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June 17, 2014

Mr. Brent Sharpe
Township Supervisor
Bois Blanc Township
P. O. Box 898
Pointe Aux Pins, Michigan 49775-0898

**Re: The Plat of Pointe Aux Pins
Stairs, Decks, and Other Structures Along the Lakefront**

Dear Brent:

This letter is a follow-up to our recent telephone conversation regarding some of the problems associated with stairs, decks, sheds, and other structures along the lakefront and on the lakeside hill within the old Plat of Pointe Aux Pins. These issues have presented an ongoing problem for Township officials and one way of remedying the situation is through a formal amendment to the Bois Blanc Township Zoning Ordinance, as amended (the "Zoning Ordinance").

FACTS

The Plat of Pointe Aux Pins (the "Plat") was created in 1908. The Plat is not a conventional plat. Instead, it was created by the Pointe Aux Pins Association pursuant to one of Michigan's old summer resort association statutes. Under Michigan law, the Plat has certain characteristics of a conventional plat and subdivision (of which there are likely tens of thousands throughout Michigan), yet it also has some traits that differ from conventional plats and subdivisions.

I have enclosed a fairly good copy of the Plat for your information.

On the face of the Plat, the first tier of lots is not shown as extending to Lake Huron. Rather, there are two items or areas that are interposed between the first tier of lots and the lake. The first item runs along the waterfront and is labeled and dedicated as "The Beach Park." The next item or area runs between the Beach Park and the first tier of lots and is labeled and dedicated as "Huron Avenue." For most portions of the Plat, the Beach Park and Huron Avenue comprise the lakefront as well as extending part or all of the way up the bank adjacent to the lakefront.

Originally, the Plat (as well as the roads, common areas, parks, etc., within the Plat) were under the jurisdiction of the Pointe Aux Pins Association. However, according to Township

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officials, the Pointe Aux Pins Association went defunct many years ago. Accordingly, it is unclear today whether the Plat should now be treated as a conventional plat or subdivision or whether it still has characteristics of a summer resort association plat.

Over the years, there have been diverging views regarding who "owns" Beach Park and Huron Avenue, who (if anyone) can install steps, structures, and other items within Beach Park and Huron Avenue, and generally who has jurisdiction over Beach Park and Huron Avenue. Some property owners in the Plat have argued that the jurisdiction of Huron Avenue and Beach Park still remains with the defunct summer resort association. Others have asserted that all of the owners of lots within the Plat jointly own Beach Park and Huron Avenue, and that any of those lot owners has a right to install items within Beach Park and Huron Avenue. Finally, a third view is that the first tier of lots actually extends to the lake but the extensions of those lots are subject to easements for Beach Park and Huron Avenue. I discuss these issues in more detail below.

Along the lakefront and on the bank adjacent to the lakefront throughout the Plat, there are a variety of different structures and items within Beach Park and Huron Avenue. Those items include steps, stairways, decks, sheds, small cottages, trellises, fire pits, sidewalks, permanent piers, and landings. Two general problems arise for the Township with regard to such items. First, Township officials are uncertain how to respond when someone proposes to install a new item within Beach Park or Huron Avenue such as a stairway, shed, deck or similar item. The second type of problem arises when someone desires to expand or replace an existing (and likely "grandparented" or lawfully nonconforming) item such as a stairway, landing, shed, etc. Given that it is unclear which lot owners or association entity has jurisdiction over Huron Avenue and Beach Park, which lot owners or entities "own" Huron Avenue and Beach Park, and similar issues, Township officials do not know whether building permits and zoning permits can be issued for the replacement of existing structures or items within Huron Avenue or Beach Park or for entirely new items.

To complicate matters further, even if the Township approves the installation or replacement of a particular item or structure within Beach Park or Huron Avenue, in many cases, the applicant would still have to obtain a separate approval or permit from the State of Michigan and the United States Army Corps of Engineers if construction below the ordinary high water mark of Lake Huron is involved.

Please let me know if any of the above-mentioned facts as they have been presented to us by Township officials are incorrect, as that could change one or more of the recommendations or opinions contained in this letter.

DISCUSSION

1. Ownership and Control of Huron Avenue and Beach Park.

At the current time, it cannot be definitively established who "owns" Huron Avenue and Beach Park. That would likely require a long and expensive lawsuit involving all of the lot owners within the Plat.

I am aware of one lawsuit that did partially answer the issue of who has some type of real property interest in Beach Park and Huron Avenue. That lawsuit was *Sims, et al. v Pointe Aux Pins Assn, et al.*, Mackinac County Circuit Court Case No. 03-5631-CH. Pursuant to the final order in that case dated April 23, 2004, Judge Charles H. Stark held that the owner of every lot within the Plat has at least an easement right in Beach Park and Huron Avenue. Specifically, the Judge stated that "the lot owners and occupants are Tenants in Common as to any easement rights in the plat." The Judge also held that "the easement rights in the avenues and parks depicted on the plats are attached to each lot owner and occupant within the plat and their descendants, as Tenants in Common." Tenants in common essentially means that every lot owner has a joint easement right with all other lot owners and that the easement right does not terminate upon the death of a lot owner but passes with title to each lot. Judge Stark did not, however, answer who or what owns the land under the easements comprising Beach Park and Huron Avenue.

My limited review of the unclear Michigan appellate case law in this area indicates that it is likely that the courts would hold (if squarely presented with the issue someday) that the first tier of lots adjoining Huron Avenue actually extend to the lake but that those first tier lots are subject to easements for Beach Park and Huron Avenue for the benefit of all lot owners within the Plat. Or, put another way, if the courts are ultimately called on to decide the issue, it is more probable than not that the first tier of lots would be deemed to extend under and "through" Huron Avenue and Beach Park to the lake (and thus, would be waterfront or riparian), but subject to easements for Huron Avenue and Beach Park in favor of all lot owners within the Plat. See *2000 Baum Family Trust v Babel*, 488 Mich 136 (2010); *Dobie v Morrison*, 227 Mich App 536, 540 (1998); *Thies v Howland*, 424 Mich 282 (1985); *Bedford, et al. v Rogers, et al.*, unpublished decision by the Michigan Court of Appeals dated April 17, 2012 (Case No. 299783); 2012 WL 1314165 and *Wojcik v Ficaj*, unpublished decision by the Michigan Court of Appeals dated April 14, 2011; Case No. 295850; 2011 WL 1436289. What makes the current situation different is that all of the Michigan appellate cases that I could find deal only with one platted dedicated road or park existing between a lake and the first tier of lots in a plat, not two such dedicated items (i.e., here, both a road right-of-way and a park) located between the water and the first tier of lots. Nevertheless, it is likely that the courts would treat the current situation the same as if there was only one such platted dedicated item located between Lake Huron and the first tier of lots in the Plat.

We have not been asked by the Township to independently research whether there have been other court cases in the past regarding the Plat, have a title search done of Huron Avenue or Beach Park, or similar undertakings. Accordingly, for purposes of this letter, we have had to rely upon documents and information provided to us by the Township.

Ultimately, however, regardless of who or which private parties have jurisdiction over and ownership of Huron Avenue and Beach Park, such rights are still subject to regulation and restriction by the Zoning Ordinance, other applicable Township ordinances, and state and federal laws as to what can occur along the lakefront.

2. Current Requirements of the Zoning Ordinance.

Under the Zoning Ordinance, it is highly unlikely that new structures or items could be installed within Huron Avenue or Beach Park. Why not? With perhaps the exception of limited stairways, the Zoning Ordinance would generally not allow items such as decks, sheds, accessory buildings, cottages or similar items to be installed within a dedicated right-of-way, park or beach. Second, and alternately, such items would normally have to be set back a certain distance from a platted road, beach or park (as well as 75 feet from the ordinary high water mark for certain structures). Three exceptions to those zoning prohibitions would include steps or stairs of a limited size (and without decks or large landings), sidewalks, and boardwalks that are flush with the ground.

3. The Lawful Nonconforming Status of Many Existing Structures and Items.

To the extent that any of the existing structures and items within Huron Avenue or Beach Park could not be installed today under the Zoning Ordinance but predated the Zoning Ordinance, they must be considered lawful nonconforming structures and items (what lay people often refer to as being "grandparented"). In other words, if such structures or items were lawful when first installed, they can remain in place so long as they are not replaced, rebuilt, expanded, enlarged or significantly modified. Under both the Zoning Ordinance and state law, lawful nonconforming structures cannot be replaced, significantly modified, rebuilt, enlarged, expanded or extended. See Section 3.02 of the Zoning Ordinance and *Norton Shores v Carr*, 81 Mich App 715 (1978) and *White Lake Twp v Lustig*, 10 Mich App 665 (1968). Normal repair and maintenance is allowed. *Ibid*.

If a lawful nonconforming structure or item is removed, demolished or destroyed (by fire, ice jams, storm, tornado, wave action or other natural disaster or process), it loses its lawful nonconforming status and cannot be rebuilt or replaced. See Section 3.02 of the Zoning Ordinance, as well as *Livonia Hotel, LLC v City of Livonia*, 259 Mich App 116 (2003) and *Norton Shores v Carr*, 81 Mich App 715 (1978).

4. The "Catch 22" Situation.

Since it cannot be determined absent court action who can lawfully apply for a permit to install or replace stairs, decks, sheds, etc., within Beach Park or Huron Avenue, Township officials generally should not issue zoning or building permits for such items because the Township cannot determine whether the individual or entity seeking the permit has sufficient ownership or control of the property involved to be able to lawfully install or build the item. In those cases in the past where the Township has issued a permit or approval for the replacement

or construction of a new structure or item within Beach Park or Huron Avenue, it has usually engendered significant controversy.

All of the uncertainties regarding Beach Park and Huron Avenue also present potential liability problems for property owners who have installed, maintained or replaced stairs, decks, etc., within Beach Park or Huron Avenue. Installing, repairing or maintaining items on property that one potentially does not own or control (or interferes with the easement rights of others) dramatically increases the liability potential for that person.

The final conundrum regarding Beach Park and Huron Avenue is the fact that regardless of who installs, maintains or replaces a particular structure or item within Beach Park or Huron Avenue, every lot owner within the Plat likely has the right to utilize such structure or item (except for the few existing small cottages or boathouses) given that it is located on either common property or a joint use easement.

5. A Possible Solution.

In order to create a degree of certainty with regard to structures and items within Beach Park and Huron Avenue in the Plat, the Township could adopt a formal amendment to the Zoning Ordinance governing such matters. I have enclosed a possible amendment to the Zoning Ordinance to that effect for review by members of the Township Board. In order to avoid wasted resources and time at the Planning Commission level, the Township Board could first indicate whether it would generally be amendable to this type of solution.

Pursuant to the proposed Zoning Ordinance amendment, every structure and item located on Beach Park and Huron Avenue within the Plat would essentially be "frozen." That is, with the exception of stairs or steps, no new substantial structure or item could be installed or built within Huron Avenue or Beach Park (or lakeside of the historic cement sidewalk). Such prohibition would include any new deck, gazebo, trellis, shed, accessory building, cottage, fence or similar item. Furthermore, to the extent that any such lawful nonconforming structure or item were removed or destroyed, it could not be rebuilt or replaced.

Stairways or steps would fall into a different category. Obviously, due to the substantial bank along the lakefront in many portions of the Plat, stairways and steps are necessary for both adjacent lot owners and other lot owners in the Plat to be able to access the beach and Lake Huron. Existing lawful nonconforming stairs and steps could be replaced upon application to the Township, but only within the exact same footprint and at the exact same size and dimensions as the prior lawful nonconforming steps or stairway. Replacement steps or stairways could not be any wider or larger, nor could hand railings and related items be any taller or bigger than the prior steps or stairs. Along portions of the bank where there are no steps or stairs, a lot owner within the Plat could apply to install a new set of stairs or steps, but there would be strict limitations on the width, size, and height of such new steps or stairways. There could be no decking or landings above or beyond a certain size.

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CONCLUSION

Adopting the proposed Zoning Ordinance amendment for the Plat (or some variation thereof) would have two general advantages. First, it would create a significant amount of certainty in an area where none exists today (and has not for years). Second, it would help prevent future structures and items from "cluttering up" the lakefront and nearby bank along a beautiful section of shoreline within the Township.

Please do not hesitate to contact me should you or any other Township official wish to discuss these matters further.

Very truly yours,



Clifford H. Bloom
Township Attorney

Enclosures

cc (w/encls): Township Clerk
Chair, Planning Commission
Zoning Administrator