

**APPROVED**

**Kasson Township**

**Zoning Board of Appeals Special Meeting & Public Hearing**

**November 20, 2023 at 1 p.m.**

**Kasson Township Hall**

Members Present: Don Drabik (Chair), Jerry Gretzinger, Dave Noonan (PC Rep), Roger Noonan (Township Board Rep), Scott Mills

Staff Present: Township Attorney Tom Grier, Zoning Administrator Tim Cypher, Township Clerk Dana Boomer (acting as Recording Secretary)

**Call to Order/Pledge of Allegiance** – Drabik called the meeting to order at 1:00 pm with the Pledge of Allegiance.

**Approval of Agenda** – Gretzinger moved, Mills seconded to approve the agenda as presented. All in favor, motion carried.

**Declaration of Conflict of Interest** – None.

**Approval of Minutes – October 11, 2023** – The board briefly discussed the minutes from the October 11, 2023 meeting. Gretzinger moved, Mills seconded to approve the minutes from October 11, 2023. All in favor, motion carried.

**Public Comment** – Kristin Houle – On behalf of the Kasson Township Neighborhood Association, she thanked the ZBA for their time and effort. This is a big project with a lot of information, and a large document record, and she thanked the ZBA and the staff.

Jacqueline Carlson – She has a piece of property near the applicant parcel. She thinks the PC and the ZBA have the authority to make a decision on this application, and she request that they deny the application. People moved into the area because of the current beautiful, natural, quiet character of the area, and she does not want to see something of this nature occur.

James Welker – He is opposed to the proposal for a racetrack in the neighborhood. It is within clear hearing distance of his property, and even the current use by motorcycles is intrusive. Eight events in a year will take up a majority of the 13 weekends in a summer, and he hopes the application is denied.

Mark Cantrell – He is an adjacent property owner, and he does not believe this is an appropriate place for an event of this sort. He can hear the motorcycles from his property, and the increased traffic and camping would be very intrusive. He is opposed to this application.

Annie Belvrie – She agrees with the opposition to the application. She and other landowners feel disrespected by this application, as it is not in the character of the county.

Don Wheelock – He lives on Kasson Road, about two miles from the track itself. The traffic from this application would be an issue. He thinks that GPS will route people coming from Traverse City up Kasson

Road, which has a lot of hidden driveways and other issues. This would lead to a lot of cars and motorcycles travelling on Kasson Road during the day and night, which would be a safety issue.

### **Public Hearing**

**R. Noonan moved to re-open the public hearing, Gretzinger seconded. All in favor, motion carried.** The public hearing was opened at 1:09 pm.

### **f. ZBA Discussion with Staff**

The ZBA re-opened the public hearing and began with item (f), ZBA discussion with staff. Drabik asked Township Attorney Grier to summarize the cases and provide a framework for the discussion today. Grier stated that there are four main sections of the Zoning Ordinance under discussion today, which the ZBA can discuss and either affirm or reverse decisions on three of those sections, and either affirm the decision or making a ruling on the fourth section (Section 4.4).

### **g. ZBA Deliberation/Findings of Fact**

### **h. ZBA Motions/Action**

The ZBA determined that they would discuss and take action on each section individually, working through the various sets of findings of fact submitted by Grier and the other attorneys.

The ZBA began the discussion with Section 7.15. Grier had provided two sets of draft findings, one of which affirms the PC decision and one of which reverses the PC decision. Grier summarized the arguments for and against the use of Section 7.15 and the history of the record and case law with regard to the section. Grier distributed copies of the pertinent Zoning Ordinance passages. Attorneys Wendling, for the applicant, and Houle, for the neighborhood association, also produced alternate findings, which were previously distributed to the ZBA for consideration.

The ZBA began discussion. Gretzinger asked, if the ZBA takes Grier's conclusion that Section 7.15 is unlawful and cannot be applied, what could be applied? Grier stated that there are other ordinances where there is language like Section 7.15, but also use words like "similar" – those may be able to be argued as legal. However, the existing Section 7.15 is so open-ended that it may even be broader than the *Whitman v Galien Township* case where the ordinance language was determined to be unlawful. Mills stated that the *Galien Township* case utilized language from Michigan Zoning Enabling Act, which requires that ordinances shall specify land uses eligible for approval. The case states that general categories of land uses were not specific enough to meet the requirements of the MZEA, such as the "commercial or industrial activities" language used in the *Galien* case. The current Kasson Township ordinances states "land and structural uses", which he feels is as broad or broader than the disallowed language of the *Galien* case. He had a hard time imagining something that wouldn't be a land or structural use, and so his opinion is that the *Galien* language is very similar to the Kasson language, and the Kasson language is even less specific than the *Galien* language and opens up the possibility of even more spot zoning than the *Galien* language. Mills feels that the *Galien* case does apply in this case.

D. Noonan agrees and feels that this is a very complicated case with a lot of gray area in Section 7.15. Section 7.15 is very broad and issues like this were never considered when the Zoning Ordinance section was first written. Originally, no one cared when big pieces of property were used for various uses, but

now there are a lot of neighbors that this will affect. This will be a hard decision. This Zoning Ordinance section should be changed to be more specific.

R. Noonan feels that the *Galien* case does apply in this case, and the Kasson language is probably even broader than the *Galien* language. He agrees with Grier that this is not a defensible section. Drabik agrees – Section 7.15 has been used as a broad, catch-all category. Gretzinger is questioning whether the ZBA should deny the appeal and have this case go to Circuit Court, or whether the PC should have considered the case on its merits, for better or worse. The ZBA discussed the arguments for or against affirming or reversing the PC decision on Section 7.15.

**R. Noonan moved to affirm the Planning Commission’s decision on Section 7.15, based on the alternate Findings of Fact to affirm prepared by Attorney Grier (see attached). Mills seconded. The ZBA briefly discussed and reviewed the prepared Findings of Fact – no changes were made. All in favor, motion carried.**

The ZBA signed the prepared Findings of Fact document, and declared the issue of Section 7.15 closed.

The ZBA then moved to the discussion of Section 4.7.2 at the recommendation of Attorney Grier. Grier summarized the history of the case with regards to Section 4.7.2., which covers the Special Land Uses allowed in the Forested District. The applicant has argued that their proposed use is substantially similar to “public or private outdoor recreation or park facilities”, an allowed Special Use in the Forested District. Grier then read the definitions of “Outdoor Recreation Establishment” and “Public Park or Park” from Zoning Ordinance Section 2.2 – Definitions. Grier worked with Zoning Administrator Tim Cypher to determine that the proposed use could not be considered a “public or private outdoor recreation or park facility”, and therefore the application under Section 4.7.2 was not allowed to proceed to Planning Commission review. It is up to the ZBA to determine whether or not the correct decision by the Zoning Administrator to not allow the application to proceed to the Planning Commission under Section 4.7.2.

Mills stated that it is clear that this is not a public park or park, because those are defined as being operated by a government body. The ZBA had consensus that this application could not be considered a public park or park. The ZBA then discussed whether it could be an outdoor recreational establishment. R. Noonan stated that it could be considered a facility for sports or amusement. Gretzinger feels that this is an event, not a facility, and that is a key point. Mills stated that the examples given for outdoor recreation establishments (“such as tennis courts, archery ranges, golf courses, miniature golf courses, golf driving ranges, and children’s amusement parks”) are fairly easy to imagine what the impact would be on neighboring properties, given that most of these are present in the county. It comes down to whether the proposed use is similar to anything on the list of examples. The ordinance gives examples to provide a greater level of specificity than what is given in the first sentence of the definition. The ZBA needs to determine whether the proposed use is similar to anything in the list of examples. The noise alone of the proposed use sets it apart in a striking way from the list of examples.

Drabik stated that this is not a low impact event. It may be relaxing to some, because it is a hobby event, but it is not low-intensity. R. Noonan stated that the enduro race is an event or set of events, while a children’s amusement park could be year round with just as much traffic. However, the noise does set it apart. Mills stated that in the initial application it was indicated that these were dangerous events with attendees signing liability waivers due to the inherent danger of the event. There is less inherent danger and noise to the example events. In addition, the events would be all day during the days of the event,

while the example uses would have hours of operation. R. Noonan is concerned about the noise as well; he is less concerned about the inherent danger as that is something taken on only by the event participants. Gretzinger stated that the example list does not include things such as shooting ranges or go-kart tracks. D. Noonan stated that things like go-kart tracks could be included in a children's amusement park. Drabik stated that the example list has a general theme, and those are more quiet activities. Mills stated that people coming into the township have a general expectation from the Zoning Ordinance, and noise is the major differentiator between the proposed use and the uses listed in the definition of Outdoor Recreation Establishment. The overnight use is also a consideration.

Drabik also stated that the location of the activity on the property is also a consideration. A track running around the outside of the property is potentially more dangerous and more of a nuisance to neighboring properties than a use that is interior to the property. Mills concluded that the effect of this use on neighboring properties is different by kind and degree from the effects of the uses given in the definition of Outdoor Recreation Establishment. While effects of the other uses might be inconvenient to neighbors, the effects of the proposed use rise to the level of potential harm to neighboring properties. D. Noonan stated that essentially the ZBA is determining whether the landowner is never allowed to conduct an Enduro race in the township or whether it fits under Outdoor Recreation Establishment. Mills stated that it is up to the ZBA to determine whether the proposed use fits the current definition of the Outdoor Recreation Establishment and therefore is allowed to be considered as a Special Use in the Forested District. R. Noonan stated that the ZBA is here to decide whether the Zoning Administrator's decision on Section 4.7.2 is justified under the current language of the Zoning Ordinance, and he believes it was.

**Mills moved to affirm the Zoning Administrator's decision on Section 4.7.2, based on the alternate Findings of Fact to affirm prepared by Attorney Grier (see attached). R. Noonan seconded.** The ZBA briefly discussed and reviewed the prepared Findings of Fact – no changes were made. **In favor: R. Noonan, Mills, Drabik, Gretzinger; Opposed: D. Noonan. Motion carried 4-1.**

The ZBA signed the prepared Findings of Fact document, and declared the issue of Section 4.7.2 closed.

The ZBA then moved to the discussion of Section 5.13 at the recommendation of Attorney Grier. Attorney Grier summarized the history of the case as it pertains to Zoning Ordinance Section 5.13, which covers temporary outdoor uses. Grier read the section, which allows temporary outdoor uses if they are similar in nature to uses permitted by right in a zoning district, or upon review by the Planning Commission. Grier stated that the original request was for one event, which then evolved to four events through subsequent correspondence from the applicant. Grier read the letter from Zoning Administrator Tim Cypher, Exhibit 24 in the record, regarding why Tim Cypher determined the proposed use could not be considered a temporary outdoor use. He determined that here was no temporary use similar in nature to those allowed by right in the Forested Zoning District. He also determined that the allowance for all other temporary outdoor uses to be reviewed by the Planning Commission contained in the second sentence of Section 5.13 was too broad and not permissible under the *Whitman v Galien Township* case analysis, similar in its application to Section 7.15. It is up to the ZBA to, first, determine whether Cypher was correct in stating that the proposed use was not similar in nature to those allowed by right in the Forested District, and second, whether Cypher was correct in determining that the second sentence provision allowing all other uses to be reviewed by the Planning Commission was too broad to be legally defensible under the *Whitman v Galien Township* case.

Gretzinger stated that he feels that Cypher was correct on the second conclusion, as that provision is extremely broad. Mills agreed – the “any other temporary outdoor uses require a review” language may be even more broad than the Section 7.15 language. Drabik stated that the word “temporary” may be the mitigating factor in this statement. One event has the potential to be temporary, but an ongoing series of events is not temporary. Mills agreed. R. Noonan agreed – temporary is one event, not multiple.

The ZBA discussed whether the proposed use is similar to any of those allowed by right. The ZBA had consensus that there are no similar uses allowed by right in the Forested District. The ZBA discussed the difference between the noise produced by agriculture and the noise produced by this event – when moving into the township, people are told that they may be in an area where they will experience noise, dust, and other disturbances from agricultural activity.

**Mills moved to affirm the Zoning Administrator’s decision on Section 5.13, based on the alternate Findings of Fact to affirm prepared by Attorney Grier (see attached). Gretzinger seconded. The ZBA briefly discussed and reviewed the prepared Findings of Fact – no changes were made. All in favor, motion carried.**

The ZBA signed the prepared Findings of Fact document, and declared the issue of Section 5.13 closed.

The ZBA then moved to the discussion of Section 4.4 at the recommendation of Attorney Grier. Grier summarized the issue with regard to Section 4.4, which covers the ability of the Zoning Board of Appeals to classify uses not specifically mentioned by the Zoning Ordinance, as long as there is basis to determine that the activity is consistent and similar to the uses already listed in the district. It is up to the ZBA to determine whether the proposed use is consistent and similar to the uses already listed in the Forested District, with respect to either the uses listed by right or by special use permit. Grier recommended the ZBA consider their previous discussions on the other ordinance sections discussed today.

Gretzinger stated that if the ZBA granted this request to have this be an allowed use would go against all of the previous motions made today. Mills agreed. D. Noonan stated that this was true, other than that he thinks this use should be allowed to be considered as similar to outdoor recreation uses. There was consensus amongst the ZBA that the proposed use is not consistent and similar with any uses permitted by right in the Forested District. The ZBA then moved to a discussion on whether the proposed use was consistent and similar with any of the uses permitted by Special Use Permit in the Forested District.

Mills asked Grier to clarify whether the ZBA would be approving the application if they said that this use is consistent and similar, or whether they would just be stating that the use is potentially consistent and similar and should be considered by the Planning Commission. Grier stated that the ZBA should go through each Special Permit Use and determine whether this use is consistent and similar with each one, and consider their previous discussions during the meeting.

Drabik read each use allowed under special land uses in the Forested District. Public or private outdoor recreation or park facilities was previously voted on, with R. Noonan, Mills, Gretzinger and Drabik stating that the proposed use was not similar and D. Noonan voting that it was similar. The ZBA briefly discussed “other similar agricultural businesses or uses” – the proposed use is not similar to this use, but it is another very broad category that could include numerous noise-producing uses. The ZBA discussed the nuisance-producing potential of a number of the items on the list, especially the agriculture-related

uses. The public or private outdoor recreation or park facilities would be the only one that could have an argument made for similarity, but Drabik feels that it is comparing apples to oranges with the proposed use and the example uses.

**Mills moved to determine that the proposed use is not similar and consistent with the uses by right or by special use in the Forested District, for purposes of classification under Section 4.4, based on the alternate Findings of Fact prepared by Attorney Grier (see attached). Gretzinger seconded.** The ZBA briefly discussed and reviewed the prepared Findings of Fact – it was determined to remove “and the 400 -acre landfill” from Item 13 of the prepared findings. **In favor: R. Noonan, Mills, Drabik, Gretzinger; Opposed: D. Noonan. Motion carried 4-1.**

**i. Close Public Hearing**

**R. Noonan moved to close the public hearing at 2:53 pm, Mills seconded. All in favor, motion carried.**

**Other Business** – Cypher and Boomer will work to schedule a ZBA meeting to approve the minutes from today’s meeting.

**Public Comment** – Fran Seymour – He thanked the PC, ZBA, and Zoning Administrator for their work during the process of this set of applications.

Tim Dowd – He thanked the ZBA for their consideration of the application and the applicable law. The track would have gone right past his house, and would have been a major disruption to the peaceful enjoyment of his property. In his 50 years as a builder, this is one of the worst plans that he has seen, and should have been shot down by the Planning Commission on the first presentation. This was a square peg in a round hole, and does not fit the township at all. If this goes further into the court system, the neighbors will be asking for remediation and reforestation of the subject property, as the work that was done to start the project was very disruptive to the surrounding landowners. He doesn’t think windmills would be as disruptive.

Pam Zientek – She thanked the PC, ZBA and Zoning Administrator for all of the work they have done on the application. She understands that the applicant can do what they want with the land, as long as they stay within the bounds of the Zoning Ordinance.

**ZBA/Zoning Administrator Comment** – R. Noonan – People have to realize that townships will soon not have any authority over commercial solar panel or windmill installations, and that is discouraging.

**Next Meeting/Adjournment** – **R. Noonan moved to adjourn the meeting, D. Noonan seconded. All in favor, motion carried.** The meeting was adjourned at 4:29 pm.

# Kasson Township Zoning Board of Appeals

## Zoning Ordinance Section 7.15 Determination To Affirm the Decision of the Planning Commission

The Applicants appeal the Planning Commission’s decision to discontinue consideration of the Special Use Permit under Section 7.15 of the Kasson Township Zoning Ordinance.

### Findings

1. The ZBA finds that the Planning Commission began processing the Special Use Permit (SUP”) under Section 7.15 “Other Special Land Uses” (**Exhibit 1**) February 18, 2023 Special Use Application).
2. The ZBA finds that there was a March 20, 2023 Planning Commission meeting wherein the SUP Application was discussed. (**Exhibit 2** Planning Commission Minutes).
3. The ZBA finds that there was a public hearing conducted on the SUP application on April 17, 2023, wherein over 100 members of the public were present, the majority of whom spoke in opposition to the SUP. (**Exhibit 21** April 17, 2023 Planning Commission Minutes).
4. The ZBA finds that on or about June 23, 2023, the Applicant requested an amendment of the SUP to request “four events per year” to replace the original plan to hold an event that past Memorial Day. [**Exhibit 10** June 23, 2023 Email from Fran Seymour to Tim Cypher (w/ attachments)].
5. The ZBA finds that the Planning Commission’s July 17, 2023 decision to discontinue consideration of the Special Use Permit (“SUP”) under Section 7.15 of the Kasson Township Zoning Ordinance was based in part on the advice of Kasson Township attorney, Tom Grier, in consultation with the Michigan Township Association’s legal counsel and others. (**Exhibit 14** July 17, 2023 Planning Commission Motion; **Exhibit 6** May 5, 2023 letter from Tom Grier to Zoning Administrator Tim Cypher).
6. The ZBA finds that the Michigan Zoning Enabling Act, MCL 125.3502(1)(a) and the published Court of Appeals case *Whitman v Galien Township*, 288 Mich App 672 (2010) were cited in support of Mr. Grier’s legal opinion that the Planning Commission should discontinue consideration of the SUP because Section 7.15 of the Zoning Ordinance is unlawful. The ZB finds that this is an accurate legal analysis. (**Exhibit 14** July 17, 2023 Planning Commission Motion; **Exhibit 6** May 5, 2023 letter from Tom Grier to Zoning Administrator Tim Cypher).
7. Specifically, the ZBA finds that Tom Grier consulted with Michigan Township Association attorney, Catherine Mulhaupt, about the Enduro Event. Mr. Grier states in his May 5, 2023 letter to T. Cypher, “Ms. Mulhaupt independently raised concerns about the Whitman COA case in the context of ZO Section 7.15. We then discussed the permitted and the special land uses within the Forested District. Ms. Mulhaupt raised further concerns about the Enduro Event because it was not consistent or comparable with any of the permitted or special land uses in the Forested District.” (**Exhibit 6** May 5, 2023 letter from Tom Grier to Zoning Administrator Tim Cypher).

8. The ZBA also finds that Mr. Grier reviewed and incorporated in part the legal opinion letter from attorney Kristyn Houle, who argued that Section 7.15 violated the specificity requirement under MCL 125.3502(1)(a) which states:

The legislative body may provide in a zoning ordinance for special land uses in a zoning district. A special land use shall be subject to the review and approval of the zoning commission, the planning commission, an official charged with administering the zoning ordinance, or the legislative body as required by the zoning ordinance. The zoning ordinance shall specify all of the following:

(a) The special land uses and activities eligible for approval and the body or official responsible for reviewing and granting approval. [Emphasis added]

Ms. Houle also argued that Section 7.15 unlawfully delegates legislative power to the Planning Commission, citing MCL 125.3502(1) and *Sun Communities v Leroy Township*, 241 Mich App 665 (2000). (**Exhibit 6** May 5, 2023 letter from Tom Grier to Zoning Administrator Tim Cypher; **Exhibit 3** May 2, 2023 Letter from Kristyn Houle to Planning Commission).

9. The ZBA finds that 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 therefore a violation of MCL 125.3502(1)(a) of the MZEA. (**Exhibit 3** May 2, 2023 Letter from Kristyn Houle to Planning Commission; **Exhibit 16** Anne Wendling email with *Whitman*, etc., cases from Peter Wendling).
10. The ZBA finds that in interpreting the specificity requirement in the MZEA, the *Whitman* Court found: "[w]hen these definitions are considered together, the statute can be read to mandate that a zoning ordinance must set forth in explicit, precise, definite and detailed language both the customary uses and the specific actions and functions that are eligible for special use permits. The legal definition of "special use permit" supports this reading of the statute. Black's Law Dictionary (9<sup>th</sup> Ed) defines a special use permit as, "a zoning board's authorization to use property in a way that is identified as a special exception in a zoning ordinance. Accordingly, the MZEA's specificity requirement ensures that property uses and activities eligible for special-use status are identified in the language of the ordinance." *Whitman*, at 682-83. (**Exhibit 16** Anne Wendling email with *Whitman*, etc, cases from Peter Wendling).
11. The ZBA finds that per the *Whitman* case, the MZEA's specificity requirement operates to prevent an administrative body (such as the Planning Commission) from engaging in rezoning, since rezoning is exclusively a legislative function. (**Exhibit 16** Anne Wendling email with cases from Peter Wendling).
12. The ZBA finds that Section 7.15 of the Kasson Township Zoning Ordinance is similar to the Galien Township zoning ordinance at issue. 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. (**Exhibit 28** Kasson Township Zoning Ordinance).

13. The ZBA finds that the Kasson Township ordinance section 7.15 “land and structural uses” is even more broad than “commercial and industrial activities” section of the Galien Township Zoning Ordinance, and therefore, does not meet the specificity requirement of the MZEA, MCL 125.3502(1). (**Exhibit 28** Kasson Township Zoning Ordinance).
14. The ZBA finds that the arguments made by attorney for Applicants, Peter Wendling, that the *Whitman* case does not apply to Section 7.15 are not convincing. The ZBA finds that the two cases cited by Mr. Wendling in his July 17, 2023 letter to the Planning Commission are *unpublished* cases, and therefore, not precedential. (**Exhibit 15** July 17, 2023 Peter Wendling letter to Planning Commission; **Exhibit 16** Anne Wendling email with cases from Peter Wendling).
15. The ZBA finds that neither the Galien Township Ordinance at issue nor Section 7.15 of the Kasson Township Ordinance include the guideline that the proposed use must be “similar to” the uses listed in the districts. The ZBA further finds that neither the ATV track in the Galien Township Agricultural District nor the proposed motorcycle race event in the Kasson Township Forested District would be “similar to” the listed uses in those districts. (**Exhibit 15** July 17, 2023 letter to Planning Commission; **Exhibit 16** Anne Wendling email with cases from Peter Wendling; **Exhibit 23** October 10, 2023 Letter from Kristyn Houle to ZBA).
16. The ZBA finds that the Planning Commission’s July 17, 2023 decision to immediately terminate any further action, including but not limited to, consideration of findings of fact, on the Motorcycle Event application, as a special land use within the Forested zoning district, was in compliance with current state law.

### Decision

Motion made by \_\_\_\_\_ and supported by \_\_\_\_\_.

Based upon the foregoing Findings, the Kasson Township Zoning Board of Appeals affirms the decision of the Planning Commission (by Motion, dated July 17, 2023) to terminate any further action on the applicants’ special use application for the Motorcycle Event under Zoning Ordinance Section 7.15 because Section 7.15 does not comply with state (zoning) law.

**Date adopted:** \_\_\_\_\_

ZBA Member Votes:

Ayes

Nays \_\_\_\_\_

ZBA Chairperson \_\_\_\_\_

ZBA Secretary \_\_\_\_\_

# Kasson Township Zoning Board of Appeals

## ZO Section 4.7.2 Determination

### To Affirm the Decision of the Zoning Administrator

The Applicants appeal the Kasson Township Zoning Administrator’s decision on July 7, 2023 to deny the processing of a request for a Special Use Permit by the Applicants within the Forested District of a Motorcycle Race Event as an Outdoor Recreational Facility under Zoning Ordinance Sections 4.7.2.

#### **4.7.2 Outdoor Recreational Facility.**

#### **Findings**

1. The ZBA finds that the Applicant’s attorney, Peter Wendling, requested that the Township allow for the processing of a Special Use Permit for the motorcycle race event within the FR district as an Outdoor Recreation Facility pursuant to Sections 4.7.2 Special Land Uses and per the definition of “Outdoor Recreation Establishment.” (**Exhibit 7** May 25, 2023 Letter from Peter Wendling to Tom Grier and Tim Cypher).
2. The ZBA finds that the Zoning Administrator (or “ZA”) responded that the Township will not allow for the processing of a Special Use Permit application on behalf of the applicant James Schettek within the Forested zoning district pursuant to 4.7.2 Special Land Use based on the ZA’s determination of the definition of the “Outdoor Recreation Establishment.” (**Exhibit 11** Tim Cypher July 7, 2023 email to Peter Wendling and Fran Seymour including July 7, 2023 Tom Grier letter to Tim Cypher).
3. The ZBA finds that the Zoning Administrator stated that the definition of Outdoor Recreation Establishment used in the Kasson Township Zoning Ordinance is constrained by the examples given. Other activities are permitted but they must be of like character to the examples provided. (**Exhibit 11** Tim Cypher July 7, 2023 email to Peter Wendling and Fran Seymour including July 7, 2023 Tom Grier letter to Tim Cypher).
4. The ZBA finds that under the Forested District, Section 4.7.2 allows “Public or private outdoor recreation or park facilities” as a special land use. (**Exhibit 28** Kasson Township Zoning Ordinance).
5. The ZBA finds that “**Outdoor Recreation Establishment**” is defined in the ordinance under section 2.2 as: a facility designed and equipped for the conduct of sports, amusement or leisure time activities and other customary recreational activities outdoors (outside of enclosed buildings) and operated as a business and open for use by the public for a fee such as tennis courts, archery ranges, golf courses, miniature golf courses, golf driving ranges, and children’s amusement parks.” (**Exhibit 28** Kasson Township Zoning Ordinance).
6. The ZBA finds that “**Public Park or Park**” is defined in the ordinance under section 2.2 as: a playground, recreation center or other public areas, created, established, designated, maintained, provided or set aside by a governmental body, for the purposes of rest, play, recreation, enjoyment

or assembly for the public and all buildings, facilities and structures thereon or therein. (**Exhibit 28** Kasson Township Zoning Ordinance).

7. The ZBA finds that read as a whole, and to effectuate the intent of the zoning ordinance and applying the plain meaning of the ordinance language, the common characteristic of the examples given in these definitions is that 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. (**Exhibit 28** Kasson Township Zoning Ordinance).
8. The ZBA finds that the unpublished case cited by Mr. Wendling in his October 25, 2023 letter, can easily be distinguished by the facts of this matter. In *Tullio v Attica Township*, the proposed use was a mulching operation that the Courts and ZBA determined fit the definition of agribusiness – which included engaging in the storage and processing of an agricultural commodity (mulch). In that case, agribusiness **was not defined in the zoning ordinance** (only examples were given) so the dictionary was consulted. It was clear that the proposed use fit the dictionary definition. In the matter at hand, Outdoor Recreation Establishment and Park **are defined by the ordinance in Section 2.2** (as well as examples given for context). (**Exhibit 26** October 25, 2023 Peter Wendling Memorandum to ZBA; **Exhibit 27** October 26, 2023 Kristyn Houle Letter to ZBA).
9. The ZBA finds that the proposed motorcycle race event is a potentially dangerous and extremely loud *event* that would last at least a couple of days and provide for “primitive” overnight camping, and the track would be located along the outer edges of the property further increasing the negative impact on neighboring properties. (**Exhibit 1 and Exhibit 1(a)** Special Use Permit Application; **Exhibit 4** May 4, 2023 letter from Kristyn Houle to Planning Commission No.1; **Exhibit 30** Enduro Site Plan submitted with Application; **Exhibit 31** Public Correspondence).
10. The ZBA finds that the definitions of Outdoor Recreation Establishment or Park do not include any high-intensity, high-volume or high-impact overnight events such as the proposed Enduro Motorcycle Race Event. (**Exhibit 11** Tim Cypher July 7, 2023 email to Peter Wendling and Fran Seymour including July 7, 2023 Tom Grier letter to Tim Cypher; **Exhibit 9** June 11, 2023 letter from Kristyn Houle to Tim Cypher; **Exhibit 22**, October 9, 2023 Letter from C. Grobbel to ZBA).
11. The ZBA finds that the proposed use is a “dangerous event” as stated in the description of the proposed use in Mr. Schettek’s SUP application. The ZBA finds that the applicant stated in the application, “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.” (**Exhibit 1** Special Use Application).
12. The ZBA specifically finds that a “dangerous event” is materially different from an outdoor recreation establishment or park such as a tennis court, a golf course, miniature golf course or a children’s amusement park. (**Exhibit 1** Special Use Application; **Exhibit 9** June 11, 2023 letter from Kristyn Houle to Tim Cypher; **Exhibit 23**, October 9, 2023 Letter from C. Grobbel to ZBA).
13. The ZBA finds that the proposed use described in the SUP application is a motorcycle race along with “primitive camping.” The ZBA finds that the applicant states in his original application, “people will start to arrive on Friday afternoon to camp for the weekend.” The amended SUP

application states that “each event involves a one-day race on a Sunday, with some participants arriving on Saturday....some may have campers for primitive camping on our site.” The ZBA finds that the definition of an outdoor recreational facility *does not* include a campground or temporary camping or any other overnight accommodations. (**Exhibit 1 and Exhibit 1(a)** Special Use Application; **Exhibit 9** June 11, 2023 letter from Kristyn Houle to Tim Cypher; **Exhibit 23**, October 9, 2023 Letter from C. Grobbel to ZBA).

14. The ZBA finds that the noise that will be generated from the event alone is enough to distinguish it from the uses listed under the Outdoor Recreation Establishment definition. Patrons of a tennis court, golf course or children’s amusement park do not need to bring their own ear protection equipment because “a person’s hearing will likely be damaged after eight hours of exposure.” (**Exhibit 2**, March 20, 2023 Planning Commission meeting minutes, p.6; **Exhibit 23**, October 9, 2023 Letter from C. Grobbel to ZBA; **Exhibit 11** Tim Cypher July 7, 2023 email to Peter Wendling and Fran Seymour including July 7, 2023 Tom Grier letter to Tim Cypher; see, C. Grobbel Report and EPA study exhibits attached to T. Grier letter).
15. The ZBA finds that the impact of the noise produced by the event on the neighboring properties is one of the most distinguishing features of the proposed land use from the definition of outdoor recreational facility or park. (**Exhibit 1** Special Use Permit Application; **Exhibit 11** Tim Cypher July 7, 2023 email to Peter Wendling and Fran Seymour including July 7, 2023 Tom Grier letter to Tim Cypher; **Exhibit 31** Public Correspondence).
16. The ZBA finds that the applicant has indicated that each motor bike will produce a sound level of 94 dB to 96 dB and that possibly more than 200 motor bikes may participate. (**Exhibit 1**, Special Use Application amendment; **Exhibit 2**, March 20, 2023 Planning Commission meeting minutes, p.6; **Exhibit 23**, October 9, 2023 Letter from C. Grobbel to ZBA; **Exhibit 11** Tim Cypher July 7, 2023 email to Peter Wendling and Fran Seymour including July 7, 2023 Tom Grier letter to Tim Cypher).
17. The ZBA finds that in his letter dated May 25, 2023, Mr. Wendling implies that a children’s amusement park may produce noise akin to the proposed motocross racing. The ZBA finds that the sounds of a children’s amusement park will not rise to the level of the noise produced by the proposed motorcycle race event and the proposed motorcycle race event is not a similar use as a children’s amusement park. (**Exhibit 2**, March 20, 2023 Planning Commission meeting minutes, p.6; **Exhibit 7** May 25, 2023 letter from Peter Wendling to Tom Grier and Tim Cypher.)
18. The ZBA finds that the Zoning Administrator stated at the March 20, 2023 meeting, that the noise from the motor bikes can be compared to the noise 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 likely be “damaged after eight hours of exposure.” (**Exhibit 2**, March 20, 2023 Planning Commission meeting minutes, p.6).
19. The ZBA finds that the proposed land use as a motorcycle race event is a dangerous high-intensity use that would include motorcycle racers starting at 15 second increments, running the course multiple times at noise ranges up to 96 dB, where there would be overnight camping, and an additional 1-2 people per rider on site. This use does not fit the zoning ordinance definition of Outdoor Recreation Facility or Park, nor is it similar to any of the examples given in the definitions. (**Exhibit 2**, March 20, 2023 Planning Commission meeting minutes, p.6; **Exhibit 23**, October 9,

2023 Letter from C. Grobbel to ZBA; **Exhibit 11** Tim Cypher July 7, 2023 email to Peter Wendling and Fran Seymour including July 7, 2023 Tom Grier letter to Tim Cypher).

20. The ZBA finds that the foregoing interpretation of the terms within Section 4.7.2 of the Zoning Ordinance is supported by the Township’s newly-adopted 2023 Master Plan, **Exhibit 29**, which has identified large uses within the Township that already produce noise and other negative externalities. These include the 3,100-acre gravel district and the 400 -acre landfill. See page 1 and Chapter 5 of the Master Plan, respectively. A survey, page 6, identified noise and vibration as community concerns. A long-term objective is a safe, healthful and peaceful environment. See page 27. There is a residential policy to allow residential uses in the Forested District and to allow enterprises that are non-intrusive. See pages 14 and 17. Such a motorcycle event would produce noise and other negative impacts materially different from the other enumerated uses under Section 4.7.2. See motorcycle event site plan, **Exhibit 30**. See prior-referenced exhibits.

**Decision**

Motion made by \_\_\_\_\_ and supported by\_\_ \_\_\_\_\_  
\_\_\_\_\_.

To affirm the Zoning Administrator’s July 7, 2023 decision to disallow the processing of the proposed motorcycle event as a special land use in the Forested District (FR) under Zoning Ordinance Section 4.7.2 as a “Public or private outdoor recreation or park facilities” as the motorcycle event does not constitute either an Outdoor Recreation Establishment or a Public Park or Park as defined under Section 2.2 of the Zoning Ordinance.

**Date adopted** \_\_\_\_\_, 2023

ZBA Member Votes:

Ayes \_\_\_\_\_

Nays \_\_\_\_\_

Chairperson \_\_\_\_\_

Secretary \_\_\_\_\_

**Kasson Township Zoning Board of Appeals**  
**ZO Section 5.13: Determination**  
**To Affirm the Decision of the Zoning Administrator**

**Section 5.13 Temporary Outdoor Use**

The Applicant appeals the Zoning Administrator’s decision that the proposed Motorcycle Race Event is not a Temporary Outdoor Use under Section 5.13 of the Kasson Township Zoning Ordinance.

**Findings**

1. The ZBA finds that the Applicant has requested that the proposed motorcycle race event fit the definition of Section 5.13 of the Zoning Ordinance as a temporary use. [**Exhibit 24** October 10 2023 letter from Tim Cypher to Peter Wendling (re: Section 5.13 of Zoning Ordinance)].
2. The ZBA finds that the Zoning Administrator stated in a written letter that the proposed motorcycle race event does not fit the definition of Section 5.13 of the Zoning Ordinance because it is not similar in nature to those uses that are allowed by right in the district, and that otherwise, the second section of 5.13 is unlawful under the *Whitman v Galien Township* case analysis. [**Exhibit 24** October 10 2023 letter from Tim Cypher to Peter Wendling (re: Section 5.13 of Zoning Ordinance)].
3. The ZBA finds that Section 5.13 has two sections, the first is: “temporary outdoor uses may be permitted in any zoning district provided that the temporary use is similar in nature to those uses that are allowed by right in the district.” (**Exhibit 28** Kasson Township Zoning Ordinance).
4. The ZBA finds that the proposed Motorcycle Race Event is not similar in nature to those uses that are allowed by right in the district. (**Exhibit 28** Kasson Township Zoning Ordinance; **Exhibit 5** May 4, 2023 Letter from Kristyn Houle to Planning Commission No 2 and Grobbel Report attached to letter; **Exhibit 6** May 5, 2023 Letter from Tom Grier to Zoning Administrator Tim Cypher).
5. The ZBA finds that Applicants’ attorney, Peter Wendling, concedes in his October 5, 2023 letter that the first section of 5.13 does not apply, he states, “therefore, the first sentence of Section 5.13 temporary outdoor uses would not apply to my client’s proposed use.” (**Exhibit 20** October 5, 2023 Peter Wendling Letter to ZBA on the Appeal).
6. The ZBA further finds that the proposed use is not temporary in nature, as the Applicants’ amended SUP application requests at least 4 events per year, making the use a *recurring event/multiple-event use* as opposed to a one-time or “temporary” use. (**Exhibit 1** Special Use Permit Application; **Exhibit 31** Public Correspondence).

7. The ZBA finds that the second section of 5.13 states, “**any other temporary outdoor uses require a review by the Planning Commission** and may require an approved site plan at the commission’s discretion...” The ZBA finds that this section is unlawful for the same reasons that section 7.15 is unlawful, because the term “**other temporary outdoor uses**” violates the specificity requirement of the MZEA pursuant to the *Whitman v Galien Township* case analysis. (**Exhibit 28** Kasson Township Zoning Ordinance; **Exhibit 5** May 4, 2023 Letter from Kristyn Houle to Planning Commission No 2 and Grobbel Report attached to letter; **Exhibit 6** May 5, 2023 Letter from Tom Grier to Zoning Administrator Tim Cypher; **Exhibit 16** July 17, 2023 Anne Wendling email with cases from Peter Wendling).
8. The ZBA finds that the *Whitman* Court found that the terms in the Galien Township Zoning Ordinance that allowed “**commercial or industrial activities**” were not specific enough, and therefore, a violation of Section 502 of the MZEA. (**Exhibit 28** Kasson Township Zoning Ordinance; **Exhibit 5** May 4, 2023 Letter from Kristyn Houle to Planning Commission No 2 and Grobbel Report attached to letter; **Exhibit 6** May 5, 2023 Letter from Tom Grier to Zoning Administrator Tim Cypher; **Exhibit 16** July 17, 2023 Anne Wendling email with cases from Peter Wendling).
9. The ZBA finds that “**any other temporary outdoor uses**” is even more broad than “**commercial and industrial activities**” and therefore, lacks the specificity the MZEA requires per the interpretation by the *Whitman* Court. (**Exhibit 28** Kasson Township Zoning Ordinance; **Exhibit 5** May 4, 2023 Letter from Kristyn Houle to Planning Commission No 2 and Grobbel Report attached to letter; **Exhibit 6** May 5, 2023 Letter from Tom Grier to Zoning Administrator Tim Cypher).
10. The ZBA finds that the Zoning Administrator’s decision that Section 5.13 does not apply to the Applicant’s proposed use and is otherwise unlawful under the *Whitman v Galien Township* case is consistent with current state law.
11. The ZBA finds that the foregoing interpretation of Section 5.13 of the Zoning Ordinance is supported by the Township’s newly-adopted 2023 Master Plan, **Exhibit 29**, which has identified large uses within the Township that already produce noise and other negative externalities. These include the 3,100-acre gravel district and the 400 -acre landfill. See page 1 and Chapter 5 of the Master Plan, respectively. A survey, page 6, identified noise and vibration as community concerns. A long-term objective is a safe, healthful and peaceful environment. See page 27. There is a residential policy to allow residential uses in the Forested District and to allow enterprises that are non-intrusive. See pages 14 and 17. Such a motorcycle event would produce noise and other negative impacts materially different from the permitted uses in the Forested District contrary to Section 5.13. See motorcycle event site plan, **Exhibit 30**. See prior-referenced exhibits.

**Decision**

Motion made by \_\_\_\_\_ and supported by \_\_\_\_\_.

To affirm the Zoning Administrator’s October 10, 2023 decision not to allow consideration of the applicants’ motorcycle event as a Temporary Outdoor Use under Section 5.13 of the Zoning Ordinance based on the foregoing Findings.

**Date adopted** \_\_\_\_\_, 2023

ZBA Member Votes:

Ayes

Nays \_\_\_\_\_

Chairperson \_\_\_\_\_

Secretary

# Kasson Township Zoning Board of Appeals

## Determination under Zoning Ordinance Section 4.4

### Section 4.4 Classification of Uses Not Listed.

#### Findings

1. The ZBA finds that the Applicant's Appeal included the statement "the Township has yet to consider applicant's alternative desire to allow for these races per Section 4.4 ... of the Kasson Township Zoning Ordinance." (**Exhibit 18** July 28 Appeals).
2. The ZBA finds that section 4.4 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." (**Exhibit 28** Kasson Township Zoning Ordinance).

3. The ZBA finds that the pertinent section of 11.5 is 11.5. C 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." [Emphasis added] (**Exhibit 28** Kasson Township Zoning Ordinance).

4. The ZBA finds that the proposed Motorcycle Race Event is not consistent and similar to any permitted use in the FR district. The ZBA finds that the permitted uses in the FR district under 4.7.1 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. (**Exhibit 28** Kasson Township Zoning Ordinance).
5. The ZBA finds that the proposed motorcycle race event is not consistent and similar to any of the permitted uses because it is not a home or an agricultural use, rather it is an inherently dangerous multiple-day, overnight camping and loud race event that would likely draw hundreds of people to the site. (**Exhibit 1 and Exhibit 1(a)** Special Use Permit Application).
6. The ZBA finds that the impact of the noise produced by the proposed event on the neighboring properties is one of the most inconsistent and distinguishing features of the proposed land use from the permitted uses in the FR district. (**Exhibit 1** Special Use Permit Application; **Exhibit 11** Tim Cypher July 7, 2023 email to Peter Wendling and Fran Seymour including July 7, 2023 Tom Grier letter to Tim Cypher; **Exhibit 22** C. Grobbel letter to ZBA; **Exhibit 31** Public Correspondence).
7. The ZBA finds that the uses allowed with a Special Use Permit under 4.7.2 include: housekeeping cabin parks, boarding or lodging houses, bed and breakfast establishments, elderly day care centers, churches, public or private outdoor recreation or park facilities, fruit packing and grading

plants, wineries, cooling and packing plants, agricultural research and development facilities; public and private, other similar agricultural businesses or uses, riding stables, kennels, cemeteries, schools, adult foster care group home group child care home. (**Exhibit 28** Kasson Township Zoning Ordinance).

8. The ZBA finds that the proposed Motorcycle Race Event is not consistent and similar to any use allowed by Special Use Permit. (**Exhibit 28** Kasson Township Zoning Ordinance).
9. The ZBA finds that the proposed motorcycle race event is not consistent and similar to any of the uses allowed with a special use permit because it is an inherently dangerous, multiple-day, overnight camping and loud race event that would likely draw hundreds of people to the site, unlike cabin parks, lodging houses, bed and breakfast establishments, kennels, cemeteries or schools. (**Exhibit 1** Special Use Permit Application).
10. The ZBA finds that the impact of the noise produced by the proposed event on the neighboring properties is one of the most inconsistent and distinguishing features of the proposed land use from the uses allowed with a special use permit in the FR district. (**Exhibit 1** Special Use Permit Application; **Exhibit 11** Tim Cypher July 7, 2023 email to Peter Wendling and Fran Seymour including July 7, 2023 Tom Grier letter to Tim Cypher; **Exhibit 22** C. Grobbel letter to ZBA; **Exhibit 31** Public Correspondence).
11. The ZBA finds that the proposed use is not consistent and similar to public or private outdoor recreation or park facilities and adopts the above findings of facts under the appeal of the denial of the use as an outdoor recreation establishment under 4.7.2 Outdoor Recreation Facility. (see above findings of facts).
12. The ZBA finds that a 3-day dangerous, noisy and overnight camping and motorcycle race event is not consistent or similar to any of the uses listed in the FR district under either those permitted by right or by special use permit, therefore, the ZBA denies the request to classify the proposed use as a use allowed under the FR District. (**Exhibit 28** Kasson Township Zoning Ordinance; **Exhibit 11** Tim Cypher July 7, 2023 email to Peter Wendling and Fran Seymour including July 7, 2023 Tom Grier letter to Tim Cypher; **Exhibit 22** C. Grobbel letter to ZBA; **Exhibit 23** October 10, 2023 letter from Kristyn Houle to ZBA; **Exhibit 27** October 26, 2023 letter from Kristyn Houle to ZBA; **Exhibit 31** Public Correspondence).
13. The ZBA finds that the foregoing application and interpretation of Section 4.4 of the Zoning Ordinance is supported by the Township's newly-adopted 2023 Master Plan, **Exhibit 29**, which has identified large uses within the Township that already produce noise and other negative externalities. These include the 3,100-acre gravel district and the 400-acre landfill. See page 1 and Chapter 5 of the Master Plan, respectively. A survey, page 6, identified noise and vibration as community concerns. A long-term objective is a safe, healthful and peaceful environment. See page 27. There is a residential policy to allow residential uses in the Forested District and to allow enterprises that are non-intrusive. See pages 14 and 17. Such a motorcycle event would produce noise and other negative impacts materially different from the other enumerated permitted and special land uses in the Forested District (FR). See motorcycle event site plan, **Exhibit 30**. See prior-referenced exhibits.

## Conclusion

Motion made by \_\_\_\_\_ and supported by \_\_\_\_\_.

The ZBA finds that a 3-day dangerous, noisy and overnight camping and motorcycle race event is not consistent or similar to any of the uses listed in the FR district, under either those permitted by right or by special use permit; therefore, the ZBA denies the request to classify the proposed use as a use allowed under the FR District pursuant to Zoning Ordinance Sections 4.4 and 11.5.

**Date adopted** \_\_\_\_\_, 2023

ZBA Member Votes:

Ayes \_\_\_\_\_

Nays \_\_\_\_\_

ZBA Chairperson \_\_\_\_\_

ZBA Secretary \_\_\_\_\_