

The St. Joseph County Planner

Land Use - Information, Education, Events

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Contents:

- Can You Use the Use Variance?
- Causes and Consequences of Fiscal Stress in Michigan
- Courts:
 - *Substantive Due Process Case
 - *Riparian Rights Case
- Training:
 - *MML Elected Officials Training
 - *Annual MTA Conf.
 - *Local Citizen Planner Classroom Series
 - *Citizen Planner Online

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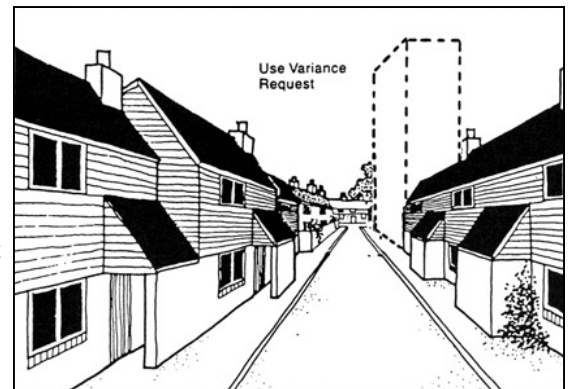
Can You Use the Use Variance?

The passage of the Michigan Zoning Enabling Act (P.A. 110 of 2006, as amended, being M.C.L. 125.3101 *et seq.*) in 2006 brought clarity to the issue of which local units of government have the authority to issue use variances. The result - only cities and villages, and a select number of townships and counties, can grant use variances.

Cities and villages have always had authority to grant use variances and that authority continues with explicit language in the MZEA. The authority of townships and counties was in question, as their zoning enabling acts never explicitly granted the use variance authority in the first place. The confusion arose because three appellate court cases in the early 2000s appeared to have authorized the limited granting of use variances in townships and counties.

The first two court cases were very fact specific and probably limited only to the jurisdictions involved. The third was a specific analysis of the Township Zoning Act (now repealed) that concluded township ZBAs do have use variance authority. However, that analysis was seriously flawed, as it failed to adequately consider the basic distinction between legislative (i.e. township board) and quasi-judicial (i.e. ZBA) activities and more importantly, it failed to compare the language in the Township Zoning Act with the City/Village Zoning Act (now repealed), which clearly grants ZBAs in those communities use variance authority. The problem created by those two cases was that some townships added use variance authority to their zoning ordinances or township and county ZBAs began to grant use variances because of the court decisions.

When the MZEA was being drafted the Michigan Townships Association (MTA) took the issue to their board of directors, which recommended extending the use variance authority only to those townships (and by default counties) that had specific ordinance language authorizing them to issue use variances, or that had granted them prior to the date of the stakeholder compromise that permitted them - February 15, 2006. During these discussions there was general agreement among groups like the MTA, the Michigan Municipal League, and the Michigan Association of Planning that use variances are not a good idea, as they usurp the power of the legislative body and there are at least three other options for offering flexibility in zoning, including rezonings, conditional rezonings, and hardship PUDs - all of which are decided by the legislative body.



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Well, to make a long story short, use variance authority is extended from cities and villages to a select few townships and counties. For a township or county to qualify they must, prior to February 15, 2006:

- have had the phrase “use variance” or “variances from uses of land,” in the zoning ordinance; or
- have granted a use variance in the past.

If neither of the above conditions apply to your township, then you do not have the authority to grant use variances. Of course, the legislative body in a community that meets the above requirements may at any time take away the use variance authority from its ZBA, but if it does so, it can never give/get it back. As previously stated, there are valid reasons for doing away with use variances all together.

Regarding nonuse or dimensional variances, all local units of government have always had the ability to utilize this tool in zoning. Remember though, the MZEA specifies for nonuse variances the applicant must demonstrate that a ‘*practical difficulty*’ exists that prevents him/her from following the strict letter of the ordinance. The courts have established over time detailed guidelines for what constitutes a ‘*practical difficulty*’. To establish that a practical difficulty exists the ZBA must be able to conclude that:

- The request for the variance is due to unique circumstances of the property;
- The request for the variance is not a result of the owner’s actions or past owner’s actions;
- Strict compliance with the ordinance prevents the use of land for uses allowed in the zoning district;
- The variance is the minimum necessary to meet the applicant’s needs;
- There will be no adverse impact on surrounding land; and
- Other standards in the zoning ordinance are met.

Now back to use variances. The MZEA details that use variance requests must demonstrate that an ‘*unnecessary hardship*’ exists that prevents the applicant from using his/her property as the ordinance prescribes. Documenting an ‘*unnecessary hardship*’ places a higher burden of proof on the applicant. The courts have established what constitutes an ‘*unnecessary hardship*’. The ZBA must be able to conclude that:

- The land cannot be used for any of the permitted or special uses in the zoning district;
- The request for the variance is due to unique circumstances of the property;
- The variance will not alter the character of the

neighborhood;

- The request for the variance is not a result of the owner’s actions or past owner’s actions; and
- Other standards in the zoning ordinance are met.

It is important to remember that variances are approvals to break the law. As such, they should only be reserved for rare instance where the applicant can clearly demonstrate a practical difficulty (in the case of a nonuse variance) or an unnecessary hardship (in the case of a use variance). If you are granting variances on a regular basis, it may be time to amend the zoning ordinance.

Causes and Consequences of Fiscal Stress in Michigan Municipalities

In recent years, Michigan local governments have experienced significant and ongoing budgetary challenges. The underlying causes of this fiscal crisis are threefold. First, Michigan’s economy, with its shrinking manufacturing base, has struggled and this is especially true since 2001. Through 2006 Michigan’s economic hardship was largely due to declines in manufacturing, in the context of a state that has historically relied on manufacturing as the primary component of its economic base. Since 2007, however, the challenges have been exacerbated by the severe national recession. Second, continuing structural deficits at the state level have led to reductions in revenue sharing to local units. Third, the combination of restrictive property tax limitations and a down housing market over the past two years has exacerbated fiscal conditions.

This analysis identifies the primary causes of fiscal stress and examines its consequences for nearly all Michigan municipalities using data for fiscal 2005, 2006, and 2007. The study finds that of the core expenditure categories, health and welfare spending has been most vulnerable (in those municipalities that offer such services). Public works and general government have also been cut in areas with increasing fiscal stress. Interestingly, we find that capital spending actually increases with fiscal stress, whereas noncapital spending is reduced. One possible explanation is that stressed communities are targeted by state and federal government for reinvestment.

The study is by MSU faculty Mark Skidmore and Eric Scorsone, both members of MSU Extension’s State and Local Government Team. To read, visit: <http://web5.msue.msu.edu/slg/Portals/0/docs/State%20Tax%20Notes%20Article.pdf>.

Land Use - Information, Education, Events

Vol. 3 Issue 5

Court: Substantive Due Process

(Unpublished No. 278208, September 8, 2009 Bedford Partners, LLC v. Bedford Twp.)

Concluding the trial court's factual findings showed it considered all the testimony and the composition of the area at issue, the court upheld the trial court's ruling the zoning violated plaintiff's substantive due process rights because while the defendant-township identified a reasonable governmental interest advanced by the zoning classification, the ordinance contained arbitrary, capricious, and unfounded exclusions of legitimate land use.

The case arose from plaintiff's purchase of farmland with the intent to build a residential development, which required the defendant to agree to rezone the property. However, the township denied the rezoning request. Plaintiff sued alleging a violation of substantive due process and a "taking" claim.

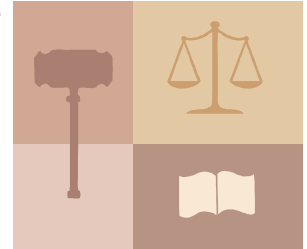
The defendant appealed the trial court's judgment for plaintiff on the substantive due process issue and plaintiff cross-appealed the trial court's dismissal of its taking claim.

The appeals court affirmed on both issues. The trial court concluded while there would be additional costs for schools and students, state money for an increase in the student body would follow. As for fire service, police service, sewers, and water, the trial court noted they were not free of charge - residents were charged for sewer and water use, and millages would generate extra revenue to offset fire and police service costs. The trial court also discounted defendant's evidence about the increase in traffic, noting, *inter alia*, plaintiff agreed to contribute to a road upgrade. The court noted the case was decided after a bench trial, not at the summary disposition stage, and it deferred to the trial court's factual findings. The court also rejected plaintiff's claims the trial court erred as to the taking claim by ruling it did not have distinct investment backed expectations since it purchased the property with notice of the restrictions, the land was adaptable because it was possible to farm, the aggregation of the property with an adjacent parcel was appropriate to determine if a taking occurred, and the property was marketable and valuable as zoned. The court could not conclude the trial court's dismissal of the taking claim was clearly erroneous in light of its factual findings, which were supported by the evidence. Affirmed. (Source: State Bar of Michigan e-Journal Number: 43680, September 14, 2009.) Full Text Opinion: <http://www.michbar.org/opinions/appeals/2009/090809/43680.pdf>.

Court: Lots adjacent to platted road along lakeshore are not riparian, in this case.

MI Court of Appeals (Published No. 284547, 6/23/09): *2000 Baum Family Trust v. Babel*

The court held the plaintiffs had no riparian rights based on the plat (subdivision) dedication because the language of the statutory dedication indicated an intent to grant to the public an unlimited use in fee of the



alleys and roadways. Although the trial court's failure to specifically analyze the language of the dedication was error, it was harmless error, and the court affirmed the trial court's denial of the plaintiffs' motion for partial summary disposition.

Plaintiffs are owners of lots fronting Lake Charlevoix, but separated from the water by Beach Drive, a road dedicated in the approved plat to the use of the public running parallel and immediately adjacent to the lake. Plaintiffs claimed the dedication merely transferred a limited fee for the sole purpose of maintaining the road, and had no effect on their riparian rights because the dedicatory language limited the public's interest in the alleys and streets to maintaining those roadways.

The court disagreed and held a statutory dedication under the 1887 Plat Act vested a fee title interest in the public limited to the uses and purposes delineated by the platters. After reviewing the language of the statutory dedication, the court concluded the platters did not intend to vest any riparian rights in plaintiffs' properties. This inquiry required a two-tier analysis - first, whether a valid statutory dedication was created under the 1887 Plat Act and, second, if so, what type of fee interest was vested in the public. The latter inquiry required an interpretation of the platters' intent. Conversely, had the dedication been one at common law, it would merely have created an easement in Beach Drive, and plaintiffs would retain riparian rights to Lake Charlevoix.

The court held the trial court's analysis concluded prematurely, holding the plat created a statutory dedication creating a fee interest cutting off plaintiffs' riparian rights, which will not always be the case. Affirmed. (Source: State Bar of Michigan e-Journal Number: 43065, June 25, 2009.) Full Text Opinion: <http://www.michbar.org/opinions/appeals/2009/062309/43065.pdf>.

Training Opportunities:

You Won! Now What? Newly Elected Officials Training by the MML

November 17, 2009, 6:00pm - 9:00pm; Kalamazoo City Hall, Kalamazoo

The MI Municipal League's training for newly elected officials, including: overview of basic local government; roles and responsibilities of elected officials; Open Meetings Act; Freedom of Information Act; and more.

For more information and to register, visit: <http://www.mml.org/imispublic/Core/Events/Events.aspx>

MTA's Annual Educational Conference & Expo

January 27 - 29, 2010; Devos Place - Grand Rapids

'Changing Times, Changing Townships' is this year's theme for MTA's annual conference. Several workshops qualify for Continuing Education Units (CEUs) for MSUE's Master Citizen Planner (MCP) program.

.For a conference brochure and registration, visit: <http://www.michigantownships.org/edconference.asp>

St. Joseph / Kalamazoo Counties Citizen Planner Classroom Series

Beginning January 27, 2010; Schoolcraft Township Hall

MSU Extension's Citizen Planner Program is a training and credentialing program for planning commission members, zoning board of appeals members, and city/village council or township board members. More information is forthcoming, or contact St. Joseph County MSUE at 269-467-5522 to hold your place.

Citizen Planner Online

Citizen Planner Online is offered entirely on the Internet, allowing you to work at your own pace at the time that works for you. Enroll at any time for the popular online course 'Fundamentals of Planning and Zoning'.

Visit: www.citizenplanner.msu.edu/online or call St. Joseph County MSUE at 269-467-5522.