

ATTORNEY WRITES



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An increasing number of people in the state of Michigan believe that urban sprawl and the permanent destruction of farmland, forests and open space will be one of the most pressing problems facing Michigan in the 21st century. Some even label it as Michigan's No. 1 long-term problem. Development is forever. Once a farm is carved up into residential lots, woods are cut down for a shopping center or a wetlands is filled for a parking lot, the natural environment can never be practically reclaimed.

A large portion of the population has chosen to move to or remain in Michigan due to its natural beauty, woods, pristine lakes and streams and vast open spaces. Few Michigan residents would list increasing urbanization, strip malls, large parking lots, or attractive skyscrapers as greatly enhancing the quality of life. It is the natural aspects of Michigan that define our state.

A good portion of my legal practice is devoted to zoning and planning issues. Unfortunately, I do not believe that there exists any "magic bullet" or easy solution to the urban sprawl problem. Solving the urban sprawl problem will be particularly difficult for the following reasons:

- (a) It will pit the rights of private property ownership against the rights of the community to reasonably regulate growth and its attendant problems.
- (b) There is no consensus (even among experts) as to how best to solve the problem.
- (c) Regulatory solutions will have to be applied over a long period of time and results will often not be seen for many years.
- (d) Few elected officials possess the political will or vision to help implement a long-term strategy which will foster conflict and controversy in the short run, particularly where the results and benefits might not be clearly seen for many years.

After having practiced municipal law and watched many developing rural and semi-rural townships for many years (including currently sitting on the planning commission of one semi-rural township), I am convinced that several techniques must be used in tandem in order to properly manage urban sprawl and prevent the needless destruction of our farmlands, forests, wetlands, lakes, and open space. Such techniques include the following:

1. Purchase of Development Rights — Many property rights advocates state that if you want to stop or severely regulate development, the governments or individuals who favor preservation should buy the land or development rights. If development is to be stopped completely on a given parcel of land, I agree. Several states have utilized so-called purchase of development rights (or "PDRs"). With a PDR, a governmental unit (or in some cases, private conservation groups) buy the "development rights" from the property owner. Pursuant to such a purchase, the property owner still owns the land and can use it for passive uses such as farming and open space, but it cannot ever be developed. Essentially, the property owner has a permanent deed restriction or conservation easement placed on the property in exchange for a one-time mutually agreed upon payment of money for the development rights. For instance, suppose that a 100-acre farm can be sold to developers for \$200,000, while it has a value of \$100,000 if it is used only for farming. By mutual agreement, the farmer could sell the development rights to the applicable governmental unit for \$100,000 and continue to farm the property forever (i.e., the farmer receives the difference between the \$200,000 amount which the developers would pay and the \$100,000 which the land is worth for farming). Peninsula Township in Grand Traverse County passed a township millage several years ago whereby township money is utilized to buy farmland development rights on a limited number of acres each year. The state of Michigan also has a PDR program for farmland which is becoming increasingly popular. Unfortunately, both programs are severely underfunded and can make only a small dent in the amount of farmland lost every year to development. In order to have an effective PDR program, new revenue sources will have to be obtained, which could include local millages or a new tax on development.

2. Clustering — An increasingly popular technique for preserving open space regarding residential developments is "clustering." Although not extensively used yet in Michigan, clustering has been popular in several other states for years. Clustering is easy to demonstrate. With a typical 40-acre parcel located in a residential zone which allows one house per acre, most housing developments would resemble a checkerboard with approximately 35 houses spread out over the entire acreage. With clustering, the same 35 houses could be built on much smaller lots (say 1/3 of an acre) and would be clustered in one or several areas on the 40-acre parcel. For example, the 35 houses could be clustered in three areas within the 40-acre parcel, while 20 acres would be kept as open space and buffering. Everyone in the development could use the open space for walking, jogging, etc. In

larger cluster developments, the property owners association could also lease out the open space for farming. Not only does this technique add to the quality of life for the residents and preserve open space, but it can also be more economical for the developer since it tends to lower development costs by shortening roadways, making it easier to hook up to sanitary sewer and water, and minimizing adverse storm water run-off impacts.

One way to prompt more clustering is to use a "carrot and stick" approach via a planned unit development ("PUD"). For example, a township could set its minimum rural lot size area at 5 acres. If a developer chooses to do a conventional unimaginative checkerboard or simple land division development, that developer might only be able to create six or seven parcels within the 40-acre parcel. If the developer decides to utilize a more imaginative cluster development with appropriate open space, however, the developer would be given a "bonus" and could have an overall density of down to one house per two acres. With that scenario, there might be as many as 18-20 lots allowed on the 40-acre parcel, but with desirable clustering and extensive open space.

3. Development Should Pay its Fair Share — Although few people realize it, the public tends to subsidize development more in Michigan than in many of the other industrialized states. In rural areas where township government predominates, increased tax revenues due to development almost never outweigh the problems and costs associated with development. While development may pay for itself in many cities, that rarely occurs in rural townships. Residential development in rural areas normally creates many problems — economists like to call these problems "negative externalities." Almost uniformly, these problems are not solved by developers and the associated costs are borne by rural townships (who can least afford to deal with these problems due to limited budgets) and the local population. Unfortunately, Michigan law does not permit local municipalities to require developers to install or pay for offsite improvements as a precondition to development, even where the development itself will cause severe problems offsite. For example, some states require developers to not only install new roads within the proposed development, but also to improve public roads leading up to the development for some specified distance. Michigan law does not allow municipalities to require off-site road improvements by developers. Some states require that developers contribute a specified dollar amount to the local school district for each new residential lot. Developers are immune from that requirement in Michigan. In order to prevent groundwater contamination, some states do not permit development in rural areas until the developer pays for the extension of municipal sanitary sewer and municipal water to the proposed development site. In Michigan, developers are normally not required to extend municipal water and sewer, and can usually utilize much less desirable private wells and septic systems.

Based on the above, it can be reasonably argued that taxpayers and local residents are subsidizing development in rural areas. Wherever subsidization occurs, it is not economically efficient since the price of new residential lots or industrial or commercial parcels do not reflect the true costs of development to the community. To the extent that you believe that such subsidization of development should stop and development should pay its own way in order to promote more efficient market allocation of where development should occur, you should contact your local legislators and urge them to enact legislation permitting exaction fees, transfer development rights and off-site improvement requirements.

You might now be asking yourself, "What does this have to do with lakes and streams?" The answer is quite simple. Much of the future development and urban sprawl will occur in and around lakes and streams. All intensive development will have very negative impacts upon adjoining lakes and streams, prompting environmental degradation. Accordingly, riparian property owners as a group should be very concerned about urban sprawl and proper local zoning and planning.

Although some legislators seem to be getting the message that the proposed broadened definition of "navigability" contained in Senate Bill 767 (presently pending in the Michigan Legislature) is a bad idea, this attempt to make virtually every trickle of water in the state of Michigan public is not yet dead. Accordingly, if you are interested in this matter, you should contact your local Michigan legislator now to voice your concerns. For a fuller discussion of Senate Bill 767, please see the article on navigability contained on Page 16 of this issue, as well as the February, 1998 issue of the *Riparian Magazine*.

If there are any water-related issues you would like to see addressed in a future *Attorney Writes* column, please send me a note at the above-mentioned address.