

Joanne Westphal

From: nancywdavy@aol.com
Sent: Tuesday, September 27, 2016 11:00 AM
To: clerk@peninsulatownship.com; supervisor@peninsulatownship.com; treasurer@peninsulatownship.com; wlwitkop@charter.net; psyr2@acegroup.cc; bptems@gmail.com; jillcbyron@gmail.com; bbickle@aol.com; wunschis23@gmail.com; maura.a.sanders@gmail.com; wwahl@wahllegal.com; maapc@acegroup.cc
Subject: Attorney's Fees

To Peninsula Township Board Members
From: Nancy W Davy 14713 Shipman Road

As a resident of Shipman Road, I have taken great interest in the suit brought by some of my neighbors against the Township. I am not a Plaintiff in the suit, so I am not privy to all details and I have no background in law, so this **process** is all new to me. But, I have attempted to learn as much as I can by attending Township meetings that pertain to this issue and by asking lots of questions.

On Monday, August 29 I attended a hearing on the suit that was held in Judge Rodger's courtroom as regards a summary decision. Lacking any legal background, much of the proceedings was unfamiliar to me, but what baffled me the most was that the Township was represented by both the insurance attorney, Todd Millar and by Township attorney, Bryan Graham. I thought it odd that there were two attorneys and by Mr. Graham's statements to the judge, it appeared that his involvement at this juncture was a new twist.

At the Township Board meeting on Sept. 13, Margaret Achorn asked for documentation of fees for the law firm Young, Graham, Elsenheimer and Wendling. After that point, I began asking myself a number of questions that I would like to pose to you.

Why would two different attorneys represent the Township? Might it be that the insurance company is unwilling to represent some of these issues? I have no understanding of the way D and O insurance works. Maybe the insurance company refuses to represent Mr. Correia because the illegal split of his property was an action taken by him as a citizen of the Peninsula and not as a Director or Officer of the Township.

That raises a question that several residents of the Peninsula have asked me. Why is the Township paying for the defense of Mr. Correia at all as this action was done by him as an individual? It may certainly be the way that insurance companies work, but why should the citizens of the community pay for his private legal issues.

We also have concerns that as this suit drags on, we all pay either in out-and-out legal fees or in increased insurance rates. This for a suit that could have been solved at many points along the way. Why can't the Board take action to settle this with the residents of Shipman Road. Mr. Weatherholt stated in a meeting some months back, "We have our second opinion". The action of the County Prosecutor to accept this issue as worthy of legal consideration speaks volumes. This man would not take time from his busy schedule to look at an issue that he did not think had strong merit.

I am especially uncomfortable paying Mr. Graham to defend the Township as I believe that is was because of his ill-advised directive telling the Township Board and the Zoning Board to pass on examining this appeal that elevated one resident questioning the actions of Township officials about a land division to a messy law suit. Ask yourselves "Who has benefited from dragging this along for over a year?"

Thank you for your consideration of these questions.

Joanne Westphal

From: Todd Millar <tmillar@swoggerandbruce.com>
Sent: Tuesday, September 27, 2016 11:14 AM
To: treasurer@peninsulatownship.com; clerk@peninsulatownship.com; supervisor@peninsulatownship.com
Cc: Ellie Krieg; Bryan E. Graham
Subject: Kahn v Peninsula Twp
Attachments: 16.09.22 Decision and Order re Motions for Summary Disposition.pdf

Folks,

Here is the court's ruling on our motions for summary disposition. You will see that the court essentially dismissed all of the Kahn complaints. This still leaves the prosecutor lawsuit intact. However, Bryan and I discussed a strategy this morning to try to get the court to dismiss that lawsuit as well. It involves the filing of another motion asking the court to rule that the prosecutor has no standing to file a lawsuit under the Twp. LDA. We hope to get that filed soon so it can be heard before the October 28 settlement conference.

Pete and Monica were my main contacts with the Twp. Given Pete's passing and Monica's departure, who should I now communicate with as the Twp. representative?

Thanks and let me know if you have any questions.

Todd

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

NANCY L. KAHN, JON KINNE, SUE KINNE,
RICK SHAFFER, DIANE SHAFFER, SARA TAFT
and DAVID TAFT,

Plaintiffs,

v

File No. 2016031743CZ
HON. PHILIP E. RODGERS, JR.

PENINSULA TOWNSHIP, SALLY AKERLEY
and PETER CORREIA,

Defendants,

and

PEOPLE OF THE STATE OF MICHIGAN, ex. rel
GRAND TRAVERSE COUNTY PROSECUTING
ATTORNEY,

Plaintiff,

v

PENINSULA TOWNSHIP, SALLY AKERLEY,
and PETER A. CORREIA, jointly and severally,

Defendants.

Jay Zelenock (P58836)
Attorney for Kahn, Kinne, Shaffer and Taft

William D. Kahn (P27638)
Co-Counsel for Kahn, Kinne, Shaffer and Taft

Robert A. Cooney (P47454)
Attorney for State of Michigan

Todd W. Millar (P48819)
Attorney for Defendants

Bryan E. Graham (P35708)
Co-Counsel for Peninsula Township and Akerley

DECISION AND ORDER REGARDING
MOTIONS FOR SUMMARY DISPOSITION

Peter Correia and Shirlanna Correia own real property in Peninsula Township, Grand Traverse County, Michigan.¹ On August 28 2012, Peter Correia obtained approval from Peninsula Township to subdivide Parcel No. 28-11-565-946-40 (the “Parent Parcel”) into three “Child Parcels.”² Surveyor Jesse Mitchell’s August 20, 2012 survey of Correia’s property, which was recorded and incorporated by reference in Peninsula Township Board’s approval of LDA 187, certified that the Parent Parcel was approximately 19.22 acres.³ The Land Division Act, MCL § 560.101 *et seq.*, (hereinafter, the “Act”) limits the ability of a landowner to split or partition real property without complying with the platting process. Specifically, a division, together with any previous divisions of the same parent parcel or parent tract, shall result in not more than four parcels for the first 10 acres or fraction thereof in the parent parcel or parent tract, and for each additional 10 acres in excess of the first 10 acres in the parent parcel or parent tract, one additional parcel.⁴ The Peninsula Township Land Division Ordinance §6(a), further indicates that a proposed division shall comply with all requirements of the Land Division Act. On December 3 2014, Correia obtained approval from Peninsula Township Assessor Sally Akerley to further subdivide Child Parcel 28-11-565-946-43 into four additional Child Parcels.⁵

Shipman Road is partially located on Child Parcels 28-11-565-946-44, 28-11-565-946-45, 28-11-565-946-46 and 28-11-565-946-47. Nancy Kahn, Jon Kinne, Sue Kinne, Rick Shaffer, Diane Shaffer, Sara Taft and David Taft (hereinafter the “Original Plaintiffs”) own real property on or near Shipman Road. Kahn submitted objections to LDAs 187 and 212 on August 21, 2015. On September 8, 2015, the Peninsula Township Board (“Board”) determined that the Zoning Board of Appeals (“ZBA”) should review and decide whether LDAs 187 and 212 were valid. On October 8, 2015, the ZBA determined it lacked jurisdiction to determine the validity of the divisions because Kahn’s appeal was untimely.⁶

¹ Mr. Correia passed away on September 4, 2016. A Notice of Death of Party was filed on September 6, 2016.

² Land Division Application No.187 (“LDA 187”) created parcels 28-11-565-946-41, 28-11-565-946-42 and 28-11-565-946-43. The survey recorded and incorporated by reference with the Township’s approval of LDA 187 indicated that Parcel 28-11-565-946-40 was 19.22 acres, which included 3.75 acres of Shipman Road.

³ This acreage included the entire length of Shipman Road (3.75 acres). The Peninsula Township Zoning Ordinance states that Parcel Size/Parcel Area is the total area within the property lines excluding road and street right-of-ways. See Article III, § 3.2.

⁴ MCL 560.108.

⁵ Land Division Application No. 212 (“LDA 212”) created parcels 28-11-565-946-44, 28-11-565-946-45, 28-11-565-946-46 and 28-11-565-946-47.

⁶ Section 8 of the Peninsula Township Land Division Ordinance states that any person aggrieved by a decision of the Township Assessor may appeal that decision to the Zoning Board of Appeals (ZBA). Any such appeal shall be filed within thirty-days from the date of the decision from which the appeal is taken.

On April 25, 2016, the Original Plaintiffs filed a three-count complaint against Peninsula Township, Sally Akerley and Peter Correia.⁷ Count I alleged a violation of the Land Division Act, Count II alleged a violation of the Freedom of Information Act and Count III alleged a violation of the Open Meetings Act. On July 15, 2016, Defendants filed a Motion for Partial Summary Disposition.⁸ The Plaintiffs filed a cross Motion for Summary Disposition on July 28, 2016, and the Court heard oral arguments by the parties on August 29, 2016. After review of the evidence submitted and careful consideration of the parties' claims, the Court now issues this written decision and order for the reasons stated herein.

A motion for summary disposition pursuant to MCR 2.116(C)(5) pertains to a party's lack of legal capacity to sue. In reviewing such a motion, the court must consider the affidavits, together with the pleadings, depositions, admissions and documentary evidence filed in the action or submitted by the parties.⁹ Summary disposition is proper if the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact.¹⁰

A motion for summary disposition pursuant to MCR 2.116(C)(8), failure to state a claim upon which relief can be granted, tests the legal sufficiency of a claim.¹¹ Only the legal basis of the complaint is examined.¹² The factual allegations of the complaint are accepted as true, along with any inferences which may fairly be drawn therefrom.¹³ Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied.¹⁴ However, the mere statement of the pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action.¹⁵

⁷ See Grand Traverse County File No. 2016031561CZ. Subsequently, on August 8, 2016, the Grand Traverse Prosecuting Attorney filed a two-count complaint against the same Defendants, requesting declaratory judgment (Count I) and injunctive relief (Count II). See File No. 2016031743CZ. These two cases are premised on the same facts and have been consolidated by the Court.

⁸ Defendants' Partial Motion for Summary Disposition was filed before Case No. 2016031743CZ was initiated and prior to the cases being consolidated.

⁹ *George Morris Cruises v Irwin Yacht & Marine Corp.*, 191 Mich App 409; 478 NW2d 693 (1991).

¹⁰ *Id.* at 413.

¹¹ *Spiek v Dep't of Transportation*, 456 Mich 331; 572 NW2d 201 (1998).

¹² *Feyz v Mercy Mem Hosp*, 475 Mich 663; 719 NW2d 1 (2006).

¹³ *Id.*

¹⁴ *Mills v White Castle Sys Inc*, 167 Mich App 202, 205; 421 NW2d 631 (1988).

¹⁵ *NuVision v Dunscombe*, 163 Mich App 674, 681; 415 NW2d 234 (1988), lv den 430 Mich 875 (1988). See also, *Roberts v Pinkins*, 171 Mich App 648, 651; 430 NW2d 808 (1988).

A motion filed under MCR 2.116(C)(10) tests the factual support for a claim and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.¹⁶ Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that “there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.¹⁷ The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.¹⁸ The nonmovant then has the burden of showing that a genuine issue of disputed fact exists and producing admissible evidence to establish those disputed facts.¹⁹ Conjecture, speculation, conclusions, mere allegations or denials, and inadmissible hearsay are not sufficient to create a question of fact for the jury.²⁰ The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.²¹ If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.²² Trial courts are not permitted to assess credibility or to determine facts on a motion for summary disposition.

In their Partial Motion for Summary Disposition, Defendants claim that the Original Plaintiffs lack standing to sue for a violation of the Act and thus, have failed to state a claim upon which relief can be granted. Moreover, Defendants contend that on August 25, 2016 and August 26, 2016, Peter Correia and Shirlanna Correia executed quit claim deeds recombining the divided land of the Parent Parcel so that only four Child Parcels remain and assert that, because the land is now in compliance with the Act, the case brought by the Grand Traverse County Prosecuting Attorney is legally moot.

¹⁶ *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001).

¹⁷ *West v Gen Motors Corp*, 469 Mich 177; 665 NW2d 468 (2003).

¹⁸ MCR 2.116(G)(3)(b); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

¹⁹ *Meagher v Wayne State Univ*, 222 Mich App 700, 719; 565 NW2d 401 (1997); *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

²⁰ *LaMothe v Auto Club Ins Ass’n*, 214 Mich App 577, 586; 543 NW2d 42 (1995); *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995); *SSC Assoc Ltd Partnership v Detroit Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991).

²¹ MCR 2.116(G)(4); *Maiden*, *supra* at 120.

²² *McCormic v Auto Club Ins Ass’n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

The Act designates specific parties that may bring a complaint for a violation of the Act, including: any municipality, board of county road commissioners or county plat board may seek an injunction of any violation; the attorney general or the county prosecuting attorney may bring an action in the name of the state; and the purchaser of any land which was partitioned or split in violation of the Act may bring a claim.²³ The Michigan Court of Appeals has found that:

Under the [Act], a municipality, board of county road commissioners, county plat board, the attorney general, a prosecuting attorney, or the purchaser of an improperly divided parcel has standing to challenge a land split. Adjacent landowners... are not granted standing under the Act to challenge a land split.²⁴

Here, the Original Plaintiffs are merely adjacent landowners and do not have standing under the Act to challenge the land splits. However, the Grand Traverse County Prosecuting Attorney does have standing to bring a complaint for a violation of the Act. Therefore, the Defendants' Motion for Partial Summary Disposition pursuant to MCR 2.116(C)(5) and MCR 2.116(c)(8), as is granted as to Plaintiffs Nancy Kahn, Jon Kinne, Sue Kinne, Rick Shaffer, Diane Shaffer, Sara Taft and David Taft only. Conversely, because they lack standing to challenge a land division under the Act, the Original Plaintiffs' request for summary disposition as to Count I is denied.

While there is evidence that the Act was violated by LDA 212, the Grand Traverse County Prosecuting Attorney has not moved for summary disposition on its request for declaratory relief finding LDA 212 void or its request that the Court order an injunction prohibiting development of Parcel A-2. Furthermore, if the Child Parcels have, in fact, been recombined so they are in compliance with the Act, declaratory relief based upon the Act is not warranted. However, injunctive relief may be warranted because, pursuant to §10 of the Peninsula Township Land Division Ordinance, any parcel created in noncompliance with said Ordinance shall not be eligible for any land use permits, building permits, or zoning approvals, such as special land use approval or sit plan approval.

As public policy, the Freedom of Information Act (FOIA) guarantees that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees.²⁵ A public body's shall

²³ MCL § 560.265, MCL § 560.266, MCL § 560.267.

²⁴ *Dalrymple v McClain*, unpublished opinion per curiam of the Court of Appeals, issued December 15, 2011 (Docket No. 301088).

²⁵ MCL 15.231.

respond to a FOIA request within five business days.²⁶ If a public body makes a final determination to deny all or a portion of any request, the requesting party may commence a civil action in the circuit court to compel the public body's disclosure of the public records.²⁷ A requesting party may also seek judicial review of any nondisclosure by commencing a civil action in the circuit court.²⁸

If a person asserting the right to receive a copy of all or a portion of a public record prevails, the court shall award reasonable attorneys' fees, costs and disbursements.²⁹ For a party to "prevail" in a FOIA action, the court must conclude that the action was reasonably necessary to compel the disclosure of public records and that the action had a substantial causative effect on the delivery of the information to the moving party.³⁰ However, the fact that a party's substantive claim under FOIA is rendered moot by disclosure of the records after an action has been commenced in circuit court is not determinative of the moving party's entitlement to fees and costs.³¹

Nancy Kahn made a FOIA request to Peninsula Township ("Township") for all documents related to LDAs 187 and 212. After receiving the Township's response, Kahn filed a FOIA appeal claiming there were critical documents missing, including portions of Item 47 and an email chain, dated August 13, 2015, between Sally Akerley and GIS technician Mike Steffes.³² On October 26, 2015, the Board decided to release all information previously redacted as attorney client privilege that pertained to Kahn's FOIA request and to waive the \$600 actual fee in favor of the estimated fee of \$200. At Kahn's July 1, 2016 deposition, she responded

²⁶ MCL § 15.235(2).

²⁷ MCL § 15.240(1)(b).

²⁸ MCL § 15.240(4).

²⁹ MCL § 15.240(6). If a court determines that the public body has arbitrarily and capriciously violated FOIA by refusal or delay in disclosing or providing copies of a public record, the court shall order the public body to pay a civil fine of \$1,000. MCL § 15.240(7). The court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of \$1,000 to the person seeking the right to receive a copy of the public record.

³⁰ *Amberg v City of Dearborn*, 497 Mich 28; 859 NW2d 674 (2014). A plaintiff prevails in a FOIA action so as to be entitled to a mandatory award of costs and fees where he is forced into litigation and is successful with respect to the central issue that the requested materials were subject to disclosure under FOIA, even though the action has been rendered moot by subsequent disclosure of the documents. *Cramer v Village of Oakley*, __ Mich App __; __ NW2d __ (June 23, 2016). In *Cramer*, the court found no evidence, apart from the fact that requested documents were produced after the suit was filed, to support the contention that the filing of the action was necessary or had a substantial causative effect on defendant's production of the documents.

³¹ *Amberg v City of Dearborn*, 497 Mich 28; 859 NW2d 674 (2014).

³² FOIA Item 47 was a four-page document including the Assessor's Map and "2012033-Act 132 SHT 1.pdf (Assessor Map)." Plaintiffs claim that Akerley created, but never disclosed, the "Attached Photo," page-four of Item 47, that was sent to Jesse Michelle.

“No” when asked, “As we sit here today, are there any documents that you have requested from the township that you have evidence exists that you believe have not been produced for you?”³³ In addition, when asked “So no matter how circuitous a route you had to go through to get it, as least as of today you believe you’ve received everything you’ve asked for?” Kahn responded “Yes.”³⁴

However, in their Motion for Summary Disposition, Plaintiffs argue that they are entitled to summary disposition on Count II because the Defendants violated FOIA by failing to produce, disclose or claim an exemption for two critical documents: (1) a color version of the “Attached Photo” and (2) the August 13, 2015 email from Mike Steffes. Plaintiffs acknowledge they were provided a black and white copy of the “Attached Photo” on June 30, 2016, but state that “the color modifications...are very material, given the extension of the boundaries into the waters of Bowers Harbor.” Further, the Plaintiffs admit to receiving a copy of the Steffes email, albeit, produced by Grand Traverse County and not the Township.

Conversely, Defendants contend that the provision of a black and white copy of the “Attached Photo” met the requirements of the FOIA request because Kahn did not request a color copy of the photo and thus, Defendants were not obligated to provide one. Akerley did not include the Steffes email in the initial FOIA packet based on her belief that it was exempt due to attorney/client privilege, but claims that the document was delivered immediately once after Kahn specifically requested the document.³⁵

In *Cramer v Village of Oakley*, the court did not find a violation of FOIA, noting that the record indicated the defendant had demonstrated a good faith intention to fulfill the FOIA request, produced the documents promptly and took no actions that could be seen as an attempt to withhold any documents from disclosure.³⁶

Similarly, in this case, the Board determined on October 26, 2015 that all information that was redacted as attorney client privilege should be released to Kahn and demonstrated a good faith intention of fulfilling her FOIA request. Further, Kahn has admitted on the record that, despite the circuitous route to obtain the documents, all the documents she requested from the Township have been produced. Here, the Defendants indicated they would provide the FOIA

³³ See Kahn Deposition, page 93.

³⁴ Id.

³⁵ See Akerley Deposition, page 104.

³⁶ Cramer, supra.

information well before Case No. 2016031561CZ was filed, therefore, the lawsuit was not reasonably necessary to compel the disclosure of the documents and did not have a substantial causative effect on the delivery of the information to Plaintiffs. As such, the Plaintiffs did not “prevail” on their FOIA claim within the meaning of MCL § 15.240(6) and they are not entitled summary disposition as to Count II.

Under the Open Meetings Act, MCL § 15.261 *et seq.*, (“OMA”) a “meeting” means the convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy, and a “decision” means a determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy.³⁷ All decisions of a public body shall be made at a meeting open to the public and such decisions of a public body shall be presumed to have been in compliance with the requirements of the Act.³⁸ A civil action may be filed in the circuit court to challenge the validity of a decision of a public body made in violation of the OMA.³⁹ When a public body is not complying with the OMA, and a person commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance and succeeds in obtaining relief in the action, the person shall recover court costs and actual attorney fees for the action.⁴⁰ In addition, a public official who intentionally violates the OMA is guilty of a misdemeanor punishable by a fine of not more than \$1,000, and shall be personally liable in a civil action for actual and exemplary damages of not more than \$500 total, plus court costs and actual attorney fees to a person or group of persons bringing the action.⁴¹

At the September 8, 2015 meeting, Township Attorney Bryan Graham noted that, with regard to Kahn’s appeal, legal issues should be addressed by the ZBA and those legal issues can be appealed to the Circuit Court.⁴² The Board then voted to stop discussion on the appeal and to send the issue of the validity LDAs 187 and 212 to the ZBA. On October 8, 2015, the ZBA

³⁷ MCL § 15.262.

³⁸ MCL § 15.263.

³⁹ MCL § 15.270. The circuit court shall not have jurisdiction to invalidate a decision of a public body for violation of the OMA unless the action is commenced within 60 days after the approved minutes are made available to the public.

⁴⁰ MCL § 15.271(4).

⁴¹ MCL § 15.272 and § 15.273.

⁴² It was also noted that the conflict of interest issue would depend on the validity of the divisions as determined by the ZBA.

determined that it did not have jurisdiction to hear Kahn's appeal because it was not filed within the 30-day period required by the ordinance and thus, did not address the validity of LDAs 187 and 212. Subsequently, on October 26, 2015, the Board addressed Kahn's FOIA appeal and her request pertaining to LDAs 187 and 212. With regard to the LDAs, Township Attorney Peter Wendling stated "this item is informational. It is not an action item."⁴³ Notwithstanding, the Board took the opportunity to discuss the facts regarding the land divisions, although they ultimately made no decision on Kahn's request.⁴⁴

The Plaintiffs argue that the Open Meetings Act (OMA) was violated because: (1) the Board determined, *prior* to the September 8, 2015 meeting, that it would take no action and make no comments on the conflict of interest allegations; (2) the ZBA limited public comment at the October 8, 2015 meeting; and (3) the Board determined, *prior* to the October 26, 2015 meeting, that it would take no action on land division issues raised by Plaintiff Kahn.

Defendants contend that the decisions made by the Board and ZBA were made in open meetings, after deliberation and public comment and that Plaintiffs have failed to provide evidence to establish these decisions were pre-determined by the Board and ZBA.

A review of the meeting minutes from September 8, 2015, indicates that the Board did, albeit briefly, discuss the land divisions and the conflict of interest issue. After hearing Graham's legal opinion as to proper jurisdiction, the Board ended the discussion and decided to send the issue to the ZBA. There is a clear record contained in the meeting minutes with respect to the decision making process on this matter and no evidence that the OMA was violated.

The meeting before the ZBA on October 8, 2015, was strictly to determine whether or not the ZBA had jurisdiction to hear Kahn's appeal. The jurisdictional issue was primary, with the land divisions propriety and the conflict of interest issues being secondary. The meeting minutes confirm that the public was permitted to comment on the ZBA's jurisdiction, being that it was the preliminary issue before the ZBA. The fact that the public was prohibited from extensive commentary on the merits of the appeal is not a violation of the OMA.⁴⁵ It is evident from the

⁴³ See October 26, 2015 Peninsula Township Board Special Meeting minutes.

⁴⁴ As of October 26, 2015, Plaintiff Kahn's right to appeal the Zoning Board decision to the Circuit Court had not yet expired, therefore, the Board was prohibited at that time from determining the merits of the issue. Because Plaintiff Kahn failed to appeal the Zoning Board decision to the Circuit Court, Defendants assert that she failed to exhaust her administrative remedies.

⁴⁵ In fact, despite the ability to limit comments solely to the jurisdictional issue, the ZBA permitted public comment on other aspects of Kahn's appeal.

record that the public had the opportunity to comment on the jurisdictional issue before the ZBA, as well as on extraneous issues relating to the appeal, and that the ZBA did not violate the OMA.

Kahn's right to appeal the ZBA decision to the Circuit Court had not yet expired on October 26, 2015. Wendling indicated that Kahn's next step procedurally was to appeal to the Circuit Court, and thus, informed the Board that Kahn's request regarding Land Division splits 187 and 212 was not "an action item." Regardless, the Board decided to "lay out the facts regarding [the] issue" and heard public commentary and concerns pertaining to the land division splits and Township procedure. After testimony from Akerley, Kahn and Correia, the Board found that the land division issues could be resolved by Kahn appealing to a higher court and suggested that she should proceed through the "normal channels" for resolution. Technically, the Board never made a decision to take no action.

The Plaintiffs' characterization that the decision to take no action was pre-determined without deliberation or vote by the Board is disingenuous. The record from October 26, 2015, clearly reflects that the Board discussed the validity of LDAs 187 and 212 and the proper entity to reach a decision on the merits of this issue. The Court does not find that the Board violated the OMA on October 26, 2015.

In conclusion, the Defendants' Partial Motion for Summary Disposition is granted as to Nancy Kahn, Jon Kinne, Sue Kinne, Rick Shaffer, Diane Shaffer, Sara Taft and David Taft. For the reasons stated herein, the Plaintiffs' Motion for Summary is denied as to Counts I, II and III. Because there remain further issues to be decided, this Decision and Order does not close the case.

IT IS SO ORDERED.



09/22/2016
02:08PM

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

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge