



# Law Office of Kristyn J. Houle, PLC

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October 9, 2023

Kasson Township Zoning Board of Appeals  
10988 S. Newman Road  
Maple City, MI 49664

Re: Public Hearing – October 11, 2023 Enduro Motorcycle Events

Dear ZBA Members:

## Introduction

My firm represents Kasson Township Neighborhood Association (KTNA). Please accept this letter as a request to *deny* the two appeals by James Schettek and Bill Kasben on their proposed land use in the Forested Residential (FR) district for Motorcycle Race Events.

**Appeal #1. An Appeal of the Planning Commission's Decision to Discontinue Consideration of SUP Application for Enduro Motorcycle Event under Section 7.15 based upon the legal opinion that the section is unlawful in accordance with the *Whitman v Galien Township* case, 288 Mich App 672 (2010).**

I support the Planning Commission's decision based on the legal advice of the township attorney, Tom Grier, in consultation with Michigan Township Association attorney, Catherine Mullhaupt. Section 7.15 is unlawful because (1) it violates the specificity requirement of the Michigan Zoning Enabling Act ("MZEA"), MCL 125.3502(1)(a); *Whitman v Galien Township*, 288 Mich App 672 (2010); and (2) it unlawfully delegates legislative power to the Planning Commission (an administrative body) that is - the power to assign special uses in zoning districts which is a *legislative power* reserved only for the elected officials on the Township Board after due process safeguards are met. [(MCL 125.3502(1)); *Sun Communities v Leroy Township*, 241 Mich App 665 (2000)]. **Please see my letters to the PC dated May 2, 2023 and May 5, 2023 for my full legal analysis. Please note: my early letters to the PC as well as Dr. Grobbel's initial letter refer to the Ag district, instead of the FR district because that is the district listed on the SUP application. Nevertheless, the same analysis applies to both districts.**

Mr. Wendling argues in his July 17, 2023 letter to the Planning Commission, that the *Whitman v Galien Township* does not apply to the facts of this matter. I respectfully disagree. Mr. Wendling cites two *unpublished* cases to support his argument that the *Whitman* case should not be applied. The cited cases are not supportive of Mr. Wendling's arguments because they both include sections of zoning ordinances that specifically provide for uses that are similar to uses listed in the specific districts. Section 7.15 does not include this safeguard.

In the *Whitman v Galien Township* case, the zoning board granted a special use permit for a snowmobile, dirt bike and ATV racetrack in the township's agricultural district. The Galien Township Zoning Ordinance stated that a special use permit could be granted by the zoning board for, "establishments for the conducting of **commercial or industrial activities**, subject to approval of the zoning board." The Court found that the terms "commercial or industrial activities" were not specific enough, and were therefore a violation of Section 502 of the MZEA.

Similarly, Section 7.15 states:

***Land and structural uses*** that are not specified in any other section of this Ordinance, but, upon being applied for under the provisions of Chapter 7, may be considered by the Planning Commission as long as they meet all of the conditions and requirements of this Chapter and the spirit and intent of the Ordinance.

Under the Kasson Township ordinance section 7.15, "land and structural uses" are even more broad than "commercial and industrial activities" and clearly lack the specificity the MZEA requires. Thus, clearly the *Whitman* analysis applies. On the other hand, the two cases cited by Mr. Wendling arguably meet the MZEA requirements by conditioning the catchall sections with the term of art "and other uses similar to" the listed uses. Therefore, they are easily distinguished from the matter before you.

In *Common Ground v City of Pontiac*, 2012 WL 1560339 (2012), the proposed use was a medical clinic for mental health issues, and the specific section of the zoning ordinance at issue stated, "principal permitted uses included health services, charitable institutions, hospitals and other uses similar to those uses." The court found that the proposed use included administrative offices, a medical director's office, a doctor's office, and rooms for psychiatric screening, and that regardless of the label, the substance of the proposed use clearly falls within the permitted principal uses of the ordinance. *Id.* at 4. The court found that plaintiff's services could fall under the principal use of physical culture and health services in Section 7.47(6) or at least was substantially similar to "health services" to fall within the catchall provision of Section 7.47(15). The use was "sufficiently similar to an outpatient medical clinic to plainly fall within the catchall "uses similar to the above uses." *Id.*

In *NSC Walker v City of Walker*, 2022 WL 17724288 (2022), the specific section of the zoning ordinance in question was a commercial district and the proposed use was a self-storage building business. The zoning ordinance in question stated, "other retail businesses or service uses determined by the board of zoning appeals to be similar to the permitted principal uses in this zoning district and compatible with the intent of the zoning district." The court found the self-storage business was substantially similar to the permitted principal uses and compatible with the intent of the zoning district.

Neither the *Whitman* ordinance nor Section 7.15 include the guideline that the proposed use must be "similar to" the uses listed in the districts. And from a practical standpoint – neither the ATV

track in the Galien township Ag district nor the motorcycle race event in the FR district would be similar to the listed uses in these districts, anyway.

Mr. Wendling's second argument is that, "[a]s such, the issue is not the overbreadth of a zoning use as in the *Galien Township* case, but rather the ability of Kasson Township to address uses purportedly not listed as an allowed use in any zoning district. As such, the only way to avoid exclusionary zoning is to allow for an application under Section 7.15 entitled *Other Special Land Uses*." (p. 2 of P. Wendling 7/17/23 letter). Once again, I respectfully disagree. The exclusionary zoning statute, MCL 125.3207 states in its entirety:

A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a local unit of government *in the presence of a demonstrated need for that land use* within either that local unit of government or the surrounding area within the state, *unless a location within the local unit of government does not exist where the use may be appropriately located* or the use is unlawful.

Just because a use is not permitted in a community under the zoning ordinance, it does not automatically rise to the level of exclusionary zoning. In *Adams Outdoor Advertising Inc. v City of Holland*, 234 Mich App 681 (1999), the court held that "demonstrated need" must "**relate to the public needs of the residents of the community, not merely to plaintiff's private economic self-interest.**" 234 Mich App at 698. Mr. Wendling does not make any argument that an Enduro motorcycle race event is a demonstrated need in Kasson Township for the community. Further, there is a location in nearby Mancelona for such a land use which is within, "the surrounding area within the state..." MCL 125.3207. Not every land use is going to be for every community. A dangerous, noisy, three-day overnight event with camping, food trucks, porta-potties and motorcycle racing for 8 hours per day, is not a land use that is likely to rise to the level of exclusionary zoning should it be denied a land use permit.

The Planning Commission simply lacks the legal authority to grant the permit under 7.15 under any scenario, and the ZBA must uphold the Planning Commission's decision to discontinue consideration of the SUP application.

**Appeal #2. Appeal #2 involves a July 7, 2023 decision by the Zoning Administrator that the proposed motorcycle race event does not qualify as an Outdoor Recreational Facility and this appeal involves three separate sections of the Zoning Ordinance:  
4.7.2, 5.13 and 4.4.**

**Section 4.7.2 Outdoor Recreational Facility.** First, the Applicants appeal the Zoning Administrator's July 7, 2023 decision that the motorcycle racing events do not fit the definition of an Outdoor Recreational Facility under Section 4.7.2 of the Zoning Ordinance. I support the Zoning Administrator's decision, and also refer the ZBA to my letter dated June 11, 2023 regarding this section.

Mr. Wendling addresses section 4.7.2 in his letter to the ZBA of October 5, 2023. Mr. Wendling spends a great deal of time arguing that Mr. Cypher's decision erroneously limited the uses for an

Outdoor Recreation Establishment to those given as examples in the definition. However, Mr. Cypher clearly did not intend for this. First, Mr. Cypher adopts the township attorney's reasoning and attaches Mr. Grier's letter to his written decision (an email dated July 7, 2023). Second, he states clearly, "I further state for the record that the definition of the term "outdoor recreation establishment" used in the Kasson Township zoning ordinance is constrained by the examples used in the ordinance. **Other activities are permitted but they must be of like character to the examples provided.**" (emphasis added).

This is a valid and enforceable decision by the zoning administrator, and he clearly meant that the examples in the definition of Outdoor Recreation Establishment are not the ONLY uses permitted. Mr. Cypher's decision was further guided and supported by the township attorney's letter attached to the decision.

If we look at the common characteristic of the examples given in the definition of Outdoor Recreation Establishment, the activities are very low-intensity and low-impact. Facilities such as a golf course, tennis court, children's amusement park, playground or other public areas "for the purposes of rest, play, recreation..." are meant for leisure and gathering, not for potentially dangerous and loud events that last over days and provide for overnight camping. Other activities that may be of like character to the examples given, might be a baseball diamond, a basketball court, or a pickle ball court. The definition does not include any high-intensity, high-volume or high-impact events such as an Enduro Motorcycle Event, a Motocross racetrack, Motocross recreational use or Motocross racing. In his May 25, 2023 letter, Mr. Wendling argues that a children's amusement park may produce noise akin to Motocross racing. I disagree. The sound of children's laughter and the operation of kiddie rides will not rise to the level of "a Boeing 737 or DC-9 aircraft at one nautical mile before landing (97 dB), a power mower (96 dB), a motorcycle at 25 feet (90 dB) or a newspaper press at 97 dB" and a person's hearing will not likely be "damaged after eight hours of exposure" to a children's amusement park. (See, March 20, 2023 Planning Commission meeting minutes, p.6).

Motocross racing is also not a "customary" recreational activity similar to a tennis court, archery range, golf course or children's amusement park. Under the North American Industry Classification System (NAICS), "race tracks" are listed as their own industry [Code 711212] which includes motorcycle race tracks, automobile race tracks, dog racing, drag strips and speedways. These land uses are simply not materially similar to the uses listed under the definitions of park or outdoor recreational establishment, and are therefore, excluded. *Independence Twp v Skibowski*, 136 Mich App 178 (1984).

Further proof of the distinguishing characteristic of motocross racing from an outdoor recreational facility is the description of the proposed use as a "dangerous event" in Mr. Schettek's 2/18/23 application.

First, the applicant describes the proposed use as a one-day "event" not an outdoor recreational facility. An "event" is temporary, whereas an outdoor recreational facility is permanent. In his application, Mr. Schettek states, "track set up would start 1-2 months prior to the event. Within 1 week of the event finishing, all course marking material will be torn down and discarded." (See

attached application description). Tennis courts, golf courses, parks and playgrounds are not set up and torn down after each use.

Second, the proposed use described in the application is a motorcycle race along with “primitive camping” over a 3-day weekend. The applicant states, “people will start to arrive on Friday afternoon to camp for the weekend.” The definition of an outdoor recreational facility does not include a campground or temporary camping or any other overnight accommodations.

The applicant states, “all people through the front gate will be required to sign a waiver form. Basically stating they are at a potentially *dangerous event* and the property owners, event promoters or workers are not held liable.” A “dangerous event” is materially different from an outdoor recreation establishment such as a tennis court, a golf course, miniature golf course or a children’s amusement park. A motorcycle race track is inherently dangerous, requires a waiver form, an EMT to be on site, generates noise in the range of 94db/a to 96 db/a, and where participants bring ear protection equipment with them. (See Minutes of March 20, 2023 Planning Commission meeting, p.6). Public services would be required for 72 hours straight. Clearly, this proposed use does not fit under the Outdoor Recreational Facility under Section 4.7.2.

Finally, the MZEA provides that “regulations shall be uniform for each class of land or buildings, dwellings, and structures within a district.” MCL 125.3201(2). “The special use standards must ensure that special uses are compatible with adjacent uses and are consistent with public health and safety.” MCL 125.3504(2). In addition to the arguments numbered above, allowing the motorcycle race event would be a public and private nuisance, it would constitute illegal spot zoning and may also rise to a regulatory taking of private property in violation of the Michigan Constitution (MLCA Const. Art 10 Sec 2).

The ZBA must uphold the Zoning Administrator’s well-reasoned and substantially supported decision that the proposed motorcycle race event is not a use encompassed by the definition of outdoor recreational facility under 4.7.2.

**Section 5.13. Temporary Outdoor Uses.** The Applicants argue that their proposed use would qualify as a Temporary Outdoor Use, and that the ZBA should permit it under this Section 5.13. I refer the ZBA to my Supplemental May 4, 2023 letter to the PC for my arguments as to why section 5.13 does not apply to the proposed use.

Mr. Wendling concedes in his October 5, 2023 letter that since he believes the proposed use qualifies as an Outdoor Recreation Establishment, which is a SUP under 4.7.2, that the first section of 5.13 does not apply. That is, the proposed use is not “similar in nature to those uses that are allowed by right in the district.” (see p. 3 of Wendling letter). Even if there was no concession, clearly a motorcycle racing event is not remotely close the listed permitted uses in the FR district, most of which are residential uses.

Mr. Wendling’s second argument is that the proposed use qualifies under the second section of 5.13 – that is, that it is, “**any other temporary outdoor uses** require a review by the Planning Commission and may require an approved site plan at the Commission’s discretion in accordance with Chapter 8.” This section runs into the same legal problems as section 7.15. It

unconstitutionally delegates legislative powers to the Planning Commission (that is, to decide on what “other temporary outdoor uses” may be allowed in any district). This legislative power is reserved exclusively to the Township Board. Additionally, the term “**other temporary outdoor uses**” violates the specificity requirement of the MZEA. The MZEA’s specificity requirement also operates to prevent an administrative body from engaging in rezoning, since *rezoning is exclusively a legislative function*. *Id.*, citing *Sun Communities, supra*, 241 Mich App at 669. The specificity requirement **encourages consistency within a zoning district and guards against undesirable “spot zoning”** which is defined as “a zoning ordinance or amendment creating a small zone of inconsistent use within a larger zone.” *Id.*, citing, *Penning v Owens*, 340 Mich 355, 367 (1954). Additionally, the proposed use would not be compatible with the other uses in the FR district. A principle of zoning is that like uses should be grouped and incompatible uses kept separate. *Robinson Twp v Knoll*, 410 Mich 293 (1981). ***A zoning ordinance that permits piecemeal or haphazard zoning is void as spot-zoning.*** *Jostock v Mayfield Twp*, 2023 WL 3261566 (2023) (*emphasis added*) [this is a published case, but only Westlaw citation available].

The Applicants also cannot have it both ways – they argue their use will be an Outdoor Recreational Facility under 4.7.2, but also a “temporary use” under section 5.13. A recreational facility would clearly be a permanent structure, and by its nature any use under 5.13 would need to be a *temporary* use. Either way, the ZBA must *deny* the Applicants’ request to classify their proposed use as a temporary outdoor use under section 5.13 for the reasons stated above.

**Section 4.4. Classification of Uses Not Listed.** This section of the Zoning Ordinance allows the ZBA to classify a use which is not specifically mentioned by this Ordinance, as described in 11.5. “Said use shall be treated in a like manner with comparable uses, as determined by the ZBA, and permitted or prohibited by the District Regulations for each Zoning District.” The pertinent section of 11.5 is 11.5C which states, “the Board may classify any activity which is not specifically mentioned in the district regulations as Use Allowed by Right or allowed by Special use Permit. The basis for such classification shall be that the activity is **consistent and similar to the uses already listed in the district.**” The motorcycle racing event is not consistent and similar to any of the uses already listed in the FR district, and the ZBA must deny the Applicants’ request to classify the proposed use as a use allowed by right or special use permit in the FR district.

As indicated above, the proposed Motorcycle Race Event is in no way shape or form consistent and similar to any permitted use in the FR district. I believe Mr. Wendling will agree given his arguments in his October 5, 2023 letter. The permitted uses in the FR district include: single family dwellings, duplex dwellings, residential PUDs, Home occupations, Agricultural uses, adult foster care family home, family child care home and foster family home. A 3-day dangerous, noisy and overnight event is simply not consistent or similar to any of these uses.

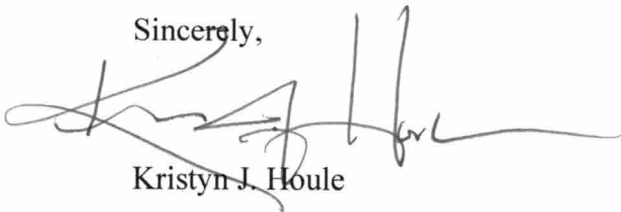
Also, as discussed above, the proposed use is not consistent and similar to a public or private outdoor recreation or park facility under 4.7.2. (see arguments above). Nor is it consistent or similar to any of the other uses listed in section 4.7.2 Special Land Uses, which include: housekeeping cabin parks, boarding or lodging houses, bed and breakfast establishments, elderly day care centers, churches, fruit packing and grading plants, wineries, cooling and packing plants, agricultural research and development facilities, other similar agricultural businesses or uses,

riding stables, kennels, cemeteries, schools, adult foster care group home or group child care home. Again, a 3-day dangerous, noisy and overnight event is simply not consistent or similar to any of these uses allowed as a special use. [See also, Expert Planner, C. Grobbel October 9, 2023 letter to ZBA].

**Conclusion**

In conclusion, for the reasons stated above, I request that the ZBA *deny* both appeals by the Applicants, and uphold the Planning Commission decision, the Zoning Administrator's decision, and otherwise deny the request to classify the motorcycle race event as a use permitted or by a SUP under the FR district.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kristyn J. Houle', written in a cursive style.

Kristyn J. Houle