

# **Our Attorney Writes On Riparian Rights and other legal matters of concern**

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## **Zoning Tools That Would Benefit Riparians If Supported or Authorized in Michigan**

The single best tool available to protect inland lakes, streams, rivers, and watersheds in Michigan, in my humble opinion, is local municipal zoning. I have discussed lake access (i.e., anti-funneling/keyhole) zoning regulations in *The Riparian* and at various ML&SA meetings so often that I fear that many of you are probably overdosed on the subject! However, in addition to water access regulations, there are numerous other zoning techniques which can help protect our water resources.

Unfortunately, Michigan is light years behind most other industrialized states at the state level when it comes to many zoning issues and lacks many of the statutes found in other states regarding environmental protection. Therefore, most innovative planning in Michigan is occurring at the local municipal level. I realize that asking riparians to learn more about zoning issues is a little like asking someone who is not very fond of broccoli to eat it. Nevertheless, zoning has huge implications for lakes and watersheds, and riparians who ignore becoming involved in local zoning decisions do so at their own risk.

Following are brief descriptions of some of the innovative and beneficial techniques available in many other states which the Michigan Legislature has either failed to authorize or support financially to the extent needed to be truly beneficial.

### **Purchase of Development Rights**

Basically, purchase of development rights (PDR) is a technique to preserve farmland and open space whereby the government buys development rights, thus precluding future development. Using this technique, the government purchases development rights on certain rural properties, and as part of such a sale, a permanent deed restriction (or conservation easement) is placed on the property which prohibits future residential and other development.

Michigan's PDR program is very limited, both in scope and the availability of funding. While a few other states have authorized hundreds of millions of dollars per year to protect vast tracts of farmland and open space, Michigan has provided only a small fraction of that amount per year, which has had little or no impact upon preservation of farmland and open space.

An exception to this is the innovative program being employed by a township government on the peninsula near Traverse City where local tax dollars are being utilized in a local PDR program which has been quite successful. However, until and unless Michigan provides a permanent, dedicated funding mechanism (such as an additional one percent sales tax, additional property transfer tax or other source of state revenue), it is unlikely that any statewide PDR program will have other than a token impact.

### **Transfer of Development Rights**

This could very well be the single best approach for preventing unreasonable sprawl, regenerating urban areas, preserving open space and farmland and protecting the environment. This is a market-based approach which permits owners of agricultural and other lands to share in the profits of development, while keeping their land in farming or open space. Best of all, it is not primarily funded by the government, but rather by the developers and ultimate buyers or users of the new lots, houses or other developments created.

What is this "transfer of development rights" (TDR) approach utilized by several other states? It is a process whereby governments designate areas for development that are within or adjacent to urban areas instead of permitting extensive development in outlying rural areas.

Such areas planned for development already have streets, public water and sewer and other improvements or the improvements are such that they can be extended a short distance without excessive cost. These areas planned for development adjacent to or near urban communities are frequently designated as the "receiving areas (or zones)." In order to develop properties in a "receiving area," a developer must not only buy (or own) the property to be developed, but also purchase a certain number of development rights from the owners of rural properties further out.

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These rural areas from which development rights can be purchased are often referred to as “sending areas (or zones).” The farmer or rural property owner would normally be allocated a certain number of development rights to sell based on the number of residential lots or other development potentials which could be developed on the rural property. These rural “development rights” are then transferred to the urban area where the developer desires to develop/redevelop property.

Once a property owner in a rural area sells development rights for use in an urban or suburban setting, a permanent deed restriction (or conservation easement) is placed on the rural property to forever prevent development. The property can still be used for nondevelopment uses such as farming, hunting, etc.

As with a PDR, the process for TDRs is purely voluntary for the rural property owner, who is free to negotiate prices with the developer regarding the development rights.

The TDR technique is being used successfully in other states, including Pennsylvania and New Jersey. Michigan Representative Patricia Birkholz ( R., Saugatuck) has introduced legislation in the Michigan House of Representatives to authorize TDRs in Michigan, but to date, that legislation has gone nowhere.

### **Mandatory Offsite Improvements**

In many other states, a developer is required under certain circumstances to make improvements outside of the boundaries of a proposed development. For instance, if a new development would overburden an existing public road, the developer would have to pay to have that existing road upgraded. In Michigan, municipalities generally cannot require off-site improvements by the developer.

### **Exaction/Impact Fees**

In many states, developers are required to pay local governmental units fees based on negative impacts from the development or out of fairness. For example, in some other states, a developer might have to pay the local school district a certain amount of money for each new residential lot. This is based on the reasoning that prior homeowners had to pay local school millages for many years to build the physical school plants and the new development would place a strain on the existing facilities (and perhaps require expansion of school facilities), such that it would not be fair for a developer to create new residential lots without making a capital contribution to the schools. Again, Michigan municipalities generally cannot charge such impact/exaction fees.

### **Extension of Public Water and Sewer**

In some states, developers are required to extend public water and sewer at their cost for significant distances before development can occur. In Michigan, if the proposed development is not located fairly close to existing public sewer and water facilities, a developer is not required to extend such facilities significant distances and in most cases, can utilize individual wells and septic tanks.

### **Why Is This Important to Riparians?**

There are three general reasons why riparians should care about all of this. First, given the relative backwardness of Michigan at the state level regarding planning, environmental protection and agricultural and open space preservation, it is important that local municipalities step up to the plate and attempt to do their part by strong and prudent local zoning and planning.

Second, it can be argued that Michigan’s lack of offsite improvement requirements, exaction/impact fees, and mandatory extension by developers of public water and sewer for all significant developments leads to greater sprawl and causes unfair subsidization of private development by the taxpayers.

Finally, good local zoning regulations (or the lack thereof) can have huge impacts on lakes, even apart from lake access regulations. For example, permitting large and dense residential developments (whether conventional, multi-family or mobile home parks) near lakes can degrade lake quality and greatly increase boat traffic on the lake, even if the development involved is not actually on the lake itself. Open space and buffer zoning can help push developmental pressures away from lakes to more appropriate locations. Utilizing zoning to keep industrial and commercial uses away from lakes can lessen negative impacts on lakes. These are just a few examples of why good zoning can be used to protect lakes, while bad zoning (or the lack of zoning at all) can create severe problems for lake communities.

### **What can be done?**

If you feel strongly about these issues, you should get involved in your local government’s zoning and planning activities. Furthermore, you can also let your state senator and representative know how you feel regarding Michigan’s falling behind in the areas of PDRs, TDRs, impact/exaction fees and environmental enforcement.