



**ZONING BOARD OF APPEALS
SPECIAL MEETING**

MONDAY, SEPTEMBER 9, 2019
Maple Room, 2nd Floor – 5:30 P.M.
201 West Ash Street, Mason MI

AGENDA

1. CALL TO ORDER

2. ROLL CALL

3. PUBLIC COMMENT

4. APPROVAL OF MINUTES

A. Approve Minutes of Regular Zoning Board of Appeals Meeting August 14, 2019

5. UNFINISHED BUSINESS

A. Appeal of Administrative Decision to deny building permits for properties located at 934 and 965 Franklin Farm Drive in Mason, MI, received from James Bonfiglio, Attorney at Law. ***Continued from August 14, 2019.***

6. NEW BUSINESS

7. LIASON REPORT

8. ADJOURN

CITY OF MASON
ZONING BOARD OF APPEALS MEETING
MINUTES OF AUGUST 14, 2019
DRAFT

Sabbadin called the meeting to order at 5:30 p.m. in the Sycamore Room at 201 W. Ash Street, Mason, Michigan.

Present: Crips, Harris, McCormick, Wilson, Sabbadin

Absent: Fisher, Madden

Also present: Elizabeth A. Hude, AICP, Community Development Director; Thomas M. Hitch, Esq., City Attorney

PUBLIC COMMENT

None.

APPROVAL OF MINUTES

MOTION by Crips second by McCormick, to approve the Zoning Board of Appeals minutes from the April 10, 2019 regular meeting.

YES (5) Crips, Harris, McCormick, Sabbadin, Wilson

NO (0)

ABSENT (2) Fisher, Madden

MOTION APPROVED

MOTION by Crips second by McCormick, to approve the Zoning Board of Appeals minutes from the April 10, 2019 training workshop.

YES (5) Crips, Harris, McCormick, Sabbadin, Wilson

NO (0)

ABSENT (2) Fisher, Madden

MOTION APPROVED

PUBLIC HEARING

A. Appeal of Administrative Decision to deny building permits for properties located at 934 and 965 Franklin Farm Drive in Mason, MI, received from James Bonfiglio, Attorney at Law

Before opening the public hearing, Sabbadin provided an overview of the process and introduced Tom Hitch, City Attorney. He asked for disclosure of conflicts of interest. There were none.

Staff distributed Exhibit F, dated August 14, 2019, which contained letters from Clark Hill PLC, Wolverine Engineers & Surveyors, Inc., and a memo from Elizabeth A. Hude, AICP, Community Development Director.

Sabbadin opened the public hearing at 5:33 p.m.

Public Comments/Discussion:

*(**Condo association, homeowners association and condominium association are used interchangeably throughout the discussion. The development was approved under the State of Michigan Condominium Act which references the creation of a Condominium Association.)*

James Bonfiglio, on behalf of Esquire Development and Construction, introduced himself and handed out an untitled document that included an Introduction, General Discussion, Clarifications Regarding Other Report Items, Additional Factual Background and Issues from Report, Other Issues raised in the July 2 letter not mentioned in the Report, Conclusion, copies of City Council resolution Acceptance of Public Utility and Access Easements for Franklin Farms Development Phases I and II, City Council resolution Acceptance of Public Improvements for Franklin Farms Development Phases I and II, Master Deed/Grant of Easement with property description and Survey drawings of storm easement detail, and a letter from Martin Colburn, City Administrator, City of Mason.

Two building permits for Franklin Farms have been denied due to lack of compliance to the original approval of the condominium subdivision and zoning requirements related to the existing detention pond and storm sewer drainage. Mr. Bonfiglio believes the City of Mason is responsible to maintain the drainage and believes evidence in his handout supports his conclusion. Mr. Bonfiglio asked if it is right to deny a building permit while the process goes on to find a solution to the problem.

Mr. Hitch asked when last home was constructed prior to the application being filed?

Mr. Bonfiglio replied 2016 or 2017, CPE builders built the home and they constructed one home out of the 34. Prior to the 2016 house, the last home was built in 2008.

Mr. Hitch asked if the single-family condominium association is functioning as it should.

Mr. Bonfiglio responded not in formal sense, and that he is maintaining the mowing of the area around the detention pond.

Mr. Hitch asked if any maintenance has occurred such as excavation or checking the drainage outlets? He also asked if any contractors have been retained for the work?

Mr. Bonfiglio stated that some owners have checked the outlets at times and cleared debris in their backyards. He was unsure if anyone had been retained.

Mr. Hitch asked whether Mr. Bonfiglio felt the pond needed to be improved.

Mr. Bonfiglio stated that he admits at some point it will need to have something done. He is not sure what the full capacity is. He also admitted that water may not flow as fast out of the pond into the flood plain.

Mr. Hitch referred to the Grant of Easement – Exhibit A – in the documents Mr. Bonfiglio handed out and asked if it included the detention pond.

Mr. Bonfiglio believed it should be in there.

Mr. Hitch asked if the detention pond was to be covered by the Grant of Easement and if he, Mr. Bonfiglio, signed that easement on behalf of Esquire Development.

Mr. Bonfiglio responded with yes to both questions.

Mr. Hitch asked Mr. Bonfiglio to read paragraph 7 of the easement (page 4 of 11), which he referenced. Mr. Bonfiglio read a portion of paragraph 7 and Mr. Hitch continued by reading the entire paragraph: *“Notwithstanding this grant of easement, the detention ponds described in Exhibit A shall remain a general common element of Franklin Farms, a condominium project under master deed at Liber 2897, Page 362, and the condominium association shall remain the owner and responsible party for the maintenance thereof, subject to the easement rights of the Grantee hereunder.”* Mr. Hitch asked Mr. Bonfiglio if what he read is what paragraph 7 states.

Mr. Bonfiglio replied that it did and he though he stated that in his comments earlier.

Mr. Hitch reiterated that it remains the responsibility of the condominium association to maintain the drainage system to which Mr. Bonfiglio stated that he can't argue with that.

Director Hude stated the building permits were denied based on the lack of proper storm water drainage facilities as evidenced by the lack of a condo association which has been named as the responsible party to maintain the detention pond. As she reviewed what was handed out by Mr. Bonfiglio regarding the easement, she noted it talks about two fifteen-foot wide storm water easements through the detention pond intended to support maintenance of the municipal utilities which were within the right of way. Director Hude referenced Exhibit D of her staff report dated August 9, 2019 and a drawing which indicates the limits of the easements granted to the city.

Staff assumes that previous building permits were granted based on the assumption that the owner of record for the detention ponds is listed as the Villages of Franklin Farms condo association, which is an active condominium association. It wasn't until the fall of 2017 that the City of Mason become aware that this was not the case. Mr. Bonfiglio sent a letter stating that the city had the wrong association listed for the detention pond and that it was a different condominium association which was not active. That is what started the conversation as to who is responsible for the detention pond and what happened to the condo association.

Since then the city had several discussions with the applicant and met with the residents in December of 2018. At the meeting the City confirmed further that indeed many were unaware of their responsibility and no dues or collections had been taken nor any type of action had been taken to ensure the detention pond was maintaining the capacity necessary to operate and function to support that development.

As required by the City of Mason's Zoning Ordinances related to the utilities, when a building permit is reviewed, they must demonstrate that the lot is supported by adequate and appropriate utilities. Given that there is no condo association, and there is no evidence the utility has been maintained, the City is not in the

position to issue building permits, which is the basis for the denial. The Master Deed and Grant of Easement state that the condominium association is the responsible party to maintain the utility. Reports have been requested from the condo association but staff only received the first three years and none since.

Mr. Hitch asked if the City approved a site plan and if the Master Deed was part of the documentation provided with the site plan. He also asked if the Master Deed specifically designates the condo association as the responsible party for the maintenance of the common elements.

Director Hude responded that the project was first approved in 1999 and the Master Deed is a part of the record. Exhibit C (Staff Report dated August 9, 2019) contains the Master Deed and Bylaws of the condo association.

Mr. Hitch asked that if the condo association was not maintaining the common elements, would that be a breach of the approved site plan?

Director Hude referenced the Zoning Ordinance which states that any changes to the Master Deed, Bylaws, or site plan by the condominium association needs to be approved as an amendment to the approved plan by the Planning Commission. That was never done to her knowledge.

Mr. Crips asked what constituted a homeowners' association, is it just single-family homes or multi-family?

Mr. Bonfiglio answered it is only the single family. The multi-family section has a condominium association in operation.

Mr. Crips asked if 100% of the homeowners attended the meetings and if they were all notified.

Mr. Bonfiglio stated that there was not 100% attendance and he did not have the documents to respond accurately but all homeowners were notified for his meeting and the City's meeting held in December.

Director Hude replied that 13 names signed in for the City meeting.

Mr. Crips asked how many homes are involved?

Mr. Bonfiglio answered 34.

Mr. Crips referenced the photo included in Exhibit F (Staff Report, August 9, 2019) which shows extensive flooding from late last year and asks if that homeowner was in attendance?

Mr. Bonfiglio responded that the homeowner is not a part of Franklin Farms.

Director Hude explained that the pictures are of the property downstream from Franklin Farms, south of the detention pond. She received a call in June of 2018 from the residents that front on Eugenia concerned about flooding. The area has flooded for many years and the Franklin Farms development did not cause the flooding; however, flooding has increased in recent years. There was an unusual flood event in the spring of

2018 and Department of Public Works and the City Fire Department assisted property owners with sandbags to prevent water from entering the homes at the back of those properties as the water was so high.

In a letter dated August 14, 2019 the City Engineer comments under items three and four regarding the importance of the drainage system to the north of that property, and that it is one factor that could have an impact on not making drainage better in that area, and not wanting to make it worse. As the City thinks about the importance of storm water management when we issue building permits, this is one reason why. There is a real problem with flooding on that property with multiple factors involved, but it is something the City is responsible for considering when we look at storm water drainage as that area continues to build out.

Mr. Crips asked for one further clarification as to whether the homes involved in the defunct condo association includes Franklin Farms Drive only and not Eugenia Drive and if the detention pond only services those homes.

Mr. Bonfiglio answered that it only includes Franklin Farms Drive and Northbrook and he doesn't believe the detention pond services all of the homes in Franklin Farms.

Sabbadin asked for public comments on this topic. Anyone speaking will have three minutes to state their case and are to give their name and address for the record.

Nancy Lynn, 899 Franklin Farms Drive stated she was the first to move in. Initial association dues were \$60/year to take care of a sign. There was never a sign, the dues were dropped, and for 13-14 years there has been nothing. All of a sudden, she received a bill for mowing and told we need a condo association. She believes it's past the statute of limitations and the residents don't want a condo association. She thinks it's unreasonable to expect the homeowners to take care of this issue when Mr. Bonfiglio set everything up and knew the condo association dissolved and never said anything about it.

Mr. Bonfiglio responded that the association was formed per state law and control was turned over to the homeowners. Esquire did what was required of them. The association elected officers and continued to function for several years. Esquire did what it was expected to do. Esquire also attempted to get the homeowners involved. Esquire talked to the prior officers and to every person they could communicate with within the development to get them involved in the association, and that they respectfully declined.

Melinda Hatfield, 964 Franklin Farms Drive was the last to move in. When the Hatfields talked to their builder in 2016, the builder verified there was no association so Ms. Hatfield was never aware there was supposed to be one. She was never aware of her responsibility until issues developed with the drainage. She agrees with Ms. Lynn that they don't want an association.

Keith Hein, 1002 Eugenia Drive, he has been involved in the Franklin Farms development since its inception. The plan was approved by the City. Mr. Bonfiglio has done what was expected of him given the City approvals. With four sites left to build it appears the lack of a homeowners' association has occurred and the permits have been denied but he would like to see the properties built and the sidewalks continued so the community can move forward.

He has concerns that the detention pond is not being maintained properly but he believes his Franklin Farms neighbors were not aware of their responsibility under the Master Deed to maintain it or that they had to have an association. The homeowners are also unaware that Mr. Bonfiglio could outsource the maintenance of the detention pond and drainage and bill the homeowners. Mr. Hein found that information in the Deed which he read today. Mr. Bonfiglio is a co-owner as a developer and lot owner and a co-owner in the association and reads from Section 7, Article 19 of Master Deed regarding remedies to resolve compliance. This section refers to what can be done when an association defaults. A co-owner can force the maintenance of the facility.

Mr. Hitch related the concern of the City that they can't use public tax dollars to perform maintenance that is supposed to be done by private owners.

Mr. Hein would like to see resolution so the four lots can be finished.

Mr. Hitch referenced in Exhibit F, the letter sent by Clark Hill PC to the Ingham County Drain Commission which provides for two options: Chapter 8 petition which can be filed by homeowners or the City, and a 433 Agreement which allows for quicker resolution.

Mr. Hein believes the homeowners are not aware of the drainage easements in their backyard and that they are not supposed to build in them, but they have. He thinks the Drain Commission options are nice for later when necessary but not now.

Mr. Hitch shared reports from LSG, Ingham County Drain Commission, and the City engineer that it needs to be dealt with now as waiting will exacerbate issues.

Mr. Hein wonders if the issue needs to be decided tonight or can everyone be brought together to work through a solution. He is concerned that there could be a negative impact with the neighbors.

Mr. Hitch stated that since an appeal has been filed, the board must act within a time frame and it cannot wait a long time. Mr. Bonfiglio would like his permits.

Mr. Bonfiglio stated that the City has the option to take the homeowners to court based on the law but they have been trying to find a solution without litigation. Esquire provided every buyer disclosure statements describing the responsibilities of the condominium association.

Dean Baker, 925 Franklin Farms. He wanted to get back to the issue at hand which is the appeal regarding the permits which have been denied. He understood that following the meeting the appeal would be reviewed and the permit would be granted or would stay with denial. Mr. Baker also wondered what steps Mr. Bonfiglio had after tonight to continue his due process rights.

Mr. Hitch responded that the Board will decide on the appeal and that Mr. Bonfiglio's next step would be to appeal to the Circuit Court if he disagrees with the outcome.

Kevin Butts, Construction Supervisor for Esquire. As a field guy on the ground he is just hearing about some of these things for the first time. Esquire started filing for the permits last October and was told by Ms.

Hude that we can't have the garage protrude in front of the house. They redesigned the plans and resubmitted in March and ordered equipment. He came in to the office on June 25 to speak to Ms. Hude and was told 'permit denied, end of story' and that she walked away. Claims there is no reason to deny the permit. He brought up the fencing at corner of Franklin Farm Drive and Northbrook. The corner lot has pole barn tin turned sideways to hold in pets which is not allowed by code on a corner lot.

Ms. Hude stated that the permit applications were submitted by Esquire Development and James Bonfiglio was listed as the primary contact. Mr. Butts is listed as site supervisor. All contact has gone through Mr. Bonfiglio. She stated that she never tells anyone their permit is denied in person. Her statement to Mr. Butts that day was that she would contact Mr. Bonfiglio in the following week.

Mr. Sabbadin asked for further comments from the public or the board.

Mr. Hitch asked if the board had anything more to add after the public hearing because after the public hearing is closed, the board would have discussion and make a determination on how to proceed.

Mr. Sabbadin, after hearing no further comments stated the following options: close the public hearing, discuss the matter and make the necessary findings of fact to support a resolution. Once the facts have been stated, staff recommends calling an adjournment to the next meeting to allow staff to prepare a final resolution on the findings. At the next meeting the ZBA will consider action on the findings and resolution. The second option is this: the ZBA may also choose to continue this public hearing to a future time and date certain if they require additional information necessary to support findings of fact from either staff or the applicant. We can also take action on the permit or deny, so there are three options.

Mr. Hitch noted that to make an action tonight, the board would have to make certain findings. It is not sufficient, for the record, to make a motion to approve the building permits, yea or nay. That would be inappropriate. There need to be findings made to support the fair evaluation of the information given to the board.

MOTION by Sabbadin, second by Wilson, to close the public hearing, discuss the matter, and make necessary findings of fact to support the preparation of a resolution. We will ask staff to enact on the findings and prepare findings and a resolution for the next meeting.

YES (5) Crips, Harris, McCormick, Sabbadin, Wilson

NO (0)

ABSENT (2) Fisher, Madden

MOTION PASSED

The public hearing closed at 7:02 p.m.

Mr. Sabbadin asked Mr. Hitch for guidance as he has only been on board for five years.

Mr. Crips shared he had served for close to 40 years, and they have never been asked to rule on a building permit denial.

Mr. Hitch shared that staff needs a sense of what the board believes the outcome should be. The principal concern is the drainage and that is where the evidence has been provided for the board to make a determination.

Mr. Crips asked who was paying taxes on the property.

Mr. Hitch responded that the common elements of the condo association have a separate parcel number whereas the condo owners pay on their individual lots and that includes the value of the common elements. The individual condo owners are paying the taxes.

Mr. Crips replied that there is money being paid that the homeowners may assume is part of the maintenance for the detention pond. Also, was any money left over from the previous dues collected?

Mr. Hitch stated that if the homeowners look at their tax statement, a small portion goes to the Willow drain, but the Willow drain is not part of the detention pond and drainage system they are discussing. There is no delegated tax for the detention pond.

Mr. Bonfiglio stated, that after speaking to the previous officers, the condo fees were used to maintain the pond area. When they ran out, a homeowner who lived adjacent to the property used his personal mower to maintain the grass around the pond area.

Mr. Crips asked what the City's responsibility was if they approve the permits now and there is increased flooding later. Is there legal recourse for the homeowners to come back after?

Mr. Hitch responded that the City would have no legal liability for the system to be maintained. It was not the primary obligation of the City to maintain as noted in the Master deed. The developer is obligated to create a drainage system that meets certain conditions when building.

Mr. Crips asked if the original developer is liable? Any issue that some properties have resold since built. Original owners were aware of the homeowners' association, but in a resale is there any responsibility to share information?

Mr. Hitch responded that he can't speculate on that.

Mr. McCormick asked if there is any indication of the cost in order to bring the drainage up to the standards.

Mr. Hitch replied no. LSG and Wolverine Engineering have looked at it but will take some time to determine.

Mr. Sabbadin asked who pays for these assessments.

Mr. Hitch shared the Ingham County Drain Commission options.

Mr. Sabbadin stated that he believes the homeowners' association should not have dissolved without notifying the City Planning Commission. The homeowners' association should come together again to have a voice within the City.

Elizabeth Baker, 925 Franklin Farms has lived there 16 years. She stated she was willing to notify homeowners. She will distribute notices to the neighbors but if they don't pay then the City should charge them as she has no authority to force payment.

Mr. Harris asked if there is any recourse if people don't pay.

Mr. Hitch stated that the Board believes the homeowners should step up. He reminds the board that the issue at hand is the appeal of the building permits.

Mr. Crips suggested the Board approve the permits with the condition that Mr. Bonfiglio takes the lead to reinstate the homeowners' association, collect money and take care of the detention pond. If he doesn't do that then the City has cited the reasons why and they will stand by the denials.

Director Hude reiterated that the permits were denied based on the lack of the storm water drainage being maintained, not because there is no homeowners' association.

Mr. Sabbadin supported Crips suggestion.

Wilson stated that he believes something needs to happen with the detention pond to keep it maintained.

Mr. Harris supported the recommendation and suggested Ms. Baker could work with Mr. Bonfiglio to get things going.

Mr. Crips stated that he realizes there are more issues than the detention pond behind the multi-family homes with the cattails. There may be an opportunity to piggy back with the other association to solve.

MOTION from Crips, second by Harris for staff to prepare recommendations and a resolution and continue the meeting to September 9th at 5:30 p.m. in the Training Room.

YES (5) Crips, Harris, McCormick, Sabbadin, Wilson

NO (0)

ABSENT (2) Fisher, Madden

MOTION PASSED

UNFINISHED BUSINESS

None

NEW BUSINESS

None

LIAISON REPORT

None

ADJOURN

The meeting adjourned at 7:32 p.m.

Elizabeth A. Hude, AICP, Community Development Director

MEMORANDUM

TO: Zoning Board of Appeals (Board)

FROM: Elizabeth A. Hude, AICP, Community Development Director

SUBJECT: 934 & 965 Franklin Farm Drive – Administrative Appeal to Denial of Building Permits

DATE: September 5, 2019

On July 10, 2019, Esquire Development and Construction, Inc. filed an appeal to the Zoning Administrator's decision to deny building permits for new residential construction on properties located at 934 and 965 Franklin Farm Drive. Staff's denial of the building permits was based upon the fact that the applicant did not supply the necessary evidence to indicate the portion of the storm water system commonly owned by the condominium association was capable of meeting the storm water requirements to support the new construction on both lots. The storm system is comprised of the detention pond located on the northeast corner of the intersection at Lavonne and Franklin Farm Drive, and a drainage easement running along the rear of properties on Franklin Farm Drive. To the contrary, staff found that based upon documentation and discussions with the applicant and residents beginning in 2017, the system was not being maintained or operating at a capacity sufficient to support the impact of increased stormwater flow resulting from the additional homes.

A Public Hearing was held on August 14, 2019. The hearing opened at 5:33 p.m. and closed at 7:02 p.m. During the hearing, the Board took testimony from the applicant and several residents, which are recorded in the minutes. The Board reviewed materials presented by staff and the applicant and discussed findings. The Board voted to continue the meeting to September 9, 2019 at 5:30 p.m. to allow staff time to prepare a Resolution based upon the Board's discussion of findings and conclusions.

Enclosed for your review and consideration are two documents prepared based upon the public hearing and discussion that took place on August 14, 2019:

- Findings and Conclusions
- Board Resolution 2019-01

The function of the Board is to determine whether the denial by the City was supported by competent and material evidence presented through the public hearing and made a part of this record. Based upon that evidence, the Board may affirm, reverse wholly or partly, or modify the order, requirement, decision, or determination appealed. When action is taken to modify said order or interpretation, the Board shall, to that end, have all of the powers of the zoning official. The concurring vote of a majority of the members appointed to and serving on the zoning board of appeals shall be necessary to reverse any order, decision, or determination of the zoning official.

Introduced:
Seconded:

**CITY OF MASON
ZONING BOARD OF APPEALS RESOLUTION NO. 2019-01**

**A RESOLUTION REGARDING THE PROPERTY LOCATED AT
934 AND 965 FRANKLIN FARM DRIVE**

September 9, 2019

WHEREAS, a request has been received from James Bonfiglio, Attorney at Law, appealing the Administrative Decision of the Zoning Administrator to deny Building Permits; and

WHEREAS, the subject property is located at 934 and 965 Franklin Farm Drive; and

WHEREAS, the subject property is located in the RS-2 (Single Family Residential) zoning district; and

WHEREAS, a public hearing on the request was noticed and held at the Zoning Board of Appeal's regular meeting of August 14, 2019, with testimony given and public comment solicited in accordance with Section 94-101 of the Mason Code; and

WHEREAS, the Board has received and reviewed proposed Findings and Conclusions as directed to be prepared by the staff, with modifications as noted on the record, if any.

NOW, THEREFORE, BE IT RESOLVED that the City of Mason Zoning Board of Appeals does hereby adopt the Findings and Conclusions; and

THIS BOARD ORDERS that the Application for Building Permits for 934 and 965 Franklin Farm Drive shall be and are hereby:

- Denied
- Granted without conditions
- Granted with the following conditions:

Upon execution of a construction contract to make the required improvements to the storm water detention basin to meet the original design volume and flow standards, either pursuant to a Chapter 8 Petition, or a Section 433 Agreement, as outlined in the attached memorandum.

— Upon substantial completion of the improvements to make the storm water detention basin meet the original design volume and flow standards.

Yes ()
No ()

CLERK’S CERTIFICATION: I hereby certify that the foregoing is a true and accurate copy of a resolution adopted by the Zoning Board of Appeals at its meeting held September 9, 2019, the original of which is part of the Zoning Board of Appeals minutes.

Sarah J. Jarvis, Clerk
City of Mason
Ingham County, Michigan

ZONING BOARD OF APPEALS

Appeal of Esquire Development and Construction, Inc.
Owner of 934 and 965 Franklin Farms Drive
Administrative Appeal After Denial of Building Permits

FINDINGS AND CONCLUSIONS

Statement of Findings

1. Esquire Development and Construction, Inc. (“Applicant”) made application for building permits for property located at 934 and 965 Franklin Farms Drive, Mason, Michigan, Lots 14 and 27 of Franklin Farms Condominiums.
2. In a letter dated July 2, 2019, the City of Mason, through its Community Development Director, Elizabeth A. Hude, denied the application for building permits and refunded the building permit fees in the amount of \$2,320.
3. On July 10, 2019, Applicant filed an appeal with the Mason Zoning Board of Appeals.
4. Under the City of Mason Zoning Code, Section 94-363(a), the Zoning Board of Appeals shall hear and decide appeals from and review any order, requirement, decision, or determination made by the zoning official in accordance with the provisions of the Zoning Code.
5. It is the function of this Board to determine whether the denial by the City was supported by competent and material evidence presented to the Board based upon evidence, in the form of documents, plans, letters, recorded instruments, including Master Deed and easements, written opinions from the engineering firms, LSG Engineers & Surveyors and

Wolverine Engineers & Surveyors, an attorney opinion from Clark Hill PLC, legal advisors to the Ingham County Drain Commissioner, and other documents as made a part of this record.

6. Franklin Farms Condominium Association is a condominium established pursuant to the Michigan Condominium Act on May 17, 2001.

7. The Master Deed provides for the creation of the Franklin Farms Condominium Association which, under the terms of the Master Deed, "shall administer, operate, manage and maintain the condominium."

8. At Article IV, *Common Elements*, Section 1(g), it provides that the storm water system is a general common element of the condominium, specifically including the storm water detention areas.

9. At Article IV, Section 3(c), it is provided that the responsibilities for the cost of maintenance, repair and replacement of all the general common elements shall be borne by the Franklin Farms Condominium Association, subject to any provision in the condominium documents expressly to the contrary.

10. It was never argued by the Applicant that anything in the condominium documents excepted the Condominium Association from maintaining the storm water system, including the storm water detention basin.

11. On March 1, 2004, the Applicant executed a grant of easement to the City of Mason for a fifteen foot wide storm sewer easement through the detention basin, as part of the municipal storm sewer system constructed within the Franklin Farm Drive right-of-way. The sole purpose of the easement was to allow the City to access the detention basin if that were necessary to repair or maintain the City's storm sewer system.

12. In said grant of easement, at paragraph 7, it was expressly stated as follows:

“Notwithstanding this grant of easement, the detention ponds described in Exhibit A shall remain a general common element of Franklin Farms, a condominium project under Master Deed recorded at Liber 2897, Page 362, and the condominium association shall remain the owner and responsible party for the maintenance thereof, subject to the easement rights of the Grantee hereunder.”

13. There was testimony at the hearing that the Condominium Association was actively engaged for approximately three years. Since that time, it has been inactive and nonfunctioning.

14. Several residents who attended the meeting spoke against the formation of a Condominium Association. One of the residents spoke of canvassing the neighborhood and receiving an overwhelming response not to reactivate the Condominium Association. This occurred after the City of Mason held a meeting with residents on December 10, 2018, to educate the residents regarding the conditions of the drainage system, including the drainage detention pond and the obligations of the Condominium Association under the Master Deed.

15. There was no evidence presented that indicated the Condominium Association, at any time, had undertaken to maintain any aspect of the storm water system, including a storm water detention basin.

16. Testimony was presented by James Bonfiglio, Representative of the Applicant, that an adjoining neighbor, for a number of years, mowed the banks of the detention pond.

17. Other than mowing by one or two neighbors, there has been no maintenance performed on the drainage system, and in particular, the storm sewer water detention basin.

18. On July 29, 2019, the engineers, LSG Engineers and Surveyors, filed a report with the Deputy Drain Commissioner, Paul C. Pratt, making several statements. Included in those

statements is the finding that the detention basin is overgrown with cattails and the basin outlet is overgrown with vegetation and is partially blocked with roots and woody material. It also found that there did not appear to be embankments surrounding the pond, as set forth in the plan, and the engineer was unsure whether those embankments were required to increase the volume of the detention pond, or merely as a screen.

19. Several witnesses confirmed that the pond was full of cattails and other foliage and debris.

20. At the hearing, both the Applicant's representative, James Bonfiglio, and several of the homeowners, stated that sooner or later it would be necessary to perform maintenance on the detention basin, so as to make it a functioning storm water detention pond.

21. On August 14, 2019, the City's engineers, Wolverine Engineers & Surveyors, Inc., filed a report. In that report, Engineer Donald B. Heck wrote as follows:

Based upon our review, it is our opinion that:

1. The storm water detention basins have not been maintained by the Home Owner's Association. This is evidenced by the increased vegetation along the detention basin banks and the accumulation of silt deposits on the basin floors.
2. The lack of maintenance has resulted in a diminished capacity to detain storm water.
3. The decreased storm water storage volume will cause an increase in runoff to the Willow Creek from the site during storm events.
4. The increased runoff could result in increased flooding or prolonged high-water conditions downstream from Franklin Farms.
5. Any additional development in this area without the restoration of the storm water detention volumes to the

original design volumes will exacerbate the current situation.

It is our opinion the development of the remaining vacant lots must be coupled with the cleaning, clearing and dredging of the existing storm water detention basin to restore the original design volumes.

22. The Applicant desires to build two additional homes on two of the four remaining buildable lots.

23. It is common knowledge that by building a home on a lot, it increases the impervious surfaces on the lot, including the driveway, patios and roofs, which increases the rate of storm water flow off the lot, as compared to its current water discharge rate in a fallow state.

24. This common understanding of improving lots, with such impervious surfaces, supports the finding of the engineer that it will exacerbate the potential for increased runoff from Franklin Farms to the properties downstream.

25. The Applicant provided no information whatsoever to refute the impact of development as it relates to increased runoff from Franklin Farms due to the diminished capacity to detain storm water.

26. The Applicant has asserted that it is no longer its responsibility to maintain the storm water detention basin and other parts of the storm system, and that it should not be penalized by denying the building permit.

27. Under the condominium documents, at Article III of the Franklin Farms By-Laws, a co-owner, such as the Applicant, can seek redress either by arbitration or filing suit in order to compel the Condominium Association to maintain the storm drainage system, including the storm drain detention basin. It could also, with others, petition the Drain Commissioner to take over the storm drain system as outlined in the memo from the attorney at Clark Hill, the attorney

for the Drain Commission.

28. The Applicant has taken no steps to enforce its remedies to properly maintain the drainage system.

29. The record shows that the Master Deed was filed as support for the site plan, and that, as set out in the easement signed by the Applicant, the Condominium Association was assuming the responsibility for maintaining the drainage facilities, including the storm drainage detention pond.

30. Evidence presented at the public hearing from staff and from pictures of Franklin Farms residences showed fences and sheds within the drainage easement which feeds the detention pond.

31. It was reported by the Planning Director that staff had received calls from some residents, complaining about flooding in their backyards.

32. Evidence was also produced in the form of pictures and testimony from a member of the ZBA, that the area to the south of Franklin Farms experiences flooding, as depicted in the pictures and from testimony that a storage shed was built on stilts.

33. Water from the detention pond flows into the Willow Creek drain to the south, and any diminution in the detention pond capacity could exacerbate the flooding of property to the south.

34. Except for the Franklin Farms drainage system, the application for the building permits meets all other City requirements.

CONCLUSIONS

35. Based upon these findings, the evidence demonstrates that the Condominium Association has not fulfilled the obligations as set forth in the Master Deed, which was part of

the documentation supporting the Special Use Permit granted by the City.

36. The failure of the Condominium Association to maintain the storm drain system, including the storm water detention basin, constitutes a breach of the terms of the Special Use Permit and the recognized obligation, as set forth in paragraph 7 of the granting of the easements.

37. The present condition of the storm water detention basin, which is full of cattails and the outlets blocked with debris and foliage is not consistent with a properly maintained storage detention basin.

38. It appears from the record that there are fences, sheds, and the like constructed in the backyards of the condominiums, in the easement where the drainage feeding the detention pond is located.

39. There is evidence in the record of complaints of flooding in the backyards, as well as evidence, as indicated by the City engineer, that the failure of the maintenance could result in increased flooding or prolonged high water conditions downstream from Franklin Farms.

40. There is evidence in the record to support the conclusion that any additional development in this area without the restoration of the storm water detention volumes to the original design will exacerbate the current situation.

41. Section 94-364(c) provides:

“(c) *Action on appeal.* The zoning board of appeals may affirm, reverse wholly or partly, or modify the order, requirement, decision, or determination appealed. When action is taken to modify said order or interpretation, the board shall, to that end, have all of the powers of the zoning official.”

42. This Board may modify the order and condition it upon reasonable conditions.

43. In this record, no substantial evidence, other than relating to the failure to maintain the drainage system, can support the denial of the building permits sought by the

Applicant.

44. This Board finds that imposing the condition that requires that the storm water drainage system, including the storm water detention basin, be brought up to the standards as set forth in the plans and documents of the condominium association, which formed the approval for the Special Use Permit, is a reasonable condition to protect the properties on site at Franklin Farms and for the property owners downstream from Franklin Farms.

45. The granting of building permits, subject to fulfilling the terms of the resolution, which accompanies these findings, is consistent with promoting the general health, welfare and safety of those in close proximity to the Franklin Farms storm water drainage system, including the storm water detention basin.

TO: Paul Pratt, Ingham County Deputy Drain Commissioner

FROM: Clark Hill PLC

DATE: August 13, 2019

SUBJECT: Procedures under the Michigan Drain Code to Establish Franklin Farms Storm Infrastructure as part of the Willow Creek Drain

You have requested an outline of the procedures available under the Michigan Drain Code, Public Act 40 of 1956, as amended, MCL 280.1 *et seq.* (“Drain Code”), to improve and establish the private drainage infrastructure within Phase II of the Franklin Farms Site Condominium, located in the City of Mason, as part of the Willow Creek Drain, an existing county drain under the jurisdiction of the Ingham County Drain Commissioner (“Drain Commissioner”). The following outlines petitioned (Chapter 8) and non-petitioned (Section 433) alternatives to improving and establishing the private drainage infrastructure under the Drain Code.

Chapter 8 Petition

Chapter 8 of the Drain Code (MCL 280.191-280.201) governs the process for cleaning out and improving existing county and intercounty drains. Absent a petition, a Drain Commissioner is limited to performing only maintenance and repair of existing county drains up to a certain annual monetary limit. When a petition is filed, an existing drain may be cleaned out, improved, extended, and have branches added, among other activities, with the benefitting properties and public corporation liable for the cost. The following is a basic step-by-step process for a Chapter 8 petition:

- A petition must be filed with the Drain Commissioner signed by either at least 5 freeholders liable to an assessment or a municipality located within the Drainage District.
- After a petition is filed, the Drain Commissioner appoints a three-member board of determination to hear testimony and consider evidence at a public meeting in which all properties within the Drainage District are notified and decide whether a project is necessary. The determination of necessity is subject to a 10-day appeal period.
- If necessity is found and no appeals are filed, or any appeals are resolved, the Drain Commissioner designs the project, acquires easements and obtains any necessary permits in order to construct the project.

- Prior to the construction of the drain project, the Drain Commissioner holds a day of review of apportionments to allow property owners and public corporations an opportunity to review the computation of cost for the project and their tentative apportionments. It is only at this time that the actual cost of the project is known.
- Apportionments, or the percentage of cost assigned to each property or public corporation at-large, are based on benefits derived and are subject to a 10-day appeal period following the day of review.
- The total cost of the drain project, including all engineering, legal, administrative, inspection and construction costs, is then levied through special assessments on benefitting properties and public corporations for a number of years, determined by the Drain Commissioner. The number of years cannot exceed 20.

433 Agreement

Section 433 of the Drain Code (MCL 280.433) provides an alternative non-petitioned method to extend or add a branch to an existing drain to provide additional drainage service to lands within an existing drainage district.

A “433 Agreement”:

- must be signed by the drain commissioner and the developer of lands, or if any lands have been sold, the developer and the landowners;
- obligates the developer to construct adequate drainage facilities according to the plans and specifications approved by the Drain Commissioner at his or her sole cost, including construction, easement acquisition, engineering, inspection, administration and legal expenses. If already constructed, the Drain Commissioner may accept the drainage facilities conditioned on the improvement of the existing drainage facilities to meet the Drain Commissioner’s standards;
- requires the developer to deposit 5% of the cost of the drain, but not more than \$2,500 for purposes of future maintenance;
- requires the developer dedicate the drainage facilities to public use and convey necessary easements to the drainage district;

Should you have any questions regarding the above, please do not hesitate to contact Lauren K. Burton at (248) 988-5854 or LBurton@clarkhill.com.