

—DRAFT—

Minutes

Village of Elberta Zoning Board of Appeals Public Hearing

401 First Street | ELBERTA, MI 49628

December 21, 2023 @ 6 pm

Call to Order: 6 pm

Roll Call

(The membership of the Zoning Board of Appeals and the Village Council is the same.)

President/ZBA Chair Jennifer Wilkins – PRESENT | Pro Tempore Emily Votruba – PRESENT | Ken Holmes – PRESENT | Ryan Fiebing – PRESENT | Brett McGregor – PRESENT

Audience

Zoning Administrator (ZA) Josh Mills, Michael Cederholm (Frankfort Fire Chief); Ken Mlcek (Fleis & Vandenbrink, Water Project Coordinator); Kat Ralston (Clerk-Treasurer), Gary Sauer (County Commissioner), Justin Towle (DPW), Mike Smith, Lori Talo, Scott Kubit, Lisa Bellar, Tim Paris, Stewart Grudzien, John Fiebing, Michael Webb

Approval of Minutes/Corrections/Additions to Previous Meeting

N/A

New Business

Public hearing on request for variance. Appeal article 20.10. No 2, Elberta Land holding Company for the following parcels:

- Tax ID, 10-06-506-002-00 (PD district)
- Tax ID, 10-06-506-002-20 (DD district)
- Tax ID 10-06-502-001-00 (DD district)

Summary by Chairperson

“The purpose of the zoning ordinances are to establish zoning districts throughout the Village of Elberta, which the use of land, the use, size, type, and location of structures, and the use of natural resources are regulated to promote the health, safety, and general welfare of the public and of the Village.

Realizing that one size doesn't fit all, or in fact there may be legitimate exceptions, the State of Michigan has established the Zoning Board of Appeals so that the Zoning Board of Appeals may examine any special circumstances that may allow a variance from the zoning rules.

The Zoning Board of Appeals has a unique status, sort of quasi-judicial. Once a decision is rendered, the decision of the zoning board can only be reversed by the circuit court in Benzie County. Since this hearing is a legal procedure, the following meeting format is followed.” (See attached agenda.)

Public Hearing Opens 6:04 pm

Applicant Presentation

Remarks by David T. Caldon (Varnum LLP), attorney for the applicant, representative for Elberta Land Holding Company (ELHC):

- Request before the board is a variance to construct a fence that is taller than 36 inches in the front yard of client's property, located on either side of the village's Waterfront Park.
- Background: Under state law and VOE zoning ordinance, a variance is appropriate where a property owner experiences a practical difficulty; deviation from strict requirements of the zoning ordinance is appropriate to do substantial justice to the property owner.

- As stated in a letter to the ZBA, ELHC's practical difficulty consists in trespassing and liability. Trespassers seek access to the waterfront. Aside from protecting its property rights ELHC has valid concerns about liability and safety.
- Client donated the land for the Waterfront Park. Those who wish to access waterfront should do so via the park. ELHC would work with the village to provide use of the property in the future for specific events.
- **Public interest in safety and welfare** Village's goal should be to direct people to Waterfront Park; client's property shouldn't be used for the public unless arranged and appropriately supervised.
- (a) **A shorter 36-inch-tall decorative fence is not adequate to keep people off the property;** people could easily climb over or through a 36-inch decorative fence. Installing the conforming fence, then having to remove it if it didn't work, would be expensive and time consuming.
- (b) **Higher fence would save Village time and energy in trespass enforcement and deterrence:** The Village can adopt or enforce an ordinance to try to sight trespassers, but that is costly, time consuming and an administrative hassle for the village that a fence would help to avoid.

Addressing questions asked by ZA in his report:

1. **Is one area of the property more problematic than the other?** One area may be more problematic, but ELHC's wish to incur the cost of the fence around both areas is evidence ELHC believes there is a practical difficulty w/r/t security of each parcel.
2. **Appropriate to remove the fencing in the future when the property is developed?** Client agrees an appropriate condition of approval is that fencing be removed or conform to the typical ordinance requirements at that time.
3. **Appropriate to specify a height limitation?** Client is agreeable to a condition of a reasonable height. Client does not request barbed wire or similar features.

Addressing the standards of the zoning ordinance:

- Factor 1. Practical Difficulties** Compliance with Section 20.10 of Zoning Ordinance for front-yard fences creates practical difficulties for his client as a 36-inch fence is inadequate to deter trespassing.
- Factor 2. Substantial Justice** ELHC's requested variance does substantial justice to ELHC as ELHC has a legal right to prevent trespassers from trespassing on the properties, and to prevent liability concerns.
- Factor 3. Public Safety and Welfare** Fences follow the spirit of the Ordinance and help with the public safety and welfare. Purpose of fences is to ensure that people do not illegally trespass or injure themselves or others on the properties.
- Factor 4: Extraordinary Circumstance** Properties present extraordinary circumstances: they are the only large undeveloped waterfront properties in private ownership in the Village. The owner does not reside at the property. The proximity to the water and the Waterfront Park is unique and exceptional. Properties have irregular shape; front is long and the sides narrower, creating large exposure to the general public, and attractive to trespassers.
- Factor 5: No Safety Hazard or Nuisance** Fences will not increase the hazard of fire or otherwise endanger public safety or create nuisance but will keep public safe and avoid public nuisance.
- Factor 6: Relationship to Adjacent Land Uses** Fences will not alter the character of the neighborhood since fences are already permitted in the district. Variance to raise fence height would deter trespassers. A fence without decorative design will not alter the character of the neighborhood.

Conclusion

Caldon and client believe that the variance complies with all applicable standards in the ordinance and respectfully requests approval

Comments from Zoning Administrator Concerning Variance

Mills referenced his memo to the ZBA in re the variance request (see attached) and reviewed the Criteria Applicable to Nonuse Variances According to Article 6.05 of the Village of Elberta Zoning Ordinance

A. Practical Difficulties Somewhat difficult to make a determination re practical difficulty for the applicant. Observed activity on the west parcel such as camping and trespassing; not much if any such

activity on east parcel. A fence complying with the ordinance will keep cars off the properties and most people off the property. Public may not understand the property is privately owned. Additional signage against trespassing and indicating private ownership could significantly deter, in collaboration with Village. Mission of ZBA is to explore solutions that comply with the ordinance. “Can a conforming fence of 36” achieve the same goal as a chain link fence that exceeds the height of 36 inches?” The way the ordinance defines front yards is important: front yard is defined as extending across the full width of the lot, the depth of which is the distance between the front property line and the nearest exterior point of a building or structure. In the case of waterfront lots, the yard fronting on the street shall be considered the front yard. By that definition, the front yard here goes from the road all the way to the water. Reminds ZBA that Section 6.05 is the article associated with the finding of facts for this matter and used to determine approval or denial of application.

Correspondence Concerning Variance Request

Communications submitted to the Zoning Administrator or the ZBA were read aloud by members of the ZBA from the following individuals (here in order of submission date; full texts of correspondence available to view by request at the Village Office).

- December 6, 2023, Linda Manville (Resident) opposed to approval of variance request; cites potential adverse effect on property values; close proximity to the entrance of Waterfront Park; potential safety and aesthetic concerns as the fence ages.
- December 14, 2023, Patrick Quinlan (longtime local fisherman) opposed to approval of variance request; area in question has been used by the public for many decades.
- December 14, 2023, David Radtke and Lisa Canada (property owners in Village) opposed to approval of variance request; cites aesthetic concerns, proximity to Waterfront Park and negative effect of fence on wildlife.
- December 19, 2023, Stewart Grudzien (property owner in Village) opposed to approval of variance request.
- December 19, 2023, Jennie Breitmeyer and Jim Townsend (homeowners in the Village) opposed to approval of variance request; detrimental effects on quality of life in the village and detrimental economic effects to the wider Benzie County, due to diminishment of general appeal of the area.
- December 20, 2023, Jill M. Fogg, opposed to approval of variance request; liability concerns of ELHC not well reasoned, since vacant structures on other parcels owned by the entity have not been addressed and pose a danger to the public and thus a more likely liability risk to the entity.

Comments From Audience in Favor of Granting Variance

None.

Comments From Audience Objecting to Granting Variance

(Speakers were limited to 5 minutes each; a complete transcript of the meeting is available upon request)

Mike Smith (owner of 240 and 248 Furnace Avenue) Neither in opposition nor in favor of approving the request. His properties are very close to the two properties owned by ELHC that are vacant. Asked for clarification: variance request is not to build a fence, which is allowed, but to build a nonconforming fence (ZA said yes). He rarely sees people trespassing on the ELHC property that is the subject of the variance request. But danger and liability are posed by the two ELHC properties on Furnace that have structures on them that are not part of this variance request.

Lisa Bellar (resident at 203 Furnace) Doesn't mind the two vacant houses owned by ELHC. She walks her dog on the subject properties. Asked why, since properties have been owned for 40 years, the sudden decision to put a fence there. Why is the owner not proposing a fence around the vacant dilapidated houses, if purpose is public safety and liability. Asked if anyone had been hurt on parcels to be fenced. "I don't want the fences. Please."

Michael Webb (self-described trespasser and tie-dye fisherman; resident of Benzonia) thanked the ZBA for holding the hearing. Fishes for salmon on the subject property every year. When the 'for sale' signs went up he called the real estate company to ask for permission to fish on the property. Doesn't have the money to buy the property but if he did he would develop it for fishing, something that's beautiful for the area and brings visitors. As a longtime fisherman on the property, he has had conversations with DNR officers there and asked to show a license, but has never been asked by anyone to leave. Any kind of fence will obstruct the view of the area. Brief, four-month tourism industry is very important.

Scott Kubit (553 Bellows, Frankfort; co-owner of Furnace Street Distillery on Furnace Street) Business partners concerned about the fence; what it might look like five years from now and what that does to the community, including view from Frankfort; currently beautiful, becoming "beat-up, run-down." Respects the rights of property owners within the constraints of current law. To go beyond that is too much.

John Fiebing (Village property owner) Is helping restore 173 Furnace, on the corner of Furnace and Short. In awe of the natural beauty and proud to help by making one home inviting and well-kept. Focus on the psychological impact of chain-link fence, and large area concerned. Chain-link fences are institutional, associated with construction, abandoned lots, minimum security prisons, and poverty. Chain-link fences one of the first things to go when a neighborhood improves. This whole area is increasingly desirable, improving visibly and quickly, but chain-link fences are unrelated to the "paradise that Elberta is." Suggest the opposite of community, inclusiveness, security, and peace of mind; suggest something sinister or even a toxic waste site; make people think: "I better walk fast, and I better not walk at night." The fence will make it hard to see that beauty and might dissuade people who want to live in Elberta. "Do not allow paradise to become sinister." Concerned about how the future planned route of the Betsie Valley Trail through the property would be affected.

Lisa Bellar fence would push a lot of people away from coming to Elberta.

Lori Talo (eight year Elberta resident) Fishes on the property and friends with others who fish there. Grandson fished there for the first time this year. Says those who use the area "police it ourselves" without incident. Children are supervised and litter is picked up. Used for years for fishing by couples, older people, veterans, and disabled people who can't access the beach. Some stay at the Betsie campsite every year for a few decades, people who can't access the river, but can fish here. You can just back up, pull up, enjoy family time, grill some hot dogs, and relax, and look at the beauty of the whole area. Is opposed to any fence.

Tim Paris (1231 Bellows Avenue, Frankfort) Speaking on behalf of at least 100 guys who come from Japan, Russia, Ukraine, England, all over the world and Texas, Indiana, Ohio and southern states. They camp on River Rd and bring a lot of revenue to the area. A fence may be needed prior to construction development, but fair warning should be given to travelers from out of the area and it should go up after salmon season.

Rebuttal by Those in Favor of the Variance

No one in audience was in favor. Caldon spoke on behalf of ELHC.

Caldon Two reasons for variance request: liability and trespassing. Comments indicate trespassing is an issue bearing on property owner's practical difficulty and is endemic. Property owner has a legal right to protect his property and keep people off. Scale and scope of trespassing referenced in writing and in public comment not remediable by 36-inch fence and ZBA has legal duty to approve the variance request. The taller fence requested is intended to be a temporary measure to prevent trespassing while property is being sold and developed. "The property owner is fine with the condition that says this fence must come down when the property is developed." Fair to provide a reasonable basis to protect and secure the property.

Rebuttal by Those Opposed to Variance

Scott Kubit Asked how often 6 ft fence around the old furnace [Iron Works] structure [Village property] has been breached; a tall fence will not stop prevent this any more than a decorative fence. Liability concerning Iron Works structure has been a concern and the Village had to knock down an entire wall because it became unsafe. Fencing won't solve stated problem and will do more harm than good. Agrees there will be negative psychological effects.

1 **Lisa Bellar** Re temporary nature of the fence: land has been for sale for some time; she contacted
2 someone about purchasing some of the property owned by ELHC. Response received was they're not going to
3 sell lots, but that they would sell multiple acres or large parcels only. "How can we say a fence is temporary
4 when no one's interested in buying it because it's extremely expensive?"

5 **Tim Paris:** There is only one trespassing sign on the subject property and it has been there for 20 or 30
6 years. Paris said he has no trespassing signs posted on both sides of his driveway and the perimeter is marked.
7 He still gets unwitting visitors in his driveway and the police won't necessarily address the issue. Police were
8 called to the subject property last fall on reports that people were illegally camping. Several members of law
9 enforcement responded to the scene but didn't issue any citations because in their view people were fishing, not
10 camping. Paris said the perimeter of the subject property is inadequately marked for police to enforce
11 trespassing laws.

12 Questions from the Zoning Board of Appeals

13 **Votruba** asked if the property owner had contacted law enforcement regarding trespassers. **Caldon** said
14 he believed so but didn't know when or what was discussed. A security fence seems the only way to eliminate
15 trespassing.

16 **Votruba** asked why the property owners weren't at this meeting. **Caldon** said he was sorry they weren't;
17 the principal wanted to be here but had an event.

18 **McGregor** thanked the public for attending and ZA and Caldton for their summaries. "I wouldn't want
19 someone trespassing where I live." Questions. 1: How many lawsuits, injuries, damage, police reports, or
20 insurance claims have been filed, and how long has the property been owned by the company? **Caldon** said he
21 did not know. **Wilkins** said she has documentation showing ELHC has owned the property since 2002 but
22 believes they have owned it longer. **McGregor** asked how many times ELHC has called the police. **Caldon**
23 said he didn't know. Re Factor 1, Practical Difficulties (not to grant the request would unreasonably prevent the
24 use of the property by the owner), **McGregor:** "What is the use of the property?" **Caldon:** "use of the property
25 means having the ability to have your own property without trespassing on it. That seems pretty self-
26 explanatory. That's a key attribute of property ownership is that you have the right to your own property and not
27 have other people on your property... This is a right other property owners in the area commonly enjoy that they
28 don't." **McGregor** asked what actions ELHC has taken within the ordinance to address trespassing. **Caldon** said
29 ELHC would like to put up a fence. Since they assume a shorter fence likely won't work, a taller fence is being
30 requested. **McGregor** said the ordinance allows for signage; did the company put up the one sign referred to?
31 **Caldon** said he didn't know. **McGregor** said we've heard 3 foot and 6 foot can be climbed over. How tall does
32 the fence need to be? **Caldon** said: 6 ft is a "serious indication that you're not supposed to go on the property"; it
33 may not prevent all trespassing. **McGregor**, re Factor 2, Substantial Justice: If this variance is granted it would
34 be fair to allow other parcels in the area to have taller fences. **Caldon** If others were having trespassing issues,
35 that would be fair. **McGregor**, re Factor 3, Public Safety and Welfare: True to say ELHC cares about safety?
36 **Caldon:** That is fair to say. It's fair to say they care about liability. The property owner shouldn't be required to
37 make improvements to their property to ensure the safety of the public when it uses their property. ELHC "gave
38 land to the village with the goal of having a village park that then would be maintained, improved by the village
39 using tax funds to provide a place for people to go. I don't think they want to be responsible for maintaining
40 their vacant property." **McGregor**, re Factor 4, Extraordinary Circumstances: Waterfront Park was mentioned
41 as an extraordinary factor that drew trespassers. **Caldon** Yes. **McGregor** You've said a number of times that
42 ELHC helped establish the park. **Caldon:** "We gave the plan to the Village park, yes" **McGregor:** The shape of
43 the property was listed as an issue too. **Caldon** Yes, it's an expansive property with a lot of waterfront, rather
44 than a home with a discrete area behind it. **McGregor** Was it that shape when it was purchased? **Caldon** Yes.
45 **McGregor:** Re: mitigating hazards, you're saying the fence doesn't create any more hazards? **Caldon** Typical
46 nuisances are trespassing, littering, vagrancy. A large area that's not policed, with a nonresident landowner, not
47 fenced, is subject to more of those things. With a fence, public is directed to the park which is policed and
48 regulated for public use. **McGregor:** The fence does not create more hazards? **Caldon** No. **McGregor:** Does
49 ELHC intend to fence down to the ordinary high water mark of the bay? **Caldon** Yes, to the bay; there are some
50 rules about going into the water. **McGregor** If you go to the ordinary high water mark and not beyond it, people
51

can just go around the fence **Caldon** Possibly; you can't put it in a steel box. **McGregor** How would an additional 36 inches on a fence you can walk around better mitigate trespassing? **Caldon** You can't make it perfectly secure. Putting barbed wire on top would add to the security but we're not asking for that. **McGregor** Would delineating the property line not serve the same purpose as a 36 inch fence? **Caldon** A 36-inch fence might help; people will hop it, get enter the property from the water, it's not perfect. **McGregor:** Re Factor 5, creates no nuisance: How is access to the Betsie Valley Trail extension going to be ensured? **Caldon** The fence would be outside the right of way. **Wilkins** asked if **Caldon** was referring to the right of way in the 2002 deed restriction document (included in ZBA materials). **Caldon** said yes; and fences will come down when there's development on the properties.

Fiebing In Michigan, development is defined as any action that materially affects the existing condition or use of land. Putting up a fence can be considered development. Betsie Valley Trail easement applies as soon as any development occurs. **Caldon** That deed contemplates a specific development with a specific site plan. **Fiebing** A fence could affect property value and the structures on a site, since a variance sticks with the site. **Wilkins** Yes. **Fiebing** If variance is granted, ELHC could decide not to develop further, which is their right, and that would violate the terms of this deed restriction. **Caldon** When property is developed there will be a path through the development. This is temporary, pending the development of the property.

McGregor re Factor 6, relationship to adjacent land uses: the fences "will not alter the character of the neighborhood but instead will be harmonious with the physical and economic characteristics of the adjacent land use." By definition, how can a fence that's nonconforming be harmonious? **Caldon:** A fence is permitted. The fence would direct people to the Waterfront Park and facilitate its use.

Wilkins Proposed fence will cross village easement for a road where sewer is located on the east section. Proposed fence will cordon off utilities through the back of the life-saving station area where a hydrant is located. **Caldon** Village access would be an appropriate condition for approval. **Wilkins** Of the fence, or the variance? **Caldon** Yes, Village should have emergency access. **Wilkins** Any fence would impede the development of that road.

Holmes Mentioned three fire hydrants and a sewer line that runs right behind the houses, and a street which is one of the original streets in town that led to the steel mill and the docking for lumber. Then later the street moved to where 168 (Furnace Ave) is now. Said two unmaintained unsecured unfenced houses ELHC also owns on Furnace have been vacant for 25 years. Asked why they hadn't been sold. **Caldon** said he would be happy to discuss that issue which is separate from the variance.

Votruba Our zoning ordinance is a work in progress, but we have to follow it. One stipulation is that a front yard is determined by a structure. Per ZA's interpretation, because there's no structure on ELHC's properties, it's all front yard. Therefore how is this not a self-created problem? If there were a structure, it wouldn't default to the entire perimeter. Some parts of the property would allow a 6 foot fence naturally. **Caldon** Self-created hardship is doing something to the land to create a problem. Gave example of a split property that doesn't have room for a house. "They've not done something to create this trespassing issue. It's just a feature of the property because it's adjacent to water."

McGregor Were there structures on the property when it was purchased? **Wilkins** Yes. **Caldon** Even if there were, demolishing a house isn't a self-created hardship for these purposes. **McGregor** It's definitely an action. They didn't fall over. **Caldon** Taking down a dilapidated structure is not the cause of this issue. **Votruba** Arguably, not developing is a potential cause of this issue. **McGregor** That's an absence of action. **Votruba** There were actions taken to initiate the circumstances of the development. **Caldon** Nothing was done to cause trespassing. **Votruba** Not a whole lot was done to prevent trespassing. **Wilkins** Or encourage the beach to beach trail, which has been put off. The Village and ELHC promised this trail would happen.

Caldon ELHC wants to sell the property to develop it. If the interested developer [from 2021] had gone forward there would probably be a trail by now. "They want to develop it with something that is meaningful, and nice, and will be bringing value to the community."

McGregor Does ELHC feel the sale and development would be helped by 2500 feet of chain link fence? **Caldon** Yes, helpful not to have trespassing when they're trying to sell.

Additional Comments from ZA

None.

Public Hearing Closed 7:30 p.m. by Wilkins; public invited to stay

ZBA Discussed Findings of Fact

Practical Difficulties **Votruba:** practical difficulties suggests nature of property makes it difficult to build a 3 ft fence; burden here is not construction of the fence but the fact of a trespassing problem, which seems like a law enforcement problem and not to do with zoning ordinance. ELHC's atty cites issue of expense; under Michigan law convenience or expense to property owner is not something this body is supposed to consider; it wouldn't be a factor for anyone else in the village following our ordinance, whether they're absentee or lack funds. **Wilkins** Try signs; currently no signs anywhere on the nonfenced areas. **McGregor** (Lack of) actions taken so far within the ordinance don't demonstrate a practical difficulty, though sympathizes with the idea that the fence might be built and then have to be torn out. **Votruba** Permissions should not be adjusted based on speculation about future outcomes.

Is the condition of practical difficulty met? Roll call: McGregor No | Fiebing No | Holmes No | Votruba No | Wilkins No | All nays.

Substantial Justice (this was addressed last owing to some confusion) **Votruba** The problem cited, trespassing, has not been addressed by any means within our ordinance yet; if signs didn't work, if contacting law enforcement didn't work, collaboration with Village, 3 foot fence; just because the landowner wants to do it a certain way for convenience doesn't call for bending the rules. **Holmes** the Village's no-camping signs have worked; said the existing no trespassing sign was put up by MDOT. Justin Towle, DPW, said he had compelled several overnight parkers to leave. **Votruba:** Property owners have a duty to take some active measures (calling law enforcement, putting up signs, etc.) when it comes to trespassing and security. **McGregor** No different from what any other property owner has to deal with.

Is the condition of substantial justice met? Roll call: McGregor No | Fiebing No | Holmes No | Votruba No | Wilkins No | All nays.

Public Safety and Welfare **Wilkins** Signs would help with some safety concerns. Village has posted no-camping signs on the west property; has never witnessed a problem on the east property. Not everyone knows any of it is private property. **Votruba** Safety might be greater with a 6 foot chain link fence, but it would be a significant detriment to the welfare of the community, for all the reasons John Fiebing stated (psychological harm). A 3 foot decorative fence is no problem. 6 foot chain link fence would also diminish the value of the Life Saving Station, which is a significant source of our revenue and thus to the welfare of the community. **McGregor** Many part-time residents have conforming fences and no problems; and, if this is a safety issue as regards trespassing, will we have to require Sand Products to fence its property too? If lack of a fence is a safety issue, we have a lot of safety issues. **Holmes** Mentioned Sand Products allowing the ski hill to operate on their property. **Fiebing** Signs and a conforming fence sufficiently address the safety issue

Is the condition of public safety and welfare met? Roll call: McGregor No | Fiebing No | Holmes No | Votruba No | Wilkins No | All nays.

Extraordinary Circumstances **Votruba** many hypotheticals: no development makes for an extraordinary circumstance and a self-created problem to some extent; nothing stopping them from putting up a 3 foot fence. **Fiebing** Per ELHC, the extraordinary circumstances requiring a variance is that properties are near public attractions; the master plan that guides development of the property existed before owners acquired it, Requirements laid out in the master plan state clearly that an open property for public use as a requirement for developing; ELHC intended to develop the property and did develop it, with grading **Votruba** Brownfield remediation **Fiebing** public access to the property is an understood condition of development, but is now being used as an exceptional circumstance.

Is the condition of extraordinary circumstances met? Roll call: McGregor No | Fiebing No | Holmes No | Votruba No | Wilkins No | All nays.

No Safety Hazard or Nuisance **Holmes:** Concerned about response to disabled ships being impeded by fence; Elberta is a known safe harbor. **Wilkins** Fence could "increase the hazard of fire or otherwise endanger public safety"; we can project that the lawn won't be mowed, as it isn't behind the existing fence, leading to a

brush fire, with our hydrants inside it. **Votruba** If trespassers climb over a 6 foot fence they are more likely to hurt themselves than with a 3 foot fence. A 6 foot fence will create a public nuisance by impeding people's views, which are the main reason people want to come here; will create a carceral atmosphere, and less interest as stated in a letter we received, in renting the LSS. **McGregor** Safety problem might increase w/r/t water rescues, and impeding fast access for other emergencies.

Is the condition of no safety hazard or nuisance met? Roll call: McGregor No | Fiebing No | Holmes No | Votruba No | Wilkins No | All nays.

Harmonious Relationship to Adjacent Land Uses **Votruba:** Hard no. Adjacent uses are the park and the beach. **Holmes** We're upgrading the beach. **Wilkins** Homeowners are adjacent. People do live there.

Is the condition of harmonious relationship to adjacent land uses met? Roll call: McGregor No | Fiebing No | Holmes No | Votruba No | Wilkins No | All nays.

Motion to Approve/Disapprove/Postpone

Discussion: **McGregor** asked if there was any reason to postpone. **Caldon:** Asked if board would consider a 6 foot decorative fence rather than chain link, since a 3 foot decorative fence, if it didn't work, would be expensive to tear out; if board would consider a decorative tall fence that might be a reason to postpone.

Votruba Expense isn't a criterion we have to consider. **Caldon** There is precedent where additional expense that isn't typical is grounds for a variance, for example with housebuilding in wetlands; the decision to do something that probably isn't going to work isn't a great option. **Votruba** Saying it probably isn't going to work is hypothetical. **Caldon** Trying to figure out ways to avoid cost of time and money on both side; is the height or the chain-link the main issue; I would like to bring some indication of a workable option to ELHC. **Votruba** We are considering this particular request, which is a six-foot chain-link fence. **Caldon:** You could propose a condition that would make it acceptable. **Votruba** You're asking us to come up with stipulations that your client hasn't actually made. **Holmes** asked for a motion.

Motion by Votruba, seconded by Fiebing, to deny the proposed fence variance as submitted because it does not conform to our zoning ordinance, which requires a decorative fence no more than 36 inches high in front yards, and in discussion with the Zoning Board of Appeals and the Zoning Administrator, the request meets none of the criteria for granting a variance.

Discussion: **McGregor:** I do support efforts to prohibit trespassing. **Wilkins:** I agree. I think we all do.

Roll call: McGregor Yes | Fiebing Yes | Holmes No | Votruba Yes | Wilkins Yes | All nays.

Adjournment

8:11 pm by Wilkins

Draft minutes prepared and posted by
Katherine Ralston, Clerk-Treasurer

**Zoning Board of Appeals
Public Hearing
December 21, 2023 at 6:00 pm
Village of Elberta**

INTRODUCTORY REMARKS - ZONING BOARD OF APPEALS

Purpose: The purpose of zoning ordinances are to establish zoning districts throughout the Village of Elberta which the use of land, the use, size, type, and location of structures, and the use of natural resources are regulated to promote the health, safety and general welfare of the public, and, of the Village.

Realizing "that one size doesn't fit all", or in fact, there may be legitimate exceptions, the State of Michigan has established the Zoning Board of Appeals; so that the Zoning Board of Appeals may examine any special circumstances that may allow a VARIANCE from the zoning rules.

The Zoning Board of Appeals has a UNIQUE status; sort of quasi-judicial. Once a decision is rendered, the decision of the Zoning Board can only be reversed by the Circuit Court in Benzie County. Since this hearing is a legal procedure, the following meeting format is followed:

Call to Order

Roll Call

Corrections or additions and, approval of minutes of previous meeting

New Business: Public Hearing on Request for Variance: Appeal Article 20.10 (2)

Elberta Land Holding Company
Tax Id#10-06-506-002-00 (PD District)
Tax Id#10-06-506-002-20 (DD District)
Tax Id# 10-06-502-001-00 (DD District)

1. Summary by Chairperson (See Above)
2. Open Public Hearing
 - a. Applicant Presentation
 - b. Comments from Zoning Administrator concerning variance
 - c. Read letters concerning variance
 - d. Comments from audience in favor of granting variance
 - e. Comments from audience objecting to granting variance
 - f. Rebuttal by those in favor of variance
 - g. Rebuttal by those opposed to variance
 - h. Questions from members of the Appeals Board
 - i. Any additional comments by Zoning Administrator
3. Close Public Hearing
4. Discussion by members of the Board.
5. Findings of Fact (Section 6.05)
6. Motion to approve, disapprove or postpone action on the variance request. Any conditions?
Second to Motion. Member discussion. Vote on motion.
7. Any other business to come before the Zoning Board
8. Adjournment

6.05 STANDARDS FOR NONUSE VARIANCES, APPEALS, EXCEPTIONS AND EXPANSIONS. Variances, appeals, exceptions and expansions shall be granted only in accordance with the Michigan Zoning Enabling Act and based on the findings set forth in this Section. The extent to which the following criteria apply to a specific case shall be determined by the Board of Appeals, however, at least one of the applicable criteria must be found by the Board of Appeals.

1. Criteria Applicable to Nonuse Variances.

a. Practical Difficulties: Compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk, density, or other dimensional provisions would create practical difficulties, unreasonably prevent the use of the property for a permitted purpose, or render conformity with such restrictions unnecessarily burdensome. The showing of mere inconvenience is insufficient to justify a variance.

b. Substantial Justice: Granting of a requested variance or appeal would do substantial justice to the applicant as well as to other property owners in the district; or, as an alternative, granting of lesser variance than requested would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners.

c. Public Safety and Welfare: The requested variance or appeal can be granted in such fashion that the spirit of these regulations will be observed and public safety and welfare secured.

d. Extraordinary Circumstances: There are exceptional or extraordinary circumstances or conditions applicable to the property involved or to the intended use of the property that do not apply generally to other properties or other similar uses in the same zoning district. The conditions resulting in a variance request cannot be self-created.

e. No Safety Hazard or Nuisance: The granting of a variance or appeal will not increase the hazard of fire or otherwise endanger public safety or create a public nuisance.

f. Relationship to Adjacent Land Uses: The development permitted upon granting of a variance shall relate harmoniously in a physical and economic sense with adjacent land uses and will not alter the essential character of the neighborhood. In evaluating this criterion, consideration shall be given to prevailing shopping patterns, convenience of access for patrons, continuity of development, and the need for particular services and facilities in specific areas of the Village.

December 18, 2023

To: Village of Elberta Zoning Board of Appeals

From: Joshua J. Mills
Zoning Administrator

Re: **ZBA Public Hearing**
Elberta Land Holding Company (ELHC)
Tax Id#10-06-506-002-00 (PD District)
Tax Id#10-06-506-002-20 (DD District)
Tax Id# 10-06-502-001-00 (DD District)

The Elberta Land Holding Company is requesting to place a security fence that exceeds a height of 36" along the front yard of the property line of tax parcels #10-06-506-002-00, 10-06-506-002-20, & 10-06-502-001-00. It is proposed that the fence will be chain link; thus, the fence will not have a decorative design as required by the zoning ordinance. The fences will be used to prevent individuals from recreational trespassing and engaging in other activity that causes liability concerns on behalf of the applicant. The application did not state what the maximum fence height would be; however, the maximum allowable fence height in the side or rear yard is 6'.

Please refer to Section 20.10 in the Village of Elberta Zoning Ordinance to become familiar with the zoning ordinance requirements associated with fences. Most importantly, refer to Section 20.10 (2) which states: Fences of an ornamental nature may be located in a front yard of any lot of record up to a height of 36 inches, provided that for corner lots, adequate clear vision is provided as determined by the Zoning Administrator. Also, please review Article 6 of the Zoning Ordinance to be familiar with the Board of Appeals process. Article 6.05 (1) will need to be addressed by the entire ZBA after the public hearing is closed. Article 6.05 (1) is considered to be the "Findings of Fact" that shall be addressed prior to a decision. I have placed the entire Article 6.05 (1) on the agenda to be used for reference. (See Agenda)

Nonuse (dimensional) variance situations, such as this request, are to be reviewed to determine if a practical difficulty exists on the property. The Michigan Court of Appeals has applied the following principles to determine if a practical difficulty exists as it pertains to dimensional variance court cases:

- Strict compliance with the zoning ordinance would unreasonably prevent the landowner from using the property for a permitted use or would render conformity necessarily burdensome.

1

ZA Memo-ELHC
Page 2 of 3.

- The variance request or a lesser relaxation of the zoning ordinance standard would provide substantial justice to the landowner and neighbors.
- The difficulty to conform is due to unique circumstances of property and is not shared by the neighboring properties in the same zone.
- The problem is not self-created.

The standards noted above come from case law. The Michigan Zoning Enabling Act does not define what a practical difficulty is, though we are required to have a zoning ordinance that allows for a variance procedural review process, which of course we do. Attorney David Caldon, who represents the property owner, has also provided this information with the letter that he submitted with the variance application.

This variance request may not necessarily meet the intent of a practical difficulty or hardship; however, it could be debated based on public safety and welfare for the community that a fence higher than 36" should be installed on the westerly parcel to prohibit the trespassing and camping that occurs during the months of May through October. Although, a fence complying with the ordinance will keep cars from entering the property it likely wouldn't keep all people out if they climb over the fence. I've never noticed any trespassing issues with the parcels located east of the Waterfront Park; however, there may be trespassing matters that exist.

Is there an alternative that meets the Zoning Ordinance?

Can a conforming fence at 36" accomplish the same goal as a chain link fence that exceeds a height of 36"? Could vehicle access to the westerly parcel be addressed with a locked gate extended across the access drive? Of course, a gate with a lock would require access for emergency services upon need. A 36" fence complying with the ordinance would keep out most people (including vehicles), but I can foresee potential issues with people climbing over or through a 36" decorative fence. Is there anything that can be done through municipal codes or enforcement that can help alleviate the trespassing that occurs?

Technically, the areas of the parcel(s) illustrating a fence have a front yard that extends from the property line to the shoreline because there are no buildings or structures. The definition of Front Yard is below:

YARD - FRONT. A yard extending across the full width of the lot, the depth of which is the distance between the front property line and the nearest exterior point of a building or structure. In the case of waterfront lots, the yard fronting on the street shall be considered the front yard.

If it is determined to allow a chain link fence higher than 36" to alleviate trespassing, then it should be conditional that the fence be removed after a development or use plan is established

2

ZA Memo-ELHC

Page 3 of 3.

and/or a project is approved by the Village. Also, I recommend discussing the Beach to Beach Trail easement and what impact a fence would have on that desired use. This should be noted as a condition even in a situation if the fence complies with the zoning ordinance. I've seen chain link fences that have been placed "temporarily" that pose structural issues over time. In these situations, the fence does not have the top brace installed due to cost. Over time without the top brace, the fence will start to sag between posts. This can impact the aesthetics and functionality of the fence.

Please follow the agenda closely and discuss the "Findings of Fact" that are outlined in Article 6.05 (1) after the public hearing is closed.

Notices associated with this hearing and request have been distributed in compliance with Article 6 of the Village of Elberta Zoning Ordinance and the Zoning Enabling Act of Michigan. If there are any questions, please contact me at (231) 882-6897 or via e-mail at jmills.zoning@gmail.com.

Thank you.

Sincerely,

Joshua J. Mills
Zoning Administrator
Village of Elberta