



Township Law *E-Letter*

TOWNSHIP ZONING AND LAND USE UPDATE

*Although land development across the state has slowed down to a virtual crawl over the last few years, zoning disputes continue to occur with surprising frequency. While past zoning cases often involved high-stakes battles over large projects, most of the disputes today concern zoning ordinance enforcement and interpretation. In addition, there are many disputes surrounding existing nonconforming uses, and how to control such problems as unsightly signs, junkyards and dangerous buildings. This **E-Letter** brings you up to date on Michigan land use law developments over the last several months.*

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Adult Uses

Zoning ordinance provisions that regulate “adult uses,” such as topless bars, sometimes encounter court challenges under the 1st Amendment, claiming that the ordinance interferes with “free speech” rights. Although these can sometimes be difficult cases, courts view the regulation of adult uses under a more lenient standard than other free speech cases, since: “Democracies need political debate more than they do topless bars in order to function.”

Regulation of adult uses is usually successful when it is directed against the secondary effects of such uses, such as crime, blight and property devaluation. The best techniques for regulation of adult uses are to (1) concentrate adult uses in a particular area within the township, or (2) disperse adult uses throughout the township by requiring that they be located a minimum distance from other adult uses, as well as a minimum distance from schools and churches, or (3) prohibiting adult uses in certain areas of the township.

The principal issue in adult use cases is whether the ordinance allows a reasonable opportunity to open and operate an adult business within the township. This issue often turns on whether the ordinance allows a sufficient number of places in the township where an adult use can be lawfully located. This is a factual issue in

every case, and depends on the particular local circumstances.

There are no set formulas or percentages. If the demand for adult uses is low, then a small number of permitted locations will be legally sufficient. To defend its ordinance, the township should document all the locations that are permitted for adult uses, as well as the feasibility of those locations for adult uses. The township should also evaluate its own land use applications and those of other local units in the area to determine the demand for adult uses in the area. As long as the township maintains a number of feasible locations that is in excess of the reasonably anticipated demand, its ordinance will be sufficient for 1st Amendment purposes. *Big Dipper Entertainment v Warren*, US Court of Appeals 6th Circuit (April 13, 2011).

Exclusionary Zoning

MCL 125.3207 provides that a township cannot totally exclude lawful uses through its zoning ordinance: “A zoning ordinance or zoning decision shall not have the effect of **totally prohibiting the establishment of a land use** within a local unit of government **in the presence of a demonstrated need for that land use within** either that local unit of government or **the surrounding area** within the state, **unless a location within the lo-**

cal unit of government does not exist where the use may be appropriately located or the use is unlawful” (emphasis added).

Based on this statute, when a land owner sues, claiming that the ordinance is “exclusionary,” there are three issues involved: (1) whether the ordinance totally excludes the land use; (2) whether there is a demonstrated need for that land use; and (3) whether there is no place in the township where such a use would be appropriate. The land owner has the burden of establishing the first two issues; and if the land owner does so, then the township must demonstrate the third issue to avoid an exclusionary zoning finding.

Michigan courts strictly require that there be a “total” exclusion of the use in question, and if any practical provision for that kind of use has been made, the exclusion is not “total.” In some townships, a large portion of the township may have been annexed or incorporated into a city or village. Under these circumstances, the court will inquire whether the use in question is allowed in the city or village “within close geographical proximity” to the township. If so, the court may find that the use has not been “totally excluded.”

The same analysis applies to the issue whether there is a demonstrated need for the proposed use. If there are other such uses in nearby communities that meet the public’s need for the specific type of use, then that can rebut the land owner’s showing of a need for the use in the township. Also, the “need” that is relevant is the public’s need for more uses of that type, not the private need of any business to open a new location for such a use. *DF Land Development v Ann Arbor Charter Township*, Michigan Court of Appeals (July 13, 2010).

Sign Ordinances

There are significant advantages to the regulation of signs through separate sign ordinances,

rather than through zoning ordinances. By statute, zoning ordinances are required to allow existing nonconforming uses to continue, as long as they are not enlarged, destroyed or abandoned. As a result, zoning ordinances are not as useful in dealing with signs that are already established, and such signs tend to continue indefinitely, regardless of the concerns they may present.

Separate sign ordinances adopted under the “police power” to regulate for the public health, safety and general welfare are not so limited in dealing with existing nonconforming signs. Unlike a zoning ordinance, a separate sign ordinance can contain provisions to require the elimination of signs over a period of time. *Albion v CLK Properties, LLC*, Michigan Court of Appeals (July 14, 2011).

Even if your township uses its zoning ordinance to regulate signs, there are some measures you can take to enhance the controls over existing nonconforming signs. For example, you can impose a requirement that no nonconforming sign may be repaired, reinforced, altered, improved, or modernized if the cost of such work would exceed 30% of the sign’s replacement cost as determined by the township. You are also not required to permit the improvement or modernization of a sign just because it would make the sign less nonconforming, if the result would still be a nonconforming sign. *Blair Township v Lamar OCI North Corp*, Michigan Court of Appeals (October 27, 2011).

Sign ordinances are sometimes challenged based on 1st Amendment freedom of speech principles. Such challenges can present difficult issues when political signs are involved. But for ordinary commercial signs, courts reject free speech challenges when (1) the ordinance requirements are content-neutral; (2) the ordinance is designed to address traffic safety or aesthetic concerns; (3) the ordinance reasonably regulates the size, physical placement, illumination and other design elements of signs; and (4) the ordinance leaves open ample channels of communication to allow signs

within allowable size, design and location limits. It is also permissible to impose different sign requirements in different use districts, with larger, more numerous and more intrusive signs being permitted in heavily commercial areas, but requiring smaller, fewer and more understated signs in less developed areas.

One circumstance to be careful about in your sign ordinance is when you specify certain exempt signs. Sometimes, the list of exempt signs might indicate a preference for certain types or messages, which is arguably not content-neutral. If you make exceptions for certain signs, make sure that the exceptions are limited to the places where messages may be displayed, the exceptions have no relationship to the message being conveyed, and the exceptions are unrelated to the content of the sign's message. *Sackllah Investments, LLC, v Northville Charter Township*, Michigan Court of Appeals (August 9, 2011).

Junkyards

Junk and salvage yards are another class of uses that are often difficult to regulate with zoning ordinances. Many of these uses have been established in townships for many years, often prior to the adoption of the zoning ordinance. As long as they are not abandoned or expanded, there is little that a township can do under a zoning ordinance to control the operations of existing nonconforming junkyards, because zoning regulations do not apply to such uses.

One option to control existing junkyards is to adopt separate junkyard or nuisances ordinances under the "police power" to regulate for the public health, safety and general welfare. Nonconforming uses are not exempt from regulation under police power ordinances. It is possible in such ordinances to impose licensing requirements and conditions for renewing licenses, prohibit and regulate certain activities based on public health and safety concerns,

and require screening or fencing, among other public health and safety requirements. Unlike zoning ordinances, a township can use police power ordinances to regulate and effect changes in existing land uses. *Soo Township v Pezolesi*, Michigan Court of Appeals (October 25, 2011).

Erroneous Permits

Almost every township has encountered the situation where a zoning permit has been granted erroneously, but the township or a neighbor does not catch the error until the construction is completed. The usual rule applied in these cases is that the land owner who obtains the erroneous permit is held to the actual requirements of the ordinance, and cannot claim any benefit as a result of the township's permitting mistake. However, some cases use an exception to this rule, which applies if the land owner acts in good faith, relies on the erroneous permit by spending a substantial amount to construct the building, and the building would be worthless if it cannot be used for its intended purpose.

Since the rule and the exception depend upon such subjective issues as "good faith" and "who knew what and when," these cases can sometimes be extremely difficult to decide. But just because the township or its zoning administrator makes a mistake in issuing a zoning permit, that does not end the inquiry. The land owner has an independent duty to review the ordinance requirements himself, especially if neighbors question the issuance of the permit before or during the construction. The land owner's prior experience with building and with the zoning requirements may also be relevant to whether he acted in "good faith," or was just taking advantage of a permit he knew was in error. *Kawkawlin Township v Sallmen*, Michigan Court of Appeals (June 22, 2010).

Special Uses

Special use permits ("SUPs") involve a zoning technique that allows discretionary approval of

certain specified uses. A zoning ordinance can permit some uses in a district as a matter of right, but other uses may require a more judgmental review based on the evaluation of the site and its relationship to the surrounding uses. These latter situations are perfectly suited to the SUP process.

It is not sufficient to specify generally what uses may be permitted by SUP. For example, where a township provided that the township board could grant an SUP in the agricultural district for “establishments for the conducting of commercial or industrial activities,” this was not a specific enough designation of the uses that were permitted by SUP.

The zoning act says that the zoning ordinance “shall specify . . . the special land uses and activities eligible for approval. . .” MCL 125.3502 (1)(a). This “specificity requirement ensures that property uses and activities eligible for special use status are identified in the language of the zoning ordinance.” This encourages uniformity within each district, guards against “spot zoning,” and helps ensure that land use districts are separated and orderly. To comply with the standards of the zoning act, a township must specifically list the uses permitted by SUP in each district with particularity in the zoning ordinance. *Whitman v Galien Township, Michigan Court of Appeals (June 10, 2010)*.

PUD May Require Off-Site Road Work

Townships may provide in their zoning ordinances for planned unit development (“PUD”) approvals, which are individually-planned developments with their own specific site plans. In granting PUD approval, the zoning ordinance may authorize the township to impose conditions on PUDs. Where the ordinance authorizes them, such conditions may properly include the improvement and paving of contiguous, off-site roads that are needed for proper access to the PUD. *Douglas v Von Der Heide, Michigan Court of Appeals (November 18, 2010)*.

Zoning Enforcement Remedies

There are a number of different remedies available to a township to enforce its zoning ordinance. One remedy is a criminal misdemeanor prosecution in district court, which can result in fines of up to \$500 per day or a possible jail sentence. Another remedy is a civil injunction action in circuit court, which can enjoin the land owner from violating the ordinance and hold the owner in contempt of court (with fines and potential jail time) if the owner violates the court’s injunction. A third remedy is a civil infraction action in district court, which can result in a combination of civil fines, limited attorney fees, costs and an injunctive order.

Each of these remedies is independent, and each day a zoning violation continues is a new and separate violation. Therefore, the township can first seek one form of relief, and later seek another form of relief in a new action if the first court case does not cure the zoning violation. *Chesterfield Charter Township v Burton, Michigan Court of Appeals (December 7, 2010)*.

Dangerous Buildings

Zoning ordinances do not lend themselves well to the policing of existing derelict buildings, since they are nonconforming uses. But problems with dangerous and abandoned buildings are becoming increasingly serious in the recent economy, which has caused a record number of foreclosures and building abandonments. To address these issues, townships should use dangerous buildings ordinances, which employ state-authorized procedures to demolish and remove dangerous buildings and charge the cost of the removal against the property.

A dangerous buildings ordinance authorizes local administrative proceedings to declare structures as dangerous buildings and authorize their removal. The procedure starts with a notice to the owner, followed by a hearing before a township-appointed hearing officer. If the hearing officer

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makes a determination that the building is dangerous, the hearing officer orders it to be removed.

The owner has a right to appeal the hearing officer's decision to a "dangerous buildings appeals board," which can be the township board. If the board determines to affirm the hearing officer's decision, it can order the building to be removed within a designated time. If the owner fails to remove the building within the required time, the township can hire a contractor to demolish and remove the building. If the building is a residential structure, the authorizing statute also allows the township to charge the costs of the demolition and removal as a tax lien against the property.

A recent Court of Appeals case rejected a number of legal challenges to a dangerous buildings ordinance and confirmed the validity of the dangerous building procedures. *Watertown Township v Nordlund*, Michigan Court of Appeal (May 11, 2010).

Mineral Extraction: "Back to the Future"

After our Supreme Court recently clarified that zoning of gravel pits and mineral extraction activities is not limited by the "very serious conse-

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quences" rule, the Michigan Legislature undid what the MTA and other municipal advocates accomplished in the Supreme Court. MCL 125.3205 now provides that an ordinance cannot prohibit the extraction of valuable minerals "unless very serious consequences would result from the extraction of those natural resources," returning the law to what it was before the Supreme Court's opinion. The new law does allow townships to exercise "reasonable regulation of hours of operation, blasting hours, noise levels, dust control measures, and traffic," to the extent not preempted by other state law.

We Can Help

The lawyers of *Fahey Schultz Burzych Rhodes PLC* have more than 130 years of combined experience assisting townships with zoning and land use issues. We work with Michigan townships to draft zoning ordinances and amendments, counsel township officials on the best practices for handling zoning issues, assist townships in difficult land use matters that are likely to lead to litigation, and defend townships in zoning litigation. Our lawyers have guided many townships through the zoning and land uses processes. Please contact us if you need assistance

Fahey Schultz Burzych Rhodes PLC, Your Township Attorneys, is a Michigan law firm specializing in the representation of Michigan townships. Our lawyers have more than 130 combined years of experience in township law, and have represented more than 130 townships across the state of Michigan. This publication is intended for our clients and friends. This communication highlights specific areas of law, and is not legal advice. The reader should consult an attorney to determine how the information applies to any specific situation.



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