

## Section 3. Operations

### Chapter 16: Planning and Zoning

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#### **Introduction**

Nothing can bring people out of their warm home to attend a public meeting like a proposal to develop property. From one perspective, the landowner will argue that it is their right to develop their land as they desire. On the other hand, neighbors in the vicinity will often cry “not-in-my-backyard.” Stuck between these two extreme positions is the city or village that will make the decision on the development project. And the planning and zoning bodies involved in the decision have to do so based not on how many hands are raised on both sides, but instead on the law. Those bodies will be called upon to balance the property rights of the landowners against the public health, safety, and welfare. Fortunately, there are statutes and ordinances that guide cities and villages in making the decisions.

#### **Statutory Framework**

Planning and zoning in Michigan are based on two specific statutes: the Michigan Planning Enabling Act (MPEA) (PA 33 of 2008) and the Michigan Zoning Enabling Act (MZEA) (PA 110 of 2006). The previous enabling acts, which in varying sections provided different authority based on whether the entity was a city, village, township, or county, were consolidated to provide consistency as nearly as possible in the new statutes.

#### **The Michigan Planning Enabling Act**

The MPEA outlines the process for creating a planning commission,

creating comprehensive plans, and adopting a capital improvements plan. Like the MZEA, it does not tell the community how to plan.

Zoning and planning are intended to be complementary, with planning providing the policy basis and fundamental guidance for the zoning map and zoning ordinance. Planning provides the vision for the exercise of the police power, and the zoning ordinance gives effect to the plan.

The zoning ordinance must be based on a plan. Absence of a legally adopted plan puts a zoning ordinance at a risk of invalidation if challenged in court. The existence of a master plan provides support for a zoning classification consistent with the plan. There should be a correlation between the master plan and the zoning ordinance. The master plan establishes an important basis for ensuring that the zoning is rational and reasonable.

The MPEA sets forth the procedure for adoption of the master plan which must be followed. At least every five years, the planning commission shall review the master plan to determine whether to commence a procedure to amend the master plan or adopt a new master plan.

#### **The Master Plan**

A master plan is a policy guide for future land use decision-making. It is a plan for a community’s long-range growth, development, and redevelopment.

The authority to prepare a master plan lies with the planning commission, not with elected officials. It must be adopted by the planning commission, but it can also be adopted by the governing body.

The general purpose of a master plan is to guide and accomplish within the community development that satisfies all the following criteria. The master plan must be coordinated, adjusted, harmonious, efficient, and economical. It considers the character of the community and its suitability for particular uses based on factors such as trends in land and population development. It also must be designed to promote the public health, safety, and welfare based on present and future needs. The master plan needs to also provide for: transportation systems, safety from fire and other dangers; light and air; healthful and convenient distribution of the population; good civic design and arrangement; public utilities, and recreation.

A master plan must also include the following subjects that reasonably can be considered as needed to guide future development: 1) maps, plats, charts, and descriptive and explanatory matter; and 2) subjects that are pertinent to the future development of the community, including land use, zoning plan, transportation systems, waterways, public utilities and structures, and redevelopment or rehabilitation of blighted areas.

#### **The Michigan Zoning Enabling Act**

The MZEA sets forth in detail the procedures for adoption and amendment of the zoning ordinance which must be followed. There is no

inherent power for a city or village to zone, and the authority is conferred through the statute.

#### **The Zoning Ordinance**

While the master plan is the guide for future development, the zoning ordinance is the actual law that applies to the development of land, and it is the zoning ordinance which must be defended if litigation is filed. The zoning ordinance is adopted by the legislative body, after a recommendation from the planning commission.

Zoning regulations place constraints on how a property owner may use their property. Yet, zoning also protects each property owner from the uncontrolled actions of others. The zoning ordinance defines each use that is permitted under each zoning classification. Only those uses specifically stated are permitted in a district, be it as of right or as a special land use.

Under Section 203(1) of the MZEA a zoning ordinance must be based upon a plan and coordinated with the plan to establish an orderly land use pattern. A zoning ordinance must be designed to promote goals including: the public health, safety, and general welfare, ensuring that uses of land are situated in appropriate locations and relationships; meeting the needs of residents for food, places of residence, recreation, trade, services, and natural resources; avoiding population overcrowding; providing adequate light and air; lessening congestion on public roads and streets; and, providing adequate transportation and utility infrastructure. Property should be zoned based on the natural suitability of the

land for the intended purposes and compatibility with adjacent land uses.

A community must be careful when drafting a zoning ordinance not to exclude a particular use of property from the entire municipal entity. Totally prohibiting the establishment of a land use where it is possible to locate that use in the community and there is a demonstrated need for that land use in the community or surrounding area can result in an exclusionary zoning claim against the community.

The general rule in litigation is that the zoning ordinance is presumed to be reasonable and constitutional. If the zoning ordinance or decision made by the city or village is based upon a duly adopted and up-to-date master plan, this provides further evidence of the reasonableness of the zoning or zoning decision. But remember that the concepts contained in the master plan must be reasonable in and of themselves. In other words, just because land carries a certain master plan designation, if that designation is in reality not reasonable given the surrounding land uses, current uses of the property, conditions of the property that impact development such as wetlands, woodlands, other environmental features, or topography, then reliance on the master plan will not carry much weight.

### **The Planning and Zoning Bodies**

#### **The Planning Commission**

The planning commission is a multi-member body whose leading responsibility is to develop, review, and update the master plan in accordance

with the law. The MPEA provides that the membership of the planning commission shall be representative of the entire territory of the local unity of government, and of important segments of the community such as economic, governmental, education, and social development, in accordance with major interests in the community, including agriculture, natural resources, recreation, education, public health, government, transportation, industry, and commerce.

Unless exempted by charter, the planning commission shall annually prepare a capital improvements program of public structures and improvements. The planning commission may also be given the power to review and approve or make recommendations regarding the approval of special land uses and planned unit developments under the zoning ordinance. Planning Commissions also commonly are tasked with holding public hearings and making recommendations on the adoption of a zoning ordinance and zoning ordinance amendments.

#### **The Zoning Board of Appeals**

The zoning board of appeals (ZBA) is sometimes referred to as a “quasi-judicial” body and is created under the MZEA. The ZBA has powers under the act including: (1) the power to interpret the zoning ordinance; the power to decide appeals of decisions of the zoning administrator, building official or other administrative decision under the zoning ordinance that can be appealed by to the ZBA by an aggrieved party; and (3) the power to grant variances

from the strict language or interpretation of the zoning ordinance.

A variance is a modification of the literal provisions of the zoning ordinance, which allows an applicant to do something that would normally be in violation of the zoning ordinance. There are two types of variances:

- 1) Use Variance. The ZBA is authorized to grant use variances in cities and villages. A use variance would permit a use of property not otherwise permitted on the property or in the zoning district. For example, a use variance would be allowing a business use in a residential zoning district.
- 2) Non-use or Dimensional Variance. The second type of variance basically covers every other request by an applicant that does not involve a change in use. Examples of dimensional variances include requests to vary setbacks, heights, and number of parking spaces.

Since a variance allows action contrary to the zoning ordinance, variances should only be granted if an applicant has demonstrated to the ZBA that they meet the requirements of the appropriate legal standards. There are two distinct standards that apply.

For a use variance, an applicant must demonstrate “unnecessary hardship,” which requires the applicant to prove:

- a) That the property cannot be reasonably used for the purposes permitted in the zoning district (i.e., property will not yield a reasonable return).

- b) That the plight of the property owner is due to unique circumstances peculiar to his or her property and not to general neighborhood conditions.
- c) That the use variance will not alter the essential character of the area.
- d) That the applicant's problem is not self-created.

On the other hand, for a non-use or dimensional variance, the standard is “practical difficulty.” This is a less stringent standard than unnecessary hardship. The elements of practical difficulty are:

- a) Whether strict compliance with the restrictions governing area, setbacks, frontage, height, bulk, density, and other similar items would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with said restrictions unnecessary burdensome.
- b) Whether a variance would do substantial justice to the applicant as well as to other property owners in the zoning district or whether a lesser relaxation of the restrictions would give substantial relief to the applicant and be more consistent with justice to others (i.e., are there other more reasonable alternatives).
- c) Whether the plight of the property owner is due to unique circumstances of the property (in other words, the hardship is not shared by others).
- d) Whether the applicant's problem is self-created.

Per the MZEA, Section 604(7), the ZBA may in considering the applicable elements grant a use or non-use

variance so that the spirit of the zoning ordinance is observed, public safety secured, and substantial justice done.

A common mistake is that too much emphasis is put on an overly broad idea of what is a “self-created” problem. Courts have rejected the idea that a problem is “self-created” simply because a person bought a property with knowledge of the zoning ordinance’s limitations or wants to do something with the property that they know requires a variance. Instead, a problem is “self-created” if a landowner or predecessor in title partitions, subdivides, or somehow physically alters the land after the enactment of the applicable zoning ordinance, so as to render it unfit for the uses for which it is zoned. So, for example, if a person simply wants to build an addition on a house that would require a setback variance, that would likely not be considered “self-created,” but if the lot used to be larger and the property owner only needs the variance because they split the property, then that would likely be considered “self-created.”

In addition, the ZBA may impose reasonable conditions, including conditions necessary to ensure that public services and facilities affected by a proposed land use or activity will be capable of accommodating increased service and facility loads caused by the land use or activity, to protect the natural environment and conserve natural resources and energy, to ensure compatibility with adjacent uses of land, and to promote the use of land in a socially and economically desirable manner pursuant to the MZEA, Section 604(7). But any conditions imposed must: 1) be

designed to protect natural sources, and the health, safety, welfare, and social and economic wellbeing of land users, adjacent property owners, and the community as a whole; 2) be related to a valid exercise of the police power and purposes affected by the activity being conditioned; and 3) be necessary to meet the intent and purpose of zoning requirements.

It must be remembered that a variance runs with the land and is not personal to the owner. Therefore, if ownership of the property changes, the variance by law remains with the land.

The conditions imposed with respect to the variance would also remain with the land and apply to a new owner.

### **The Legislative Body**

The final adoption of the zoning ordinance falls on the elected officials, as does the final decision on many of the applications filed under the zoning ordinance. Since the legislative body is elected, the public tends to put more pressure on them to cater to the personal desires of the public on how land should be used. It is not uncommon to have the public claim that the officials were elected to “do what we say.” Yet, it is the duty of the legislative body to act on behalf of the entire community—and not just the often-small group of residents who oppose something—and to do so in compliance with the standards of the zoning ordinance and the law.

### **Meeting Requirements and Procedures**

In addition to complying with the Open Meetings Act and all applicable adopted bylaws and rules of order for public

meetings of the council, planning commission, and ZBA, the MZEA and MPEA should be consulted to ensure that the notices required for adopting and amending the master plan, and scheduling public hearings on applications filed under the zoning ordinance such as rezonings, special land uses, planned unit developments, and requests before the ZBA are provided, including meeting specified timeframes for the notice. Failure to provide the required notice will result in potential litigation and invalidation of the decision that was made at the meeting.

When the meeting begins, consider moving through preliminary matters such as attendance and approval of the prior minutes and agenda promptly. Avoid things such as lengthy explanations of procedures and introduction of staff unless they serve some material purpose. This is important for a number of reasons. The public has taken time to come to the meeting and are waiting. The applicant is waiting and possibly expending monetary resources to have professionals attend with them. Most importantly, it is important to establish a professional appearance and atmosphere to establish respect for the public body and its decision-making abilities. The deliberation of the public body and those who spoke will be reflected in the minutes of the meeting, which are public records subject to later review by a court if litigation is filed.

The public has a right to appear at public meetings and to comment. In many cases, individuals may appear at a meeting and voice their opposition to the applicant's request without giving relevant facts or other evidence. While

objections of neighboring property owners should be heard and considered, the simple fact that there is opposition to a request is not a legitimate or defensible ground for denying the request. Instead, the sole grounds for approving or denying the request should be the fact that the applicant has failed to demonstrate the legal standards necessary to obtain the relief requested. And most importantly, make sure to conduct any hearing fairly as procedural due process requires the hearing to be conducted before a "fair and impartial tribunal."

### **Making a Good Decision**

The key to making a good decision is straightforward. First, know what you are being asked to decide. Second, review the application and all other documents submitted so that you are familiar with the request. Third, view the property to get a feel for the surrounding area. Fourth, know whether the decision you are making allows you to exercise discretion. Fifth, and most importantly, know the standards that you will be applying to your decision. The standards should be clearly outlined in the zoning ordinance for each type of development proposal.

Generally, land use decisions are concentrated in the following areas:

- a) administration and enforcement;
- b) site plan review;
- c) special land uses;
- d) planned (unit) developments;
- e) conditional rezonings; and
- f) ordinance amendments.

It is important to know whether the decision will allow the community to exercise discretion.

Zoning administration and site plan review are nondiscretionary approvals, meaning that if the application meets the ordinance requirements, the application must be approved. Hopefully, staff will have worked with the applicant prior to the application coming before the deciding body to work out any issues or non-compliance with ordinance requirements.

On the other hand, special land uses, planned developments, conditional rezonings, ordinance amendments, and matters before the ZBA allow the exercise of discretion in making the decision. By nature, these uses may or may not be appropriate on any particular piece of property and more discretion is involved in making the decision. This does not mean that the discretion is unfettered. The zoning ordinance will contain the standards to be applied—both nondiscretionary and discretionary—and those are the standards that must be applied in making the decision. Nothing more, nothing less.

The zoning ordinance standards should be designed to promote the intent and purpose of the zoning ordinance, ensure compatibility with surrounding land uses, and to promote the public health, safety, and welfare. When making a discretionary decision, the motion should contain a review of each of the specific standards in the zoning ordinance and findings on whether those standards have been met. Don't "fly by the seat of your pants" when making the decision.

Reasonable conditions may be imposed with approval of a discretionary decision. Importantly, there must be a correlation between any condition imposed and a burden that is being created by the proposed land use or development. Those conditions must:

- Ensure adequate public services and facilities.
- Protect the natural environment and conserve natural energy.
- Promote use of the land in a socially and economically desirable manner.

### **Avoiding Litigation**

Unfortunately, even when you follow all the rules, lawsuits in land use decisions are inevitable. Knowing the potential claims that may be asserted assists in helping the community evaluate any land use application to avoid the pitfalls of litigation.

Land use litigation is in many ways a battle of expert witnesses. That is why it is recommended that the city or village utilize its own "experts"—the planner, engineer, arborist, environmentalist, and so on—to provide information and opinions throughout the process. Even though there is a presumption of constitutionality that applies, that really only gives the community an upper hand in the event that the proofs on both sides are close. The community must be prepared to go to court and defend its zoning ordinance and decision. And consistency with the master plan can help in the defense—but only if the master plan has been reviewed and updated as required by law—and only if the actual master plan designation can pass the reasonableness test. In other

words, litigation will involve the defense of both the master plan and ordinance or decision.

### **What you can expect in Litigation**

There are several types of typical challenges raised in most land use cases, which will be highlighted in this section. Within each of these types, a landowner may challenge the zoning ordinance on its face in an effort to invalidate the whole ordinance, and/or will make an “as-applied” challenge claiming that an otherwise valid ordinance was improperly applied in their situation.

#### **1. The Takings Claim**

A property owner may claim that the ordinance or its application amounts to a taking without compensation, either permanently or temporarily (i.e., during the time that the property owner was prevented from using their property while an ordinance was being improperly applied.)

There are basically two types of takings. The first is called a categorical taking. In that situation, the community has basically physically appropriated land without first paying for it. For example, if a city or village were to construct a widened road along property without first obtaining an easement, this would be a physical appropriation without compensation. A categorical taking can also arise simply through regulation. For example, if a community were to adopt an ordinance that prohibited removal of trees in an area, it might result in land having to sit vacant. In this type of situation, the community has not physically appropriated the land, but has

regulated it in such a way that there is no use for the property.

The most common claim is what is known as a regulatory taking. In this situation, the question is whether the regulations have “gone too far.” Although zoning need not provide for the most profitable use of land, it must still provide an economic and marketable use. There is no set formula for what goes too far, but courts will look at the character of the government's actions, the economic impact on the property owner, and whether the regulation has interfered with the landowner's distinct investment-backed expectations.

In many cities and villages, there is limited area left for development. Some of the remaining parcels have unique features or locational issues that make development difficult. For example, let's say a subdivision was developed decades ago, but the corner parcel on two main roads did not get built because of lack of demand. Over time, development has occurred in the area, the roads have been expanded, and the property is burdened by substantial traffic. Even though the master plan may still designate the land for residential use, you might not be able to support a residential zoning based on the changed circumstances.

In addition, sometimes a community will plan a condition on the approval. Conditions may be appropriate but may be considered to be an exaction by a court. To be legitimate, there must first be some statutory authority for the exaction. Second, the exaction must be reasonably related, i.e., have an essential or reasonable nexus to the



need created by the development (which should be documented by appropriate studies or reports). Third, the exaction cannot deprive the property owner of all reasonable use of its land. Fourth, the primary purpose of the exaction must be related to the service being provided and not be for general revenue sharing (i.e., a disguised tax). Lastly, the degree of the exaction demanded must bear the required “rough proportionality” to the projected impact of the proposed development.

To help avoid takings concerns, when considering a development proposal or request for rezoning, you should ask questions, including: 1) has the master plan been revised as required by law; 2) is the master plan designation of the property reasonable in light of existing circumstances; 3) does the zoning ordinance coordinate with the master plan; 4) does current zoning provide the property owner a reasonable and marketable use of the property; 5) can what you have done be supported by your own consultants and experts?

## **2. The Substantive Due Process Claim**

The law requires that an ordinance or decision must not be unreasonable or arbitrary or capricious. Generally governmental action will pass a substantive due process challenge if a rational relationship exists between the ordinance or decision and any legitimate governmental interest. A landowner challenging the ordinance or decision must negate each and every conceivable governmental interest to win. This is often a difficult standard for a landowner to meet. In addition to having an updated master plan as

required by law, ask yourself whether the decision you are making can be supported by legitimate governmental interests, identify those interests, and identify the support for those interests in the factual record or through your own expert’s report. For example, if a proposal is denied on the basis of fear about traffic, but the applicant has provided a traffic study showing a negligible impact on traffic, then the community may have difficulty showing that the interest in traffic is legitimate without its own contrary expert traffic study.

## **3. The Equal Protection Claim**

If the decision is made based on membership in a suspect class, you might have an equal protection issue. Generally, the law provides that all persons similarly situated should be treated the same. Landowners will often try to argue that they were denied a rezoning or approval and point to someone else that was not. But in the absence of the properties being identical in all material respects, the approval of one application does not mandate the approval of another.

Like the substantive due process claim, as long as there is not clear discrimination based on a suspect class (i.e., race, gender, religion), and there is no clear discriminatory in, the court will look at whether the zoning or decision, and any perception of different treatment between properties, is supported by legitimate governmental interests.

#### **4. The Procedural Due Process Claim**

Procedural due process requires notice and an opportunity to be heard before an impartial tribunal. The best way to avoid this claim is to make sure that proper notice is being provided for an application as required by your ordinance and the MZEA, and that the applicant is given a fair and sufficient opportunity to speak at the public meeting.

Procedural due process claims often arise when there are large groups of the public opposing a land use proposal and they vocally express their concerns that may or may not have any real support or basis in fact. The public has the right to appear at a public meeting and voice their objections to a project. And it is generally the rule that residents would prefer that property remain undeveloped. Local officials must remember to not react to the public or jump on the bandwagon. When that occurs, the argument is always made that the decision maker was not being impartial.

#### **Dos and Don'ts**

Here are some tips to promote reaching defensible decisions:

- Periodically review and update all ordinances and the master plan to ensure that they comply with current law and current conditions in your community.
- Retain appropriate experts to review what might be a difficult or controversial application to make sure that your decision can be supported.
- Make sure you support your decision by fully articulating the reasons for

the decision on the record in the motion voted upon by the entire council, board, or commission, by connecting the facts that weight toward approval or disapproval of the request to each element of the relevant standards of the ordinance. Keep detailed minutes of information presented during the public meetings, as the basis of the decision rendered must be found in the official record, and the motion guides a reviewing court in finding the facts that were most important in adopting the motion.

- Move things along. It is not necessary for each member to voice on the record his or her particular opinion in each case, particularly in cases where there appears to be some degree of unanimity among the members as to a decision. Even if an individual member states very strong reasons that align with the body's final vote, those individual comments are not considered to be part of the official decision if they are not spelled out in the motion that is ultimately voted upon.
- Your decision should not be made based on your personal opinion or public political pressure. Whether individual members or citizens "like" the proposal or wish they could hold out for a "better" use of a property is not relevant, and decisions based on public sentiment are difficult to support.
- Participate in and promote training for the people that sit on public bodies that make land use decisions. Focus on the key issues that involve their duties.
- Avoid random, off-the-cuff comments at meetings, because

- they end up in the minutes and can be damaging in court proceedings.
- Avoid giving applicants or members of the public advice or suggestions on what they should or could do to improve their request. The desire to be helpful is understandable but doing so could be problematic for you and/or the community when applicants claim that they relied on the advice but still end up having their application denied.
  - Stay focused. Deliberations can often go off on tangents that are not relevant to your task of finding the relevant facts and applying them to the variance standards. Questions to the applicant and comments of the members should be direct and focused on that task. The chair of the meeting is at the helm of the meeting and is the primary person to respectfully point out to fellow members when the group is heading down an unnecessary path, but staff or other members may chime in to help in this regard as well.
  - Use sample motion forms if made available.
  - Train municipal staff. Make them aware of what is happening in the area of land use litigation.
  - Develop policies for the handling, review and recommendation on land use requests.
  - Watch for conflicts of interest.
  - Be prepared. Read your materials ahead of the meeting. Staff will have provided materials that are intended to help address as many issues as they can foresee.
  - If there is something relevant that you identify in your preparation that is confusing or seems incomplete, contact the staff liaison to

- communicate it in advance of the meeting. It might be possible to get the missing information or clarification in a supplement before the meeting and help the deliberations proceed efficiently (thus avoiding a postponement or looking unprepared for the meeting).
- Applications for some types of land uses are governed by complex federal and state statutes and case law specific to those uses and are common subjects for litigation, such that they should be approached with heightened caution. It is recommended that you consult with your community's legal counsel regarding applications filed for a place of worship, homes for the disabled (such as sober living homes), marijuana uses, telecommunications facilities, windmills, and billboards.

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**Rosati Schultz Joppich &  
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All 26 of our attorneys have dedicated their entire practice to serving cities, villages, and townships throughout the State of Michigan. We serve both as municipal attorneys (general counsel) on a day-to-day basis, and as litigation counsel defending or prosecuting cases for local governments in court. Many communities also call us in to help with special or complex matters that require the assistance of outside special legal counsel. Municipal law is what we do.