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MEMORANDUM

TO: Elmwood Charter Township Planning Commission **VIA EMAIL**

FROM: Bryan E. Graham *BEG*

DATE: January 26, 2023

SUBJECT: Legal relationship between private deed restrictions and special use permit approval procedures

This memo is intended to address the legal relationship between private deed restrictions and special use permit approval procedures. In his January 18, 2023 letter attorney John P. Lynch asserts that one of the reasons the planning commission should deny the requested special use permit is that allegedly there are private deed restrictions that limit the property to residential uses only.

I agree with Mr. Lynch that the planning commission cannot approve a special use permit if that special use permit does not comply with state law. However, I disagree with his assertion that a private deed restriction is imposed by state law, thus disqualifying special use permit approval.

Special use permit approval is governed by the Zoning Enabling Act, MCL 125.3101, *et seq.*, and that the requirements of the Elmwood Charter Township Zoning Ordinance. Specifically, Section 504(1) of the Zoning Enabling Act, MCL 125.3504(1), provides:

If the zoning ordinance authorizes the consideration and approval of **special land uses** or planned unit developments under section 502 or 503 or otherwise provides for discretionary decisions, **the regulations and standards upon which those decisions are made shall be specified in the zoning ordinance.** (Emphasis added.)

The township zoning ordinance complies with this statutory mandate when it specifies the standards for special use permit approval in Section 9.3. None of the standards contained in Section 9.3 of the zoning ordinance requires compliance with private deed restrictions. Finally, Section 504(3) of the Zoning Enabling Act, MCL 125.3504(3), provides:

A request for approval of a land use or activity **shall be approved if the request is in compliance with the standards stated in the zoning ordinance**, the conditions imposed under the zoning ordinance, other applicable ordinances, and state and federal statutes. (Emphasis added.)

Therefore, if the planning commission finds that all of the standards contained within Section 9.3 of the zoning ordinance (which does not require compliance with private deed restrictions) have been met, then the planning commission is required by law to approve the special use permit.

Under Michigan law compliance with a deed restriction is not required by any state statute. As the Michigan Court of Appeals stated in *Petersen Fin LLC v City of Kentwood*, 337 Mich App 460, 475 (2021):

In general, "[a] deed restriction **represents a contract** between the buyer and the seller of property." *Bloomfield Estates Improvement Ass'n, Inc v Birmingham*, 479 Mich 206, 212; 737 NW2d 670 (2007). (Emphasis added.)

Although the planning commission is required to approve or deny a requested special use permit based on the standards contained in Section 9.3 of the zoning ordinance, if the planning commission approves the requested special use permit, the alleged private deed restrictions may still apply to the property. Section 1.2.E of the zoning ordinance provides:

Relationship to Other Documents. This Ordinance is **not intended to repeal, abrogate, annul or, in any way, impair or interfere with existing provisions of deed restrictions**; subdivision regulations; private restrictions placed upon property by covenants; condominium rules; ownership association rules; or ordinances, laws, or regulations of any federal, state or county agency. However, when this Ordinance has more restrictive regulations, limitations or requirements, then this Ordinance shall control. (Emphasis added.)

Therefore, as a contract between property owners, the private deed restrictions can be enforced by property owners benefitted by those deed restrictions through a private lawsuit in the Circuit Court.

Concerning a related topic, I have heard comments from the public and Mr. Lynch raised in his letter that the proposed development could have an adverse impact on the Road Improvements and Maintenance Agreement governing the private roads leading to the proposed development. Again, the planning commission must base its decision on the standards contained within Section 9.3 of the zoning ordinance. Specifically, Section 9.3.A.5 and 9.3.A.9 deal with the physical adequacy of the roads leading to the

proposed development. Like deed restrictions, the road maintenance agreement is a contractual matter between the parties and cannot legally be considered by the planning commission when rendering its decision. In addition, if the property owners believe that the proposed development will unduly burden the private easement servicing the properties, then those private property owners can enforce their private property rights through a private lawsuit in the Circuit Court.

If there are questions concerning this matter, I can address those questions at the planning commission meeting on February 28, 2023.

BEG

