ZONING BOARD OF APPEALS
WEDNESDAY, DECEMBER 9, 2020
Electronic Meeting – 5:30 P.M.
201 West Ash Street, Mason MI

In accordance with State Law, which has authorized remote participation in public meetings for a defined reason, it has been determined by the City of Mason that an electronic meeting is necessary to protect the public health. Public participation is encouraged and procedures facilitating that participation are outlined in supplemental materials attached.

AGENDA

1. **CALL TO ORDER**
2. **ROLL CALL**
3. **OATH OF OFFICE**
4. **PUBLIC COMMENT**
5. **APPROVAL OF MINUTES**
   A. Approve Minutes of Zoning Board of Appeals Meeting February 12, 2020.
6. **UNFINISHED BUSINESS**
   A. Resolution 2020-03 An amendment to Resolution 2019-01 for 934 and 965 Franklin Farm Drive
7. **NEW BUSINESS**
8. **LIASON REPORT**
   A. City Manager Report
9. **ADJOURN**

ZONING BOARD OF APPEALS
ELECTRONIC MEETING INFORMATION

PLEASE TAKE NOTICE that the meeting of the City of Mason Zoning Board of Appeals scheduled for **December 9, 2020, starting at 5:30 p.m.,** will be conducted virtually (online and/or by phone) due to health concerns surrounding Coronavirus/COVID-19.

The City of Mason will be using Zoom to host this meeting. A free account is required to use Zoom. Please take the time to download and set-up Zoom prior to the meeting. Zoom may be accessed here: https://zoom.us/

MEETING INFORMATION:

Topic: **Zoning Board of Appeals Meeting**
Time: **December 9, 2020 at 5:30 p.m.** Eastern Time

Meeting ID: 816 7060 9534
Passcode: MASON2020

Video Conference Information: **Link to join online:**
https://us02web.zoom.us/j/81670609534?pwd=WGlabWliKzJaV1BPQmRUMmNiU3FhZz09

- You may also join a meeting without the link by going to join.zoom.us on any browser and entering the Meeting ID identified above.

- Phone Information:
  Dial (312) 626 6799 (Enter meeting ID when prompted.)

To comply with the **Americans with Disabilities Act (ADA),** any citizen requesting accommodation to attend this meeting, and/or to obtain this notice in alternate formats, please contact Michigan Relay at https://hamiltonrelay.com/michigan/index.html.

Resources: More Questions? Please Contact our Customer Service Desk at 517.676.9155.

Note on Public Comments:
If you would like to provide comments beforehand, please send those comments in an email by 3:00 pm on the day of the meeting to marciah@mason.mi.us. They will be read aloud by Chair.

If you would like to speak during the meeting, you can send your name and address to marciah@mason.mi.us by 3:00 pm on the day of the meeting. You can still speak at the meeting if you do not notify us in advance.

General Procedures Related to Electronic Meetings

As required under Public Act 228 of 2020, the following procedures outline the accommodation of meetings held, in whole or in part, electronically by City Council or a City Board or City Commission. Additional procedures will be adopted at a later date, by the Council, to accommodate members that are eligible and cannot attend in person for meetings held on or after January 1, 2021.

Electronic Meeting Procedures for City Council, City Board or City Commission Members

- All attendees including City Council, City Board or City Commission Members will enter the meeting with a muted microphone.
- The meeting Chair's microphone will be unmuted to call the meeting to order.
- During initial roll call, each member will announce the physical location they are participating from by stating the county, city, township, or village and state which they are attending the meeting from.
- The meeting Chair will call for a motion and members will signify making a motion by either voice or the "Raise Hand" feature. The same process will be followed for a second to a motion. The meeting Chair will then acknowledge which member made the motion and which member seconded the motion.
- The meeting Chair will then ask if there is any discussion on the motion. Members will indicate a desire to discuss by either voice or the "Raise Hand" feature. The meeting Chair will then acknowledge the particular member granted the floor for discussion by name.
- Votes shall be taken by roll call.

Electronic Meeting Procedures for Public

- All public participants entering the meeting will automatically be muted upon entering.
- All public participants should either turn off or leave off their video camera. Only City Council, City Board or City Commission Members will be allowed to have their video cameras on. Your video camera will be turned off for you if you do not turn it off yourself.
- Public rules are displayed in the "Chat" Feature; however, the chat feature will not be turned on to allow for chat comments to be added.
- Public comment:
  - Public only will be allowed to address the members during Public Comments
  - Public is allowed three (3) minutes to speak.
  - Public must state the name and address slowly and clearly before they start to address the Council.
  - Public comments will be addressed in the following order:
    1. Those provided the day of the meeting and sent to the designated person in the meeting instructions by a certain time will be read during the meeting.
    2. Those using the Video Conference Portion (not calling on a telephone) will be asked to use the "Raise Your Hand" Feature in Zoom. The meeting Chair will call on individuals to speak and they will be unmuted at that time.
    3. Participants that are available only by phone, after the meeting Chair requests.
- Inappropriate or disruptive participants will not be allowed or tolerated and will be removed from the meeting.
- Due to the electronic nature of this type of meeting the meeting Chair, at his discretion, may adjourn the meeting with or without notice for any reason. Every attempt will be made to remain connected to the meeting, however two examples of abrupt adjournment may be computer connectivity issues or lack of appropriate participation.

ADDITIONAL ZOOM INSTRUCTIONS FOR PARTICIPANTS:

PHONE INSTRUCTIONS - to join the conference by phone

1. On your phone, dial the teleconferencing number provided above.
2. Enter the **Meeting ID number** (provide with agenda) when prompted using your touch- tone (DTMF) keypad.

VIDEOCONFERENCE INSTRUCTIONS – to watch and speak, but not to be seen

Before a videoconference:

1. You will need a computer, tablet, or smartphone with speaker or headphones. You will have the opportunity to check your audio immediately upon joining a meeting.
2. Details, phone numbers, and links to videoconference or conference call is provided above. The details include a link to "Join via computer" as well as phone numbers for a conference call option. It will also include the 9-digit Meeting ID.

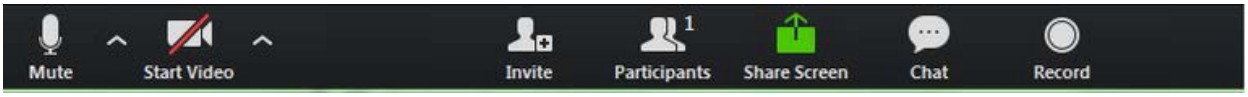
To join the videoconference:

1. At the start time of your meeting, enter the link to join via computer. You may be instructed to download the Zoom application.
2. You have an opportunity to test your audio at this point by clicking on "Test Computer Audio." Once you are satisfied that your audio works, click on "Join audio by computer."

If you are having trouble hearing the meeting, you can join via telephone while remaining on the video conference:

1. On your phone, dial the teleconferencing number provided above.
2. Enter the **Meeting ID number** when prompted using your touch- tone (DTMF) keypad.
3. If you have already joined the meeting via computer, you will have the option to enter your 2- digit participant ID to be associated with your computer.

Participant controls in the lower left corner of the Zoom screen:



Using the icons in the lower left corner of the Zoom screen, you can:

- Mute/Unmute your microphone (far left)
- Turn on/off camera ("Start/Stop Video")
- Invite other participants
- View Participant list – opens a pop-out screen that includes a **"Raise Hand"** icon that you may use to raise a virtual hand during Call to the Public
- Change your screen name that is seen in the participant list and video window

Somewhere (usually upper right corner on your computer screen) on your Zoom screen you will also see a choice to toggle between "speaker" and "gallery" view. "Speaker view" shows the active speaker. "Gallery view" tiles all of the meeting participants.

CITY OF MASON
ZONING BOARD OF APPEALS MEETING
MINUTES OF FEBRUARY 12, 2020
DRAFT

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

Present: Fisher, Harris, Madden, McCormick, Sabbadin, Wilson
Absent: None
Also present: Elizabeth A. Hude, AICP, Community Development Director

PUBLIC COMMENT
None.

APPROVAL OF MINUTES
MOTION by Fisher second by Wilson, to approve the Zoning Board of Appeals minutes from the January 8, 2020, meeting.

Yes (6) Fisher, Harris, Madden, McCormick, Sabbadin, Wilson
No (0)
Absent (0)

MOTION APPROVED

PUBLIC HEARING

A. Petition for variance from the City ordinances Chapter 94 Article X, Chapter 100 Tables 1, 2 related to a non-conforming structure, non-conforming uses and dimensional requirements, parking in the front yard and deed restrictions on property located at 513 - 515 W. South St. in Mason, MI, filed by Crockett Law Offices.

Sabbadin opened the public hearing at 5:31 p.m.

Public Comments/Discussion:
Greg Crockett, 2196 Commons Parkway, Okemos, along with his associate, Ben Fulger, same address, is the applicant of the petition. They are trying to fix a snafu that is over 20 years old regarding a 537 square foot variance that they are short on to make it a four unit. He made reference to the City of Mason tax assessor documents that are available from the BS&A website which also show it being a four-unit property. They stated that they spoke to the original builder's son and were told that it was built as a four unit but his dad didn't have any records or memory of the property. The bank foreclosed on it around 2007 and acknowledged it was a four unit, the realtor who sold it to Mr. Crockett's clients also listed it as a four unit, so this property has existed that way for a long time. Mr. Crockett stated that his clients used the property for a while and they always thought it to be two duplexes. Mr. Crockett's clients sold the property to Four

Points Management, who after checking into a mailbox issue, found that City records indicate it is only a 2 unit. There was also mention of deed restrictions at that time but nothing was ever enforced and it is past the statutory time frame to do so, plus the restrictions expire in five years. A decision was made by their clients to go to the City of Mason to see what could be done to correct the matter.

With regards to the request for a variance, Mr. Crockett stated that his clients and the new owners did not create the problem and believes they meet the criteria which states "the variance must be granted in order to avoid practical difficulties not created by the applicant that would result from strict application of the letter of this chapter." The lot is 537 square feet too short of the required lot size, and they believe their only option would be to see if a neighbor would sell them a small piece of land. To have a four unit they would also need two more parking spots which they could not have on the back side of the property due to a slope in the property; it would be difficult to get heavy machinery in there so therefore it is impractical and, they again, did not create the problem.

Second, "a variance will not permit the establishment within a zoning district of any use not permitted within the district," this district is zoned for up to eight units so having a four unit would fall into the permitted use.

Crockett continued with the third criteria, "A variance will not cause a substantial adverse effect to property or improvements in the zoning district and the immediate surrounding neighborhood", which goes along with their position that the property has existed as a four unit for at least 20 years with no complaints or issues. He said the City wants to say that allowing the variance due to the ignorance of the owner is a slippery slope but he does not believe it is, because who's ignorance is it? The taxing authority has a document for this property showing it to be a four unit. The bank and realtor should also have known better and not listed it improperly.

Fourth, "a variance will not be contrary to the public interest and will ensure that the spirit and intent of this Chapter will be observed, public safety secured, and substantial justice done." They are not asking for anything extreme as the property is not going to be changed in any way. Property taxes will not change unless it reverts to a four unit. Substantial justice is very broad and the owners and former owners did not create this problem and the taxes have been paid as a four unit. A lesser remedy was suggested that it could be a 3 unit which would be okay but they would still have one unit sitting empty so the property value will continue to go down. Mr. Crockett finished by referencing the aerial satellite view of the neighborhood.

Harris asked if the property had been used as a four unit from the beginning. Crockett believed it had been, but they do not know for sure. Harris then asked if it is being used as a four unit now. Crockett said the current owner is only using it as two because that is what is allowed.

Pete Brown is representing Four Points Management who purchased the property in January 2019. In March of 2019, the City addressed the issue with his client who is currently in compliance but is letting two units sit vacant. He reiterated that Mr. Crockett did a good job with the timeline and that initially it seems that it was built as a four unit even though the permit was only pulled for a two unit. They are in the process of litigation in the Ingham County Circuit Court with Mr. Crockett's client, and in an effort to rectify things everyone met with Director Hude where it was resolved to come to the Zoning Board of Appeals seeking a variance or any other help that can be given.

Sabbadin requested that Director Hude give her Staff Report findings before they ask questions.

Director Hude first referenced the handout she provided to the Board members regarding practical difficulty, what it is and what the criteria are, and the legal definition of practical difficulty. In the instance where facts are provided and all of the criteria are met, you are legally obligated to approve the variance but you have to have facts present to meet all five of the criteria. She defined practical difficulty in a legal sense, that there is a unique condition on the lot. Hude used as an example Exhibit B containing copies of the original plat of the four created lots, all equal size. To meet practical difficulty, there would need to be a unique condition on the lot related to the topography or other natural features that inhibit the lawful location of structure.

Director Hude continued her review of the handout and criteria for granting a variance – that it will not be harmful to neighbors or the community as a whole, is consistent with the intent of the Code was not made necessary by prior action of the applicant, it was not created by design, is tied to the unique characteristic of the lot, and lastly, is not based solely on financial return. Director Hude then referenced the comments from the report prepared by the City's consultant, Mark Eidelson of Landplan - that the criterion has not been met – we do not know when the four units were created as a building permit was never pulled for the work which is the mechanism for knowing whether it complies. Exhibit A is referred to which is the original permit that shows approval of a duplex, and a copy of the deed stating a restriction to two units, and a floor plan which clearly shows two kitchens. Hude checked with the water department and there are only two water meters for the property. The applicant included in their application a letter stating that 'both units are licensed for adult foster care.' The term 'both' refers to two units. In Exhibit B Hude referenced a letter sent to the owners, in 2013, from the Zoning Official that stated the property is a duplex two-family with the addresses being 513 and 515 W. South St. The assessor record is an observation not a legal status. There is no building permit on file for the extra two kitchens and bathrooms that were installed to create four units. With regard to the deed restriction, no one in the city has authority to change the deed. Hude also included in Exhibit A correspondence she had with Four Points Management and Ben Fulger that states that according to City records the property was a two-family duplex. In the emails she discussed options for use of the property. The site is eligible for up to three units based upon size, and it is zoned residential multifamily. While the use as multi-family is allowed, there are additional zoning requirements that need to be met, one being parking. She did discuss ways they might meet the requirements such as a petition to change the law with regard to density, decreasing the lot size requirement to have four units.

ZBA member Fisher asked if there would normally be four water meters if there were four units? Hude replied that the permit was for two units so the number of water meters is consistent with what was approved, but sometimes lawful structures will have one water meter installed for two tenants.

ZBA member McCormick asked how long it has been the policy of the City to allow parking in a front yard of residences? Hude noted it is not consistent with the ordinance now and there are some exceptions in commercial districts. She is honoring the building permit and the property as pre-existing, non-conforming though it would not be allowed to be built as is today.

Mr. Brown followed up on what had been said and acknowledged that the Board can't do anything for the deed restriction as that is a private issue and they are stuck with it as a two unit, but once they get beyond

the deed restriction, how do they turn it into a four unit. He sees there are two main issues. First, is the minimum lot size. Can they can get a variance to accommodate the 537 square foot exception that they are short to allow the property to be a four unit, if so, then second, there is a parking issue. The current ordinance requires two spaces for every unit, so they would need to determine where they can get eight parking spaces to accommodate the number of units.

Mr. Crockett also shared per a photo provided of the property, there was a concrete slab on one offset side of the driveway where there is a car parked and there was a gravel area on the other side of the driveway where they would park 2 cars. He also noted after Director Hude's remarks that they could check into parking behind the property and using Beacon Lakes.

Director Hude clarified that the variance has to be related to an issue regarding the lot: topography, soil or shape of the lot. The structure needs to meet the zoning requirements, which this one does not, as there is no evidence it was ever approved as a four unit. The interior also needs to meet minimum square footage requirements and she has nothing to verify what is inside, there is no updated architectural floor plan. Hude also noted that the Planning Commission would be the proper authority to involve if they wished to seek a permit for three units, and if they wish to file a petition to change the ordinance for lot size requirements.

Mr. Crockett stated that the interior square footage is a deed restriction and is not relevant. Hude remarked that it is a requirement of zoning and noted footnote number 7, minimum area per dwelling unit. If there was a current architectural floor plan that would provide the finding of fact, then she would be able to determine whether it meets the requirements or not.

Sabbadin closed the public hearing at 6:10 p.m.

Sabbadin noted a typo in the Staff Report calling it an appeal for a variance. He noted that nothing has been denied by Director Hude so there is no appeal. He stated that this is a yes or no decision based on what the parties have provided. The facts that are known are that it was built in 2000 as a two unit and at some point it was changed without permits to a four unit and it is non-conforming. The practical difficulty is not the City's issue, someone made a mistake and did not look up the deed. The facts are that it is a two unit. The zoning allows the property to become a three unit, but not a four.

Wilson agreed with Sabbadin and noted that there are other solutions. He believes it to be a financial issue and doesn't meet the threshold for a variance in multiple ways.

MOTION by Fisher second by Wilson, to deny the variances being requested based on the facts in the staff report that there is no practical difficulty related to a unique physical feature of the land, and that the denial does not render the property to be unusable.

Yes (6) Fisher, Harris, Madden, McCormick, Sabbadin, Wilson
No (0)
Absent (0)

MOTION APPROVED

UNFINISHED BUSINESS

A. Staff update on 882 Stag Thicket & 934 & 965 Franklin Farms

Staff met with Ron Enger, Engineer, and the LaMacchia's, and they are working toward a grading plan so they can secure the proper permits to move forward on their project. They were given a deadline of March to turn in their information.

Hude was going to get in contact with the City Attorney for an update on the Franklin Farms case, but didn't have a chance to. Staff did turn in everything that was requested by the Circuit Court and it was accepted.

NEW BUSINESS

None

LIAISON REPORT

Sabbadin referenced the City Manager's report from January 31, 2020.

Madden reported that Council held a joint meeting with the Planning Commission to discuss the CIP.

Sabbadin reported that Planning Commission met Tuesday and had a very good follow up discussion regarding the CIP.

ADJOURN

The meeting adjourned at 6:25 p.m.

MEMO

TO: Zoning Board of Appeals
FROM: Elizabeth A. Hude, AICP, Community Development Director
SUBJECT: 934 & 965 Franklin Farm Drive – Amendment of Resolution 2019-01
DATE: December 3, 2019

REQUESTED ACTION

The Board had previously received from James Bonfiglio, Attorney at Law, 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. Resolution 2019-01 was approved granting approval of the Building Permits subject to conditions related to the problem with drainage infrastructure. James Bonfiglio, Attorney at Law, filed an appeal of the Zoning Board of Appeal's decision in Resolution 2019-01 in 30th Judicial Circuit Court for Ingham County. The Hon. Judge James S. Jamo remanded the matter, Case NO. 19-797-AA, back to the Zoning Board of Appeals to remove the conditions stated in Resolution 2019-01.

A copy of the Judge's decision prefaced by a summary from Tom Hitch, City Attorney is enclosed along with a proposed amendment to Resolution 2019-01, referenced as Resolution 2020-03 for your consideration.

Introduced:
Seconded:

CITY OF MASON
ZONING BOARD OF APPEALS RESOLUTION NO. 2020-03
AN AMENDMENT TO RESOLUTION NO. 2019-01

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

December 9, 2020

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 had previously received and reviewed proposed Findings and Conclusions and approved Resolution 2019-01 granting approval of the Building Permits subject to conditions; and

WHEREAS, James Bonfiglio, Attorney at Law, filed an appeal of the Zoning Board of Appeal's decision in Resolution 2019-01 in 30th Judicial Circuit Court for Ingham County, Case NO. 19-797-AA; and

WHEREAS, the Board has received and reviewed the decision of the Hon. Judge James S. Jamo, 30th Judicial Circuit Court for Ingham County, Case NO. 19-797-AA remanding the matter back to the Zoning Board of Appeals to remove the conditions stated in Resolution 2019-01.

NOW, THEREFORE, BE IT RESOLVED that the City of Mason Zoning Board of Appeals does hereby amend its previous decision in Resolution 2019-01; and

THIS BOARD ORDERS that the Application for Building Permits for 934 and 965 Franklin Farm Drive shall be and are hereby granted, subject to the repayment of the required permit fees previously refunded to Esquire Development, and with no further conditions.

Yes (0)
No (0)
Absent (0)

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 December 9, 2020, 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 l(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.

CLARK **HILL**

MEMORANDUM

TO: FROM: Paul Pratt, Ingham County Deputy Drain Commissioner 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

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You have requested an outline of the procedures available under the Michigan Drain Code, Public Act 40 of 1956, as amended, MCL 280. l *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 L8 u1t o n@clarkhil l.com .

MEMO

TO: MASON CITY COUNCIL

FROM: THOMAS M. HITCH, CITY ATTORNEY

RE: DECISION AND ORDER IN THE MATTER OF *ESQUIRE DEVELOPMENT V CITY OF MASON AND FRANKLIN FARM CONDOMINIUM ASSOCIATION*

DATE: November 19, 2020

The purpose of this memorandum is to transmit to the Council the Opinion and Order of the Ingham County Circuit Court, the Honorable James S. Jamo presiding. The Judge reversed the decision of the Mason Zoning Board of Appeals and remanded the matter back for the removal of the conditions the Zoning Board of Appeals placed upon its grant of the building permits to Esquire Development. The conditions were that a contract to perform the required maintenance be executed prior to issuing the building permits.

As the Council may remember, Esquire Development sought two building permits to construct two site condo units on two of the four remaining vacant lots in the Franklin Farm Condominium Association. The building permits were denied by the building official, Elizabeth Hude, and, upon appeal to the Zoning Board of Appeals, it modified the denial by granting the permits, but conditioned upon the signing of a construction contract between either the condominium association or the Ingham County Drain Commissioner, to perform the deferred maintenance on a storm water detention pond that served the units within the Franklin Farm Condominium Association. Since the pond had been built in the mid-2000's, other than the mowing of the grass on the banks, there had never been any maintenance to the detention pond.

Esquire Development appealed to the Circuit Court claiming a number of constitutional violations, and claiming that it had no responsibility as a condominium unit owner to take upon itself the obligation to maintain the ponds. It thus claimed that whatever the obligations of Franklin Farms Condominium Association were (the Association has long been defunct), it argued that it was improper to condition building permits for its vacant lots when the obligation clearly rested with the Association to maintain the ponds.

On the other hand, the City argued that there was an implicit obligation on the part of the Association to continue its existence in order to undertake its obligations under a grant of easement, and the special use permit. While there was no specific language contained in the special use permit, the City urged the Court to find that the Condominium Act and the corresponding Master Deed contemplated a continuing, functioning association and that its breach of the Condominium Act, and the terms of the Master Deed, constituted a breach of the special use permit.

In its decision, the Court focused on the fact that the special use permit was not conditioned upon the Condominium Association being a functioning organization. At page 3 of the decision, the Court wrote:

> "The City acknowledges that it entered into an easement agreement as it related to easements and detention ponds with the understanding that the FFCA would be the responsible party for the maintenance of the detention ponds within the FFC site. The Master Deed, with attached Bylaws, designates the FFCA as the responsible party for maintenance of all common elements of the development, including storm water detention areas. Contrary to the City's arguments, however, the SUP does not itself require the FFCA to continue to exist, nor does the SUP place the burden upon the Plaintiff to manage the existence and acts of the FFCA. The City points to sections of the Master Deed and the Michigan Condominium Act; however neither of these are relevant in determining whether Plaintiff has met its obligations under the SUP its self. They are likely relevant in determining whether the homeowners have met their own obligations, but that is not the question presented by this litigation. The Court therefore finds that there is no competent, material, or substantial evidence on the record indicating that the current status of the FFCA, a separate and distinct entity, constitutes a violation of Plaintiff's SUP."

The Court also touched on several other issues. It held that the statements and information provided by the engineers in this case, which was presented to the Zoning Board of Appeals, was not sufficient in its view to demonstrate that the development of these lots would have "an affect on flooding or high water conditions downstream". It also concluded, because the Court had ruled that there was not competent, material or substantial evidence on the record or that the imposed conditions of the Zoning Board of Appeals were not a reasonable exercise of discretion, it had no need to consider the numerous constitutional issues raised by the Petitioner.

The Court did note, that it "appreciates the difficult position of the ZBA in attempting to find a party to make responsible for the maintenance of the detention basin", but the Court did not believe that it could put the burden on just a single property owner or the Ingham County Drain Commissioner.

It should be noted that in an appeal such as this, the Circuit Court is limited to looking at the record generated below. In fact, the Ingham County Drain Commissioner has taken on this project by granting the petition and finding the necessity to make the repairs. I have spoken with the Drain Commissioner's office, and have been advised that the engineers have been doing work

on the project, and it is anticipated in the next construction season that the project will be completed. In that respect, the detention pond will be brought up to current design specifications, the property owners within the district will be assessed for the cost, on their taxes, and all future maintenance will be performed by the Drain Commissioner.

It is my recommendation that no appeal be taken in this matter. The City has spent its resources in pursuing this matter and because the Ingham County Drain Commissioner is now taking over the jurisdiction of this detention pond, I see no further benefit to the City in expending more money in this litigation.

It is, however, my recommendation that staff, working with the Planning Commission, develop requirements regarding condominium projects which condition the special use permit on the continued viability of the condominium association. To my knowledge, this is not a widespread requirement, as, for the greatest percentage of condominium associations, they continue to be functioning and maintaining the properties as required under the Condominium Act, and Master Deed, and any applicable local zoning requirements. Nonetheless, because of this experience, I would strongly urge that the special use requirements for condominium developments be broadened to include language which would prevent further development should the Condominium Association become defunct.

The Planning Commission may also want to consider whether condominium developments (or subdivisions, for that matter) should all be required to make their storm water control utilities be subject to the jurisdiction of the Drain Commissioner's office. That does make the utilities more expensive, as the Drain Commissioner requires inspectors to be on-site for any of the storm drainage work. I have not discussed this issue with the Drain Commissioner, but if we were to proceed to consider making that a condition, it would be my recommendation that we first seek input from the Drain Commissioner's office.

Please contact me if you have any further questions including, if you desire, to have me appear at a Council meeting to discuss.

There is one final point. If there is a desire on the part of the City Council to appeal this decision, a Claim of Appeal must be filed 21 days from November 13 which, by my calculations, would be December 4, 2020. If there is an interest, please advise because there are several steps that need to be taken in preparation of filing a Claim of Appeal. This includes obtaining a certified copy of the lower court record, ordering the transcript and the like. These tasks are not particularly onerous but they should not be left to the last minute.

TMH:cf

STATE OF MICHIGAN
IN THE 30TH JUDICIAL CIRCUIT FOR INGHAM COUNTY

ESQUIRE DEVELOPMENT,

Petitioner,

v

CITY OF MASON and FRANKLIN FARM CONDOMINIUM ASSOCIATION,

Respondents.

OPINION & ORDER

CASE NO. 19-797-AA

HON. JAMES S. JAMO

At a session of said Court
held in the city of Lansing, county of Ingham,
this 13 day of November, 2020.

PRESENT: HON. JAMES S. JAMO, Circuit Court Judge

This matter comes before the Court on Petitioner's Claim of Appeal from the City of Mason Zoning Board of Appeals' imposition of certain conditions upon building permits. This Court, being fully apprised of the premises, REMANDS to the Zoning Board of Appeals for further proceedings consistent with this Opinion & Order.

FACTS

Plaintiff is the developer of a parent parcel in the City of Mason, commonly known as Franklin Farms, now consisting of a single-family site, Franklin Farm Condominiums (FFC) and a multi-family site, Villages at Franklin Farm Condominiums (VFFC). The special use permit and site plan (SUP) for the parent parcel, which included terms and requirements for a detention basin and storm sewer, were approved in April of 2000. Pursuant to the Michigan Condominium Act, the Franklin Farm Condominium Association (FFCA) and Villages at Franklin farm

Condominium Association (VFFCA) were formed, and control of the FFCA and VFFCA was transferred to homeowners in 2003. At this time, the co-homeowners of the FFCA have declined to formalize the operations of the FFCA.

In April of 2019, Plaintiff applied for two permits to construct single-family homes on two of the remaining four home sites in FFC. Initially, the City refused to issue the permits, alleging that the storm system was failing. Plaintiff appealed to the City of Mason Zoning Board of Appeals (ZBA), where the City argued that the building permits had been denied due to a "lack of appropriate storm drainage facilities as evidenced by the lack of a condo association what has been named as the responsible party for maintaining the detention pond," and that prior permits had been granted under the assumption that the detention basin was being managed and maintained by the VFFCA. [1] Plaintiff argued that maintenance of the detention pond was appropriately placed with the homeowners, and further that there is minimal discharge from the home sites for which the building permits were being sought. In September of 2019, the ZBA thereafter adopted a resolution granting the building permits subject to two conditions: 1) that the control of the detention basin be shifted from the FFCA to the Ingham County Drain Commission (ICDC), and 2) that a contract be entered under the supervision of the ICDC to make improvements to the detention basin. This appeal followed.

STANDARD OF REVIEW

Pursuant to MCL 125.3606 and MCL 125.585(11), a party aggrieved by a decision of the ZBA may appeal to the circuit courts, which will review the decision to ensure that it complies with the state constitution and laws, that it was based upon proper procedure, that it was supported by competent, material, and substantial evidence on the record, and that it represents a reasonable

[1] Transcript, 8/14/19, p 22-23.

exercise of discretion granted by law to the zoning board. The court is generally limited to the review of the record, although it may order an expansion of the record if there is good cause for additional evidence to not have been a part of the record below.

ANALYSIS

Plaintiff argues that the decision of the ZBA does not comply with the Constitutions of the United States or of the State of Michigan; the decision of the ZBA does not comply with Michigan law; the decision of the ZBA was not based upon proper procedure; the decision of the ZBA was not supported by competent, material, and substantial evidence on the record; and the decision of the ZBA was not a reasonable exercise of discretion as granted by law to the ZBA.

The City argues that the critical issue in this case is whether "the failure of the Condominium Association to maintain the storm water detention basin constitutes a breach of the terms of the Special Use Permit ("SUP") and the recognized obligation of the Association to maintain the detention pond as set forth in the grant of easement."[2] The SUP contemplated the formation of the FFCA. The FFCA was, in fact, formed, and Plaintiff transferred the administration of the FFCA to the co-homeowners in 2003. The City acknowledges that it entered into an easement agreement as it related to easements and the detention ponds with the understanding that the FFCA would be the responsible party for the maintenance of detention ponds within the FFC site. The Master Deed, with attached Bylaws, designates the FFCA as the responsible party for maintenance of all common elements of the development, including storm water detention areas. Contrary to the City's arguments, however, the SUP does not itself require the FFCA to continue to exist, nor does the SUP place the burden upon the Plaintiff to manage the existence and acts of the FFCA. The City points to sections of the Master Deed and the Michigan Condominium Act;

[2] Defendant's Brief in Response, p 10.

however, neither of these are relevant in determining whether Plaintiff has met its obligations under the SUP itself. They are likely relevant in determining whether the homeowners have met their own obligations, but that is not the question presented by this litigation. The Court therefore finds that there is no competent, material, or substantial evidence on the record indicating that the current status of the FFCA, a separate and distinct entity, constitutes a violation of Plaintiff's SUP.

Furthermore, the City argues that development of the remaining four sites of the FFC development will have a negative effect on the storm water storage volume in the area, thereby justifying a condition upon additional building permits to restore the detention basins. In support, the City introduced a letter from Wolverine Engineers & Surveyors, which notes that "increased runoff could result in flooding or prolonged high-water conditions downstream," and "[a]ny additional development in this area without the restoration of the storm water detention volumes to the original design volumes will exacerbate the current situation."[3] However, the letter provides no information regarding the current impact of the detention basins on storm water runoff or high-water levels. Another letter provided by LSG Engineers & Surveyors addressed to the Deputy Drain Commission notes that the detention basin at issue is overgrown, but again draws no connection between new building permits and an effect on either the detention basin or other flooding or high-water levels.[4] Although a topographical survey was referenced at oral argument, it was not included as part of the certified record. There is nothing in the record that supports the conclusion that the development of the remaining properties at the FFC will have any effect on flooding or high-water conditions downstream. Therefore the Court finds that there was no competent, substantial, or material evidence on the record to support the ZBA's decision to apply the relevant conditions to the building permits.

[3] Certified Record at 151.
[4] Certified Record at 135.

Plaintiff also argues that the ZBA's decision was not a reasonable exercise of discretion as authorized by law. This Court agrees. Although the Court appreciates the difficult position of the ZBA in attempting to find a party to make responsible for the maintenance of the detention basin, the ZBA cannot reasonably put the burden of the FFCA's obligations on a single property-owner or the ICDC. The ZBA's attempt to force Plaintiff to either maintain the detention basin itself or otherwise to sue the homeowners into reformalizing the FFCA in order to maintain the detention basin or to enter into a contract with the ICDC is not rationally related to the issuance of building permits.

To the extent that the City argues that the Constitutional arguments presented by Plaintiff cannot be heard before this Court because the ZBA doesn't decide constitutional matters, this Court disagrees; the plain text of the ZBA's authorizing statute, MCL 125.3606, authorizes this Court to consider the ZBA's actions in relation to constitutions and statutes. However, because this Court has determined that the ZBA's decision was not supported by competent, material, or substantial evidence, and that the ZBA's decision was not a reasonable exercise of its discretion as authorized by law, the Court declines to consider the remainder of Plaintiff's arguments.

THEREFORE IT IS ORDERED that the ZBA's decision is REVERSED. This case is remanded to the City of Mason Zoning Board of Appeals for further proceedings in accordance with this Order.

Hon. James S. Jamo
Circuit Court Judge

PROOF OF SERVICE

I hereby certify that I emailed a copy of the above ORDER to each attorney of record on November 13, 2020.

/s/ Kacie Smith
Kacie Smith
Law Clerk