

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ST. CLAIR

LUCKY 7 DEVELOPMENT, L.L.C., and
GRAND POINTE DEVELOPMENT, L.L.C.,

Appellants,

-vs-

Case No. 08-000717-AA

CLAY TOWNSHIP, a Michigan Municipal
Corporation,

Appellee,

OPINION

This is an appeal from a decision of the Clay Township Planning Commission. Appellants sought approval from the Planning Commission in order to construct a cluster housing development. The Planning Commission denied Appellants' application for approval of a special land use. Appellants have appealed that decision in this Court. Because the decision of the Planning Commission was lawful and a proper exercise of discretion based on competent material and substantial evidence, that decision is affirmed.

Any party aggrieved by a decision of a planning commission may obtain review in the Circuit Court. MCL 125.3607. This Court reviews the decision to determine whether it (1) complies with the constitution and laws of the state, (2) is based upon proper procedure, (3) is supported by competent, material, and substantial evidence, and (4) represents a reasonable exercise of discretion. MCL 125.3606.

On or about April 4, 2007 appellant submitted a special land use application to Clay Township. (Récord on Appeal A Tab 5(A)). Appellant was

applying for permission to develop cluster housing at property described in the application. (*Id.*) The property consists of three hundred eighty acres on the north portion of Harsens Island. (Record on Appeal A Tab 5(B), Tab 9(B)(B)). Most of the property is zoned for rural suburban uses (RS-1), though some of it is zoned for single-family residential use (R-1). (*Id.*)

According to Clay Township's Zoning Ordinance, cluster housing is a special land use in RS-1 and R-1 zones. Clay Township Zoning Ordinance §§ 5.03, 6.03. Special land uses must be approved by the Clay Township Planning Commission. *Id.* § 19.01. Section 19.05 of the Zoning Ordinance provides:

The Planning Commission shall review the particular circumstances and facts applicable to each proposed special land use in terms of the following standards and requirements and shall make a determination as to whether the use proposed and subject site meet the following standards and requirements:

1. Will be in accordance with the general objectives, intent and purposes of this Ordinance.
2. Will be in accordance with the goals and objectives of the Clay Township Master Plan.
3. Will be designed, constructed, operated and maintained in harmony with the existing and intended character of the general vicinity and that such a use will not change the essential character of the area in which it is proposed.
4. Will not be hazardous or disturbing to existing or future uses in the same general vicinity and in the community as a whole.
5. Will be served adequately by essential public facilities and services, such as highways, streets, police and fire protection, storm water drainage, refuse disposal, water and sewage facilities, and schools or persons or agencies responsible for the establishment of the proposed use shall be able to provide adequately for such services.
6. Will not create excessive additional requirements at public cost for facilities and services and will not be detrimental to the economic welfare of the community.
7. Will not involve uses, activities, processes, materials and equipment or conditions of operation that will detrimental to any person, property or general welfare by reason of excessive production of traffic, noise, vibration, smoke, fumes, glare or odors.
8. Will ensure that the environment shall be preserved in its natural state, insofar as practicable, by minimizing tree and soil

removal, and by topographic modifications which result in maximum harmony with adjacent areas.

9. Will not impede the normal and orderly development and improvement of surrounding property for uses permitted within the Zoning District.

On February 27, 2008, the Clay Township Planning Commission considered appellant's final proposal for a special land use. (Minutes of the Clay Township Planning Commission pg 8 (February 27, 2008)). A majority of the Planning Commission voted to deny the application. (*Id*). Members of the Commission specifically referenced §19.05(3) of the ordinance. One member, Thomas Krueger, noted:

Item three says that the cluster homes will be designed, constructed, operated, and maintained in harmony with the existing or intended character of the general vicinity and that such use will not changes [sic] the essential character of the area in which it is proposed. I just can't see that at all. The general character of the area is going to change dramatically because we are re-routing a road around the thing and they are dredging a 60-acre basin in the middle of the property. (Minutes 5 (February 27, 2008)).

Krueger also stated:

Item eight states will ensure that the environment shall be preserved in its natural state, insofar, [sic] as practicable, by minimizing tree and soil removal and by topographic modifications which result in maximum harmony with adjacent areas. Again, a 60 acre basin and moving all the dirt around I got to believe it won't be preserved in its natural state. (*Id* 6).

Commissioners Whitey Simon, Earl Lines, and Kathie Schweikart all voiced their agreement with Krueger. Krueger brought a motion, specifically based upon §19.05(3) and (8), and a majority of the Commission approved a resolution to deny the application, finding that the proposed development would result in the character of the general vicinity being "dramatically changed," and that the development plan would not satisfactorily ensure that the environment would be preserved.

The site plans submitted to the Planning Commission present the final nature of the proposed development. (Record on Appeal A Tab 11(A)). A large

artificial lagoon would dramatically alter the topography of the area. (*Id.*) The development calls for three hundred forty-eight residential units, including one hundred seventy-two waterfront homes. (*Id.*) A significant road project would be required to link the development to existing roads. (*Id.*)

On appeal, appellants first argue that the Commission has failed to state the reasons underlying its denial of the special land use application as required by MCL 125.3502. However, the minutes of the February 27, 2008 Commission meeting clearly articulate the reasons underlying the denial. The motion specifically referenced enumerated requirements of Section 19.05 of the Zoning Ordinance, and the members who supported the motion outlined explicit problems with the proposal. The Commission properly specified the bases of its decision.

Appellants next argue that the Commission's decision was not supported by competent, material, and substantial evidence. Appellant argues that the decision of the board was based upon unfounded concerns with the characteristics of the sixty-acre basin. However, the Commission clearly articulated its concern with the very *existence* of the large artificial waterway. There is no dispute about the nature or magnitude of the basin, and the evidence establishing the basin's size, location and intended usage was substantial. There is no dispute that a road would have to be re-routed to accommodate the development's needs.

This is the evidence underlying the Commission's decision and it is unchallenged. Based upon this evidence, the Commission concluded that the proposed development was not in harmony with the existing and intended character of the general vicinity and that such a use would change the essential character of the area in which appellants propose to locate their development. The Commission also concluded that the proposed development failed to ensure that the environment shall be preserved in its natural state, insofar as practicable, by minimizing tree and soil removal, and by topographic modifications which result in maximum harmony with adjacent areas.

Appellants extol the virtues of the basin and downplay the impact of the road project, but the uncontroverted evidence demonstrates that these are substantial components of the project. The Commission based its decision upon

this evidence. On appeal, appellants reiterate the quality, cleanliness and feasibility of the basin. However, no matter how cleverly conceived, the basin represents a substantial change from the undeveloped natural character of the property.

The question for the Commission was whether this substantial change conformed to the requirements of the Zoning Ordinance. The Commission determined that the change did not conform to those requirements, and the material evidence before them was competent and substantial to support that decision.

Harsens Island has a special character. It is accessible only by boat (including ferries) and has a distinct rural-suburban population living in a unique balance with the largely unspoiled natural surroundings that are the hallmark of the island. This development centers on substantial topographical changes, represents an intense transmogrification of the undeveloped area in question, and represents an intense use of the land. While the development has been thoughtfully and painstakingly prepared, the Commission could easily conclude from the evidence before it that this development would not be in harmony with the existing or intended character of the general vicinity, and that it did not minimize topographic modifications to result in maximum harmony with adjacent areas.

Appellant also argues that the basin is a "pond" as that term is defined in the Zoning Ordinance and that it has a "right" to a pond. However, even assuming *arguendo* that the basin is a "pond," and that the Zoning Ordinance entitles appellant to a pond, the Commission did not review the creation of the sixty-acre basin in isolation. The Commission reviewed the creation of the sixty-acre basin within the proposal for the development. Within that context, the Commission found the basin and the development not to be in harmony with the existing or intended character of the general vicinity. That review was proper and within the Commission's discretion.

Questions about the suitability of this development are not for this Court. Those questions are to be answered by the Commission, so long as they answer them lawfully.

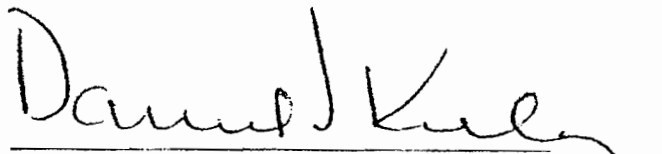
The courts cannot sit in judgment on the precise merits of the myriad discretionary and factbound decisions reached every day by democratically elected governing bodies in the area of zoning and development. We can only review whether the local governing bodies have discharged their powers in a manner consistent with applicable law. *Altman v Meridian Twp*, 439 Mich 623, 642; 487 NW2d 155 (1992).

In this case, the Commission's decision was lawful, was supported by competent, material, and substantial evidence, was a proper exercise of discretion, and therefore must be upheld by this Court.

For the foregoing reasons, the decision of the Clay Township Planning Commission is AFFIRMED.

An Order consistent with this Opinion may be presented for entry as provided by Michigan Court Rule.

Dated: 6-2-09



Hon. Daniel J. Kelly, Circuit Court Judge

Please note:

As of this date, July 2009, Lucky seven has filed an appeal. As we hear any news, we will again publish that ruling.