

**FINAL**

**EVELINE TOWNSHIP  
ZONING BOARD OF APPEALS  
December 11, 2014**

Chairman Chris Carson opened the meeting of the Eveline Township Zoning Board of Appeals at 7:05 p.m. with the Pledge of Allegiance. The members in attendance were: Chris Carson, Kevin Schlickau, and Vance Wood. Others in attendance were Zoning Administrator Barry Wood, Eveline Township Attorney Bryan Graham, Township Supervisor John Vron dran, Attorney Dan Barron, attorney for Sommerset Pointe Development, Attorney Ross Hammersley, attorney for Appellants, John Ferguson, P.S., and Recording Secretary Janet Blossom as well as several visitors.

Attorney Graham noted that ZBA member, Michelle Johnson, has resigned as a regular member of the ZBA, and that a new member, Vance Wood, has been appointed as alternate member to the ZBA. Vance Wood was then introduced by Chairman Carson. Attorney Graham asked the following questions of Vance Wood:

Attorney Graham: You have been sworn in as a member of the ZBA, correct?

Vance Wood response: Yes.

Attorney Graham: You were not present on 10/30/14 when the ZBA heard evidence on the legal standing issues?

Vance Wood response: That is correct.

Attorney Graham: Have you had the opportunity to read the minutes and exhibits and other materials you deemed necessary to get up to speed on the issue of the legal standing?

Vance Wood response: Yes.

Attorney Graham: Are you now prepared to go forward on assisting in making a decision on the legal standing issue?

Vance Wood response: I am.

Attorney Graham stated he is satisfied that we are ready to proceed.

Chairman Carson moved to approve 10/30/14 minutes as presented. Roll call vote: Kevin Schlickau aye, Chris Carson aye, Vance Wood abstain, 0 nays. Motion approved.

Chairman Carson moved to approve 12/04/14 minutes as presented. Roll call vote: Kevin Schlickau aye, Chris Carson aye, Vance Wood abstain, 0 nays. Motion approved.

Attorney Graham reviewed the process since 10/30/14 stating we are at the point of board deliberations on the legal standing issue. At the 10/30/14 meeting, both parties were given an opportunity to present information on the legal standing issue. At the end of that meeting, the board adjourned deliberations, basically closing the public hearing and going into deliberations. Both attorneys have contacted Attorney Graham and asked for the opportunity to present to the board, additional information related to the legal standing issue. Because the board has already gone into the deliberation phase, you have discretion as to whether you will receive additional information on the standing issue. Attorney Graham instructed the board that once you have made your decision as to whether or not you will accept additional information, it is important to give the reasons as to why you have reached your decision. In the event the Court is called upon to review the board's decision, it will understand that the board has exercised its discretion in an appropriate manner. The next step this board needs to address is whether you are willing to have additional information presented tonight on the legal standing issue.

Chairman Carson moved to not accept additional information stating the attorneys have had ample time to present additional information.

Attorney Hammersley stated he wants to present clarification of materials that were sent following the 10/30/14 hearing and not additional information, on behalf of his clients. He said they were presented with a copy of the Finding of Fact and there were errors in the Finding of Fact. He has corrected the Finding of Fact and presented a corrected version to Attorney Graham. That was the primary focus and contents of the "additional information". It was not additional information that no one had seen before, but a correction of the materials that were presented. Attorney Hammersley contests the characterization of that material as additional,

stated it was simply for clarification purposes, and has copies of that information for all board members, and hopes to present this material to the board for the purpose of viewing the corrected version, including the Court of Appeals case that was cited. Attorney Hammersley has additionally presented new information in the form of a full copy of the Court of Appeals opinion that was cited in the original materials. Everything else is a corrected version or supplemental documentation that was already presented on behalf of his clients.

Chairman Carson questioned Attorney Hammersley if this is the case that he presented previously from another township.

Attorney Hammersley responded “no”. It is a Court of Appeals opinion that was quoted in their supplemental materials. In the section on legal standing in their supplemental materials, there is the *Brown v The East Lansing Zoning Board of Appeals*, and he has provided a copy of quotes from that case for the board’s review. Part of the correction to the Finding of Fact is that the Finding of Fact stated there were no Court of Appeals cases that were cited in their materials, which is incorrect.

Attorney Graham wanted the record to reflect that the proposed corrections to the Finding of Fact in Attorney Hammersley’s Option #1 and Option #2 were presented to the ZBA as part of their deliberation process. All of the board members have had an opportunity to review Attorney Hammersley’s Option #1 and Option #2. The board, during its deliberations, will have the opportunity to consider those proposed changes that Attorney Hammersley has indicated. Attorney Graham understands that Attorney Hammersley wants to present additional packets of information. Attorney Graham directed that the board must make a determination as to whether they have sufficient material on the *Brown* case to proceed and again states that Attorney Hammersley’s corrected Option #1 and Option #2 have been presented to the board as part of their deliberation process.

Attorney Hammersley requested that the full contents of the packet he presented to Attorney Graham which included a cover letter from Attorney Hammersley, Option #1 and Option #2 as corrected, a packet of documents including a power point presentation from Fred Taylor at a September meeting of the Township Board, be presented to the ZBA. Those materials were in the public record prior to the closure of the record at the October 30<sup>th</sup> hearing. The other materials are the

*Brown* case and the agenda from the Township Board meeting at which Mr. Taylor presented his materials during the September 9<sup>th</sup> meeting. The reason to include the September 9<sup>th</sup> Township Board meeting agenda is that agenda item 9 is “Presentation from Fred Taylor of Sommerset Pointe Yacht Club”, which is not additional information, but is contained in the public record.

Attorney Barron felt it would be appropriate to open a public hearing, to allow Fred Taylor to present information in an attempt to clarify mischaracterizations and misstatements made by Appellants regarding facts and information provided by Mr. Taylor in their attempt to claim special damages.

Attorney Hammersley objected to adding new information, with regard to a presentation by Mr. Taylor, without Appellants’ opportunity to review and make a response.

Attorney Barron argued it is the same information that Attorney Hammersley desired to present to the ZBA as well as Mr. Taylor’s clarifications of mischaracterizations and misstatements regarding the facts and information.

Chairman Carson did not want to accept any additional information stating the ZBA is beyond the point of accepting new information which would lead to additional rebuttal from the parties, additional sessions of the ZBA, wanted to consider only the facts and did not want to consider here say comments.

Chairman Carson moved not to accept additional information beyond what has already been presented for consideration.

ZBA member Kevin Schlickau commented he only wants to hear the facts and not here say comments.

ZBA member Vance Wood felt the documents clearly spell out the problems on both sides of the issue and agrees with Chairman Carson regarding the question of whether to accept additional information.

Chairman Carson asked for a second to his motion not to accept information beyond what has already been presented. Vance Wood supported the motion. Roll call vote: Kevin Schlickau aye, Chris Carson aye, Vance Wood aye, 0 nays. Motion approved.

Attorney Hammersley clarified that all information after the October 30<sup>th</sup> hearing will not be accepted for deliberations with the exception of the two different Options #1 and #2 from the Finding of Fact which will be considered in deliberations. Attorney Graham confirmed that was correct.

Attorney Graham directed that the ZBA is at the point of deliberations on the legal standing. He has prepared some proposed motions on both sides of the issue for consideration and consensus by the ZBA.

Chairman Carson considered Proposed Motion on the Standing Issue, Option #1 and the various points made in the Proposed Motion Option #1. There has been no real information from any engineering firms stating there is a likelihood of negative impacts from the wastewater treatment plant, but rather it is a possibility and anything is possible. Court cases from another county do not have a bearing on this case before the ZBA in Charlevoix County.

Chairman Carson considered Proposed Motion on the Standing Issue, Option #2 and the various points made in the Proposed Motion Option #2. He has heard different comments on what could happen and do we want to guess at what could happen.

Chairman Carson asked for comments from the other board members. Member Vance Wood stated that there was no proof that negative impacts will occur and therefore until more proof existed as to the likelihood of negative impacts, he was leaning toward Option #1. Member Kevin Schlickau is also considering Option #1. He works out in the field as an electrical inspector for the County and is not convinced noise would be a negative impact from generators, as numerous backup generators do exist in the county, nor that a potential for light pollution would cause a negative impact.

Attorney Hammersley wanted confirmation that all board members have seen the corrected versions of the Finding of Fact; the board confirms that they have.

Attorney Graham confirmed with the board that they are leaning toward Proposed Motion on the Standing Issue, Option #1. The board should consider both the Proposed Motion Option #1 presented by Attorney Graham as well as the Proposed Motion Option #1 with changes, as presented by Attorney Hammersley.

Chairman Carson directed the audience that the Board will not accept additional comments from the audience at this time, unless requested by the Board, in an effort to maintain order.

Chairman Carson then moved, supported by Vance Wood, that the appeal of the August 19, 2014 Eveline Township Planning Commission Decision and Order granting a special use permit to Castle Farms Enterprises, Inc., Sommerset Water Treatment, Inc., and Sommerset Pointe Development, LLC to construct a wastewater treatment plant on Marshall Road (Parcel No. 15-006-032-020-00) which was filed by Robert and Candace Greene, Geoff Nelson, Robin Lee Berry, and Anthony Williams is hereby dismissed, because those individuals do not have the required legal standing to pursue the appeal. This motion is based on the following facts:

1. Section 7.2.G of the zoning ordinance governs appeals to the ZBA from Planning Commission decisions concerning special use permits, and provides:

The Zoning Board of Appeals shall review any decision made by the Eveline Township Planning Commission regarding a special use permit, provided an application for appeal is made to said Board of Appeals. The applicant, Zoning Administrator, Township Board, or any aggrieved persons may file such an appeal.

(Exhibit 1)

2. Section 604(1) of the zoning enabling act, MCL 125.3604(1), provides that an appeal to the ZBA may be taken by “a person aggrieved” by a zoning decision. (Exhibit 5)

3. A party is "aggrieved" only if he or she alleges and proves that he or she has suffered special damages related to the beneficial use and enjoyment of his or her own land that are not common to other similarly situated property owners, or in other words, the party must allege and prove special damages that establish that he or she will be detrimentally affected by the zoning decision being appealed in a manner different from the citizenry at large. (Exhibit 5)

4. Appellants cite an opinion from the Manistee County Circuit Court, *Maple Grove Township v Village of Kaleva*, File No. 07-12815-AA

(Exhibit 29-6), for the proposition that the Appellants must only demonstrate negative impacts that are “substantially likely” to occur by the proposed land use and that “a sufficient likelihood of harm” is sufficient to establish special damages necessary to be an aggrieved party.

5. The Board finds, based on the advice of the township attorney, that a Circuit Court decision from a different county is not binding within Charlevoix County. In addition, the Board finds that Appellants have not cited any Court of Appeals or Michigan Supreme Court case that cites the “substantially likely” or “sufficient likelihood of harm” standard for establishing the special damages required to be an aggrieved person.

6. In their Supplemental Appeal and Request for Review, the Appellants assert that they have standing for the following reasons:

a. That they are long-standing tax payers of Eveline Township.

b. That they are owners of real property that is directly adjacent to that proposed facility or within 300 feet of the property on which the proposed facility will be located.

c. That they will be negatively impacted by the proposed facility in the following ways:

i. From noise and light pollution.

ii. From a change of character in this rural residential neighborhood.

iii. From a risk of sewage and wastewater contaminating their homes and property.

iv. From a likelihood of contamination of wells and harm to groundwater on their properties.

v. From a loss of property values for their homes and properties due to the changing character of the area and potential abandonment of the treatment facility.

vi. From the loss of family income due to contamination of the home and property of Robin Lee Berry, and Anthony Williams.  
(Exhibit 29, pp. 2 and 4-5)

7. At the public hearing Dan Barron, the attorney for the SUP applicant, asserted that the reasons given by the Appellants for legal standing were not proven as required by case law and were based on worst case scenarios and wild speculation. Mr. Barron further stated that speculative special damages do not meet the legal requirements for standing, which Mr. Barron asserted must be established and demonstrated through viable evidence. (ZBA October 30, 2014 minutes, pp. 1-2)

8. The Board finds that Appellants have failed to allege and prove special damages sufficient to make Appellants “aggrieved persons” under Michigan law. This finding is based on the following:

a. The status of the individuals as taxpayers in the township does not establish that they will suffer special damages related to the beneficial use and enjoyment of their own land that is different than the citizenry at large or that is different than other similarly situated property owners.

b. The Appellants’ status as neighboring property owners does not in and of itself afford them legal standing. (Exhibit 5)

c. Any adverse financial interest to Appellants from the development of the proposed wastewater treatment plant is also legally insufficient to afford Appellants legal standing. (Exhibit 5)

d. The negative impacts stated by Appellants have only been alleged. They have not been proven as required by Michigan case law. In addition, those impacts are speculative, based on the following provisions of the affidavits presented:

i. **If** the proposed wastewater treatment facility or the infrastructure to implement and operate said facility at the top



of the hill on Marshall Road **were to fail**, untreated or partially treated sewage and/or wastewater would **likely** flow down-hill from the facility location onto my property and **potential[ly]** into our home. (Emphasis added.) (Robert D. Greene Affidavit, paragraph 6 [Exhibit 29-1]; Candace J. Greene Affidavit, paragraph 6 [Exhibit 29-2]; Anthony Williams Affidavit, paragraph 6 [Exhibit 29-5])

ii. I understand that the treatment facility itself will have on-site electricity generation, as well as a “digester” (per Mr. Taylor’s materials presented to Township residents on Sept. 9th, 2014), both of which can be **expected** to produce excessive noise that will disturb the quietude of the rural residential character of the area. The noise is like having a 24 hour, 7-day-per-week lawn service running on a neighbor’s property next door. (Emphasis added.) (Robert D. Greene Affidavit, paragraph 11 [Exhibit 29-1]; Candace J. Greene Affidavit, paragraph 11 [Exhibit 29-2]) (See also the Anthony Williams Affidavit, paragraph 11 [Exhibit 29-5] and the Robin Lee Berry Affidavit, paragraph 10 [Exhibit 29-4] for similar provision.)

iii. It is **possible** that lights and/or alarms will be installed at the treatment facility location, or the pumping station, or both. The additional light will cause light pollution and disturb our ability to enjoy the night-sky view from our home. Any alarm system will cause additional noise pollution and the diminishment of our ability to enjoy the peace and quiet of our home’s rural location. **If** the alarm is triggered and sounds, I will also suffer an increase in anxiety over the possibility of a catastrophic failure of the sewage and waste water treatment facility directly uphill from my house and property. (Emphasis added.) (Robert D. Greene Affidavit, paragraph 13 [Exhibit 29-1]; Candace J. Greene Affidavit, paragraph 13 [Exhibit 29-2]; Anthony Williams Affidavit, paragraph 2 on page 2 [Exhibit 29-5]) (See also the Robin Lee Berry Affidavit, paragraph 12 [Exhibit 29-4] for similar provision.)

iv. The failure of the treatment facility, its containment system, its pumping station, or any related portion of its infrastructure **could cause** a cascade of law or partially treated sewage and/or wastewater flowed down slope from the proposed facility's location directly onto my property and **possibly** into my home. I will no longer feel safe in my own home from such an event occurring at any time. (Emphasis added.) (Robert D. Greene Affidavit, paragraph 14.b [Exhibit 29-1]; Candace J. Greene Affidavit, paragraph 14.b [Exhibit 29-2]; Anthony Williams Affidavit, paragraph 3.b on page 3 [Exhibit 29-5])

v. I will **likely** see a loss of property value as a result of a sewage treatment facility being located on the top of the hill directly above my home and the surrounding property because it will change the character of the immediately surrounding area.

vi. (Emphasis added.) (Robert D. Greene Affidavit, paragraph 14.d [Exhibit 29-1]; Candace J. Greene Affidavit, paragraph 4.d [Exhibit 29-2]; Anthony Williams Affidavit, paragraph 3.d on page 3 [Exhibit 29-5])

vii. **If** the development connected to the Sommerset Water Treatment, Inc. facility is not successful, then my neighborhood would **potentially** be stuck with a large volume of untreated and partially treated sewage waste on top of a hill with no one to operate and/or maintain the system and prevent the occurrence of a catastrophic failure. (Emphasis added.) (Robert D. Greene Affidavit, paragraph 14.e [Exhibit 29-1]; Candace J. Greene Affidavit, paragraph 14.e [Exhibit 29-2]; Anthony Williams Affidavit, paragraph 3.e on page 3 [Exhibit 29-5])

viii. **If** the proposed wastewater treatment facility or the infrastructure required to implement and operate said facility at the top of the hill on Marshall Road **were to fail**, untreated or partially treated sewage and/or wastewater would **likely** flow

down-hill from the facility location onto my property and **potentially** into my workshop, where my family and I make our livelihood by making and producing item to sell. (Emphasis added.) (Robin Lee Berry Affidavit, paragraph 5 [Exhibit 29-4])

ix. A catastrophic failure of the proposed sewage/wastewater treatment system on top of the hill would **likely** enter the stream that runs south to more, through the center of our property, and then through two other property owners' land before emptying into Lake Charlevoix. (Emphasis added.) (Robin Lee Berry Affidavit, paragraph 13 [Exhibit 29- 4])

x. **If** this sewage smells to [sic] high . . . (Emphasis added.)(Anthony Williams Affidavit, paragraph 3.f on page 3 [Exhibit 29-5])

9. The Board, therefore, finds that Appellants have failed to allege and prove special damages sufficient to make them “aggrieved persons” under Michigan law and as a result do not have legal standing to pursue this appeal.

Roll call vote Chris Carson aye, Kevin Schlickau aye, Vance Wood aye, 0 nays. Motion approved.

Chairman Carson then opened the meeting to public comment on non-agenda items.

Robert Greene questioned what may happen with the Special Use Permit if Fred Taylor does not need to develop the waste treatment plant on Marshall Road because of another agreement that may be entered into between the City of Boyne City and Somerset Pointe Development for waste treatment?

Attorney Graham responded: Assuming the City of Boyne City and Somerset Pointe Development come to an agreement for waste water treatment, he would anticipate that Somerset would formally withdraw its' request for a Special Use Permit that the Planning Commission granted. If that were the case, and they

would formally withdraw their request for a special use permit, it basically makes this appeal moot, because there is no special use permit upon which to make an appeal.

Candace Greene questioned what is meant by a formal withdrawal of the request for a Special Use Permit?

Attorney Graham responded: The formal withdrawal for request of a special use permit could be accomplished via a letter.

Robert Greene also questioned what will happen with the sewage currently contained on the Somerset Yacht Club property?

Attorney Graham responded: He would assume, however is not certain, that it would be dealt with by the Health Department and Somerset.

There being no further business before the board, Chairman Carson moved, supported by Kevin Schlickau, to adjourn at 7:42 p.m. Motion approved.

Respectfully submitted,

Janet Blossom, Secretary