

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

JENSAM LLC,
a Michigan limited liability company,

Plaintiff,

v.

Case No. 17-10764
Hon. Gershwin A. Drain

CHARTER TOWNSHIP OF OAKLAND,
a Michigan municipal body,

Defendant.

CONSENT JUDGMENT

Parties, Jurisdiction and Venue

1. Plaintiff Jensam, LLC is a Michigan limited liability company with a registered office located at 2301 W. Big Beaver Road in Troy, Michigan (“Jensam”).

2. Defendant Charter Township of Oakland is a Michigan municipal body located in Oakland County, Michigan (“Township”).

3. This Court has original subject matter jurisdiction over the federal questions asserted in the Complaint (Doc. 1) (“Complaint”) pursuant to 28 U.S.C. §1331.

4. The actions or occurrences alleged in the Complaint occurred in Oakland County, Michigan.

5. The Township is subject to personal jurisdiction in this Court.

6. Venue is proper in the Eastern District of Michigan, Southern Division, pursuant to 28 U.S.C. §1391(b) and (c).

The Property and Current Zoning

7. Jensam is involved in the business of real estate development.

8. Jensam is the owner of approximately 247 acres of land commonly known as 2275 Clarkston Road in the Township (“Property”).

9. The Property consists of five parcels of vacant land, Parcel I.D. Nos. 10-17-100-010, 10-17-200-001, 10-17-200-002, 10-17-200-003 and 10-17-200-04. (*See* Exhibit A).

10. The Property is located south of Clarkston Road, west of Lake George Road and east of Adams Road in the Township.

11. The Property is currently zoned Very Low Residential Density (“VLRD”) by the Township, with the exception of an approximately twenty (20) acre parcel on the northeast corner of the Property, which is zoned Medium Residential Density (“MRD”).

12. The VLRD zoning district requires a minimum single family residential lot or unit area of 75,000 square feet for lots or units with sewer improvements.

13. The MRD zoning district requires a minimum single family residential lot or unit area of 19,500 square feet for lots or units with sewer improvements.

Nature of the Action

14. The Complaint alleges that the Township Board of Trustee’s October 11, 2016 denial of Jensam’s land use request for Special Land Use - Ultimate Paved Road Zoning approval to allow Jensam to develop the Property for 182 or more single family residences (“Special Land Use Request”) (the “Denial”) violates Jensam’s rights to substantive due process (Count I of the Complaint) and equal protection (Count II of the Complaint) under the United States Constitution and

further violates 42 U.S.C. §§ 1983 and 1988 (Count III of the Complaint).

15. Jensam's Complaint alleges that the requested single family density on the Property set forth in the Special Land Use Request was previously permitted by the Township on the Property and would be permitted on the Property under the Township's Ultimate Paved Road Zoning District.

16. Jensam's Complaint alleges that Jensam has a constitutionally protected property interest in the Township's compliance with its Zoning Ordinance with respect to the Special Land Use Request and the Denial.

17. Jensam's Complaint alleges that Jensam objectively met the Township's standards for granting a Special Land Use with respect to the Special Land Use Request, particularly the primary criteria of showing that the requested increased residential density would not result in the deterioration of a public road.

18. Jensam's Complaint requests that the Court enter a final Order: (i) compelling the Township by affirmative injunction to issue all approvals and permits necessary to reasonably accommodate Jensam's Special Land Use Request and the associated single family residential development project on the Property; (ii) enjoining the Township from interfering with Jensam's use of the Property consistent with the Special Land Use Application, as supported by accompanying engineering and design materials submitted by Jensam to the Township; and (iii)

granting Jensam its attorney fees, expert fees and other damages as provided by 42 U.S.C. § 1988(b), 42 U.S.C. §1983 and/or other law.

19. The Township has denied and disputed certain material factual allegations in the Complaint and has expressly disputed liability in its Answer to the Complaint (Doc. 5).

20. Therefore, the parties to this litigation have taken part in multiple facilitated mediation sessions with Thomas J. Ryan, Esq. in an attempt to agree upon a single family residential development which represents a resolution in the best interest of the Township residents.

21. These negotiations have resulted in an agreement whereby the proposed Residential Development would be limited in size and scope and would provide both Jensam and the Township with certainty regarding site improvements, infrastructure improvements and other benefits which may otherwise not be achieved.

The Court is otherwise fully advised of the premises.

NOW, THEREFORE, it is hereby Ordered and Adjudged as follows:

Residential Development

22. Jensam shall be permitted to develop the Property for single family residential development purposes at a maximum density not to exceed 156 single

family residences, each residence located on a single family lot or unit (the “Residential Development”).

23. The Residential Development contemplates and includes all reasonable and customary site improvements for the installation, construction and use of the types of lots, units and residences, and accessory uses customarily incidental to such lots, units and residences in like developments (i.e., common area improvements and roads), as the case may be.

24. Jensam shall be entitled to construct 156 single family residential dwelling units (with each subdivision lot, site condominium unit or detached unit being a “residential lot or unit”), provided however, the Residential Development shall not include more than 156 residential lots or units.

25. Such right of development shall be subject to the issuance of all necessary and customary engineering and building approvals and permits after timely review of engineering and construction/building plans by Township departments and consultants, as contemplated by this Consent Judgment, without undue delay.

26. Development and use of the Property shall be in conformance with all applicable laws, ordinances and regulations, provided, however, where the express terms of this Consent Judgment deviate from present and future Township ordinances, the terms of this Consent Judgment shall govern.

27. For purposes of interpreting any Township ordinance, regulation or standard, the Residential Development shall comply with the ordinances, regulations and standards applicable to the Township's MRD zoning district in effect at the time of entry of this Consent Judgment, unless such interpretation is inconsistent with this Consent Judgment.

28. Jensam shall be enjoined from developing or disturbing the Property in any manner inconsistent with this Consent Judgment unless this Consent Judgment is modified by stipulation of the parties.

29. Aside from enforcing the terms of this Consent Judgment, and undertaking the process of review, inspection and approval consistent with this Consent Judgment and applicable laws, ordinances and regulations, the Township shall be enjoined from preventing the Residential Development in conformance with this Consent Judgment.

30. The parties recognize that municipal sewer is currently and will continue to be accessible and available to the Property in terms of physical location and capacity with respect to the Residential Development. The Residential Development will be improved, in part, at Jensam's sole expense, by the extension of municipal sewer to each single family residential lot or unit in the ordinary course of single family residential development and engineering standards in the Township and Oakland County, Michigan (collectively the "Sewer Taps"). The Residential

Development also shall provide access or a “stub” or multiple “stubs” pursuant to existing Township ordinance and engineering standards at a location determined by both Jensam's and the Township's civil engineers for any proposed future expansion of the sewer system to area properties located in the Township's Sewer District.

31. The parties acknowledge that the Township has an adopted Sewer Policy, as amended. The parties hereto agree that, per the Policy's order of priority and based on the common ownership of properties on the Time-Priority Schedule, Jensam may select THE PROPERTY HEREIN DESCRIBED as having priority for the reservation of 217 Sewer Taps. As such, the Township Engineers having confirmed the Property's priority status for the issuance of Sewer Taps and having determined sufficient capacity for the reservation and approval of not less than but in no event more than 156 Sewer Taps to accommodate the Residential Development, consistent with the Township's Sewer Policy and the General Policy and Standards for approval of sewer allocation and extension set forth therein, the parties herein acknowledge Jensam's immediate and vested entitlement to no more than 156 conditional Sewer Taps and, under the terms of the Policy and its legal authority, the Township Board herein waives the property set aside for future sanitary sewage disposal facility(s) for the reason that under the unique circumstances of this case, the Township Board has determined the Residential Development protects the public's health and safety; is in the best interest of

Township residents; represents a reduction in density for the benefit of current residents and is consistent with the Township's overall land use plan; represents a reduction from 217 reserved Sewer Taps to 156 Sewer Taps and the corresponding reduction in the total reserved sewer capacity; promotes the overall objectives of the Sewer Policy and reflects a reasonable interpretation of the unique change in circumstances, including, but not limited to, the creation and addition of the Property to a post-policy Sewer District. Jensam acknowledges the release and waiver of any additional Sewer Taps for the Property stated or otherwise claimed under the Township's sewer policy, as amended or otherwise. Jensam understands that in the event less than 156 Sewer Taps are used or are needed for the Residential Development, any unused taps will expire and are non-transferable Jensam will pay all fees and charges to the Township and/or Oakland County associated with the Sewer Taps in the ordinary course and consistent with then standard prevailing rates and charges applicable to single family residential development in the Township and Oakland County. Additionally, Jensam shall be responsible and pay any costs or fees associated with obtaining any utility easement or other property acquisition associated with the Residential Development as contemplated by this Consent Judgment. Jensam assumes all responsibilities, if any, to pay back the Plum Creek developer, Home Owners Association or any property owner or other interested person or entity who may be entitled to a sewer pay back under the Plum Creek

Sewer Payback Agreement, dated August 31, 1993, as amended, and, further, Jensam agrees to indemnify, hold harmless and defend the Township from any claim or cause of action arising out of said Payback Agreement, including, but not limited to, any claim or demand for payback from the Township.

32. The Parties agree that Jensam will, at its sole expense, construct a potable water well facility, any required water storage and related improvements on approximately 76.36 acres located at the northwest corner of Clarkston Road and Lake George Road commonly known as the “Garling Site” so as to provide potable water service to each single family residential lot or unit in the ordinary course of single family residential development and engineering standards in the Township and Oakland County, Michigan (the “Well Facility”).

Jensam will design and construct the Well Facility, any required water storage and related improvements to: (a) the then current standards of the Michigan Department of Environment, Great Lakes, and Energy (“EGLE”); (b) the then current standards of the Oakland County Water Resource Commission (“WRC”); and (c) to the Township’s standards as of the date of this Consent Judgment (collectively the “Well Facility Standards”); the Township will not impose further or stricter standards than the Well Facility Standards. Jensam will submit engineering plans for construction of the Well Facility and related improvements for administrative approval to EGLE, WRC and the Township to ensure compliance

with the Township's standards. Jensam has the option of submitting engineering plans for construction of the Well Facility and related improvements for review and approval separate from or together with engineering plans for the remainder of the Project.

After the Well Facility and related improvements are operational to the Well Facility Standards, Jensam will convey to the Township by quit claim deed the Well Facility and related improvements and provide easements necessary for the Township to access, operate, maintain, expand, and service the Well Facility and related improvements, consistent with the Well Facility Standards as required by the Township Engineers. In such quit claim deed, Jensam will retain an easement to install new wells on the Well Facility property and/or connect additional wells to the Well Facility if such wells are necessary to provide water service to the Property (consistent with the Residential Development). Consistent with Township policy, current and future owners of the Property, where appropriate, will be charged standardized tap fees by the Township to access water from the Well Facility. Consistent with all other Township water users, current and future owners of the Property will be subject to standard usage fees and charges from the Township, including, but not limited to, charges for inspection and administrative fees and costs.

The Residential Development shall provide an easement, multiple easements, a “stub” or multiple “stubs” at a location determined by both Jensam's and the Township's civil engineers consistent with the Well Facility Standards. Sufficient capacity of the Well Facility and related improvements shall be reserved to ensure that water service is available from the Well Facility and related improvement to provide water service to the Property (consistent with the Residential Development).

33. Jensam, at Jensam’s sole expense, will pave Clarkston Road between Adams Road and Lake George Road consistent with the requirements of the Road Commission for Oakland County; such paving was required by the Township's prior Ultimate Paved Road Zoning District and related Ultimate Paved Road Zoning Ordinance. The parties acknowledge that Clarkston Road is an Oakland County Road and that Oakland County must approve and issue all associated permits and approvals associated with paving Clarkston Road. If said approvals or permitting is delayed or withheld by Oakland County or the Road Commission for Oakland County or by other factors outside Jensam’s control (as determined by a reasonableness standard), said delays or withholding will not delay in any respect any form or type of permitting, review or development of the Residential Development by the Township and Jensam may post an adequate performance bond with Oakland County or the Township, as the case may be, in the manner discussed

below. It is the sole responsibility of Jensam to obtain Road Commission for Oakland County permitting and pay for any required road improvement or other required improvements associated with the paving of Clarkston Road. Subject to the other requirements of this paragraph 33, if Clarkston Road is paved from the intersection of Clarkston and Adams easterly to the westerly-most entrance to the Residential Development, Jensam shall be allowed to receive building permits and subsequent Final Certificate of Occupancy permits, if in compliance with Township Ordinances, for up to 4 model homes in phase I (as discussed at Paragraph 43) from the Township prior to the entire paving of Clarkston Road between Adams and Lake George. Because Jensam is paving Clarkston Road in accord with the Township's Ultimate Paved Road Zoning Ordinance, a traffic study shall not be required for the Residential Development.

34. No single family residential lot or unit in the Residential Development shall be developed on less than a 120' wide lot or unit except certain lots or units located on cul de sacs that are "triangular" or "pie-shaped" in nature may be less than 120' wide at the point of triangulation.

35. No single family residential lot shall be developed on a lot that is less than the minimum square footage and setback requirements under the Township's current MRD zoning district classification applicable to residential lots, units and properties improved by sewer.

36. All single family residential lots or units in the Residential Development shall be developed with attached side-entry garages only, with the exception of the four large lots of not less than 1.5 acres in area along Lake George Road (see Paragraph 41), which lots may include, in addition to attached side-entry garages, additional one or two car garages that may either be detached or constructed at an angle such that they are not attached and/or side-entry.

37. The site plan shall include a 40-foot-wide easement (“Scenic Easement”) located adjacent to the south 60-foot Clarkston Road right of way for the entire frontage of the Property to be used for construction of a 10-foot-wide paved safety path (“Safety Path”) and landscape buffer (“Landscape Buffer”). Jensam and the Township agree to work in good faith to determine the location of the Safety Path which is anticipated to meander within the Scenic Easement and dedicate by easement or other means the ability of the general public to use the Safety Path. In the event such Safety Path construction requires temporary construction of easements in excess of 10', Jensam agrees to provide same. Jensam shall construct the safety path or, at the Township's option, make an in lieu of payment to the Township's safety path fund in an amount determined by the Township engineers adequate to construct the Safety Path per Township standards. Whether constructed by Jensam or at a later date by the Township by way of the in lieu payment, the Master Deed and related By-Laws shall confirm that all future

maintenance, repair or replacement of the safety path and interior paths on the property shall be the responsibility of the property owners and/or Home Owners Association.

38. Jensam and the Township agree to work in good faith to agree on a reasonable landscape design within the Scenic Easement.

39. The Scenic Easement shall include both the Landscape Buffer and the Safety Path and shall provide for a total of 40 feet in setback width from the north boundary of any lot, unit or common area in the Residential Development to the south right of way of Clarkston Road.

40. Jensam will install two entrances to the Residential Development along Clarkston Road in accordance with all applicable Township and Oakland County ordinances and standards.

41. Four of the 156 lots or units may be constructed by Jensam along Lake George Road and may be created by inclusion in a plat, site condominium or metes and bounds parcel split, in the sole discretion of Jensam. Each of the four lots, units or parcel splits fronting Lake George Road shall be not less than 1.5 acres in area and is expected to be serviced by an individual septic system and private individual wells, but at the discretion of Jensam, may access the Sewer Taps, if determined appropriate by Jensam at its discretion. In accordance with all applicable Township and Oakland County ordinances and standards and subject to the Land Division

Act, if Jensam chooses to create the four parcels described in this paragraph 41 by metes and bounds parcel split, the Township shall not object to the creation and issuance of new parcel ID numbers for these four parcels following the usual and customary procedures for other like parcels in the Township. The issuance of building permits for the four parcels described in this paragraph 41 shall not be dependent or contingent on the issuance of site plan, engineering and/or building approvals and permits by the Township for the remainder of the Residential Development.

42. The Property and Residential Development will be developed according to a site plan consistent with the terms of this Consent Judgment, subject to meeting ordinary engineering requirements and all other requirements of this Consent Judgment (the “Site Plan”) and the Township ordinances and regulations.

43. Consistent with the Township’s site plan application guidelines, which provide for phasing of developments, the Site Plan may provide for phasing of the Residential Development at the discretion of Jensam.

44. Jensam shall prepare and submit a Site Plan to the Township consistent with site plan standards applicable to MRD residential developments contained in the current Township Zoning Ordinance as of the date of submission.

45. After the customary engineering, planning and department reviews have been completed by the Township, without undue delay the Township Planning

Commission shall review the Site Plan and related materials. The Planning Commission shall review the Site Plan and conduct a public hearing for purposes of ensuring compliance with the Consent Judgment and Township Ordinance and standards applicable to the current MRD zoning district.

46. The scope of the Site Plan review shall include all approvals by the Township Building Inspector, Township Ordinance Officials, Township Planner, Township Engineer, Township Police and Fire Officials, and by such other administrative officials and/or consultants reasonably and ordinarily deemed appropriate by the Township.

47. Such administrative reviews of the Site Plan and engineering plans shall be conducted without undue delay for the purpose of ensuring that the Site Plan conforms with all of the terms and provisions of this Consent Judgment and all applicable law, ordinances and regulations, and ensuring that the Site Plan meets engineering and construction standards generally applied to residential developments under the ordinances of the Township, with the understanding that, as noted, above, where the express terms of this Consent Judgment deviate from present and future Township Ordinances, the terms of this Consent Judgment shall govern.

48. The Township ordinances governing the development approvals for the Residential Development shall be those in effect at the time of the entry of this

Consent Judgment. The Residential Development shall comply with all ordinances and regulations of the Township provided they are not inconsistent with the terms of this Consent Judgment.

49. Upon receiving the Township Planning Commission's recommendation regarding the Site Plan, the Township Board of Trustees at a regularly scheduled meeting (but in no event more than 60 days from the date of the Planning Commission's review and recommendation), shall review the recommendation, Site Plan and related materials for determining consistency with this Consent Judgment and all applicable Township ordinances, standards, regulations, and reviews.

50. Unless further reasonable detail or reviews are determined necessary by a vote of the Board of Trustees, final Site Plan approval for the Residential Development may be approved by the Township Board of Trustees at a scheduled meeting described above (but in no event more than 60 days from the date of the Planning Commission's review and recommendation) in accord with the provisions of this Consent Judgment. Site Plan approval for the Residential Development shall be valid for 2 years from completion of the pre-construction meeting for the Residential Development between Jensam, the Township and other state, county or agency officials. The Township's Board of Trustees may grant Site Plan approval extensions from time to time, if necessary, in the ordinary course.

51. Consistent with the Township's site plan application guidelines, which provide for applicants proposing site condominium and/or subdivision plat approval, the Site Plan may provide for either site condominium and/or subdivision plat approval.

52. Jensam shall post or provide security (such as a letter of credit, cash or corporate surety bond issued by a company licensed for such purposes in Michigan) for the completion of any improvement required herein and as set forth in the Township's Ordinances.

53. The parties acknowledge that Jensam may request the right to make certain nonmaterial modifications and amendments to the Site Plan as a result of the obligation to comply with requirements of EGLE, the Road Commission for Oakland County and/or other appropriate county, state and federal governmental agencies. Jensam may also request of the Township the right to make nonmaterial modifications relating to the location and/or size of residential lots or units, or nonmaterial field changes determined to be required as a result of engineering and/or facts revealed during on-site work. Such requests for nonmaterial modifications and amendments, if any, shall be reviewed by the Township administratively (i.e., by the Township staff and/or professional outside consultants. Jensam shall not unreasonably request such a modification or amendment, and the Township shall not unreasonably deny such a modification or amendment. The

Township reserves the right (but not required) to unilaterally declare and deny any change or modification of the minimum lot size stated herein as a “material” modification or amendment. When approved, such nonmaterial modifications and amendments may be filed with the Court with a stipulation of the parties as an amendment to and part of this Consent Judgment. For purposes of this provision, making a “nonmaterial” modification or amendment shall not alter the basic intent as embodied in this Consent Judgment.

54. This Consent Judgment is binding upon the parties hereto, their respective heirs, personal representatives, successors, successors-in-interest, transferees, transferees-in-interest and assigns.

55. The terms and conditions of this Consent Judgment as the same may be amended from time to time, exclusively by stipulation of the parties and order of the Court, including without limitation, uses permitted on the Property pursuant to this Consent Judgment, shall be deemed to run with the land and be for the benefit of the Property and the Township and not for the benefit of surrounding off-site properties.

56. This Consent Judgment supersedes and replaces any and all prior inconsistent agreements between Jensam and the Township relative to the Property, and any and all prior inconsistent Court orders or judgments of any nature relative to permitted development or uses of the Property.

57. Regardless of future Master Plan and/or zoning changes which may occur or affect the Property, the uses permitted hereunder shall not be deemed to be legal nonconforming uses, but rather permitted uses, subject to and in accordance with this Consent Judgment.

58. Unless specifically waived or modified herein, Jensam shall comply with all ordinances, policies and standards of the Township including, but not limited to, the Township's Safety Path Ordinance, Tree Ordinance, Sewer Policy and any and all performance guarantees set forth therein.

59. This Court shall maintain jurisdiction over the implementation and enforcement of this Consent Judgment.

60. In the event of a dispute between the Township's administrative official(s) and Jensam's representative(s) regarding the timing/delay of the Township's review or approval of the Site Plan or any other approval or permit applicable to the Property or the Residential Development, the parties mutually agree that Thomas J. Ryan, Esq. or his successor (a third person, with expertise in the area of the respective dispute(s) and agreed upon by the parties), shall resolve the dispute(s) on a final and binding basis as between Jensam and the Township by written and signed determination. Said determination shall then be enforceable at the discretion of either party with the Court.

61. This is a Consent Judgment as to the entire dispute between the parties, including all issues set forth in the Complaint. Any subsequent amendment hereto must be in writing, and approved as to form and substance by authorized representatives of parties hereto, or their respective heirs, representatives, successors, successors-in-interest, transferees, transferees-in-interest and assigns, and entered by the Court without the necessity of public hearing.

62. The parties to this action represent to this Court that they have read this Consent Judgment, have discussed it with counsel, understand the terms and conditions hereof, and further, hereby agree that this Consent Judgment, or an affidavit executed by the parties providing notice of this Consent Judgment, shall be recorded with the Oakland County Register of Deeds.

63. Each person signing this Consent Judgment on behalf of any party hereby represents and warrants that he/she is a duly authorized representative and agent of that respective party, and he/she has full authority to bind said party to all of the covenants, warranties, representations, terms and conditions of this Consent Judgment.

64. This Consent Judgment resolves the entire dispute between the parties with regard to all issues and claims set forth in this matter, and all issues and claims that could have been asserted by Jensam as of the date of this Consent Judgment relative to the Property, and all issues and claims that Defendant could have raised

as of the date of this Consent Judgment concerning the issues and claims set forth in this matter relative to the Property, and all such issues and claims are merged as part of this Consent Judgment, including any claim for monetary damages, attorney fees, delay or any other damage claim.

65. The terms and conditions of this Consent Judgment shall be appurtenant to the Property. These terms and provisions shall run with the Property as if they were covenants running with the land. The terms and conditions of this Consent Judgment shall inure to the benefit of and be binding on the parties and their respective heirs, successors, successors-in-interest, transferees, transferees-in-interest and assigns, and reference herein to Plaintiff, Jensam, Township and/or Defendant (including reference to the Plaintiff and/or the Township, as applicable) shall include their respective heirs, successors, successors-in-interest, transferees, transferees-in-interest and assigns.

66. Subject to the continuing jurisdiction of the Court to ensure compliance with this Judgment, this Judgment resolves the last pending claim and closes the case.

IT IS SO ORDERED

Dated: November 4, 2019

s/Gershwin A. Drain

HON. GERSHWIN A. DRAIN
United States District Judge

EXHIBIT A

EXHIBIT A

Tax Parcel Id Number: 10-17-100-010

T4N, R11E, SEC 17 E 1/2 OF NW 1/4 EXC BEG AT PT DIST N 89-59-00 E 1495.15 FT FROM NW SEC COR, TH N 89-59-00 E 150 FT, TH S 00-01-00 E 290.40 FT, TH S 89-59-00 W 150 FT, TH N 00-01-00 W 290.40 FT TO BEG 79 AN208A

Tax Parcel Id Number: 10-17-200-001

T4N, R11E, SEC 17 W 1/2 OF NE 1/4 80 AN207

Tax Parcel Id Number: 10-17-200-002

T4N, R11E, SEC 17 W 1/2 OF NE 1/4 OF NE 1/4 20 AN205

Tax Parcel Id Number: 10-17-200-003

T4N, R11E, SEC 17 E 1/2 OF NE 1/4 OF NE 1/4 20 AN204

Tax Parcel Id Number: 10-17-200-004

T4N, R11E, SEC 17 SE 1/4 OF NE 1/4 40 AN206