majority of the property to be developed is classified LKE2 (Leelanau-Kalkaska loamy sands, 12 to 18 percent slopes, moderately eroded) and LKF2 (Leelanau-Kalkaska loamy sands, 25 to 45 percent slopes, moderately eroded). The plan focuses development on sandy steep slopes and unique topographical features on the property.
  - ii. The Board finds that the development plan calls for the removal of "approximately half of the tree cover" on the property "to accommodate grading and earthwork for the project." (Application at 23). The Application itself points out the importance of these trees for soil and slope stability (Application at 10). According to Dr. Christopher Grobbel, this will likely cause substantial erosion on the property due to a loss of stabilizing trees on steep slopes. (Grobbel Reports)
  - iii. The Board finds that the plan calls for regrading of steep slopes and topographical features on the property cutting some 15 vertical feet of the bluff and filling equivalent areas (see Application at 24). Some 27 acres of the property, or 33% of the land, will be denuded and re-contoured with heavy equipment.
  - iv. The Board finds that County Soil Erosion Control's review is contingent on grading and stabilization plans for the bluff and topographical features that have not been submitted. The Board further finds that the County identifies the potential for storm water to be directed onto neighboring properties as a result of grading activities on the site. No Part 91 permit has been procured by the Developer. (Township Exhibits 7, 8.)

**This standard HAS NOT been met.**

(j) That the drainage plan for the proposed development is adequate to handle anticipated stormwater runoff, and will not cause undue runoff onto neighboring property or overloading of water courses in the area.

- i. The Board finds that the development plan calls for development next to a very steep bluff down to East Bay. The plan also calls for regrading portions of the top of this bluff for home sites and the removal of

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“approximately half of the tree cover” on the property “to accommodate grading and earthwork for the project.” (Application at 23). The Application itself points out the importance of these trees for soil and slope stability (Application at 10). According to Dr. Christopher Grobbel, this will likely cause substantial erosion and runoff due to a loss of stabilizing trees on steep slopes. (Grobbel Reports)

- ii. The Board finds that the plan calls for regrading of steep slopes and topographical features on the property cutting some 15 vertical feet of the bluff and filling equivalent areas (see Application at 24). Some 27 acres of the property, or 33% of the land, will be denuded and re-contoured with heavy equipment.
- iii. The Board finds that County Soil Erosion Control’s review is contingent on grading and stabilization plans for the bluff and topographical features that have not been submitted. The Board further finds that the County identifies the potential for storm water to be directed onto neighboring properties as a result of grading activities on the site. No Part 91 permit has been procured by the Developer. (Township Exhibits 7, 8.)
- iv. The Board finds that evidence has been presented at the public hearing of historic use of pesticides on the property containing compounds like lead and arsenic. These compounds stay in the soil and could there is a high likelihood that they exceed acceptable state criteria. The developer has not provided any information on the environmental condition of the soils on the property, including any Phase I, Phase II or BEA studies done in conjunction with the property. The developer has not provided an approved or proposed “due care plan” for the property to ensure there is no runoff of contaminated substances. (See Part 201, MCL 324.20101, *et. seq.*)

**This standard HAS NOT been met.**

(n) That the plan provides for the proper expansion of existing facilities such as public streets, drainage systems and water sewage facilities.

- i. The Board finds that the Applicant has failed to provide the Township with evidence that it has access for the location of the new proposed emergency access drive to Smokey Hollow Road.

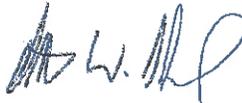
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- ii. The Board finds that the Developer has not procured a Part 41 permit for the proposed community septic system. The Board finds that the information is incomplete and lacks evidence in support due to the lack of State or County approval of the wastewater treatment plans for the development. (Township Exhibit 2)
- iii. The Board finds that, in order for the development to have essential services and facilities, the development proposal includes a new emergency access road, a storm sewer detention basin and community septic system that cannot be counted as "open space" for purposes of the PUD development. These items, when removed from the calculation for preserved open space presented by the Developer, reduce the amount of preserved open space well below the required 65% for an open space PUD. (Exhibit B to May 10, 2016 correspondence)

**This standard HAS NOT been met.**

Thank you for providing us with the opportunity to share our concerns about this project and our proposed findings of fact. We urge the Township to deny the project based on the proposed findings of fact provided above. If you have any follow up questions, please do not hesitate to contact me.

Sincerely,



Scott W. Howard



# Grobbel Environmental & Planning Associates

P.O. Box 58      Lake Leelanau      Michigan      49653

August 22, 2016

Mr. Peter A. Correia, Supervisor  
Peninsula Township Board  
Peninsula Township  
13235 Center Road  
Traverse City, Michigan 49685

**RE: Supplemental Planner's Report – The 81 on East Bay - Planned Unit Condominium Project, Boursaw Road, Section 21, Peninsula Township, T29N R8W, Grand Traverse County, Michigan.**

Dear Peninsula Township Board of Trustees,

This professional planner's report is intended to supplement the report submitted by myself on July 13, 2015.

**Project Description.** The proposal is for a Planned Unit Development (i.e., a single-use residential PUD) known as "The 81 on East Bay," and consists of 41 single-family lots ranging in size from 11,633 square feet to 43,008 square feet on 80.26 acres.<sup>1</sup> The subject property possesses more than 180 feet of vertical drop (i.e., elevation change) and 2,505 lineal feet of East Grand Traverse Bay shoreline, and consists of two (2) separate parcels (tax parcel ID numbers #28-11-114-001-00 and #28-11-114-001-00). Each parcel is commonly-held, parcel #001-00 (66.85 acres) is zoned Rural & Hillside Residential (R1-A) and parcel #002-00 (14.36 acres) is zoned Coastal Residential (R1-B) by the Peninsula Township zoning ordinance.<sup>2</sup> The project intends utilize on-site water wells for all lots, and to serve proposed Lots 1 through 5 and 25-29 with private septic systems and proposed Lots 6-24 and 30-41 are to be serviced by an on-site community wastewater treatment system.<sup>3</sup> Other planned infrastructure include an access road and two (2) *cul de sacs* (understood to be private, and not to be maintained by Grand Traverse County), and an approximately 185,000 square feet storm water retention/infiltration basin.

**Peninsula Township Zoning Review.** The project is to be brought for review before the Peninsula Township Board of Trustees on August 23, 2016. Based on the application materials available on August 22, 2016 on the Peninsula Township website, the project should be denied as proposed for the

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<sup>1</sup> The 81 on East Bay: An Open Space Preservation Community, submitted to Peninsula Township as a Planned Unit Development, a Special Use in the Rural & Hillside (R-1A) and Coastal Zone (R-1B) Zoning Districts, prepared by Mansfield Land Use Consultants, January 2015, as revised.

<sup>2</sup> Peninsula Township Zoning Ordinance, adopted June 5, 1972 (amendments through August 31, 2009).

<sup>3</sup> It is noted elsewhere in the project plans Lot #6 is listed as using on-site private waste water septic system and not the community waste water treatment system. See pp. 26 & 33.

failure to adequately comply with the following requirements of the Peninsula Township Zoning Ordinance.<sup>4</sup>

**Septic/Community Septic System.** Importantly, no detail nor required MDEQ Part 41 permit or Part 41 permit application has been provided for the proposed community sewage treatment and disposal system (i.e., handling 10,000 gallons or more of sewage per day) and proposed to serve 31 of the 41, or 75.6% of the lots planned. It is noted that on March 15, 2016 the Peninsula Township Board rejected the Applicant's request to accept any responsibility according to Part 41 requirements to take over the operation and maintenance of the proposed community seepage system in the event of The 81 PUD development failure or bankruptcy<sup>5</sup> (i.e., see Part 41 administrative rules, MCL 324.3109(3)(a)). Consequently, in accordance with MDEQ, Water Resource Division Policy and Procedure WRD-010, the Applicant must either retain ownership of the sewerage system or transfer ownership to a "legal entity" to represent all sewage system users, all of which are required to be members and signatories to a covenant for system operation and maintenance in perpetuity. Furthermore, the Applicant's legal entity and/or successors must assume all responsibility for all aspects of the sewage system via such a covenant, and a required perpetual escrow fund agreement for system operation and maintenance.

Sections 8.1.3(1)(c) and (e) of the Peninsula Township Zoning Ordinance require the Applicant's plans and permits/assurance letters for such essential services be provided for public review and inspection before Township approval or approval with conditions of this application. Consequently, the site plan and SUP application as provided are incomplete and preclude Township Board consideration or potential approval or approval with conditions of this plan.

**Soil Erosion/Grading.** Section 7.4.3 of the Peninsula Township Zoning Ordinance states that "(t)he following rules shall apply to any filling, grading or other earth movement within 200 feet of the normal high water mark<sup>6</sup> to prevent harmful erosion and related sedimentation...

- 1) The smallest amount of bare ground shall be exposed for as short a time as feasible.
- 2) Temporary ground cover such as mulch must be used as soon as possible and permanent cover such as sod be planted.
- 3) Diversions, silting basins, terraces and other methods must be used to trap any sediment.
- 4) Fill must be stabilized according to accepted engineering practices.
- 5) The Zoning Administrator may issue a land use permit for a seawall without regard to the minimum yard setback from the ordinary high water mark otherwise required in Section 6.8.1 when a sea wall is necessary to protect or prevent structures on the premises from erosion damage caused by high water."

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<sup>4</sup>Peninsula Township Zoning Ordinance, effective June 5, 1972 and as amended through August 31, 2009.

<sup>5</sup> Peninsula Township Resolution No. 2016-03-15 (*sic*) #1, dated March 15, 2016.

<sup>6</sup> The Peninsula Township Zoning Ordinance defines the "normal high water mark" as the MDEQ OHWM of 580.5 feet above mean sea level (msl) (IGLD85) and 581.0 feet above msl (USGS Survey Datum).

Despite past requests, current site plans fail to provide any detail regarding the volume of earth to be moved or graded during site “balancing,” especially within 200 feet of the ordinary high water mark (OHWM) of Lake Michigan/East Arm of Grand Traverse Bay.<sup>7</sup> Plans as submitted also fail to provide sufficient detail as to the timing of planting and species selected to be planted as temporary or permanent ground cover/site stabilization to prevent soil erosion and loss, lack detail regarding the design capacity and location of silt basins or other technologies to trap and remove sediments (if any), and fail to provide any detail regarding contingency plans should significant precipitation events occur during site grading/balancing and soil erosion and sedimentation control (SESC) methods fail in whole or in part. The January 25, 2015 preliminary SESC review letter from the Grand Traverse County Soil Erosion – Sedimentation Control Department similarly notes that “a grading and stabilization plan will be required from the contractor prior to grading the steep slope areas new the bluff. It will need to be demonstrated that the undisturbed bluff will be protected and that the graded area will be adequately stabilized to prevent erosion.”<sup>8</sup> Based on my experience as the planner of record for Acme Township, Grand Traverse County during the recent construction of the Meijer Superstore/Village at Grand Traverse and as a professional planner reviewing the recent Leelanau Moorings project, such complete grading, site stabilization/re-vegetation and detailed SESC plans are absolutely required by the Peninsula Township Zoning Ordinance prior to PUD approval or approval with conditions. Therefore, the 81 plans as submitted are incomplete and should be denied as presented.

Secondly, it has been my professional experience assisting the Grand Traverse Regional Land Conservancy, Leelanau Conservancy, and private parties in the transfer/acquisition of active/former orchard lands in northwest Michigan that persistent lead and arsenic soil contamination, i.e., above MDEQ Part 201 direct human contact criteria, is all too common from past herbicide application practices. Consequently, given the Applicant’s intended residential development of this parcel, the Applicant must perform and/or disclose the results of soil sampling/analysis to Peninsula Township decision-makers and the public prior to Township action in this matter. Therefore, the 81 plans as submitted are incomplete and should be denied as presented.

We remain very concerned about the potential for soil erosion/deposition, resulting wildlife habit loss and fragmentation, and aesthetic impacts as observed from public navigation areas of East Grand Traverse Bay from the extensive earthwork proposed for this development. Alternatively, home sites should be “worked into and with” the existing topography, public view sheds, and wildlife habitats and migration corridors should be understood and preserved within required open space, while allowing developers to achieve a reasonable rate of return through the residential development of this site. This proposed project’s proximity to East Grand Traverse Bay necessitates far more careful and ecological informed planning and development to comply with the tenants of the Peninsula Township Master Plan and the spirit and intent of the Peninsula Township Zoning Ordinance.

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<sup>7</sup>The 81 site plans state, “(t)he proposed grading is what is minimally required in order to construct the roadway, buildable lake view residential lots and septic and storm water infrastructure.” Notably, grading cut/fill volumes are still not disclosed within plans reviewed for this project. However, conservative estimates suggest more than 27 acres of the project’s nearly 82 acres or nearly 33% will completely denuded and graded/re-contoured with heavy earth moving equipment for development. Site grading plans do not detail cut/fill volumes, but cross-sections provided indicate cut/fill up to 15 feet in depth in graded areas and suggest an average cut/fill depth of 10 feet in graded areas across the site. Grading (i.e., cut/fill) volumes can therefore be reasonably estimated at 1,178,733.6 square feet or 11,787,336 cubic feet (436,568 yards). This is an astonishing amount of earthwork proposed for very to extremely steep slopes, i.e., the project focuses proposed development on existing steep slopes and the majority of flat to gently sloping areas at the site are proposed for required open space.

<sup>8</sup> Gwendolyn Zagore, Grand Traverse County Soil Erosion Inspector, Grand Traverse County Soil Erosion-Sedimentation Control Department, January 25, 2015.

**Vegetation Removal/Shoreline.** Section 7.4.4 of the Peninsula Township Zoning Ordinance states that “regulation of tree cutting along the Great Lakes shoreline is necessary to protect scenic beauty, control erosion and reduce effluent and nutrient flow from the shore land. These provisions shall not apply to the removal of dead, diseased or dying trees at the discretion of the landowner, or to silvicultural thinning upon recommendation of a forester. Tree cutting in a strip paralleling the shoreline and extending thirty-five (35) feet inland from all points along the normal high water mark of the shoreline shall be limited in accordance with the following provisions:

- 1) No more than 30% of the length of this strip shall be clear cut to the depth of the strip.
- 2) Provided, further that cutting of this 30% shall not create a clear cut opening in this strip greater than thirty (30) feet wide for every one hundred (100) feet of shoreline.
- 3) In the remaining 70% length of this strip cutting shall leave sufficient cover to screen cars, dwellings, accessory structures, as seen from the water; to preserve natural beauty and to control erosion.
- 4) Natural shrubbery shall be preserved as far as practicable, and where removed it shall be replaced with other vegetation that is equally effective in retarding runoff, preventing erosion and preserving natural beauty...”

Alternatively, Section 7.4.4 allows the Applicant to submit a “special cutting plan” allowing greater cutting as may be permitted by the Zoning Board of Appeals. Based on information available, no such alternative cutting plan has been proposed.

The 81 plan as proposed focuses development upon the most sensitive land areas, i.e., “extremely steep” slopes in the words of the developer’s agents, up to 45 percent.<sup>9</sup> Moreover such extremely steep slopes are comprised of highly erodible Kalkaska loamy sand and Leelanau-Kalkaska loamy sands. Importantly, more than 40% of the entire site is comprised of loamy sand slopes greater than 12%, nearly 34% of loamy sand slopes greater than 18% and nearly 27% loamy sands greater than 25 percent. Slopes. Such steep to extremely steep sandy slopes represent the most challenging development areas in our region, especially once existing vegetative cover and associated root mass are removed, and due to the project’s close proximity to East Grand Traverse Bay.

The 81 application proposes the removal of about one-half of the existing forest cover existing at the parent parcels.<sup>10</sup> The significant short-term release of phosphorous into near surface groundwater immediately following the removal of existing tree and ground cover on this scale has recently been observed during the construction of a golf course in Leelanau County.

Importantly, such forest cover is not uniformly spread across the site, but was wisely retained by former agriculturalists on the steep to extremely steep slopes at the site to retain soils and prevent gully erosion, downslope sedimentation, and mass bank slumping. Importantly, mass slumping and soil erosion has been observed recently at four (4) locations on similar slopes (i.e., percent slope and soil textures) two locations along Lake Michigan north of Harbor Springs - immediately following the removal existing tree cover for residential development. As a general rule, the selective thinning of forest cover up to 30% for filtered views is required by communities following good planning principles, clear cutting, such as proposed) is strictly prohibited, root systems are left in place, and filtered view trimming is only

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<sup>9</sup> See the above referenced SUP application, p. 11.

<sup>10</sup> See above referenced site plan and SUP application for The 81 on East Bay, p. 23.

undertake after home construction primarily working within site topography to direct thinning only where needed to create desired home lake views.

**Likelihood of Environmental Degradation from Plan as Proposed.** Given the planned density of residential development within the most environmentally sensitive portions of the site (i.e., the prevalence of steep to extremely steep loamy sand soils); proximity to East Grand Traverse Bay; and typical residential development patterns within shoreline developments in northwestern Michigan (i.e., the significant clearing of trees for a homes/drives/parking footprints; additional tree removal for water views; and future lawn irrigation and fertilization, etc.), I believe that significant water quality degradation and aesthetic impact from public ways are likely adjacent to and directly resulting from this development as proposed. Specifically, given soil types, the extensive planned clearing of mature forests on steep to extremely steep slopes and extensive earthwork/re-contouring as planned for home development, I believe that there is a likelihood of water quality degradation within the near shore environment of East Grand Traverse Bay from this development.

Alternative development plans including conservation design and low impact development techniques, and the full implementation of best management practices should be considered at this location in conformance with the Peninsula Township Master Plan and zoning ordinance and Michigan's Part 17: Environmental Protection Act, including site conservation with the Grand Traverse Regional Land Conservancy and Peninsula Township. Given the extensive unbroken shoreline, productive farmland, intact and connected forests and wildlife habitat, and extremely steep sandy slopes vulnerable to erosion at this location, Township review of this plan requires no less than bringing to bear conservative, imaginative and innovative approaches to preserve these parcels or to advance a development plan that results in low impact/conservation residential development.

Thank you for the opportunity to provide these comments. Please contact me if you've any questions at 231-499-7165 or [cgrobbel@grobbelenvironmental.com](mailto:cgrobbel@grobbelenvironmental.com).

Sincerely,  
**Grobbel Environmental & Planning Associates**



Christopher P. Grobbel, Ph.D.  
Sr. Project Manager/Planner

cc Scott Howard, OBH

August 23, 2016

Dear Peninsula Township Board:

Please accept my letter in regards to SUP#123 – The 81 on East Bay Planned Unit Development for the Public Hearing this evening. I am an adjacent landowner on the westward boundary of the proposed development. I have submitted letters in regards to this matter to the Planning Commission on 4/13/15; 5/18/15; 6/8/15. The 81 development will inevitably have adverse impacts to my property and to the Peninsula as a whole.

As it relates to my property, the developer's plans call for significantly re-grading the wooded ridge and slope along the western boundary of the parcel. Disturbance to the ridge and slope could cause soil erosion, diversions of water flows and storm water runoff making the slope unsound and impacting my retention wall. Per the ruling of Judge Phillip Rodger's in December 2015, the soil and erosion studies for this parcel were incomplete. I urge the Board to look closely at this issue and require proper studies of the soil and potential erosion.

In addition, the fire emergency egress route plan was also found to be inadequate by Judge Rodger's. As a neighboring landowner this is also a critical issue that needs to be addressed with a safe a proper solution. Also, of concern is the placement of community the septic system and potential adverse impacts to the water quality of East Bay.

Finally, as you are aware, this parcel is largest remaining privately owned intact piece of shoreline on the Peninsula. The 81 plans are contrary to the character of the Old Mission Peninsula, defined by its unique agricultural, historic and scenic natural beauty. The plans do not fit within the guidelines of the Township's Master Plan. I hope that the outcry by my fellow neighbors, landowners and residents of the Peninsula in opposition to The 81 development are being heard.

I urge you to thoughtfully consider your decision and require the developer, to every extent possible, to preserve the key environmental features of the property: the shoreline, bluffs, wooded ridges, and water quality of the East Bay.

Respectfully submitted,

Kadee Tseitlin  
3900 Sean Robinson Court  
Traverse City, MI 49686

## Michelle Reardon

---

**From:** Susan Piehl <officemanager@peninsulatownship.com>  
**Sent:** Monday, August 22, 2016 2:28 PM  
**To:** Michelle  
**Subject:** FW: New Form Entry: Contact Form

**From:** [cnickerson@centurytel.net](mailto:cnickerson@centurytel.net) [<mailto:no-reply@weebly.com>]  
**Sent:** Monday, August 22, 2016 1:38 PM  
**To:** [officemanager@peninsulatownship.com](mailto:officemanager@peninsulatownship.com)  
**Subject:** New Form Entry: Contact Form

You've just received a new submission to your [Contact Form](#).

### Submitted Information:

#### Name

Carol Nickerson

#### Address

10707 Bluff Rd.  
Traverse City, MI 49686

#### Email

[cnickerson@centurytel.net](mailto:cnickerson@centurytel.net)

#### Comment

I am opposed to the 81 on East Bay project.

**Michelle Reardon**

---

**From:** jksjhardy@charter.net  
**Sent:** Sunday, August 21, 2016 10:35 PM  
**To:** 'clerk@peninsulatownship.com'; 'psyr2@acegroup.cc';  
'treasurer@peninsulatownship.com'; 'wlwitkop@charter.net'; 'mark@agency.com';  
'jillcbyron@gmail.com'; 'assessor@peninsulatownship.com';  
'planner@peninsulatownship.com'; 'zoning@peninsulatownship.com';  
'deputyclerk@peninsulatownship.com'  
**Subject:** Thumbs down to Project 81 Smoky Hollow and Boursaw Road development

RECEIVED  
AUG 22 2016  
BY: MK

I am communicating to you all again with questions and possible solutions regarding the 81 on East Bay development. As a second generation peninsula resident my neighbors and I have attended several of the meetings regarding this large scale project. The 81 on East Bay project continues to push for approval with many continued, detailed questions unanswered regarding the large scale environmental impact, soil contamination, traffic, and safety just to name a few. Attorney Scott Howard brought up many of these unanswered details such as soil contamination studies and other questions at the August 15th meeting with the planning commission. While I understand growth and development are important to any community, it needs to be carefully planned out for blending and keeping the existing unique priorities intact. Examples of some unanswered questions before this is approved are:

1. Soil testing for years of farming this property needs to be done and results evaluated and addressed.
2. Traffic studies on Center Road, Bluff Road, and Smoky Hollow Road for safety need to be done and results assessed and evaluated.
3. More in depth surrounding environmental studies such as well and sewer runoff need to be done evaluating the impact on the existing home sites and wildlife.

The peninsula is a very unique piece of land that the residents have respected and cultivated over time and that is what has kept it so pristine for years. A solution to keep the peninsula so valuable might even be for the developer to work with the land conservancy or the state to preserve this piece of land for generations to use and enjoy. Many generations have enjoyed this unique parcel and it is very important to preserve and respect it for what it is and for future generations to be able to enjoy as well.

As I didn't have their email addresses I would appreciate a copy of this letter forwarded to the planning commission, Keith Leak, Al Couture, Donna Hornberger, Penny Rosi, Isaiah Wunsch, Laura Serocki, and Monnie Peters.

Thank you for your time regarding this issue,

Katherine Hardy

11261 Buff Road

-----  
From: [jksjhardy@charter.net](mailto:jksjhardy@charter.net)

To:

Cc:

Sent: Mon, 10 Aug 2015 11:17:23 -0400 (EDT)

Subject: Thumbs down to Project 81 Smoky Hollow and Boursaw Road development

I am writing to express my concern regarding this large development Project 81 for several reasons:

1. Safety and increases in traffic on Bluff Road are two concerns as Bluff Road is a beautiful, scenic, rural, curvy road used by a vast number of bicyclists, roller bladers, and runners. There have been a number of serious biking accidents on this road over the years because of increased traffic already as well as the width and curviness of the road. This proposed large development would produce much increased traffic and jeopardize all individuals who have enjoyed this route for many years as well as visitors to the peninsula. Even though using Center Road and Smoky Hollow is a more direct route to this property residents would use scenic Bluff Road.
2. Excavating this large area of shoreline would interfere with the natural, fragile ecosystems already in existence, and therefore cause other environmental issues on a much larger scale on the peninsula, altering what makes this peninsula so unique. And even current shoreline residents from what I understand cannot legally excavate or alter areas below the high water mark even on their own property.
3. Decreased natural wildlife habitats and what characterizes the peninsula as such a unique area will disappear as excavating trucks move and clear the land for this large scale development, and week after week residents will see logging trucks haul truckload after truckload of what was once a beautiful hardwood forest cut down for possibly rows and rows of yellow or white condominiums.

As a current peninsula resident, I will not support this project.

Thank you for your time regarding this,

Katherine Hardy  
11261 Bluff Road  
Traverse city, MI 49686  
(cell 231-668-1984)

(I am hoping to attend Tuesday's July 14th meeting).

**Michelle Reardon**

---

**From:** james komendera <jameskomendera@msn.com>  
**Sent:** Monday, August 22, 2016 7:12 AM  
**To:** supervisor@peninsulatownship.com; clerk@peninsulatownship.com;  
treasurer@peninsulatownship.com; wlwitkop@charter.net; psyl2@av2group.cc;  
Bptems@gmail.com; Jill Byron; planner@peninsulatownship.com  
**Subject:** Letter To The Peninsula Township Board

RECEIVED  
AUG 22 2016  
BY: UK

Peninsula Township Board  
13235 Center Rd.  
Traverse City, MI. 49685

Dear Mr. Supervisor and Board Members,

I am writing you regarding my deep concern regarding the 81 on East Bay PUD which you will again take under discussion tomorrow, Tuesday, August 23, 2016. As you know, these 81 acres was a former farmland and has the possibility of containing many contaminants used in farming decades ago. Please view the attachments of this letter. The first is a soil test on similar, former farm property on the Peninsula in 2013 by the Engineering firm of Gosling and Czubak. Please note the high levels of Lead, Arsenic and Mercury highlighted in yellow.

The 81 acres in question, previously the Boursaw Farm, had similar farming practices as the property mentioned above. The second attachment is by resident, Tim Boursaw, whose family farmed the 81. The farming practices described by Mr. Boursaw and the attached soil test leave little question that these 81 acres also may have contaminated soil. Due to the mass excavating proposed by this development there should be a deep concern for the spread of these toxic chemicals to the neighboring properties and East Bay itself. For these reasons I am asking that you mandate a Baseline Environmental Assessment for this property prior to any final approval.

Thank You,

James Komendera  
4168 Rocky Shore Trail  
Traverse City, MI. 49686

james has files to share with you on OneDrive. To view them, click the links below.

-  [Soil Results Table 2.pdf](#)
-  [new doc 74.pdf](#)

CLIENT: Kerry Murdoch  
 SITE: Westwind Road  
 PROJECT NO: 2014544.01

**SOIL GENERIC RESIDENTIAL CLEANUP CRITERIA (GRCC) COMPARISON TABLE**

Hazardous Substance	Chemical Abstract Service Number	Sample I.D.		Statewide Default Background Level	Residential Drinking Water Protection Criteria	Particulate Soil Inhalation Criteria	Direct Contact Criteria
		SS #1	SS #2				
Arsenic	7440382	27,000	17,000	5,800	4,600	7.20E+05	7,600
Barium (B)	7440393	36,000	47,000	75,000	1.30E+06	3.30E+08	3.70E+07
Cadmium (B)	7440439	ND<710	ND<760	1,200	6,000	1.70E+06	5.50E+05
Chromium (VI) (total)	18540299	4,400	6,000	NA	30,000	2.60E+05	2.50E+06
Copper (B)	7440508	11,000	7,400	32,000	5.80E+06	1.30E+08	2.00E+07
Lead (B)	7439921	220,000	48,000	21,000	7.00E+05	1.00E+08	4.00E+05
Mercury (Total) (B,Z)	Varies	300	48	130	1,700	2.00E+07	1.60E+05
Selenium (B)	7782492	460	590	410	4,000	1.30E+08	2.60E+06
Silver (B)	7440224	ND<1,800	ND<1,900	1,000	4,500	6.70E+06	2.50E+06
Zinc (B)	7440666	27,000	17,000	47,000	2.40E+06	ID	1.70E+08

**NOTES:**

Units are expressed in micrograms per kilogram (ug/kg). Criteria with six or more digits are expressed in scientific notation. A footnote is designated by a letter in parentheses and is explained in the footnote pages that follow the criteria tables.

Shaded criteria are exceeded by one or more samples. Only relevant criteria are listed.

Prepared by Gosling Czubak Engineering, adapted from the Natural Resources and Environmental Protection Act (NREPA), Part 201, R.299.5746, Attachment 1, Table 3, Soil: Residential Part 201 Generic Cleanup Criteria and Screening Levels. Document release Date: December 30, 2013.

5/10/2016

Outlook.com - jameskomendera@men.com

### Statement from Tim Boursaw:

In regards to whether the Boursaw property (now known as "The 81") was ever used as a farm, all you have to do is stop by the Boursaw farmhouse at the corner of Boursaw Road and Bluff Road and read the Centennial Farm sign stating that the farm was owned by the same family for over a hundred years.

Abraham Lincoln signed the property deed to the Boursaw family. In the beginning, the farm was used as a maple syrup operation, and then transformed into cattle, food crops and a small dairy operation, similar to many of the farms on the Old Mission Peninsula at that time. In the 1930s, it was transformed into a cherry farm.

From the 1930s to the 1970s, about 80 percent of the property was cherry orchards. Like all cherry farms on the Old Mission Peninsula from the 1930s to the 1950s, the land was exposed to pesticide and fertilizer practices of the time. This included applications of copper, lead, nicotine, arsenic and other toxic pesticide and fertilizer substances which were legal at the time, but phased out through the late 1950s and early 1960s and replaced with more effective, but no less toxic substances.

That being said, the history of cherry farming on the Old Mission Peninsula was a great boon to area farmers, but did have negative consequences on the land. After the Boursaw farm was sold around 1970, Phil Weatherholt took over the care and harvest of the orchards until they had run their course and the trees were pushed out. The property has sat dormant since then.

Jane

**SESC PERMIT**

Under the provisions of PART 91, SOIL EROSION & SEDIMENTATION CONTROL ACT (SESC) (1994 PA 451 as amended) and/or GRAND TRAVERSE COUNTY SESC ORDINANCE, as amended.

GRAND TRAVERSE COUNTY  
SOIL EROSION & SEDIMENTATION  
2650 LAFRANIER RD  
TRAVERSE CITY MI 49686  
Phone # (231) 995-6042

Permit #: 24013  
Sensitivity: 4  
Type: RESIDENT  
Issued: 5/09/2016  
Expires: 5/09/2017  
Fee: 3,967  
Receipt #: 38459  
Applied: 4/08/2016

Owner:  
THE 81 DEVELOPMENT COMPANY, LLC  
6978 DIXIE HWY  
CLARKSTON MI 48346

Contractor/On-Site responsible person:  
ALPERS EXCAVATING  
16 S WEST SILVER LAKE RD  
TRAVERSE CITY MI 49685

DEQ Permit #: NOC PENDING Issue Date:  
Credit/Surety Amount: 80,000.00 Expires: 5/06/2017

Authority is hereby granted to make the following earth changes:

GRADING TO CONSTRUCT RESIDENTIAL PUD, ROADS, UTILITIES, STORM BASIN  
CLEARING; AMEND TO ADD FIRE LANE

Located at: 15634 SMOKEY HOLLOW RD 15636 BLUFF RD  
In PENINSULA Twp, Sect 14 Town 29N Range 10W Lot # Block  
Sub: THE 81 ON EAST BAY  
Property Tax #: 28 - 11 - 114 - 001 - 00

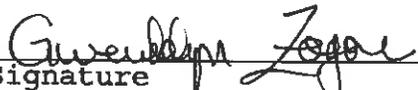
**Permit Conditions:**

1. The permitted activity shall be completed in accordance with the approved plans and specifications, and the following general conditions.
2. This permit does not waive the necessity for obtaining all other required federal, state, or local permits.
3. Permittee shall notify the permitting agency within one week after completing the permitted activity or one week prior to the permit expiration date, whichever comes first.

**General Conditions:**

In accordance with Rule 1709 promulgated under the authority of Part 91, Soil Erosion and Sedimentation Control, of the natural Resources and Environmental Protection act, 1994 PA 451, as amended, and in addition to the information on the attached plan(s) and special conditions, the following general conditions apply to the earth change authorized by this permit.

- Design, construct, and complete the earth change in a manner that limits the exposed area of disturbed land for the shortest period of time.

  
Signature

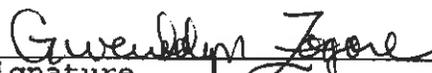
THIS PERMIT ALONG WITH THE SITE PLAN MUST BE POSTED AT THE PROJECT SITE  
Continued on Next Page

- Remove sediment caused by accelerated soil erosion from runoff water before it leaves the site of the earth change.
- Temporary or permanent control measures shall be designed and installed to convey water around, through, or from the earth change at a non-erosive velocity.
- Install temporary soil erosion and sedimentation control measures before or upon commencement of the earth change activity and maintain the measures on a daily basis. Remove temporary soil erosion and sedimentation control measures after permanent soil erosion measures are in place and the area is stabilized. (Stabilized means the establishment of vegetation or the proper placement, grading, or covering of soil to ensure its resistance to soil erosion, sliding, or other earth movement.)
- Complete permanent soil erosion control measures for the earth change within five calendar days after final grading or upon completion of the final earth change. If it is not possible to permanently stabilize the earth change, then maintain temporary soil erosion and sedimentation control measures until permanent soil erosion control measures are in place and the area is stabilized.

**Specific Conditions:**

This permit is approved according to the site plan received on April 8, 2016 and revised on May 3, 2016 from Mansfield Land Use Consultants Job No:14016 with the following requirements:

1. Follow all prescribed Soil Erosion and Sedimentation Control measures on page C3.0 of the revised site plan.
2. Phasing must be followed according to the schedule. Each phase must be stabilized as described before moving to the next phase. Any change in the schedule must be approved by this office.
3. Install silt fence according to the site plan, properly trenched in 6 inches deep and end stakes wrapped. Double rows are required as specified. Silt fences must be inspected regularly. It is imperative to inspect all fences during and after spring snow melt.
4. Construct all storm ditches/swales with no greater than 3:1 slopes and stabilize as shown on page C1.2.
5. The storm water detention basin must be stabilized with erosion control blankets as indicated. All outlets must be stabilized with rock rip rap as shown in the engineered site plan.
6. Construct wooden stairs as shown. Stabilize all disturbed areas around the post holes with woody mulch or other non-erosive ground cover.
7. Any vegetation must be established and show significant growth in order to final this permit.
8. Construct stone construction entrance as shown.  
Do not allow sediment to be tracked onto the street. If tracking does occur, sweep the street at the end of the work day.
9. Install a culvert in the road ditch under the entryway. The ends of the culvert must be stabilized so that erosion does not occur in the road ditch.
10. The storm water operator, licensed by the MI DEQ, must submit

  
Signature

Continued from Previous Page  
SESC PERMIT

Permit 24013

weekly reports to the County Enforcing Agent.

11. Submit a copy of the MI DEQ Notice of Coverage to this office.

12. The engineer of record must submit a letter of certification stating that the project is built according to the site plan in order to final this permit.

13. PERMIT, GREEN CARD & SITE PLAN MUST BE POSTED AT THE PROJECT SITE AT ALL TIMES UNTIL PERMIT HAS FINAL APPROVAL FROM THIS OFFICE

AMEND 08/12/16 FIRE LANE ACCESS FROM SMOKEY HOLLOW RD

1. Install silt fence as shown on the amended site plan submitted from Mansfield Land Use Consultants Job No: 14016.

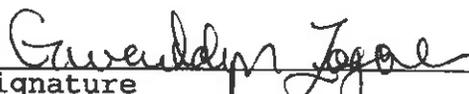
2. Install mats on ditches as shown on the engineered site plan.

3. Check dams should be installed immediately upon shaping the ditches

4. Install rip rap at outlets as shown.

5. Install stone construction entrance to prevent tracking onto Smokey Hollow Rd. If tracking does occur, the road must be swept by the end of the day.

6. All vegetation must be re-established and this road completely stabilized in order to final the permit.

  
Signature

THIS PERMIT ALONG WITH THE SITE PLAN MUST BE POSTED AT THE PROJECT SITE

REVIEWED / APPROVED  
 Soil Erosion Compliance  
 Subject to Field Inspections

Reviewer EJZ Date 8/18/16

BM#1: ELEV = 629.05  
 NAIL ROOT 48" MAPLE  
 N 10752.2418 E 11264.4687

BM#2: ELEV = 674.52  
 NAIL ROOT 18" MAPLE  
 N 12276.6579 E 11100.2573

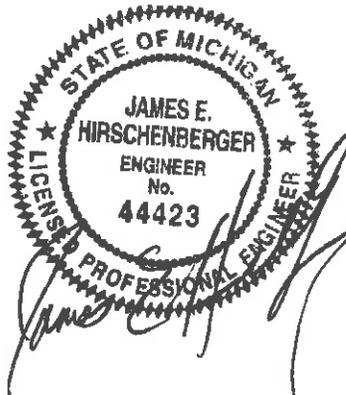
BM#3: ELEV = 734.81  
 NAIL ROOT 20" TWIN OAK  
 N 11258.6169 E 10247.1784

830 Cottageview Dr., Ste. 201  
 P.O. Box 4015  
 Traverse City, MI 49685  
 Phone: 231-946-9310  
 www.maaeps.com  
 info@maaeps.com

**CONSTRUCTION NOTES:**

GRADING SHALL PROVIDE POSITIVE DRAINAGE ACROSS THE ENTIRE SITE.  
 EROSION CONTROL SHALL INCLUDE FURNISHING AND PLACING TOPSOIL AND SEED  
 OVER THE EXTENTS OF THE DISTURBED AREAS ON THE SITE. MULCH BLANKET IS  
 REQUIRED WHERE SLOPES ARE 3:1 OR GREATER.

TREVOR RD. (PVT.)



**Mansfield**

**Land Use Consultants**

14-00  
 1A

THE 81 ON EAST BAY

DESIGN	Open Space Calculation Updates
	Permit & Twp. Submittals
	Permit & Twp. Submittals
	Permit Submittals
	Construction Plan Updates
	Fire Road Access
	NEW FIRE ROAD ACCESS PLAN & PROFILE
	Stormwater Design, Storm Water & S.E.S.C. Submittals

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

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JAMES KOMENDERA, an individual, and  
PRESERVE OLD MISSION PENINSULA,  
a domestic non-profit corporation

Appellants,

v

File No. 2015031218AA  
HON. PHILIP E. RODGERS, JR.

PENINSULA TOWNSHIP,

Appellee,

and

THE 81 DEVELOPMENT CO., LLC, a  
Michigan limited liability company,

Intervening-Appellee.

---

Scott W. Howard (P52028)  
Katherine E. Redman (P74030)  
Attorneys for Appellants

Peter R. Wendling (P48784)  
Attorney for Peninsula Township

Joseph E. Quandt (P49739)  
Edgar Roy (P36809)  
Marc S. McKellar (P78367)  
Attorneys for 81 Development Co

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DECISION AND ORDER ON APPEAL

On January 5, 2015, The 81 Development Company, LLC (“Developer”) submitted to Peninsula Township an application for a Special Use Permit to construct a Planned Unit Development on two parcels of property commonly known as 15634 Smokey Hollow Road and 15636 Bluff Road.<sup>1</sup> The Peninsula Township Planning Commission (“Commission”) held a

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<sup>1</sup> The two parcels, Tax Id Nos. 11-114-001-00 and 11-114-002-00, shall collectively be referred to as the “Site.” The Site contains steep slopes, primary ridgelines, wetlands, lakes and is rural area not designated for Agricultural Preserve areas. See Peninsula Township Planning & Zoning Department Staff Report (May 13, 2015), § 2.9.

public hearing on the application for Special Use Permit and Planned Unit Development on May 18, 2015.<sup>2</sup> On June 15, 2015, the Commission deliberated and unanimously recommended approval of the Special Use Permit and Planned Unit Development. On July 14, 2015, after receiving the findings from the Commission, the Peninsula Township Board (“Board”) held an additional public hearing on the application for Special Use Permit and Planned Unit Development. On August 11, 2015, based upon the general findings of fact and specific findings under Ordinance Sections 8.1.3 and 8.3, the Board<sup>3</sup> approved the Special Use Permit and Planned Unit Development subject to certain conditions.<sup>4</sup>

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Additionally, the Site is surrounded by developed residential properties to the north and south and both properties are primarily zoned R-1A, pursuant to the Peninsula Township Zoning Ordinance. R-1A Zoning discussed, *infra*. The Bluff Road parcel is partially zoned as an R-1B Coastal Zone Residential District. R-1B zoning is intended for the development of residential properties of a semi-rural character along lakeshore drives and areas of high scenic value where more intensive development would deteriorate the peninsula environment and less invasive development is not essential to maintenance of the established environment. Ordinance § 6.3.1. R-1B districts allow for the same uses permitted by “Right,” “Under Special Conditions” or by “Special Use Permit” as the R-1A Districts and also allow for two-family dwellings. Ordinance § 6.3.2.

<sup>2</sup> Once a special use permit application is submitted to Peninsula Township, the application along with all required data is transmitted to the Township Board for consideration after referral to a study by the Planning Commission. The Planning Commission may hold a public hearing on the application. Upon receipt of a recommendation from the Planning Commission, the Township Board shall publish in a newspaper having a general circulation in the Township, not less than five nor more than 15 days before the date the application will be considered, one notice that a request for special land use approval has been received. The notice shall be delivered to all persons whom real property is assessed within 300 feet of the boundary in question. Ordinance § 8.1.2(3).

<sup>3</sup> See Board Minutes for August 11, 2015, approved September 8, 2015. Board members Weatherholt, Correia, Hoffinan, Avery, Rosi and Witkop voted to approve the SUP and PUD. Board member Jill Byron did not participate in the discussion or vote on August 11, 2015. Discussed *infra*.

<sup>4</sup> The conditions are as follows: “(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 within 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; (2) Proof of Compliance with all Federal, State, County, Township and other governmental regulations relative to the establishment of a Condominium Subdivision Planned Unit Development shall be submitted to the Peninsula Township Planning and Zoning Department prior to issues of the SUP; (3) No material earth movement other than soil borings until the SUP is issued; (4) Requirement of a Performance Bond or other enforceable appropriate financial mechanism to ensure the construction and long terms maintenance of private roads, community septic system, fencing/landscaping, and emergency water tank as planned in accordance with SUP #123 based on the recommendation of the Township Engineer and Accountant as required by statute; (5) Maintenance of water tank will be the responsibility of The 81 developer and Homeowners Association in the long-term and shall be verified annually to the satisfaction of the Peninsula Township Fire Department; (6) Detailed grading plans shall be supplied to the Township Engineer for the Township Engineer’s review and approval prior to SUP issuance; (7) The management of the shared waterfront hoist/shore stations shall be defined and outlined within the condominium bylaws as per current zoning standards; (8) The shared water front open space shall allow one set of steps to the water and this shall be outlined in the condominium bylaws; (9) Relocated entrance sign to be compliance with Section 7.11 of the Ordinance; and (10) Review of Master Deed and Bylaws and site plan by Township Attorney to ensure compliance with these conditions and the SUP/PUD.”

James Komendera owns real property adjacent to the Site. Preserve Old Mission Peninsula (POMP) is a domestic nonprofit that was incorporated on October 7, 2015.<sup>5</sup> Komendera and POMP, collectively the Appellants, filed a Claim of Appeal on October 8, 2015.<sup>6</sup> Appellants make three major arguments on appeal. Appellants claim that: (1) the Board's decision was not authorized by law because the Board incorrectly interpreted and applied the Peninsula Township Zoning Ordinance ("Ordinance") standards; (2) the Board's factual findings were insufficient to support its conclusions and were not supported by competent, material and substantial evidence on the record; and (3) the Board's recusal of Jill Byron ("Byron") at the Developer's insistence was inappropriate as no conflict of interest existed and Byron's participation in the project discussion potentially would have resulting in a different outcome for the Special Use Permit and Planned Unit Development findings. The Court heard oral arguments by the parties on December 21, 2015, took the matter under advisement, and now issues this written decision and order affirming, in part, and reversing, in part, the decision of the Board.

Each organized Michigan township shall be a body corporate with powers and immunities provided by law.<sup>7</sup> The township board of an organized township in this state may provide by zoning ordinance for the regulation of land development.<sup>8</sup> Municipalities have the authority to regulate land use through zoning pursuant to the Michigan Zoning Enabling Act.<sup>9</sup> The Zoning Enabling Act provides that a local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of one or more districts, which regulate the use of land and structures to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other public facilities and facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation and other public service and facility and to promote public health, safety and welfare.<sup>10</sup> The Act also provides that

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<sup>5</sup> See Michigan Department of Licensing and Regulatory Affairs <<http://www.dleg.state.mi.us>> (accessed January 5, 2016).

<sup>6</sup> James Komendera, as an adjacent property owner to the Site, is affected by the approval of the SUP/PUD and clearly has standing to pursue this appeal. Therefore, the issue of whether POMP also has standing to pursue this appeal is moot and will not be addressed by the Court.

<sup>7</sup> Const 1963, art 7, § 17.

<sup>8</sup> *Carleton Sportsman's Club v Exeter Twp*, 217 Mich App 195, 198; 550 NW2d 867 (1996).

<sup>9</sup> MCL § 125.3101 *et seq.*

<sup>10</sup> *Id.*

regulations shall be uniform for each class of land or buildings, dwellings, and structures within a district.<sup>11</sup>

The Michigan Constitution states that:

All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.<sup>12</sup>

Substantial or substantive evidence is evidence that a reasonable person would accept as sufficient to support a conclusion, while this requires more than a scintilla of evidence it may be substantially less than a preponderance.<sup>13</sup> Substantial evidence includes facts based on inferences that are legitimate and supportable.<sup>14</sup> The substantial evidence test is not whether a contrary decision could have been supported by substantial evidence, but whether the decision the agency actually made was supported by substantial evidence.<sup>15</sup> Meaningful judicial review of whether there was competent, material and substantial evidence on the record requires knowledge of the facts justifying the agency's conclusion and courts should accord due deference to administrative expertise and not invade administrative fact finding by displacing an agency's choice between two reasonably different views.<sup>16</sup> A board's decision should be affirmed unless: (1) it is contrary to law, (2) based on improper procedure, (3) not supported by competent, material and substantial evidence on the record, or (4) an abuse of discretion.<sup>17</sup>

Appellants claim that the Board's approval was not authorized by law because: (1) the Planned Unit Development does not preserve natural features on the property to the maximum feasible extent; (2) the Planned Unit Development does not protect 65% of the property as

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<sup>11</sup> *Id.*

<sup>12</sup> Const 1963, art 6, § 28.

<sup>13</sup> *Tomczik v State Tenure Comm*, 175 Mich App 495, 499; 438 NW2d 642 (1989); *Barak v Drain Comm'r for Co of Oakland*, 246 Mich App 591, 597; 633 NW2d 489 (2001).

<sup>14</sup> *In re Payne*, 444 Mich 679, 690-691; 514 NW2d 121 (1994).

<sup>15</sup> *Badder v Dep't of Human Services*, unpublished opinion per curiam of the Court of Appeals, issued February 8, 2011 (Docket No. 294245).

<sup>16</sup> *Reenders v Parker*, 217 Mich App 373; 551 NW2d 474 (1996); *Dignan v Mich Pub School Employees Retirement Bd.*, 253 Mich App 571; 659 NW2d 629 (2002). Deference is afforded to an agency's choice between two alternative views because of the agency's administrative expertise.

<sup>17</sup> *Badder, supra*.

qualified open space; and (3) fact finding and ordinance interpretation were unlawfully delegated to staff. Appellants further claim that the Board's factual findings were insufficient to support its conclusions and were not supported by competent, material and substantial evidence on the record. Specifically, Appellants argue that: (1) the Board failed to make sufficient findings to support its determination that natural resources will be preserved to a maximum feasible extent; (2) the Board did not determine that the proposed open space met the standards set forth in § 8.3.4(4); (3) the grading plan was not reviewed prior to the Board's approval of the Planned Unit Development; and (4) the Board failed to elucidate how the proposed development satisfies the objectives for a Planned Unit Development project.

Pursuant to the Ordinance R-1A, Rural and Hillside Residential Districts are zoned for the continued development of (1) rural areas suited to very low density residential development; (2) fragile hillside areas; and (3) interface areas between more intensive residential uses and agricultural land uses.<sup>18</sup> The uses permitted by right in R-1A districts include single family dwellings, customary uses and structures, public recreation, storage of trailer units, the keeping of domestic pets, general farming and horticultural uses, family day care homes and group day care homes.<sup>19</sup> Additionally, Planned Unit Developments are permitted by Special Use Permit (SUP) in R-1A districts.<sup>20</sup> The Ordinance states that the following objectives shall be considered in reviewing any application for a SUP for a PUD:

- (1) To provide a more desirable living environment by preserving the natural character of open fields, stand of trees, steep slopes, brooks, ponds, lake shore, hills, and similar natural assets.
- (2) To provide open space options.
- (3) To encourage developers to use a more creative and imaginative approach in the development of residential areas.
- (4) To provide for more efficient and aesthetic use of open areas by allowing the developer to reduce development costs through the by-passing of natural obstacles in the residential project.
- (5) To encourage variety in the physical development pattern of the Township by providing a mixture of housing types.
- (6) To provide for the retention of farmland by locating the allowed number of housing units on the agricultural units on the agricultural parcels of land in

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<sup>18</sup> Ordinance § 6.2.1.

<sup>19</sup> Ordinance § 6.2.2.

<sup>20</sup> Ordinance § 6.2.4(1); § 6.5A *et seq.* A Planned Unit Development (PUD) is defined as a land area which has both individual building sites and common property, such as a park, and which is designed and developed under one (1) owner or organized group as a separate neighborhood or community unit. Ordinance § 3.2.

clusters which are suitable for residential use and keep the remaining agricultural land in production or fallow and available for production.<sup>21</sup>

Qualifying conditions for a SUP include that: (1) the PUD project shall not be less than 20 acres in area; (2) the PUD shall be located within a Residential or Agricultural District, or combination of Residential and Agricultural Districts; (3) water and waste disposal shall comply with the Township Master Plan; (4) the proposed density of the PUD shall be no greater than if the project were developed with the lot area requirements of the particular zone district or districts in which it is located; and (5) open space shall be provided.<sup>22</sup> The four options for dedication of the provided open space include:

- (1) Open Space Dedicated for Private Use: A residential PUD with a minimum of 65% of the net acreage kept as open space and owned by the Home Owners Association or Condominium Association. That open space land shall be set aside as common land for the sole benefit, use and enjoyment of the present and future lot or home owners within the development.
- (2) Open Space Dedicated for Public Use: A Residential PUD with a minimum of 10% of the net acreage dedicated to the Township.
- (3) Open Space Dedicated for Deed Restricted Agricultural Land: A PUD with a minimum of 65% of the net acreage as deed restricted agricultural land.
- (4) Open Space Apportioned Between Private Use and Deed Restricted Agricultural Land.<sup>23</sup>

Section 8.1.3(3)(f) of the Ordinance states that, in reviewing an impact assessment and site plan, the Board and Commission shall consider the specific requirement that natural resources will be preserved to a maximum feasible extent, and that areas to be left undisturbed during construction shall be so located on the site plan and at the site per se. By definition, “maximum” is the “greatest quantity or value attainable,”<sup>24</sup> “feasible” means “capable of being put into effect or accomplish; practicable, or capable of being successfully utilized; suitable”<sup>25</sup> and “extent” is the “range, distance, or space that is covered by something or included in something.”<sup>26</sup>

Appellants argue that § 8.1.3(3)(f) requires an analysis and determination of whether there are other practicable alternatives that would preserve more natural features at the Site. The

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<sup>21</sup> Ordinance § 8.3.2.

<sup>22</sup> Ordinance § 8.3.3.

<sup>23</sup> Ordinance § 8.3.6.

<sup>24</sup> Merriam-Webster Dictionary <<http://merrimam-webster.com>> (accessed January 7, 2016).

<sup>25</sup> *Friends of Crystal River v Kuras Properties*, 218 Mich App 457, 466; 554 NW2d 457 (1996).

<sup>26</sup> Merriam-Webster Dictionary <<http://merrimam-webster.com>> (accessed January 7, 2016).

Board similarly concluded that § 8.1.3(3)(f) necessitates a comparison of potential development alternatives. However, the Board found it more pertinent to compare the proposed SUP/PUD with the type of development permitted at the Site by right under the Ordinance.

The Site has 2500 lineal feet on East Grand Traverse Bay and the property zoned R-1B could theoretically accommodate up to 35 individual lots. The property zoned R-1A could accommodate an additional 30 lots or more, depending on the configuration, elevation and grading and the Developer could remove as many trees as it felt necessary in order to market the lots. Presumably road development would be more intensive in order to support access to a minimum of 65 lots and multiple docks could be installed along East Grand Traverse Bay in the shoreline area. Under the Ordinance, exercising the uses permitted by right would allow considerably more development on the Site, which undoubtedly would result in a decrease in open space and significant destruction with respect to grading and deforestation.<sup>27</sup> Comparatively, the proposed SUP/PUD has 41 densely clustered units with smaller lot sizes, approximately 54 acres of open space, limited road development and one main dock at the shoreline to consolidate boat traffic.

Ultimately, the Board determined that natural resources will be preserved to the maximum feasible extent, stating:

The Board finds that any form of development is going to cause some disturbance to the site. Regardless, given that development of the parcel is allowed under the zoning Ordinance under both the R-1A and R-1B Zoning Districts, the PUD as proposed preserves as undeveloped area 54.23 acres as open space. The plan also includes through a small setback, 1500 lineal feet of undeveloped East Grand Traverse Bay waterfront, exclusive of dockage facilities. As such, given the other options available for development under the zoning ordinance, the plan as presented and as developed, will leave areas undisturbed during construction and afterward as depicted on the site plan and at the site.<sup>28</sup>

In addition to comparing the SUP/PUD with potential development by right, the Board asked engineers at Gourdie-Fraser if the natural resources would be preserved to the maximum feasible extent, given the proposed SUP/PUD. Gourdie-Fraser responded:

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<sup>27</sup> Preservation of natural resources and open space are both objectives to be considered in reviewing a SUP/PUD. Ordinance § 8.3.2.

<sup>28</sup> See Board Minutes for August 11, 2015. To support this conclusion, the Board relied on Commission Exhibits 1, 8, 9, 11, 12, 14, 19.2, 19.3, 19.7, 19.9, 19.10, 20, 21 and Board Exhibit 3.

In general, we believe this to be the case with the proposed plan...the intent of the private road and drain system design concepts appear to be reasonable in the context of the existing topography and existing drainage plan.<sup>29</sup>

The Revised Staff Report, dated May 13, 2015, also indicated that “the layout is utilizing the natural topography of the site in an effort to reduce the impacts on the natural resources at the site.”<sup>30</sup> The Commission and subsequently, the Board, rationally relied on the information provided by Gourdie-Fraser and staff in concluding that natural resources would be preserved to the maximum feasible extent.

This is a situation where substantial evidence was produced both to support and oppose the proposed SUP/PUD and where alternative findings could have been made based on the evidence. However, courts must give due deference to the agency’s regulatory expertise and may not invade the province of exclusive administrative fact-finding by displacing an agency’s choice between two reasonably differing views.<sup>31</sup> A court may not aside findings of an administrative agency merely because alternative findings also could have been supported by substantial evidence on the record.<sup>32</sup> Relying on competent, material and substantial evidence on the record, the Board lawfully exercised its discretionary authority in determining that the standard required by § 8.1.3(3)(f) was satisfied. Thus, the Court must affirm the Board’s finding that natural resources will be preserved to the maximum feasible extent.

The Ordinance defines “open space” as an area that is open to the sky exclusive of roads, parking lots and building envelopes.<sup>33</sup> Any application for a SUP shall provide for an open space option, such as open space dedicated for private use, open space dedicated for public use, open space dedicated for deed restricted agricultural land or open space apportioned between private use and deed restricted agricultural land.<sup>34</sup> When open space is dedicated for private use, a minimum of 65% of the net acreage must be kept as open space and owned by the Home Owners Association or Condominium Association.<sup>35</sup> Private use open space land shall be set aside as common land for the sole benefit, use and enjoyment of the present and future lot or

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<sup>29</sup> See Commission Exhibit 11, Gourdie-Fraser Report, dated May 4, 2015.

<sup>30</sup> See Revised Staff Report, dated May 13, 2015, § 2.9.

<sup>31</sup> *Badder, supra*.

<sup>32</sup> *Hughes v Almenda Twp*, 284 Mich App 50; 771 NW2d 453 (2009).

<sup>33</sup> Ordinance § 3.2.

<sup>34</sup> Ordinance § 8.3.6.

<sup>35</sup> *Id.*

home owners within the development.<sup>36</sup> However, only the following land uses may be set aside as common land<sup>37</sup> for open space or recreation use:

- (a) Private recreational facilities (but not golf courses) such as pools, or other recreational facilities which are limited to the use of the owners or occupants of the lots located within the PUD.
- (b) Historic building sites or historical sites, parks and parkway areas, ornamental parks, extensive areas with tree cover, low lands along streams or areas of rough terrain when such areas have natural features worthy of scenic preservation.
- (c) Commonly owned agricultural lands.<sup>38</sup>

The SUP application indicated that the PUD would include open space dedicated for private use and the Board found that the PUD, as submitted, preserves open space, keeping 65% of the site undeveloped, inclusive of the 1500 lineal feet of waterfront preserved as common open space.<sup>39</sup>

Appellants suggest that the proposed development does not protect 65% of the Site as qualified open space because preservation of a large open field does not meet the definition of qualified open space. Conversely, Appellees claim that parks and parkway areas are permissible land uses to be set aside as common land for open space.

“Parks” and “parkway areas” are not defined under the Ordinance. However, by statute, “park” means an area of land or water, or both, dedicated to one or more of the following:

- (i) Recreational purposes, including but not limited to landscaped tracts; picnic grounds; playgrounds; athletic fields; camps; campgrounds; zoological and botanical gardens; swimming, boating, hunting, fishing, and birding areas; foot and bridle paths.
- (ii) Open or scenic space.
- (iii) Environmental, conservation, nature, or wildlife areas.<sup>40</sup>

The portion of the Site designated as open space undeniably encompasses open or scenic space, nature or wildlife areas and areas dedicated to recreational purposes, such as swimming and boating. Clearly, the Ordinance permits parks to be set aside as common land for open space or recreation use and, while the Board did not specify that the undeveloped 54 acres of open space would be dedicated to “parks” and “parkway areas,” it can legitimately be inferred that the

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<sup>36</sup> *Id.*

<sup>37</sup> Common land is defined as a parcel or parcels of land together with the improvements thereon, the use, maintenance and enjoyment of which are intended to be shared by the owners and occupants of the individual building units in a planned unit development. Ordinance § 3.2.

<sup>38</sup> Ordinance § 8.3.3(5) and § 8.3.4(4).

<sup>39</sup> Board Minutes for August 11, 2015, pages 7, 8, 12, 15, 18.

<sup>40</sup> MCL § 141.321.

open space qualifies as a “park.” The Board’s determination was lawful, based on proper procedure, supported by competent, material and substantial evidence on the record and not an abuse of discretion. Therefore, this Court affirms the Board’s finding that the open space meets the requirements of Ordinance § 8.3.3(5), § 8.3.4(4) and § 8.3.6.

Township boards may receive assistance in the review process of a PUD, including the gathering of information or the making of a recommendation by another body, so long as such assistance is not precluded by township ordinance.<sup>41</sup> Review by a planning commission of PUD applications is not expressly prohibited by the Michigan Zoning Enabling Act.<sup>42</sup> When an ordinance designates a township board as the final review body and decision maker, and the planning commission’s report is merely a recommendation, case laws indicates that the township board must independently determine whether the proposed PUD meets the ordinance requirements.<sup>43</sup> While a planning commission may conduct a public hearing, review the PUD application and its preliminary site plan and submit a report with recommendations to the township board, the township board has the ultimate authority to review and approve the PUD.<sup>44</sup>

The Board implemented the following 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 within 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.

Appellants claim that, by implementing the above conditions, the Board unlawfully delegated final fact finding and ordinance interpretation to staff members. Appellees argue that the Board does not have engineering expertise to ensure that the emergency access plan, as set forth in the application, is built in a manner which ensures functionality.<sup>45</sup> Therefore, the Board

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<sup>41</sup> *Hughes, supra.*

<sup>42</sup> *Id.*; MCL §125.3101 *et seq.*

<sup>43</sup> *Hughes, supra.*

<sup>44</sup> *Id.*

<sup>45</sup> Using the same rationale, it is reasonable to assume that the Board would also rely on the Township Engineer to review and comment upon a grading plan for the Site.

relies upon its engineers and other qualified staff to ensure that the application and site plan standards, as approved, are properly engineered and constructed.

The Court acknowledges that Board members do not possess the same knowledge or expertise that a professional engineer or fire chief might. Specific zoning concerns like drainage, grading, emergency access and storm water control should, and may, be reviewed by skilled professionals who can provide informed opinions and reasonable recommendations to the Board. The gathering of information and the making of recommendations by experts/professionals is appropriate and not unlawful. However, complete delegation of authority and approval to said experts/professionals, without review, is unlawful. The Board may review recommendations and reports submitted by experts/professionals, such as the Township Engineer and the Fire Chief, and may choose to rely on any endorsements within, but the Board cannot approve expert findings that have not yet been made.

In this case, the location for the additional egress for emergency purposes was undecided at the time the Board voted to approve the SUP/PUD. The location and functionality of an emergency access road are zoning issues that may, and should, be reviewed by a professional organization like the Peninsula Township Fire Department. The Board could rely on any recommendations as to location and functionality *after* reviewing the findings of the Fire Department. Instead, the Board delegated the determination of the location and functionality to the Peninsula Township Fire Department and preemptively approved the Fire Department's findings. Similarly, the Board delegated approval of the grading plan to the Township Engineer.

Reliance on expert/professional recommendations is permitted, so long as a township board independently determines that a proposed PUD meets ordinance requirements. Here, the Board did not "independently determine" that the proposed SUP/PUD met the ordinance requirements because it delegated authority to the Fire Department and the Township Engineer to provide approval on certain zoning standards. The Court finds that the Board improperly delegated authority to staff and remands this issue for further consideration consistent with this decision and order.<sup>46</sup>

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<sup>46</sup> The Ordinance has required standards relating to soil erosion, grading and stormwater. In its findings and conclusions, the Board indicated that the Developer "shall submit a grading plan with sufficient details to evaluate the plan for protection of steep slopes and vegetation present on site as requested by the SESC and the Township Engineer." Similarly, the Board found that "storm water control review is currently being contemplated by the Township Engineer and the site shall comply fully with the requirements of Storm Water Control Ordinance." These

The requirement that the Board review expert findings and recommendations prior to approving an SUP/PUD is not a mere technicality. Recommendations and opinions of experts may be scientifically sound, but be undesirable in the overall context of a project. Also, those opposed should have the opportunity to confront such opinions in a public hearing or provide additional substantive information that may cast doubt on their efficacy in the overall plan before the Board. Ultimately, on matters of lay and expert opinion, it is the Board that must make final, accurate and independent determinations on all issues before them.

The Ordinance states that the following objectives shall be considered in reviewing any application for a SUP/PUD:

- (1) To provide a more desirable living environment by preserving the natural character of open fields, stand of trees, steep slopes, brooks, ponds, lake shore, hills, and similar natural assets.
- (2) To provide open space options.
- (3) To encourage developers to use a more creative and imaginative approach in the development of residential areas.
- (4) To provide for more efficient and aesthetic use of open areas by allowing the developer to reduce development costs through the by-passing of natural obstacles in the residential project.
- (5) To encourage variety in the physical development pattern of the Township by providing a mixture of housing types.
- (6) To provide for the retention of farmland by locating the allowed number of housing units on the agricultural units on the agricultural parcels of land in clusters which are suitable for residential use and keep the remaining agricultural land in production or fallow and available for production.<sup>47</sup>

With regard to Objective (1), the Board found that the preservation of 54.23 acres of open space and 1500 lineal feet of shoreline will preserve the natural character of the open fields largely contained within the open space. Further, the SUP/PUD provides a desirable living environment for future purposes of units both with respect to views and the preservation of the same from surrounding properties without significantly hindering viewsheds and having negative impacts upon the lakeshore and other natural assets of the property. With regard to Objective (2), the Board noted that 54.22 acres, or 65% of the property would be dedicated to open space. With regard to Objective (3), the Board indicated that the SUP/PUD preserves a substantial portion of the shoreline in a natural state to be used as shared waterfrontage, as opposed to

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statements are not legally sufficient findings to support a conclusion that the standards for soil erosion, grading and storm water have been met and the Court remands these issues for further consideration by the Board.

<sup>47</sup> Ordinance § 8.3.2.

individual unit private frontage. In addition, the Board found that when balancing market demands for desirable residential parcels in conjunction with the preservation of 65% of the property, the SUP/PUD is a more creative and imaginative approach to the development of the property for residential purposes. With regard to Objective (4), the Board found that the SUP/PUD preserves 1500 lineal feet of waterfront from direct development and maintains open space along Boursaw Road which results in minimal aesthetic changes from the road corridor. Additionally, the wetlands on the property will remain preserved. With regard to Objective (5), the Board found that the SUP/PUD has general design standards which allow for diversity in unit types. Finally, with regard to Objective (6), the Board found that the property is subject to residential zoning, is currently vacant and is not being utilized for farmland. Further, the SUP/PUD does not impact farmland utilized in the Township directly adjacent to the Site or within the vicinity of the Site. In addition, the Board indicated the likelihood that 65% of the open will remain fallow land.

The Appellants claim that the proposed SUP/PUD does not meet the objectives for a PUD project. However, this claim appears to rely on the Appellants' subjective understanding and interpretation of the required objectives. As outlined above, the Board went through each Objective and provided reasoning, on the record, as to how and why the individual Objective was satisfied. While the Appellants may not agree with the Board's reasoning, it is clear that there was competent, material and substantial evidence on the record to support the Board's finding that each Objective was met. As stated above, courts must give due deference to the agency's regulatory expertise and may not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views.<sup>48</sup> A board's decision should be affirmed unless: (1) it is contrary to law, (2) based on improper procedure, (3) not supported by competent, material and substantial evidence on the record, or (4) an abuse of discretion.<sup>49</sup> As such, the Court affirms the Board's findings that the SUP/PUD meets the objectives for a PUD project.

According to the Developer, Byron articulated a strong opposition to the PUD project and was, in effect, "prejudging the project before the public hearing process was complete and well

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<sup>48</sup> *Badder, supra.*

<sup>49</sup> *Id.*

before deliberations on the merits of the project.”<sup>50</sup> Specifically, the Developer notes that Byron endorsed, via a “Like” on a Facebook page, a group opposing the proposed PUD.<sup>51</sup> Prior to the August 11, 2015 meeting, the Developer requested that the Board address Byron’s potential conflict of interest and suggested that she may need to withdraw or recuse herself from consideration of the PUD project, stating “Byron’s endorsement of an opposition group unequivocally demonstrates her conflict of interest and the conflict of interest could be utilized as a legal basis to challenge the Township Board’s future decision, regardless of the final vote/decision.”<sup>52</sup>

Byron did not participate in the deliberation or voting process on August 11, 2015. On appeal, Appellants state that the Township required Byron to abstain from participating at the behest of the Developer, that no conflict of interest existed and that Byron’s recusal was improper. Appellees maintain that Byron recused herself because she recognized the possible appellate issue which could be raised by the Developer if she were to participate in the deliberation and voting on the SUP/PUD.

The neutrality and impartiality of members to a zoning proceeding are essential to the fair and proper operation of a zoning body, and the evil to be avoided is the creation of a situation tending to weaken public confidence in the zoning process.<sup>53</sup> In a zoning proceeding, bias can take the form of favoritism toward one party or hostility toward the opposing party, that is, personal bias or prejudice that imperils the open-mindedness and sense of fairness that a zoning official is required to possess.<sup>54</sup> An administrative officer is generally disqualified from acting as a decision maker if he or she has a personal or pecuniary interest in the proceedings.<sup>55</sup> The decision as to whether a particular interest is sufficient to disqualify a member of a zoning

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<sup>50</sup> See Correspondence from Joseph E. Quandt to Pete Correia, dated August 10, 2015. Other than the Facebook endorsement, discussed *infra*, the Developer does not provide additional evidence to support its claim that Byron “articulated a strong opposition” to the project.

<sup>51</sup> On its Facebook page the opposition group, Save the 81, indicates that its intent is to save, preserve and protect Old Mission Peninsula from over development and destruction. Byron “liked” a post on August 4, 2015, that requested individuals sign an online petition at [www.stoptc.org](http://www.stoptc.org). The home-page for the petition states, “Your shoreline is about to change!! There is a request before the township to build 41 ‘site’ condominiums on 25ft of East Bay shoreline, with some lots less than 100ft. wide! Add to that a dock for 40 boat slips! Please ask your Board members not to approve this development as proposed! Save The Outstanding Peninsula!”

<sup>52</sup> *Supra*, FN 33.

<sup>53</sup> 4 ALR6 263, § 2.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* However, it has also been held that the law does not require that members of zoning bodies have no opinion concerning the proper development of their communities and local governments would be seriously handicapped if any conceivable interest, no matter how remote and speculative, would require the disqualification of a zoning official.

proceeding is necessarily a factual one and depends upon the circumstances of the particular case.<sup>56</sup> As a general rule, as long as a rational basis exists for the zoning decision, the purpose or motive of the ordaining body becomes irrelevant to any inquiry into its reasonableness.<sup>57</sup>

Pursuant to the Peninsula Township Code of Ethics:

When making discretionary, administrative decisions, including but not limited to land use decisions, township officials shall refrain from making statements or taking any actions outside the formal decision-making process that would suggest they have prejudged the matter before them or would in any way preclude them from affording the applicant and the public a fair hearing.<sup>58</sup>

The Peninsula Township Board Rules of Procedure indicates that a member of the Board shall declare a conflict in connection with a zoning matter pending before the township board and shall disqualify himself or herself from deliberating and voting on the matter when the board member has made statements or taken any action outside the formal decision-making process that would suggest that he or she has prejudged the matter or would in any way preclude him or her from affording the applicant and the public a fair hearing.<sup>59</sup> Further, a Board member may disqualify himself or herself from deliberating and voting after a good faith determination that because of prior business or personal relationships with the applicant or with other participants in the public hearing process, or for other reasons, that he or she cannot afford the applicant and the public a fair hearing.<sup>60</sup>

By itself, choosing to “Like” a group’s Facebook page can hardly be considered strong and vigorous advocacy by an individual. The fact that a member participating in a zoning proceeding may have taken a tentative position on the subject of the proceeding does not necessarily establish that the member had predetermined the issue and the law does not require that members of zoning bodies have no opinion concerning the proper development of their communities and local governments.<sup>61</sup> However, by a plain reading of the Peninsula Township Board Rules of Procedure, when a Board member has made statements or taken *any* action outside the formal decision-making process, that member must declare a conflict of interest and

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Peninsula Township Code of Ethics, § A ¶ 13.

<sup>59</sup> Peninsula Township Board Rules of Procedure, § 9.2(4).

<sup>60</sup> Peninsula Township Board Rules of Procedure, § 9.2(6).

<sup>61</sup> 4 ALR6 263, § 2.

disqualify himself or herself from deliberating and voting on the relevant issue.<sup>62</sup> Here, Byron acted by “liking” a group opposing the proposed PUD. This act, while minor, did occur outside the formal decision-making process, appears to endorse a specific participant-group and suggests potential bias or prejudice against the Developer. Therefore, pursuant to the Peninsula Township Code of Ethics and the Peninsula Township Board Rules of Procedure, Byron’s recusal was proper.<sup>63</sup>

In conclusion, the Court finds that the Board lawfully exercised its discretion under the Ordinance when it determined that: (1) the natural resources will be preserved to the maximum feasible extent; (2) the open space meets the requirements of Ordinance § 8.3.3(5), § 8.3.4(4) and § 8.3.6; and (3) the proposed SUP/PUD meets the objectives set forth in Ordinance § 8.3.2. Further, the Court finds that Byron’s recusal was proper pursuant to the Peninsula Township Board Rules of Procedure. 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.

IT IS SO ORDERED.



01/15/2016  
03:57PM

PHILIP E. RODGERS, JR., CIRCUIT COURT JUDGE, P29082

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HONORABLE PHILIP E. RODGERS, JR.  
Circuit Court Judge

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<sup>62</sup> See Peninsula Township Board Rules of Procedure, § 9.2(4). Emphasis added by Court.

<sup>63</sup> Appellants’ claim that Byron’s participation in the project discussion potentially would have resulting in a different outcome for the SUP/PUD findings is mere speculation. Even if Byron had participated in the deliberation and voting on August 11, 2015, her vote would not have been outcome determinative.



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STATE OF MICHIGAN  
GRAND TRAVERSE COUNTY  
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06/10/2016 PAGE 1 OF 7  
PEGGY HAINES REGISTER OF DEEDS

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**EMERGENCY ACCESS EASEMENT**

THIS AGREEMENT is made and entered into this 9<sup>th</sup> day of June, 2016, by and between Terry L. Wells, Trustee of the Terry L. Wells Trust dated April 22, 1996, and Rebecca B. Wells, Trustee of the Rebecca B. Wells Trust dated April 22, 1996, whose address is 15966 Smokey Hollow Road, Traverse City, MI 49686 as Grantors, and The 81 Development Co., LLC whose address is 6978 Dixie Highway, Suite A, Clarkston MI as Grantee.

**RECITALS**

- A. Grantors are the owners of certain real property in Peninsula Township, Grand Traverse County, Michigan as described in **Exhibit A**. (Burdened Property).
- B. Grantee is the owner of certain real property contiguous to the Burdened Property in Peninsula Township, Grand Traverse County, Michigan as described in **Exhibit B**. (Benefitted Property)
- C. Grantee desires to obtain and construct an emergency access easement over a portion of the Burdened Property that will allow for ingress and egress to the Benefitted Property in the event of emergencies as defined in this Agreement.
- D. Grantors are willing to grant such easement based upon the terms and conditions contained herein.

*→ LESS than \$100-  
2RS*

NOW, THEREFORE, for valuable consideration, the receipt of which is acknowledged, the parties agree to the following:

1. Grant of Easement. Grantors hereby grant to the Grantee an easement to construct, and to use during Emergency Events, as defined herein, a non-exclusive 33' wide emergency access easement over and across a strip of the Grantors Burdened Property, along with a drainage easement, both as more particularly described in the Survey Sketch by Mansfield Land Use Consultants attached as **Exhibit C**. (the Easement).

2. Term. The term of this Agreement shall commence upon the date that the parties have signed this Agreement and shall continue into perpetuity to be an appurtenance to the Benefitted Property and run with the land.

3. Emergency Events. For the purposes of this Agreement, an "Emergency Event" is defined as any event that creates an immediate public health, welfare and safety hazard. The intent of this Agreement is to permit construction and use of a private emergency road to be used as a detour for the general public, and the passage of emergency vehicles, when normal access to the Benefitted Property is otherwise limited or rendered unsafe due to an Emergency Event.

4. Use of Easement. The Grantee may use the easement for construction and drainage and ingress and egress upon the occurrence of and during an Emergency Event as aforesaid. The Grantee shall use its best efforts to notify Grantor of its intent to use the Easement during an Emergency Event; however, the inability to contact Grantor despite such efforts shall not preclude the use of the Easement until such time as the Emergency Event has subsided.

5. Use of Easement: Maintenance and Improvements. Grantor retains all other rights to use the Easement provided exercises of such rights do not interfere with the rights under this Easement. Interference includes but is not limited to, physically modifying the Easement so as to make it impossible or difficult to use the road such as altering topography, installing fences, structures or other like improvements, piling or storage of dirt, debris or other materials.

- A. Grantee shall maintain the Easement in a safe condition and shall bare all costs of construction, as well as maintenance and repair of the Easement caused by the elements and use of the Easement.
- B. Grantee may provide gates on the east and west entrances to the easement it constructs, to the use of the Easement, and shall keep such gates locked except when the easement is in use under this Agreement; and an access method shall be provided to Owner and the Fire Department as required for emergency purposes.

6. Ownership. Grantor covenants that it is the owner of the above-described property on which the Easement is situated, that it has the right to convey the easement interest described herein, and that title to the Burdened Property is free and clear of any encumbrances which would interfere with the ability to grant the easement rights herein.

7. General Provisions.

- A. Binding Effect. All provisions of this Agreement, including the benefits and burdens, shall run with the land and are binding upon and inure to the heirs, assigns, successors, tenants, and personal representatives of the parties to this grant.
- B. Construction. The rule of strict construction does not apply to this Agreement. This Agreement shall be given a reasonable construction so that the intention of the parties to confer a usable right of enjoyment on the Grantee.
- C. Notice. All notices shall be sent by U.S. mail to the addresses provided for in this Agreement. Any party may lodge written notice of change of address with the other.

- D. Governing Law: Venue. The terms and conditions of this Agreement shall be construed, interpreted and enforced in accordance with the applicable laws of the State of Michigan. If any legal action is necessary to enforce the terms and conditions of this Agreement, the parties agree that the jurisdiction and venue for bringing such action shall be in the appropriate court in Grand Traverse County, Michigan.
- E. Amendment. No amendment or modification of this Agreement shall be binding unless expressed in writing and executed by the parties hereto or their successors.
- F. Counterparts. This Agreement may be executed in several counterparts, each of which taken together shall constitute the Agreement.

WITNESS WHEREOF, the parties have set their hands on the dates set forth below.

Grantors:

Terry L. Wells Trust UAD 4/22/96

X Terry L. Wells TTEE  
By: Terry L. Wells, Trustee

Date 6-9-16

Rebecca B. Wells Trust UAD 4/22/96

Rebecca B. Wells TTEE  
By: Rebecca B. Wells, Trustee

Dated: 6-9-2016

STATE OF MICHIGAN )  
COUNTY OF GRAND TRAVERSE)ss

On this 9th day of June, 2016, before me, a Notary Public in and for said county, personally appeared Terry L. Wells, Trustee of the Terry L. Wells Trust UAD 4/22/96 and Rebecca B. Wells, Trustee of the Rebecca B. Wells Trust UAD 4/22/96, to me known to be the same persons described herein, and who executed the within instrument and who acknowledged the same to be their free act and deed.

Philip A. Settles, Notary Public  
Grand Traverse County, MI  
Acting in Grand Traverse County, MI  
My commission expires: 9/12/20



**Burdened Property**

**Legal Description:**

Part of Southeast 1/4 of Southeast 1/4 of section 10 and part of Northeast 1/4 of Northeast 1/4 of Section 15, T29N R10W, beginning at the Northeast corner of said section 15, thence South 445.50 feet along East line, thence North 89 deg 47' West 973.33 feet to center line of Smokey Hollow Road, thence along said center line the following 4 courses, North 03 deg 20' East 290.21 feet, thence North 11 deg 39' East 37.58 feet, thence North 01 deg 20' East 268.38 feet, thence North 08 deg 58' West 187.15 feet, thence South 89 deg 47' East 167.31 feet, thence South 40 deg 26' East 440.51 feet to North line of said Section 15, thence South 89 deg 47' East 521.90 feet to Point of Beginning. Containing 12.048 Acres more or less. Parcel ID #: 11-115-001-00



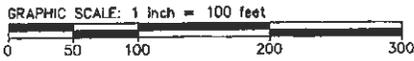
**BENEFITED PROPERTY**

**LEGAL DESCRIPTION AS SURVEYED:**

THAT PART OF GOVERNMENT LOT 1, SECTION 14, TOWN 29 NORTH, RANGE 10 WEST, PENINSULA TOWNSHIP, GRAND TRAVERSE COUNTY, MICHIGAN, MORE FULLY DESCRIBED AS FOLLOWS;  
BEGINNING AT THE WEST QUARTER CORNER OF SAID SECTION 14; THENCE NORTH 00° 26' 00" EAST ALONG THE WEST LINE OF SAID SECTION 14, 2680.32 FEET TO THE NORTHWEST CORNER OF SAID SECTION 14; THENCE SOUTH 88° 48' 33" EAST ALONG THE NORTH LINE OF SAID SECTION 14, 1100.32 FEET TO A MEANDER CORNER NEAR GRAND TRAVERSE BAY; THENCE ALONG AN INTERMEDIATE TRAVERSE LINE NEAR GRAND TRAVERSE BAY FOR THE NEXT 14 COURSES; THENCE SOUTH 01° 25' 58" WEST, 79.02 FEET; THENCE SOUTH 25° 05' 02" EAST, 518.78 FEET; THENCE SOUTH 16° 55' 47" EAST, 311.68 FEET; THENCE SOUTH 11 ° 58' 32" EAST, 199.94 FEET; THENCE SOUTH 23° 25' 55" WEST, 93.64 FEET; THENCE SOUTH 04° 27' 27" WEST, 183.95 FEET; THENCE SOUTH 07° 07' 53" EAST, 108.47 FEET; THENCE SOUTH 10° 47' 34" EAST, 232.80 FEET; THENCE SOUTH 30° 26' 26" WEST, 105.07 FEET; THENCE SOUTH 07° 17' 53" WEST, 193.38 FEET; THENCE SOUTH 17° 13' 58" WEST, 118.48 FEET; THENCE SOUTH 02° 04' 42" EAST, 96.58 FEET; THENCE SOUTH 13° 19' 36" WEST, 92.41 FEET; THENCE SOUTH 04° 54' 55" WEST, 110.42 FEET; THENCE LEAVING INTERMEDIATE TRAVERSE LINE NORTH 88° 41' 38" WEST, 204.43 FEET; THENCE SOUTH 28° 47' 55" WEST, 225.55 FEET; THENCE SOUTH 88° 41' 59" EAST, 297.95 FEET TO A POINT NEAR GRAND TRAVERSE BAY; THENCE SOUTH 15° 16' 57" WEST ALONG AN INTERMEDIATE TRAVERSE LINE NEAR GRAND TRAVERSE BAY, 60.08 FEET; THENCE NORTH 62° 20' 10" WEST, 107.35 FEET; THENCE NORTH 88° 41' 59" WEST, 204.40 FEET; THENCE SOUTH 28° 47' 55" WEST, 125.70 FEET TO THE EAST-WEST QUARTER LINE OF SAID SECTION 14; THENCE SOUTH 89° 46' 27" WEST ALONG THE EAST-WEST QUARTER LINE OF SAID SECTION 14, 944.97 FEET TO THE POINT OF BEGINNING. THE SIDELINES EXTEND TO THE WATER'S EDGE OF GRAND TRAVERSE BAY.

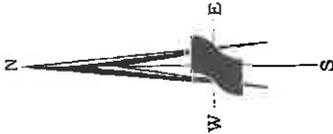


# Survey Sketch



### Legend

- Iron Found
- Monument Found
- Nail Found

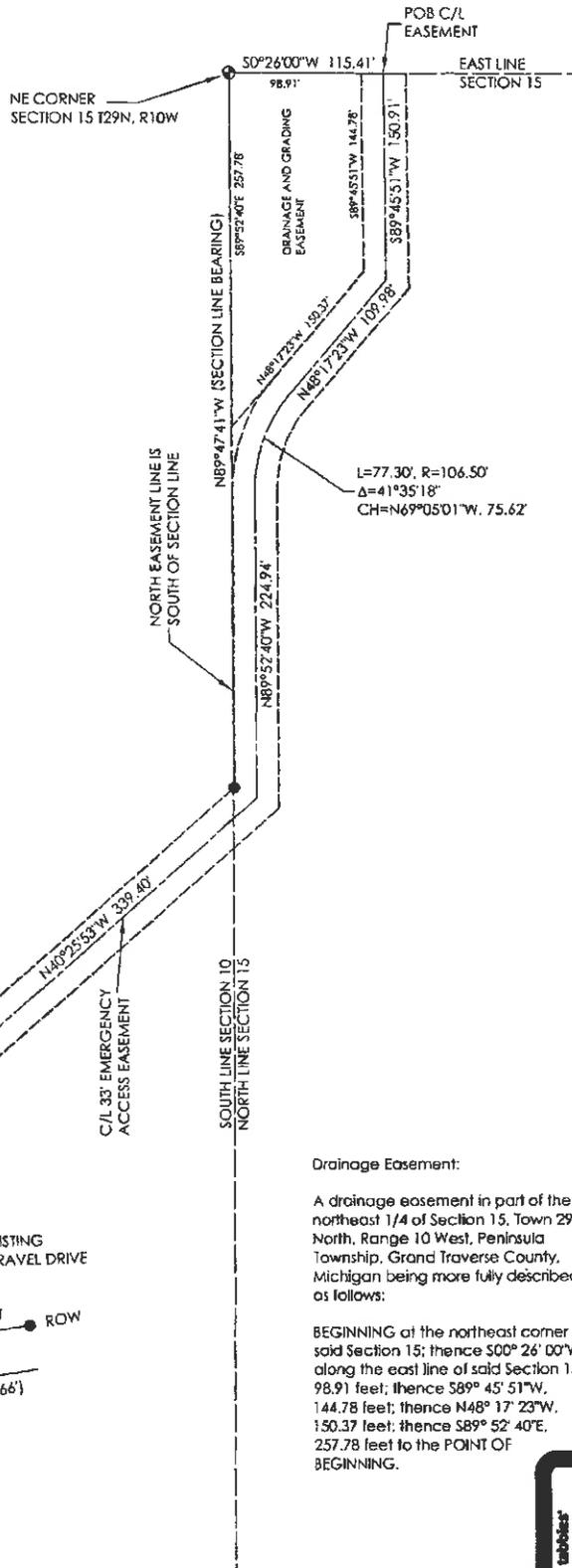
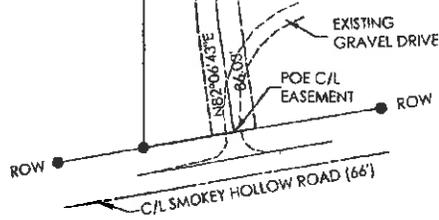


### Emergency Access Easement:

A 33-foot wide emergency access easement in part of the southeast 1/4 section 10 and part of the northeast 1/4 of Section 15, Town 29 North, Range 10 West, Peninsula Township, Grand Traverse County, Michigan with the centerline being described as follows:

Commencing at the northeast corner of said Section 15; thence  $S00^{\circ}26'00''W$  along the east line of said Section 15, 115.41 feet to the POINT OF BEGINNING; thence  $S89^{\circ}45'51''W$ , 150.91 feet; thence  $N48^{\circ}17'23''W$ , 109.98 feet; thence 77.30 feet along the arc of a 106.50 foot radius curve to the left, having an included angle of  $41^{\circ}35'18''$ ; and the long chord of which bears  $N69^{\circ}05'01''W$ , 75.62 feet; thence  $N89^{\circ}52'40''W$ , 224.94 feet; thence  $N40^{\circ}25'53''W$ , 339.40 feet; thence 106.80 feet along the arc of a 106.50 foot radius curve to the left, having an included angle of  $57^{\circ}27'24''$ ; and the long chord of which bears  $N69^{\circ}09'35''W$ , 102.38 feet; thence  $S82^{\circ}06'43''W$ , 86.03 feet to the east right of way of Smokey Hollow Road and the POINT OF ENDING. Sidelines of easement terminate at the east right of way of Smokey Hollow Road and the east line of said Section 15.

$L=106.80'$ ,  $R=106.50'$   
 $\Delta=57^{\circ}27'24''$   
 $CH=N69^{\circ}09'35''W$ , 102.38'



### Drainage Easement:

A drainage easement in part of the northeast 1/4 of Section 15, Town 29 North, Range 10 West, Peninsula Township, Grand Traverse County, Michigan being more fully described as follows:

BEGINNING at the northeast corner of said Section 15; thence  $S00^{\circ}26'00''W$  along the east line of said Section 15, 98.91 feet; thence  $S89^{\circ}45'51''W$ , 144.78 feet; thence  $N48^{\circ}17'23''W$ , 109.98 feet; thence  $S89^{\circ}52'40''E$ , 257.78 feet to the POINT OF BEGINNING.



**Mansfield**  
 Land Use Consultants  
 Planners - Civil Engineers - Surveyors  
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 Fax: (231) 946-8926  
 www.maeps.com

The B1 Development Company, LLC  
 Part of  
 Sections 10 & 15, Town 29 North, Range 10 West  
 Peninsula Township, Grand Traverse County, Michigan

DRN:MKG CR  
 6/7/16  
 14016  
 SHT 1 OF 1