



Attorney Writes

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GETTING IN THE ZONE

Although the *Riparian Magazine* has dealt extensively over the years with zoning lake access regulations such as anti-funneling provisions, it has only occasionally discussed other zoning issues which have impacts upon lakes. Following are some of the “hot” zoning issues which can greatly, and sometimes adversely, affect your lake community.

Mineral Extraction Operations

It is not uncommon for commercially valuable sand and gravel deposits to be located near inland lakes. Some mining operations should not be permitted at all due to severe adverse environmental impacts. Other mining operations should be strictly regulated and allowed to occur only with conditions attached which will prevent degradation of watersheds and lakes. Although mining operations are somewhat favored under the Michigan common law due to the need for building materials in our economy and the fact that such resources are found only in certain locations, local municipalities can still extensively control mining through zoning. For example, a zoning ordinance can permit mining only in certain zoning districts and even then, require that a mining operation be approved only as a special use. Zoning regulations normally only cover new mining operations since existing operations are usually deemed to be lawful nonconforming use (*i.e.*, they are grandparented). However, municipalities can also regulate existing mining operations by enactment of police power regulations, which will not be subject to nonconforming rights defenses. Zoning ordinances and police power ordinances can regulate many aspects of mining, including placing time limits on the completion of mining, requiring reclamation, limiting hours of operation, requiring posting of monetary security to ensure compliance with ordinance requirements or reclamation, and many other conditions.

Telecommunication Towers

A proliferation of telecommunication towers near lakes can be aesthetically displeasing. Unfortunately, the federal government has preempted some of this area of the law, such that local control has become more limited. Fortunately, local municipalities still have fairly significant ordinance authority to regulate the siting, height and other characteristics of new telecommunication towers. Given the evolving technology, it is likely that the number of requests for municipal approval of new towers will greatly increase in all areas of the state in the near future.

Intensive Livestock Operations

Despite extensive opposition by municipalities, environmental groups, riparians and other interested citizens, the Michigan Legislature enacted legislation last year (which the Governor signed into law) severely limiting the ability of local governments to regulate huge poultry and livestock operations, often referred to as “intensive livestock operations.” Such operations can involve poultry, hogs or

cattle, and can produce waste volumes similar to the sewage produced by small cities. It is not clear at this early stage to what extent municipalities can still regulate intensive livestock operations, although it appears that local governments do retain some degree of limited control. At the very least, local governments should review their existing ordinance provisions governing farming in order to remove provisions which are now illegal and to consider whether alternate regulations should be adopted which comply with the new legislation.

Zoning Escrow Fees

In the past, the very modest fees paid by developers for zoning reviews done by local governments rarely covered the true costs of such reviews. If a significant project or development is proposed, local governments have often faced the choice between utilizing the municipal attorney, planner and engineer to assist in such zoning review (and have the cost paid for by the municipality or taxpayers), or alternately, not be able to utilize the assistance of its professionals in the process. If the municipality utilized its professionals, the taxpayers of the township effectively subsidized what many believe should be costs paid for by the developer. Where a municipality is deterred from utilizing its professionals during the zoning process due to the costs involved, that can sometimes lead to the approval of developments which should be denied or the approval of projects without sufficient study or safeguards.

One innovative solution to this problem is the use of so-called zoning escrow fees. In municipalities which have adopted a zoning escrow fee policy, a developer must put a certain amount of money in escrow with the municipality in addition to the normal fixed application fee. Out of that fund, the municipality is able to cover all reasonable costs incurred by its professionals attributable to the particular development involved. The Michigan appellate courts have generally upheld this practice, so long as the amount charged to the developer’s escrow account is reasonable.

Open Space Preservation

Zoning techniques such as purchase of development rights (PDRs), transfer of development rights (TDRs) and exaction fees or impact fees (*i.e.*, requiring developers to do off-site improvements) are probably the ultimate answers to controlling urban sprawl. Michigan is light years behind in this area since it does not have much of the necessary state legislation in place to implement such policies. Furthermore, such policies might be too “exotic” (although that is likely to change over time) and expensive for many communities at this time. Accordingly, if a municipality desires to preserve farm and other open space, it will have to utilize more conventional zoning techniques. Such techniques can include increased minimum lot sizes, cluster developments involving mandatory open space set aside and mandatory PUD approval for developments over a certain size. Although one or more of these techniques might not be the long-term

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Building Permit/ Nonconforming Use/Deck

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A trial court correctly found a deck constructed without issuance of a building permit to be a nuisance per se and correctly ordered the removal of the deck. *Gerrish Township v J. Doering*, No. 216584. Decided May 26, 2000 (unpublished).

Defendant, John Doering owned land in the Woodlawn Subdivision in plaintiff Gerrish Township. Doering's lot faced the 66-foot wide Sheridan Drive that ran along the shoreline of Higgins Lake. Because Sheridan Drive had never been developed or maintained, the actual width of the driving surface was 12 feet and this resulted in a strip of land between the Higgins Lake shoreline and the edge of the driving surface. Doering's parents constructed a deck on the untraveled water side of Sheridan Drive around 1952. Doering removed the deck and replaced it with another. The Township found Doering in violation of its zoning ordinance that prohibits such construction without a permit. The Township requested a trial court order for Doering to remove the replacement deck he had built without a permit. The trial court found that Doering's new deck did not comply with the provisions of the Township's zoning ordinance and ordered Doering to remove the deck.

On appeal to the Court of Appeals, the Court found that the replacement deck constituted a "structure" and that the Township's zoning ordinance requires a permit prior to the erection of a structure. Doering's construction of the deck without prior issuance of a permit was clearly a violation of the zoning ordinance. The Court disagreed with Doering's claim that his nonconforming use could continue because it predated the Township's zoning ordinance. The ordinance provided that a nonconforming use could not be continued if either one of two things occurred: 1) the use was terminated for more than 180 days; and/or 2) the use was discontinued through vacancy or destruction to an extent of more than 50% of its assessed valuation. While the record was not clear whether the nonconforming use had lapsed for more than 180 days, the Court found that the second condition of protection had not been met:

"The parties stipulated that Doering removed the sun deck built by his parents and constructed a new one in the same location. It is beyond dispute, then, that the nonconforming use the old deck represented was discontinued to an extent of more than 50% of its assessed valuation. Under the first component of § 5.4 of the Township Zoning Ordinance, any future use had to conform entirely to the Ordinance. The replacement deck did not so conform. No further construction of the statute is necessary and we therefore uphold the trial court's decision on this issue."

The Court affirmed the trial court's ruling.

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answer to preserving open space and slowing urban sprawl, they are likely the best short term answers given the triage situation many townships find themselves in today.

Private Road Regulations

It is not uncommon for developers to develop lakefront lots by utilizing cheap private roads. Private road regulations, coupled with strict lot width-to-depth ratio limitations, can promote not only safe road and driveway access to new lakefront lots, but also more comprehensive planning and regulation of new lakefront developments.

Limitation of Development Where Public or Private Community Water and Sewage Systems are Unavailable

A few municipalities are utilizing a two-tier zoning density system. If public water and sewer are available, density can increase. If one or both such public services are unavailable, the land involved can be developed only in a much less dense fashion. Some municipalities will permit densities between these two extremes if a developer installs a private community water system, a community sewer system or both.

Moratoriums

Can a municipality impose a moratorium if a significant development or use appears on the horizon and the municipality does not have the appropriate regulations in effect to deal with it? Unfortunately, Michigan case law is not very clear regarding moratoriums. Nevertheless, it appears that a municipality probably can impose an effective moratorium if it is done for relatively short periods of time (for example, 60 or 90 days) while a municipality diligently works on a new ordinance or ordinance amendment.

Regulating Marinas and Commercial Developments

Obviously, a municipality should carefully scrutinize existing and potential commercial areas on and around lakes. It is much more prudent to plan and deal with these issues ahead of time than to ignore siting and regulation issues until a proposed marina or commercial development occurs near a lake.

Mobile Home Parks

Recently, there seems to be a proliferation in the number of proposals for new mobile home parks at or near lakes and in rural areas. While the mobile home industry succeeded years ago in shielding itself from some local zoning and regulatory powers, municipalities still have fairly extensive authority regarding the zoning and placement of new mobile home parks. Again, it is much better to plan ahead with the appropriate zoning before a mobile home park is proposed than to wait until an application actually occurs. If a municipality is not pro-active regarding this matter, it could be stuck with a court-approved mobile home park in a location which is undesirable. Obviously, a new mobile home park on or near a lake could have potentially huge negative impacts upon the lake and its watershed.

The best advice with regards to zoning and planning is to do all of the following:

- Plan ahead;
- Be pro-active;
- Utilize professional services (legal, planning, engineering);
- Put a high priority on effective zoning and planning;
- Be innovative; and
- Fully involve the community.