

**Clearwater Township**  
Planning Commission  
Regular Meeting of July 1, 2019  
As approved August 5, 2019

**Call to Order, Pledge of Allegiance:**

Chair Backers called the meeting to order at 7:02 p.m., and opened with the Pledge of Allegiance.

**Roll Call of Members and Recognition of Visitors:**

Commissioners present: Backers, Casassa, Eldridge, Fields, Von See.  
Public: Carol Backers

**Approval of Agenda:**

**MOTION** by Casassa, second by Von See, to accept the agenda as presented. Motion carried.

**Call for Disclosure of Conflicts of Interests:**

All commissioners declared no conflicts of interests with items on the agenda.

**Approval of Minutes:**

**MOTION** by Casassa, second by Von See, to accept the minutes of June 3, 2019 as presented. Motion carried.

**Public Comment for Matters Not on the Agenda:**

There was none.

**Commissioner Comment for Matters Not on the Agenda:**

There was none.

**Correspondence:**

1. Chair Backers remarked that he had forwarded a document from the NAR concerning the *Knick v. Scott Township* SCOTUS decision regarding a property owner's Fifth Amendment rights when government takes his property without paying for it. The text of this document is hereby incorporated into the record by reference, and is attached to the permanent copy of these minutes as [Att A].

The key quote from the ruling is: "A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it." The Court's opinion reads: "The Fifth Amendment right to full compensation arises at the time of the taking, regardless of post- taking remedies that may be available to the property owner. In sum, because a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time."

This decision simply recognizes the supreme law of the land, in particular, the Fifth Amendment protections of the Constitution.

[Post-meeting note: This decision recognized the logical flaw in the *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* decision of 1985, which “held that a property owner must seek just compensation under state law in state court before bringing a federal takings claim under §1983.” However, “the unanticipated consequence of this ruling was that a takings plaintiff who complied with *Williamson County* and brought a compensation claim in state court would – on proceeding to federal court after the unsuccessful state claim – have the federal claim barred because the full faith and credit statute required the federal court to give preclusive effect to the state court’s decision.”

(Quotes taken from the Syllabus of the *Knick v. Scott Township* SCOTUS decision, available at [https://www.supremecourt.gov/opinions/18pdf/17-647\\_m648.pdf](https://www.supremecourt.gov/opinions/18pdf/17-647_m648.pdf).)

2. We received an email message, on June 25, 2019, from the Michigan Attorney General’s office, in response to our letter of March 8, 2019, requesting clarification on 1) the specific geographic boundaries of our county and township where it meets the surrounding waterbodies, and 2) the jurisdictional boundaries of the township with regard to those waterbodies. Our original letter and the Attorney General’s office reply are hereby incorporated into the record by reference, and copies of each are attached to the permanent copy of these minutes as [Att B].
3. The Kalkaska County Planning Commission sent a letter by email to the Clerk of Clearwater Township, advising the results of their subcommittee review of the text amendment proposed to our Ordinance 22 (Zoning Ordinance), submitted to us by Mike Bieniek on behalf of Tillman Infrastructure. The letter is hereby incorporated into the record by reference, and a copy of it is attached to the permanent copy of these minutes, as [Att C].

### **Ongoing Permanent Business:**

Chair Backers instructed the commissioners to pursue their homework on the sections of the Master Plan assigned to them.

### **Old Business:**

AG Response - The email message, received on June 25, 2019, from the Michigan Attorney General’s office, purports to be in response to our letter of March 8, 2019, requesting clarification on 1) the specific geographic boundaries of our county and township where it meets the surrounding waterbodies, and 2) the jurisdictional boundaries of the township with regard to those waterbodies. The response does not offer us any answers to our questions. In our discussion, we maintained that there must be a way to have access to the statute that defines our boundaries. Perhaps we should approach our State legislators for assistance. We still have homework to do on this matter, since it is central to the question of what authority Clearwater Township has to control activities on the sandbar just off the southern shore of Torch Lake.

Kalkaska County Planning Commission - sent a letter by email to the Clerk of Clearwater Township, advising the results of their subcommittee review of the text amendment proposed to our Ordinance 22 (Zoning Ordinance), submitted to us by Mike Bieniek on behalf of Tillman Infrastructure. They concluded that “the proposed language would not be detrimental if the text amendment is approved by Clearwater Township.” They further indicated that they are considering adding it to the Kalkaska County Zoning Ordinance.

Discussion among the commissioners clarified our concerns: 1) the additional restrictions imposed on all telecommunications towers (not all towers are commercial), could have the unintended consequences of making it virtually impossible for a homeowner to erect a tower such as a TV antenna tower for private use and attached to the house; 2) adding the same leeway, found in section 24.09.A.02, in waiving general setback requirements, to the residential spacing requirements in section 24.09.A.11, counters the public safety reasons for which those spacing requirements were instituted; and 3) the specification of collapsible towers threatens the viability of imposing any setback requirements at all. For the record, we reaffirmed this Commission’s unanimous recommendation that the Clearwater Township Board should deny both of the Tillman-proposed text amendments to Ordinance 22, Sections 24.09.A.02 and 24.09.A.11.

Further, we recognized that whatever decision is ultimately taken by Clearwater Township in the matter of the Tillman telecommunications tower, must have substantive evidentiary support. Chair Backers reiterated the fact that if the Tillman team had done proper due diligence by reading the requirements spelled out in Ordinance 22 (Zoning Ordinance), they would have known that they needed a dimensional variance and a special land use permit, from Clearwater Township, before they could seek a building permit from Kalkaska County. It seems highly unlikely to this Commission that ours is the first township the Tillman team has encountered where such requirements exist. We also take note of the not-so-subtle threat by the Tillman team to charge the township with violation of the federal Telecommunications Act.

#### **Report of Planning Commission Chair:**

There was no further report from Chair Backers.

#### **Report of Township Representative:**

Clerk Eldridge – reported that the Township Board has accepted the proposed job description for the Zoning Administrator, as well as the proposed ordinance enforcement policy. Backers asked if that was by Resolution, not requiring a public hearing. Eldridge said it was. Backers indicated he had a couple of suggestions for improving the document. Since it has already been adopted by the Board, the suggestions would have to be discussed here and then sent to the Board as recommendations. As of this moment, Adam Parzych has not signed the paperwork to accept the new job description.

There will be a special meeting on July 18, at 6:30 p.m., prior to the regular Board meeting, regarding the proposed Noise Ordinance.

There is no new contract for our township to provide fire protection to Rapid River Township. The current contract expires July 31. Without coverage from Clearwater Township, Rapid

River's coverage comes entirely from Kalkaska County. Supervisor Gaylord has asked Clerk Eldridge to draw up a new contract for 1.5 miles. Kalkaska County charges by the run, which is more expensive.

### **Report of ZBA Representative:**

Commissioner Fields – reported that the dimensional variance request brought by Mike Bieniek on behalf of Tillman Infrastructure, acting as agent for property owners James and Denise Bary, was heard on April 8, but postponed at the applicant's request. Deliberations had begun, and the applicant's appeal had failed the first standard of review. That might appear to be sufficient to deny the appeal, since the applicant must meet all five standards for approval. But, Attorney Peter Wendling counseled the ZBA that we must proceed through all standards because if the case were brought to trial, and the applicant successfully argued against the single failed standard, and there were no other standards applied, the court could reverse the ZBA decision. On the second standard, the 4-person Board was tied. At this point, the applicant elected to postpone the hearing until the full 5-person Board could be present.

Subsequently, the applicant effectively withdrew the original variance petition and brought a *de novo* petition for a shorter tower. That hearing was scheduled for the July 8, meeting of the ZBA, but has been postponed indefinitely until after the Township Board makes a decision on the text amendments to Ordinance 22, Sections 24.09.A.02 and 24.09.A.11, proposed by Tillman Infrastructure. We understand this matter is on the agenda for the July 18, 2019, Township Board meeting.

A variance hearing was held June 24, 2019, on the petition of James Deater to build an attached garage at his home on Water Street. Water Street is not properly located within its platted right-of-way. All the houses on the block are, in fact, legally nonconforming buildings encroaching on the right-of-way setback. Building the garage so that it is harmonious with the house design will encroach on the right-of-way setback by the same distance. The variance was approved.

### **Report of Zoning Administrator:**

The report from Zoning Administrator Parzych, was distributed. The report is hereby incorporated into the record by reference, and a copy it will be attached to the permanent copy of these minutes as [Att D].

Chair Backers expressed his dismay that without the Zoning Administrator present, it was difficult to learn much from the written report. Eldridge explained that one of the requirements of the new job description is that he attend the meetings. The new job description will become effective on the date of signing. There is no built-in time limit for signing. Technically, it appears we are in limbo and may not actually have a zoning administrator in office because the job description is in place, but it has not been signed by Parzych. Eldridge commented that the office staff is in the process of designing the documentary tools the zoning administrator will need to create and maintain a proper paper trail and history.

**New Business**

Chair Backers calendared a review, by the Commission, of the new Zoning Administrator job description for the August meeting.

Chair Backers instructed the commissioners to do their homework for review of the Master Plan, so that we can assemble the various part of the plan, update it, and submit it to the Township Board, for approval by October 2019.

**Closing Public Comment:**

There was none.

**Adjournment:**

**MOTION** by Von See, second by Casassa, to adjourn. Adjournment at 7:47 p.m.

**Assignments:**

- Fields to put the review of the new ZA job description on August agenda. Commissioners are to review the resolution and description and bring their suggestions for any changes.
- Commissioners are to pursue their assignments for the Master Plan review.

**Next Meeting:** August 5, 2019, at 7:00 p.m., in the Clearwater Township Community Center (aka the Little Red Schoolhouse).

Respectfully submitted,



Tina Norris Fields  
Secretary

### **Text of the SCOTUS document provided by Chair Backers**

On Friday, the Supreme Court issued its ruling in the case of Knick v. Township of Scott, a decision which NAR believes will lead state and local governments to be more thoughtful and deliberate when developing laws or regulations that could infringe on Americans' private property rights.

Specifically, Knick v. Township of Scott declared that plaintiffs who have accused local governments of violating the Takings Clause of the U.S. Constitution may proceed directly in federal court rather than first litigating in local circuits, overturning a 34-year old precedent set by a 1985 Supreme Court ruling.

"A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it," the Court's opinion reads. "The Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner. In sum, because a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time."

As many Realtors® are aware, property owners had previously been required to exhaust all remedies to receive just compensation for private property seizure in state court before they could escalate the case to federal court.

Going forward, property owners will have both state and federal court available to redress their property rights. NAR expects this new development to prompt state and local governments to be more strategic regarding takings, especially in the areas of land use planning and environmental regulations, in order to avoid the uncertainty of litigation in federal court. Considerations surrounding compensation should intensify and increase, as well.



**CLEARWATER TOWNSHIP**

**P.O. Box 1**

**Rapid City, Michigan 49676**

**Tel: 231-331-6249 Fax: 231-331-4375**

March 8, 2019

Attorney General Dana Nessel  
G. Mennen Williams Building  
525 W. Ottawa Street  
P.O Box 30212  
Lansing, MI 48909

Dear Attorney General Nessel:

Clearwater Township in Kalkaska County is wrestling with a legal jurisdiction question. Clearwater Township has within its boundaries partial shorelines of both Skegemog and Torch lakes. What are the geographical boundaries of Clearwater Township? If the geographic boundaries include portions of either or both lakes, what legal enforcement authority does the Township have?

The Clearwater Township Planning Commission is requesting an official opinion from the office of the Attorney General in order to clarify the Township's legal authority.

Respectfully,

Tom Backers, Chair  
Planning Commission  
Clearwater Township  
Email address: [tbackers.plan.clearwater@gmail.com](mailto:tbackers.plan.clearwater@gmail.com)



Tina Fields <tfields.plan.clearwater@gmail.com>

**Fwd: Citizen Response**

2 messages

**Tom Backers** <tbackers.plan.clearwater@gmail.com> Wed, Jun 26, 2019 at 8:29 PM  
To: Tina Fields <tfields.plan.clearwater@gmail.com>, Kathy Eldridge or Jule Moore <clerk@clearwatertwp.com>

As I suspected...we are on our own here...

Tom B...

----- Forwarded message -----

From: **Michigan Attorney General** <miag@michigan.gov>  
Date: Tue, Jun 25, 2019 at 1:46 PM  
Subject: Citizen Response  
To: [tbackers.plan.clearwater@gmail.com](mailto:tbackers.plan.clearwater@gmail.com) <tbackers.plan.clearwater@gmail.com>

June 25, 2019

Tom Backers  
[tbackers.plan.clearwater@gmail.com](mailto:tbackers.plan.clearwater@gmail.com)  
Citizen Inquiry #2019-0246519-A-C

Dear Mr. Backers,

Attorney General Dana Nessel has asked me to respond to your letter regarding township government. It is my understanding that you are the chair of a township planning commission. You ask this office to advise you as to the following: 1) the geographical boundaries of the township, and 2) if the township boundaries include portions of certain lakes, what legal enforcement authority the township has with respect to those areas.

I regret the delay with responding to your inquiry. This Department receives hundreds of letters and emails each week, making some delays inevitable.

This Department is responsible for providing legal advice to various state departments and state officials. In the absence of express statutory authority, however, the law does not permit this Department to provide legal advice to officials of local units of government or private citizens. Therefore, this Department is unable to advise you regarding your inquiry.

For your information, this Department does not supervise local units of government, which administer their affairs through an elected governing body and other locally elected and appointed officials under the authority of various Michigan statutes and other local regulations. A township board, as the governing body of the township, may seek the advice of an attorney for the township regarding legal issues about which concerns have been raised. Under certain circumstances, the actions of the township board and other officials of the township are subject to court review in civil cases.

On behalf of the Attorney General, I sincerely hope that this information will be of assistance to you.

Jessica McGivney  
Division Chief  
State Operations Division  
Att.

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 **Backers Letter.pdf**  
535K

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**tfields.plan.clearwater@gmail.com**

Wed, Jun 26, 2019 at 9:03

<tfields.plan.clearwater@gmail.com>

PM

To: Tom Backers <tbackers.plan.clearwater@gmail.com>, Kathy Eldridge or Jule Moore <clerk@clearwatertwp.com>

Hi Tom,

As disappointing as this reply is, we still must be able to get the original statute. We just have to figure out how. I've done some old map research that is enlightening, but the statute is what we need.

Later,  
TNF

*Sent from my LG G Vista 2, an AT&T 4G LTE smartphone*

[Quoted text hidden]

Karen Van Horn  
Kalkaska County Zoning Administrator  
890 Island Lake Road  
Kalkaska MI 49646  
(231) 258-3367  
[kvanhorn@kalkaskacounty.org](mailto:kvanhorn@kalkaskacounty.org)

June 19<sup>th</sup>, 2019

Clearwater Twp. Planning Commission  
Clearwater Twp. Clerk  
Adam Parzych, Clearwater Twp. Zoning Administrator

Dear All,

The Kalkaska County Planning Commission held a regular meeting on June 12<sup>th</sup>, 2019. Clearwater Township Zoning Text Amendment (Cell Tower) was on the agenda. The Board discussed this and appointed a subcommittee to review said proposed text amendment language. The subcommittee consisting of Stuart McKinnon, Bob Mickevicius, and myself met on June 18<sup>th</sup>, 2019 in my office. The subcommittee reviewed the proposed text amendment language (Section 24.09) in regards to setbacks and spacing for placement of cell towers. The subcommittee found that the proposed language would not be detrimental if the text amendment is approved by Clearwater Township. In addition, the subcommittee of the Kalkaska County Planning Commission is proposing to recommend review and likely adoption of the same language to the Kalkaska County Zoning Ordinance.

Thank you for the opportunity to review this proposed text amendment language. I have emailed this letter to the Clearwater Township Clerk, Adam Parzych, Zoning Administrator, and Mike Bieniek, AICP, Zoning Director, LLC Telecom Services. I did not send to the Clearwater Twp. Planning Commission as I did not have an email for them thus the reason for emailing to their clerk.

Sincerely,

Karen Van Horn

### Clearwater Township Zoning Administration Monthly Report

Month/Year MAY 2019

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Land Use Permits Issued

- 1 Garages, Sheds
- Residences
- Residences w/Attached Garage
- Pole Barns
- 2 Resident Additions
- 1 Decks, Porches, etc.
- Miscellaneous, Other Buildings

27

Field Checks

- 0 Attorney Contacts
- 1 Planning Commission Meetings
- 0 ZBA Meetings and/or Township Board Meetings
- 15 Contacts with Public, Home or Land Owners
- 0 Training Sessions

Date: 6-21-19

Signature:   
Zoning Administrator