May 2004

Public Policy Brief

State & Local Government Area of Expertise Team

Selected Planning and Zoning Decisions: 2004

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This public policy brief summarizes the important state and federal court cases and Attorney General opinions issued between May 15, 2003 and April 30, 2004.

Nonconforming Uses

Leoni Twp. v. George, No. 237388 (Mich. App., May 22, 2003)(unpublished).

A township can compel a lessening or complete elimination of a nonconforming use when the use changes.

Defendant used his property primarily for the storage and crushing of a large number of cars. The evidence showed that when a 1963 zoning ordinance rezoned the parcel to suburban residential use, a maximum of 32 cars would have been on the site, and that defendant had substantially expanded the operation since that time. The Court of Appeals found that the trial court acted within its authority when it ordered the defendant's nonconforming use of his property to be discontinued. Defendant argued he should have been able to have up to 32 vehicles stored on the property; however, citing *National Boatland, Inc. v. Farmington Hills Zoning Bd. of Appeals,* 146 Mich. App. 380 (1985) the Court of Appeals concluded that when a change in the nonconforming use is contemplated, the authorities may take advantage of that fact to compel a lessening or complete suppression of the nonconformance.

Manufactured Housing/Substantive Due Process/ Equal Protection/Demonstrated Need

Landon Holdings, Inc. v. Grattan Twp., 257 Mich.App 154, 667 NW2d 93 (2003).

A zoning ordinance did not violate the Township Zoning Act, nor violate substantive due process or equal protection clauses of the constitution, simply because no land was presently zoned for manufactured housing, when there was no indication that the township was likely to deny an application for manufactured housing if requested.

Co-plaintiff Osborn owned approximately two hundred acres near M-44 that Landon wished to purchase and develop as a manufactured housing community. The ordinance in effect at that time allowed manufactured housing pursuant to a special use permit in areas zoned R-R residential. Osborn's property was zoned agricultural. Thus, Landon's proposed development would have required both rezoning and a special use permit. Plaintiffs filed a complaint against defendant on December 14, 1999, challenging the defendant's zoning ordinance as a violation of the Township Zoning Act. Earlier in 1999 the township had begun making revisions to its master plan to address manufactured housing. In June 2000 (subsequent to plaintiffs' lawsuit), the township amended its zoning ordinance to add "'MHC' Manufactured Housing Community" to the list of zoning districts, and created a new chapter, 9-A, which sets forth the conditions for establishing an MHC district and the procedures for review of site plans. No land was rezoned to MHC; rather, the township indicated that property owners

must apply for rezoning to MHC. Plaintiffs filed a request for rezoning under the new amendment, but reserved its right to present this court challenge to the validity of the ordinance.

Plaintiffs argued that the township's amendment that created a manufactured housing district was illusory because the amendment did not rezone any property and defendant's land use plan did not identify any property suitable for a manufactured housing district. The Court of Appeals pointed out that there are two exceptions to the general rule that the law to be applied in a zoning decision is that which was in effect at the time of court decision: (1) a court will not apply an amendment to a zoning ordinance where the amendment would destroy a vested property interest acquired before its enactment, and (2) a court will not apply the amendment where the amendment was enacted in bad faith and with unjustified delay. The test to determine bad faith is whether the amendment was enacted for the purpose of manufacturing a defense to a plaintiff's suit. The Court found that the township did not act in bad faith or with unjustifiable delay in amending the challenged zoning ordinance even though it did not amend ordinance until after the lawsuit was filed, because it began updating its master plan before the lawsuit, and both the original ordinance and amended ordinance applied to property throughout township, not just plaintiffs' property.

The Court found that the ordinance amendment allowing for manufactured housing districts, did not totally exclude manufactured housing communities, either effectively or on its face, and thus did not violate the Township Zoning Act, even though it did not designate any areas for manufactured housing and permitted such use only in conjunction with an approved application for rezoning or special use permit. The township's master plan indicated that manufactured housing was appropriate for the township (though no such manufactured housing communities existed at the time of the lawsuit and the plan failed to identify suitable locations), and there was no indication that township was unlikely to grant a special use permit or to rezone property if requested.

As to the constitutional challenges, the Court observed that when no suspect or somewhat suspect classification can be shown, the plaintiff bringing an equal protection challenge has the burden of establishing that the statute is arbitrary and not rationally related to a legitimate governmental interest. The Court further stated that a zoning ordinance need only be rationally related to a legitimate governmental interest to survive a substantive due process challenge. The Court concluded that plaintiffs failed to meet either constitutional challenge, stating, "It is reasonable that defendant would wish to regulate the location of manufactured housing communities within the township just as it regulates the location of other uses. Plaintiffs have not shown why it is unreasonable for defendant to wait to rezone certain areas for manufactured housing rather than either permitting them by right in existing districts or specifically designating certain areas as manufactured housing districts before owners even apply for rezoning."

Uniform Condemnation Procedures Act (UCPA)/ Just Compensation

Silver Creek Drain District v. Extrusions Division, Inc. 468 Mich. 367, 663 N.W.2d 436 (2003).

Environmental contamination conditions are factors to be considered in determining fair market value to establish just compensation in a condemnation action under the UCPA.

Defendant owned an eight-acre parcel of vacant land adjacent to its operations complex in Grand Rapids. In 1992, defendant applied to the city of Grand Rapids for a permit to build a warehouse on the eight acres. The application was denied. Defendant was informed that, in 1991, the plaintiff had identified the parcel as its desired site for a storm-water retention pond. Defendant claimed that denial of a permit, together with the failure of the Drain District to commence a condemnation action, amounted to an unconstitutional taking of private property without just compensation. Accordingly, in 1992, defendant initiated an inverse-condemnation action against the city and the Kent County Drain Commissioner. On March 7, 1994, the Drain District, pursuant to the UCPA, tendered a good-faith "just compensation" offer in the amount of $211,300 to defendant for the parcel. This offer, as allowed by the UCPA also reserved the Drain District's right to proceed against defendant in a federal or state action for

contamination-cost recovery. On May 26, 1994, the Drain District executed a "declaration of taking," which indicated that this private property was being taken for purposes of a necessary public improvement. In June, the $211,300 good-faith "just compensation" amount was placed in escrow. The Drain District then filed its condemnation action and again reserved the right to bring a federal or state cost-recovery action. On February 20, 1995, the parties stipulated, and the trial court ordered, that the parcel be conveyed to the Drain District and that the Drain District pay defendant $211,300 for the taking. Following this, the Drain District, notwithstanding the stipulation and order, sought an order that would hold the funds in escrow as security for the remediation costs as allowed under the UCPA. Defendant, in response, citing part 201 of the Natural Resources and Environmental Protection Act (NREPA), claimed that it was not the cause of the contamination, and therefore was not liable for remediation costs. Accordingly, it argued that the funds should be released. On November 3, 1995, by stipulation, the trial court ordered the escrowed sums, as well as interest, paid to defendant.

In a 1997 bench trial concerning valuation, the trial court found that the value of the eight-acre parcel, if environmental concerns were ignored, was $278,800. The court then determined that the parcel "was an environmentally contaminated site, with respect to which a reasonably prudent purchaser would have required, at a minimum, a formal Type-C Closure from the [Department of Natural Resources] as a condition precedent to closing." The trial court found that, while remediation costs would approach $2.3 million, the reasonable cost of the Type-C closure was $237,768. It concluded, therefore, that the net fair market value was $41,032 ($278,800 minus $237,768). The trial court entered an order to that effect.

The trial court concluded that environmental contamination conditions were factors to be considered in determining fair market value (FMV) to establish just compensation in a condemnation action under the UCPA. The Court of Appeals reversed the trial court in part, concluding the UCPA provided no authority for a court to consider any contamination factor in the establishment of FMV and contamination could only be considered in separate proceedings for remediation costs. The Michigan Supreme Court reversed the Court of Appeals on this issue only, and remanded the case to the trial court. The Supreme Court determined that "just compensation," as used in the Michigan Constitution, was a legal term of art in the law that meant in 1963, and still means, "the proper amount of compensation for property taking into account all factors relevant to the market value." The Supreme Court concluded that the trial court understood the matter properly and simply considered contamination as one factor, although a significant one, in establishing a FMV for the property. The Court held that this was an appropriate way to consider contamination in a just compensation proceeding under the UCPA.

Justices Cavanagh and Kelly agreed the majority arrived at the correct result, but unnecessarily reached a constitutional issue when the statutory provisions of UCPA were sufficient to decide the case. Justice Weaver concurred in the result reached by the majority but wrote separately to express disagreement with the majority's construction of the constitutional concept of "just compensation" as being a legal term of art. Justice Weaver expressed further concern that the majority's assertion that contamination costs must be considered in just-compensation determinations amounted to a "one-size-fits-all" rule in the context of just compensation.

Inverse Condemnation/*De facto* Taking/Blight by Planning

Merkur Steel Supply Inc. v. City of Detroit, ___Mich.App.___ (2004)

City actions taken over the course of a ten-year period constituted "blight by planning" and resulted in a de facto taking of property.

Plaintiff brought an inverse condemnation suit against the city, claiming that the combined effects of city actions since 1991 constituted a *de facto* taking. Sometime in 1987, the city started its efforts to expand Detroit City Airport. In that year, the city signed an agreement with an air carrier that obligated the city to undertake capital improvements at the airport. During this time, the city was not complying with existing FAA regulations, as some of the buildings near the airport, including plaintiff's, were too close

to the existing runway. However, the FAA granted temporary waivers to the city for the noncompliance. Beginning in 1988, the city accepted grant money from the FAA and the state of Michigan to maintain and expand the airport. The grants all contained the condition that the city agreed to prohibit the construction of new improvements and remove any existing hazards on the property near the airport. Then in 1991 the Detroit city council approved acquisition of the land surrounding the airport and the city did in fact condemn some of the area, but not plaintiff's land. Around 1989, plaintiff began contemplating constructing a 40,000 square foot addition to the existing building on their property in order to expand their business. In June 1990, plaintiff filed a notice of construction with the FAA. On December 19, 1990, the director of Detroit City Airport wrote a letter to the FAA objecting to plaintiff's building of the proposed structure. But in January 1991, the FAA issued a determination that construction of the proposed addition would not be a hazard to aviation; this determination was set to expire on August 24, 1992. In the meantime, the city filed an airport layout plan in April 1992, that put plaintiff's property directly in the way of the proposed airport expansion. In July 1992, plaintiff applied to the FAA for an extension determination, but in August 1992, the FAA revoked its "no hazard" determination because of the city's airport layout plan. Also during this time plaintiff applied for a building permit from the city, but it was denied. In 1996, the city filed a revised layout plan showing the new airport runway going right through plaintiff's property, but the city took no further action to condemn plaintiff's property. So in September 1997, plaintiff wrote to then City Airport Director Suzette Robinson to inform her that it wished to proceed with its development. After receiving no response, plaintiff sent Robinson a second letter in October 1997, informing her that it would proceed with construction unless the city advised it that no building would be approved. Plaintiff again received no response from the city. Thereafter, in November 1997, plaintiff hired an architecture firm to prepare plans for construction.

On July 2, 1999, the FAA issued a determination that the new building would be a hazard to aviation. On July 26, 1999, the Aeronautics Bureau issued a Tall Structure permit to plaintiff but attached certain conditions. The permit recognized that while the forty-foot building would not interfere with aviation, it could interfere with the city's plans to expand the airport. It issued the permit with the condition that the proponent or any subsequent owners of the proposed building would not receive reimbursement for the building or any businesses associated with the building if the property was acquired for expansion. At this point, plaintiff alleges it considered its project dead.

Plaintiff filed the present lawsuit for inverse condemnation against the city in September 1999. In part, plaintiff alleged that the city's filing of an airport layout plan constituted a taking of plaintiff's property without just compensation. After extended legal maneuvers, on March 7, 2002, a jury determined that plaintiff had suffered damages in the amount of $6,800,000 and would continue to suffer damages in the amount of $3,800 per month. The city appealed.

The Court of Appeals summarized the situation as follows:

> "Plaintiff filed the present inverse condemnation suit against the city for all of the city's acts that were taken in an attempt to thwart plaintiff's efforts at construction, and for the city's attempt to "take" plaintiff's property without formally condemning it. The city approved the condemnation of the area and the area was in a state of decline because of the lack of city services and the fact that the residents anticipated condemnation. While the city intended to condemn the area, it had formally condemned few of the properties and let the majority of the properties decline and await possible future formal condemnation. Plaintiff presented evidence of a decline of its property through evidence that the city's actions prevented plaintiff from building a new building for its business. Plaintiff also presented evidence that the city had the intent to completely take plaintiff's property but failed to take the appropriate steps in over ten years. The city accepted money from the government with the promise that it would prohibit any new construction and would remove any existing hazards, which included plaintiff's business. Further, there was testimony and exhibits admitted at trial that showed city

> acknowledgment that the area around the airport was to be condemned. …In sum, this is a case of blight by planning. The city's plans to expand Detroit City Airport, possibly sometime in the future, thwarted plaintiff's attempts to run and expand its business and significantly impaired the value of plaintiff's property rights. The city made its plans clear but never followed through with its plans and never attempted to legally obtain plaintiff's property..... Thus, plaintiff presented evidence that the city abused its legitimate powers in its actions aimed at plaintiff's property. Under the circumstances, the trial court used the correct test in determining whether plaintiff presented evidence of a taking."

The Court acknowledged that defendant's actions could not be definitively categorized as a *regulatory* taking; however, the Court found that the trial court used the correct test in determining whether plaintiff presented evidence of a taking.

> "No exact formula exists concerning a *de facto* taking; instead, the form, intensity, and the deliberateness of the governmental actions toward the injured party's property must be examined. [citing *Heinrich v. Detroit,* 90 Mich.App 692, 282 NW2d 448 (1979)]. The plaintiff has the burden of proving causation in an inverse condemnation action. .... A plaintiff may satisfy this burden by proving that the government's actions were a substantial cause of the decline of its property. The plaintiff must also establish that the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property. ... The mere threat of condemnation and its attendant publicity, without more, is insufficient. Before a court may conclude that a taking occurred, it must examine the totality of the acts alleged to determine whether the governmental entity abused its exercise of legitimate eminent domain to plaintiff's detriment."

The Court of Appeals upheld the multi-million dollar jury verdict.

Road Right-of-Way/Public Service Commission Orders

Mayor of Lansing v. Michigan Public Service Commission, 257 Mich.App. 1, 666 N.W.2d 298 (2003).

Chapter 247 of the Highway Code (MCL 247.183) does not require a pipeline company to obtain consent from an affected local unit of government before obtaining Public Service Commission approval of the project, but does require approval before the company "enters upon, constructs, and maintains the project."

The Michigan Public Service Commission (MPSC) issued an order authorizing defendant Wolverine Pipeline Company to construct and operate a 26-mile liquid petroleum pipeline in the right-of-way of Interstate-96 in the City of Lansing and Ingham County. The MPSC determined Wolverine had demonstrated a need for the pipeline and it was reasonably designed and routed, and approved the application with certain safety conditions proposed by the city. The plaintiff-city claimed its consent was required by the Michigan Constitution, the State Highway Code, and MPSC R. 460.17601(2)(d) before MPSC could issue the order. Deciding an issue of first impression, the Court of Appeals held that the Highway Code requires the consent of the local governments, but such consent need not be obtained *before* seeking MPSC's approval. The Court concluded the language of the statute requires the consent of the affected local government, but only before the person "enters upon, constructs, and maintains the project." Accordingly, the MPSC properly determined Wolverine need not submit with its application the consent of the local governments. The Court noted in a footnote that a city has the right to grant or withhold consent under Article 7, Section 29 of the Michigan Constitution, provided the city's decision is not arbitrary and unreasonable.

County Primacy Over Township Zoning/Statutory Construction

Pittsfield Charter Twp. v. Washtenaw County, 468 Mich. 702, 664 N.W.2d 193 (2003).

Applying accepted rules of statutory construction, a county does not need to comply with a township's

zoning ordinance when locating a proposed homeless shelter on county-owned land within the township.

Washtenaw County owns property in Pittsfield Charter Township that the township's zoning ordinance designated as I-1 (limited industrial). With the financial participation of the City of Ann Arbor, the county advertised a proposal to construct a new homeless shelter, which it would own, on the county-owned property. The I-1 district ordinance neither expressly nor conditionally permits such a use. The township took the position that the proposed use violated its zoning ordinance and thus was impermissible. The county asserted that, pursuant to the county commissioners act (CCA), (MCL 46.1 et seq.) county boards of commissioners are not subject to township zoning ordinances when determining the site of, or prescribing the time and manner of erecting, county buildings.

The Michigan Supreme Court concluded that the county board need not comply with the township's zoning ordinance. The Court's statutory analysis indicated the higher priority was with the county. The Court looked to the cases of *Dearden v. Detroit,* 403 Mich. 257, 269 N.W.2d 139 (1978) and *Burt Twp. v. Dep't of Natural Resources,* 459 Mich. 659, 593 N.W.2d 534 (1999) for guidance. In *Dearden*, the Court held that the legislative intent, where it can be discerned, controls the question of whether a governmental unit is subject to the provisions of another's zoning ordinance. In *Burt* the court cautioned there are no "talismanic words" conveying the Legislature's intent to create immunity from local zoning, rather the Legislature need only use terms that convey its clear intention the grant of jurisdiction given is, in fact, exclusive. The lack of focus on county buildings in the TZA reinforced the Court's view that the Legislature intended priority be given to the county in siting its buildings.

Justice Weaver's concurrence agreed with the result, but found the majority's reliance on statutory construction unhelpful and unnecessary because the plain text of the CCA clearly conveys the Legislature's intent to grant county boards of commissioners exclusive jurisdiction over site selection for and construction of county buildings.

School District Primacy over Township Zoning/ Statutory Construction

Northville Charter Twp. v. Northville Public Schools, 469 Mich. 285, 666 N.W.2d 213 (2003).

Local school districts need not comply with township zoning and planning ordinances when siting and designing school facilities.

Treating the question as a matter of statutory construction, the Michigan Supreme Court held that local school districts, which are required to submit building plans to the state superintendent of public instruction for approval, were not required to comply with township zoning and planning ordinances under the Township Zoning Act and the Township Planning Act. Because the text of the Revised School Code unambiguously grants the state superintendent sole and exclusive jurisdiction over local school district construction and site plans, it immunizes school districts from local ordinances affecting these functions. The Court concluded that the "site plan" referred to in the Revised School Code is the plan for everything on the property, i.e., the entire project; it is not coterminous with "construction plans." Thus the state superintendent of public instruction's power to review and approve plans and specifications for the construction, reconstruction, or remodeling of school buildings and site plans is unaffected by any zoning or planning rules or ordinances regarding what goes on within the site itself.

In his concurrence, Justice Cavanagh was troubled by the lead opinion's suggestion the state superintendent's power to review local school districts' site plan is limited to "what goes on within the site itself," He asserted that under the Revised School Code the legislature did not indicate any restriction on the superintendent's authority.

Justice Weaver wrote separately because she was not persuaded by the lead opinion's position it is "necessary" to join the state superintendent as a party before addressing the intervening plaintiffs' argument concerning the improper delegation of legislative authority.

Justice Markman dissented, asserting that there is no clear legislative intent in the Revised School Code to exempt school districts from local zoning ordinances.

Snowmobile Trails/DNR Primacy over Township Zoning/Statutory Construction

Chocolay Charter Township v. Department of Natural Resources, No. 246171 (Mich.App., October 28, 2003)(unpublished).

Under the Snowmobiles Act (MCL 324.82101 et seq.), the designation of land by the Michigan Department of Natural Resources for snowmobile operation on state-owned or state-controlled lands is not preempted by restrictions of a local unit of government, including township zoning ordinances.

Again treating the question of primacy as a matter of statutory construction, the Michigan Court of Appeals concluded that the Snowmobiles Act gives the Michigan DNR sole authority to designate snowmobile trails on state-owned or state-controlled lands, preempting a township ordinance specifically prohibiting the operation of snowmobiles on state-owned land located in residentially-zoned districts within the township.

Expansion of Nonconforming Use/Laches/ "Doctrine of Unclean Hands"

Polkton Charter Township v. Henke, No. 238890 (Mich.App., August 14, 2003)(unpublished)

The trial court did not err in determining laches applied and the doctrine of unclean hands did not apply when the plaintiff-township took no official action in preventing defendants' expansion of their dairy farm until the time the complaint was filed.

At the time defendants purchased the property in 1987, the property had been zoned for residential use. The use of the property as a dairy farm was a valid nonconforming use, predating the enactment of the zoning ordinance. Defendant continued to expand the dairy farm operation from 1989 until about 1995 by adding buildings and increasing herd size. The township eventually brought an action in 2000 for violation of the township zoning ordinance because the defendant never obtained zoning permits prior to any expansion activities.

In deciding in favor of the defendant, the Court of Appeals considered it critical that plaintiff undertook no official action in preventing any of defendants' expansions from the time defendants erected a pole barn in 1989 in violation of the ordinance until the time the complaint was filed in 2000. The Court also emphasized the equity issues of the case: The building inspector (the person responsible for issuing building permits for the township) performed electrical work for defendants. Further, two members of the township's board made regular visits to defendants' farm without mentioning the requirement for a permit or possible violations of the zoning ordinance: The defendants' veterinarian was a long-term township board member, and another long-time board member drilled and maintained defendants' wells and went to the farm a couple of times a year. The Court observed that "A person seeking equity should be barred from receiving equitable relief if there is any indication of overreaching or unfairness on this person's part."

Minimum Lot Size/Substantive Due Process/ Takings

Zeerco Management. Corp. v. Chippewa Township, No. 238800 (Mich.App., August 26, 2003) (unpublished).

The section of defendant-township's zoning ordinance requiring single-family residential lots to be a minimum of one acre was not invalid as a violation of substantive due process.

Plaintiff owned approximately 48 acres of vacant land in the township. The majority of the property owned by plaintiff was zoned R-1, or single-family residential. In 2000, plaintiff proposed a plan to develop seventy single-family residential condominiums on the R-1 zoned portion of the property. The site plan listed the size of the lots for the condominiums ranging from 0.45 acres to 1.03 acres, with the average lot size being 0.55 acres. However, the township zoning ordinance provided that each lot in a single-family residential zoned area must be a minimum of one acre. The township planning commission accepted plaintiff's site plan with several conditions, including the condition that plaintiff get a variance regarding the one acre zoning requirement. Plaintiff applied to the board of zoning appeals for a variance from the one acre minimum lot size restriction. After procedural questions were resolved, the board of

zoning appeals voted to deny plaintiff's variance application.

The Court of Appeals concluded that plaintiff failed to carry its burden of demonstrating the township did not have a legitimate governmental interest for the one-acre minimum lot size requirement. The stated reason for the lot size requirement was that the township did not have a sewer system and the water table could not support more densely located septic systems. While the master plan contemplated the development of more densely located residential units in the area, the recommendation for increased density was in connection with the development of public water and sewer facilities, which the evidence showed had not yet been built.

Adult Entertainment/Liquor Licenses/Local Ordinances Banning Nudity

Van Buren Township v. Garter Belt, 258 Mich.App. 594, 673 N.W.2d 111 (2003).

Local ordinance banning nudity at licensed liquor establishments is constitutional.

Defendant owned and operated a bar in Van Buren Township that featured nude dancing and is licensed by the Michigan Liquor Control Commission (LCC). In March 1999, The township enacted an ordinance prohibiting persons "appearing in a state of nudity" from frequenting, loitering, working, or performing in any establishment licensed or subject to licensing by the Michigan Liquor Control Commission. Defendant featured nude dancing long before the adoption of the ordinance. After defendant failed to comply with the ordinance, the township sued, seeking to enjoin defendant from featuring nude dancing that violated the ordinance. Defendant sought to have the ordinance declared unconstitutional, arguing that nude dancing is a form of expression protected by the First Amendment. Further, defendant claimed that the township improperly enacted its ordinance without proof that defendant's bar caused any adverse secondary effects. The township moved for summary disposition, arguing that the ordinance was not a complete ban on nude entertainment, but, instead, was a valid liquor control ordinance designed to combat known secondary adverse effects associated with the combination of nudity and the consumption of alcohol.

The Court of Appeals held that state law on the subject does not "occupy the field of regulation" to preempt local action. The Court said a section of state law providing for the state Liquor Control Commission to issue topless permits is not intended to prevent a local ordinance banning topless activity or nudity. The Court thus rejected the argument that the state intended to exclusively occupy the field of nudity regulations in large counties.

The Court of Appeals further held that nude dancing is not an activity protected by the U.S. Constitution. The ordinance was worded identically to that part of a Clinton Township ordinance that the Court of Appeals held "constitutionally valid and enforceable" in *Jott, Inc. v. Clinton Charter Twp.,* 224 Mich.App. 513, 569 N.W.2d 841 (1997). The defendent contended that *Jott* had been superceded by U.S. Supreme Court decisions giving First Amendment application to some nudity, but the Court of Appeals responded that the nation's highest court has not repudiated "that a state may, in exercise of its inherent police powers, constitutionally regulate appropriate places where liquor may be sold, including prohibiting nudity at liquor-licensed establishments." Much of that power, it noted, derives from the amendment repealing prohibition. The Court of Appeals rejected defendant's claim that another U.S. Supreme Court ruling undermined that state authority, as it said the decision only said the 21st Amendment could not be used to give constitutional legitimacy to laws abridging freedom of speech. The Court found that the township ordinance was a valid content-neutral time, place, and manner regulation designed to serve a substantial governmental interest in preserving the quality of urban life while allowing for reasonable alternative avenues of communication.

Noting township testimony regarding increased police calls, litter and noise emanating from bars featuring nudity, and a summary of studies of the effects of adult entertainment in other municipalities, the Court found that these "provide compelling evidence that sexually oriented businesses are associated with high crime rates and depression of property values. In addition, such businesses can dramatically change the character of the community because of noise, liter, and illicit activities generated by them."

Spot Zoning/Presumption of Validity

City of Essexville v. Carrollton Concrete Mix, Inc., 259 Mich.App. 257, 673 N.W.2d 815 (2003).

Rezoning waterfront property from M-1 industrial to D-1 development district was not spot zoning when the zoning ordinance was enacted after consideration of the city development plan calling for nonindustrial riverfront uses.

The City of Essexville brought action against Carrollton Concrete Mix to enjoin river dredging activities and the storage of bulk material on the company's 4.37-acre Saginaw River waterfront property. The property is bordered to the east by Main Street and to the west by a railroad. The northern border of the property consists of approximately eight hundred feet of river frontage. The northeasterly, adjacent property is a cement plant, while the land lying southwest and adjacent to Carrollton's property is a city park and a city sewage disposal plant. In 1983 the zoning was changed from industrial to a development district that included among its permitted uses, "public and private parks and recreational facilities that utilize environmental or natural resource conditions as a basis for recreation." This change was made in response to the city's 1982 master plan, which recommended that certain property along the river, including Carrollton's property, be rezoned to promote the eventual development of recreational and residential uses. The plan focused on the fact that the city had evolved over time into a residential suburb of Bay City, and that public opinion surveys indicated a greater need for recreational opportunities. At the time of trial, the property was being used for a dredging operation in the Saginaw River. In January 2000 there were two piles of bulk material approximately thirty feet high being stored in disregard of the zoning ordinance. The city sent Carrollton two letters requesting that it discontinue what the city considered to be an illegal nonconforming use. The city filed suit seeking an injunction against Carrollton's activities when the dredging operation was not discontinued.

The trial court initially ruled from the bench in favor of the city, relying primarily on *Brae Burn, Inc. v. Bloomfield Hills,* 350 Mich. 425 (1957), and *Kropf v. Sterling Heights.,* 391 Mich. 139 (1974) to determine that the presumptively valid zoning ordinance was reasonable because the city was acting pursuant to a comprehensive master plan. However, after hearing oral argument by both parties urging a new trial, the court issued a written opinion directly contrary to its initial ruling. Relying on *Penning v. Owens,* 340 Mich. 355 (1954) and *Anderson v. Highland Township* 21 Mich.App. 64 the court concluded that the city engaged in spot zoning by singling out Carrollton's property to be used as a park when the surrounding land was designated as industrial.

The Court of Appeals determined that in order to properly resolve the dispute, it needed to decide whether the *Penning* and *Anderson,* cases contained separate zoning principles apart from those set forth in *Brae Burn* and *Kropf* and if so, which line of cases controlled. In *Brae Burn*, the Supreme Court held that ordinances come to courts "clothed with every presumption of validity," and that it is "the burden of the party attacking to prove affirmatively that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of his property." Under this deferential standard of review, successful challenges will be limited to "extreme" cases. In *Penning*, the Supreme Court held that "A zoning ordinance or amendment… creating a small zone of inconsistent use within a larger zone is commonly designated as 'spot zoning'....Such an ordinance is closely scrutinized by a court and sustained only when the facts and circumstances indicate a valid exercise of the zoning power."

The Court of Appeals concluded that *Penning* and *Anderson* were, indeed consistent with *Brae Burn*. In neither *Penning* nor *Anderson* did the courts disavow the deferential standard of review forcefully declared in *Brae Burn* and other cases. Moreover, both *Penning* and *Anderson* denounced "haphazard," "piecemeal" zoning decisions that were contrary to existing zoning plans, which is consistent with the "reasonable and arbitrary" test set forth in *Brae Burn* and other cases. The opinion went on to state:

> "We believe the holdings in *Brae Burn, Kropf*, and *Penning* can be summarized as follows. When a local governing body validly enacts a zoning ordinance, the courts must take a deferential role in reviewing claims that such decisions are unreasonable and arbitrary. That is why our Supreme Court has

> repeatedly held that such ordinances are clothed with a presumption of validity, and that it will only be the rare case that results in judicial intervention…. But, when a discrete zoning decision is made regarding a particular parcel of property—typically a decision involving an amendment or variance that results in allowing uses for specific land that are inconsistent with the overall plan as established by the ordinance—the courts will apply greater scrutiny. Those isolated or discrete decisions are more prone to arbitrariness because they are micro in nature, i.e., the decisions are based on the particular land and circumstance at issue in the request for amendment or variance. To the contrary, macro decisions made by the local body, such as the enactment of a new zoning ordinance, typically reflect a decision on how the city will be developed in the years to come, i.e., are made pursuant to an overall plan of action."

The Court of Appeals reversed the trial court's order, but remanded the case to the trial court to determine whether the purpose of the rezoning was to lower the market price of Carrollton's property in anticipation of the city making an offer to purchase it.

Lake Access/Road End

Higgins Lake Property Owners Association v. Gerrish Twp., No. 235418 (Mich.App., October 30, 2003) (unpublished).

Road ends designated on a plat as "dedicated to the use of the public" may be used for boating, swimming and fishing, but not for sunbathing, picnicking or the installation of private docks.

Higgins Lake, and the platted roads that terminate at the edge of the lake, have been the subject of numerous lawsuits. This case addressed substantively the same issues as were addressed in *Higgins Lake Property Owners Association v. Gerrish Twp,* 255 Mich.App 83; 662 NW2d 387 (2003), (see last year's case summary); namely, the range of permissible uses of the road ends as controlled by the subdivision plats that dedicated the streets and alleys "to the use of the public." Owners of back lots in the subdivisions, as well as members of the general public, have used the road ends for lounging, sunbathing, and picnicking, and have also moored boats and placed boat hoists at the road ends. Plaintiffs argued that these activities were beyond the scope of each plat dedication and sought to enjoin further use of the road ends for these purposes.

After the Court of Appeals spent considerable time, energy and ink addressing the procedural aspects of the five consolidated cases (with over 100 litigants), the Court focused its attention on the central issue (for our purposes) of the case: the scope of the plat dedication. Citing *Jacobs v. Lyon Township*, 199 Mich.App. 667, 502 N.W.2d 382 (1993) the Court set forth the standard that the "intent of the grantor" controls the scope of the dedication, and set about to glean the intent of the grantor from the evidence submitted at trial.

Court of Appealsthe .

One of the roads at issue was Michigan Central Park Boulevard, which runs adjacent to the lake. Plaintiffs claimed that there had never been a clear offer of dedication because the plat did not specify a road width. In the alternative, plaintiffs claimed that if there was sufficient offer of dedication the township did not accept the offer. The Court found that the description was sufficiently specific to constitute an offer of dedication, and that the dedication had been accepted by the township by virtue of the incorporation of the road into the county road system in 1940.

With regard to the scope of the dedication and the intent of the grantor, the Court reiterated the same conclusions it reached in the previous Higgins Lake cases (cited above):

> "Therefore, we affirm the trial court's findings of fact and hold that members of the public, which for purposes of this issue include back lot owners, have the right to use the surface water of Higgins Lake in a reasonable manner for activities such as swimming, boating, and fishing. But lounging, sunbathing, picnicking and installing boat hoists at the road ends subject to this appeal are prohibited as outside the scope of the dedications. One non-exclusive dock may be erected at each road end for public access to Higgins Lake. Having legally gained access to the water at

the road ends, members of the public may temporarily moor boats 'as an incident of the public's right of navigation'…but may not moor boats permanently or seasonally. Additionally, private docks are not permitted at the road ends."

Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)

Shepherd Montessori Center, Milan v. Ann Arbor Charter Twp., 259 Mich.App. 315, 675 N.W.2d 271 (2003).

The trial court erred in ruling there was no material question of fact as to whether the decision to deny a use variance to a religious school imposed a "substantial burden" on the exercise of religion.

This is the first case brought under RLUIPA in Michigan state courts. RLUIPA prohibits a governmental entity from imposing a land use regulation upon a person, or a religious institution, in a manner that "substantially burdens" the free exercise of religion, unless the regulation is (a) in furtherance of a compelling governmental interest, and (b) the least restrictive means of furthering that interest. It generally applies to land use regulations under which a government makes an "individualized assessment of the proposed use for the property involved." (for a more complete analysis of RLUIPA, see July 2001 *Planning & Zoning News*.)

This case involved a proposal for a Montessori school that wished to locate in Domino's Farms Office Park in Ann Arbor Township. The school was not a permitted use in the district under the township's zoning code. The school sought a use variance from the board of zoning appeals (BZA). The variance was denied. The school challenged the decision, and cited as critical the fact that the township had previously given a use variance to a non-religious school on the same premises. The township pointed out that the other use, in fact, started out as a school/day care for employees of the office park. The trial court dismissed the school's complaint, and the school appealed.

The Court of Appeals upheld the trial courts dismissal of procedural and substantive due process claims on the grounds that the township was exercising its lawful zoning authority. On the RLUIPA claim, however, the Court acknowledged that the act of deciding on a use variance constituted an "individualized assessment of the proposed use," and proceeded to examine caselaw from other jurisdictions on First Amendment "freedom of religion" and RLUIPA claims, relative to "substantial burden":

"The substantial burden must be based on a 'sincerely held' religious belief.….In *LyngNorthwest Indian Cemetery Protective Ass'n,* 485 U.S. 439, 450-451, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988), the Supreme Court indicated that for a governmental regulation to substantially burden religious activity, it must have a tendency to coerce individuals into acting contrary to their religious beliefs…. Conversely, a government regulation does not substantially burden religious activity when it only has an incidental effect that makes it more difficult to practice the religion. Thus, for a burden on religion to be substantial, the government regulation must compel action or inaction with respect to the sincerely held belief; mere inconvenience to the religious institution or adherent is insufficient….The difference between a 'substantial burden' on religious exercise and an 'inconvenience' on religious exercise has been discussed in federal court cases dealing with RLUIPA. The district courts have concluded that the regulations must have a 'chilling effect' on the exercise of religion or substantially burden religious exercise in order to be consistent with the Supreme Court's substantial burden test. For example, in *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency,* 218 F.Supp.2d 1203, 1226-1227 (C.D.Cal., 2002), the federal district court held that the denial of an application to build a church on its property constituted a substantial burden because '[p]reventing a church from building a worship site fundamentally inhibits its ability to practice its religion.'"

Concluding that the record was insufficiently developed at trial, the Court of Appeals remanded the case to the trial court to receive further evidence on the reasons for the township's denial and whether the denial imposed a substantial burden on religious exercise. The factors the Court considered missing from the record included "whether there are alternative locations in the area that would allow the school consistent with the zoning laws; the actual availability of alternative property, either by sale or

lease, in the area; the availability of property that would be suitable for a K-3 school; the proximity of the homes of parents who would send their children to the school; and the economic burdens of alternative locations."

MDEQ Rulemaking/Unlawful Delegation of Authority/Statutory Construction

Lake Isabella Development, Inc. v. Village of Lake Isabella, 259 Mich.App. 393, 675 N.W.2d 40 (2003).

Michigan Department of Environmental Quality (MDEQ) Rule 33, which required applicants wishing to construct a private sewage system to obtain a resolution from the local government agency agreeing to take over the system if the owner fails to properly maintain or operate it, was an unlawful delegation of discretionary power to municipalities contrary to statute.

Plaintiff sought to construct a private sewage disposal system for a development project in the village limits of the Village of Lake Isabella. The private system was necessary because the village did not have a public sewer system, and the lakefront land contained soils unsuitable for on-site septic systems. Plaintiff applied for MDEQ approval. Plaintiff submitted a detailed engineering plan and permit application to MDEQ, but MDEQ refused to review the plan or issue a permit until the Village of Lake Isabella provided a resolution as required by 1999 AC, R 299.2933(4) (MDEQ Rule 33) ensuring that the village agreed to take over the private wastewater disposal system in the event it was not properly operated or maintained. Plaintiff requested the necessary resolution from the village, but the village rejected plaintiff's request, pointing out again that the village did not have a public sewer system, the necessary funds to construct one, nor the desire to assume responsibility for any failed private systems. The village's decision not to provide the resolution effectively killed the project. Plaintiff brought suit.

The trial court concluded, and the Court of Appeals affirmed, that MDEQ Rule 33 was contrary to the legislative intent underlying the DEQ's enabling statute, and thus, invalid. The Court stated that the rule conferred on municipalities indirect veto power over the construction of sewer systems in contravention of the grant of exclusive jurisdiction to the DEQ over permits for sewer construction, and effectively constituted an unlawful delegation of discretionary power to municipalities. Furthermore, the rule imposed a new burden on municipalities that granted such resolutions by imposing operational mandates regarding sewer maintenance upon municipalities that were ill-adapted to comply with those mandates.

Constitutionality of Height Restrictions/Area Variance

Burman v. City of Birmingham, No. 241981 (Mich.App. November 25, 2003)(unpublished).

Height restrictions are virtually universally accepted as having a substantial relation to public health, safety, morals, and welfare and, therefore, not a violation of substantive due process.

Plaintiffs requested a 4 1/2-foot variance from the city's 30-foot height restriction, so they could build a 34.45-foot-tall house. At the public hearing before the Board of Zoning Appeals (BZA), plaintiffs' architect argued that the two adjacent houses were over thirty feet in height (they were built before the zoning ordinance was amended) and that plaintiffs' light and air would be blocked if they did not receive a variance. Plaintiffs' architect also argued that the proposed house had a French Tudor style, and the height was necessary to preserve the character of the neighborhood. The BZA voted to deny plaintiffs' request for a variance, finding that plaintiffs' need for the variance was self-created and plaintiffs had not shown an undue hardship or practical difficulty in building a house within the limits of the zoning ordinance. The BZA noted that strict compliance with the ordinance would not prevent plaintiffs from building an attractive house. Plaintiffs brought an action against the city, charging that the ordinance was invalid as a violation of substantive due process. The trial court granted summary disposition in favor of the city, and plaintiffs appealed.

In support of their argument, plaintiffs pointed to the Planning Board's recommendation to amend the zoning ordinance to impose a thirty-five-foot height limit, and the affidavit of one of the members of the Planning Board, stating that there was no reason for

the height restriction in the ordinance to be thirty feet, rather than thirty-five feet. However, there was some disagreement at the April 12, 2000, Planning Board meeting regarding what the height limit should be on single-family residential houses. The record showed that some residents at the Planning Board meeting supported the thirty-foot height restriction, arguing that it would preserve the character of the neighborhood. Notwithstanding these arguments, the Planning Board in a non-unanimous vote recommended amending the zoning ordinance to incorporate the thirty-five foot restriction. The City Commission considered the Planning Board's recommendation at a meeting at which it heard from the city planner and took comments from no less than forty-five people regarding the zoning ordinance amendment. After considering the arguments and comments, the City Commission decided to reject the Planning Board's recommendation and adopt an ordinance that included a thirty-foot height restriction.

The Court of Appeals determined that plaintiffs did not show that there was no room for a legitimate difference of opinion concerning the reasonableness of the thirty-foot height restriction. Noting that the City/Village Zoning Act provides that the legislative body of a city or village may regulate and limit the height and bulk of buildings, the Court observed that "the concept of building height restrictions is virtually universally accepted as bearing a substantial relation to public health, safety, morals and welfare." The Court of Appeals affirmed the trial court ruling.

Natural Resources and Environmental Protection Act (NREPA)/Right to Farm Act (RTFA)/ Preemption of Local Ordinance Regulating Hunting Preserves

Milan Twp. v. Jaworski, No. 240444 (Mich.App. December 4, 2003)(unpublished).

Township ordinance requiring a special use permit to operate a hunting preserve on agriculturally-zoned land is not preempted by NREPA, but is preempted by the RTFA.

Defendant bred, raised and sold pheasants and quail at a hunting preserve. Customers who purchased game birds from defendant had the option to either buy and take home live birds, or hunt the live birds at the preserve. The hunting preserve was licensed by the Department of Natural Resources (DNR). Under the township zoning ordinance defendant was required to seek a special use permit to operate the hunting preserve on its property. The property was zoned agricultural. Despite the township's rejection of defendant's application, defendant continued to operate the hunting preserve. The township filed a complaint for declaratory judgment and seeking injunctive relief against defendant. The township conceded that although neither hunting nor the raising or selling of game birds violates the ordinance, defendant's act of charging a fee to allow people to hunt rendered the preserve a "commercial recreation area" as defined in the ordinance. Under the ordinance a special use permit is required to operate a commercial recreation area in an agricultural district. Defendant alleged that the ordinance was preempted by NREPA and RTFA. The trial court enjoined defendants from selling the right to hunt game birds on their property, and the defendant appealed.

Defendant argued that because a DNR license is mandated by Part 417 of NREPA entitled "Private Shooting Preserves," NREPA provisions directly conflict with the ordinance, which purports to preclude operation of a hunting preserve even if it is licensed by the DNR. The Court of Appeals held the ordinance was not preempted by NREPA because there was no indication that the Legislature intended to regulate the *location* of commercial hunting preserves through its regulation of hunting. As such, NREPA does not directly conflict with the ordinance requirement of special approval for "commercial recreation areas" on agriculturally zoned property. NREPA does not completely occupy the field of zoning that the ordinance regulates. NREPA and the ordinance "only happen to intersect in circumstances like the one presented here."

The Court did conclude that the township ordinance was preempted by the RTFA. According to the Court, under the definitions set forth in RTFA defendant's property was a "farm" because it was used for breeding, raising and selling game birds for commercial purposes. The game birds raised on defendant's property were "farm products" because they were useful to human beings and produced by agriculture. The hunting of game birds on defendant's property constitutes a "farm operation" because it

involves the "harvesting of farm products." Deferring to the dictionary definition, the Court determined that the verb "harvest" is generally defined as "to gather; reap; to gather the crop from; to catch or take for use." The Court further reasoned that because "game birds" are a farm product addressed in the GAAMPs and "hunted chiefly for sport," it naturally followed that the commission contemplated hunting as a form of harvesting this farm product. In support of this conclusion, the Court looked at the Michigan Commission of Agriculture's recently adopted resolution recognizing "Game Bird Hunting Preserves as an agricultural activity and a value-added farm opportunity." Accordingly, the Court concluded that the hunting of game birds is a protected farm operation under RTFA.

Use of Parcel for "Funneling" Lake Access

Soupal, et al., v. Shady View, Inc., 469 Mich. 458, 672 N.W.2d 171 (2003).

Providing lake access by" funneling" non-riparians across a lakefront parcel zoned for single-family residential constitutes a multiple-family use in violation of local zoning.

Plaintiffs owned riparian properties adjacent to lot 139 of Woodlawn Subdivision on Higgins Lake. Lot 139 is zoned "Residential District 1" (R-1) according to the Gerrish Township Zoning Ordinance. Defendant, a nonprofit association of numerous families, owned lot 139. It was authorized to issue twenty shares of stock, nineteen of which were sold to individual shareholders who are owners of other non-riparian lots in the subdivision. Defendant bought lot 139 specifically to provide communal access to the lake for use by its nonriparian shareholders. Among the modifications to the property made by the defendant was the construction of a dock that was 160 feet long with twenty boat slips. A cabin on the lot, which had been used by prior titleholders as a single-family seasonal cottage, was converted to function as a community center for defendant's shareholders. The Roscommon Circuit Court entered judgment in favor of the neighbors. The Court of Appeals reversed the trial court in an unpublished opinion from February 2003, finding that the zoning ordinance did not prohibit the operation of marinas on property classified as R-1, that defendant's marina was not a commercial enterprise (which was prohibited in R-1), and that the dock was neither a nuisance per se nor a nuisance in fact., The neighbors appealed.

The Michigan Supreme Court characterized the question before it as "whether an association of multiple families may provide a communal access to Higgins Lake notwithstanding the local zoning ordinance that permits only single-family uses on the property owned by the association. If the proposed use is inconsistent with single-family use" the Court stated, "it is immaterial whether the property is being used for a 'commercial' purpose."

The Court concluded that defendant's use of the property was inconsistent with its single-family designation.

> "Even assuming that the Court of Appeals correctly ruled that defendant's marina is not *commercial,* the marina nevertheless is in violation of the zoning ordinance because of the prohibition in art IV, § 4.1 of the use of land 'for any purpose other than the types and uses permitted in the respective Districts....' The occupation of the lot by a multiple-family association and the operation of an oversized marina containing twenty boat slips are not permitted uses in an R-1 district. The use of the former cottage as a community building is not a permitted use under the ordinance. The ordinance provides that a 'Dwelling Unit' must be 'occupied exclusively as the home, residence or sleeping place of one (1) family....' Art III, § 3.1. It is clear that neither defendant nor its nineteen shareholders qualify as a 'family' as defined by the ordinance. Furthermore, operation of a twenty-boat-slip marina and a community house is not an '[a]ccessory use' that is 'related to [the] principal use' of the R-1 lot under § 6.1(b)3. .... It is clear from the testimony that the cabin on lot 139 was designed to be a single- family dwelling. The lot, with its seventy-seven feet of lake frontage, was intended to support that use. Operating the marina, irrespective of its commercial or noncommercial nature, is not related to the property's permitted use as a single-family dwelling."

Local Historic District Act (LHDA)

Bruley Trust v. City of Birmingham, 259 Mich.App. 619, 675 N.W.2d 910 (2003).

Under the LHDA, it is sufficient that a city appoint an historic district study committee by passing a resolution, rather than through an ordinance.

The city of Birmingham passed an ordinance designating plaintiff's property as an historic district under the LHDA (MCL 399.201). Plaintiff's lawsuit alleged, among other things, that the ordinance constituted a denial of due process, was a taking without just compensation, violated the right to equal protection, and amounted to a violation of substantive due process on its face. The Court of Appeals first addressed whether the claim was ripe (i.e., whether all administrative remedies were exhausted) for judicial review. The trial court granted summary disposition in favor of the city on the ripeness question, but the Court of Appeals concluded that plaintiffs were excused from obtaining a final decision at the administrative level because they brought facial challenges to the ordinance's constitutionality (A facial challenge is when the plaintiff does not take issue with any aspect of the *execution or enforcement of the ordinance*; that is, the ordinance "on its face" is unconstitutional), noting that "any exhaustion of the various administrative remedies available to her would have been futile because there is no sense in forcing a plaintiff to plod through the lengthy administrative process when only the courts have the authority to resolve the controlling constitutional issue." The Court remanded the case to the trial court for further proceedings on the constitutional issues. The Court found no merit in plaintiff's contention that she was entitled to summary disposition because the city failed to create the historic district study committee by way of an ordinance. While the LHDA requires an ordinance to establish an *historic district,* nothing in the plain language of MCL 399.214 requires an ordinance to establish an *historic district study committee.* The portion of the statute that requires the appointment of a historic district study committee does not indicate that the appointment need be made by way of an ordinance. The Court of Appeals granted summary disposition in favor of the city on this count.

Mineral Rights Lease

Rorke v. Savoy Energy, LP, 260 Mich.App. 251, 677 N.W.2d 45 (2003).

Holder of mineral rights lease retained the right to drill from plaintiffs' surface to a bottom hole under another surface owner's land, when the bottom hole was located within the subsurface land granted in the lease.

Plaintiffs owned the surface rights to a piece of property, while defendant owned the oil, gas, and mineral rights. Defendant reopened a capped oil well on plaintiffs' property and used it to drill underneath and beyond plaintiffs' land. Plaintiffs objected to the reopening of the well, claiming that defendant could not use plaintiffs' surface to drill to a bottom hole located under another surface owner's land. Significantly, the mineral rights lease was executed before the land was subdivided and sold to different surface owners, so while plaintiffs purchased a portion of the surface area affected by the lease, they did not purchase all of it. Although the bottom hole of defendant's well was not located under plaintiffs' surface land, it *was* located within the subsurface land granted to defendant in the mineral rights lease. The circuit court granted summary disposition to defendant, reasoning that (1) defendant acted properly and in accordance with the lease granting it subsurface rights and (2) plaintiffs failed to object to defendant's actions at a particular administrative hearing concerning the scope of the drilling operation and therefore could not bring a circuit court claim. On appeal, plaintiffs argued that the circuit court erred in concluding that the lease permitted defendant to drill from plaintiffs' surface to a bottom hole located under another surface owner's land.

The Court of Appeals found "no authority for the proposition that when the surface of land covered by an oil and gas lease is later subdivided, that subdivision somehow diminishes the lessee's right to drill. The lease in the instant case states that the lessee can extract oil 'from any well or mine on the leased premises,' and defendant simply did so." The Court found plaintiff's argument "illogical:

> "If, for example, a surface owner subdivided a surface estate into fifty small parcels, and the lessee entitled to the oil and gas rights

was not permitted to use a well bore to drill anywhere other than straight down, the lessee would be forced to construct fifty wells to explore the subsurface. In the face of Michigan's strong policy against waste, see MCL 324.61502, MCL 324.61504, and MCL 324.61505, which the Legislature has defined as, inter alia, drilling unnecessary wells, see MCL 324.61501(q)(ii)(D), plaintiffs' proposition is not tenable….The terms of the lease were clear, and therefore the circuit court properly ruled, as a matter of law, that the lease permitted defendant's actions."

Natural Resources and Environmental Protection Act (NREPA)/Preemption of Local Ordinance Regulating Wastewater Treatment Plant Discharge

City of Brighton v. Township of Hamburg, 260 Mich.App. 345, 677 N.W.2d 349 (2004).

Part 31 of NREPA, regulating pollution discharge into surface waters, preempts local ordinances regulating the same subject matter.

The city of Brighton sought to expand its wastewater treatment plant located in the township. After obtaining a permit for the expansion from the DEQ, Brighton filed suit against the township because the township refused to accept Brighton's site plan application. In anticipation of Brighton's action the township had instituted a moratorium on wastewater treatment plants. The township then adopted an ordinance setting stricter limits on the discharge of certain nutrients than the DEQ permit. Brighton claimed state law preempted the township's discharge limits. The trial court agreed and issued a summary disposition in favor of Brighton. The township appealed.

Concluding the effective regulation of water pollution requires statewide treatment, the Court of Appeals held that Part 31 of NREPA preempted the township's ordinance. The court found preemption based on the *Llewellyn* test because the *comprehensive scheme* set forth in Part 31 of NREPA clearly occupies the field of regulation the municipality seeks to enter and the regulated *subject matter* demands exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest. The effective regulation of water pollution requires statewide treatment and the Legislature enacted a broad, detailed, and multi-faceted scheme to manage "point source pollution control." The Court stated that "exclusive statewide regulation is vital to achieve the uniformity and consistency necessary to effectuate our state's public policy of maximum, effective protection of our state's water resources." It noted that the DEQ is the only agency authorized to issue discharge permits and to bring criminal and civil charges for violations. The court agreed with intervenor-DEQ that "the state's ability to control water pollution statewide would be substantially undermined by a balkanized, patchwork of inconsistent local regulations. Such a regulatory scheme would create a crazy quilt patchwork scheme of regulation under which certain dischargers could be found to violate certain discharge limits enacted by certain local units of government and not violating other local units of government's discharge limits."

Subdivision Plats/Private Dedications after January 1, 1968

Martin v. Beldean, ___Mich___, 677 N.W.2d 312 (2004).

Private dedications in plats filed after the January 1, 1968 effective date of revisions in the Land Division Act are expressly recognized.

In November 1969, developers of a subdivision in Oxford Township in Oakland County recorded the Tan Lake Shores Subdivision Plat. The plat divided the subdivision into 21 lots and three outlots. In a paragraph entitled "Dedication" the plat states in part that "Outlot A is reserved for the use of the lot owners...." Plaintiffs and their predecessors in interest purchased lot 21 and the northerly part of adjoining outlot A in tandem pursuant to various deeds. When they applied for a permit to build a home on lot 21 and the part of outlot A mentioned in their deed, they learned that the subdivision plat had dedicated outlot A for the use of the lot owners. Plaintiffs filed quiet title action against the other lot owners to void plat language reserving outlot A for lot owners. Defendant lot owners responded by arguing that the reservation of outlot A constituted a valid statutory dedication of the lot for the use of the

other lot owners in the subdivision pursuant to MCL 560.253(1) of the Land Division Act (LDA) (previously known as the Subdivision Control Act). The Court of Appeals ruled dedications of land may only be made to a governmental body for public purposes and the body must accept the dedication. Plaintiffs appealed to the Michigan Supreme Court.
The Supreme Court concluded that the Court of Appeals erred in failing to observe the 1968 changes in the language of the Land Division Act, which stated:

> "When a plat is certified, signed, acknowledged and recorded as prescribed in this act, *every dedication, gift or grant to the public or any person, society or corporation* marked or noted as such on the plat shall be deemed sufficient conveyance to vest the fee simple of all parcels of land so marked and noted…."

The Supreme Court determined that this language allows dedications, gifts, and grants to the public, as well as dedications, gifts, and grants to any person, society, or corporation when the dedication, gift, or grant is so marked and noted in the plat. Because a person is always private and a society or corporation may be, the statute clearly authorizes private dedications.

The Court further ruled that plaintiffs were required to file their claims under the LDA, which not only outlines the specific procedures to be followed and what must be pleaded, but also requires that an extensive group of parties be served, including everyone owning property located within three hundred feet of the lands described in the petition, the municipality, the State Treasurer, the drain commissioner, the county road commissioners, affected public utilities, and, in certain instances, the directors of the Department of Transportation and the Department of Natural Resources. Allowing this action to proceed as one to quiet title is contrary to the statutes, and reduces the certainty associated with plats.

Subdivision Plats/Private Dedications Prior to January 1, 1968

Little v. Hirschman, ___Mich___, 677 N.W.2d 319 (2004).

Private dedications in plat filed prior to January 1, 1968 conveyed "at least an irrevocable easement" in land.

In a separate case issued concurrently with *Martin v. Beldean*, the Michigan Supreme Court ruled that private dedications made in the plat in question conveyed "at least an irrevocable easement" in the property in question. This case involved two parks on Mullett Lake and the Cheboygan River dedicated in a 1913 plat "to the owners of the several lots" within the plat. The owner of two waterfront lots adjacent to one park filed suit to block public access of the alley between the lots to travel to and from the park.

The Supreme Court began by observing:

> "From statehood until 1925 our various plat acts authorized public dedications, but did not specifically refer to private dedications. Yet, during this era, without exception that has been brought to our attention or discovered by our research, plats with dedications to private individuals or groups were reviewed and approved by the Auditors General of this state, and relied upon by purchasers and their successors."

The Court reviewed a long line of cases assessing the relative rights of owners of platted lots, and the interpretation of private dedications found in those plats. The Court determined that the first statutory recognition of private dedications could be found in the 1925 plat act, but further said the 1925 plat act did not expressly grant legitimacy to private dedications, but by its language presupposed that such dedications were already legal.

> "In both the era of statutory silence on private dedications (1835-1924) and the era of implicit statutory recognition of private dedications (1925-1966), a dedication of land for private use in a recorded plat gave owners of the lots an irrevocable right to use such privately dedicated land. We agree \ith such holdings."

Based on the language found in the plat in question, the Court found that defendants are prevented from claiming exclusive rights in the parks, and that "dedications of land for private use in plats before

1967 PA 288 took effect convey at least an irrevocable easement in the dedicated land."

Restrictive Covenants/Planned Unit Development Review

Benz v. Pittsfield Charter Twp., No. 243133 (Mich.App., January 27, 2004)(unpublished).

A restrictive covenant placed on plaintiffs' land by the developer, plaintiffs' predecessor in title, is valid and enforceable and does not run contrary to the Township Zoning Act (TZA).

The developer placed a restrictive covenant in the deed to plaintiff that restricted the use of the parcel to residential use and a limited density of homes. Plaintiff asserted that the developer put the restrictive covenant into its deed to plaintiffs as a condition to defendant's approval of the developer's planned unit development for a shopping center on another parcel of land owned by the developer. Plaintiffs argued that the restrictive covenant represents an illegal and unenforceable condition because the TZA does not specifically allow restrictive covenants, and their use as zoning tools improperly circumvents procedural protections.

The Court of Appeals concluded that the TZA specifically allows a township to place reasonable conditions on its acceptance of a planned unit development (PUD). While the statute and case law have placed some limitations on a township's authority to impose such conditions, the restrictive covenant's beneficial impact on the density around the PUD, the fact that the land was owned by the PUD's developer during the PUD's review, and the condition's overall reasonableness keep the condition within those limitations. In response to plaintiff's assertion that imposing a restriction on land outside a proposed development as a condition of approval of the development is improper. The Court responded by observing that a township naturally has greater leeway to impose a condition than implement a bald restriction, because the developer ultimately decides whether it will accept the condition or forego its plans for development. Nothing in the TZA restricts the vast conditioning authority that the Legislature granted townships, and an otherwise reasonable and related condition is not rendered invalid simply because it burdens property outside the project's bounds.

Constitutionality of Rezoning/Need for Administrative Review/*Paragon Properties v. Novi*

1st Rural Housing Partnership, LLP v. City of Howell, No. 241192 (Mich.App., February 5, 2004)(unpublished).

Plaintiff, having sought and been denied alternate relief in the form of a variance, need not appeal that decision of the ZBA to the circuit court before (or contemporaneously with) an original action in circuit court challenging the zoning ordinance itself.

In 1998, plaintiff was denied a rezoning to B-1, Local Business from RM, Residential Multifamily. A second rezoning request in 2000 was also denied, after which a use variance was pursued with the Zoning Board of Appeals. The variance was denied. Thereafter, plaintiff filed this case with the trial court seeking declaratory relief alleging that defendant's zoning ordinance, as applied, constituted an unconstitutional taking and inverse condemnation of plaintiff's property. The trial court dismissed the case, concluded that it lacked jurisdiction over this case because plaintiff filed an original action alleging a confiscatory taking rather than by appealing from the adverse decision of the ZBA on the variance request. Plaintiff appealed to the Court of Appeals.

The Court of Appeals resolved the matter in favor of the plaintiff, reasoning:

> "In *Paragon Properties Co v. Novi,* 452 Mich. 568, 550 NW2d 772 (1996), the Supreme Court held that a property owner who alleges that a zoning ordinance is confiscatory on its face may immediately file an original action in the circuit court because the finality doctrine does not apply. But where a property owner, as here, is challenging the zoning ordinance as being confiscatory as applied, the finality doctrine does apply and there must be a final decision from the zoning authority before the matter may move into the courts. The Court in *Paragon* interpreted this to include the necessity for the property owner to seek

alternate relief, such as a variance, before the matter is ripe for judicial review.

The question which arises then is whether plaintiff, having sought and been denied alternate relief in the form of a variance, must appeal that decision of the ZBA to the circuit court before (or contemporaneously with) an original action in circuit court challenging the zoning ordinance itself. Plaintiff in essence argues that, having completed the process within the city to no avail, it is free to abandon the pursuit of a variance and proceed directly to circuit court with its original action challenging the zoning ordinance itself. Defendant, and the trial court, would have us conclude that plaintiff must continue to pursue the variance issue through the circuit appeals process.

We believe that this issue is controlled by our decision in *Sun Communities v. Leroy Twp,* 241 Mich.App 665, 617 NW2d 42 (2000). In *Sun Communities,* the plaintiff sought the rezoning of its property, which request was denied. The plaintiff then filed an original action in circuit court, alleging, inter alia, a taking of private property without just compensation. This Court concluded that there was no need to pursue an appeal from an administrative decision of the ZBA when the plaintiff is challenging the legislative decision regarding rezoning.

Here, plaintiff's lawsuit does not involve a challenge to the administrative activities of a municipal body acting in the capacity of a zoning board of appeals. Instead, it involves numerous constitutional challenges to the legislative actions of the township board in applying the AG zoning to plaintiff's property. *There is no authority that requires a party to pursue an appeal to challenge the constitutionality of a legislative act of rezoning.* Indeed, neither a city council's decision to rezone land nor a zoning board of appeal's decision to grant a variance is relevant to the constitutionality or unconstitutionality of an ordinance's provisions."

The Court of Appeals determined that this case was controlled by the emphasized language above, and that plaintiff had the option to (1) pursue the variance issue by appealing the adverse decision to the circuit court, (2) abandon the variance issue and merely bring an original action in the circuit court challenging the zoning ordinance itself, or (3) both.

Duress as a Matter of Law/Supervisor Speaking at BZA Meeting

Department of Transportation v. Township of Kochville, ___Mich.App.___, ___N.W.2d___ (2004)

*Township supervisor's appearances at the defendant-Board of Zoning Appeals' meeting to speak against plaintiff's project did not constitute an imposition of duress as a matter of law***.**

Plaintiff undertook a road-widening project to improve M-84, which runs through Kochville Township. The township denied 10 zoning variance requests related to the project. The township supervisor appeared at the meeting and spoke against granting the variances. Plaintiff appealed all 10 denials to the trial court and moved for peremptory reversal claiming the supervisor's appearances in his capacity as the township supervisor amounted to an imposition of duress as a matter of law because the township board, of which the supervisor is a member, has powers of appointment over defendant. The trial court peremptorily reversed the defendant's denial of the variance requests.

The Court of Appeals concluded that the trial court improperly granted plaintiff's motion for peremptory reversal. In reaching this conclusion the Court distinguished the present case from two previous Court of Appeals cases with similar facts. In *Barkey v. Nick,* 11 Mich.App. 381, 161 N.W.2d 445 (1968), and *Abrahamson v. Wendell (On Rehearing),* 76 Mich.App. 278, 256 N.W.2d 613 (1977) the Court of Appeals found duress as a matter of law, but those cases were distinguishable from the present case because the officials involved in those cases had financial interests in the results of the variances. In the present case, however, the supervisor's only interest was the public interest. "Accordingly, he did not serve an interest other than that of the voters,

taxpayers, members of the general public, justice, and due process."

Wetland Protection Act/Preemption of Local Wetlands Ordinance

Forsberg Family, LLC v. Charter Twp. of Meridian, No. 245413 (Mich.App. February 24, 2004)(unpublished).

Local zoning ordinance providing for buffers around wetlands was not preempted by the state statutory scheme of wetland protection.

Plaintiff owned about nine acres of undeveloped land in Meridian Township that included state-regulated wetland. Plaintiff began plans to develop the property into an office park. A small portion of the wetland area was needed for the construction of a road and a parking lot. Accordingly, plaintiff obtained a permit from MDEQ to fill a total area of 0.149 acres in five different areas in the wetland that would allow plaintiff to construct the road and parking lot. The township zoning ordinance requires structures and graded surfaces on land adjacent to wetlands be set back no less than twenty feet from the edge of the wetland, and that a protective vegetative buffer be maintained on this twenty-foot strip. Plaintiff applied for zoning variances from the township to allow it to construct the parking lot and road without having to provide a twenty-foot setback from the edge of the wetland at the new landfills. The township denied the variances on the grounds that any special circumstances in this case were self-imposed, that no practical difficulties would result from denying the variances because the development plans could be changed, and a variance would adversely affect adjacent land.

The Court of Appeals ruled that the trial court properly granted the township's motion for summary disposition. The thrust of plaintiff's argument was the ordinance poses "a blanket ban on all development near the wetland." The court disagreed. While the unique facts and circumstances in this case indicate the zoning ordinance *as applied to plaintiff's property* may have prohibited its development, this was not what plaintiff raised as a claim below. Further, the Wetland Protection Act expressly grants local units of government the power to regulate wetlands within their boundaries as long as the regulation complies with the Act. Nothing in the Act prohibited a local unit of government from imposing a 20-foot setback area from the edge of the wetland for natural vegetation. The Court concluded that the zoning ordinance did not preclude what the statute permits, and the ordinance did not purport to regulate the wetland itself.

Procedural Due Process

ACC Industries, Inc. v. Mundy Charter Township, No. 242392 (Mich.App., February 24, 2004)(unpublished).

Plaintiff does not have a "property interest" in a rezoning decision, sufficient to trigger procedural due process protections, when it had no justifiable expectation that the decision would be approved.

Plaintiff's property was zoned RA, a residential low-density zone. In late 1994 plaintiff first requested a zoning change to M3, a classification permitting construction of a manufactured housing community. Defendant township voted in November 1994 to deny plaintiff's first application for rezoning, without provided plaintiff with a copy of the township master plan. Plaintiff contended that its representatives requested a copy of the master plan before there was any vote on the first rezoning application, and further requested that no decision be made regarding rezoning until a copy of the master plan was provided for its review. Plaintiff maintained that despite this request to adjourn, defendant township board members proceeded to vote on the rezoning proposal without providing the master plan to plaintiff. Plaintiff stated that it was not provided with a copy of the master plan until sometime after the November 1994 meeting and thus was required to reapply and pay a second fee in order to present a second application, which was presented and denied in May 1995. Plaintiff argued there was a genuine issue of material fact regarding whether there was an effective denial of its opportunity to be heard (procedural due process violation) when it presented the first rezoning request.

The Court of Appeals held that summary disposition in favor of the township was proper:

> "Plaintiff had no justifiable expectation that its plan would be approved because Mundy Township had discretion to deny the rezoning

request. Moreover, even if plaintiff possessed a sufficient property interest to support a procedural due process claim, plaintiff cannot demonstrate that it was denied the process due. Plaintiff does not complain that it was not given notice or an opportunity to be heard. Rather, plaintiff complains that defendant failed to adjourn a hearing that was established at plaintiff's request and that it was not provided with information it deemed necessary in order to present its case during the hearing. We know of no authority, and plaintiff cites none, recognizing a procedural due process claim based on the failure to adjourn a rezoning hearing that was initially requested by the applicant at the time of his or her choosing and where the applicant's attorney wrote in advance of the meeting to withdraw the application. In any event, even assuming the process regarding the first application was flawed, the trial court correctly held that any alleged deficiency was cured by the fact that plaintiff subsequently obtained the master plan and thereafter was provided and accepted the opportunity to make a presentation regarding its proposal to both the planning commission and the township board."

Contract Zoning/City Village Zoning Act

DWC Diversified, Inc. v. Village of Rosebush, No. 244999 (Mich.App., March 11, 2004)(unpublished).

City-Village Zoning Act does not authorize the imposition of conditions on rezoning requests.

The village refused to rezone plaintiffs' property unless plaintiffs first put a fence around it. Plaintiffs claimed that this constituted "unlawful conditional zoning." The village countered by arguing that MCL 125.584c permits the imposition of conditions on rezoning requests. The trial court sided with the village. The Court of Appeals reversed.

The Court of Appeals determined that MCL 125.584c(2) allows the imposition of "[r]easonable conditions" only in "conjunction with the approval of a special land use, planned unit development, or other land uses or activities permitted by discretionary decision." Plaintiffs correctly argued this statute does not apply to rezoning requests. The distinction between the discretionary decisions associated with special uses and the legislative actions associated with zoning (or rezoning) has long been recognized in Michigan. Rezoning involves the amendment of zoning ordinances, and is a legislative act. The approval of special uses, with or without associated conditions, is an administrative act. Section 584c(2), which allows the imposition of discretionary conditions, applies only to administrative approvals of special uses within a zone, not to the legislative act of zoning or rezoning, which requires amendment of a zoning ordinance, an act committed solely to the legislative body. Reversed and remanded.

Public Opposition to Zoning Request

K.M. Young Corp. v. Charter Twp. of Ann Arbor, No. 242938 (Mich.App., March 16, 2004)(unpublished).

Public opposition to zoning issues is a relevant and proper consideration for a zoning authority, particularly on the issue of whether a proposed use is "harmonious" with existing land uses.

Plaintiff sought to construct and operate a 250-student school on a 7.78 acre parcel of land in the township. The land was zoned for suburban residential use; however, it was not disputed that primary schools were permissible in such districts as a "conditional use." The township board's denial of plaintiff's application stemmed, in essence, from one main concern—the size of the proposed project in relation to both the size of the parcel on which it would be located and the existing and future uses of the surrounding lands. Evidence was submitted that the proposed use would be "disturbing to existing and future neighboring uses" There was substantial opposition to the proposed school from the neighboring residents. Numerous letters as well as a petition containing the signatures of approximately fifty neighboring property owners opposing the proposed school were presented to the board. Many of these owners indicated a desire to see the parcel preserved for residential use and expressed concern over the increase in traffic congestion associated with the proposed school.

The Court of Appeals reversed the trial court, and upheld the township's denial of the conditional use permit. After restating the standard of review the courts are to apply to local zoning decisions, the Court addressed the issue of the proper consideration a zoning authority is to give to neighborhood opposition, stating that "public opposition to zoning issues is a relevant and proper consideration for a zoning authority." The Court cited *A & B Enterprises v. Madison Twp,* 197 Mich.App 160, 494 NW2d 761 (1992) for the proposition that the public notice and hearing requirement of the Township Rural Zoning Act would be defeated if a township board could not consider public opposition to a proposed rezoning classification, and *Davenport v. City of Grosse Point Farms Bd of Zoning Appeals,* 210 Mich.App 400, 534 NW2d 143 (1995) for the proposition that neighbor opposition to proposed zoning is relevant to the issue whether the project proposed is "harmonious" with existing land use.

Detachment Elections

Township of Casco, et. al., v. Secretary of State, et. al., ___Mich.App.___, ___N.W.2d___(March 25, 2004).

The Home Rule Cities Act (HRCA) does not permit a single election for multiple detachments of land involving more than two governmental entities.

Defendants Walter and Patricia Winkle petitioned the State Boundary Commission to annex land they owned just outside the boundary of the City of Richmond into the City. Some of the land was in Casco Township and some in Columbus Township. Because fewer than one hundred persons lived on the land, no referendum on annexation was authorized, and the Boundary Commission approved the annexation without a popular vote. The Winkles wanted the annexation because they hoped to develop the land commercially, which could not be done without the sewer and water lines that Richmond offered. The townships challenged the annexation in court after first entering an agreement to transfer the land to another township instead of to Richmond. The State Boundary Commission, the trial court, and the Court of Appeals in a previous case (see *Casco Township v. State Boundary Commission,* 243 Mich.App 392, 622 NW2d 332 (2000)) all found that the transfer agreement was a "sham," and allowed the annexation by Richmond to go forward. The individual plaintiffs, among others, then signed a petition to detach the land from Richmond and return it to Columbus and Casco Townships. The petition called for a single election in which votes from Richmond and the two townships would be totaled, and an overall majority would decide the question. Although Casco and Columbus Townships are in St. Clair County, Richmond is partly in St. Clair and partly in Macomb County. Because Richmond straddles the county line, the detachment election petition was sent to the Secretary of State to determine whether such a vote was authorized by statute. The Secretary of State requested legal advice from the Attorney General. In an informal opinion, the Attorney General advised that despite the absence of controlling case law, the petition's request for a single vote on multiple detachments was not authorized by statute. The Secretary of State agreed with this assessment and informed plaintiffs that the vote could not be scheduled.

The Court of Appeals concluded that the petitions contained "two separate questions": (1) whether to detach land from Richmond into Casco Township, and (2) whether to detach land from Richmond into Columbus Township. "In simple terms, it is clearly unfair that citizens of one township be allowed to vote on issues that affect another township. Indeed, the townships' combined voting strength could be used to overwhelm the city's voting strength. Such an outcome conflicts with the Michigan constitutional mandate that '[a]ll political power is inherent in the people. Government is instituted for their *equal* benefit, security and protection.'" The Court therefore concluded that the HRCA does not unambiguously endorse a single election for multiple detachments of land involving more than two governmental entities.

Land Division Act/Condominium Act/Preemption of Local Ordinance

Conlin v. Scio Township, No. 243886 (Mich.App. April 22, 2004)(unpublished).

Because it expressly allows municipalities to impose stricter requirements, the Land Division Act does not preempt the field of land subdivisions.

Plaintiffs sought approval to develop a 136-acre tract of land in the township for residential purposes. The land was zoned A-1, General Agricultural. Section 4.02 of the township's zoning ordinance allows single-family dwellings as a permitted use in the A-1 district, subject to certain density restrictions prescribed in § 402.B.1, which, according to plaintiffs, would allow one home for each 7.5 acres. Alternatively, § 5.30.B of the zoning ordinance allows Rural Open Space Developments in the A-1 district as a conditional use, also subject to certain density restrictions, prescribed in § 5.30.D, which, according to plaintiffs, would allow one home for each 5.2 acres. Plaintiffs claimed that the township's zoning ordinances, particularly the density restrictions, were contrary to the intent of the LDA, and effectively result in condominiums being prohibited in the A-1 district in violation of the Condominium Act. Thus, both the LDA and the Condominium Act preempted the township's zoning ordinance to the extent that the ordinance seeks to impose additional restrictions on the platting of land or the development of condominiums.

In response to plaintiffs' argument that, because the township's ordinance limits land divisions in the A-1 district to those not requiring a plat, it does not "carry out the provisions of th[e] [land division] act," the Court of Appeals concluded that the LDA does not preempt the field of land subdivisions because it expressly allows municipalities to impose stricter requirements. While the act specifies those divisions that must be platted, it does not require that platted subdivisions be permitted in all districts. Additionally, the Court found support in the fact that the Township Zoning Act enables a township to impose density restrictions in each zoning district.

The Court further concluded that, while condominiums may not be prohibited by a municipality, the Condominium Act clearly authorizes a municipality to *regulate* condominiums. The Court cited the language in Section 141 of the Condominium Act, which provides: "(1) A condominium project shall comply with applicable local law, ordinances, and regulations. Except as provided in subsection (2), a proposed or existing condominium project shall not be prohibited nor treated differently by any law, regulation, or ordinance of any local unit of government, which would apply to that project or development under a different form of ownership."

ATTORNEY GENERAL OPINIONS

Open Space Amendments to Township Zoning/ Right of Referendum

AGO 7143 (October 2003).

In 2001, the Legislature added a requirement to the Township Zoning Act (TZA) requiring each non-exempt township with a zoning ordinance to include within its ordinance provisions for the preservation of open space. The Attorney General was asked whether such an ordinance amendment was subject to the right of referendum, since the statute mandates the new provisions. The Attorney General concluded that MCL 125.283 (the referendum statute of the TZA) would apply, since there are no exceptions stated in the statute. As to the effective date of the amendment, should a referendum petition be filed, he concluded that if petitions are filed with a township clerk within 30 days after publication of the open space amendment, the ordinance does not take effect until the township clerk determines that the petitions are inadequate or until the registered electors of the township approve the open space preservation ordinance by majority vote at a referendum election.

The Attorney General also addressed whether the township would be required to adopt a second or alternative amendment if the first were rejected by a vote of the people. He concluded that the township board may, but is not required, to adopt another open space preservation ordinance. The subsequent ordinance also would be subject to the referendum petition and election provisions of section 12 of the Township Zoning Act.

Municipalities Not Subject to Land Division Act

AGO 7145 (December 2003).

The Attorney General was asked whether the Land Division Act applies to municipalities when they sell land that they own. Confirming that an earlier opinion (AGO 5391) regarding the Subdivision Control Act applies equally to the LDA, the Attorney General concluded that a municipality is *not* subject to the platting requirements of the LDA. In reaching this conclusion, he determined that the term "proprietors," as used in the Act, does not encompass municipalities. By its own definitions, then, the LDA

applies to proprietors, not municipalities. He found support for this interpretation in the fact that urban renewal plats made by municipalities were specifically subjected to platting requirements, saying that there would be no need to specifically include urban renewal plats if municipal platting were generally subject to the LDA. The Attorney General distinguished previous court cases and AG Opinions that have applied the LDA to building authorities and airport authorities because both were "corporations" included, by definition, within the definition of "proprietor" in the LDA.

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