

## **Town Board Meeting (Public Hearing)**

**November 17, 2016 7:00 p.m.**

**St. Joseph's Church - 12675 Center Road**

Meeting called to order at 7:00 pm.

Present: **Avery, Byron, Westphal, Manigold, Weatherholt, Witkop, Rosi, Hayward. Jim Young.** Rachel Mavis, recording secretary.

### **Approve Agenda**

**Motion by Weatherholt / Westphal to approve agenda. Motion passed.**

### **Brief Citizen Comments**

Margaret Achorn - 11284 Peninsula Drive. Thank you to the board members who are leaving office - Penny, Wendy, Dave, Jill, and Mark. Thank you for your service. At the conclusion she'll be taking the oath of office to be a representative. She would like to remind the board members that when they were sworn in (election or appointment) each one made a pledge to the township. They took on a position of public trust, to manage the affairs of the township and the best interest of the public. Protect public health, safety, and welfare of persons and property in this township. She asks that they honor their oath and hold high their responsibility to the people of this community.

### **Conflict of Interest**

**Byron** asked to recuse herself.

**Avery** asked to recuse himself. The information came to him just today, as well as when he arrived. One report attacks a client of his, so he feels he has a conflict of interest. (Manigold asked if the board could agree / disagree with board member's request to recuse themselves. Weatherholt thinks it's up to the board member. Witkop would like Jim Young to speak to it. Young said that the ethics code is what applies - there is no provision that board makes final decision. He respectfully suggests under ethics policy that it's a legitimate conflict of interest.)

### **New Business**

**Manigold** - Will now close regularly scheduled meeting and open public hearing on The 81 project.

Summary of project - the board passed 81 and it went to court. The court decided the decisions made were valid, but sent two of them back. Those are the two that will be addressed this evening.

Young - the areas passed back to them can be summarized into four separate categories.

- adequate safety standards for fire protection (including emergency access road)
- soil erosion

- grading
- storm water

His recommendation that based on the planners the board works through the four issues. The public must understand that the board's decision is limited only to the issues that were remanded. The board cannot redo any prior decisions.

**Manigold** - will now begin public hearing - invitation for presentation.

Philip Settles, 5168 US 31 N. (attorney) - On August 15 the board approved the objectives of the ordinance and approved the general requirements and specific requirements and SUP. They left grading to be decided by township engineers; left emergency safety to fire chief. The judge said that the board has to listen to opinion of the expert and make their own decision, not depend upon the decision of the experts.

Engineering reports are at exhibits 7 & 11. There are four letters from the engineer (beginning in March '16) - confirms that open space, storm water, and road design were approved; also approved site grading. Fire road was developed from northwest portion of development that is in compliance with int'l fire code (more than 30 units requires secondary access). Exhibits 16 & 13 show that fire chief agreed. Engineer approved new fire road (exhibit 7) and East 81 (widened road). Reaffirmed in exhibit 11.

Next exhibit that relates with judge's remand is the SESC permits (exhibit 17). Those exhibits provide evidence for every standard in regards to grading and soil erosion.

In regards to the adequacy of fire access / fire protection plan - as of 8/9/16, fire chief had minor concerns about signs (exhibit 16). In this exhibit is also a letter from that same day, where the fire chief's approval is supported by fire code and reasoning is given. Exhibit 13 is the the chief's approval of East 81 (when road was widened, they needed chief's approval that it met fire code). Exhibit A supports these findings. In township's proposal there was a proposal to move the fire access road. Settles has a letter from Ron Taylor stating that option would not be compliant (too close to other entrance). If Appendix D of the int'l fire code is not necessary, then secondary access is not necessary. They've provided exhibits and reasoning to prove that they should have their PUD and SUP approved now.

Doug Mansfield - 830 Cottageview Dr. Ste. 201. He looked through township for dead end roads and how many lots were at the end of those roads. They found 40 dead end roads in Peninsula township alone. There are 2 or 3 lots all the way to 61 lots or more (Bluffs) where this is the case. Underwood Ridge, which has been given awards by this township, doesn't have a second road. His client pulled a permit on Chestnut Ridge where this is the case. (Recently approved by township.) If looking at past policy and history, dead end roads with a cul-de-sac is an appropriate land use. This parcel is 3-sided... one side was created in '92, and the other side also does not connect. Underwood has 5 cul-de-sacs with no outlets. They feel they have met the court remands.

Dave Petrov - 9988 Riley Rd., Interlochen. He's disappointed by Doug Mansfield. He has been a firefighter for 8 years. One of the things that the int'l fire code tries to do is find ways to overcome fires. They apply newer standards and get better (sprinklers, etc.) When you talk about the possibility of having blockage because of a fire, it's a remote case - the bigger issue is snow and ice prohibiting fire trucks from being able to get in. Think about it from what it's supposed to be, not the easiest way to get around it.

David Dapp - he is a confused citizen tonight. He wants to speak to the bigger picture. He wants to speak to the soil erosion plan because it was avoided prior to this issue. Any soil erosion should be accompanied by a baseline study. We've learned that toxic chemicals have been used in the past on the peninsula. Developer should provide soil testing. If you grade the soil, as the developer is planning, it can move the contaminants to another area. A thorough environmental study should be done. Second issue: the board has an issue to protect the health, safety, and welfare of its residents. Community septic may not be a viable system for this property.

Mark Nadowski - 10 McKinley Rd., president of Protect the Peninsula. He'd strongly recommend that the board table this project until the new town board and new planning board take their place and have the time to study the information. The new board should demand that additional environmental studies be done since this doesn't conform to the master plan or other developments. At previous town hearings (2015), people were limited to 3 minutes - suppressing the voices of the people. The findings of fact were revised prior to the vote by the township attorney. It's clear that this project doesn't meet MP and zoning ordinances. It should go back to PC to make sure all concerns are addressed so new town board has all info to make proper decision. This and all future projects will protect - not destroy - Old Mission Peninsula.

Ann Rogers, 1236 Peninsula Dr. NMEAC. Dedicated to bringing education and protection of the environment to people in this area. They've been involved since '80. It's difficult to tell from agenda if there was supposed to be a vote tonight. It should be tabled until there is info on a lot of the critical issues that were brought up. NMEAC asked for an environmental impact statement at the first meeting last fall and still haven't received one. You can't put a bluff or trees back once they're cut back. It's not fair to saddle a new board with the consequences (intended / unintended).

Greig Reizig - co-chair of NMEAC. It's opposed to 81 Project. The proposal includes grading over steep ridges - including over 150-year-old trees. He is worried about the issues that could come out of that. They believe a complete environmental assessment should be done. They suggest tabling issue until new board is seated.

Wendell Woodard - 17768 Smokey Hollow. During the meeting that he attended, he was the last to speak regarding his concerns about the developer not testing the soil for toxicity. Each comment by citizens ahead of him were fundamentally sound and he supports them. Tonight he wants to reiterate his concern about the necessity of testing the soil, and the impact the development could have on the water table. Given the land restructuring this would take, would we want the runoff into the bay? Do we want to bequeath to our children and grandchildren a sprawl of wasteland, brought on by private wealth? You can't buy back an environment. When ecosystems are gone, they're gone for good. He humbly, respectfully, and supportively requests that the board not falter from the master plan for the peninsula and stay the course. It's not just the residents that will suffer, but the unique peninsula - both land and bay.

Ellen Barnes. 11423 Bluff Rd. She has been interested and amazed at development over last 20 years. The developers of Underwood Hills preserved the integrity of the hills. The same with Eagle's Landing - they've preserved the hills and valleys. Didn't change the contouring of the land.

Jim Floray 13617 Bluff Rd. - He's not heard data, facts, or costs based on environmental factors. We have a potential situation in front of us if the soil is contaminated. Grading should not be conducted until a soil test has been completed. The following is based on data, financial risk, and actual events across US - in state after state, old orchards that are being developed became an environmental issue b/c the soil was contaminated with lead and arsenic. Lead arsenate has been used in pesticides in the past. They were designed to be persistent, and it's that persistence that has caused issues for decades past their use. They bind tightly to the soil and separate into lead and arsenic. Lead arsenate can also be released in the soil when it's disturbed. It could be released into the bay. It was one of the most commonly used sprays used in fruit orchards. Arsenic and lead do not break down, but accumulate. Contaminated topsoil needs to be scraped away and removed - it can cost \$1 million per acre. In NC - a 500-acre orchard was turned into residential housing. 90 homes were built by '99. A local resident heard about birth defects in

babies born within this development. Testing was initiated and high arsenic and lead were found. An emergency removal was ordered. 31,500 tons of contaminated soil were removed - costing \$4 million. In NJ, soil samples showed elevated arsenic levels. \$500,000 to remove contaminated soil. In Fenton, MI - the developer found contaminated soil. 23 of the 90 lots have high arsenic - won't pose a health risk unless the soil is disturbed. He's provided data and financial implications - a thorough study needs to be done to analyze soil and ground water (for wells). Drinking water can't be an issue for those individuals.

Garrett Chase 15009 Bluff Rd. Question to developer and counsel - can you assure me and my children that you will never ask us to boil water or drink bottled water in years to come?

Jim Komendera - 4168 Rocky Shore Trail, President of Preserve Old Mission. So much has been said about soil testing - soil testing of another piece of local farm land showed 10x lead and 5x arsenic (2013). An alternate is a use by right. This proposed PUD does more to harm the environment than if the developer went and put in a regular platted sub (as he's allowed to do). The Moorings (in Elmwood township) is a soil erosion disaster. It was approved by their township.

Scott Howard, 420 E Front St., representing Preserve Old Mission. He wants to focus on the "remand issues" and put aside that the ordinance requires us to preserve natural features. Put aside that the ordinance tells developers to be creative with the natural features. Focus specifically on some of the soil erosion issues. 8.3.1 sub paragraph 3.i - has that standard been met? - that this proposed development will not create soil erosion problems? Is this the type of development that will not cause sedimentation problems? Anecdotally a few have been shared that have been approved and have caused problems (Moorings in Elmwood and Meijer in Acme). Look at what scientists have to say - you're dealing with steep slopes on this particular property, as well as sandy slopes (highly erodible). You're moving a massive amount of dirt on this site. There's 30 feet cut off of bluff, 5-20 feet of fill going in. Based on evidence on record, are you assured that this project will not cause problems? 8.3.1 paragraph 3.k - grading or filling will not affect character of property or neighboring properties. Be ok with re-grading the property or not ok with it, not just ok with one area, like developer is. When it comes to fire issues and how we talk about open space, there's the 65% open space preservation requirement. Their idea of "open space" includes the community septic system, strips of land between people's homes and road, and a parking area for golf carts down by beach - none of that is "open space" under the terms of the ordinance. It's approximately 5 acres off from what they claim is open space - 58%, not 65%. That's reason enough to deny this project. He's provided 10 pages of proposed findings of fact. Does this project meet those standards? If the answer in your heart is no, deny the project. The evidence is there, just adopt the motion.

Jack Kelly - he's the township supervisor for Elmwood. The Moorings is in Leelanau County, not Elmwood township. He's only here as an interested bystander, but it is in Leelanau County and NOT Elmwood township.

Jill Byron - 2249 Twin Eagles Drive - the engineering firm of this is the current president of the MI township association and the same engineer that forgot to put the additional acreage in the Bonobo plan. Do due diligence when looking at plans and considering if you'll approve. The judge told the board to go back to the drawing board on this plan and look at environmental impact. Residents have supplied evidence. You should deny the 81 plan. Thank you to the residents for continuing to fight for our beautiful home. This is not Oakland County, which is where the developer is from.

Susie Shipman - 14735 Shipman Rd. - She wanted to come up and raise her voice and support some of the comments from previous people. Honor the spirit of our township master plan and look very carefully at the scientific info that's available to us when decisions of this magnitude are being considered.

Philip Settles - he knows how important an environmental assessment would be. These orchards have been here. If it was fundamental, it would be in the code. The code is a reflection of the township's ideas of what's important. The township talks through it's code. The standards for PUDs don't talk about environmental assessments. The lack of fairness is that it's a moving object for the applicant. The applicant looks at the code - doesn't ask every resident for their opinion. Each lawyer has told their client to go to the township and look at the code before they buy. That's why they hire engineers to look at the codes. Soil erosion - will it not occur? If we have to make a decision based on what will 100% happen, we can't. Even experts make mistakes.

David Dapp - comment to lawyer... every township is delegated some responsibilities. There are agencies that have regulations. Due care responsibility (Dept. of Env. Quality) - if there is a suspected contamination, there is an obligation to test.

**Manigold** - Closed public hearing and returned to open meeting.

Young - as he mentioned earlier, the planner has prepared a list of standards that are intended to implement the judge's decision. Having the planner go through those with you is the most efficient way to do it. Based on one public comment - you have multiple proposed findings of fact. You are not obligated to accept any particular version of the facts. You can adopt any facts that you want - you are the fact finders. His suggestion is that Gordon walk us through the applicable standards.

**Weatherholt** - should we wait to go through the standards until the new board is in place? It is a poor use of time to go through all of them and then table it.

**Rosi** - with a public hearing, can't you receive information until 4:00pm that day? **Weatherholt** - yes, we had some come in 5 minutes before the hearing. It's so much info that we need to look at for a bit of time before we can make a logical decision. It's overwhelming, to say the least. **Rosi** agreed. She went through material yesterday and today. We know this site. We've been working on it for 2 years now. We know enough to make decisions, but we don't know how to express them in order to make it clear. She intended to come tonight and fulfill her responsibility as a board member, but once again is inundated with information. She appreciated everyone who spoke earlier. In regards to 8.3.2 - she had some confusion about this... there are 6 items called the objectives. She was told by the attorney that day that the objectives were not part of the decision-making. If they're not, why are they there? Those objectives are the things we care about as a community. The objectives are a part of our ordinance.

**Witkop** - has some questions... they are up to 4 findings of fact. What she finds interesting is that all of the comments have been about environment or soil erosion. When going to the findings of fact, there's nothing about environment. She feels uncomfortable as a board member with that disconnect. As far as open space - how does she as a board member know that the calculations weren't done right? Fire prevention - why is this there? In our township, the codes don't apply to single family homes. What do we do with the fact that the developer may have to change the plan? She doesn't think it's possible for the board to make a good decision tonight.

**Westphal** - having identified the 4 categories that the judge remanded us, it seems that the problems that they heard mostly were related to soil, slopes, and grading. In her opinion, they have the capacity to create a perfect storm on that site. They have the potential to directly affect human health. They have the capacity to degrade a natural and cultural ecosystem. If the developer was serious about making money, these things will affect the value of the home. In her opinion, based on the information given to them, all of these are coming together to create a perfect storm. Mr. Settles - have you ever purchased a house? (Settles: Yes.) When you go after a mortgage from a bank or credit union, are you not asked to provide an environmental assessment? Will they fund you without worrying about purchasing contaminated land? (Settles: They would tell me from the beginning.)

**Manigold** - there are too many contingencies from the beginning. First thing he did when he took office was to ask for an environmental study, but because of it already passing, there was nowhere to put it. He thinks the developer should take it back to the PC and come up with a clean project proposal (including an environmental assessment). He's heard the stories of the other communities - he grew up on a farm. Sometimes nothing shows up in the assessment. What he's hearing is that we table it until we get an answer... including what findings of fact we use. He wants to make sure they do the right thing. He doesn't think they can make a good decision tonight.

Doug Mansfield - As a board member, it's hard to go back and forth without direction. The remanded issues are permitted and approved by the agencies that you've handed them to.

**Manigold** - in fairness, a lot of the roads you pointed out were done a long time ago and Underwood has two emergency exits. **Witkop** - she sees what Doug is asking for. Can we get clarification... where do the environmental concerns fall into the remanded issue? There seems to be the opinion that they fall into soil erosion and grading. To walk out and table it without any direction to the developer seems unfair. What portion of our ordinance requires a second connecting road? Unless we can clarify some of these things, it's not fair to walk out of here and leave them unanswered.

**Rosi** - With the amount of trees being moved and the amount of soil being moved, we owe it to the community that we are going to deal with environmental issues. If the PC made a mistake or the previous planner, why would we not want to go back and deal with it? **Witkop** - she'd like to hear from Gordon and Jim... does an environmental study fall under what's remanded by the judge?

Young - It goes back to the findings that the board did in 8/15 and the judge's remanding. 8.1.3k - "the grading or filling will not destroy the character of the property or the surrounding area, and will not adversely affect the adjacent or neighboring properties." - adding a road and the grading that would come from that... but that's not the whole property. Imposing a condition with the secondary road - because that requires grading, an environmental study is necessary. There is nothing that stops the developer from voluntarily undertaking that assessment on their own. The bigger project needs serious research and something in writing. There are complexities with adjourning this - there will be new board members. Are they precluded from this? Can they review the record and minutes and participate? Does the MI statute that Mr. Howard brought up allow a community to request that study?

**Witkop** - where is the second road coming from? **Hayward** - when looking at the remand with the fire chief, the proposed access road to Smokey Hollow came into issue (snow, locked gates, etc.) **Witkop** - if the fire code doesn't apply, why is that second connection on their plan? **Hayward** - the fire code is a standard. The fire dept looks at standards for safety. In his opinion, it doesn't apply. They found the amended ordinance today - it exempts the R3 grouping (1-2 family homes). **Witkop** - Do you have an opinion if the environmental study falls into what the judge remanded? **Hayward** thinks it does for an additional access road only. They can't have an environmental assessment on the entire project - only what's been remanded back.

**Witkop** - If the board votes on what the developer has proposed, the environmental study can only be pertaining to the additional road. Will you (Jim) enter an opinion if the fire code applies? Young - he has no problem interpreting our ordinance as drafted. He needs historical application of ordinance from Gordon. That's what's important to the court. He needs background facts before he can provide an opinion.

**Weatherholt** - without giving the developer a clear path, he doesn't know how you can table it to a place unless you do something specific. **Witkop** - to just walk away is unfair to all involved. She doesn't think that the environmental study applies. **Rosi** - she thinks it will apply. She wants the attorney to look into it. **Weatherholt** - can you make your two points clear for a motion? **Witkop** - they feel inundated with material, including last minute material. In order to make an informed decision, they've had no chance to review. They would like a legal opinion on if an environmental assessment is lawfully required for the larger

area. They would like guidance from Gordon Hayward and Jim Young regarding the int'l fire code and it's application / basis of requirement for second access road. If it's turned down, an oath is taken by the board to protect the health, safety, and welfare - can board members turn it down for that reason? They'd like research to be done before a date is set.

**Motion by Witkop / Weatherholt** to adjourn for the deliberation to a date to be set by the planner. **Motion passed.**

**Motion by Weatherholt / Witkop** to bring Byron and Avery back. **Motion passed.**

### **Citizen Comments**

Susie Shipman - 14735 Shipman Rd. She has somewhat of a conflict since she is a neighbor on the road where this issue is occurring. She thinks it's important that our community understands what's going on here and that the new town board understand some of the details on this case. In 2014 20 acres were parceled by former township supervisor Pete Correia into several lots. Neighbors requested that the township look into the division of land. Town board and ZBA were advised by the township legal not to look into it since it was past 30 days. Township assessor and surveyor added land (including land now submerged) in order for it to meet the 20 acre minimum. Prosecutor Bob Cooney took the case and is providing independent look into the matter. She would encourage town board and residents to read the information on this. Township attorneys are representing and defending both sides. Township is spending hours and taxpayer dollars on this. The township should be the enforcement of ordinances - and to defend the law, not find ways around it.

### **Board Comments**

Avery - he's been involved in environment for 37 years. We've asked this developer to jump through hoop after hoop after hoop. Now we're going to create a new set of hoops. Dr. Komondera brought a lawsuit that was thrown out. Judge determined all but 4 things. The developer will bring another lawsuit and we'll lose. Thousands of dollars will go towards legal fees. Our job as a board member is to look at code and see if he complied.

**Motion to adjourn by Byron / Witkop. Motion passed.** Meeting adjourned at 9:24 pm.