

**KASSON TOWNSHIP
ZONING BOARD OF APPEALS**

Applicant: James Schettek
244 W. Kasson Ctr
Maple City, MI 49664

Fran Seymour
1145 Hastings Street
Traverse City, MI 49686

Hearing date: October 11, 2023
Deliberations and Decision Monday, November 20, 2023

Property Owner: Bill Kasben
1175 E. Kasson Road
Maple City, MI 49664

APPLICATION TO REVERSE THE ZONING ASMINISTRATOR'S DECISION TO NOT
ALLOW APPLICANTS AND PROPERTY OWNERS TO APPLY TO THE ZONING
BOARD OF APPEALS TO OBTAIN A CLASSIFICATION OF USES NOT LISTED
UNDER SECTION 4.4 OF THE ZONING ORDINANCE

The applicants and property owner are seeking to appeal the decision of the Zoning Administrator Tim Cypher who determined on October 10, 2023 in conjunction with advice from township's legal counsel Thomas Grier not to allow an application to be precessed before the Zoning Board of Appeals under Section 4.4 *Classification of Uses Not Listed* to obtain a use classification for a proposed Enduro race. The application seeks a determination by the Zoning Board of Appeals to classify a use potentially not listed under the Zoning Ordinance under Section 4.4 as a comparable use either by right or by special use within the FR zoning district. The applicant requests that the ZBA rule as follows:

That the zoning administrator allow for the processing of an application before the Zoning Board of Appeals to classify the proposed Enduro Race(s) as either a use by right or by special use within the FR zoning district including but not limited to a determination that the use constitutes a special land use identical or similar to a Public or Outdoor Recreation or Park Facility.

The Zoning Board of Appeals having considered all the comments, evidence and letters submitted by the public, as well as all comments and materials submitted by the applicant and applicant's representative and attorney representing some of the citizens

and the board having considered 32 Exhibits, the board having reached a decision on this matter states as follows:

GENERAL FINDINGS OF FACT

1. The property is located in the Forested District (FR) under the Kasson Township Zoning Ordinance. (See Exhibit 28 and 29).
2. On February 18, 2023, the applicants and property owner applied for a special use permit for the purpose of holding an Enduro Race on the property. Said race being for a narrow and very finite period of time. (See Exhibit 1).
3. Based upon the advice of the Zoning Administrator, the applicants sought a special use permit under Section 7.15 of the Kasson Township entitled *Other Special Land Uses* which provides as follows:

“Land and structural uses which 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 the conditions and requirements of this Chapter and the spirit and intent of the ordinance.” (See Exhibit 28).
4. The application was introduced to the Planning Commission on March 20, 2023 with the public hearing occurring on April 17, 2023 before the Kasson Township Planning Commission. (See Exhibits 2 and 21).
5. At the Public Hearing on April 17, 2023, ZBA member Scott Mills, under comments listed as a person speaking in opposition to the application as being recognized, stated that “. . . special use permits transfer with the parcel; in other words, they run with the land. There is lots of talk about selling land. He asked the PC to consider the types of racing.” (See Exhibit 21).
6. Attorney Kristyn Houle, representing some of the residents within Kasson Township, wrote three letters. One dated May 2, 2023 two more dated May 4, 2023 opposing the application for a special use permit and stating that the processing of such a permit under Section 7.15 was unlawful based upon Michigan Court of Appeals case of *Whitman v. Galien Township 288 Mich App 672 (2010)*. (See Exhibits 3, 4 and 5).
7. On May 5, 2023, Township Attorney Tom Grier wrote a letter to Tim Cypher, Zoning Administrator, opining on special use standards in the Zoning Ordinance which could not be met under Section 7.7A, B and E, (although the Planning Commission had not even begun to review these standards) stating that the SUP should not be granted absent a sound study showing otherwise. Mr. Grier’s letter further stated that his analysis of the *Whitman v Galien Township* case also concluded that the special use permit could not be processed under Section

7.15. (See Exhibit 6).

8. Township attorney Tom Grier drafted the motion which was passed by the Kasson Township Planning Commission on July 17, 2023 dismissing the application prior to any deliberations being made by the Kasson Township Planning Commission stating that it is the township attorney's opinion that the application cannot be processed under state law as Section 7.15 of the Kasson Township Zoning Ordinance was invalid. (See Exhibit 14).
9. Applicants, through the assistance of their attorney Peter Wendling of Young, Graham & Wendling, P.C., requested of Tim Cypher, Zoning Administrator, the processing of a Special Use Permit under the Forested District (FR) being a special land use under Section 4.7.2 for Public or Private Outdoor Recreation or Park Facilities. This request was pursuant to a telephone call to Mr. Cypher as well as correspondence from Attorney Wendling's office (See Exhibit 12). It is the applicant's/landowner's position that a special land use should be processed by the Kasson Township Planning Commission under Section 4.7.2 *Public or Private Outdoor Recreation or Park Facilities* given that the Zoning Ordinance also has a definition of *Outdoor Recreation Establishment* which reads follows:

“ . . . is a facility designed and equipped for the conduct of sport, amusement or leisure time activities and other customary recreational activities outdoors, (outside of an enclosed building) 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.” (See Exhibit 28).

10. Section 2.1 of the Kasson Township Zoning Ordinance provides rules for text application including provisions under Section 2.1 I and J which state “that the particular shall control the general and that terms not herein defined shall have common, customary meanings.” (See Exhibit 28). Applicants and property owner also suggested through their attorney that an application for the proposed use could also be submitted under Section 5.13 of the Kasson Township Zoning Ordinance entitled *Temporary Outdoor Uses*. The first paragraph being germane to the application which reads as follows:

“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. **Any other temporary outdoor uses require a review by the Planning Commission and my require an approved site plan at the commission's discretion in accordance with Chapter 8.**” (Emphasis added in bold) (See Exhibit 28).

Mr. Grier, township attorney, provided additional correspondence to the Zoning Administrator stating that Section 5.13 cannot be utilized to process an application for the proposed Enduro Event because the first sentence mentions

that the proposed use is “not similar in nature to those uses that are allowed by right in the district.” However, Mr. Grier’s letter did not address the important part of Section 5.13 with respect to this application that any other temporary use can be processed subject to Planning Commission review and at their discretion, a site plan under Chapter 8 of the Zoning Ordinance. (See various correspondence from Attorney Grier being Exhibits 5, 11 and 13).

11. Mr. Cypher has also forbid applicants and property owner from applying to the Zoning Board of Appeals to have the proposed use classified as a use not listed, although it appears that under Section 4.7.2 an Enduro use as proposed by the applicants and as presented would fit a public or private outdoor recreation or park facility to the extent it did not. Such a use could be classified by the Zoning Board of Appeals under Section 4.4. An application under Section 4.4 to the ZBA was also denied by the Zoning Administrator. (See Exhibits 11, 13, 20 and 26).

The Zoning Board of Appeals recognizes all of the above General Findings of Fact as being applicable to all applications for a ruling from the ZBA provided by applicants and property owner.

SPECIFIC FINDINGS OF FACT

1. The Board finds that Section 4.4 entitled *Classification of Uses Not Listed* grants the ZBA the authority and power to classify a use not specifically mentioned in this ordinance in tandem with Section 11.5 C which states that the board may classify any activity which is not specifically mentioned in the district regulations as a use allowed by right or allowed by special use permit. (See Exhibit 28).
2. The Board further finds that Section 11.5 C second sentence states that the basis for such classification shall be that the activities consistent and similar to the uses already listed in the district. (See Exhibit 28).
3. The Board finds that unlike *Whitman v Galien Township*, the more applicable case is *Reilly v Marion Township 113 Mich App 584 (1982)* wherein the Michigan Court of Appeals stated as follows:

“The Board is empowered under the ordinance to add to the list of special use exceptions those exceptions deemed necessary to protect adjacent properties, the general neighborhood and its residents and workers. Therefore the board of appeals had clear authority to consider Defendant Turner’s application for a special exception use not listed in Section 8.23. Plaintiffs argued that only the legislative body may determine permissible uses of land and the legislative body may not delegate this power to an administrative body, such as a board of appeals (*Florka v Detroit 369 Mich 568 (1963)*.) Plaintiffs would be correct **if the local legislative body**

had given the board of appeals unlimited authority to create special exception uses. However, the Board of Appeals authority to grant special exception uses is limited by Section 9.83b . . . (list of standards follows in the case.”

The Board further finds that the Kasson Township Zoning Ordinance as in the *Reilly* case, has standards under Section 11.5 to determine uses not listed and that Section 4.4 and 11.5 require such uses listed by the ZBA to meet the standards of district regulations for each zoning district. (See Exhibit 28).

- 4. As such, the Board finds that the *Whitman v. Galien Township* case is not dispositive and is distinguished in its application to Section 4.4 given that the Kasson Township Zoning Ordinance provides that any use determined by the ZBA must meet the standards and requirements of the Zoning Ordinance and that under Section 11.5 C which is directly referenced and utilized by Section 4.4, the ZBA is properly utilizing its interpretative power with standards contained in the Zoning Ordinance as authorized by the Michigan Zoning Enabling Act. (See Exhibits 26 and 28).

Motion made by _____ and supported by _____ to reverse the Zoning Administrator’s decision not to process an application under Section 4.4 which in turn references Section 11.5 and direct that the Zoning Administrator allow for the applicants and property owner to submit an application for processing by the ZBA under Section 4.4 as well as its reference to the requirements and powers of the ZBA under Section 11.5.

DATE DECISION AND ORDER ADOPTED

_____, 2023

Chairperson

Secretary