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21st Century Update: The "Public Use" Limitation on Eminent Domain

by

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Introduction

The courts have made clear that sovereign entities like the State of Michigan inherently possess the power to take property through eminent domain.[1] Though eminent domain is one of the state's "drastic" powers,[2] it is importantly limited by the constitution's requirement that property may only be taken through eminent domain for a "public use":

> Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Const 1963, art 10, §2.

The precise contours of the "public uses" for which property may be taken, however, have not been static.

Background: Public Use in the 20th Century

A. Pre-*Poletown* Michigan law.

1. Historically, Michigan law prohibited the government from taking property for uses that were not plainly public uses.

2. In *Shizas v City of Detroit,*[3] for example, the city was attempting to take property for a public parking structure that would feature retail space on the ground floor. The city intended to lease the ground-floor retail space to private users.

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[1] *See, e.g., People ex rel Trombley v Humphrey,* 23 Mich 471, 472 (1871).
[2] *See City of Muskegon v Irwin,* 31 Mich App 263, 268; 187 NW2d 481 (1971).
[3] 333 Mich 44; 52 NW2d 589 (1952).

3. The Michigan Supreme Court held that taking property to allow even part of the property to be used for private purposes ran afoul of the "public use" limitation.

4. In rejecting the city's taking, the court stated that when "the intention to confer a private use or benefit forms *the purpose or a part of the purpose* of the proceeding or taking the power of eminent domain may not be exercised."[4]

B. Pre-*Poletown* Federal law.

1. While Michigan courts were vigorously enforcing the state constitution's public use limitation, federal courts were moving toward a more permissive standard.

2. Problems in enforcing a strict "public use" limitation on eminent domain, including determining the portion of a taken property that must be open to public use for the taking to be constitutional, led to the erosion of the "actual" public use standard in the federal courts.[5]

3. The United States Supreme Court confirmed that with its 1954 decision in *Berman v Parker,*[6] in which a congressional act declared an entire area of Washington, D.C., to be blighted and authorized the use of eminent domain to take those properties to eliminate the blight and promote redevelopment.

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[4] *Id.* at 54.

[5] *See Kelo v City of New London*, 125 S Ct 2655, 2662 (2005) (discussing historic cases); *see also* RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 170-75 (1985).

[6] 348 US 26; 75 S Ct 98; 99 L Ed 27 (1954).

4. The owner of a property in the area challenged the government's ability to take his property and convey it to another private user, but the United States Supreme Court rejected that challenge. Essentially, it held that "public use" is equivalent with "public welfare," and that it was required to defer to the congressional finding that the public welfare require the property to be taken and redeveloped.[7]

C. *Poletown.*

1. After *Berman,* the states also began using eminent domain to transfer land between private owners for redevelopment.[8]

2. Michigan dramatically allowed eminent domain to be used in this manner in *Poletown Neighborhood Council v. City of Detroit.*[9] Pursuant to a Michigan statute allowing the use of eminent domain to provide assistance to industry and economic development,[10] the City of Detroit resolved to take an entire neighborhood, known as "Poletown" due to many of its residents' Polish ancestry, and convey the property to General Motors for the construction of a new assembly plant.

(a). Addressing the property owner's challenge that the taking was for private purposes, the Michigan Supreme Court purported to apply "heightened scrutiny," but cited *Berman* for the principle that it was

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[7] *See id.* at 31-33.
[8] *See, e.g., State ex rel. Bruestel v. Rich,* 110 NE2d 778 (Ohio, 1953); *see also* EPSTEIN, *supra* note 5, at 179 ("Once *Berman v. Parker* is on the books, the question remains whether any condemnation of land can be attacked for want of a public purpose").
[9] 410 Mich 616; 304 NW2d 455 (1981).
[10] *See id.* at 630.

required to defer to the legislative judgment that such a taking was for a "public use."

(b). The Michigan Supreme Court held that the constitutional term "public use" was synonymous with "public purpose," and that both were efforts to "describe the protean concept of public benefit."[11]

(c). Based on the economic benefit that the assembly plant would allegedly bestow on a city in woeful economic straits, the court concluded that the assembly plant would provide a public benefit and therefore, the City's use of eminent domain to establish the plant was proper.[12]

D. Post-*Poletown* Developments.

1. After the Michigan Supreme Court approved taking land from private owners to convey to another private owner for use as an assembly plant, eminent domain began to be used for all manner of economic development projects.

2. In Michigan alone, eminent domain was used to assemble land for an automobile assembly plant for Chrysler,[13] to establish a theater district,[14] to build two professional sports stadiums,[15] and for a slew of other projects that

[11] *Id.*
[12] *See id.* at 635.
[13] *See City of Detroit v Vavro,* 177 Mich App 682; 442 NW2d 730 (1989).
[14] *See City of Detroit v Lucas,* 180 Mich App 47; 446 NW2d 596 (1989).
[15] *See Detroit/Wayne County Stadium Auth v 7631 Lewiston, Inc,* 237 Mich App 43; 601 NW2d 879 (1999).

used eminent domain to take property from one private owner for conveyance to another private owner.

E. *Poletown's* Impact in Other Jurisdictions.

1. Other states followed Michigan's lead, allowing the power of eminent domain to be used for a number of economic development projects that resulted in transferring property between two private owners.[16]

2. The federal courts also approved varying uses of the power of eminent domain, including the Supreme Court's decision in *Hawaii Housing Authority v Midkiff,*[17] in which the court permitted the State of Hawaii to use eminent domain to take properties from their owners and convey the properties to their tenants to reduce the concentration of land ownership in the state.[18]

3. By 1985, Professor Richard Epstein of the University of Chicago Law School noted that the function of the "public use" limitation was "an empty question,"[19] as the limitation had been withered such that nearly any taking would satisfy its minimal requirements.

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[16] *See, e.g., City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1 (Nev. 2003); *State ex rel. Tomasic v. Unified Gov't of Wyandotte County*, 962 P.2d 453 (Kan. 1998); *State ex rel. Washington Convention & Trade Ctr. v. Evans*, 966 P.2d 1252 (Wash. 1998); Atlantic City v. Cynwynd Invs., 689 A.2d 712 (N.J. 1997); *City of Jamestown v. Leevers Supermarkets, Inc.,* 552 N.W.2d 365 (N.D. 1996); *Maready v. City of Winston-Salem*, 467 S.E.2d 615 (N.C. 1996); *City of Duluth v. State*, 390 N.W.2d 757 (Minn. 1986); *Common Cause v. State,* 455 A.2d 1 (Me. 1983).

[17] 467 US 229; 104 S Ct 2321; 81 L Ed2d 186 (1984).

[18] *See id.* at 235. Note that Justice O'Connor wrote the majority opinion approving this use of eminent domain in *Midkiff*.

[19] EPSTEIN, *supra* note 5, at 161.

The 21st Century: Change and Continuity in the Public Use Limitation

As the 20th Century came to a close, *Poletown* and its progeny had eroded the public use limitation such that it was hardly a limitation at all. But as the 20th Century gave way to the 21st Century, the groundwork for a change was in place.

A. *Wayne County v Hathcock.*

1. During that time frame, Wayne County began to plan a proposed mixed-use business and technology park south of Wayne County Metropolitan Airport, to be known as the "Pinnacle Aeropark."

2. The county had acquired much of the land that it intended to incorporate into the park through a federally-assisted noise abatement program, in which the county purchased properties from owners who did not wish to endure the noise from planes flying overhead. But many owners did not want to sell.

3. Because of that, the owners also refused the county's overtures to acquire their land for the Pinnacle Aeropark. As a result, the county attempted to use its power of eminent domain to take those properties.[20]

4. The property owners challenge the public use for the taking. Relying on *Poletown*, the trial court approved the taking, and the court of appeals affirmed, though two of the three judges on the panel wrote separately to express

[20] *See Wayne County v Hathcock*, 471 Mich 445, 451-55; 684 NW2d 765 (2004).

their belief that *Poletown* did not accord with the constitution and should be overruled.[21]

B. *Hathcock* Overrules *Poletown*.

1. Unanimously, the Michigan Supreme Court held that *Poletown* misinterpreted the Michigan constitution in permitting the use of eminent domain to take land from one owner to transfer it to another for economic development.

2. The court held that *Poletown* erred in relying on *Berman*, as Michigan law did not require deference to a legislative decision on whether a taking was for a public use.[22] Rather, the public use limitation had to be applied in accord with the historic meaning of "public use" in Michigan law.

3. Defining the precise contours of "public use" was unnecessary to decide *Hathcock*, however, as the Court focused specifically on whether the county's purported taking qualified under any of the three instances when Michigan law allowed a property to be taken from one private owner and transferred to another private owner. Those instances, which had been discussed in Justice Ryan's dissent from *Poletown*, are:

(a). taking land to transfer to an owner, like a railroad, that provides services that would be unavailable absent the ability to assemble land;

(b). taking land to transfer to institutions that remain accountable to the public, like heavily-regulated pipelines; and

[21] *See Wayne County v Hathcock,* unpublished opinion per curiam of the Court of Appeals, decided Apr 24, 2003 (Docket No 239438).
[22] *See id.* at 480.

(c). taking land based on the land's own characteristics, such as genuine blight, which results in transferring the land to new owners after the blight is eliminated.[23]

4. The county's purported taking was not analogous to any of these three permitted categories of takings, and found support only in the economic development rationale from *Poletown*.

5. But the court held that the *Poletown* rationale had no basis in Michigan law, overruling *Poletown* and along with it eliminating the possibility that eminent domain can be used to take property from one owner to transfer it to another solely for purposes of economic development.[24]

C. *Kelo v City of New London.*

1. When the same court that had decided *Poletown*, the case that for so long had served as the icon for abuses of the power of eminent domain, repudiated the use of eminent domain to take land for economic development purposes, the decision created anticipation that other courts would again follow Michigan's lead and breathe new life into the public use requirement.

2. Specifically, the United States Supreme Court's grant of certiorari in *Kelo v City of New London,*[25] in which the Connecticut courts had permitted the City of New London to exercise its power of eminent domain to take properties from homeowners for conveyance to a developer as part of an economic

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[23] *See id.* at 473-75.

[24] *See id.* at 483 ("*Poletown*'s conception of a public use – that of 'alleviating unemployment and revitalizing the economic base of the community' – has no support in the Court's eminent domain jurisprudence") (footnote omitted).

[25]

development project, created anticipation that every government in the nation would soon operate under a more restrictive "public use" analysis.

D. *Kelo* Retains a Permissive Federal Standard.

1. In *Kelo*, however, Justice Stephens provided a majority opinion for the United States Supreme Court that declined to alter the interpretation of the public use limitation that the court had set forth in *Berman* and *Midkiff*.

2. The Supreme Court acknowledged that taking a property "for the sole purpose of transferring it to another private party" would be unlawful, but pointed out that taken property can be transferred from one private owner to another, as in the case of railroads.[26]

3. According to the court, the city's takings were not designed solely to transfer the properties from one private owner to another, but were designed as part of a development plan to bolster the economy in a city that had experienced a long period of decline. Therefore, the takings were not definitively unconstitutional; but because they were not for actual public use, like a road or school, they were also not definitively permissible.

4. The takings fell somewhere in between, leading the court to state that their validity depended on whether the city's development plan served a "public purpose."[27]

5. This sealed the case's outcome: Connecticut legislative bodies had crafted the development plan, and, as it did in *Berman*, the court deferred to the

[26] *Id.* at 2661.
[27] *Id.* at 2663.

legislative prerogative. The court concluded that the development plan, which had to be viewed in its entirety and not just as it applied to the contested properties, served a valid "public purpose," rendering the takings constitutional.[28]

6. Somewhat Ironically, Justice O'Connor, who had written the court's opinion in *Midkiff* approving a permissive public use standard, offered a dissent in *Kelo* that accused the majority of reducing the constitutional public use clause to "horatory fluff."

E. *Kelo*'s Crack in the Door.

1. In rejecting the property owners' argument that taking land for economic development can never be a public use, the court stated that promoting "economic development is a traditional and long accepted function of government."[29]

2. But the court left the door open for states to adopt "public use" standards that do not allow governments to use eminent domain for economic development purposes. The court explicitly stated that its decision that the Fifth Amendment permitted the takings in *Kelo* did not preclude "any state from placing further restrictions on its exercise of the takings power."[30]

3. In fact, *Kelo* specifically cited *Hathcock* as an example of the type of restriction that states may impose on the power of eminent domain.[31]

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[28] *See id.* at 2665.
[29] *Id.*
[30] *Id.* at 2668.
[31] *See Kelo*, 125 S Ct at 2668.

F. The (Over?) Reaction to *Kelo*.

1. Because of the widespread sentiment that *Kelo* was wrongly decided, a number of other states have begun initiatives to join Michigan in adopting more restrictive limitations on eminent domain. For example, in response to *Kelo*, Alabama adopted legislation in August 2005 that prohibits the use of eminent domain to take property for purposes of private development, to enhance tax revenue, or to transfer to a non-governmental entity.[32]

2. Similarly, states including California, Delaware, Florida, Georgia, Louisiana, Massachusetts, Minnesota, New Jersey, Ohio, Oklahoma, Rhode Island, and Texas, as well as Connecticut, where *Kelo* originated, are considering changes to their eminent domain laws, through either legislation or amendments to the state constitutions, to limit the use of eminent domain for economic development.[33]

3. Even Michigan, where *Hathcock* prohibits takings for transferring a property from one owner to another on an economic development rationale, will vote on a proposed constitutional amendment in November 2006 designed to ensure that no future court could decide to reverse *Hathcock* and allow such takings.

4. The proposed constitutional amendment would amend Const 1963, art 10, §2 to provide in part as follows:

> Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner

[32] ALA. CODE §11-47-170 (amended August 2005); see also Id. §11-80-1 (amended August 2005).

[33] *See* Baldas, *States Ride Post-Kelo Wave of Legislation,* NAT'L L.J. (Aug. 2, 2005).

> prescribed by law. If private property consisting of an individual's principal residence is taken for public use, the amount of compensation made and determined for that taking shall be not less than 125% of that property's fair market value, in addition to any other reimbursement allowed by law. Compensation shall be determined in proceedings in a court of record.
>
> "Public use" does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues. Private property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment to this constitution that added this paragraph.
>
> In a condemnation action, the burden of proof is on the condemning authority to demonstrate, by the preponderance of the evidence, that the taking of a private property is for a public use, unless the condemnation action involves a taking for the eradication of blight, in which case the burden of proof is on the condemning authority to demonstrate, by clear and convincing evidence, that the taking of that property is for a public use.
>
> Any existing right, grant, or benefit afforded to property owners as of November 1, 2005, whether provided by this section, by statute, or otherwise, shall be preserved and shall not be abrogated or impaired by the constitutional amendment that added this paragraph.[34]

Other Developments: Takings that Are for Public Use.

When the Michigan Supreme Court overruled *Poletown*, it explained that it did not need to "cobble together" a comprehensive definition of public use. Rather, *Hathcock* held only that a taking that results in the taken land being transferred to a private entity must satisfy one of the three requirements explained in Justice Ryan's *Poletown* dissent. Just one year later, though, the court was presented with an opportunity to further clarify the meaning of "public use."

[34] *See* S.J. Res. E, 93d Leg., 1st Sess. (2005) (proposing to amend Const 1963, art 10, §2).

A. *City of Novi v Adell Trusts.*

1. In *City of Novi v. Robert Adell Children's Funded Trust,*[35] the court addressed the circumstances when taking private property for a road complies with the public use limitation.

2. There, the City of Novi proposed to take a portion of the Trusts' property for a road project. The property was near a major intersection, and the city proposed to build a "ring road" around that intersection.

3. Also, the city proposed to build an "industrial spur" to the ring road to primarily service an industrial facility that was adjacent to the Trusts' property. Both the ring road and the spur were planned to cross the Trusts' property.

4. The Trusts had no objection to the ring road, but challenged the city's power to take its property for a "road" that amounted to a driveway for the industrial facility.

B. *Adell* Sets Forth When Property May be Taken for a Road.

1. The court held that the taking was for a public use. It explained that the public use standard from *Hathcock* did not apply because the city did not propose to take the Trusts' property and transfer title to it to some other private owner. Further, it declined the City's invitation to hold that a road is always a public use, instead drawing on historic precedent explaining "the difference between public and private use in the context of roads."

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[35] 473 Mich 242; 701 NW2d 144 (2005).

2. Specifically, the court relied on *Rogren v Corwin,*[36] which had held that whether a taking for a road satisfies the public use requirement "depends largely upon" a few factors: whether the road is established by a public authority; whether the damages for the condemnation of the land are paid by the public; and whether the road is controlled, managed, and maintained by public officers.

3. Because the city initiated the plan for the industrial spur, would retain ownership, control, and maintenance responsibility over the spur, and the spur would be open to the public, regardless of whether it primarily serviced one property, the court held that the spur was a public road, so the city's taking for that road complied with the constitution's public use limitation.

4. The majority's analysis of the *Rogren* payment element is more nuanced. The industrial facility's owner had agreed to contribute several hundred thousand dollars toward the industrial spur, but the court stated that the contribution in this case was not dispositive. This analysis seems to indicate that courts should analyze the *Rogren* factors using a "qualitative, not quantitative" approach.

C. Necessity.

1. In addition to challenging the public use for the road, the Trusts had challenged the necessity for the City's taking. Essentially, the Trusts argued that the city had not even investigated whether a road to service the industrial facility could be built without taking their property, so it was not "necessary" to take their properties for such a road.

[36] 181 Mich 53, 58 (1914).

2. Under the Uniform Condemnation Procedures Act, property owners have the burden to demonstrate that the government's declaration that it is necessary to take property arose from fraud, an abuse of discretion, or an error of law.[37]

3. The court held that the Trusts had not carried their burden of invalidating the City's declaration of necessity, as the city had not committed the elements of fraud, or made an error of law, leaving only abuse of discretion to invalidate the taking. But the city's decision to build the industrial spur on the Trusts' land was not an abuse of discretion because that decision fell within the "principled range of outcomes."

4. The Trusts argument that the city never considered alternatives, rushing to take their land to build the industrial spur, was insignificant to the Michigan Supreme Court. It emphasized that as long as the end result was reasonable, the process used to reach that result is immaterial. Therefore, the court concluded that the taking was "necessary" and valid.

Conclusion

The 21st Century has already seen a dramatic shift in Michigan's public use limitation on eminent domain, and may see even more changes to the constitutional standards. Though many had anticipated that the United States Supreme Court would follow Michigan's lead, by failing to do so that court may have actually provided the impetus for a number of other states to adopt standards similar to Michigan's "public use" standard.

[37] *See* MCL 213.56.

21st Century Update: Compensation and Damages in Eminent Domain

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21st Century Update: Compensation and Damages in Eminent Domain

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I. INTRODUCTION

Whenever private property is taken through the power of eminent domain, both the United States and Michigan Constitutions guarantee that the property owner shall receive "just compensation" for the taking. See US Const amend V; Const 1963, art 10, §2. This outline addresses some of the general standards governing just compensation, and several recent statutory and common law developments affecting the just compensation inquiry.

II. WHAT IS "JUST COMPENSATION?"

A. Generally. "Just compensation" has been defined in a number of ways, but the lasting expressions of the constitutional commandment provide that the purpose of just compensation is "to put the property owner in as good a position as it would have been had the taking never occurred." See, e.g., Dep't of Transp v Van Elslander, 460 Mich 127, 129; 594 NW2d 841 (1999). Other definitions, usually recited alongside the foregoing statement, explain that just compensation "should enrich neither the public at the property owner's expense, nor the property owner at the public expense." Id.

B. No Single Formula. The cases also make clear that there "is no formula or artificial measure of damages applicable to all condemnation cases. The amount of damages to be recovered by the property owner is generally left

* Mr. Cohen wishes to thank Jason C. Long, Esq. of Steinhardt Pesick & Cohen, Professional Corporation, for his valued assistance with this outline.

to the discretion of the trier of fact after consideration of the evidence presented." Id.

C. All Pecuniary Losses. Michigan law also establishes that "just compensation" includes all pecuniary losses caused by a taking. See, e.g., Chicago & GT Ry Co v Hough, 61 Mich 507, 508 (1886) ("nothing is just compensation which does not make good all the pecuniary loss or outlay occasioned to the owner by the appropriation of his property"); Poirier v Grand Blanc Twp, 192 Mich App 539, 545 (1992) (analogizing "just compensation" to the damages available in a tort action). As set forth below, market value is often the starting point for just compensation.

III. JUST COMPENSATION FOR REAL PROPERTY: THE MARKET VALUE STANDARD

A. Market Value. When real property is taken for a public project, the starting point for the owner's "just compensation" is typically the property's market value. The Michigan Supreme Court recently reaffirmed that, when ascertaining a property's market value to determine just compensation, courts must consider all value inherent in the property and "'every . . . element entering into [the property's] cash or market value, as tested by its capacity for any and all uses. . . .'" Silver Creek Drain Dist v Extrusions Division, Inc, 468 Mich 367, 377; 663 NW2d 436 (2003), quoting Searl v Lake County Sch Dist No 2, 133 US 553, 564 (1890).

B. Recent Legal Developments Concerning the Market Value Standard. Numerous factors may contribute to a property's market value. Michigan courts have recently addressed several of these factors.

1. Contamination. In Silver Creek, supra, the specific issue before the Michigan Supreme Court was whether environmental contamination could be taken into account when determining a condemned property's market value to establish just compensation. The question arose because, under the Uniform Condemnation Procedures Act (the "UCPA"), MCL 213.51 et seq., a condemning agency is entitled to reserve or waive its "rights to bring federal or state cost recovery actions against the present owner of the property arising out of a release of hazardous substances at the property and the agency's appraisal of just compensation for the property shall reflect such reservation or waiver." MCL 213.55(1). Thus, appraisers for both condemning agencies and property owners developed a practice of appraising property under the "assumption" that it was free of contamination, knowing that a condemnor could pursue environmental cost recovery actions, if necessary, after conclusion of the condemnation case. In such instances, therefore, "just compensation" would be awarded assuming the property to be "clean."

(a) Contamination is a Factor to Consider. But in Silver Creek, the Supreme Court held that, because all factors that contribute to a property's market value must be considered, any environmental contamination on a property may be taken into account when determining the property's market value at the condemnation trial, regardless of the UCPA's cost-recovery mechanism.

(b) Impact. The Supreme Court's decision in Silver Creek places condemned property owners in a difficult situation. In an ordinary market

transaction involving a contaminated property, the property's owner may **either** (i) sell the property for a "low price," accounting for the property's contamination, **or** (ii) conduct environmental remediation and then sell the property for a higher price, representing the property's value as remediated. Effectively, therefore, the owner "pays" for the property's contamination only once, either in the form of a reduced sale price or as the cost of remediation.

Under Silver Creek, however, if a contaminated property is taken, the owner may **both** (i) receive just compensation based on the property's "low" value as a contaminated property, **and** (ii) then be responsible for the costs of remediating the property in a cost recovery action after the condemnation case concludes. In the three years since Silver Creek's publication, the Supreme Court has not addressed, let alone resolved, this risk of condemnors "double dipping" against condemned property owners.

2. Possibility of Rezoning. Another recently "ballyhooed" issue, which may impact a condemned property's market value, is the possibility that the property could be rezoned for a use other than that which existed at the time of the taking. A "reasonable possibility of rezoning" may be taken into account when determining the property's market value "to the extent that 'the possibility' would have affected the price which a willing buyer would have offered for the property just prior to the taking.'" Dep't of Transp v Van Elslander, 460 Mich at 130, quoting State Hwy Comm'r v Eilender, 362 Mich 697, 699; 108 NW2d 755 (1961).

(a) Evidence of the Possibility of Rezoning. Generally, the parties may present evidence that a property could be rezoned for a different use if there was a "reasonable possibility" that the zoning would be changed. The possibility of a zoning change cannot be "frivolous" or "purely speculative." Van Elslander, 460 Mich at 131.

(b) Evidence of Actual Rezoning. In a recent decision, the Michigan Supreme Court held that, in a partial taking case, a party may not attempt to demonstrate that a property possessed a reasonable possibility of rezoning on the date of taking by presenting evidence that, after the taking, the remaining portion of the property was **actually** rezoned. In Dep't of Transp v Haggerty Corridor LP, 473 Mich 124; 700 NW2d 380 (2005), a portion of a parcel was taken for a road project. At trial, the court permitted the property owner to introduce evidence that, after the partial taking, the portion of its remaining property (i.e. the remainder), was actually rezoned. The owner offered the evidence to support its theory that the entire property possessed a reasonable possibility of rezoning before the taking.

The Supreme Court reversed, but reached no consensus as to any reasoning for the reversal. Three Justices voted to reverse because they concluded that, having occurred after the date of valuation, the evidence of actual rezoning was neither relevant nor admissible. Three others voted to affirm because they concluded that the evidence was both relevant and admissible. The case therefore turned on Justice Kelly's vote to reverse, which was based on her conclusion that the evidence was relevant, but should have been excluded

under MRE 403. As the decision failed to yield a majority analysis, Haggerty Corridor's precedential significance remains an open question. Moreover, as explained below, the decision does not preclude admissibility of comparable market transactions merely because they occur after the date of valuation.

3. Assemblage. Another ingredient that may contribute to market value is the potential to assemble a property with neighboring parcels to create a larger development. In Detroit/Wayne County Stadium Auth v Drinkwater, Taylor & Merrill, Inc, 267 Mich App 625; 705 NW2d 549 (2005), lv app pending, the Court of Appeals addressed the condemnation standard governing claims that a property may be so assembled. The court explained that, unlike rezoning, which (as explained above) is based on a "reasonable possibility" standard, theories regarding assemblage must satisfy a "reasonable probability" test. According to the court, the distinction is that, in cases involving potential for rezoning, the only contingency is whether the municipality would grant a rezoning application. Conversely, the court reasoned, the potential for assemblage rests on a chain of contingencies that must be fulfilled before an assemblage can occur.

Thus, the court approved the trial court's instruction to the jury that it should consider "whether 'a prudent buyer would have had a belief that private assemblage was **reasonably probable** within a reasonable time and for a reasonable price.'" Id. at 560 (emphasis added). On another note, the Court of Appeals ruled that, unlike evidence of actual rezonings that occur after the statutory date of valuation, comparable market transactions, which occur after that statutory date, are typically admissible as proof of the condemned parcel's

valuation. Id., 705 NW2d at 565. This is an important distinction in Michigan's evolving law of eminent domain.

IV. JUST COMPENSATION: OTHER FACTORS IMPACTING MARKET VALUE

A. In General. In addition to the normal market forces that affect a property's market value, certain unique rules apply in the condemnation setting. Conceptually, the rules are designed to ensure that property owners receive neither too much nor too little as just compensation. As set forth below, however, the concepts are sometimes difficult to translate into practice.

B. Disregarding the Condemnation. A longstanding rule provides that, for purposes of establishing just compensation, a property's value must be determined as if the condemnation did not occur. In other words, if public knowledge of a pending condemnation project had an impact on prices in the marketplace, then that impact is to be disregarded when property is later taken for that same project. See, e.g., City of Detroit v Cassese, 376 Mich 311, 318; 136 NW2d 896 (1965). The rule is designed to ensure that condemnees receive neither too much nor too little just compensation where the very condemnation project for which their property is taken either inflated or depressed the real estate market. In partial taking cases, the rule applies only to the property's "before taking" value. See MCivJI 90.15, Note on Use.

1. Codification of the Rule. In a package of amendments to the UCPA adopted in 1996, the Legislature attempted to codify this rule:

> A change in the fair market value before the date of the filing of the complaint which the agency or the owner establishes was substantially due to the general knowledge of the imminence of the

> acquiring by the agency, other than that due to physical deterioration of the property within the reasonable control of the owner, shall be disregarded in determining fair market value. . . [T]he property shall be valued in all cases as though the acquisition had not been contemplated. MCL 213.70(1).

2. Evidence of Market Impact. Relatedly, parties often file motions in condemnation actions attempting to preclude admissibility of evidence that they claim was impacted by the pending condemnation project. For example, a condemning agency may attempt to exclude evidence of some other property's sale price, that the owner wishes to use as evidence of the taken property's value, claiming that the sale price was inflated by knowledge of the pending condemnation. The duty to disregard "project influence," however, is not an exclusionary rule of evidence, but rather a matter of weight for the jury. A leading eminent domain treatise explains that the rule only prohibits compensation attributable to the pending condemnation's impact on value. It is the jury's role to sort out how much, if any, impact the pending condemnation wielded on the market:

> The majority rule excluding enhanced value does not necessarily exclude evidence of enhancement; it merely excludes compensation for increased value attributable to anticipation of the proposed project. Thus, an appraiser or other valuation expert may consider all comparable sales reflecting possible enhancement but will be required to adjust such sales to delete any noncompensable enhanced value. Comparable sales occurring after the date of valuation that reflect enhanced value may also be admitted, but may require appropriate adjustment for enhancement in jurisdictions where this incremental value is noncompensable. 3 Nichols on Eminent Domain §8A.01[10], p 8A-21 (rev 3d ed, 2000) (footnotes omitted).

C. Special and General Effects. In the same package of 1996 amendments to the UCPA, the Legislature adopted a provision that applies

specifically to partial taking cases. The new language purports to draw a distinction between the "general effects" and the "special effects" of a condemnation project, proposing that only "special effects" that would alone provide a basis for an inverse condemnation cause of action are compensable:

> The general effects of a project for which property is taken, whether actual or anticipated, that in varying degrees are experienced by the general public or by property owners from whom no property is taken, shall not be considered in determining just compensation. A special effect of the project on the owner's property that, standing alone, would constitute a taking of private property under section 2 of article X of the state constitution of 1963 shall be considered in determining just compensation. MCL 213.70(2).

The purported distinction between "general" and "special" damages conflicts with the Supreme Court's statement in Silver Creek, supra, that just compensation must account for all factors that influence value, regardless of whether those factors are experienced by persons from whom no property was taken.

The Michigan courts have yet to specifically address the Legislature's attempt to require that the type of "damages" that would support liability in an inverse condemnation action must be present to obtain compensation in a direct condemnation action. Other states' courts, however, have clearly explained that, in a direct condemnation action, damages are compensable regardless of whether other owners experience similar damages and regardless of whether the damages would support liability in an inverse condemnation action. See, e.g., City of Columbus v Farm Bureau Coop Ass'n, 273 NE2d 888, 892 (Ohio Ct App, 1971) ("We conclude . . . that consequential damages which would be damnum absque injuria in the absence of a taking, may be compensable damages to the residue in the event of a taking of a portion of an owner's property"); State v City

of Elizabeth Bd of Ed, 282 A2d 71, 76 (NJ Super Ct, 1971) ("A distinction must be made . . . between damages to a remainder area when part of a tract is physically appropriated, and damages to a tract no part of which is physically appropriated. In the former case it matters not that the injury is suffered in common with the general public"); Silver Creek, 468 Mich at 374 ("no act of the Legislature can take away what the Constitution has given").

In the coming years, Michigan's courts will be called upon to address numerous issues pertaining to the foregoing statute. What is the meaning of the phrase, "in varying degrees?" What does "the general public" mean for purposes of permitting, or excluding, damages? Does it mean that, if other owners of taken property experience the same kinds of damages as the present owner, then none of them are entitled to receive just compensation for those effects? Obviously, this statute, like several others included within the wave of the UCPA's 1996 amendments, will require judicial review in the future.

D. Benefits. Other provisions in the UCPA apply to partial taking cases where "benefits" might accrue to that portion of property remaining after a taking for a new public road or other public improvement.

1. Just Compensation for Partial Takings. When only part of a property is taken, "just compensation" is generally calculated by determining the entire property's value before the taking, and comparing that with the value of the property remaining after the taking. This "before and after" formula ensures that property owners receive just compensation for both the portion of property physically taken, and for any diminution in value suffered by the remainder. See,

e.g., City of Grand Rapids v Barth, 248 Mich 13; 226 NW 690 (1929).

2. Benefits to the Remainder. In some circumstances, however, a condemning agency may contend that a remainder property benefits from the public improvement for which land was taken. For example, where a portion of a parcel is taken for a freeway off-ramp, the owner's remaining property is rendered smaller, but it may enjoy additional value due to the new off-ramp's proximity.

3. Statutory Authorization is Necessary to Consider Benefits. Michigan courts require statutory authorization for any consideration of "benefits." See Fitzsimmons & Galvin, Inc v Rogers, 243 Mich 649, 664; 220 NW 881 (1928). Absent such authorization, only the detriment to a remainder property may be considered in the after-taking valuation analysis.

4. The UCPA's Benefits Provisions. The UCPA addresses "benefits" in two separate sections. Whether, and how, the following two "benefits" provisions interact has not yet been addressed in any reported Michigan decision.

(a) MCL 213.73. This section, included in the UCPA at the time of its adoption in 1980, provides that any "enhancement benefits" of a new public improvement shall be considered when determining just compensation. The statute further provides that, if the agency intends to claim that its project creates enhancement benefits, then it must plead such benefits in its complaint and carry the burden of proof that benefits are present. The statutory provision also permits a property owner to request an order compelling the condemning agency

to acquire the entire property, rather than just a portion of it, thereby shifting the "risk" of an erroneous benefits theory to the agency itself. See MCL 213.73.

(b) MCL 213.70(2). This section, added to the UCPA in 1996, provides that if a project's detrimental effects on a property are considered, then "they may be offset by consideration of the beneficial effects of the project."

V. JUST COMPENSATION: OTHER DAMAGES

A. Generally. As mentioned above, just compensation includes not only a property's market value, but also "all the pecuniary loss or outlay occasioned to the owner by the appropriation of his property." Chicago & GT Ry Co v Hough, 61 Mich at 508. While Michigan's courts have not specifically enumerated each and every kind of damage available as just compensation, some of the broader categories include the going concern value of a business, City of Detroit v Michael's Prescriptions, 143 Mich App 808; 819; 373 NW2d 219 (1985), business interruption damages, In re Grand Haven Hwy, 357 Mich 20, 28; 97 NW2d 748 (1959), costs incurred to avoid business interruption damages, City of Detroit v Hamtramck Commty Fed Credit Union, 146 Mich App 155; 379 NW2d 405 (1985), and lost rents, see City of Muskegon v DeVries, 59 Mich App 415, 419; 229 NW2d 479 (1975). On the other hand, the courts have made clear that "lost profits" may not be included in "just compensation" for a taking. See City of Detroit v Larned Assocs, 199 Mich App 36; 501 NW2d 189 (1993).

B. Distinguishing Compensable Business Interruption from Lost Profits. The Court of Appeals recently attempted to distinguish between compensable business interruption damages and non-compensable lost profits.

In Detroit/Wayne County Stadium Auth v Drinkwater, Taylor & Merrill, Inc, supra, a van transportation company based its operations on a site taken for stadium development. The site was located in close proximity to the bulk of the company's transportation runs. The trial court permitted the company to introduce evidence demonstrating that, because the company would no longer operate from a property located so close to where the bulk of its business occurred, the company would sustain increased labor and operational costs for each van trip. The transport company styled this as a "business interruption" claim, but the Court of Appeals disagreed, holding that this evidence related "to lost profits and not business interruption damages." See 705 NW2d at 570-71. Arguably, the court's holding is case-specific. But if labor and operating costs are now generally inadmissible on grounds that they are somehow lost profits, then the law of business interruption in Michigan has changed, at least until judicial clarification is provided.

VI. CONCLUSION

The goal of "just compensation" requires counsel, the courts, and the legislature, to strive to place each condemned property owner in as good a position as that which the owner occupied before any taking occurred. Translating that goal into practice remains challenging, and rewarding, work. Recent developments in Michigan's law of eminent domain have provided some answers to questions that loomed in this area of the law, but new and important issues await resolution in the 21st century.

Zoning and Condemnation 21st Century Update

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REAL PROPERTY LAW SECTION
HOMEWARD BOUND – FEBRUARY 2, 2006
ZONING – 21ST CENTURY UPDATE

I. Ripeness

A. Supreme Court Decisions and Federal law

1. Williamson County Regional Planning Commission v. Hamilton Bank, 473 US 172, 87 L Ed 2d 125 (1985)

a. Federal Courts will not consider a takings claim for damages until the property owner pursues a remedy under state law or unless the property owner has no remedy under state law. The claim is not ripe until a state fails "to provide adequate compensation for the taking." Id at 195. How far must the property owner go? See Palazzolo v Rhode Island, 533 U.S. 606, 618-621, 150 L Ed 2d 592 (2001).

b. The ripeness rule is prudential, not jurisdictional. Suitum v Tahoe Regional Planning Agency, 520 U.S. 725, 733-734, 137 L Ed 2d 980 (1997); Also see San Remo Hotel, infra, (Rehnquist, J. concurring); Lucas v South Carolina Coastal Council, 505 U.S. 1003, at 1012-1013, 120 L Ed 2d 798 (1992), and Stevens, J. dissent, Id at 1062.

c. The ripeness rule does not apply to facial challenges to the validity of a zoning ordinance. See San Remo Hotel, infra, 162 L Ed 2d, at 335, n. 23, and Id at 338; Nuenfeldt, infra, 356 F. Supp 2d at 774; and see Paragon, infra, for state law.

d. Procedural due process claims are not subject to a ripeness defense. Nasierowski Bros Investment Co v Sterling Heights, 949 F 2d 890 (6th Cir 1991).

e. Substantive due process claims (i.e., claims under the due process clause, as opposed to claims under the takings clause of the U.S. Constitution) are not subject to ripeness defense. See San Remo, infra, 125 SCt at 338; Pearson v Grand Blanc, 961 F 2d 1211, 1215 (6th Cir 1992); Nuenfeldt v Williams Township, 356 F Supp 2d 770, 775-776 (E.D. Mich, 2005).

2. San Remo Hotel LP v San Francisco, 545 US ___, 162 L Ed 2d 315 (2005).

a. Supreme Court holds that once a land owner litigates her takings claims in state court, she is precluded from litigating the claim in federal court. Does San Remo therefore mean that federal courts are closed to any claim for takings damages? Does San Remo close the door Williamson County left open? Has the Supreme Court "catch 22d" property owners? See San Remo quote from and rejection of Santini.

b. Note: Justice Rehnquist, joined by Justices O'Connor, Kennedy, and Thomas, concurred in the San Remo decision, but stated: "It is not clear to me that Williamson County was correct in demanding that, once a government entity has reached a final decision with respect to a claimant's property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court… . Williamson County's state litigation rule has created some real anomalies, justifying our revisiting the issue." Id at 340-341. Williamson County is thus apparently neither a "super-duper" precedent nor a "super" precedent. BUT – since Chief Justice Rehnquist is no longer on the Court and Justice O'Connor may be leaving soon, and in light of the intense questioning of Chief Justice Roberts and of nominee Alito, we are likely to wait a while for a revisit.

c. Practical Note – Even where ripeness doesn't strictly apply, it doesn't make much sense to start a zoning case in federal court, except, perhaps in a procedural due process case, because if you combine the abstention doctrine with San Remo's issue preclusion approach, you're likely to be bound by the state court decision.

B. Michigan Ripeness Law

1. Electro-Tech, Inc v HF Campbell Co and City of Westland, 433 Mich 57, 445 NW2d 61 (1989)

Applied Williamson County ripeness rule to a state court action for takings damages. Significance of Electro-tech was that (1) it went beyond Williamson County, which was simply a gate-keeping rule for when the federal courts would be open to takings claims, and made ripeness a Michigan rule, (2) it contained language which could be used to extend the ripeness rule to substantive due process challenges; and (3) it applied ripeness where the claim was that the city imposed an unconstitutional condition on site plan approval. See Justice Brickley's dissent.

2. Paragon Properties v Novi, 452 Mich 568, 550 NW2d 772 (1996).

a. A takings claim challenging a city zoning ordinance as applied to property is not ripe until the property owner has applied for a use variance and been denied.

b. Paragon does not apply to a facial challenge. Id at 577.

c. Does Paragon apply to township zoning ordinances? There is some difference in language between the City and Village Zoning Act and the Township Zoning Act. Open question – some townships believe a township zoning board of appeals cannot grant a use variance and some believe it can.

d. A substantive due process challenge to a zoning ordinance may be made without seeking a use variance. Sun Communities v Leroy Township, 241 Mich App 665, 617 NW2d 42 (2000). Also see concurrence by Judge Donofrio in Wolters Realty, Ltd v Saugatuck Township, Court of Appeals No. 247228, 10/25/05 (unpublished).

II. Standard of Review in Federal Regulatory Takings Cases

Lingle v Chevron USA, 544 US __, 125 SCt 2074, 161 L E 2d 867 (2005)

a. The "substantially advances" test is not the correct test for determining whether a regulation affects an uncompensated Fifth Amendment taking.

b. But government may not require a person to give up a constitutional right as a condition of obtaining a permit. Query – what would have happened if Electro-Tech had gone to the U.S. Supreme Court?

c. Takings Which Require Compensation

1. Any permanent physical invasion.

2. A "total" regulatory taking; deprivation of all value. How about substantially all value? See Lucas v South Carolina Coastal Council, 505 US 1003, 120 L Ed 2d 798 (1992), and see n. 7, Id at 813.

3. A regulation which imposes too severe a "magnitude of… economic impact and… interferes [too much] with legitimate property interests." [?] 161 L Ed 2d at 889. In other words, a taking must be total to be compensable, but too much of a taking can also be compensable. How much is too much is beyond the scope of this summary. See Lucas, supra, n. 7, 120 L Ed 2d at 813. Also, Palazzolo, supra. For a discussion of Michigan law, see K &

K Construction v DEQ, 267 Mich App 523, 705 NW2d 365 (2005), on remand from 456 Mich 570, 575 NW2d 531 (1998).

4. Lingle in summary – "the 'substantially advances' formula is not a valid takings test… ." Id at 892. But (1) Lingle does not apply to substantive due process cases; and (2) it is a Fifth Amendment case – it does not speak to Michigan's takings clause, although the Michigan courts may well follow it.

III. Discussion of Recent Michigan Decisions of Some Interest

Recent decisions do not break any new ground; the following and others to be discussed do shed some light on how litigants may fare in Michigan courts

A. Ripeness - invocation in substantive due process as well as inverse condemnation cases, e.g., Neuenfeldt v Williams Twp, 356 F Supp 2d 770(ED Mich, 2005); VanWulfen v Montmorency County, 345 F Supp 2d 730 (ED Mich, 2004); Roach v Lapeer Twp, Court of Appeals No. 251088 (March 15, 2005)

B. Referendum - application to consent judgments and “the effect of rezoning” - reiteration of Green Oak Twp v Munzel, 255 Mich App 235; 661 NW2d 243 (2003)

C. Religious Land Use & Institutionalized Persons Act, 42 USC § 2000cc et seq - conflict between Michigan and federal court decisions

D. Land division - overreaching from both sides: claims by local government that other regulations apply to division approvals and claims by property owners that land division act standards preempt other regulations. Sotelo v Grant Twp, 470 Mich 95; 680 NW2d 381 (2004); Camburn v Macon Twp, Court of Appeals No. (May 26, 2005)

E. Unconstitutional conditions – RSWW, Inc v City of Keego Harbor, 397 F3d 427 (CA 6 2005) – unconstitutional conditions for administrative zoning approval

F. Short-term rental regulation and zoning riparian uses - keeping the peace or exclusionary zoning? Twp of Yankee Springs v Fox, 264 Mich App 604; 692 NW2d 728 (2004), Torch Lake Protection Alliance v Ackermann, Court of Appeals No. 246879 (November 20, 2004)

G. Nonconforming uses - reaffirms bedrock principles of preserving nonconforming uses against presumptions of loss or abandonment. Livonia Hotel, LLC v Livonia, 259 Mich App 116, 131; 673 NW2d 763 (2003)

IV. Recent Michigan Legislation

A. PUDs with off-site open space – simultaneous amendments to the planned unit development provisions of all three enabling acts provide that “if requested by the landowner, a [local government] may approve a planned

unit development with open space that is not contiguous with the rest of the planned unit development." This provision allows dense development where it is planned or already exists and preservation of open space where it is planned, exists, or is otherwise desirable. The legislation arose from a project which placed the open space for a PUD across the street. The amendment does not set such limits, and could allow in-fill development with simultaneous preservation by conservation easement or other device of farmland or other open space anywhere else in the county, township or city.

B. Open Space Zoning, MCL 125.584f (cities/villages), MCL 125.286h (townships), MCL 125.216h (counties) (see "Recent Legislation" attached)

Open space zoning requires local governments to allow development at the option of the landowner with the same number of dwelling units on half the land or less while keeping the rest perpetually undeveloped. In cities, only 20 percent of the land must be kept as open space.

The provision applies to land already zoned at a density of two or fewer dwelling units per acre or, if the land is served by a public sewer system, three or fewer dwelling units per acre.

The statute sets almost no limits on local government discretion in defining how the percentage of developed land or open land is calculated or the discretion and procedures for reviewing and approving the development plan. Accordingly, most simply duplicate planned unit development provisions.

C. Conditional or Contract Zoning, MCL 125.584g (cities and villages), 125.286i (townships), MCL 125.216i (counties). The legislature amended the zoning acts to simply provide, in almost identical language in each act:

1. An owner of land may voluntarily offer in writing, and the [local government] may approve, certain use and development of the land as a condition to rezoning of the land or an amendment to a zoning map.

2. In approving the conditions under subsection (1), the [local government] may establish a time period during which the conditions apply to the land. Except for an extension under subsection (4), if the conditions are not satisfied within the time specified under this subsection, the land shall revert to its former zoning classification.

3. The [local government] shall not add to or alter the conditions approved under subsection (1) during the time period specified under subsection (2).

4. The time period specified under subsection (2) may be extended upon the application of the landowner and approval of the [local government].

5. A [local government] shall not require a landowner to offer conditions as a requirement for rezoning. The lack of an offer under subsection (1) shall not otherwise affect the landowner's rights under this act, the ordinances of the [local government], or any other laws of this state.

As a practical matter, conditional or contract zoning has been used in Michigan by various devices, including the use of simultaneous site plan, special use permit, and rezoning approvals, development agreements without real statutory authorization, utility agreements that include provisions that extend well beyond the utilities to include essential development details, or the recording of restrictions in order to induce rezoning. As a result, the legislature took the view that the practice – whether viewed as blackmail or necessary corollaries to offset more intense development – should be legalized.

Although the statutory amendments authorize conditions as part of the legislative act of rezoning, the authorization was initially attacked as failing to provide standards, procedures, or other regulatory details more common to administrative procedure. Some southeastern Michigan communities, on advice of counsel, have declined to allow conditional zoning.

The history of conditional or contract zoning is not uniform in other states, and similar authorization varies from statutes as simple as Michigan's to very complex. Decisions under those statutes may provide some guidance, but are probably of limited use in the application of Michigan's statute. They do suggest at least that the authorization has given rise to very little litigation. See, The Background to Michigan's Conditional Zoning Authorization, 32 Michigan Real Property Review 67 (Summer 2005).

D. Many municipal attorneys and the Michigan Township Association believe that despite the apparent simplicity of an offer by the landowner and acceptance by the legislative body as stated in the statute, an enabling ordinance is required for local government to employ conditional zoning. The MTA model ordinance (attached) is likely to be adopted in many townships. It is worth examining in any event to identify the procedural and substantive issues that are likely to arise. Those would include the following:

1. Whether offered conditions may authorize uses or structures not permitted in the new district;

2. Meaning of "certain use and development" – whether it may include conditions not directly part of the land, the use, or the development of the site itself, like off-site improvements or payments;

3. Relationship of the conditions to the property approved for rezoning;

4. Necessity of subsequent approvals for special use permit or site plan;

5. Whether a rezoning condition may grant a variance;

6. Whether the initial application must include conditions;

7. When amendment of conditions may be made during the process and the necessity of any new public hearings or new review by planning commission;

8. The required form for the statement of conditions, whether in form of agreement or as part of ordinance;

9. Whether a statement of conditions or agreement should be recorded;

10. Whether the offer must be subject to municipal recitals of voluntariness, release of all claims, waivers of right to sue, or the like.

11. After initial development, violation becomes a zoning violation and does not automatically work a reversion of the zoning.

12. Procedure for zoning reversion

I. Pending Legislation

A. Zoning Consolidation - HB 4398

a. Governor's Land Use Leadership Council report called for the zoning and planning enabling acts to be "updated to reflect contemporary growth, redevelopment, and preservation needs and to define the respective roles of government in meeting these needs." The Michigan Association of Planning also initiated an effort to first combine the separate enabling statutes without substantive change and then address changes in subsequent legislation.

b. HB 4398 as passed the House preserved almost all key distinctions between city/village and township/county zoning, including protest petitions in cities versus referenda in townships and counties; distinctive language on zoning variances with "use" only employed to describe city/village variances; broader standing and joinder for city nonconforming use litigation; interim zoning authority for townships/counties.

c. Combined act requires careful examination to find where distinctions between types of government are eliminated and where they are maintained (sometimes in excruciating detail).

d. Even in early drafts, the principal sponsor sought to coordinate and simplify notice provisions. Substitute going to Senate committee would abolish use variance distinctions.

B. Planning consolidation - Substitute for SB 683 (N.B., the version first introduced and found online at michiganlegislature.org is not the correct bill; the sponsor has a complete replacement)

1. As with zoning consolidation, the avowed aim is to combine the three planning acts into a single enabling act without substantive change, then consider amendments in the future.

2. Most changes will be technical but the legislature will have to decide whether to preserve the independent authority under the planning act for planning commission review of plats, site plans, and public improvements, as well as legislative body approval of master plans.

3. This bill does not create "coordinated planning." "Joint" planning, recently authorized as an attempt to revive largely lifeless regional planning has not happened yet. At best, small cities and townships without a plan or zoning have tried to combine efforts to cut costs.

CITY AND VILLAGE ZONING ACT (EXCERPT)
Act 207 of 1921

125.584b Planned unit development.

Sec. 4b. (1) As used in this section, "planned unit development" includes cluster zoning, planned development, community unit plan, planned residential development, and other terminology denoting zoning requirements designed to accomplish the objectives of the zoning ordinance through a land development project review process based on the application of site planning criteria to achieve integration of the proposed land development project with the characteristics of the project area.

(2) A city or village may establish in a zoning ordinance planned unit development requirements which permit flexibility in the regulation of land development; encourage innovation in land use and variety in design, layout, and type of structures constructed; achieve economy and efficiency in the use of land, natural resources, energy, and the providing of public services and utilities; encourage useful open space; and provide better housing, employment, and shopping opportunities particularly suited to the needs of the residents of the state. The review and approval of planned unit developments shall be by the commission appointed to formulate and subsequently administer the zoning ordinance, an official charged with administration of the ordinance, or the legislative body.

(3) Within a land development project designated as a planned unit development, regulations relating to the use of land, including, but not limited to, permitted uses, lot sizes, setbacks, height limits, required facilities, buffers, open space areas and how they are to be preserved, and land use density shall be determined in accord with the planned unit development regulations specified in the zoning ordinance. The planned unit development regulations need not be uniform with regard to each type of land use if equitable procedures recognizing due process principles and avoiding arbitrary decisions are followed in making regulatory decisions. Unless explicitly prohibited by the planned unit development regulations, if requested by the landowner, a city or village may approve a planned unit development with open space that is not contiguous with the rest of the planned unit development.

(4) The planned unit development regulations established by a city or village shall specify:

(a) The body or official which will review and approve planned unit development requests.

(b) The conditions which create planned unit development eligibility, the participants in the review process, and the requirements and standards upon which applications will be judged and approval granted.

(c) The procedures required for application, review, and approval.

(5) Following receipt of a request to approve a planned unit development, the body or official charged in the ordinance with the review and approval of planned unit developments shall hold at least 1 public hearing on the request. A zoning ordinance may provide for preapplication conferences before submission of a planned unit development request, and the submission of preliminary site plans before the public hearing. Notification of the public hearing shall be given in the same manner as required by section 4a(3) for public hearings on special land uses. Within a reasonable time following the public hearings, the body or official responsible for approving planned unit developments shall meet for final consideration of the request, and shall deny, approve, or approve with conditions, the request. It shall prepare a report stating its conclusions on the request for a planned unit development, the basis for its decision, the decision, and any conditions relating to an affirmative decision. If the ordinance requires that the legislative body amend the ordinance to act on the planned unit development request, and if the hearing was not held by the legislative body, the report, a summary of comments received at the public hearing, minutes of all proceedings, and all documents related to the planned unit development request, shall be transmitted to the legislative body for consideration in making a final decision. If an amendment of a zoning ordinance is required by the planned unit development regulations of a city or village zoning ordinance, the ordinance amendment procedures of this act shall be followed, except that the hearing required by this subsection shall be regarded as fulfilling the public hearing requirement of section 4.

(6) If the planned unit development regulations of a city or village zoning ordinance do not require amendment of the ordinance to authorize a planned unit development, the body or official charged in the zoning ordinance with review and approval of planned unit developments may give final approval, approval with conditions, or denial to a request.

(7) Final approvals may be granted on each phase of a multiphased planned unit development if each phase contains the necessary components to insure protection of natural resources and the health, safety, and welfare of the users of the planned unit development and the residents of the surrounding area.

(8) In establishing planned unit development regulations, a city or village may incorporate by reference other applicable ordinances or statutes which regulate land development. The planned unit development regulations contained in a zoning ordinance shall encourage complementary relationships between zoning

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regulations and other regulations affecting the development of land.

History: Add. 1978, Act 638, Eff. Mar. 1, 1979;—Am. 2003, Act 227, Imd. Eff. Dec. 18, 2003.

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CITY AND VILLAGE ZONING ACT (EXCERPT)
Act 207 of 1921

125.584g Conditions to rezoning land; offer by landowner; approval by city or village; time period; extension; lack of offer by landowner.

Sec. 4g. (1) An owner of land may voluntarily offer in writing, and the city or village may approve, certain use and development of the land as a condition to a rezoning of the land or an amendment to a zoning map.

(2) In approving the conditions under subsection (1), the city or village may establish a time period during which the conditions apply to the land. Except for an extension under subsection (4), if the conditions are not satisfied within the time specified under this subsection, the land shall revert to its former zoning classification.

(3) The city or village shall not add to or alter the conditions approved under subsection (1) during the time period specified under subsection (2).

(4) The time period specified under subsection (2) may be extended upon the application of the landowner and approval of the city or village.

(5) A city or village shall not require a landowner to offer conditions as a requirement for rezoning. The lack of an offer under subsection (1) shall not otherwise affect a landowner's rights under this act, the ordinances of the city or village, or any other laws of this state.

History: Add. 2004, Act 579, Imd. Eff. Jan. 4, 2005.

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TOWNSHIP ZONING ACT (EXCERPT)
Act 184 of 1943

125.286h Qualified township zoning ordinances; option of landowner to develop land zoned for residential development; requirements; limitations; "qualified township" defined; zoning ordinance provisions cited as "open space preservation."

Sec. 16h. (1) Subject to subsection (4) and section 12, beginning 1 year after the effective date of the amendatory act that added this section, each qualified township shall provide in its zoning ordinance that land zoned for residential development may be developed, at the option of the land owner, with the same number of dwelling units on a portion of the land specified in the zoning ordinance, but not more than 50%, that, as determined by the township, could otherwise be developed, under existing ordinances, laws, and rules, on the entire land area, if all of the following apply:

(a) The land is zoned at a density equivalent to 2 or fewer dwelling units per acre, or, if the land is served by a public sewer system, 3 or fewer dwelling units per acre.

(b) A percentage of the land area specified in the zoning ordinance, but not less than 50%, will remain perpetually in an undeveloped state by means of a conservation easement, plat dedication, restrictive covenant, or other legal means that runs with the land, as prescribed by the zoning ordinance.

(c) The development does not depend upon the extension of a public sewer or public water supply system, unless development of the land without the exercise of the option provided by this subsection would also depend upon such an extension.

(d) The option provided pursuant to this subsection has not previously been exercised with respect to that land.

(2) After a land owner exercises the option provided pursuant to subsection (1), the land may be rezoned accordingly.

(3) The development of land under subsection (1) is subject to other applicable ordinances, laws, and rules, including rules relating to suitability of groundwater for on-site water supply for land not served by public water and rules relating to suitability of soils for on-site sewage disposal for land not served by public sewers.

(4) Subsection (1) does not apply to a qualified township if both of the following requirements are met:

(a) Since on or before October 1, 2001, the township has had in effect a zoning ordinance provision providing for both of the following:

(*i*) Land zoned for residential development may be developed, at the option of the land owner, with the same number of dwelling units on a portion of the land that, as determined by the township, could otherwise be developed, under existing ordinances, laws, and rules, on the entire land area.

(*ii*) If the land owner exercises the option provided by subparagraph (*i*), the portion of the land not developed will remain perpetually in an undeveloped state by means of a conservation easement, plat dedication, restrictive covenant, or other legal means that runs with the land.

(b) On or before the enactment date of the amendatory act that added this section, a land owner exercised the option provided under the zoning ordinance provision referred to in subdivision (a) with at least 50% of the land area remaining perpetually in an undeveloped state.

(5) As used in this section, "qualified township" means a township that meets all of the following requirements:

(a) Has adopted a zoning ordinance.

(b) Has a population of 1,800 or more.

(c) Has land that is not developed and that is zoned for residential development at a density described in subsection (1)(a).

(6) The zoning ordinance provisions required by subsection (1) shall be known and may be cited as the "open space preservation" provisions of the zoning ordinance.

History: Add. 2001, Act 177, Imd. Eff. Dec. 15, 2001.

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Overview of General Provisions of the Open Space Amendments to the Zoning Acts

Each zoning act (the County Zoning Act, the Township Zoning Act, and the City and Village Zoning Act) has new amendments that are meant to encourage the preservation of open spaces by mandating that qualified municipalities must include in their zoning ordinance provisions that allow the developer owning residentially-zoned land to build the same number of dwelling units on just a portion of that land as would be allowed to be developed on all of the land, provided that the undeveloped land remains perpetually undeveloped.

Counties, townships, cities, and villages to which the new provisions apply were to enact zoning ordinances providing for this option by December 15, 2002.

The separate amendments to each zoning act are largely identical. The only difference is in the provisions dictating how much of the land must remain undeveloped. The differences are in bold type.

I. The County Zoning Act – MCL 125.216h

A. Which counties are required to enact open space preservation ordinances?

"Qualified Counties". These are defined as any county that:

1. Has adopted a zoning ordinance,
2. Has a population of 1800 or more,
3. Has undeveloped land that is zoned residential, which has a zoned density of 2 or fewer dwelling units per acre, or three or fewer dwelling units per acre if the land is served by a public sewer system.

B. What must the open space preservation ordinance allow for?

1. "[T]hat land zoned for residential development may be developed, *at the option of the landowner*, with the same number of dwelling units on a portion of the land specified in the zoning ordinance, ***but not more than 50%***, that, as determined by the county, could otherwise be developed under existing ordinances, laws, and rules, on the entire land area." MCL 125.216h(1) (emphasis added).
2. It is important to note that the county specifies in its zoning ordinance the size of the reduced portion of land that can be developed. This portion **cannot be any larger than 50% of the entire land area.** Thus, the ordinance may allow a developer to build the same number of dwelling units on as little as 30% of land as could be developed on the entire land area.

3. It is important to note that the amendment still allows the county to determine how many dwelling units could have been developed on the entire parcel. This means that although a parcel may be large enough to accommodate 50 dwelling units, but only 40 can be developed on the land because of other issues such as wetlands, etc., only 40 units may be developed on a smaller portion of the land, even if that smaller portion has no wetlands or other issues.

C. What land within the county qualifies for the exercise of this option?

1. Residentially zoned property;

2. That is zoned at a density equivalent to 2 or fewer dwelling units per acre, or, if it is served by a public sewer system, 3 or fewer dwelling units per acre;

3. At least **50% of which must remain perpetually in an undeveloped state** by means of a conservation easement, plat dedication, restrictive covenant, or other legal means that runs with a land;

4. The development of which does not depend upon the extension of a public sewer or public water supply system, unless development of the land without the exercise of the option provided for by the open space amendment would also depend on such an extension. (In other words, if the developer wishes to build all of the dwelling units on 50% of the available land, such a development must not depend upon the extension of the public sewer or water supply system, unless such an extension would be necessary even if this option were not chosen);

5. That has not been developed previously through the exercise of the option allowed by the open space preservation ordinance.

D. Which Qualified Counties are exempt from having to enact an open space preservation ordinance?

1. Qualified Counties where both of the following are true:

a. The county has had in effect since on or before October 1, 2001, a zoning ordinance providing for a substantially similar option and providing that if such an option is exercised, the portion of undeveloped land will remain perpetually undeveloped by some legal means that runs with the land;

b. On or before the enactment date of the act that added this statute, the landowner exercised the option allowed by the current ordinance and at least 50% of the land will remain perpetually undeveloped.

2. The effect of this "exemption" is that all Qualified Counties must have some kind of ordinance similar to the ordinance required by this amendment.

E. Other considerations

1. After a landowner exercises the option provided for by this statute, the land may be rezoned "accordingly"

2. The development of land under this option is still subject to other applicable ordinances, laws, and rules (including rules relating to the suitability of groundwater for on-site water supply for land not served by public water and rules relating to the suitability of soils for on-site sewage disposal for land not served by a public source).

II. The Township Zoning Act – MCL 125.286h

A. Which townships are required to enact open space preservation ordinances?

"Qualified Townships". These are defined as any township that:

1. Has adopted a zoning ordinance,

2. Has a population of 1800 or more,

3. Has undeveloped land that is zoned residential, which has a zoned density of 2 or fewer dwelling units per acre, or three or fewer dwelling units per acre if the land is served by a public sewer system.

B. What must the open space preservation ordinance allow for?

1. "[T]hat land zoned for residential development may be developed, *at the option of the landowner*, with the same number of dwelling units on a portion of the land specified in the zoning ordinance, ***but not more than 50%,*** that, as determined by the township, could otherwise be developed under existing ordinances, laws, and rules, on the entire land area." MCL 125.286h(1) (emphasis added).

2. It is important to note that the township specifies in its zoning ordinance the size of the reduced portion of land that can be developed. This portion cannot be any larger than 50% of the entire land area. Thus, the ordinance may allow a developer to build the same number of dwelling units on as little as 30% of land as could be developed on the entire land area.

3. It is important to note that the amendment still allows the township to determine how many dwelling units could have been developed on the entire parcel. This means that although a parcel may be large enough to accommodate 50 dwelling units, but only 40 can be developed on the land

because of other issues such as wetlands, etc., only 40 units may be developed on a smaller portion of the land, even if that smaller portion has no wetlands or other issues.

C. What land within the township qualifies for the exercise of this option?

1. Residentially zoned property;

2. That is zoned at a density equivalent to 2 or fewer dwelling units per acre, or, if it is served by a public sewer system, 3 or fewer dwelling units per acre;

3. **At least 50% of which must remain perpetually in an undeveloped state** by means of a conservation easement, plat dedication, restrictive covenant, or other legal means that runs with a land;

4. The development of which does not depend upon the extension of a public sewer or public water supply system, unless development of the land without the exercise of the option provided for by the open space amendment would also depend on such an extension. (In other words, if the developer wishes to build all of the dwelling units on 50% of the available land, such a development must not depend upon the extension of the public sewer or water supply system, unless such an extension would be necessary even if this option were not chosen);

5. That has not been developed previously through the exercise of the option allowed by the open space preservation ordinance.

D. Which Qualified Townships are exempt from having to enact an open space preservation ordinance?

1. Qualified Townships where both of the following are true:

   a. The township has had in effect since on or before October 1, 2001, a zoning ordinance providing for a substantially similar option and providing that if such an option is exercised, the portion of undeveloped land will remain perpetually undeveloped by some legal means that runs with the land;

   b. On or before the enactment date of the act that added this statute, the landowner exercised the option allowed by the current ordinance and at least 50% of the land will remain perpetually undeveloped.

2. The effect of this "exemption" is that all Qualified Townships must have some kind of ordinance similar to the ordinance required by this amendment.

E. Other considerations

1. After a landowner exercises the option provided for by this statute, the land may be rezoned "accordingly"

2. The development of land under this option is still subject to other applicable ordinances, laws, and rules (including rules relating to the suitability of groundwater for on-site water supply for land not served by public water and rules relating to the suitability of soils for on-site sewage disposal for land not served by a public source).

III. The City and Village Zoning Act – MCL 125.584f

A. Which cities or villages are required to enact open space preservation ordinances?

"Qualified Cities" or "Qualified Villages". These are defined as any city or village that:

1. Has adopted a zoning ordinance,

2. Has a population of 1800 or more,

3. Has undeveloped land that is zoned residential, which has a zoned density of 2 or fewer dwelling units per acre, or three or fewer dwelling units per acre if the land is served by a public sewer system.

B. What must the open space preservation ordinance allow for?

1. "[T]hat land zoned for residential development may be developed, *at the option of the landowner*, with the same number of dwelling units on a portion of the land specified in the zoning ordinance, ***but not more than 80%,*** that, as determined by the city or village, could otherwise be developed under existing ordinances, laws, and rules, on the entire land area." MCL 125.584f(1) (emphasis added).

2. It is important to note that the city or village specifies in its zoning ordinance the size of the reduced portion of land that can be developed. **This portion cannot be any larger than 80% of the entire land area.** Thus, the ordinance may allow a developer to build the same number of dwelling units on as little as 30% of land as could be developed on the entire land area.

3. It is important to note that the amendment still allows the city or village to determine how many dwelling units could have been developed on the entire parcel. This means that although a parcel may be large enough to accommodate 50 dwelling units, but only 40 can be developed on the land because of other issues such as wetlands, etc., only 40 units may be

developed on a smaller portion of the land, even if that smaller portion has no wetlands or other issues.

C. What land within the city or village qualifies for the exercise of this option?

1. Residentially zoned property;

2. That is zoned at a density equivalent to 2 or fewer dwelling units per acre, or, if it is served by a public sewer system, 3 or fewer dwelling units per acre;

3. **At least 20% of which must remain perpetually in an undeveloped state** by means of a conservation easement, plat dedication, restrictive covenant, or other legal means that runs with a land;

4. The development of which does not depend upon the extension of a public sewer or public water supply system, unless development of the land without the exercise of the option provided for by the open space amendment would also depend on such an extension. (In other words, if the developer wishes to build all of the dwelling units on 80% of the available land, such a development must not depend upon the extension of the public sewer or water supply system, unless such an extension would be necessary even if this option were not chosen);

5. That has not been developed previously through the exercise of the option allowed by the open space preservation ordinance.

D. Which Qualified Cities or Qualified Villages are exempt from having to enact an open space preservation ordinance?

1. Qualified Cities or Qualified Villages where both of the following are true:

   a. The city or village has had in effect since on or before October 1, 2001, a zoning ordinance providing for a substantially similar option and providing that if such an option is exercised, the portion of undeveloped land will remain perpetually undeveloped by some legal means that runs with the land;

   b. On or before the enactment date of the act that added this statute, the landowner exercised the option allowed by the current ordinance and at least 20% of the land will remain perpetually undeveloped.

2. The effect of this "exemption" is that all Qualified Cities or Qualified Villages must have some kind of ordinance similar to the ordinance required by this amendment.

E. Other considerations

1. After a landowner exercises the option provided for by this statute, the land may be rezoned "accordingly"

2. The development of land under this option is still subject to other applicable ordinances, laws, and rules (including rules relating to the suitability of groundwater for on-site water supply for land not served by public water and rules relating to the suitability of soils for on-site sewage disposal for land not served by a public source).

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MTA MODEL ZONING ORDINANCE PROVISIONS
PERTAINING TO CONDITIONAL REZONING

With the recent amendment of the Township Zoning Act by 577 PA 2004, Michigan townships for the first time acquired the ability to rezone land subject to conditions voluntarily offered by the landowner. While the full implications of this statutory change are not yet known, the following Model Zoning Ordinance Provisions are intended to help a township implement this new "conditional rezoning" procedure.

These provisions have been drafted to be incorporated as amendments to a township's zoning ordinance and will likely have to be modified to fit properly into an individual township's zoning ordinance. The types of modifications that may be needed include the following:

1. **Modification of the section and subsection references to be consistent with the remainder of the Zoning Ordinance.**

2. **If a township has a Zoning Board instead of a Planning Commission, then all references in the model provisions to the Planning Commission would need to be changed accordingly.**

3. **If a township's Zoning Ordinance currently refers to a pre-application conference with township staff as part of the prescribed rezoning process, then text modification may be needed to make clear that conditional rezonings are also subject to this requirement.**

4. **These model zoning provisions, like the statutory provision authorizing conditional rezoning, refer to the rezoning applicant as the "owner of land". If a township's zoning ordinance uses different terminology, then the model zoning provisions may need to be modified accordingly.**

5. **Subsection G of the model zoning provisions provides that unless another time period is specified in the Ordinance rezoning the subject land, the approved development and/or use of the land pursuant to building and other required permits must be commenced upon the land within 18 months after the rezoning took effect. A township considering adoption of these model zoning provisions should feel free to change the reference to "18 months" if it feels another time period would be more desirable.**

MTA urges that any township considering adoption of this model in whole or in part first consult with its local attorney so that (1) the township is properly advised of the full implications of these provisions and (2) all needed or desired modifications to these provisions can be made.

Section __. Conditional Rezoning.

A. Intent.

It is recognized that there are certain instances where it would be in the best interests of the Township, as well as advantageous to property owners seeking a change in zoning boundaries, if certain conditions could be proposed by property owners as part of a request for a rezoning. It is the intent of this Section to provide a process consistent with the provisions of Section 16i of the Township Zoning Act (MCL125.286i) by which an owner seeking a rezoning may voluntarily propose conditions regarding the use and/or development of land as part of the rezoning request.

B. Application and Offer of Conditions.

1. An owner of land may voluntarily offer in writing conditions relating to the use and/or development of land for which a rezoning is requested. This offer may be made either at the time the application for rezoning is filed or may be made at a later time during the rezoning process.

2. The required application and process for considering a rezoning request with conditions shall be the same as that for considering rezoning requests made without any offer of conditions, except as modified by the requirements of this Section.

3. The owner's offer of conditions may not purport to authorize uses or developments not permitted in the requested new zoning district.

4. The owner's offer of conditions shall bear a reasonable and rational relationship to the property for which rezoning is requested.

5. Any use or development proposed as part of an offer of conditions that would require a special land use permit under the terms of this Ordinance may only be commenced if a special land use permit for such use or development is ultimately granted in accordance with the provisions of this Ordinance.

6. Any use or development proposed as part of an offer of conditions that would require a variance under the terms of this Ordinance may only be commenced if a variance for such use or development is ultimately granted by the Zoning Board of Appeals in accordance with the provisions of this Ordinance.

7. Any use or development proposed as part of an offer of conditions that would require site plan approval under the terms of this Ordinance may only be commenced if site plan approval for such

use or development is ultimately granted in accordance with the provisions of this Ordinance.

8. The offer of conditions may be amended during the process of rezoning consideration provided that any amended or additional conditions are entered voluntarily by the owner. An owner may withdraw all or part of its offer of conditions any time prior to final rezoning action of the Township Board provided that, if such withdrawal occurs subsequent to the Planning Commission’s public hearing on the original rezoning request, then the rezoning application shall be referred to the Planning Commission for a new public hearing with appropriate notice and a new recommendation.

C. Planning Commission Review.

The Planning Commission, after public hearing and consideration of the factors for rezoning set forth in Section ___ of this Ordinance, may recommend approval, approval with recommended changes or denial of the rezoning; provided, however, that any recommended changes to the offer of conditions are acceptable to and thereafter offered by the owner.

D. Township Board Review.

After receipt of the Planning Commission’s recommendation, the Township Board shall deliberate upon the requested rezoning and may approve or deny the conditional rezoning request. The Township Board's deliberations shall include, but not be limited to, a consideration of the factors for rezoning set forth in Section ____ of this Ordinance. Should the Township Board consider amendments to the proposed conditional rezoning advisable and if such contemplated amendments to the offer of conditions are acceptable to and thereafter offered by the owner, then the Township Board shall, in accordance with Section 11 of the Township Zoning Act (MCL 125.281), refer such amendments to the Planning Commission for a report thereon within a time specified by the Township Board and proceed thereafter in accordance with said statute to deny or approve the conditional rezoning with or without amendments.

E. Approval.

1. If the Township Board finds the rezoning request and offer of conditions acceptable, the offered conditions shall be incorporated into a formal written Statement of Conditions acceptable to the owner and conforming in form to the provisions of this Section. The Statement of Conditions shall be incorporated by attachment or otherwise as an inseparable part of the ordinance adopted by the Township Board to accomplish the requested rezoning.

2. The Statement of Conditions shall:

   a. Be in a form recordable with the Register of Deeds of the County in which the subject land is located or, in the alternative, be accompanied by a recordable Affidavit or Memorandum prepared and signed by the owner giving notice of the Statement of Conditions in a manner acceptable to the Township Board.

   b. Contain a legal description of the land to which it pertains.

   c. Contain a statement acknowledging that the Statement of Conditions runs with the land and is binding upon successor owners of the land.

   d. Incorporate by attachment or reference any diagram, plans or other documents submitted or approved by the owner that are necessary to illustrate the implementation of the Statement of Conditions. If any such documents are incorporated by reference, the reference shall specify where the document may be examined.

   e. Contain a statement acknowledging that the Statement of Conditions or an Affidavit or Memorandum giving notice thereof may be recorded by the Township with the Register of Deeds of the County in which the land referenced in the Statement of Conditions is located.

   f. Contain the notarized signatures of all of the owners of the subject land preceded by a statement attesting to the fact that they voluntarily offer and consent to the provisions contained within the Statement of Conditions.

3. Upon the rezoning taking effect, the Zoning Map shall be amended to reflect the new zoning classification along with a designation that the land was rezoned with a Statement of Conditions. The Township Clerk shall maintain a listing of all lands rezoned with a Statement of Conditions.

4. The approved Statement of Conditions or an Affidavit or Memorandum giving notice thereof shall be filed by the Township with the Register of Deeds of the County in which the land is located. The Township Board shall have authority to waive this requirement if it determines that, given the nature of the conditions and/or the time frame within which the conditions are to be satisfied, the recording of such a document would be of no material benefit to the Township or to any subsequent owner of the land.

5. Upon the rezoning taking effect, the use of the land so rezoned shall conform thereafter to all of the requirements regulating use and development within the new zoning district as modified by any more restrictive provisions contained in the Statement of Conditions.

F. Compliance with Conditions.

1. Any person who establishes a development or commences a use upon land that has been rezoned with conditions shall continuously operate and maintain the development or use in compliance with all of the conditions set forth in the Statement of Conditions. Any failure to comply with a condition contained within the Statement of Conditions shall constitute a violation of this Zoning Ordinance and be punishable accordingly. Additionally, any such violation shall be deemed a nuisance per se and subject to judicial abatement as provided by law.

2. No permit or approval shall be granted under this Ordinance for any use or development that is contrary to an applicable Statement of Conditions.

G. Time Period for Establishing Development or Use.

Unless another time period is specified in the Ordinance rezoning the subject land, the approved development and/or use of the land pursuant to building and other required permits must be commenced upon the land within 18 months after the rezoning took effect and thereafter proceed diligently to completion. This time limitation may upon written request be extended by the Township Board if (1) it is demonstrated to the Township Board's reasonable satisfaction that there is a strong likelihood that the development and/or use will commence within the period of extension and proceed diligently thereafter to completion and (2) the Township Board finds that there has not been a change in circumstances that would render the current zoning with Statement of Conditions incompatible with other zones and uses in the surrounding area or otherwise inconsistent with sound zoning policy.

H. Reversion of Zoning.

If approved development and/or use of the rezoned land does not occur within the time frame specified under Subsection G above, then the land shall revert to its former zoning classification as set forth in MCL 125.286i. The reversion process shall be initiated by the Township Board requesting that the Planning Commission proceed with consideration of rezoning of the land to its former zoning classification. The procedure for considering and making this reversionary rezoning shall thereafter be the same as applies to all other rezoning requests.

I. Subsequent Rezoning of Land.

When land that is rezoned with a Statement of Conditions is thereafter rezoned to a different zoning classification or to the same zoning classification but with a different or no Statement of Conditions, whether as a result of a reversion of zoning pursuant to Subsection H above or otherwise, the Statement of Conditions imposed under the former zoning classification shall cease to be in effect. Upon the owner's written request, the Township Clerk shall record with the Register of Deeds of the County in which the land is located a notice that the Statement of Conditions is no longer in effect.

J. Amendment of Conditions.

1. During the time period for commencement of an approved development or use specified pursuant to Subsection G above or during any extension thereof granted by the Township Board, the Township shall not add to or alter the conditions in the Statement of Conditions.

2. The Statement of Conditions may be amended thereafter in the same manner as was prescribed for the original rezoning and Statement of Conditions.

K. Township Right to Rezone.

Nothing in the Statement of Conditions nor in the provisions of this Section shall be deemed to prohibit the Township from rezoning all or any portion of land that is subject to a Statement of Conditions to another zoning classification. Any rezoning shall be conducted in compliance with this Ordinance and the Township Zoning Act (MCL 125.271 et seq.)

L. Failure to Offer Conditions.

The Township shall not require an owner to offer conditions as a requirement for rezoning. The lack of an offer of conditions shall not affect an owner’s rights under this Ordinance.

With the advent of conditional rezoning, it becomes even more important that a Township considering a rezoning request include in its deliberations a consideration of certain basic factors pertinent to rezoning decisions. To help ensure and document a consideration of these factors, the following additional language is suggested for inclusion at an appropriate place in a Township's Zoning Ordinance.

> In reviewing an application for the rezoning of land, whether the application be made with or without an offer of conditions, factors that should be considered by the Planning Commission and the Township Board include, but are not limited to, the following:
>
> 1. Whether the rezoning is consistent with the policies and uses proposed for that area in the Township's Master Land Use Plan;
>
> 2. Whether all of the uses allowed under the proposed rezoning would be compatible with other zones and uses in the surrounding area;
>
> 3. Whether any public services and facilities would be significantly adversely impacted by a development or use allowed under the requested rezoning; and
>
> 4. Whether the uses allowed under the proposed rezoning would be equally or better suited to the area than uses allowed under the current zoning of the land.