

**CHARTER TOWNSHIP OF COMMERCE
ZONING BOARD OF APPEALS
SPECIAL EDUCATION & DISCUSSION MEETING**

Thursday, January 24, 2019

2009 Township Drive

Commerce Township, Michigan 48390

A. CALL TO ORDER: Rusty Rosman, Chairperson called the special education discussion meeting to order at 5:30pm.

ROLL CALL: Present:

Rusty Rosman, Chairperson

Jorge Pacheco, Secretary

Rick Sovel

Bill McKeever

Clarence Mills

Robert Mistele, Alternate ZBA Member

Also Present:

Hans Rentrop, Township Attorney

David Scott, Township Supervisor

Dave Campbell, Planning Director

Paula Lankford, Assistant to the Planning Director

B. APPROVAL OF MEETING AGENDA

MOTION by Mills, supported by Pacheco, to approve the Zoning Board of Appeals Special Education & Discussion Meeting Agenda for January 24, 2019, as presented.

MOTION CARRIED UNANIMOUSLY

C. APPROVAL OF MEETING MINUTES: None.

D. PUBLIC DISCUSSION OF MATTERS NOT ON THE AGENDA: None.

E. UPDATE OF ACTIVITIES IN COMMERCE TOWNSHIP: None. (*To be discussed at the Regular ZBA Meeting to follow at 7:00pm*)

F. OLD BUSINESS: None.

G. NEW BUSINESS:

ITEM G1: EDUCATIONAL UPDATE WITH THE TOWNSHIP ATTORNEY

The Commerce Township ZBA has made it their practice to hold an annual education and discussion special meeting prior to their first regular meeting of the year. Township Attorney Hans Rentrop will be leading the discussion at the January 24, 2019 special meeting, beginning at 5:30pm. Mr. Rentrop will be prepared to speak on the following three topics:

1. Precedence, and whether the ZBA's decision on one petition sets a precedence for their future decisions on comparable petitions

2. The procedure by which a ZBA decision can be challenged in Oakland County Circuit Court by an aggrieved party
3. An update on recent case law relative to ZBA action

1. Precedence, and whether the ZBA's decision on one petition sets a precedence for their future decisions on comparable petitions

Attorney Rentrop – Good evening. Thank you for the opportunity to speak to all of you. Tonight, we will address the three main issues as noted on the agenda.

To start off with the precedential value of ZBA decisions; on the chart is a list of the ZBA roles, which include administrative appeals, interpretations of the zoning district boundaries, interpretations of zoning ordinance provisions, variances and exceptions. Those are the main categories. As far as the precedential value of administrative appeals, from say a Building Official's decision or something of that nature, they're not – they don't carry any precedential value.

The Court has said that such appeals may be taken to the ZBA by the person, firm or corporation aggrieved, or by an official, department, board or commission of the Township affected by the order requirement decision and determination. Meaning that these appeals are specifically done by one person, or by the Township. Because it's done by one person for a particular matter, then it's not going to have a precedential value. That language is found in both State law and in the Township Zoning Ordinance. What is interesting is if the Township makes an administrative appeal. What binding precedential effect does that have? It may have more effect, but there's no real law because you don't typically get administrative appeals by a group within the Township. What you do get is interpretations, and that can be by both an individual or someone within the Township itself, both of the Zoning Ordinance itself and of the map. In this regard, there is no law clearly on point as to whether they're precedential or not. In my opinion they are not, for two reasons.

First of all, the ZBA has no authority to legislate. You don't have the power to change the Zoning Ordinance. To have a decision be precedentially binding would seem to negate that prohibition; it seems in conflict. In my opinion, I don't think there's authority to add precedential value.

Further, you also have the issue of due diligence. Of course, we always say to people, "Well, did you look at the zoning before you bought the property? Do you know what it is?" It's one thing to review the Zoning Ordinance. It's another thing to go through every single ZBA decision ever made to find out the interpretations of various provisions. It seems excessive to ask an individual, and beyond the reasonable requirements of due diligence. The courts have made a decision about what due diligence is, and said, *It incorporates whether the record contains sufficient information to appraise the party that some right or title is claimed, or attempted to be conveyed in the premises. If it does, the purchaser is bound to use reasonable diligence to ascertain what it is that is so claimed or attempted to be conveyed.*

If their title had something in it specifically related to a ZBA interpretation, then maybe there's something there; but, it would be unreasonable in my opinion to expect that someone would go beyond their own title to look for issues.

Sovel – When we pass a variance, does it ever show on a title?

Attorney Rentrop – No, it doesn't.

Sovel – How are they supposed to figure that out?

Attorney Rentrop – I guess I shouldn't have said title. What would be required of an individual would be to look at the title search, and arguably, determine the zoning, then approach the Township and ask if there is anything special about this property.

Sovel – Let's say we passed a variance and it makes it restricted for the future. Do we have an obligation to record it?

Attorney Rentrop – There is no provision law that says you can record it, and there are limitations as to what you can and cannot record. If it was a Court decision, you can get it recorded. I don't know that there is any provision to allow a variance to be recorded on it's own right.

If you get into a situation where you're asked to make an interpretation, and you think it's important that the interpretation you made is relevant to other property within the community, what you should do is recommend to the Planning Commission and the Township Board that an amendment to the Zoning Ordinance be made. That's the best way to do it, then everyone is on notice and it will be binding on everybody.

In regard to variances, they are not precedential because they are unique to the nature of the land itself. The courts have held that the variances run with the land, and then there's other reasons too; which is an application for variances, when applied to the Zoning Ordinance in effect at the time. When you're doing a variance, whether some other property has received a variance under different law, you're to apply the variance and provisions enacted and in effect at the time you're making the decision. Regardless what happened in the past, and regardless what may happen in the future, it is what's in effect at that date when you're making the decision.

We know sometimes there will be litigation situations where we'll change the Ordinance in the process. There has been some Court review about it as to whether that's lawful or not. They look at bad faith, they look at other things. If you made that change to merely clarify something, or to make it consistent with what you've always done, they're going to say it's okay. If they think you're just using it as a defensive tactic to avoid litigation, they'll probably rule against us.

Also, with variances, of course each one is supposed to be applied on the unique criteria of the individual property itself. We know every person that comes in seeking a variance has a unique situation themselves. You have the six criteria in the Zoning Ordinance that you're to apply to the facts in their case to make a decision. Again, if you have more than one person asking for the same variance, and you think that variance is appropriate, you can of course grant it if they satisfy the criteria. It's also a good indication that maybe you need to amend the Zoning Ordinance too.

As far as exceptions go, there's no precedential effect on those simply because they're parcel specific.

A couple things to note, of course, is that there are limitations to the ZBA's authority that are actually set forth in the Zoning Ordinance, and most is mirrored in State law as well. One, any variance that you issue expires after 365 days. That makes it less precedentially binding, because if it is not exercised then it's gone in that year. If it is exercised, then it's open and obvious to everybody.

The ZBA can't review the Planning Commission and Township Board decisions. You don't have the authority to review their determinations. You do have the authority to make interpretations, but not for decision. Of course, that also brings us to that you don't have the power to legislate. You're a reviewing body; not an acting body.

2. The procedure by which a ZBA decision can be challenged in Oakland County Circuit Court by an aggrieved party

Attorney Rentrop – Rusty had asked me to address several questions regarding the Circuit Court.

What is the Circuit Court? Who can take the ZBA cases to the Circuit Court? What are the timelines and processes to appeal to the Circuit Court? What is required when you get there, and how do you avoid the Circuit Court?

To start off, I'll provide a brief review of what the Court system is. There are four basic courts; District, Circuit, Court of Appeals, Supreme Court. The District Court has certain limitations. It's for your traffic offenses, small claims division. It's broken down into small claims and general divisions. Small claims is informal hearings, traffic violations, civil lawsuits \$6,000 or less. There are no attorneys in the small claims division. The general division hears civil claims up to \$25,000. They see a lot of landlord/tenant and small collections type issues. The criminal division hears misdemeanors, if the crime leads to jail time and not prison. If it leads to prison time, it gets bumped up to Circuit Court. Circuit Court has the broadest hearing powers. Most cases will end up there. They do criminal cases for felonies and other matters where the offender can potentially go to prison. The civil division is also over \$25,000. They also allow for injunctive relief there. We have a special provision that allows for injunctive relief in District Court as a municipality, but it's rare. There's also Juvenile and Probate Courts.

With regard to appeals, there are appeals by right and appeals by leave. An appeal by right means that the statute specifically allows you to take an appeal to the Court. Appeals by leave means you have to apply to the Circuit Court if they happen to hear that case. In our situation, we avoid the District Court all together, under statute and under our Zoning Ordinance. If someone seeks to appeal a decision of the ZBA, they have an appeal by right to the Circuit Court.

Who can take ZBA cases to the Circuit Court? Any party aggrieved by a decision of the ZBA may appeal to the Circuit Court for the county in which the property is located. Who is aggrieved, the applicant or the Township? This is an appeal by right. Filing an appeal by right includes a claim of appeal form, then a copy of the order being appealed from, which would be the decision made by the ZBA. In this case it would be a decision by the ZBA, either in writing or in the minutes, along with a copy of the minutes or transcript, or proof of the same that has been ordered. Proof if the appellant has filed a bond, if one is required, and most likely not. Proof that the appeal fee has been paid, and proof of service that everything has been served on the other party.

Dave Campbell – Can a neighboring property owner, next to a property that a variance was granted for, can he be the aggrieved party?

Attorney Rentrop – No, and I will get to that shortly.

What are the timelines and processes to get to Circuit Court? A person aggrieved by a decision has a right to appeal within 30 days after the ZBA issues its decision in writing, signed by the Chairperson, so a letter or something of that nature. Or, 21 days after the ZBA approves the minutes of its decision; whichever comes first. If you don't issue a letter or decision formally, but you approve the minutes at the next meeting, then they have 21 days from that date.

Chairperson Rosman – We don't say anything to our applicants about having 30 days to appeal to Circuit Court. Should we be doing something like that?

Attorney Rentrop – You are not obligated to do that in this forum. Rick, you are obligated to do it, as you may know, under an SAD provision. SAD's have a 30-day right to appeal to the Michigan Tax Tribunal, but there is no similar provision in the ZBA. Once it goes to the Circuit Court, the Court will issue a scheduling order. For a ZBA appeal case, typically it's just a hearing date. Briefs should be filed by the parties, along with answers and replies.

What is required once you are at the Circuit Court? The application was filed, the record of the ZBA hearings and briefs. The Court will be looking for a succinct, fact-based decision using applicable legal standards of the Zoning Ordinance as it applies to the decision being made. They want a clean, crisp, clear decision using the standards. To quote the Court, *The decision of the ZBA should be affirmed, unless it is contrary to law based upon improper procedure, not supported by competent material and substantial evidence on the record, or an abuse of discretion.* I thought this was interesting also, *The ZBA must state the grounds upon which it grants a variance, and cannot simply repeat the conclusionary language of the Zoning Ordinance without specifying the factual findings underlying the determination that the requirements of the Zoning Ordinance were satisfied in the case at hand.*

The Court is saying, you can't just say we find that the six factors have been satisfied. They're going to look to see how you've taken the facts presented during the presentation at the hearing, and applied them to the criteria.

The Court will review the briefs and will typically host oral argument, unless it's so clear-cut from the briefs themselves that they can make a decision. At the Circuit Court level, there is no new evidence provided. Whatever decision that is made at the ZBA level, the written decision, the minutes, et cetera, that's the only evidence included in the record. The Circuit Court will not hear any new testimony and will not look at any new pictures. It's important you make it clear on the record.

Sovel – If someone shows us a picture, and we look at that and use it, do we have to keep a copy of it? That's the advice we used to get.

Attorney Rentrop – I don't know that it is necessarily critical that you have it, but if you want that for the record, you should retain it. If they want that for that record, they should retain it. It is incorporated as part of the record when it's referenced in the minutes. Arguably, yes, I think you should retain a copy. That would be my recommendation.

Chairperson Rosman – When they want to give us something, I'll have to say, we're glad to take it, but we have to keep it.

Sovel – If someone gives me something and it influences my decision, that's considered part of the record.

Discussion continued regarding duplication of items presented, and the fact that it is not necessary to retain the original documents. Copies can be made.

Attorney Rentrop – I think it's best for Dave and Paula to let the applicant know in advance, when they're seeking a variance, that whatever documents they want to submit and have the ZBA consider, they should make a copy for the record.

Sovel – When Rusty reads her introduction to the meeting, she could add language referencing that anything presented to the ZBA will become property of the Township.

Attorney Rentrop – I would recommend that you do that.

Chairperson Rosman – We will do that.

Attorney Rentrop – Judges can review the record to ensure that it complies with four factors. First, that it complies with the constitution and the laws of the State. *The decision is not illegal.* For example, did the variance authorize something prohibited by State law? Obviously, you can't grant a variance to break the law.

The second thing is that it's based upon proper procedure. *The Court will consider, were the processes or requirements of the Zoning Ordinance followed?* Did you skip anything? Was the hearing conducted? Did the person have an opportunity to be heard and present their evidence?

They're also going to look at whether it is supported by competent material and substantial evidence on the record. *Substantial evidence is evidence that a reasonable person would accept as sufficient to support a conclusion. More than a scintilla of evidence, but less than a preponderance of evidence.* Basically, is there substance to the decision, is there substance to the evidence? Is it reasonable to expect that? It does not have to be certified, but is it reasonable to believe that this is a valid document. When there is substantial evidence, the Circuit Court must not substitute its discretion for that of an administrator or tribunal, even if the Court might have reached a different result based upon the same evidence. If you get evidence before you, and you could argue it two different ways, the decision you make is going to receive deference. If there's any basis to use the evidence in the record to support the ZBA's decision, based upon the criteria, even if the Court thinks you're totally wrong, they'll support you

because the evidence supports it. You are the fact-finders, and you were the ones that were there when it happened. If you make a good, well-reasoned decision, it will be upheld.

The fourth factor is that it, *Represents reasonable exercise of discretion granted by law to the Zoning Board of Appeals. Did the ZBA exceed its decision-making power?*

There's very little law on this. The Courts have said, *They will not sit in judgment on matters wholly within the discretion of the ZBA. Only where there is provable abuse, caprice or arbitrary action may the Court interfere.* For example, you have discretion in your interpretation of the facts as applied to the six variance criteria. The court will consider whether you abused that discretion, or whether the decision was arbitrary. You're the ultimate authority. They're only going to look to see if you did something wrong. As long as you apply the facts to the criteria, you're going to be good.

How do you avoid Circuit Court? Follow the Zoning Ordinance as specifically and with as much detail as possible. Further, it's hard to justify an appeal for a decision that is well-reasoned. It is hard to overturn. A judge will uphold it, and it's less likely to have the case remanded back to the ZBA for further fact-finding. Specificity and application of the criteria are critical to the decision.

Can the Circuit Court decision be appealed? Yes, decisions of the ZBA can be appealed to the Michigan Court of Appeals and, if necessary, the Michigan Supreme Court, through appeals by leave. The Supreme Court is difficult to get to, and they will only hear it if it is a matter of public policy.

Sovel – If the Township was in Circuit Court and they found against us, can we also appeal?

Attorney Rentrop – Absolutely, you would be an aggrieved party and you could do that.

Discussions ensued regarding prior ZBA cases and decisions, and the Federal Courts versus State Courts.

Attorney Rentrop explained that he does not believe a neighbor could file an appeal.

Attorney Rentrop – Appeals to the Court of Appeals from the Circuit Court must be made within 21 days of the Circuit Court order. The Supreme Court appeal would need to be filed within 42 days of the Court of Appeals order.

3. An update on recent case law relative to ZBA action

Attorney Rentrop reviewed three cases and provided updated case law. *City of Detroit v. City of Detroit Board of Zoning Appeals*, Court of Appeals, October 2018. This was reported, which means it is precedentially binding. The issue was whether the purchase of property, knowing the Zoning Ordinance prohibited the use intended, precluded the applicant from seeking a variance. The Court said, "No, it did not preclude them from seeking a variance." The Court concluded that, *A Zoning Board must deny a variance on the basis of a self-created hardship rule, when the landowner or predecessor in title partitions, subdivides or somehow physically alters the land after the enactment of the*

applicable Zoning Ordinance, so as to render it unfit for uses for which it is zoned. We declined to extend the self-created hardship rule to all instances where a landowner simply purchased the property with knowledge of the Ordinance's applicable restriction. There are some caveats to that. After the ordinance has been enacted, if someone changes the land and makes it nonconforming, they're automatically out with a self-created hardship. If they do things to their own benefit, such as mining the property, the Court says that does not comply as they are changing the land. The ZBA does not do use variances, but simply a different use is not going to get it there. It has to be actual physical changes to the land after the Ordinance was enacted to make it inconsistent with the current Zoning Ordinance. This was a use variance, and not on point with what the Township usually sees, which are dimensional variances. This case is recent, so it could be appealed.

Discussions took place regarding how the City of Detroit had standing, details of the use variance, and how this may relate to a prior case for the Township.

Attorney Rentrop reviewed case law for *Edgewood Holdings v. County of Otsego*, Unreported, October 2018. This involved a constitutional taking of property; not just an appeal of a ZBA decision. This should be perceived with that caveat in mind. The issue was the finality requirement, which is that you exhaust all remedies before you seek an appeal to the Circuit Court.

The finality requirement provides that, *A claim that the application of government regulation affects a taking of property interest is not ripe until the governmental entity charged with implementing the regulation has reached a final decision regarding the application of the regulation to the property at issue. This finality requirement is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.*

The applicant was arguing that the decision made by the ZBA constituted the takings of property because they couldn't use their property for a beneficial use. The Court held that the matter was not final, because the letter of denial from the ZBA advised the plaintiff that they could pursue a rezoning of the property to a different zoning district, or could request amendment of the Zoning Ordinance to allow such uses, and the plaintiff did not pursue those options.

McKeever – Isn't that a use variance?

Attorney Rentrop – That is a use variance, and that is a federal taking. Could it apply to a Township case? It's unclear, but it does boil down to the issue that it needs to be ripe for review. If you have something within your dimensions that you feel is not satisfied with the setback rules, you can explain that the petitioner could always file an application to amend the Ordinance and try to persuade the Township Board. Would stating that in a letter protect you from having it taken to Circuit Court? Possibly, but this case is unreported and not precedential, so I would not rely upon it too heavily. The final case is *Olsen v. Jude and Reed, LLC*, Reported, July 2018. The issue in the case is whether the neighbors of a property owner, who had been granted a

dimensional variance request, had standing to appeal the ZBA's decision to the Circuit Court.

The holding was that the neighbors did not have standing to appeal a dimensional variance because only an "aggrieved party" may appeal a ZBA decision. The Court defines an "aggrieved party" as this; *An aggrieved party must allege and prove that he or she has suffered some special damages not common to other property owners similarly situated. Incidental inconveniences, such as increased traffic congestion, general aesthetics and economic losses, population increases, or common environmental changes are insufficient to show that that party was aggrieved. Instead, there must be unique harm, dissimilar from the impact that other similarly situated property owners may experience. Moreover, mere ownership of the adjoining parcel is insufficient to show that a party is aggrieved. Aesthetics, ecological and practical harms are insufficient to show special damages not common to other property owners similarly situated.*

I think you would be an aggrieved party if the variance caused a water discharge on your property.

Discussions took place, relating this case law update to Township cases and hypotheticals, including water issues, grade changes, erosion, aesthetics, privacy fences and blocking views of a lake. Attorney Rentrop stressed the importance of the special damages or harm being unique, and not common to the problem. He also noted again that this decision is recorded.

Jorge Pacheco and Attorney Rentrop discussed the six criteria for receiving a variance. Attorney Rentrop feels that the ordinance requires all six to be met for a variance to be granted. The ZBA Board Members had considered a majority of the criteria when this was previously addressed, however the matter was deferred.

H. OTHER MATTERS: None.

I. CORRESPONDENCE: None.

J. PLANNING DIRECTOR'S REPORT: None.

K. ADJOURNMENT:

- **NEXT REGULAR MEETING DATE: THURSDAY, MARCH 28, 2019 @ 5:30PM**

MOTION by Mills, supported by Sovel, to adjourn the meeting at 6:46pm.

MOTION CARRIED UNANIMOUSLY

Jorge Pacheco, Secretary