

2003-2004 Homeward Bound Series:
Real Estate Practitioner's Guide
to Essential Zoning Law and
Administrative Procedures

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REAL ESTATE PRACTITIONER'S GUIDE TO ESSENTIAL ZONING LAW AND ADMINISTRATIVE PROCEDURES

January 15, 2004
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I. Zoning Due Diligence

A. Introduction

No real estate development project can be built without governmental approvals. The governmental approval process often starts with an analysis of the zoning district in which the project is located, and whether the project complies with that district. Most experienced development professionals attack the zoning approval process as an integral part of the initial planning for a project. They are hesitant to spend any time, money or energy on a development unless they believe that the project is properly zoned and likely to receive the other governmental approvals which may be necessary to complete the project. The following is an outline of several areas relevant to the zoning due diligence process.

1. The Basics – Understand What Your Client Is Doing

Real estate development comes in many forms. The practitioner must understand the intentions of the developer client in order to fashion an effective zoning due diligence analysis. Consider the following:

- a. Developer purchases property with the intention of continuing to use the property without further development. Examples: purchasing existing office buildings, industrial buildings and commercial centers.
- b. Developer purchases vacant property to develop a new commercial, industrial or residential project.
- c. Developer purchases existing buildings or residences with the intention of demolishing the structures and constructing a new project.
- d. Any combination of the above.

2. Essential Tools

After understanding the intentions of your developer client, you must obtain the basic tools for the analysis.

- a. **The Zoning Ordinance.** Obtain the **most current** copy of the zoning ordinance and zoning map from the municipality. Do not rely on zoning ordinances and maps which are in your office library, since zoning ordinances change on a regular basis. Further, when you obtain zoning ordinances make sure that: (i) you have a copy of all relevant amendments; and (ii) that you understand the organization of the zoning text itself so that you do not miss any relevant ordinances. Zoning ordinances come in all forms. Some municipalities keep their ordinances in good order and up to date, while others are not quite as efficient. You must make sure you coordinate your research with the planning professional at the municipality, or with the outside professional planning consultant hired by the municipality.
- b. **The Survey or Site Plan.** Whenever possible obtain the survey or proposed site plan for the proposed development. However, note that a site plan without a survey is potentially dangerous, since a site plan cannot be relied on to provide you with accurate information regarding the physical characteristics of the property. Consider the following issues on the survey:
 - i. correct legal description;
 - ii. easements;
 - iii. access to public and private roads;
 - iv. total acreage;
 - v. adjoining uses and, if any, adjoining rights-of-way; and
 - vi. access to utilities or existence of utilities on the property.

If a survey is not readily available, at least obtain the tax assessment plat information to confirm parcel ID numbers and the legal description on record with the municipality.

- c. **Contact with Municipal Employees.** Confirm current zoning of the property with the local zoning administrator.
- d. **Site Visit.** Visit the site, or at least drive through the site. A personal visit gives you important information about the condition of the site and its apparent existing use.
- e. **Zoning Outline.** Work from a zoning analysis outline. See the outline below, and the form attached to these materials as Exhibit A.

3. Topics for Zoning Analysis Outline

Generally, it is very difficult to perform any detailed zoning due diligence analysis without a survey. Many areas of the zoning analysis simply cannot be accurately determined without a surveyor providing information. Although the land use attorney finds himself/herself using an engineer's scale to check a distance or legal description, it is not prudent to give a formal zoning analysis based on an attorney's measurement of a given distance. The practitioner should rely on architects, civil engineers and surveyors for such measurements.

a. Property Location and Size.

- i. The basic characteristics of the property should be determined from the survey, site plan and zoning information obtained from the "essential tools" set forth above.
- ii. Other than area of the land, you should obtain the size of any buildings located on the property.
- iii. The site name, if any, should be identified as well as a confirmation of the jurisdiction and address of the property.

b. Existing Land Use and Zoning.

- i. Confirm the existing land use and zoning with the zoning administrator and planning department before you come to any conclusions.
- ii. If the property is currently in use, confirm the use with the owner and compare the actual uses with the permitted and special uses allowed in the zoning ordinance.
- iii. Confirm the date of existing ordinance and existing zoning designation and compare the current ordinance to the ordinance that was in existence at the time the current use commenced. Confirm the existing zoning designation and make sure there are no amendments to the existing ordinance that will affect future use.
- iv. Review the adjacent zoning designations and uses if it is applicable to your property. Often times dimensions and improvements on a property are determined by uses on the adjacent property. For example, an office zoning which abuts residential zoning may have different dimensional setback requirements as well screening requirements. The ordinance may also require that there be a minimum distance allowed between buildings (a so-called "distance between buildings" ordinance). In such a case, the location of the nearest building on the adjacent property will be relevant.

c. Conformance Status.

After you have made some of the basic determinations you can more accurately analyze whether the existing property conforms with the ordinance.

- i. Review the current use and whether it is a legal and conforming use, or a legal nonconforming use or an illegal and nonconforming use.
- ii. Identify any aspect of the property not in compliance with the current zoning ordinances. For example, many older existing structures do not meet the current code for setbacks or other dimensional requirements, including without limitation, the number of parking spaces, height, and distance between buildings.
- iii. If the property is not in compliance with current zoning ordinances, identify those areas not in compliance and analyze what must be done to bring the property into compliance, if possible.
- iv. Analyze whether the zoning authorities would allow the property to be rebuilt if the property is not now in compliance, and a major casualty occurs. Further, if a building exists on the property which is legally nonconforming, in the event of such a casualty, would the municipality require that the remainder of the building be demolished or be rebuilt to comply with the updated codes?

d. Site History.

- i. It is important to visit the city zoning administrator, planning department and building department to obtain certificates of occupancy that were issued for the shell building, as well as any additional certificates of occupancy issued to any tenants in the building. It is prudent to order copies of these certificates of occupancy for your files.
- ii. Obtain copies of any variances, special permits or conditions issued by the zoning administrator, the planning department, the building department or any municipal board authorized to grant such permissions. This may require that you ask for certified copies of minutes or other council resolutions which confirm that such permissions were granted.
- iii. Obtain copies of any outstanding building or zoning violations, if any. Inquire as to the current status of these violations.
- iv. General information. During the course of obtaining information on the site history, you will come in contact with the zoning administrator, officials in the building department and the planning department. You should obtain as much knowledge from them as possible regarding the history of the site. This "oral history" may not appear in the records but can be very helpful.

e. Site Specifications, Dimensional Information.

- i. The basic site specifications of a property deal directly with the dimensional issues of any development. Specifications such as setbacks, building size, density, parking and other special zoning requirements must be analyzed in this site specification section.

1. Setbacks.

- a. Identify required current district setbacks for the front yard, site yard, rear yard and any distance between buildings requirements (especially in office and industrial parks). Special setbacks should also be reviewed, that is, setbacks which are determined as a result of adjacent property uses (example: office or commercial uses abutting residential uses), or setbacks required as a result of specialized uses (example: daycare centers, nursing homes, recreational facilities and schools).
- b. Compare the current district setbacks with the existing building and determine whether or not the building is in compliance.
- c. If not in compliance, identify a plan to bring the setbacks into compliance. Such a plan might involve applying to the Zoning Board of Appeals for a variance, or some other special permission allowed under the ordinance.

2. Building Height.

- a. Determine the allowed maximum height as well as the number of stories for the district.
- b. Compare the existing building height and number of stories to the district.

3. Building Site Area Requirements.

- a. Analyze the minimum lot size, minimum lot width and minimum depth for the district.
- b. Determine if the existing building is in compliance with the district standards.
- c. If not in compliance, determine how to bring the building into compliance or obtain permission for the existing condition.
- d. Confirm that the lot upon which a building exists has not been altered in any way that might change its setback or other dimensional characteristics. For example, assume an industrial park was developed as one parcel with several industrial buildings. After the development of the buildings, the owner files a master deed and creates separate site condominiums for each building and its related parking. In this case, unlike the original approval process which treated the entire property as one lot, each of the new condominium units, under most ordinances, would be considered as a single lot. Therefore, any current analysis would have to determine all dimensional data for each unit as if the building were sitting on a separate lot.

4. Building Density.

- a. Review building density formulas for the district. Such formulas usually include some maximum area of coverage allowed per lot

in the district, or in the alternative, some form of ratio which determines the size of a structure which can be built on any given lot.

- b. Determine (from a survey) the current building footprint and whether or not the footprint is in compliance with the existing district.
- c. If not in compliance, identify the procedure necessary to bring the structure into compliance.

5. **Parking.**

- a. Review the parking formula for the district and the current or future use of the land.
- b. Identify the number of spaces which will be required for the intended use and review the site plan to determine compliance with the ordinance. Review current parking on the existing site and whether it complies with the ordinance.
- c. If the parking plan for the project will not comply with the ordinance, determine a procedure for obtaining a variance or other approval so that the site plan or project can be built with the number of parking spaces planned.

4. **Miscellaneous Zoning Requirements**

- a. **Special Districts.** If the property is in a special zoning district or a development area, analyze the potential uses for that area and how your client may take advantage of those uses. Examples include overlay zones for downtown areas which allow mixed uses, downtown development areas, and other special zoning districts which allow for special planned use developments.

5. **Contact Information for the Municipality**

- a. Obtain the name, address, telephone, fax and e-mail for each of the administrators or consultants of the municipality for future reference.

6. **The Final Question – How Much Time Will It Take?**

- a. Any zoning analysis must include a review of how much time is necessary to obtain all of the required governmental approvals, and, if necessary, how long it will take to bring a project into compliance.
- b. If a project is already constructed and in compliance with the zoning ordinance, the transactional attorney must determine if there are any **additional** permits which are necessary in order for the client to use the property for its intended purpose.

7. Governmental Approvals and Due Diligence

- a. Once the zoning analysis is completed, the transactional attorney must bring his/her knowledge of the zoning process to the negotiation of the documents.
- b. Any time period calculated on the basis of the issuance of a governmental approval must be carefully reviewed to provide for a realistic period in which to obtain the necessary approval.
- c. Time periods which **commence or terminate** as of the issuance of an approval, or as of a rezoning, must be carefully analyzed so that the governmental approval which has been issued is final, and cannot be revoked or appealed subsequent to the issuance or granting of the permit. For example, if a closing is to occur within 30 days of a site plan approval, on what date is the site plan actually approved? Is it the date of the hearing at which the planning commission approved the plan? Is it the date of the approval of the minutes of that hearing that approved the site plan? Is there an appeal period for any interested party to appeal the granting of the site plan? Is the approval of the site plan an assurance that your client can proceed to build the plan? Are other permits necessary and should the closing be triggered by the issuance of these other permits instead of the site plan? Questions such as these often arise, or should arise, during the negotiation of purchase agreements, development agreements, and other agreements which affect the acquisition and development of property.

8. Conclusion

- a. A zoning analysis of a parcel should not be a mystery as long as the practitioner equips himself or herself with the proper tools and methodically reviews the zoning in accordance with a thorough outline.
- b. See a sample zoning due diligence outline following this Section I.

Example of a Zoning Analysis

Building: _____
Unit: _____
Size of Unit: _____

1. **Building Address:**
2. **Conformance Status:**
 - Conforming _____
 - Legal Nonconforming _____
 - Illegal non-conforming _____
 - Comments, if any:

3. Site History:

- Use and Occupancy Permits.
- Certificates of Occupancy.
- Special Use Permits.
- Building or Zoning Violations on File.
- Comments, if any:

4. Site Specifications:

- Zoning District
- Setbacks:

	District minimum	Site Plan	Survey	Compliance
Front:				
Side:				
Rear:				
Between Buildings				
Other:				

Comments, if any:

5. Building Size:

- Height Allowed in District.
- Height of Existing Building per survey.
- Height of Existing Building per site plan.
- Comments, if any:

6. Building Site Area:

	District Minimum	Survey	Site Plan	Compliance
Lot Size				
Lot Width				
Lot Depth				

- Comments, if any:

7. Density:

	District- Maximum Coverage by all buildings	Survey	Site Plan	Compliance
Density				

- Comments, if any:

8. Parking:

	District Minimum for use	Survey	Site Plan	Compliance
Parking spaces				

- Comments, if any:

9. Other Zoning Requirements:

10. Contact Information:

A. Zoning Official

B. Surveyor

II. Zoning Enabling Acts

A. Zoning Is a Delegated Power

1. Local units of government (“local units”) have no inherent police power. They derive their power to zone primarily from the state zoning enabling acts.¹
2. Michigan has three zoning enabling acts: The City and Village Act, MCL 125.581 et seq.; (the “C&V Act”) The Township Zoning Act, MCL 125.271 et seq. (the “Township Act”) and the County Zoning Act, MCL 125.201 et seq. Although many provisions are identical, there are differences between the acts. It is important, therefore, to refer to the enabling act that governs the local unit.

1. *Sun Communities v Leroy Twp*, 241 Mich App 665 (2000)

3. Michigan has three acts that authorize land use planning; The Township Planning Act, MCL 125.321 The County Planning Act, MCL 125.101 and the Municipal Planning Act, MCL 125.31 et seq., (Applies to Cities and Villages)²
4. There are five acts that provide local government with their general authority, including to the power to enact general ordinances.
 - Township Act, MCL 41.4, et seq
 - Charter Township Act, MCL 42.1, et seq
 - General Village Act, MCL 61.1, et seq
 - Home Rule Village Act, MCL 78.1, et seq
 - Home Rule City Act, 117.1, et seq³
5. Through the zoning acts, the legislature has delegated to local units the police power to regulate land use. The police power is the general authority to enact and enforce ordinances that may impinge on individual rights for the common good. There are limits on the extent to which the police power lawfully may interfere with individual rights protected by the Constitution.

B. Cities and Villages

1. The city council is the legislative body of a city. The Home Rule Cities Act, MCL 117.1 grants certain powers to city government. All cities must have charters. A city charter is a separate document drafted by a charter commission and approved by the voters. The charter is plan of self-governance adapted to the needs and desires of the electorate.⁴ The Legislature, however, has determined the mandatory, permissive and prohibited provisions that a charter may contain.
2. The Home Rule Act, MCL 117.1 requires that a city have an elected mayor. The mayor can be either a “weak” or “strong” mayor, depending upon the city’s charter. In general terms, a weak mayor is a voting member of the council, but has no administrative or veto power. A strong mayor is elected to serve a limited term, is not a voting member of the council and has veto powers.⁵
3. In cities, unlike townships, the clerk and treasurer are not council members. They may, however, be elected offices.

2. Detailed discussion concerning land use planning, including master plans is beyond the scope of these materials.

3. There are also several acts that authorize different forms of county government.

4. *City of Detroit v. Walker*, 520 N. W. 2d 133 (Mich. 1994).

5. See Generally, Citizens Research Council, “A Bird’s Eye View of Michigan Local Government in at the End of the Twentieth Century”, August 1999 (Report #326)

C. Villages

1. General Rule Villages

- General rule villages are located within townships. Villages originally were formed in townships to provide some measure of urban services in an otherwise rural area.
- A general rule village can annex contiguous township land with the approval of the county board of commissioners.
- The general law village is governed by a council president, 6 trustees, a clerk and treasurer. The clerk and treasurer are not part of the village council.

2. Home Rule Villages

- They are also located within townships. They, however, like home rule cities, have their own charters.
- Villages can annex general township land in several different ways, which usually include the need for an election.
- The Home Rule village also has a president, trustees, clerk and treasurer. The clerk and treasurer are not council members.

D. Townships

1. General Law Townships:

- General Law townships are susceptible to annexation by both cities and villages.
- The legislative body of a general law township is composed of a supervisor, township clerk, treasurer and 2 trustees. A general law township with more than 3000 registered voters or a population of more than 5000 persons may have 4 trustees. MCL 41.70 The supervisor, clerk and treasurer are voting members of the legislative body

2. Charter Townships:

- Charter townships, have more powers than a general law township, but unlike home rule cities and villages, they do not create their own charters. The legislature provides a single charter for all charter townships by way of the Charter Township Act, MCL 42.1.
- Charter Townships are generally immune from annexation by cities and villages with some exceptions. MCL 42.34. A charter township that does not provide municipal services, such as sewer and water, generally is not immune from annexation.
- The governing body includes an elected supervisor, clerk, treasurer and four trustees. The executive member of the board is the Township Supervisor. The township supervisor, clerk and treasurer are voting members of the legislative or governing body.

- A charter township, unlike a general law township, also may hire a Superintendent to manage township affairs.

E. Counties

1. There are four kinds of county government:
 - general law;
 - optional unified with a manager;
 - optional unified with an elected executive; and
 - Charter counties.
2. There are not many counties that regulate the land use of the local units located within the county. Counties may be the zoning authority for rural townships that have not adopted a zoning ordinance.
3. Counties may also participate in zoning decisions within townships that have their own zoning ordinance and administration. The Township Zoning Act requires townships to submit new and amended zoning ordinances to the county planning commission, if one exists, prior to adoption or amendment of the ordinance. The county only acts as a recommending body and has no legislative or coercive power over the Township's zoning and land use practices.

III. General Overview of Zoning Ordinances

A. The Purpose of Zoning Ordinances

1. The Township Act

125.273 Zoning ordinance; basis; considerations.

Sec. 3.

The zoning ordinance shall be **based upon a plan designed to promote the public health, safety, and general welfare**; to encourage the use of lands in accordance with their character and adaptability, and to limit the improper use of land; to conserve natural resources and energy; to meet the needs of the state's residents for food, fiber, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land; to insure that uses of the land shall be situated in appropriate locations and relationships; to avoid the overcrowding of population; to provide adequate light and air; to lessen congestion on the public roads and streets; to reduce hazards to life and property; to facilitate adequate provision for a system of transportation, sewage disposal, safe and adequate water supply, education, recreation, and other public requirements; and to conserve the expenditure of funds for public improvements and services to conform with the most advantageous uses of land, resources, and properties. **The zoning ordinance shall be made with reasonable consideration, among other things, to the character of each district; its peculiar suitability for particular uses; the conservation of property values and natural resources; and the general and appropriate trend and character of land, building, and population development.**⁶

2. The C&V ACT

125.581 Regulating and restricting use of land and structures; purpose; division of city or village into districts; plan for land development regulations and districts; ordinance subject to electric transmission line certification act.

Sec. 1.

(1) The legislative body of a city or village may regulate and restrict the use of land and structures; to meet the needs of the state's residents for food, fiber, energy and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land; to insure that uses of the land shall be situated in appropriate locations and relationships; to limit the inappropriate overcrowding of land and congestion of population and transportation systems and other public facilities; to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility needs; and to promote public health, safety, and welfare, and for those purposes may divide a city or village into districts of the number, shape, and area considered best suited to carry out this section. **For each of those districts regulations may be imposed designating the uses for which buildings or structures shall or shall not be erected or altered, and designating the trades, industries, and other land uses or activities that shall be permitted or excluded or subjected to special regulations.**

(2) The land development regulations and districts authorized by this act **shall be made in accordance with a plan designed to promote and accomplish the objectives of this act.**

3. Zoning Map

The zoning map is part of the zoning ordinance and should depict the zoning classification of all the property in the municipality. **Caution:** Zoning maps are not always kept up to date, requiring more investigation to determine the zoning of property. The most up-to-date information regarding the zoning of a parcel of property should be in the municipalities' book of zoning ordinances. The municipality is supposed to supplement the current zoning ordinance with any new or amended zoning ordinances, but that does not always happen.

4. Zoning Districts

The zoning ordinance contains a description of the zoning districts and the primary uses and accessory uses permitted in the district. Uses are permitted either by right or by special land use or they are prohibited.

- If a use is permitted by right the municipality cannot deny the use because of the impact of the use on adjoining property, or the municipality in general. The underlying presumption is that the legislative body has already determined that any impacts from uses permitted by right are reasonable impacts.

6. The author has added the emphasis shown in statute sections cited in these materials.

- The trend is for municipalities to limit the uses in a zoning district that are permitted by right.
- A zoning district may also include accessory uses. An accessory use is a building or activity that is subordinate to the primary building and activity on the premises and integrally related to the primary use. **EXAMPLE:** Detached garage.
- Different ordinances have different names for special land uses. They may be called uses with special conditions, conditional uses, waiver uses, and special exceptions. Under Michigan law, however, the enabling acts refer to all such uses as special land uses.
- The theory underlying the special land use is that there are land uses that have certain characteristics, which make them inappropriate in some locations within the zoning district or require the imposition of special conditions to make them appropriate in any location within the district.
- Uses not mentioned usually are prohibited. The Zoning Board of Appeal may have authority to interpret the ordinance to determine whether a use not named would be permitted in the district.

5. **Development Regulations**

There are development regulations that apply in each zoning district. These regulations govern building height, sideyard, front and rear setbacks from the street, property lines and other buildings. They govern the percentage of the site that may be covered by buildings and other impervious surfaces, parking requirements and signage. They also may include landscaping requirements, woodland and wetland regulation and natural feature protection setbacks. They may include purely aesthetic regulations such as permitted building material and design.

6. Many municipalities include development regulations that likely are beyond the authority of the Acts. **Example:** There, arguably, is no authorization to dictate the kind and quality of building materials that the developer may use if the building is not located within a qualified historic district.
7. **Equal Protection.** The zoning acts require that regulations within a district apply equally to all classed of building within the district. For example, the same height and setback requirements apply to all buildings in the district.

125.582 Regulation of buildings and open spaces. (C&V Act)

To further carry out the objectives of this act, the legislative body of a city or village may regulate and limit the height and bulk of buildings erected, and regulate and determine the area of yards, courts, and other open spaces, and for those purposes divide a city or village into districts of the number, shape, and area considered best suited to carry out the purposes of this section. **The regulations shall be uniform for each class of buildings throughout each district, but the regulations in 1 district may differ from those in other districts.**⁷

7. The companion Township provision is MCL 125.271

IV. The Procedure to Enact and Amend Zoning Ordinances Including Rezoning Property in Cities, Villages and Townships

- A. The Same Procedure Applies to Enacting a New Zoning Ordinance, Amending the Text of an Ordinance or Changing the Zoning District Classification of Property, Which Is an Amendment to the Zoning Map.
- B. These Are All Legislative Procedures and Can Only Be Accomplished by Legislative Action.

1. Cities and Villages

- Either the municipality or the property owner may petition for a change to the zoning classification of the land.
- The rezoning procedure usually involves filling out a form identifying the property and the property owner. If the applicant is not the property owner, the municipality may require proof that the property owner approves of the rezoning application. Depending on the municipality, it may require more than proof of an option to purchase. Site plans are not required for seeking a rezoning and, theoretically should not be considered or presented at a hearing on the rezoning.
- The application is usually submitted to the clerk, the building department or planning department, depending on the size and sophistication of the municipality. Some communities have professional land use planners on staff or with whom they contract to advise municipal departments on land use requests. If there is no planning staff, the application is given directly to the planning commission, usually only days before the hearing. In many cases, individual members have not reviewed the application prior to the hearing.
- The planning commission members are appointed by the legislative body. The planning commission is an advisory body on land use issues to the legislative body. The City and Village Act refer to the “zoning commission”, which drafts the first zoning ordinance for approval by the legislative body. The zoning commission becomes the planning commission after the adoption of the ordinance.
- The planning commission’s continuing duties include preparing and adopting a plan for land use and for revisiting the ordinance to determine if any changes are needed to the ordinance. Recent legislation authorizes the legislative body to adopt the master plan, which was not true in the past. Recent legislation also requires the municipality to review its master plan every five years and make any necessary adjustments.
- The local unit must provide not less than 15 days notice in a newspaper of general circulation that a hearing will be held on the rezoning request.
- The municipality must give no less than 15 days notice to affected property owners if the municipality initiates the rezoning of a single, or

several adjacent properties. The municipality need not provide individual notice when it enacts its first ordinance.⁸

- The planning commission is required to prepare a tentative and final report to submit to the legislative body regarding the requested rezoning. The planning commission must hold at least one public hearing before submitting its final written report to the legislative body either recommending the approval or denial of the rezoning request. The submission to the legislative body also must include a summary of comments made at the public hearing.
- The legislative body cannot make a decision until it has received the planning commission's final report on the rezoning request.
- The legislative body is not required to hold, but may hold additional public hearings on the rezoning request. The charter may require that the council hold a public hearing prior to making a decision. The legislative body is authorized to return the matter to the planning commission for further review. The legislative body's final decision must be made at a meeting open to the public, but not necessarily a public hearing. The public has the right to be heard on the rezoning request if it is a public hearing.
- Certain property owners may present a protest petition to the legislative body regarding the proposed rezoning. The petition must be transmitted to the legislative body prior to the final decision. A properly submitted petition requires passage of the rezoning by a 2/3 vote of the legislative body, unless the charter requires a larger vote, which cannot exceed 3/4 of the council member's vote.
- The legislative body does not have to accept the planning commission's recommendation. If the rezoning request is approved, there are rules regarding publishing notice of the amended zoning classification. These rules are more important in townships as they trigger the right to hold a referendum on an ordinance rezoning property.
- The text of a zoning ordinance may be amended to permit a use in a district that was not previously allowed. A text amendment can achieve the same result as rezoning the property. And in some cases may be less politically charged.

C&V ACT

125.584 Ordinances; public hearing; notice; affidavit; appointment and report of commission; transmission of summary and report; determination of boundaries or imposition of regulations; amendment and adoption of ordinances or maps; supplements; protest petition; vote; exclusion of publicly owned land; publication and contents of notice of adoption.

8. The case law is ambiguous concerning whether personal notice is required when the municipality rezones more than several adjacent parcels, but less than all the parcels in the municipality.

Sec. 4.

(1) The legislative body of a city or village may provide by ordinance for the manner in which regulations and boundaries of districts or zones shall be determined and enforced or amended, supplemented, or changed. At least 1 public hearing shall be held by the commission appointed to recommend zoning regulations or, if a commission does not exist, by the legislative body before a regulation becomes effective. **Not less than 15 days' notice of the time and place of the public hearing shall first be published in an official paper or a paper of general circulation in the city or village.** Not less than 15 days' notice of the time and place of the public hearing shall first be given by mail to each public utility company and each railroad company owning or operating any public utility or railroad within the districts or zones affected, and the airport manager of each airport, that registers its name and mailing address with the city or village clerk for the purpose of receiving the notice. An affidavit of mailing shall be maintained. **A hearing shall be granted to an interested person at the time and place specified on the notice.**

(2) The legislative body of a city or village, unless otherwise provided by charter, may appoint a commission to recommend in the first instance the boundaries of districts and appropriate regulations to be enforced in the districts. If a city or village has a planning commission, that commission shall be appointed to perform the duties set forth in this section. **The commission shall make a tentative report and hold at least 1 public hearing before submitting its final report to the legislative body. A summary of the comments submitted at the public hearing shall be transmitted with the report of the commission to the legislative body. The legislative body may hold additional public hearings if it considers it necessary or as may be required by charter.**

(3) In a city or village having a commission appointed to recommend zoning requirements, the legislative body shall not in the first instance determine the boundaries of districts or impose regulations until after the final report of the commission. In such a city or village, the legislative body shall not amend the ordinance or maps after they are adopted in the **first** instance until the proposed amendment has been submitted to the commission and it has held at least 1 hearing and made report thereon. In either case, the legislative body may adopt the ordinance and maps, with or without amendments, after receipt of the commission's report, or refer the ordinance and maps again to the commission for a further report.

(4) After the ordinance and maps have in the first instance been approved by the legislative body of a city or village, amendments or supplements thereto may be made as provided in this section, except that **if an individual property or several adjacent properties are proposed for rezoning, notice of the proposed rezoning and hearing shall be given to the owners of the property in question at least 15 days before the hearing.**

(5) Upon presentation of a **protest petition** meeting the requirements of this subsection, **an amendment to a zoning ordinance which is the object of the petition shall be passed only by a 2/3 vote of the legislative body, unless a larger vote, but not to exceed 3/4 vote, is required by ordinance or charter. The protest petition shall be presented to**

the legislative body before final legislative action on the amendment and shall be signed by 1 of the following:

- (a) **The owners of at least 20% of the area of land included in the proposed change.**
- (b) **The owners of at least 20% of the area of land included within an area extending outward 100 feet from any point on the boundary of the land included in the proposed change.**

(6) For purposes of subsection (5), **publicly** owned land shall be excluded in calculating the 20% land area requirement.

(7) Following adoption of a zoning ordinance and subsequent amendments by the legislative body of a city or village, **1 notice of adoption shall be published in a newspaper of general circulation in the city or village within 15 days after adoption.** Promptly following adoption of a zoning ordinance or subsequent amendment by the legislative body of the city or village, a copy of the notice of adoption shall also be mailed to the airport manager of an airport entitled to notice under subsection (1). (Emphasis added)

(8) The notice of adoption under subsection (7) shall include the **following** information:

- (a) In the case of a newly adopted zoning ordinance, the following **statement:** “A zoning ordinance regulating the development and use of land has been adopted by the city (village) council of the city (village) of _____”.
- (b) In the case of an amendment to an existing ordinance, either a **summary** of the regulatory effect of the amendment, including the geographic area affected, or the text of the amendment.
- (c) The effective date of the **ordinance.**
- (d) The place and time where a copy of the ordinance may be purchased or inspected. The filing and publication requirements in this **section** relating to city and village zoning ordinances supersede charter provisions relating to the filing and publication of city and village ordinances.

2. Township Rezoning Procedures

- References in the Act to the “zoning board” should not be confused with the township board or the zoning board of appeals. The “zoning board” is the name of the body that creates the first township zoning ordinance. The planning commission succeeds to the duties and powers of the “zoning board.”
- The township requires that the planning commission give notice of its public hearing twice. The first publication must be printed not more than 30 days, and not less than 20 days prior the hearing. The second publication must be printed not more than 8 days before the hearing date. Note: *This provision is substantially different than the notice provisions in the City and Village Act.*
- If the hearing is on an amendment to the ordinance, including the rezoning of the property of an individual or several adjacent properties,

the planning commission must deliver personal notice by mail or otherwise to the property owner, and to the property owners or occupants of single-family, or 2-family dwellings within 300 feet of the proposed rezoning. The notice must be delivered not less than 8 days before the hearing. The clerk must prepare an affidavit of mailing notice. *Note: The C&V Act does not require serving anyone with notice other than the property owner.*

- Following the public hearing, if the county has established a body and procedure for reviewing ordinances, the planning commission must submit the zoning ordinance, text or map amendment to the county for its review and recommendation, The county has 30 days in which it must make a recommendation or forfeit the review right. The county also can waive any review rights granted by the Township Act. *The C&V Act does not require this step in the rezoning, enactment or ordinance amendment process.*
- The planning commission also must submit a summary of the comments made at the public hearing and its report to the township board, which may hold more hearings. The township board must publish notice not more than 15 days, or less than 5 days before the hearing.
- After receipt of the report from the planning commission, the township board must grant a hearing on the proposed ordinance to a property owner who requests the hearing.
- Once the ordinance or amendment is before the township board, it has the option to refer proposed changes, if any, back to the planning commission, and if the option is exercised, the board must request that the planning commission prepare a report on the board's proposed changes to the zoning ordinance.
- If the township board does not refer proposed changes back to the planning commission, the board may vote on the ordinance adoption or amendment at the public hearing, or at a subsequent hearing, which is not required to be a public hearing. The township board needs a majority vote to pass the ordinance or amendment.
- The township board must hold a hearing at a regular or special meeting to adopt an ordinance or any amendments.
- The ordinance or amendment becomes effective 7 days following publication, unless citizens file a petition for a referendum on the ordinance or amendment. The ordinance only becomes effective if the citizens approve it. The C&V ACT has no referendum provision. The city or village charter, however, may provide authority for a referendum.

TOWNSHIP ACT PROVISIONS

125.277 Township zoning board; recommendations.

Sec. 7.

The township zoning board shall adopt and file with the township board recommendations as to:

- (a) A zone plan for the unincorporated portions of the township as a whole which plan shall be based upon an inventory of conditions pertinent to zoning in the township and section 3.
- (b) The establishment of zoning districts including the boundaries thereof.
- (c) The text of a zoning ordinance with the necessary maps and zoning regulations to be adopted for a zoning district or the township as a whole.
- (d) The manner of administering and enforcing the zoning ordinance.

125.279 Public hearing; notice; affidavit of mailing.

Sec. 9.

(1) Before submitting its recommendations of a tentative zoning ordinance to the township, **the township zoning board shall hold at least 1 public hearing. Notice of the hearing shall be given by 2 publications in a newspaper of general circulation in the township. The first publication shall be printed not more than 30 days and not less than 20 days and the second not more than 8 days before the date of the hearing.**

(2) Not less than 20 days' notice of the time and place of the hearing shall also be given by mail to each electric, gas, pipeline, and telephone public utility company, each railroad operating within the district or zone affected, and the airport manager of each airport, that registers its name and mailing address with the township zoning commission for the purpose of receiving the notice.

(3) **An affidavit of mailing shall be maintained.** The notices shall include the places and times at which the tentative text and any maps of the zoning ordinance may be examined.

125.280 Submission of proposed zoning ordinance for approval; composition and purpose of coordinating zoning committee; presumption; waiver.

Sec. 10.

Following the hearing, the township zoning board shall submit the proposed zoning ordinance including any zoning maps to the county zoning commission of the county in which the township is situated for review and recommendation if a commission has been appointed, as provided by Act No. 183 of the Public Acts of 1943, as amended, being sections 125.201 to 125.232 of the Michigan Compiled Laws, and is functioning in the county, or to the county planning commission appointed as provided by Act No. 282 of the Public Acts of 1945, as amended, being sections 125.101 to 125.107 of the Michigan Compiled Laws, or, by resolution of the county board of commissioners, to the coordinating zoning committee of the county. If there is not a county zoning commission or county planning commission, the proposed zoning ordinance, including any zoning maps, shall be submitted to the coordi-

nating zoning committee. The coordinating zoning committee shall be composed of either 3 or 5 members appointed by the county board of commissioners for the purpose of coordinating the zoning ordinances proposed for adoption under this act with the zoning ordinances of a township, city, or incorporated village having a common boundary with the township. **If the recommendation of the county zoning commission, planning commission, or coordinating zoning committee has not been received by the township within 30 days after receipt of the ordinance by the county, it shall be conclusively presumed that the county has waived its right for review and recommendation of the ordinance. The county board of commissioners of a county by resolution may waive the county review of township ordinances and amendments required by this section.**

125.281 Transmitting summary of comments and proposed zoning plan and text to township board; additional hearings; notice; report on amendments; adoption and effective date of zoning ordinance.

Sec. 11.

The township zoning board shall transmit a summary of comments received at the public hearing and its proposed zoning plan and text to the township board. The township board may hold additional hearings if the township board considers it necessary. Notice of a public hearing held by the township board shall be published in a newspaper which circulates in the township. The notice shall be published not more than 15 days nor less than 5 days before the hearing. If the township board considers amendments to the proposed text, or a zoning ordinance, advisable, the township board shall refer the amendments to the zoning board for a report thereon within a time specified by the township board. After receiving the report, the township board shall grant a hearing on a proposed ordinance provision to a property owner who by certified mail addressed to the clerk of the township board requests a hearing and the township board shall request the zoning board to attend the hearing. After a hearing at a regular meeting or at a special meeting called for that purpose, the township board may adopt, by majority vote of its membership, pursuant to this act, a zoning ordinance for the portions of the township outside the limits of cities and villages, with or without amendments that have been previously considered by the zoning board or at a hearing. Subject to section 12, the ordinance shall take effect upon the expiration of 7 days after publication under section 11a or at such later date after publication as may be specified by the township board. (Emphasis added)

125.281a Filing zoning ordinance with amendments or supplements; publication and contents of notice of ordinance adoption.

Sec. 11a.

(1) The zoning ordinance or subsequent amendments or supplements shall be filed with the township clerk, and **1 notice of ordinance adoption shall be published in a newspaper of general circulation in the township within 15 days after adoption. Promptly** following adoption

of a zoning ordinance or subsequent amendment by the township board, a copy of the notice of adoption shall also be mailed to the airport manager of an airport entitled to notice under section 9(2).

(2) The notice of **ordinance** adoption under subsection (1) shall include the following information:

- (a) In the case of a newly adopted zoning ordinance, the following statement: "A zoning ordinance regulating the development and use of land has been adopted by the township board of the township of _____".
- (b) In the case of an amendment to an existing zoning ordinance, either a summary of the regulatory effect of the amendment, including the geographic area **affected**, or the text of the amendment.
- (c) The effective date of the **ordinance**.
- (d) The place where and time **when** a copy of the ordinance may be purchased or inspected.

125.282 Filing petition for submission of ordinance to electors.

Sec. 12.

Within 7 days after publication of a zoning ordinance under section 11a, a registered elector residing in the portion of the township outside the limits of cities and villages may file with the township clerk a notice of intent to file a petition under this section. **If a notice of intent is filed, then within 30 days following the publication of the zoning ordinance, a petition signed by a number of registered electors residing in the portion of the township outside the limits of cities and villages equal to not less than 15% of the total vote cast for all candidates for governor**, at the last preceding general election at which a governor was elected, in the township may be filed with the township clerk requesting the submission of an ordinance or part of an ordinance to the electors residing in the portion of the township outside the limits of cities and villages for their approval. Upon the filing of a notice of intent, the ordinance or part of the ordinance adopted by the township board shall not take effect until 1 of the following occurs:

- (a) The expiration of 30 days after publication of the ordinance, if a petition is not filed within that time.
- (b) If a petition is filed within 30 days after publication of the ordinance, the township clerk determines that the petition is inadequate.
- (c) If a petition is filed within 30 days after publication of the ordinance, the township clerk determines that the petition is adequate and the ordinance or part of the ordinance is approved by a majority of the registered electors residing in the portion of the township outside the limits of cities and villages voting thereon at the next regular election which supplies reasonable time for proper notices and printing of ballots, or at any special election called for that purpose. The township board shall provide the manner of submitting an ordinance or part of an ordinance to the electors for their approval or rejection, and determining the result of the election.

125.284 Amendments or supplements to zoning ordinance; notice of proposed rezoning; adoption of amendment conforming to court decree; notice of adopted amendment.

Sec. 14.

Amendments or supplements to the zoning ordinance may be made in the same manner as provided in this act for the enactment of the original ordinance. If an individual property or several adjacent properties are proposed for rezoning, the township zoning board shall give a notice of the proposed rezoning to the owner of the property in question, to all persons to whom any real property within 300 feet of the premises in question is assessed, and to the occupants of all single and 2-family dwellings within 300 feet. The notice shall be delivered personally or by mail to the respective owners and tenants at the address given in the last assessment roll. If the tenant's name is not known, the term "occupant" may be used. If the notice is delivered by mail, an affidavit of mailing shall be filed with the zoning board before the hearing. *The notice shall be made not less than 8 days before the hearing provided by section 9 stating the time, place, date, and purpose of the hearing. An amendment for the purpose of conforming a provision of the zoning ordinance to the decree of a court of competent jurisdiction as to any specific lands may be adopted by the township board and the notice of the adopted amendment published without referring the amendment to any other board or agency provided for in this act.*

V. The Process of Making Presentations Before Local Land Use Bodies: ("How to Get a Shovel in the Ground")

A. Goals for Presentation

1. Walk out of the hearing with a decision that allows your client to put a shovel in the ground.
2. Give the decision-makers a reason to say "yes".
3. Be able to express your entire presentation in one or two simple sentences.
4. Prepare so thoroughly that the motion to approve the project is made and passed immediately after you introduce yourself and before you have a chance to give your presentation.

B. Rules for Your Presentation

1. Provide each of the decision-makers with a set of exhibits (reduced to 8-1/2 x 11" or 8-1/2 x 14").
2. Keep all exhibits simple.
3. Don't display an exhibit until you are ready to discuss it (remember an exhibit will become the focus of attention).

4. Prior to the hearing, show your exhibits to a person who has never seen them before and ask them to give you their reaction.
5. Don't use humor or sarcasm (unless you are a professional comedian).
6. Be careful not to challenge the board in a disrespectful or combative manner (they **will** most likely respond negatively).
7. Hold your temper.

C. Protecting the Record

1. Preserve your client's right to challenge an adverse decision.
2. Anticipate the contents of the record.
3. Submit written letters, reports and exhibits in advance of or at public hearings.
4. Use of court reporters – sometimes they are necessary.

D. Litigation

1. A last resort – the worst way to attempt to solve the zoning or land use problem.
2. Litigation is time consuming and expensive.
3. You may get an answer to a question you never asked!

E. What Role Do We Play When We Advise a Client During the Governmental Approval Process?

1. We must, first, be knowledgeable as to the ordinances and how they apply to our client's project. Coordinate any review and analysis of the project with the client's architects and engineers.
2. Explain the procedural process including hearing rules and procedures, as well as the appeals process, if necessary. Generally, we have a responsibility to guide our client through the maze of the municipal approval process.
3. Candidly advise as to the weaknesses and strengths of development from the perspective of obtaining a municipal approval. The object is not to change the project, but to work on ways to obtain the approvals your client requires for his/her vision of the development.
4. Identify solutions and work informally with the planning staff.
5. Be sensitive to the ability (or lack of ability) of your experts to make a presentations. Listen to an expert rehearse the presentation. Many experts know their field of expertise but are not skilled at selling the project to a municipal board.
6. Prepare yourself, your client and the experts for the presentation.
7. Sell the project to the municipality.
8. "Get the shovel in the ground."
9. Protect the record in case of future litigation.

F. Contact with the Planning Department and Other Municipal Staff Members

1. First rule: this is their turf.
2. Second rule: municipal staff members may be your most important set of advisors...yes, advisors!
3. Remember that these individuals are employees of the municipality, and their job is to work for the well being of the community at large, not just your project...be sensitive to their current priorities.
4. Communicate with all outside land use planning, engineering, and other consultants, if the municipality uses such advisors.
 - a. Understand the relationship between the outside consultant and the municipality. How long has the consultant been employed by the municipality? Does the staff generally rely on the outside consultants, or are the outside consultants used in only certain circumstances?
5. Do not forget to obtain information from other departments within the municipality (i.e. police, fire, engineering, etc.)

G. Practical Analysis of the Planning Commission

1. Planning commissioners are appointed by the elected officials of the municipalities, and the commissions are authorized by statute.
2. Commissioners come to the commission with varied backgrounds. They are citizens willing to contribute their time and effort to serve the community. Such people must be respected for their dedication.
3. This body holds a tremendous amount of power in the approval process and all presentations and contact with the board must be well prepared.
 - a. Damage is often done at this level of the approval process due to ill-prepared presentations.
 - b. Damage at this level can be, and often is, fatal to the project.
4. The main job of the planning commission is to review the plans presented to ensure the plans comply with the ordinances of the municipality. Also, among other duties, planning commissions hold public hearings and make recommendations to city councils and township boards of supervisors regarding planned unit developments and rezoning petitions. Examples of the concerns of the planning commission are as follows.
 - a. Concerns of the neighbors.
 - b. Traffic, traffic, traffic.
 - c. Design and building materials of the project and how the development relates to surrounding projects and complies with the zoning district in which it is situated.

- d. Environmental issues (example: wetlands, storm water runoff and the effect of the project, environmentally, on the neighbors and the municipality in general).
 - e. Safe and efficient access to the project.
 - f. Landscaping.
5. **DO NOT UNDERESTIMATE THE POWER OF THIS COMMISSION!** A favorable decision of the planning commission is crucial to the planning process. A favorable decision from the commission can provide you with the permission necessary to move directly to preparation of construction documents and the issuance of the building permit. In short, the planning commission can, in effect, give you permission to **PUT A SHOVEL IN THE GROUND! SO (AGAIN)... DO NOT UNDERESTIMATE THE POWER OF THIS COMMISSION!**
6. Planning commission meetings are held in public, and public hearings have their own special dynamic. This is not a courtroom. The rules of evidence do not apply.
- a. The chairperson of a planning commission will usually let anyone in the audience speak. Very rarely is any person cut off or prevented from saying what he or she wants to...whether or not their comments have anything to do with your project.
 - b. Unlike a courtroom, irrelevant comments (from either the public or the commission itself) are very difficult, if not impossible, to control. Unfortunately, many such comments may serve only to confuse or side track a meaningful discussion of your project. Such apparent irrelevant comments often pose the most dangerous threat to a deliberation process of a commission.
 - c. Some planning commission meetings become heated. If so, you should attempt to stay calm and record comments made during the meeting so that you can address them, if necessary, at some later time. Arguing with an angry crowd is not productive.

H. Practical Analysis of the Zoning Board of Appeals (“ZBA”) for Purposes of the Presentation

1. ZBA's are authorized by statute. They have very specific purposes with regard to zoning ordinances. Their jurisdiction includes (but is not limited to) granting variances as well as hearing appeals of decisions made by the building or zoning officials.

NOTE: AVOID THE COMMON MISCONCEPTION...THE ZBA IS NOT ANOTHER PLANNING COMMISSION, IT OPERATES BY A COMPLETELY DIFFERENT SET OF RULES.
2. When you prepare for a Zoning Board of Appeals presentation, do not make the same presentation you made to the planning commission. Instead, concentrate on the criteria the Zoning Board of Appeals is obligated to consider by local ordinance and state law.

I. The Zoning Variance

1. Variances come in two varieties. “Use” variances and “dimension” or “non-use” variances. Generally they are what their name suggests.
 - a. A use variance is one which grants the petitioner the ability to use his/her property in a way that is not normally allowed within that specific zoning district. These types of variances are often more difficult to obtain than “dimension variances.” The standards for obtaining the use variance are very carefully considered by the Zoning Board of Appeals since a change of use is a more radical departure from the ordinance than granting a dimensional variance.
 - b. Some ordinances allow a varied use of the property by means of provisions of the ordinance other than by a variance, such provisions include without limitation, planned developments or downtown development districts. As part of such special districts, the request to obtain a modification from ordinance standards is often heard by the planning commission, and then the planning commission will recommend approval or denial of the request to the city council or township board of supervisors. Examples are as follows.
 - i. Exceptions.
 - ii. Waiver uses as modifications.
 - iii. Special exceptions.
 - iv. Special uses.
 - v. Conditional uses.
 - c. The “dimension” or “non-use” variance is one which varies a particular dimension of a project, such as a setback distance or the number of parking spaces permitted. These variances are granted more frequently and the criteria for obtaining the variance are less stringent than the use variance.
 - d. **Undue Hardship vs. Practical Difficulty.**
 - i. The definitions of these terms have been hopelessly misunderstood and confused. But an “undue hardship” is more difficult to demonstrate than a “practical difficulty”
 - ii. Most municipalities, however, simply say that a variance will not be granted without the demonstration of an “undue hardship”. This type of hardship cannot be “self-created”, but must exist naturally, or as a result of an occurrence that has nothing to do with the petitioner. Examples most often include problems occurring as a result of the natural condition of the property, i.e. its size, shape, location, topography, environmental or other natural feature of the property.
 - e. **Example: Typical Standards for Granting a Use Variance.**
 - i. Unnecessary Hardship.
 - ii. Prevention of property owner from using his/her property.

- iii. Not contrary to health, safety or welfare of community.
 - iv. Substantial justice will be done by granting variance.
 - v. The variance is not one which should, instead, be an amendment to the zoning ordinance.
- f. See sample ordinances following this Section IV.

Example of Supplement to Applications to the Township Zoning Board of Appeals for Variances in RA-1 Zoning District

Applicant: Land Developer, L.L.C.
Property address where variance is requested: Lot 3, Lot 4 and Lot 5, Michigan Valley Subdivision; commonly known as 1234 Shady Lane
Date: **January 14, 2004**

1. Introduction:

Applicant's property, presently known as 1234 Shady Lane, consists of three platted lots in the Michigan Valley Subdivision ("Subject Property"). The front of each lot faces Shady Lane, and the rear of each lot runs along the bank of the Arbor River. All three platted lots are considered buildable lots pursuant to the Township Ordinance. The Subject Property is presently occupied by three single family residences, one on each lot. (See Photos at Exhibit __).

As depicted on the survey and site plan documents submitted with ZBA Applications, Applicant intends to demolish the existing homes and construct the three new single family residences on each respective lot. It is Applicant's intent to construct homes with a 26.0-ft. building height, which height is permitted by the Schedule of Regulations applicable to the RA-1 Zoning District. **However, because of the extreme grade difference between the front of the lots and the rear of the lots, caused by the drop off from the street to the Arbor River, a strict application of the ordinance would force Applicant to construct three homes with a maximum height of 10.5 feet each!**

2. Statement of "Unnecessary Hardship" and "Practical Difficulty"; Variances Requested:

Strict adherence to the Ordinance would allow for a home with a maximum height of only 10.5 feet on each lot.

Under the Schedule of Regulations, a residential structure may be constructed to a maximum height of 30 feet for the RA-1 Zoning District. In determining allowable building height for individual residences, height is measured from the "grade of the lot" to the highest point of the roof surface. In order to determine the "grade of the lot", an average of existing grade must be taken from the four corners of the lot line. Due to the unique topography of the Subject Property and the extraordinary grade elevation change from the front yard to the rear yard of each respective lot, calculation of average "grade of the lot" from the four corners

of the lot would result in a loss of approximately 19.5 feet of otherwise allowable building height in the RA-1 Zoning District for each lot.

While Applicant intends to construct homes that meet every other applicable zoning restriction in the RA-1 Zoning District, Applicant requests a height variance of 15.5 feet for each of the three lots to permit the construction of a single family residence with a 26.0-ft. building height on each lot.

3. Standard For Granting Variances Under the Ordinance:

The standard for the granting of variances under the Ordinance at § 841-418(2) requires the ZBA to determine that: (1) because of **special conditions** applicable to the property in question, the provisions of this chapter, if strictly applied, unreasonably prevent the property owner from using his/her property for a permitted purpose; (2) **literal enforcement** of the chapter would **result in an unnecessary hardship**; (3) the granting of the variance will **not be contrary to the spirit and purpose of this chapter** nor contrary to the **public health, safety and welfare**; and (4) the granting of the variance will result in **substantial justice** to the property owner, the owners of the property in the area and the general public.

4. Applicant's "Unnecessary Hardship" and "Practical Difficulty" Meet The Criteria for Granting a Variance:

(1) **Special Conditions.** As described above, the special conditions applicable to the Subject Property revolve around its size, shape and location. That is, there is an extraordinary grade elevation change that occurs from the front of the Subject Property on Shady Lane to the rear of the Subject Property as it slopes downward westerly toward the Arbor River ravine. Topographical surveys filed with the Applications show a grade change on Lot 1 from 747.6 feet at the front to 710.7 feet at the rear, a loss in total grade of 36.9 feet. Likewise, a grade change from 748.1 feet at the front to 710.6 feet at the rear occurs on both lots 2 and 3, a loss in total grade of 37.5 feet for each lot.

Measurement of "grade of the lot" at the four corners of the respective lot would result in the construction of a residence with a maximum height of 10.5 feet. A residence of such a height **would not be allowable under existing BOCA building standards** due to requirements related to foundation and roof stability. **The Applicant could not obtain building permits to construct the proposed homes. Accordingly, strict adherence to the Ordinance totally prevents Applicant from using the Subject Property for the permitted single family residential purpose.**

(2) **Literal Enforcement.** **The limitation on building height imposed by strict adherence to the definition of "grade of the lot" would unintentionally penalize Applicant for the Subject Property's irregular topography and extraordinary grade elevation change. Note: if the ordinance is strictly adhered to, none of the existing residences could exist because all lots on that street experience the same problems of grade difference due to the drop off to the Arbor River.** Preventing Applicant from using the Subject Property for the permitted purpose of constructing three single family homes would result in an unnecessary hardship and practical difficulty not intended by the Ordinance. The primary purpose behind measuring the "grade of the lot" from the four cor-

ners of the lot is to prevent residential builders from artificially raising the grade around a structure's footprint so as to then artificially increase the structure's height. Applicant intends no such grade increase around the perimeter of the footprint for either of the three intended homes and seeks only to build residences to the same height allowed any other property owner in the Township who intends to construct on a lot with an even grade. Therefore, literal enforcement of the ordinance would result in an unintended unnecessary hardship.

(3) Variance Not Contrary to Spirit of Ordinance or Health, Safety or Welfare. The Spirit and Purpose of the Ordinance will not be violated because the Applicant intends to construct homes of less than the allowable maximum height in the RA-1 Zoning District. The construction of a 26.0-ft. high home is in conformance with the character of the surrounding area and the character of new residential construction in the Township. The construction of a 10.5-ft. high home, even if allowable under existing BOCA building standards, would not be in harmony with the character of the surrounding area. There are no negative health, safety and welfare concerns for the Township or its residents relative to Applicant's variance request. As shown on elevations provided, the proposed homes have been tastefully designed and will be of significant benefit to the surrounding community.

(4) Variance Will Provide Substantial Justice. The granting of the requested variance will alleviate Applicant's unnecessary hardship and practical difficulty, a unique situation that was not self created. Applicant has chosen the only reasonable areas on the Subject Property on which to construct the proposed residences, on areas of even grade consistent with the present location of the existing home. Negative community impact is not an issue.

5. Conclusion:

Applicant's variance request meets the standard applicable to the granting of variances under the Ordinance at § 841-418(2). Applicant has demonstrated that there exists an unintentional unnecessary hardship and practical difficulty resulting from strict adherence to the Ordinance which would prevent Applicant from using the Subject Property for a permitted purpose. The granting of the requested variances will not adversely affect the objectives of the Master Plan or the intent or the spirit of the Ordinance.

It is respectfully requested that the ZBA grant a height variance of 15.5 feet for each of lots 1, 2 and 3 to allow for the construction of three homes with a 26.0-ft. building height on each of the platted lots that comprise the Subject Property. Thank you for your time and consideration.

Respectfully submitted,

Dated: January 14, 2004

WILLIAMS, WILLIAMS, RUBY & PLUNKETT, P.C.

By: _____

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VI. Non-Legislative Zoning Decisions and Procedures

A. Discretionary Decisions

1. Most zoning decisions and procedures are not legislative, even when the legislative body is acting as the decision - maker.
2. A local unit has no discretion to prohibit uses of land that are permitted by right in a zoning classification. The local unit, however, has some discretion to approve or deny certain land uses. These so called “discretionary” decisions are classified as administrative or quasi- judicial decisions. They are also sometimes ministerial in nature, when the decision-maker has very little discretion to approve or deny the land use request.
3. The Zoning Acts identify special land use approval, planned unit development approval [with an exception discussed infra], site plan review and the granting of variances as discretionary decisions.
4. **The Common Features of Discretionary Decisions:**
 - The decision must be based on standards and requirements provided in the zoning ordinance.
 - The ordinance must identify the decision-making body or individual, which in the case of special land use, planned unit development, and site plan review may either be the zoning administrator, the planning commission or the legislative body. The zoning board of appeal is the only body that may grant variances.⁹
 - The ordinance must specify the materials and other documents that an applicant must submit with its application to obtain approval of a permit or use.
 - If the application meets the requirements and standards of the ordinance, then the decision-maker **must** grant approval and loses any discretion to deny the land use request.
 - The decision-maker must disclose the bases for its conclusions and decisions.
 - The decision-maker may impose conditions on the approval of the land use request.
 - The decision-maker may approve, deny or approve the land use application with conditions.
 - The conditions must meet the standards and requirements for imposing conditions on discretionary approvals.
 - The conditions must be recorded and can not be unilaterally modified. Changes to conditions require the mutual agreement of the municipality and landowner.

9. The zoning administrator is usually a paid employee, whose duties include enforcing zoning violations and issuing permits for construction, occupancy, grading, and other similar activities. The administrator also may process appeals to the zoning board of appeal. The ZBA may review the decisions, orders, and determinations of the zoning administrator.

- Under federal constitutional law, the condition must be substantially related to furthering a legitimate public interest and must be proportional to the impact caused by the land use. The condition, in other words, must be calculated to ameliorate any impact caused by approving the land use.¹⁰
- Note that the legislative body has no authority, under Michigan law, to impose conditions on the grant of a rezoning request. The practice of granting rezoning subject to conditions is called “conditional rezoning” and usually is permitted in states that treat the rezoning of a single parcel of land as an administrative and not a legislative act.

125.286d Discretionary decisions; requirements, standards, and conditions.

Sec. 16d.

(1) If a township zoning ordinance authorizes the consideration and approval of special land uses or planned unit developments pursuant to section 16b or 16c, or otherwise provides for discretionary decisions, the **requirements and standards upon which the decisions are made shall be specified in the ordinance.** The standards shall be consistent with, and promote the intent and purpose of the zoning ordinance, and shall insure that the land use or activity authorized shall be compatible with adjacent uses of land, the natural environment, and the capacities of public services and facilities affected by the land use. The standards shall also insure that the land use or activity is consistent with the public health, safety, and welfare of the township. **A request for approval of a land use or activity which is in compliance with the standards stated in the zoning ordinance, the conditions imposed pursuant to the ordinance, other applicable ordinances, and state and federal statutes, shall be approved.**

(2) **Reasonable conditions may be required with the approval of a special land use, planned unit development, or other land uses or activities permitted by discretionary decision.** The conditions may include conditions necessary to insure that public services and facilities affected by a proposed land use or activity will be capable of accommodating increased service and facility loads caused by the land use or activity, to protect the natural environment and conserve natural resources and energy, to insure compatibility with adjacent uses of land, and to promote the use of land in a socially and economically desirable manner. Conditions imposed shall meet all of the following requirements:

- (a) Be designed to protect natural resources, the health, safety, and welfare and the social and economic well being of those who will use the land use or activity under **consideration**, residents and landowners immediately adjacent to the proposed land use or activity, and the community as a whole.
- (b) Be related to the valid exercise of the police power, **and** purposes which are affected by the proposed use or activity.
- (c) Be necessary to meet the intent and purpose of the zoning ordinance, be related to the standards established in the ordinance for the land use or

10. *Dolan v City of Tigard*, 512 US 374 (1994)

activity under consideration, and be necessary to insure compliance with those standards.

(3) The conditions imposed with respect to the approval of a land use or activity shall be recorded in the record of the approval action, and shall remain unchanged except upon the mutual consent of the approving authority and the landowner. The approving authority shall maintain a record of conditions which are changed.¹¹

B. Special Land Uses

- The landowner may have the proper zoning for the property, but the desired use of the property requires special permission.
- The approval of a special land use is an administrative and not legislative act so that the legislative body need not act on the application.
- Many municipalities, however, make special land use approval an unnecessary and more expensive two-step process by requiring a recommendation from the planning commission and final approval from the legislative body.
- A municipality must require site plan review with the approval of a special land use.
- The decision making body must provide notice that it has received an application for special land use approval.
- The applicant, the decision making body, or persons on whom the local unit must serve personal notice, may ask for, and are entitled to, a public hearing on the application. The decision making body must publish notice if a public hearing is requested. In any event, the decision maker must publish notice that it has received the request prior to making a decision on the special land use request.
- **CAUTION:** Judicial review of a decision on a special land use request may be limited to the record that the applicant makes before the decision-making body. It is therefore essential to prepare for the hearing as if it were a quasi-trial.¹² Additionally, there may be a 21 day period in which the applicant must seek judicial review in the nature of an appeal from an adverse administrative decision.

Township Act¹³

MCL 125.286b

(1) A township may provide in a zoning ordinance for special land uses which shall be permitted in a zoning district only after review and approval by either the **zoning board**, **[read: planning commission]** an official charged with administering the ordinance, or the township board, as specified in the ordinance. The ordinance shall specify:

11. C&V Act provision is identical see MCL 125.584c

12. Since this seminar is geared to the transactional attorney, it is beyond the scope of the materials to detail the very complex litigation rules and law that apply to seeking judicial review of land use decisions.

13. The C&V Act provision is identical. MCL 125.584a Special land uses

- (a) The special land uses and activities eligible for approval consideration and the body or official charged with reviewing special land uses and granting approval.
- (b) The requirements and standards upon which decisions on requests for special land use approval shall be based.
- (c) The procedures and supporting materials required for application, review, and approval.

(2) Upon receipt of an application for a special land use which requires a decision on discretionary grounds, **1 notice that a request for special land use approval has been received shall be published in a newspaper which circulates in the township, and sent by mail or personal delivery to the owners of property for which approval is being considered, to all persons to whom real property is assessed within 300 feet of the boundary of the property in question, and to the occupants of all structures within 300 feet. The notice shall be given not less than 5 nor more than 15 days before the date the application will be considered.** If the name of the occupant is not known, the term "occupant" may be used in making notification. Notification need not be given to more than 1 occupant of a structure, except that if a structure contains more than 1 dwelling unit or spatial area owned or leased by different individuals, partnerships, businesses, or organizations, 1 occupant of each unit or spatial area shall receive notice. In the case of a single structure containing more than 4 dwelling units or other distinct spatial areas owned or leased by different individuals, partnerships, businesses, or organizations, notice may be given to the manager or owner of the structure who shall be requested to post the notice at the primary entrance to the structure.

The notice shall:

- (a) Describe the nature of the special land use request.
- (b) Indicate the property which is the subject of the special land use request.
- (c) State when and where the special land use request will be considered.
- (d) Indicate when and where written comments will be received concerning the request.
- (e) **Indicate that a public hearing on the special land use request may be requested by any property owner or the occupant of any structure located within 300 feet of the boundary of the property being considered for a special use.**

(3) **At the initiative of the body or official responsible for approving special land uses, or upon the request of the applicant for special land use authorization or a property owner or the occupant of a structure located within 300 feet of the boundary of the property being considered for a special land use, a public hearing with notification as required for a notice of a request for special land use approval, as provided in subsection (2), shall be held before a decision is made on the special land use request which is based on discretionary grounds. If the applicant or the body or official responsible for approving special land uses requests a public hearing, only notification of the public hearing need be made. A decision on a special land use which is based on discretionary grounds shall not be made unless notification of the request for special land use approval, or notification of a public hearing on a special land use request has been made as required by this section.**

(4) **The body or official designated in the zoning ordinance to review and approve special land uses may deny, approve, or approve with conditions, a request for special land use approval. The decision on a special land use shall be incorporated in a statement containing the conclusions relative to the special land use under consideration which specifies the basis for the decision, and any conditions imposed.**

C. Planned Unit Development

1. Definition

- A PUD is best described as a means of adapting the land to a particular use rather than adapting a use to predetermined regulations. A PUD is a site specific zoning ordinance.
- The purpose of a PUD is to apply development techniques to a large scale project that would not be possible under the existing zoning ordinance.
- Most municipalities do not use the PUD to its full potential or as the legislature intended.
- Many ordinances simply apply the regulations of the underlying zoning district to a PUD, which defeats the purpose of the PUD.
- Many ordinances do not use PUD techniques to create integrated large scale multi-use projects. Municipalities instead use the PUD as a means to escape the “use by right” provisions of a zoning ordinance to obtain more control over a project than would be permitted under a traditional zoning ordinance.

2. The Granting of a PUD May Be Either an Administrative or Legislative Act

- The municipality may provide for a PUD option within a zoning district. Alternatively, the zoning ordinance may treat a PUD as a distinct zoning district.
- If the PUD is a distinct zoning district, and the property must be rezoned to that district, the process is legislative and requires following the usual procedures for rezoning property.
- The granting of a PUD is an administrative act if it is an option in a zoning district and does not require rezoning.

3. The Advantages of PUD Approval from the Developer and Community Perspective

- A PUD can be advantageous to the developer of a large project, especially with a mixture of uses. Importantly, the developer can under certain conditions obtain final approval for a phased project.
- A PUD provides an opportunity for legal “conditional zoning”.
 - Municipalities often deny requests for rezoning because of a perceived loss of control if the property is rezoned.
 - For example, a developer will seek a rezoning to a commercial classification in order to accommodate a specific project or type of development.
 - The community may like the specific use, but are afraid that if the rezoning is granted, the developer can either sell the property to another developer who will develop a use considered unwanted, but permitted by right in the zoning district.

- The municipality cannot grant the rezoning conditioned upon the developer only constructing, for example, the promised “upscale retail store” according to a site plan full of aesthetic amenities.
- Municipalities do not trust developers and are wary of granting a rezoning which will permit panoply of permitted uses. The municipality fears getting a 7-11 store, rather than the promised “upscale” store.
- By granting a PUD, the municipality also can add conditions and exact benefits that it otherwise would lack authority under a traditional zoning ordinance.

4. The Procedure for Obtaining PUD Approval

- The body or official designated as decision-maker must hold at least one public hearing with notice made according to procedures that apply for special land uses.
- A developer may request, if provided in the ordinance, a preapplication conference prior to submission of the request.
- The developer may also submit preliminary site plans prior to the hearing.
- The decision-maker or board must meet within a reasonable time following any public hearings and make a final decision denying, approving, or approving the application with conditions.
- The decision-maker is required to prepare a **report** [not just a “statement” as with a special land use] specifying its conclusions and the basis for its decision, including imposition of conditions.
- If rezoning is required, the legislative body must make the final decision and the usual rezoning procedures apply. The initial public hearing held on the PUD request satisfies the requirement that the planning commissions holds the initial hearing and make a recommendation.
- Most municipalities make the PUD procedure much more onerous, expensive and time consuming than the legislation intended. There is no reason for a municipality to require review and recommendation by the planning commission and a final decision made by the legislative body, if no rezoning is required.

C&V Act

125.584b Planned unit development.¹⁴

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

14. The Township Act provision is identical, MCL 125.286c Planned unit development

achieve integration of the proposed land development project with the characteristics of the project area.

(2) A city or village may establish planned unit development requirements in a zoning ordinance 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 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.

(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. An 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 multi-phased 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, when available and applicable, may incorporate by reference other ordinances or statutes which regulate land development. The planned unit development regulations contained in zoning ordinances shall encourage complimentary relationships between zoning regulations and other regulations affecting the development of land.

D. Site Plan Review

1. The Enabling Acts only require the submission of a site plan in connection with a special land use and PUD approval, but as a practical matter, almost all communities require site plan review for all new land uses and improvement of existing sites, except for the construction of one single-family housing unit.
2. The site plan is supposed to depict the site in detail as it will look once all the improvements have been made.
3. The purpose of site plan review is to ensure that the placement of buildings, setbacks, building heights, land coverage, landscape, lighting, traffic flow, drainage, parking, signage, access and other site details and design meet the requirements of the zoning ordinance and any other applicable state and federal laws.
4. Site plan review procedures may differ greatly in local units, because the enabling legislation permits local units to determine the procedure and requirements for site plan review.
 - The zoning ordinance will describe the activities that trigger the need for site plan review.
 - Some communities require only approval from the planning commission. Site plan review may, but there is no requirement that it must, be conducted in public.
 - Some communities unnecessarily require review and approval by the planning commission and the legislative body. This unnecessary procedure is more expensive, time consuming, and arguably serves no legitimate public

interest. The planning commission in these communities acts only as the advisory body to the legislative body.

- Some communities provide an “appeal” from planning commission decisions on site plan approval to the legislative body.
5. A public hearing and notice is required if the site plan review is conducted in conjunction with a special land use or PUD approval.
 6. Since the decision maker can place conditions on the approval of a site plan, many communities use site plan review as a way to extract amenities from developers that are not necessarily legal conditions.
 7. A decision-making body may preliminarily approve a site plan with a lengthy list of conditions. The land owner could be faced with several more reviews over many months to ensure that the revised plans meet the conditions. A developer can hopefully short circuit this kind of delay by making it very difficult for the reviewing body to assert at the next hearing that the developer has failed to satisfy the conditions of approval.
 - Often, the reviewing body will spontaneously impose the conditions while making a motion to approve the plan. It may be difficult to take detailed notes. It is not safe, necessarily, to wait for the minutes to identify the changes required for site plan approval.
 - If any question exists, try to get an answer on the spot so that no confusion exists over what the reviewing body expects to see at the next review.
 - If any question exists following the meeting, contact the municipality’s engineer, if one exists, or other knowledgeable person, to confirm the required changes before investing the time and money revising the plan.
 - There may be roadblocks in dealing with the municipality to get answers. Make a record of attempts to get clarification from reluctant officials or consultants to present at the next hearing, when the planning commission asserts that the developer has failed to satisfy the conditions.
 8. There are some communities that do not require formal site plan review for every minor change to a site plan, but permit administrative review and approval by the municipality’s planning or engineering staff or consultant.
 9. The zoning acts require mutual agreement between the owner and local unit to make changes to an approved site plan.

Township Act

125.286e Site plan.¹⁵

Sec. 16e.

(1) As used in this section, “site plan” includes the documents and drawings required by the zoning ordinance to insure that a proposed land use or activity is in compliance with local ordinances and state and federal statutes.

15. The C&V Act is identical except for paragraph 6 of the Township Act

(2) A township **may** require the submission and approval of a site plan before authorization of a land use or activity regulated by a zoning ordinance. **The zoning ordinance shall specify the body, board, or official charged with reviewing site plans and granting approval.**

(3) If a zoning ordinance requires site plan approval, the site plan, as approved, shall become part of the record of approval, and subsequent actions relating to the activity authorized shall be consistent with the approved site plan, **unless a change conforming to the zoning ordinance receives the mutual agreement of the landowner and the individual or body which initially approved the site plan.**

(4) The procedures and requirements for the submission and approval of site plans shall be specified in the zoning ordinance. Site plan submission, review, and approval shall be required for special land uses and planned unit developments. **Decisions rejecting, approving, or conditionally approving a site plan shall be based upon requirements and standards contained in the zoning ordinance, other township planning documents, other applicable ordinances, and state and federal statutes.**

(5) A site plan **shall be approved if it contains the information required by the zoning ordinance and is in compliance with the zoning ordinance and the conditions imposed pursuant to the ordinance, other township planning documents, other applicable ordinances, and state and federal statutes.**

(6) The purpose of this amendatory act is to clarify the authority of the township body, board, or official charged with reviewing site plans and granting approval of site plans, which is implied from the language of this act, but which is not specifically set forth in this act.

VII. The Zoning Board of Appeal

A. Powers and Functions

1. The ZBA is an administrative and quasi-judicial body, whose members are appointed by the local unit's legislative body.¹⁶
2. The Zoning Enabling Act authorizes a municipality to appoint a zoning board appeal with the power to:
 - Review on appeal the decisions, orders, requirements or determinations made by "an administrative official or body" charged with the enforcement of the zoning ordinance. Some communities delegate a whole host of activities to the ZBA such as reviewing planning commission decisions on administrative matters.
 - Grant variances from ordinance provisions when passing upon an appeal from an adverse decision, order, requirement or determination.
 - Hear and decide questions that arise from the administration of the ordinance including interpreting the zoning map. The ZBA also interprets the

16. Unless the city or village legislative body acts as the ZBA, then the members elected.

provisions of the ordinance, including in some local units whether a use not specifically permitted would be excluded.

- Hear and decide matters required by the zoning ordinance or referred to the ZBA for determination.
 - The ZBA may only review decisions made with respect to Special land use approval and planned unit development approval if expressly provided in the ordinance.
3. Any aggrieved person, including municipal officers, department's bureaus or boards may appeal an administrative, decision, order, requirement or determination to the ZBA.
 4. Check the zoning ordinance or ZBA rules to determine the time limit that exists in which to file the appeal to the ZBA.
 5. The filing of an appeal automatically stays enforcement of the decision, order, requirement or determination from which the aggrieved person is appealing, unless the official or body from whose action the appeal arises certifies that such stay would pose an immediate threat of harm to life or property
 6. The ZBA also has the power to:
 - Administer oaths.
 - Issue a restraining order to stay enforcement if the officer from whom the appeal is taken has filed a certificate opining that the stay will pose an immediate threat to life or property. The court may also issue the restraining order.
 - Compel the appearance of witnesses to hearings.
 - Impose conditions on the grant of a variance.
 7. A person "affected" by a ZBA decision has an appeal by right to the circuit court. The appeal is heard the record made before the ZBA. If the applicant intends to appeal an adverse decision, the applicant should prepare for the hearing as if it were a trial.
 - There is case law that holds that the appeal must be filed within 21 days from the date that the ZBA approves the minutes at which it made its decision, rather than 21 days from the date of the decision.
 - If a ZBA mails or otherwise serves a copy of its findings and conclusions on the applicant prior to the date that the ZBA approves the minutes, it would be prudent to use the date of that service for the purpose of filing an appeal.
 8. **Differences Between C&V Act and Township Act**
 - In cities and villages only, the council may double as the ZBA. If a city has a building board of appeals, that body may be enlarged to also serve as the zoning board of appeals.
 - In Townships, the ZBA is only required to notify the applicant of the time and place of the hearing at which its request will be heard.

- In Cities and Villages, the notice of the hearing must be given personally by hand delivery or mail to the owners of real property and to the occupants of single family and 2 family dwellings located within 300 feet of the subject land.
- In cities and villages with a population less than 1,000,000, the ZBA needs a majority vote to approve a variance or to reverse the decision of the body or official from which the appeal is granted or to otherwise decide a matter in the land owner's favor. The ZBA needs the concurring vote of 2/3 of its members to grant a **use** variance.
- In cities and villages with a population greater than 1,000,000, the ZBA must have the concurring vote of 2/3 of the members to grant **any** variance or reverse the decision of the body or official from which the appeal is granted or to otherwise decide a matter in the land owner's favor.
- In townships, regardless of population, the concurring vote of a majority of the members is needed to reverse decisions, orders, requirements or determinations which on an appeal or to decide a matter in the applicant's favor, including the grant of a variance.
- A Township ZBA may not conduct business if less than a majority of its members are present.

B. Variances

1. The general rule is that variances run with the land and are not personal to the landowner.
2. The grant of a variance cures any non-conforming aspect of land or structures, or uses of land.
3. **Dimensional variances:** These variances relate to relaxing development regulations, such as set backs, height, lot size, width, depth, and other similar provisions. The standard for granting a dimensional variance is that absent the variance it is difficult as a practical matter to develop the property.
 - The zoning ordinance also might require the owner to not only establish a "practical difficulty", but also an "unnecessary hardship" in complying with the dimensional regulations of the zoning ordinance.
 - Michigan law provides, however, that the "unnecessary hardship" standard applies only to use and not dimensional variances.¹⁷
 - Under the "practical difficulty" standard, the owner does not have to show that the property cannot be developed, absent the variance.
 - The owner has to show that due to the characteristics of the land, which differ from similarly situated land, it is difficult or impractical to comply with the ordinance and therefore unjust to require compliance just for the sake of compliance. The owner should also demonstrate that permitting the variance

17. *Puritan – Greenfield Ass'n v Leo*, 7 Mich App 659 (1967)

is within the spirit, if not the letter of the law, consistent with the master plan, and will not harm the public or nearby property.

4. **Use Variances:** A ZBA may also grant a variance from the use provisions of a zoning ordinance. A ZBA has no legislative authority and may not rezone land to an entirely new use classification. The ZBA, however, may approve a specific use of land with appropriate conditions that is not otherwise allowed in the zoning district.
 - The variance does not change the zoning classification.
 - The standard for obtaining a use variance is that without the variance the landowner will suffer an “unnecessary hardship”. The phrase “unnecessary hardship” has been defined as meaning that, absent the variance the ordinance as applied to the property would effectuate a taking of that property.¹⁸
 - There is case law that provides that the need for the variance must arise from the characteristics of the property, rather than the owner’s needs, whether economic or otherwise. A ZBA may typically state that it cannot consider economic hardship to the individual when reviewing a request for a variance. This is not true as applied to use variances and also may not be true as applied to dimensional variances.
 - A landowner may be able to prove “unnecessary hardship” through demonstrating that under the current allowable uses, the owner cannot receive a reasonable return on its investment, the property is not marketable for any of the allowable uses.¹⁹
 - The hardship is unnecessary if the variance would be within the spirit of the ordinance, consistent with the master plan, will not interfere with the property rights of neighboring property, will not cause harm to the public and provide the owner with equitable relief.
5. **Uniqueness of Hardship or Difficulty:** The case law also requires either with dimensional or use variances that the hardship or practical difficulty be unique to the subject land. The purpose of this requirement is that if most of the property in the zoning district is not adaptable to the permitted uses, the land should be rezoned rather than the ZBA granting spot variances. Recent case law, however, arguably has relaxed this standard.²⁰
6. In many states, the ZBA may not grant use variances for large areas of land. Michigan has rejected that rule. In Michigan, there is nothing to prevent a ZBA from granting a use variance for 2 acres or 200 acres.²¹

18. Id.

19. Id.

20. *Paragon Properties Co v City of Novi*, 452 Mich 568 (1996); *Janssen v Holland Charter Twp*, 252 Mich App 197 (2002)

21. *Paragon, supra*, at n.20

7. A property owner cannot challenge the constitutionality of an ordinance as applied to its land without first seeking a rezoning from the legislative body and a use variance from the ZBA.²²
8. There is some difference of opinion whether a township ZBA has the authority to grant a use variance based upon textual differences in the Township and C & V Acts.
 - The Township Act provides as follows:

Where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the zoning ordinance, **the board of appeals in passing upon appeals may vary or modify any of its rules or provisions** so that the spirit of the ordinance is observed, public safety secured, and substantial justice done. The board of appeals may impose conditions with an affirmative decision pursuant to section 16d (2).
 - **The C&V Act provides as follows:**

If there are practical difficulties or unnecessary hardship in carrying out the strict letter of the ordinance, **the board of appeals may in passing upon appeals grant a variance in any of its rules or provisions relating to the construction, or structural changes in, equipment, or alteration of buildings or structures, or the use of land, buildings, or structures**, so that the spirit of the ordinance shall be observed, public safety secured, and substantial justice done.

 - Note that the Township Act grants general power to the ZBA to vary **any** of its rules or provision. The C&V Act is more specific in its grant of power to vary ordinance rules or provisions.
 - However, cities and villages of any size need a 2/3 vote of the members to grant a use variance. A township ZBA needs only a majority vote to grant a variance. The Township Act has no specific voting requirements for use variances as contrasted to dimensional variances as does the city and village act.
 - The Township Act does not require that any published or personal notice be served publicizing an appeal proceeding or variance request. The C&V Act requires the service of personal notice on owners and occupants of property located within 300 feet of the property.

C. Selected Township and C&V Act ZBA Provisions

1. Township Act

125.288 Township board of appeals; selection, qualifications, and terms of members; chairperson; per diem or expenses; removal; conflict of interest; misconduct in office; vacancies; majority required to conduct business.

22. Id.

(6) A township board of appeals shall not conduct business unless a majority of the regular members of the board is present.

125.290 Township board of appeals; duties; variance.

Sec. 20.

(1) The township board of appeals shall hear and decide questions that arise in the administration of the zoning ordinance, including the interpretation of the zoning maps, and may adopt rules to govern its procedures sitting as a board of appeals. It shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official or body charged with enforcement of an ordinance adopted pursuant to this act. It shall hear and decide matters referred to it or upon which it is required to pass under an ordinance adopted pursuant to this act. For special land use and planned unit development decisions, an appeal may be taken to the board of appeals only if provided for in the zoning ordinance.

(2) The concurring vote of a majority of the members of the township board of appeals is necessary to reverse an order, requirement, decision, or determination of the administrative official or body, or to decide in favor of the applicant any matter upon which the board is required to pass under the ordinance, or to grant a variance in the ordinance. **An appeal may be taken by a person aggrieved or by an officer, department, board, or bureau of the township,** county, or state. In addition, a variance in the ordinance may be applied for and granted pursuant to section 4 of the uniform condemnation procedures act, 1980 PA 87, MCL 213.54, and this act. The township zoning board of appeals shall state the grounds of each determination.

125.291 Board of appeals; appeals.

Sec. 21.

Such appeal shall be taken within such time as shall be prescribed by the township board of appeals by general rule, **by the filing with the officer from whom the appeal is taken and with the board of appeals of a notice of appeal specifying the grounds thereof.** The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

125.292 Board of appeals; restraining order.

Sec. 22.

An appeal stays all proceedings in furtherance of the action appealed from unless the officer from whom the appeal is taken certifies to the township board of appeals after the notice of appeal shall have been filed with him that by reason of facts stated in the certificate, a stay would in his opinion cause imminent peril to life or property, in which case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of appeals or by the circuit court, on application, on notice to the officer from whom the appeal is taken and on due cause shown.

125.293 Township board of appeals; appeals.

Sec. 23.

The township board of appeals shall fix a reasonable time for the hearing of the appeal, give due notice thereof to the parties, and decide the appeal within a rea-

sonable time. At the hearing, a party may appear in person or by agent or by attorney. The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination as in its opinion ought to be made in the premises, and to that end shall have all the powers of the officer or body from whom the appeal was taken and may issue or direct the issuance of a permit. Where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the zoning ordinance, the board of appeals in passing upon appeals may vary or modify any of its rules or provisions so that the spirit of the ordinance is observed, public safety secured, and substantial justice done. The board of appeals may impose conditions with an affirmative decision pursuant to section 16d(2).

125.293a Township board of appeals; decision final; judicial review.

Sec. 23a.

(1) The decision of the board of appeals rendered pursuant to section 23 shall be final. However, a person having an interest affected by the zoning ordinance may appeal to the circuit court. Upon appeal the circuit court shall review the record and decision of the board of appeals to insure that the decision:

- (a) Complies with the constitution **and** laws of the state.
- (b) Is based upon proper **procedure**.
- (c) Is supported by competent, material, and **substantial** evidence on the record.
- (d) Represents the reasonable exercise of **discretion** granted by law to the board of appeals.

(2) If the court finds the record of the board of appeals inadequate to make the review required by this section, or that there is additional **evidence** which is material and with good reason was not presented to the board of appeals, the court shall order further proceedings before the board of appeals on conditions which the court considers proper. The board of appeals may modify its findings and decision as a result of the new proceedings, or may affirm its original decision. The supplementary record and decision shall be filed with the court.

(3) As a result of the review required by this section, the court may **affirm**, reverse, or modify the decision of the board of appeals.

2. City and Village Act

125.585 Board of appeals; rules governing procedure; appointment and terms of members; powers and duties of board; appeals; variances; remuneration; finality of decision; judicial review.

Sec. 5.

(1) **The legislative body of a city or village may act as a board of appeals upon questions arising under a zoning ordinance.** The legislative body may establish rules to govern its procedure as a board of appeals. **In the alternative, the legislative body may appoint a board of appeals consisting of not less than 5 members, each to be appointed for a term of 3 years.** Appointments of the first members shall be for terms of 1, 2, and 3 years, respectively, so as nearly as possible to provide for the subsequent appointment of an equal number of members each year. After the initial appointments, each member shall hold office for the full 3-year term.

(3) **The board of appeals shall hear and decide appeals from and review any order, requirements, decision, or determination made by an administrative official or body charged with the enforcement of an ordinance adopted under this act. The board of appeals shall also hear and decide matters referred to the board or upon which the board is required to pass under an ordinance adopted under this act. For special land use and**

(4) In a city or village having a population of less than 1,000,000, the concurring vote of a majority of the members of the board is necessary to reverse an order, requirement, decision, or determination of an administrative official or body, or to decide in favor of the applicant a matter **upon which the board is required to pass under an ordinance, or to effect a variation in an ordinance except that a concurring vote of 2/3 of the members of the board is necessary to grant a variance from uses of land permitted in an ordinance. In a city having a population of 1,000,000 or more, the concurring vote of 2/3 of the members of the board is necessary to reverse an order, requirement, decision, or determination of an administrative official or body, or to decide in favor of the applicant a matter upon which the board is required to pass under an ordinance, or to grant a variance in an ordinance.**

(5) An appeal may be taken by a person aggrieved, or by an officer, department, board, or bureau of the city or village. In addition, a variance in an ordinance may be applied for and granted pursuant to section 4 of the uniform condemnation procedures act, 1980 PA 87, MCL 213.54, and this act. **A board of rules or board of building appeals of a city or village may be enlarged to consist of not less than 5 members, and these may be appointed as the board of appeals as provided in this section.**

(6) An appeal under this section shall be taken, within a time prescribed by the board of appeals by general rule, by filing, with the officer or body from whom the appeal is taken and with the board of appeals, a notice of appeal specifying the grounds for the appeal. The officer or body from whom the appeal is taken shall immediately transmit to the board all the papers constituting the record upon which the action appealed from was taken.

(7) An appeal under this section stays all proceedings in furtherance of the action appealed from unless the officer or body from whom the appeal is taken certifies to the board of appeals, after the notice of appeal is filed, that by reason of facts stated in the certificate, a stay would in the opinion of the officer or body cause imminent peril to life or property. If such a certification is filed, the proceedings shall only be stayed by a restraining order. A restraining order may be granted by the board of appeals or by the circuit court, on application, on notice to the officer or body from whom the appeal is taken and on due cause shown.

(8) **The board of appeals shall fix a reasonable time for the hearing of the appeal and give notice of the appeal to the persons to whom real property within 300 feet of the premises in question is assessed, and to the occupants of single and 2-family dwellings within 300 feet.** The notice shall be delivered personally or by mail addressed to the respective owners and tenants at the address given in the last assessment roll. If a tenant's name is not known, the term "occupant" may be used. Upon the hearing, a party may appear in person or by agent or by attorney. (Emphasis added)

(9) The board of appeals shall decide the appeal within a reasonable time. The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from and shall make an order, requirement, decision, or determination as in the board's opinion ought to be made in the premises, and to that end shall have all the powers of the officer or body from whom the appeal is taken.

If there are practical difficulties or unnecessary hardship in carrying out the strict letter of the ordinance, the board of appeals may in passing upon appeals grant a variance in any of its rules or provisions relating to the construction, or structural changes in, equipment, or alteration of buildings or structures, or the use of land, buildings, or structures, so that the spirit of the ordinance shall be observed, public safety secured, and substantial justice done.

(10) The board of appeals may impose conditions upon an affirmative decision, as provided in section 4c(2). The legislative body of a city or village may authorize the remuneration of the members of the board for attendance at each meeting.

(11) The decision of the board of appeals is final. However, a person having an interest affected by the zoning ordinance may appeal to the circuit court. Upon appeal, the circuit court shall review the record and decision of the board of appeals to ensure that the decision meets all of the following requirements:

- (a) Complies with the constitution and laws of this state.
- (b) Is based upon proper procedure.
- (c) Is supported by competent, material, and substantial evidence on the record.
- (d) Represents the reasonable exercise of discretion granted by law to the board of appeals.

(12) If the court finds the record of the board of appeals inadequate to make the review required by this section, or that additional material evidence exists that with good reason was not presented to the board of appeals, the court shall order further proceedings before the board of appeals on conditions that the court considers proper. The board of appeals may modify its findings and decision as a result of the new proceedings, or may affirm the original decision. The supplementary record and decision shall be filed with the court.

(13) As a result of the review required by this section, the court may affirm, reverse, or modify the decision of the board of appeals.

VIII. Zoning Violations

A. The Violation of a Zoning Ordinance Is a Nuisance Per Se

1. The municipality has the right to obtain the abatement of the violation without having to prove the elements of a nuisance claim if it proves that the use of land is violating the ordinance.
2. The municipality may issue a ticket, impose a fine, or file an action in district court to abate the alleged nuisance.
3. The owner can appeal the notice of violation to the ZBA and must exhaust that administrative remedy prior to challenging the alleged violation in circuit court on constitutional or other grounds.

B. Statutory Provision

Township Act.²³

125.294 Violation as nuisance per se; abatement; liability; administration and enforcement of ordinance; penalties.

23. The C&V Act has the same provision.

Sec. 24.

A use of land, or a dwelling, building, or structure including a tent or trailer coach, used, erected, altered, razed, or converted in violation of a local ordinance or regulation adopted pursuant to this act is a nuisance per se. The court shall order the nuisance abated and the owner or agent in charge of the dwelling, building, structure, tent, trailer coach, or land is liable for maintaining a nuisance per se. The township board shall in the ordinance enacted under this act designate the proper official or officials who shall administer and enforce that ordinance and do either of the following for each violation of the ordinance:

- (a) Impose a penalty for the violation.
- (b) Designate the violation as a municipal civil infraction and impose a civil fine for the violation.

IX. Nonconforming Uses and the Problem of Vested Rights

A. Definition

1. Zoning law provides vested rights to continue lawfully existing uses of land and structures that become unlawful by the passage of a new ordinance or amendment that affects the property. Note the difference in the language between the two acts:

Township act:

125.286 Nonconforming uses.

(1) The lawful use of a dwelling, building, or structure and of land or a premise **as existing and lawful** at the time of enactment of a zoning ordinance, or, in the case of an amendment of an ordinance, then at the time of the amendment, **may be continued although the use does not conform with the ordinance or amendment.**

C & V Act:

125.583a Nonconforming uses and structures.

Sec. 3a.

(1) The lawful use of land or a structure **exactly as the land** or structure existed at the time of the enactment of the ordinance affecting that land or structure, **may be continued, except as otherwise provided in this act,** although that use or structure does not conform with the ordinance.

2. **Structural or Dimensional Non-conformity.** The use of the property may conform to the ordinance, but is still non-conforming land, because buildings may become non-compliant through a change in development regulations. The property may become non-conforming by a change in minimum setback, lot size, lot dimension or lot coverage requirements.
3. **Nonconforming Use.** The use of the property becomes non-conforming if the zoning district changes or an amendment to the zoning text no longer permits the use.

- A municipality may take the position that the property is a non-conforming use if an amendment to the text of the ordinance classifies the formally permitted by right use as a special land use.
 - The municipality may require the owner to apply for special land use approval if the owner submits a plan to change any feature of the site or make any improvement to the buildings.
4. An existing use or structure is lawful if the owner was using the property for the purposes it wishes to continue when the regulations changed.
- Many ordinances purport to terminate a non-conforming use if it ceases for 30 or more consecutive days claiming that the owner has abandoned the use. These provisions are not enforceable.
 - The burden is the municipality to prove abandonment with proof not only of non-use but also that the owner intended to abandon the legal nonconforming use.²⁴
5. The Zoning Acts with some subtle differences require the local unit to provide terms upon which nonconforming uses may be maintained or restored. Compare the township provision with the city and village provision.

MCL 125.286(2)

(2) **The township board shall** provide in a zoning ordinance for the **completion**, restoration, reconstruction, extension, or substitution of nonconforming uses **upon reasonable terms** set forth in the zoning ordinance. In establishing terms for the completion, restoration, reconstruction, extension, or substitution of nonconforming uses different classes of nonconforming uses may be established in the ordinance with different requirements applicable to each class.

125.583a (2)

(1) **The legislative body may provide** by ordinance for the **resumption**, restoration, reconstruction, extension, or substitution of nonconforming uses or structures **upon terms and conditions** provided in the ordinance. In establishing terms for **the** resumption, restoration, reconstruction, extension, or substitution of nonconforming uses or structures, different classes of nonconforming use may be established in the ordinance with different regulations applicable to each class.

- The local unit may create different classes of nonconforming uses and structures.
 - Different regulations may apply to each class of non-conforming use.
6. Cities, villages and townships have authority to condemn non-conforming property and property rights to bring the property into conformance with the ordinance.

24. *Livonia Hotel, LLC v City of Livonia*, ___ Mich App ___ (2003)

B. The Disadvantage of Non-Conforming Property

1. The law of non-conforming uses represents a balance between the owner's protected property rights and furthering the purpose of zoning for the benefit of the entire community. The policy is that public is benefited by the eventual cessation of non-conforming uses of land.
2. Although a property owner may continue the use, the local unit may enact ordinances and laws that encourage the eventual cessation of the non-conformity. These rules can harm a thriving business that requires a building addition or extension.
 - The property owner may not alter the property if the change expands the non-conformity or adds substantially to the market value of the property. The owner may make minimal repairs required to keep the premises safe.
 - Some ordinances require cessation of the non-conformity if a certain percentage of the property or its value is destroyed by fire or other calamity.

C. Establishing a Vested Right If the Law Changes Prior to Fully Establishing the Use

1. The issue of obtaining a vested right to use the property as zoned becomes problematical if the law changes before the use is substantially established.
 - In general, no landowner has a vested right in the zoning of its property. The local unit has the police power, if lawfully exercised, to rezone property or amend ordinances even if the rezoning or amendment thwarts the owner's planned use of the property.
 - The mere possession of an approved building permit or site plan does not guarantee vested rights to develop the property as approved, if the law changes prior to construction.²⁵
 - Most communities place time limits on the validity of a building permit or approved site plans.
 - Although, the owner may have some renewal rights, the project may be lost if the law changes during the renewal or original time period.
 - The developer of a long term, phased project is especially at risk if the law changes prior to the completion of all the phases of development.
2. Exceptions – Substantial Change to the Property
 - A property owner will obtain vested rights to complete a project if it has made substantial changes to the land, which includes excavation and construction prior to the change in the law.²⁶

25. *Schubiner v West Bloomfield*, 133 Mich App 490 (1984)

26. *Gackler Land Co v Yankee Springs Twp*, 427 Mich 562 (1986)

- Constructing a road and completing grading and excavation may not be enough to vest rights under the old ordinance, if the improvements can be used under the new zoning classification.²⁷
 - The court has held that the mere expenditure of money, no matter the cost, on site plan, engineering and architectural plans will not assure vested rights.²⁸
3. Bad Faith Exception
- This exception applies even if the property owner has not yet made a substantial change to the land when the ordinance is amended or the municipality denies a permit based upon a pending ordinance change.²⁹
 - If an owner challenges the denial or revocation of a building permit based upon a change in the law, the general rule is that the court in resolving the matter will apply the ordinance that exists at the time of the court's decision.³⁰
 - The court may however exclude evidence of the new ordinance if for example;
 - The local unit denied the permit prior to enacting the new ordinance and does not enact it until after the owner sues.
 - The court may or may not exclude evidence of the new ordinance based on whether the court determines that the local unit amended the ordinance to assert a defense that did not exist when the plaintiff filed the lawsuit.³¹
 - Even if the ordinance is changed prior to filing suit, the court may disregard it upon evidence that the municipality enacted the ordinance or amendment in a blatant attempt to stop the plaintiff's development.³²
 - The court may make that conclusion if the ordinance applies specifically to the plaintiff's property and not to the general population. For example, the local unit rezones the plaintiff's land after receiving notice of a pending site plan application under the existing law.³³
4. Even if the developer establishes the right to construct under the pre-existing law, it is still at a disadvantage because what it has gained is the right to develop a nonconforming use that will be subject to the usual limitations on nonconforming property.

27. Id.

28. Id.

29. *Willingham v City of Dearborn*, 359 Mich 7 (1960)

30. *Klyman v City of Troy*, 40 Mich App 273 (1972)

31. Id.

32. *Keating Int'l v Orion Twp*, 395 Mich 539 (1975)

33. *Klyman, supra*, at note 30

X. Have You Been Wrongfully Denied a Land Use Application, or Has the Municipality Imposed Unreasonable Conditions on the Approval?

- A. The answer to the question asked in the title of this section can only be determined on a case by case basis. However, the following is a general outline of a procedure that might be followed in order to determine whether your client has been wrongfully treated by a municipality after an unfavorable decision.
1. Example: Client A is denied a site plan or variance petition. What do you do?
 - a. Review site plan and survey. Make sure that the site plan and survey do not have any problems which you had not anticipated prior to the presentation.
 - b. With respect to a planning commission decisions, review the plans and your client's application. Then determine whether or not the application falls within the ordinance, or whether there is a reason stated in the ordinance for the planning commission to either deny the application or impose conditions. In the case of a zoning variance, review the ordinance criteria for granting a variance and the information presented to the Zoning Board of Appeals to determine if all of the criteria were met.
 - c. Review the minutes of the meeting which denied the request or imposed the conditions. If possible, obtain a copy of the unapproved minutes as well as a copy of the approved minutes. Determine if any changes have been made and whether the minutes, as finally approved, as accurate.
 - d. Review staff memos regarding the decision of the municipal body.
 - e. Interview the municipal planner and consultants involved in the decision to confirm the criteria by which these consultants made their recommendations.
 - f. Compare the basis of denial or conditions to the ordinance.
 - g. Determine whether approval was discretionary or mandatory.
 - h. Research state law and review the enabling legislation to ensure that the municipal body acted within the authority of the state statute.
 - i. Research case law for analogous fact situations.
 - j. Compare to accepted principles of health, safety and welfare (substantive due process).
 - k. Review applicable political considerations and how they may have affected, possibly unlawfully, the decisions of the municipal body.
 - l. Determine your remedies:
 - i. Administrative appeals.
 - ii. Judicial appeals.

- iii. Consider ripeness and exhaustion of administrative remedies.
- iv. Declaratory relief actions.
 - v. Substantive or procedural due process claims.
 - vi. Taking claims.
 - vii. Damages.
- m. Determine the risks and costs of pursuing remedies and advise the client of their options in writing.

XI. Development Agreements

A. Purpose

1. The efficacy of a development agreement is that it theoretically gives the landowner assurance, especially in a large project that will be built in phases, that it has vested rights to fully execute a given plan without concern over changes in the ordinance.
 - In most cases, a developer has to worry about a site plan and building permits expiring before it can even finish the first phase of a project.
 - A site plan typically expires after one or two years unless renewed. The renewal is not always automatic or guaranteed.
2. A development agreement can give both sides the certainty they want regarding the project. The government gets certainty that the developer will build the project that the developer has represented that it intends to build.

B. Legal Basis for Development Agreement

1. A municipality must have enabling power to enter into development agreements. The zoning acts impart to municipalities police power to regulate the use of land for the protection of the public health, safety and welfare. Although many municipalities enter, and even require such agreements, they are not necessarily even lawful or enforceable documents.
2. Michigan, unlike California, Florida, Colorado, Hawaii and other states, has no explicit enabling legislation for development agreements.
3. The concern with development agreements, even in states with specific enabling legislation, is that they not be “contract zoning”. An agreement may be classified as illegal contract zoning to the extent that it requires the legislative body to limit or curtail the exercise of its zoning power, bind future legislatures or to confer favoritism for the exchange of benefits in the execution of its laws.³⁴
4. Michigan has no express enabling authority for development agreements. There is no case law finding that the authority for such agreements may reasonably be implied from the existing zoning acts. There is also a dearth of any meaningful case law on “contract zoning” that could serve as a guidepost in drafting develop-

34. See generally, *Zahodiakin v Zoning Board*, 86 A2d 127, 8 NJ 386 (1952)

ment agreements. The drafter, therefore, should be aware of the following risks and principles when drafting and “negotiating” a development agreement:

- The government is not just another business entity with whom the client is negotiating a contract. The government can make and break promises without being bound by general contract law principles.
- A municipality has no inherent power to make contractual promises. The promises not within the local unit’s scope or authority are unenforceable.³⁵
- The local unit cannot bind itself or future legislatures to agreements that are *ultra vires* or beyond their power to make.³⁶ The local unit also may be unable to bind future legislatures to lawful agreements.
- The local unit can disavow an *ultra vires* agreement usually without any liability to the other contracting party.³⁷
- Private entities contracting with local government are on notice of the government’s limited power to bind the municipality to contractual agreements.³⁸ That imputed knowledge restricts the private entity from enforcing an agreement, if not on legal, then equitable grounds.
- Equitable and promissory estoppel claims require that the injured party reasonably or justifiably relied on the promise or representation of the party to be estopped. The private individual’s imputed knowledge of the limited promises that the government may lawfully make rebuts that the individual reasonably or justifiably relied on the promise.
- Estoppel principles in general are ineffective against *ultra vires* governmental action. The local unit cannot be estopped from enforcing its zoning laws, even if the local unit issued a permit for the activity that it is now attempting to terminate. Therefore, any permits issued pursuant to an invalid development agreement may be revoked.³⁹
- There is a narrow exception to the non-estoppel rule, if the property owner has completed costly construction under the invalid permit and the property cannot be reasonably adapted to any permitted or lawful use.⁴⁰
- In some circumstances, a local unit also may be estopped from retaining economic benefits that it has obtained through the fully executed and later disavowed *ultra vires* agreement.⁴¹

35. *Thomas v Port Huron*, 27 Mich 320 (1873)

36. See generally, *Michigan Municipal Liability and Property Pool v Muskegon County*, 235 Mich App 183 (1999)

37. *Id.*

38. *Utica State Savings Bank v Oak Park*, 279 Mich 568 (1937); *Lasky v City of Bad Axe*, 352 Mich 272 (1958)

39. See *Mazo v City of Detroit*, 9 Mich App 354 (1968)

40. *Pittsfield v Malcom*, 375 Mich 135 (1965)

5. In contrast to risks of non-performance by the government for which the owner may have no remedy, the owner may be bound by promises that it makes in a development agreement even if landowner later wants to disavow a condition as unreasonable or unconstitutional.
 - A person can lawfully waive its constitutional rights. The developer, thus, may be estopped from later challenging on constitutional grounds an economic benefit that it agreed to give the local unit as an inducement to enter the agreement.
 - The developer generally also may be estopped from disavowing on grounds other than constitutional ones a benefit that it promised to provide in consideration for the development agreement.

C. The PUD Provisions of the Zoning Acts Arguably Provide Authority for Development Agreements

1. The enabling legislation for a PUD comes closest to providing arguable authority for “development agreements”. The statute does not explicitly permit PUD “agreements”. The Act states that the PUD **ordinance** regulates the development. The flexibility of the PUD is that the government and developer can work together to create the development and use regulations for the project.
2. The PUD provisions still may be subject to challenge if the provisions can be read as ultra vires.
3. In general, the development agreement should contain:
 - The permitted uses of the site.
 - The development regulations that apply to site design, signage, parking and other similar regulations.
 - The procedure for obtaining future permits and other necessary approvals that may be a pre-condition for construction of any phase of development.
 - The procedure for amending or changing site plans, development regulations and approved uses.
 - Enforcement Procedures.
 - Escape clause.
 - Attachments and exhibits.
4. **Provisions That Developers Seem to Want in Development Agreements Include:**
 - **The Assurance of Specific Uses and Ability to Add Uses in a Long Term Phased Project.** The PUD enabling legislation easily authorizes the drafting of an ordinance that specifies the permitted uses and category of uses.

41. *Furstenberg Bros v Township of Carrollton*, 61 Mich App 230 (1975); *Coit v Grand Rapids*, 115 Mich 493 (1898) but see, *Michigan Municipal Liability and Property Pool v Muskegon County*, 235 Mich App 183 (1999), *supra* note 24.

- **Development Regulations That Permit the Most Economic and Practical Development of the Site.** The PUD enabling legislation permits and encourages devising development regulations that best suit the site. The enabling legislation appears to permit the parties to include regulations that deviate from similar uses in traditional zoning districts. This means that theoretically buildings in a PUD may exceed height limitations that apply to similar buildings in traditional districts. The PUD could also theoretically contain sign regulations that are more liberal than those permitted in other zoning districts.
- **Streamlined Approval Procedures.** The municipality may not have the unassailable authority to agree to site plan approval, building permit approval and issuance of certificates of occupancy on terms any different than apply to all development projects in the local unit. The enabling provisions for site plan review as discussed *infra* arguably give the municipality the authority to devise streamlined or alternate approval procedures for site plan review without violating equal protection guarantees by permitting these review procedures in special situations such as the on going administration of a PUD. The municipality has the flexibility under the site plan review enabling provisions to permit administrative review of site plan. The municipality should however include the availability of these procedures, according to the special terms, in its site plan ordinance.
- **Guaranteed Approvals.** The site plan enabling authority requires the reviewing body to approve site plans that meet all the conditions for approval. A development agreement or PUD ordinance could specify clear and objective requirements that plans must meet to obtain approval.
- **Site Plan and PUD Amendment Procedures.** There is arguably sufficient enabling authority under the PUD and site plan provisions of the zoning acts to enable the parties to craft amendment procedures that apply to the specific project. For example, the site plan enabling provisions suggest that changes to site plans require the mutual agreement of the municipality and property owner. The Discretionary decision statute, *supra*, similarly requires mutual agreement to change or amend conditions that are part of discretionary land use approvals such as a PUD and site plan approval. The agreement, therefore, should be able to specify the procedures and standards for amendments for the documents.
- **Vested Rights to Complete the Project As Approved.** Most zoning ordinances put time limitations on the use of a site plan or building permit, without having to reapply for approval. Also, as discussed above, the law could change prior to the completion of a project according to an approved site plan and building permit. A municipality may have no authority to make a promise that the developer has vested rights in a particular plan or permit. Such a promise raises the issue of unlawful contract zoning and equal protection issues. A municipality certainly can enact ordinance that provides that a developer has vested rights for a certain time period to complete a project according to an approved site plan and building permit. It is not clear, however, that the municipality has the authority to grant vested rights

on an ad hoc basis or contrary to an existing ordinance. A municipality could deal with this issue by enacting a vested rights ordinance that applies to PUD projects. Moreover, the PUD statute provides that the municipality may give final approval on phased projects. This provision could also serve as authority to have a special vested rights provision in individual PUD ordinances.

- **Prevent Creating Non-Conforming Uses or Sites** This is the toughest provision to draft. Classic illegal contract zoning is a promise to not to apply amended or enact new ordinances that apply to property. It is arguably illegal because it restrains the promise's police power, and purports to bind the exercise of a future legislature's police power. It also could be subject to an equal protection challenge. As stated, however, the enabling act provides that site plan changes and amendments to conditions are subject to the mutual approval of the landowner and municipality. The drafter, therefore, should try to include as conditions, which comport with the enabling legislation, site regulations that the developer may want to immunize from future changes to the ordinances. If the site regulation is a condition, then arguably the municipality cannot unilaterally apply the new ordinance to the property and alter the site plan or conditions. The drafter may want to incorporate the language from the enabling acts that govern the mutual change of conditions and site plan activities to more explicitly set forth the changes to conditions and site plans that require mutual agreement and draft standards for reaching that agreement.

5. **Enforcement Procedures:**

- Municipalities usually want a provision in an agreement, which permits the local unit to revoke site plan, PUD or other permit approvals, if the developer violates the terms of the agreement.
- There is little if no Michigan case law on the government's ability to revoke special land use permits, site plan approval or PUD approval and the scope of the landowner's due process rights.
- The developer may be held to have knowingly waived its due process or other constitutional rights that could be violated through a permit revocation and later be estopped from challenging such provisions.
- The Zoning Enabling Act, *supra*, provides the remedy for zoning violations. The enforcement provisions of the development agreement, arguably, should simply incorporate these provisions. The Act gives the local unit broad authority to enforce against zoning violations short of revoking permits or prior approvals.
- If the agreement has a termination clause it should be carefully drafted to accord the greatest amount of due process protection for the developer. The drafter may want to add that if the local unit requires the drastic action of termination, that it must also agree to return any economic or civic benefits it received from the developer such as dedication of land, that was unrelated to the impact of the project, making financial contributions, or building

roads, pathways, etc. that went beyond what the municipality could have demanded in a traditional development.