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Bryan E. Graham Peter R. Wendling

MEMORANDUM

October 25, 2023

TO: Kasson Township ZBA

FROM: Peter Wendling, Attorney for Applicants James Shetteck, Fran Seymour and Landowner Bill Kasben

SUBJECT: Applicant/Owners Memorandum to ZBA Appeal of Planning Commission decision to dismiss SUP Application under Section 7.15; Appeal of Zoning Administrator Decision to not allow amendment and/or processing of Special Land Use Permit Under Section 4.7.2 in the FR District; Appeal of ZBA's decision not allowing the ZBA to review the proposed use as a classification of uses under Section 4.4 and refusal of the ZBA to process a Temporary Outdoor Use through the Planning Commission by the Zoning Administrator under Section 5.13 of the Zoning Ordinance

Facts:

On February 18, 2023, Applicant James Schettek, and Owner Bill Kasben as well as assistant to the applicants agent, Fran Seymour, applied for a Special Use Permit after consulting with the Kasson Township Zoning Administrator to hold an Enduro Motor Bike event on multiple contiguous parcels at the corner of East Kasson Road and South Bright Road. The tax id numbers for these parcels were provided on the original application. The original application asked for an event to occur on May 28, 2023. Based upon the advice of the Kasson Township Zoning Administrator, the applicants and their agents were told that the application should be processed under Section 7.15, "Other Special Land Uses" under the Kasson Township Zoning Ordinance. Chapter 7 of the Zoning Ordinance generally addresses special land uses and special use permit requirements. Section 7.15 allows for the processing of special land 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 the conditions and requirements of this chapter and the spirit and intent of the ordinance."* The application was introduced to the Planning Commission on March 20, 2023 with the public hearing occurring at the April 17, 2023 Kasson Township Planning Commission meeting. At the public hearing, Mr. Scott Mills, current member of the ZBA 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." This comment in the approved minutes was referenced under persons speaking in opposition to the application at the time that such people were recognized by the Chair of the Planning Commission.

Many property owners who spoke out against the proposed special land use and who were generally opposed to limited Enduro events, hired Attorney Kristyn J. Houle, PLC to represent them. Ms. Houle has stated in correspondence to the Township that Section 7.15 of the Zoning Ordinance under which the special use permit was to be processed was unlawful under the case of *Whitman v Galien Township 288 Mich. App. 672(2010)* In reviewing this issue, Township Attorney Tom Grier sent out a letter on May 5, 2023 to the Zoning Administrator. The letter advised that the Galien case results in the invalidation of Section 7.15 of the Zoning Ordinance. Mr. Grier's May 5, 2023 letter to the Zoning Administrator first addressed the special use standards essentially stating without providing the Planning Commission an opportunity to rule on the matter, that *". . . until the sound study has been conducted, and the study shows that the event can proceed without harming the neighboring properties, the standards in Zoning Ordinance Section 7.7A.B. and E. have not been met and the SUP should not be granted."* Mr. Grier went on in his letter to state that based upon Kristyn Houle's letter of May 2, 2023 that Section 7.15 which was the basis of the processing of the special use permit as determined by the Kasson Township Zoning Administrator, was unlawful under the reasoning of the case of *Whitman v Galien Township 288 Mich App 672 (2010).* Subsequent to this opinion, Mr. Grier drafted a motion for the Planning Commission to dismiss this appeal without further deliberation or making any findings of fact under the standards of the Kasson Township Zoning Ordinance for the processing of special land use permits. Thus, the current appeal is allowed under Section 11.4 and 11.2 H.1 of the Kasson Township Zoning Ordinance.

Contemporaneous to this decision , the applicant also raised the question of whether or not an application could be filed under Section 5.13 of the Zoning Ordinance. Chapter 5 is entitled General Provisions and under Section 5.1, Chapter 5 states that it is the intent of this chapter to set forth provisions that will regulate the uses allowed in all districts. Section 5.13 allows for temporary outdoor uses. As argued at the October 11, 2023 Zoning Board of Appeals meeting on behalf of the applicant and owner, while Enduro races are not specifically stated directly as a permitted use in the FR Zoning District, Section 5.13 allows for any other temporary outdoor uses (i.e. uses that are different than those permitted in any zoning district) to require review by the Planning Commission and may require an approved site plan at the Commission's discretion in accordance with Chapter 8. Township Attorney Tom Grier's letter of May 5, 2023 also eliminated this avenue stating that such an application cannot be processed because permitted uses in the FR district under Section 4.7.1 are not similar in nature to the Enduro event. This opinion ignored the second sentence in the first paragraph of Section 5.13. In any event, although this letter was to advise the Zoning Administrator, the Zoning Administrator made no opinion regarding Section 5.13 until October 10, 2023 on this topic when the Zoning Administrator issued an opinion letter mirroring the advice of the Township Attorney.

Taking a further careful look at the Zoning Ordinance, the applicant requested of the Zoning Administrator that the application either be resubmitted as a new application or amended to allow for an Enduro events in the FR district as a Special Land Use under Section 4.7.2 as a Public or private outdoor recreation or park facility. It is interesting to note that the main objection to the Enduro Event is the noise. There is no track being built by the applicant nor was one requested as the Enduro event would occur on the natural existing lands of the owner's property. On page 18 of the Zoning Ordinance Definitions *Outdoor Recreation Establishment* is defined as

> " A facility designed and equipped for the conduct of sports, amusement or leisure time activities, neither customary activities outdoors (outside of an enclosed building) and operated as a business and open to use by the public for a fee such and tennis courts, archery ranges, golf courses, miniature golf courses, golf driving ranges and children's amusement parks."

The word "business" is not defined and nor does the outdoor recreation establishment require that a business be a for profit business or a non-profit business (applicant proposes a non-profit business).

Township Legal counsel Tom Grier as well as attorney Kristyn Houle provided a letter stating that Section 4.7.2 Public or Private Recreation or Park Facilities and the corresponding definition of Outdoor Recreation Establishment does not apply. After much discussion of Ms. Houle's letter stating that the uses are not similar, Mr. Grier in his July 7, 2023 letter focuses on the amount of noise - something that is generally addressed by the Planning Commission in any event with any special use permit. Mr. Grier states at the end of his letter under Summary and Conclusion, that common experience shows that none of the identified example of uses would produce sound levels associated with a motorcycle race events. This is an unknown as with any issues involving sound, time, operations are clearly within the province of the Planning Commission and their ability to address such issues through the special use review process.

The final issue before the Zoning Board of Appeals is Section 4.4 entitled *Classification of Uses Not Listed*. This, in turn, allows the Zoning Board of Appeals to have the power to classify a use which is not specifically mentioned in the ordinance as being within the powers of Section 11.5 interpretation and classification of uses. What is interesting is that Section 11.5 being an interpretation is essentially what the ZBA is tasked to do regardless of decisions ultimately being made by the Planning Commission and the Zoning Administrator based strictly upon the advice of the township's legal counsel. Section 4.4 states that,

> "The Zoning Board of Appeals shall have the power to classify a use which is not specifically mentioned by this ordinance, as described in Section 11.5. Said use shall be treated in a like manner with comparable uses, as determined by the Zoning Board of appeals and permitted or prohibited by the district regulations

for each zoning district(s)."

This was also denied. An application to the ZBA by the applicants and the property owner under Section 4.3 was also denied by the Zoning Administrator and is the last matter being appealed.

Argument:

I. Appeal Under Section 7.15

Although utilizing Section 7.15 was the choice of the Township Zoning Administrator and not the applicant and property owner for processing the applicant/property owner's special use permit, Attorney Houle argued that his section of the ordinance was invalid. This opinion was supported by Township Attorney Tom Grier who also opined that this section cannot be used for approving any special use permit. The basis for the denial is the ruling under *Whitman v Galien Township 288 Mich App 672 (2010)* by the Michigan Court of Appeals. The Galien Township Ordinance listed in one of its districts, a special use which read as follows: "*establishments for the conducting of commercial or industrial activities subject to the approval of the Zoning Board.* " The case involved a request for an ATV racetrack on the property during the summer months. In the case before the Kasson Township ZBA, there is no racetrack and the property will remain unimproved and the events will occur for a very limited time on a seasonal basis. In any event, in reviewing the language that the Michigan Court of Appeals in the Galien Township case, the Michigan Court of Appeals reviewed MCL 125.3201 as well as special uses under MCL 125.3502. That Court of Appeals stated that the main failure of the Galien Township ordinance provision was that the township ordinance failed to define the words *commercial* or *industrial.* Using a dictionary of general use, the court reviewed Random House Webster's College Dictionary and found that a dictionary definition of *commercial* and *industry* was so broad that it was insufficient under MCL 125.3502(1)(a) by failing to specify the special land uses and activities eligible for approval under that standard.

What is different about the Kasson Township's Zoning Ordinance is that Chapter 7 addresses special uses in all zoning districts with Section 7.15 stating that any particular use may or may not be approved if the Planning Commission determines that they *"meet all the conditions and requirements of this chapter and the spirit and intent of this ordinance"* (or not). The bottom line is that the Planning Commission needs to be able to deliberate in order to make this determination. Whether or not the Planning Commission would have come to this same conclusion as Ms. Houle and the Township attorney, utilizing the standards for approval of a special use permit, remains to be seen. Failing to process the special use permit is not one of the options under Section 7.7 of the Zoning Ordinance. The basis for determination of a special use permit (much less a basis of whether or not a special use permit is granted) can be tempered by applying conditions and safeguards under Section 7.8. The ordinance does not provide that the township attorney or others outside of the township are allowed to kill the process before it occurs.

In *Galien*, the township could have passed a moratorium to revise the ordinance. Another option for the Galien Township Planning Commission could have been to decide for themselves that the use listed was over broad and did not comply with the law. This could have been done with the advice of the Galien Township attorney. The problemin this case is that the application was improperly killed off and the issue improperly determined without going through the requirements of the Zoning Ordinance, being Planning Commission review.

Also unlike the Galien Township case, Section 7.15 does not directly state what an over broad use is such as an "industrial use" or "commercial use" as was the case in Galien Township. The Planning Commission, through the Township Board as the legislature, must make a decision and can only approve a special use under Section 7.15 if it *"meet(s) all the conditions and requirements of this chapter and the spirit and intent of the ordinance."* Thus, the proposed special use if it does not match up with any other uses listed in the FR District, as a special use, the Planning Commission would deny the special use permit.

II. Appeal of Section 4.7.2

In addition to the materials I presented at the October 11, 2023 hearing, attached is the case of *Tullio v Attica Township*. Although this is an unpublished Michigan Court of Appeals case, it is a very recent one from 2022. In that case, the Attica Township Zoning Ordinance allowed for a special land use and "agribusiness" or "other similar uses. " The *Tullio* case involved a planning commission decision that a mulching operation constituted an agricultural use being similar to what was allowed in the Zoning Ordinance. The Planning Commission in Attica Township approved the mulching business as an *agribusiness* and Plaintiffs appealed the approval. "Agribusiness" was listed as a special land use. The ordinance did not define the term *agribusiness* but included examples such as farm implement sales, cider mills, farmers markets, farm dairies and pick your own farms. The court noted that due to the fact that *agribusiness* itself was not defined, it looked at a Miriam Webster dictionary definition of *agribusiness* which stated that *agribusiness* is "*an industry engaged in the producing operations of a farm, the manufacture and distribution of farm equipment and supplies, and the processing, storage, and distribution of farm commodities.*" The court in *Tullio* decided that given the dictionary definition and the broad examples as allowed in the Zoning Ordinance, that the matter was able to be processed by the Attica Township Planning Commission under the standards for special use permits. This is identical to the situation involving Section 4.7.2 *Public Or Private Outdoor Recreation or Park Facilities*. In Mr. Grier's opinion letter to the Zoning Administrator dated July 7, 2023, Mr. Grier states that "common experience" shows that none of the identified uses in the definition of *Outdoor Recreation Facility* being tennis courts, archery ranges, golf courses, etc., would produce the sound level associated with motorcycle race events. There is no supporting evidence for Mr. Grier's statement. In the *Tullio* case, certainly noise would be created in the grinding operation to produce mulch as an agribusiness. Noise is something that would be managed, mitigated and addressed by

the Planning Commission, not by denying the applicant and landowner the right to go before the Planning Commission. In fact, in the *Tullio* case, the Plaintiffs argued that the mulch manufacturing operation did not fit into the contemplated agribusiness use under Attica Township's Zoning Ordinance and instead was better suited for industrial use under the ordinance (see page 2 of 8 *Tullio v Attica Township*) As in Kasson Township's definition of *Outdoor Recreation Establishment*, the Attica Township Zoning Ordinance listed examples of what constituted "agribusiness." The Michigan Court of Appeals noted that in the trial court's decision that even though agribusiness is not specifically defined, the list of what constitutes an agribusiness provided in the ordinance is non exclusive. Examples include farm implement sales, cider mills, farmers markets, farm dairies and pick your own farms. As such, the trial court in *Tullio*, as affirmed by the Michigan Court of Appeals, stated it was proper for the issue to go before the Attica Township Planning Commission in the same manner that it is proper for the Enduro Motocross race to go before the Kasson Township Planning Commission. This is not a rezoning as claimed by Mr. Grier in his July 7, 2023 letter on page six. Further, the examples provided in the definition of *Outdoor Recreation Establishment* did not specifically exclude uses that make various types and ranges of noise. There are currently zoning disputes across the nation arguing over the "pop" made by pickleball courts in residential areas (see attached article). Certainly a children's amusement park would likely make more noise than a pickleball court. In addition, there would be adults at the children's amusement parks; there would be rides and various types of games, loudspeakers electrical and diesel engines running the rides and crowds of people. Logic and experience dictates that **any** amusement park would make a substantial amount of noise. In turn, this would be reviewed by the Planning Commission as part of the process.

The Plaintiffs in the *Tullio* case were also concerned about the noise related to the mulch manufacturing however, as both the trial court and the Court of Appeals determined, that was not an issue that determined whether or not it was to be processed as a special land use. How noise is addressed is a matter for the Planning Commission which would also make a determination as to the type of noise. This also includes the ability of the Planning Commission to consider reports whether they are from Mr. Groebbel or from any other party including the applicants. This is a normal process for any type of special use permit. What is not normal is the denial by the Zoning Administrator to forbid the processing of a special use permit which clearly proposes a use as stated in Section 4.7.2 to wit *Public and/or Private Outdoor Recreational Park Facilities* and which is further established as being non-exclusive to a variety of uses as defined under an *Outdoor Recreation Establishment*. In short, the applicant and landowner are entitled to request the processing of a special land use for their property in the FR district pursuant to Section 4.7.2 Special Land Uses and to be heard and processed by the Planning Commission. On a final note, please review Section 2.1 of the Zoning Ordinance, particularly B and J.

III. Appeal of Section 4.4 Classification of Uses

Under Section 4.4 the Zoning Board of Appeals shall have the power to classify a use which is not specifically mentioned in the ordinance. While utilizing this section is certainly not the first choice of the applicant and the landowner, the Zoning Board of Appeals is not given carte blanche under this Section. With respect to processing and reviewing a use under this provision of the Zoning Ordinance, Section 4.4 reins in the authority of the Zoning Board of Appeals and allows them only to make this decision if the use is generally permitted within the zoning district for each of the zoning districts as applicable. Frankly, I am not sure if the ZBA needs to make a decision under this section other than stating that the use is indeed permitted by special use in the FR district under Section 4.7.2. However, in this case, Section 4.7.2 specifically addresses the use which the applicant and property owner wish to place the property under making a decision on this by the Zoning Board of Appeals very easy, even while reviewing Section 4.4. This use is allowed to be processed as a special use.

IV. Appeal of Section 5.13

Section 5.13 is one of the more interesting sections of the Zoning Ordinance. It essentially incorporates under zoning a *Temporary Outdoor Use*. This applies to all zoning districts. A Temporary Outdoor Use is similar in nature to a use by right in the district is approved as a use by right. Although silent, it is presumed that the Zoning Administrator would issue permits for such a use. Uses which are not uses that are allowed by right in the district classified in the second sentence of Section 5.3 are any other temporary outdoor uses which require review by the Planning Commission and may require an approved site plan at the Commission's discretion in accordance with Chapter 8. (Chapter 8 addresses Site Plan Review). Temporary uses are different than traditional land uses. This is clearly meant to apply to special events outside otherwise allowed uses by right or by special use. If the Galien Township case prohibits this use, which it does not because the Galien Township case involved a permanent year-round use, then nobody within the township is allowed to have any temporary outdoor use event whether that involves a wedding on a residential property, a birthday party or other event which will temporarily attract people for the event to a particular parcel within the township. There would be no fundraising special events at any wineries or distilleries either. It is also important to note that unlike the Galien Township case, this section allows temporary uses in all zoning districts. It is not open ended, but rather it is quite specific. *Use* is defined under the Zoning Ordinance as follows:

> "Use is the purpose for which land or a building(or buildings) is arranged, designed or intended, or for which land or a building (or buildings) is or may be occupied and used."

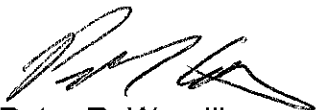
The Merriam Webster Online Dictionary defines temporary as *"lasting for a limited time."* Thus, the Kasson Township Zoning Ordinance clearly and specifically allows for temporary outdoor uses - meaning uses for a limited period of time which under the ordinance with respect to land or buildings "may be occupied and used." In Township Attorney Tom Grier's letter to Tim Cypher dated May 5, 2023, Mr. Grier concentrates on the first sentence of Section 5.13 which of course does not apply to the FR zoning

district. However, this is not the only regulation under Section 5.13 under which a Temporary Outdoor Use can occur. Mr. Grier, in ignoring the second sentence, sidesteps Ms. Houle's argument regarding the Galien Township case. However, if one applies Ms. Houle's argument, then Mr. Grier's opinion that Temporary Outdoor Uses are 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 would also be prohibited under the Galien Township case. In short, if a use is similar to a use by right in the district and it is temporary and is a temporary use, the Zoning Administrator makes the decision. If the use is a Temporary Outdoor Use not allowed by right in any particular district, the Planning Commission makes the decision so long as the applicant meets the site plan standards under Chapter 8. Section 5.13 has nothing to do with the open ended or legislative problems outlined in the Galien Township case. It is a perfectly legitimate avenue to address what the applicant and landowner are seeking with respect to the Enduro race.

Once again, the ZBA needs to reverse the decision of the Zoning Administrator and allow the applicant and landowner to apply for a special use permit under both the special use standard under Section 4.7.2 and under Section 5.13, and will work with the Planning Commission to ensure that all issues raised of concern whether by residents or otherwise with respect to noise or anything else, are address through conditions which relate to the Zoning Ordinance which may be imposed by the Planning Commission. There is, however, no basis to forbid the applicant and land owner to proceed in front of the Kasson Township Planning Commission under any of these theories and provisions in the Zoning Ordinance as any one of them can be decided by the Planning Commission.

it seems that many avenues by which someone could come before the Planning Commission as provided in the Zoning Ordinance are purportedly blocked because multiple sections of the Kasson Township Zoning Ordinance are purportedly illegal. This is simply not logical.

Sincerely,



Peter R. Wendling

cc: Kristen Houle, Tom Grier, T.Cypher, F. Seymour

Tullio v. Attica Twp.

Court of Appeals of Michigan

July 28, 2022, Decided

No. 358343

Reporter
2022 Mich. App. LEXIS 4453 *; 2022 WL 3009714

THOMAS W. ***TULLIO***, MARY T. ***TULLIO***, and ***ATTICA*** PINES CAMPGROUND, Plaintiffs-Appellants, v ***ATTICA*** TOWNSHIP and ***ATTICA*** TOWNSHIP ZONING BOARD OF APPEALS, Defendants-Appellees.

Prior History: [*1] Lapeer Circuit Court. LC No. 20-053995-AA.

Tullio v. Attica Twp., 2021 Mich. App. LEXIS 7395 (Mich. Ct. App., Dec. 29, 2021)

Core Terms

agribusiness, mulch, Township, zoning ordinance, proposed use, land use, farm, ordinance, manufacturing operation, planning commission, zoning, agricultural, circuit court, zoning board, plaintiffs', dictionary, approve, trial court, site plan, manufacturing, estoppel, relocate, site

Counsel: For THOMAS W. ***TULLIO***, MARY T. ***TULLIO***, ***ATTICA*** PINES CAMPGROUND, Plaintiffs - Appellants: JAMES R. PORRITT JR.

For TOWNSHIP ***ATTICA***, ***ATTICA*** TOWNSHIP ZBA, Defendants - Appellees: MICHAEL J. GILDNER.

Judges: Before: M. J. KELLY, P.J., and MURRAY and BORRELLO, JJ.

Opinion

PER CURIAM.

In this zoning dispute, plaintiffs appeal by leave granted[1] the circuit court order affirming the decision of defendant, Attica Township Zoning Board of Appeals (ZBA), to affirm the Attica Township Board's grant of a special land use permit to Owen Tree Service, Inc., which allowed Owen Tree Service to relocate its mulch manufacturing operation to a site adjoining plaintiffs' campground. We affirm.

I. BASIC FACTS

On January 11, 2018, at a meeting of the Attica Township Board of Trustees, Randy Owen, the owner of Owen Tree Services, requested that the Board permit him to relocate his mulch manufacturing operation from an area zoned as industrial to a location zoned as agricultural. Plaintiffs Thomas and Mary Tullio own and operate a campground that is adjacent to the proposed mulch production site. Although they opposed

[1] ***Tullio v Attica*** *Twp, unpublished order of the Court of Appeals, entered December 29, 2021 (Docket No. 358343), 2021 Mich. App. LEXIS 7395.*

Owen's request to relocate his mulch manufacturing business, **[*2]** the Township Board approved the request.

Plaintiffs appealed the decision to the ZBA, arguing that the Board's decision was erroneous on both procedural and substantive grounds. Procedurally, they argued that the Attica Township Zoning Ordinance did not give the Board the authority to approve the move without the submission of proposed site plans. Substantively, they argued that it was improper for the Board to conclude the mulch operation fit into the agricultural district because manufacturing of mulch is properly suited for industrial-zoned districts. They noted that "at best" the mulch operation might be deemed either an "agribusiness" or an "agricultural limited business use," both of which are special land uses that would require Owen Tree Service to file an application with the Attica Township Planning Commission. On March 8, 2018, the ZBA overturned the Board's decision and directed that Owen Tree Service's request to relocate must go before the Planning Commission.

Owen appealed the ZBA's decision to the circuit court, arguing that the ZBA's decision was improper because the proposed use was agricultural and was not subject to review by the Planning Commission. The circuit court **[*3]** disagreed. As will be discussed in detail later, the court determined that the mulch manufacturing operation was an agribusiness under the relevant zoning ordinance. And, as a result, because the ordinances only permitted agribusiness uses as special land uses, "the ZBA did not err by determining that planning commission review was required prior to possible approval of a site plan and special land use permit." The court also concluded that if the Board had "intended to approve the proposed use under section 4.58 [permitting uses that are similar to other permitted uses], it does not appear from the record that the board followed proper procedure by making the 13 specific findings required by the zoning ordinance."

Thereafter, Owen applied for a special land use as an agribusiness or "other similar use" for the mulch operation. As required, planner's reports for the special land use were submitted. The planner's reports consistently stated that the mulch manufacturing operation was an agribusiness "as determined by the Township's Zoning Administrator." In response, plaintiffs wrote a letter to the Planning Commission, arguing the mulch manufacturing operation did not fit into the contemplated **[*4]** agribusiness use under Attica Township Zoning Ordinance § 4.29, and instead was better suited for industrial use under the ordinance. Further, at a public hearing on Owen's application, 15 residents opposed the proposal, while five supported it.

Despite plaintiffs' argument, the Planning Commission passed a motion to approve the special land use application. In doing so, the Planning Commission specified that Owen Tree Service would be subject to restrictions on the use of the property as imposed by Attica Township Zoning Ordinance § 6.2. Plaintiffs opposed the Planning Commission's approval, again arguing that a mulch manufacturing operation did not properly belong in an agriculturally-zoned district. Subsequently, the Board split on whether to approve Owen's application for special land use. However, a motion to approve Owen's site plan, as recommended by the Planning Commission, passed.

Plaintiffs appealed the approval to the ZBA, asking it to reverse the determination by the Board. They argued that reversal was proper because (1) there was never a proper determination of fact that the mulch operation constituted an agribusiness and (2) the decision to allow the mulch operation to **[*5]**

move was an abuse of discretion. At the July 23, 2020, ZBA meeting, the ZBA determined that the mulch manufacturing operation was an agribusiness.

Plaintiffs appealed the ZBA's decision to the circuit court, arguing that the only reason the ZBA concluded the mulch operation was an agribusiness was because of the circuit court's dictum in the previous appeal. Defendants argued the circuit court should defer to the ZBA's decision that the mulch operation constitutes an agribusiness. The circuit court determined the proposed use was properly classified as an agribusiness under the zoning ordinance, and the ZBA did not abuse its discretion by interpreting the proposed use fit the agribusiness special use designation. This appeal follows.

II. STANDARD OF REVIEW

"All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law." *Const 1963, art 6, § 28*. "This Court reviews de novo a trial court's decision in an appeal from a city's zoning board, while giving great deference to the trial court and zoning board's **[*6]** findings." *Norman Corp v City of East Tawas, 263 Mich App 194, 198; 687 NW2d 861 (2004)*. "The decision of a zoning board should be affirmed by the courts unless it is (1) contrary to law, (2) based on improper procedure, (3) not supported by competent, material, and substantial evidence on the record, or (4) an abuse of discretion." *Reenders v Parker, 217 Mich App 373, 378; 551 NW2d 474 (1996)*; *MCL 125.3606(1)*. Whether a decision is supported by substantial evidence has been clarified by this Court, which

> . . . reviews the circuit court's determination regarding ZBA findings to determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the [ZBA]'s factual findings. This standard regarding the substantial evidence test is the same as the familiar clearly erroneous standard. A finding is clearly erroneous if the reviewing court, on the whole record, is left with the definite and firm conviction that a mistake has been made. [*Hughes v Almena Twp, 284 Mich App 50, 60; 771 NW2d 453 (2009)* (quotations marks and citations omitted, alteration in original).]

A decision is an abuse of discretion when it is outside the range of principled and reasonable outcomes. *Elher v Misra, 499 Mich 11, 21; 878 NW2d 790 (2016)*.

Additionally, "[w]hen construing an ordinance, principles of statutory construction apply." *Norman Corp, 263 Mich App at 206*. "If the plain and ordinary meaning of the language is clear, **[*7]** judicial construction is normally neither necessary nor permitted." *Id.* (quotation marks and citations omitted). The goal of interpreting an ordinance is to "discern and give effect to the intent of the legislative body." *Great Lakes Society v Georgetown Charter Twp, 281 Mich App 396, 408; 761 NW2d 371 (2008)*.

III. CLASSIFICATION OF OWEN TREE SERVICE'S OPERATIONS

The *Michigan Zoning Enabling Act, MCL 125.3101 et seq.*, provides for the creation of a zoning board of appeals (ZBA). *MCL 125.3601(1)*. A ZBA "is municipal administrative body, charged with interpreting the ordinance, hearing appeals, granting variances, and performing various functions that may arise in the administration of the zoning ordinance." *Sun Communities v Leroy Twp, 241 Mich App 665, 670; 617 NW2d 42*

(2000). The recurring issue in this matter is whether the mulch manufacturing operation is an agribusiness under the Attica Township Zoning Ordinance.

Under Attica Township Zoning Ordinance § 3.1.1A, "Agricultural Districts are designed to provide single family home sites in areas more rural in character." The ordinance defines agriculture as "[s]oil dependent cultivation of crops or the raising of farm animals, for primarily commercial purposes, in accordance with generally accepted farming practices." The zoning requirements for agricultural districts are separated into two categories: principal permitted uses **[*8]** and special land uses. Under Attica Township Zoning Ordinance § 3.1.1B, principal permitted uses include uses such as farms, single-family dwellings, hobby farms, and keeping of animals. Agribusiness is a special land use under § 3.1.1C. While the term agribusiness is not defined in the Attica Township Zoning Ordinance, § 4.29 lists examples including "farm implement sales, cider mills, farmers markets, farm dairies, and pick-your-own farms." Because agribusiness is considered a special land use, there are specific procedures to follow, as outlined in Attica Township Zoning Ordinance § 6.2. These procedures include the submission of a site plan to the Planning Commission, which must then be approved by the Board. Special land uses are also subject to certain conditions, outlined in Attica Township Zoning Ordinance § 6.2(1)(A) through (H).

Here, in its October 4, 2018 decision, the circuit court determined that the mulch manufacturing business was an agribusiness. The court reasoned:

> The zoning ordinance does not define "agribusiness" but provides the following no-exclusive list of examples: farm implement sales, cider mills, farmers markets, farm dairies, and pick-your-own farms. Merriam-Webster's **[*9]** dictionary defines agribusiness as "an industry engaged in the producing operations of a farm, the manufacture and distribution of farm equipment and supplies, and the processing, storage, and distribution of farm commodities." Because storing woodchips and grinding them into mulch is engagement in the storage and processing of an agricultural commodity, [Owen's] proposed land use is properly classified as an agribusiness under the ordinance. Because agribusiness uses are permitted only as special land uses, the ZBA did not err by determining that planning commission review was required prior to possible approval of a site plan and special land use permit.

In its July 23, 2020 decision affirming the Board's approval of the relocation of Owen Tree Service's mulch manufacturing operation, the ZBA referenced that decision, stating:

> [T]his board finds as a matter of fact that the operations of Owen Tree Service, the subject matter of this appeal, are "Agribusiness" within the meaning of the township zoning ordinance. WHELAN [one of the ZBA members deciding the appeal] STATED THAT HE USED JUDGE HOLOWKA'S DETERMINATION THAT OWEN TREE SERVICE IS AN AGRIBUSINESS AS HIS DETERMINATION.

On appeal, **[*10]** plaintiffs argue that the doctrine of collateral estoppel[2] did not bind the

[2] In general, the doctrine of collateral estoppel applies if the following three elements are satisfied:

> (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full [and fair] opportunity to litigate the issue; and (3) there must be mutuality of estoppel. [*Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004) (quotation marks and citation omitted, alteration in original).]

ZBA to accept the circuit court's October 4, 2018 determination that the mulch manufacturing operation was an agribusiness. They argue that the court's determination was non-binding dictum.[3] In response, defendants argue that the doctrine of collateral estoppel bars plaintiffs from arguing that the mulch manufacturing operation is not an agricultural business.

We need not determine whether the doctrine of collateral estoppel required the ZBA to accept the circuit court's determination as binding. Nothing in the ZBA's decision indicates its belief that it was, in fact, bound by the circuit court's earlier determination. Instead, the ZBA's decision indicates that it was using the circuit court's determination "as [its] determination." Thus, rather than treating the determination as binding, **[*11]** the ZBA instead found it to be persuasive and adopted as its own the circuit court's determination that the mulch manufacturing operation was an agribusiness within the meaning of the relevant zoning ordinances.[4] Because we conclude that the ZBA independently determined that the proposed operation was an agribusiness under the ordinance, plaintiffs' argument that they were denied due process because the ZBA's decision was based exclusively on dictum is without merit.

Next, Attica Township also argues that plaintiffs are precluded from arguing that Owen Tree Service's operations are properly classified as an agribusiness by the doctrine of judicial estoppel. "Under [that] doctrine, a party who has *successfully* and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding." *Paschke v Retool Indus, 445 Mich 502, 509; 519 NW2d 441 (1994)* (citation omitted). For this doctrine to apply, a party must present a "wholly inconsistent" claim after an earlier court proceeding in which the court accepted the party's position as true. *Id. at 510*. Here, in response to the Township's appeal of the ZBA's first opinion, plaintiffs argued Owen Tree Service's proposed use was not agricultural, but **[*12]** was "at best" an agribusiness use, which is classified as a special land use under Attica Township Zoning Ordinance § 6.2. The crux of the argument then was that the proposed use *might* be an agribusiness, not that it unequivocally was an agribusiness. Because the claim must be successfully and *unequivocally* asserted in the earlier appeal, we conclude that the doctrine of judicial estoppel does not bar plaintiffs' argument.

Plaintiffs also contend the trial court improperly usurped the authority of the ZBA when it used a dictionary definition of agribusiness to interpret the township's zoning ordinance. The trial court used the dictionary definition of agribusiness: "an industry engaged in the producing operations of a farm, the

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[3] "Dictum is a judicial comment that is not necessary to the decision in the case" and is not binding authority. *Pew v Mich State Univ, 307 Mich App 328, 334; 859 NW2d 246 (2014)*. However, "if a court intentionally addresses and decides an issue that is germane to the controversy in the case, the statement is not dictum even if the issue was not decisive." *Id.* In this case, the circuit court affirmed the ZBA's decision to require the relocation request to be submitted to the Planning Commission because the court determined that, under the relevant zoning ordinances, Owen Tree Service's operations were properly classified as an agribusiness, which required a special use permit, which, in turn, required that the matter be submitted to the Planning Commission. Because the determination that the business was classified as an agribusiness was, therefore, germane to the controversy in the case, it was not dictum.

[4] On appeal, plaintiffs point out that Owen Tree Service's lawyer submitted a letter to the ZBA arguing that the circuit court's determination was binding on the ZBA. However, the fact that a position was argued before the ZBA does not mean that the ZBA must have agreed with the position argued. Instead, we look to the language used by the ZBA in its determination, which, as noted above, does not include any indication that the ZBA found itself to be precluded from independently deciding the issue.

manufacture and distribution of farm equipment and supplies, and the processing, storage, and distribution of farm commodities." *Merriam-Webster's Collegiate Dictionary* (11th ed). When interpreting a zoning ordinance, "undefined terms must be given their plain and ordinary meanings, [and] it is proper to consult a dictionary to define terms." *Risko v Grand Haven Charter Twp Zoning Bd of Appeals, 284 Mich App 453, 460; 773 NW2d 730 (2009)*. Because the ordinance only gives examples of agribusiness, but not a definition, the trial court properly considered **[*13]** the dictionary definition.

Plaintiffs next argue the ZBA erred because there was not sufficient evidence on the record to show the proposed use properly fit the definition of an agribusiness. In support, plaintiffs direct this Court to opinions where this Court has held that the ZBA must state on the record the grounds upon which it justifies its decision. In particular, in *Reenders, 217 Mich App at 377-378*, this Court concluded the trial court erred when it found there was sufficient factual evidence to support the zoning board's decision when the ordinance in question required the ZBA to make affirmative findings related to four standards. This Court held that it was "insufficient for the zoning board to merely repeat the conclusory language of the zoning ordinance without specifying the factual findings underlying the determination that the requirements of the ordinance were satisfied in the case at hand." *Id.*

The ordinance in this case sets out a similar requirement as the one in *Reenders*, providing that any agribusiness use must meet five requirements under Attica Township Zoning Ordinance § 4.29:

> 1. All buildings, any equipment, materials or produce being stored or for sale shall be set back at least one hundred (100) **[*14]** feet from all property lines.
> 2. One (1) display area is permitted within the required setback area for merchandise for sale, not to exceed four hundred (400) square feet in area.
> 3. One (1) non-illuminated sign, not exceeding a total of thirty-two (32) square feet and eight (8) feet in height is permitted for all such agribusiness use.
> 4. Adequate off-street parking shall be provided to serve the expected number of patrons and shall have at least a gravel surface properly graded and dust-free at all times. In determining the adequacy of the number of parking spaces, the approving body shall compare the proposed use to similar uses listed in Section 5.2.12.
> 5. Whenever the proposed use is adjacent to a residential zoning district, a ten (10) foot landscaped greenbelt shall be provided along the entire property line adjoining the residential zoning district.

In addition, any special land use, which an agribusiness is considered, must meet the requirements of Attica Township Zoning Ordinance § 6.2(1)(A) through (H):

> A. The proposed special land use shall be of such location, size, and character that it will be in harmony with the appropriate and orderly development of the surrounding neighborhood **[*15]** and/or vicinity and applicable regulations of the zoning district in which it is to be located.
> B. The proposed use shall be a nature that will make vehicular and pedestrian traffic no more hazardous than is normal for the district involved, taking into consideration vehicular turning movements in relation to routes of traffic flow, proximity and relationship to intersections, adequacy of sight distances, location and access of off-street parking and provisions for pedestrian traffic, with particular attention to minimizing child-vehicle interfacing.
> C. The proposed use shall be designed as

to the location, size, intensity, site payout and periods of operation of any such proposed use to eliminate any possible nuisance emanating therefrom which might be noxious to the occupants of any other nearby permitted uses, whether by reason of dust, noise, fumes, vibration, smoke or lights.

D. The proposed use shall be such that the proposed location and height of buildings or structures and location, nature and height of walls, fences and landscaping will not interfere with or discourage the appropriate development and use of adjacent land and buildings or unreasonably affect their value.

E. The **[*16]** proposed use shall relate harmoniously with the physical and economic aspects of adjacent land uses as regards prevailing shopping habits, convenience of access by prospective patrons, continuity of development, and need for particular services and facilities in specific areas of the Township.

F. The proposed use is necessary for the public convenience at the proposed location.

G. The proposed use is so designed, located, planned and to be operated that the public health, safety, and welfare will be protected.

H. The proposed use shall not cause substantial injury to the value of other property in the neighborhood in which it is to be located and will not be detrimental to existing and/or other permitted land uses in the zoning district.

Here, the ZBA adopted as its own the circuit court's October 4, 2018 determination that the mulch manufacturing operation was an agribusiness. Moreover, unlike *Reenders*, a thorough review of the record shows the determination was made using competent, material, and substantial evidence on the record. While the ZBA's finding is brief, the record shows significant evidence that, through the process outlined in the ordinance, a thoughtful decision was made. The Planning **[*17]** Commission made findings on each point of Attica Township Zoning Ordinances § 4.29 and § 6.2(1), referencing the planning reports that were made to ensure the proposed use met each requirement. Indeed, the robust record in this case is not "devoid of factual or logical support." *Reenders, 217 Mich App at 381*. Plaintiffs repeatedly argue the only reason for the finding that the mulch operation constituted an agribusiness was the circuit court's finding in the first appeal. However, it is clear from the record, the circuit court's finding was only part of what was considered by township officials when the proposed use was granted. Likewise, the Planning Commission and Board considered plaintiffs' position, which was set forth in letters sent through plaintiffs' lawyer and comments at public hearings. In light of the record, we conclude that the ZBA did not err by determining the proposed use constituted an agribusiness under the zoning ordinance, and the circuit court did not err in concluding there was sufficient evidence to label the proposed operations an agribusiness.

IV. ABUSE OF DISCRETION

Plaintiffs also argue the ZBA abused its discretion when it approved Owen's proposed use because of the dust, noise, and **[*18]** odors caused by the mulch manufacturing operation. We disagree. "[A]s long as the zoning board following ordinance regulations regarding the extension of the nonconforming use, strictly construed, the variance was appropriately granted to [defendant]." *Reenders, 217 Mich App at 377*. See also *Spanich v City of Livonia, 355 Mich 252, 266; 94 NW2d 62 (1959)* (an appellate court "does not sit as a superzoning commission, and we

do not substitute our judgment for that of the legislative body charged with the duty and responsibility in the premises, except in the unusual case.").

From the record on appeal, it is apparent that the proper procedures were followed. Specifically, Owen Tree Service completed multiple site plans; public hearings were held where feedback was received from citizens; and reasonable restrictions were placed on Owen Tree Service, consistent with the requirements of the ordinance. Special conditions included limiting the hours of operation, precluding the operation from being open on weekends, inspections by the township engineer, a 100-foot greenbelt buffer to shield the operation from view of the road or neighbors, and noise-reducing measures on equipment. In light of the foregoing, the ZBA's decision is not outside the range of reasonable outcomes. *Elher, 499 Mich at 21*.

Affirmed. **[*19]** Defendants may tax costs as the prevailing parties. *MCR 7.219(A)*.

/s/ Michael J. Kelly

/s/ Christopher M. Murray

/s/ Stephen L. Borrello

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Observer
You. Your Neighbors. Your Neighborhood.

Town moves ahead on adding pickleball references to building standards

Town Commissioners back off pursuit of specific noise rules.

By Eric Garwood | 9:40 a.m. October 29, 2019

The Longboat Key Club in March converted tennis courts near the marina next to Portofino Ristorante & Bar into four pickleball courts.

LONGBOAT KEY NEWS

Players of pickleball play by a lot of rules unique to their sport.

- Only one serve attempt to start a point;
- No volleying a return of serve;
- No setting foot in the "kitchen" to play a shot.

But builders of pickleball courts play by the same rules as anyone setting out to construct a tennis court in Longboat Key. In other words, what rules apply to where and how a tennis court can be built and used also apply to pickleball . . . and pretty much every other racket sport out there.

Sound rules

Sound rules apply to "whether sound annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of a reasonable person of normal sensibilities." Enforcement takes

In fact, once a court is built, the town's rules and regulations don't really care what lines are painted on it or what game is played on its surface.

into account volume, intensity, nature of sound (usual or unusual), proximity to sleeping facilities, time of occurrence, duration and type of activity (commercial or non-commercial)

That's something the town has talked about since the spring, when the Planning, Zoning and Building Department began a series of updates of zoning code.

One proposed change working its way through discussion is the addition of the word "pickleball" alongside the word "tennis" in development standards.

"Obviously, there has been a lot of attention nationally and obviously locally here in the sport of pickleball," said Allen Parsons, the town's director of planning, building and zoning. "I'll say that interest hasn't necessarily translated itself into a lot of activity in terms of permitting."

In fact, zero applications have been submitted in the nearly two years since he's been with the town.

The issue of sound, though, has been raised in Longboat Key and elsewhere. The sport, which originated in 1965 but has recently sprung up in popularity, employs a solid wood or composite paddle and a hard-plastic ball. One of its most persistent of the sport's criticisms is the "popping" noise of play.

Parsons said there are no noise rules in town aimed specifically at any particular sport or rules that rely on specific decibel levels. "Our sound ordinance, I don't think is a whole lot of help here in regulating pickleball," he said, adding an exemption for recreation noise exists in areas open to the public, such as Bayfront Park.

And while Town Commissioners ultimately have backed away from delving into such noise-mitigation rules for now, the issue has reappeared from time to time.

Commissioner Randy Clair, in a workshop this month, reminded his colleagues that the town was concerned about sound mitigation when considering a recommendation to build pickleball courts near the Public Tennis Center, adjacent to a condo community and a church. A $16,000 line item for sound-deadening fencing was part of one proposal.

Mayor George Spoll said he was concerned about the possibility of a property owner building or converting a properly-permitted backyard court, and leaving neighbors with little recourse if a homeowners association lacked authority.

"Living with a tennis court clearly is different than living with a pickleball court," he said.

Town Attorney Maggie Mooney told commissioners adding specific regulations for pickleball sound could become complicated, and the town had been down a similar road and decided against further action.

"I caution the commission on digging into the sound regulations might require a bigger bite of the apple than we're prepared to talk about right now," she said, adding the town in the past had looked into a decibel-based set of rules and found just the equipment alone could cost between $25,000 and $50,000. Parsons said, too, that it might be worth investigating whether pickleball noise rises past the level of typical municipal sound prohibitions.


Commissioners agree with residents on pickleball

Key Club granted more time for pickleball plans


Longboat to consider changes to sound ordinance in November


Pickleball plans firm up with consultant report


Rehearing planned for Longboat Key pickleball proposal

"I do think it's a challenge," he said. "Here's our standard . . . whether it's the sound of ball hitting paddle or people hooting or hollering after a great play or something like that, is that unreasonable?"

Commissioner Mike Haycock and others said the issue of pursuing sport-specific sound regulations wasn't immediately necessary.

Vice Mayor Ed Zunz said it never hurts to look toward the future, saying a distinction needs to be made, though he acknowledged sound-deadening fencing could raise concerns about aesthetics.

"They may be hard questions, but that doesn't mean we can avoid them because they are hard," he said. "I think we have to give more consideration to it."

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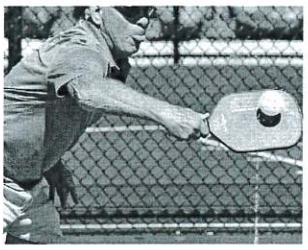

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