



Washtenaw County Department of Planning & Environment

TO: Planning Advisory Board Members

FROM: Tony VanDerworp, Director

DATE: May 1, 2006

SUBJECT: Population Projections and Legal Defensibility

Introduction

At a recent PAB meeting, staff recommended that a local unit of government update their growth projections to enhance the legal defensibility of their master plan and zoning ordinance. In researching several recent reports (see References), I found no cases specifically based on growth projections. However, there are several references to reasonableness of the community's master plan wherein growth projections and assessment of the need for additional development plays a critical role in defending lawsuits. The following is brief summary of: recent case law; description of the data/analysis and public purpose components of a plan; process for making findings in zoning decisions; and notes about the benefits that a regional approach to growth can provide is provided for your review. If additional information is needed, we will be glad to perform further research on this topic.

Overview of Case Law

While most law suits in Michigan are a result of denial of rezoning requests, successful defense of lawsuits relies on master plan information because the master plan is an essential foundation for any zoning ordinance. For land use, master plan provisions that are relied upon in defending lawsuits include considering projected growth implications; delineation of areas for growth and areas to remain rural; and clear public policy statements regarding community character.

Penn Central Transportation Company v. City of New York, 438 US 104, 127; 98 S Ct. 2646; 57 Led2d 631 (1978), is the most cited case concerning taking of property and involves an essentially ad hoc factual analysis of economic impact of the regulation on reasonable backed expectations and the character of the government action. Michigan courts interpreting Penn Central have generally held that plaintiffs must demonstrate that the government action precludes the use the property for any purpose to which it is reasonably adapted¹. Regulations that preclude the most beneficial use of the property may be justified where the restrictions are reasonably necessary to effectuate substantial public purpose².

This "ad hoc analysis" suggests that the data, analysis and public purpose behind a community's master plan should be carefully constructed and documented in the plan. As one attorney puts it, "Don't make the court search for reasons to uphold local government zoning decisions³."

The following Michigan case law (emphasis added) demonstrates that having an up-to-date master plan which is based on reasonable assumptions and clear public purpose is critical to defending lawsuits:

Fredricks v Highland Twp. 228 Mich App 575; 579 NW 2d 441 (1998) – "Basic rules of court procedure is that the challenger has the burden of proof that the ordinance is arbitrary and unreasonable restriction upon the owner's use of the property... **that there is no room for a legitimate difference of opinion concerning its reasonableness.**"³

Deming v Township of Imlay, Michigan court of Appeals No. 226101 (2/15/02 unpublished). – "The court ruled against the Township's denial of a manufactured housing community **Factual issues in dispute include whether there is a need for a manufactured housing community** in the Township and whether the use is appropriate to the location."²

Pythagorean Inc v Grand Rapids Township, Mich. Ct. App., Case No. 254369 (Unpublished Sept. 22, 2005) – “The ...evidence...established legitimate reasons for (local government initiated) rezoning the property (from commercial) to office uses. The reasons of the rezoning include the desire of the public not to have commercial uses...and **the lack of a need for additional commercial uses in the area.**”¹

Landon Holdings Inc v Grattan Twp, 257 Mich App 154; 667 NW 2d (2003) – “**Preservation of rural character of an area and the channeling of high density development close to public services are two rational bases for an existing AR zoning ordinance. The zoning ordinance therefore advanced a legitimate governmental interest** and withstood the due process and equal protection rights challenges made by a plaintiff that desired to permit manufactured homes on land in an agriculturally-zoned district.”¹

Frame v Nehls, 452 Mich 171, 183; 550 NW2d 739 (1996) – “Unless the dissimilar treatment alleged infringes on the exercise of a fundamental right (e.g., land rights) **the challenged regulatory scheme will survive equal protection if it is rationally related to a legitimate governmental interest.**”³

Leave no room for legitimate differences of opinion

Reasonableness of the Plan (Data and Analysis)

As indicated in the case law examples above, developing a reasonable plan can help in defending disputes of whether there is a need for additional growth in the community. The plan should therefore include enough socioeconomic, scientific and engineering backup information so that a court can comfortably conclude that the plan is reasonable rather than arbitrary. Using the Land Use Element as an example, reasonable data and analysis includes the following:

- Projecting future population and economic growth (a 20 year period is recommended as this timeframe affords residents some certainty as to the amount and location of growth in their community and reasonable in terms of projecting growth based on historic and regional growth patterns).
- Preparing land use options that allocate land uses by type based on the projected growth and other factors such as the existing character of the community; transportation, water and sewer and school locations and capacity; soil suitability and natural features.
- Receiving community input on future growth during the development of the plan.

To further present your position and assist the court in its determination of reasonableness, the plan should also include specific language regarding how the data and analysis is to be used or interpreted. The plan should have specific language that:

- Adequately explains the role of any included maps (e.g., are the maps intended to establish precise boundaries for various land uses or only to function as general guidelines).
- Adequately explains the role of textual findings and recommendations (e.g., does the text serve as immutable requirements, generalized suggestions or some combination thereof).
- Includes the adoption mechanism (e.g., ordinance) in the Plan.
- References all supporting documents (data and analysis, public comment opportunities, notices to local governments, special studies etc.). These documents provide more detailed information and explanation of certain plan provisions and when referenced in the plan, can be used as supporting information in defending lawsuits.

The Importance of Taking a Regional Approach

There are two types of problems associated with developing a reasonable plan based on growth projections at the township level: (1) Growth projections at this level are not as accurate as regional or county-wide projections,

thereby making planning for growth more difficult; and (2) Some townships purposely plan to remain rural despite growth pressures resulting in challenges that the plan is unreasonable in light of regional growth demands. The recently enacted Joint Municipal Planning Act (Act 226 of 2003) provides a potential solution to these problems. After formally approving a joint planning commission and defined territory by 2 or more jurisdictions, the jointly-developed master plan can designate land uses throughout the region and each jurisdiction no longer has to provide for all land uses within its borders. For example, if a "Manufactured Housing Community" master plan land use designation is provided for in the joint master plan, then that land use does not need to be designated in the remaining areas of the participating jurisdictions.

Two obstacles to developing a joint land use plan is the cost for planning services to integrate the plans of several communities and the requirement to set up a formal agreement regarding how the plan is adopted and enforced. I have attached a cost estimate analysis which compares the cost of planning for a single township versus a region to demonstrate that cost saving could occur under a regional approach (Attachment 1). With respect to the requirement for a formal joint planning mechanism, many local officials may feel that a joint commission would abrogate the local authority invested in them to control growth. However, as seen in Attachment 2, there are options available that allow joint planning with local approval or denial of development proposals.

Don't make the courts search for a reason to uphold your plan

Legitimate Public Purpose

Master plans are comprehensive and sometimes confusing documents. Not only do they contain data, analysis, goals, objectives and policies for several elements; they include references to public desires and address issues that are unique to a community. Unless you were intimately involved in the development of the plan, it is often difficult to grasp and apply the public purpose provisions in the document in a practical fashion (e.g., when reviewing a development proposal). To assist residents, land owners, public officials and the courts in developing and interpreting the plan, the public purpose of the plan can be categorized into five main categories (called the 5 C's).

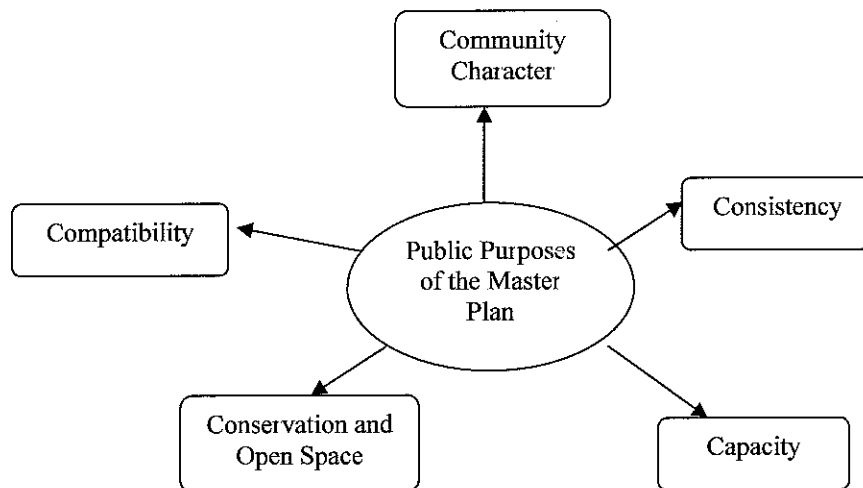


Figure 1: The Five Public Purposes of the Master Plan

Community Character - to ensure that growth and development will maintain or enhance the community's desired physical character. Whether your community desires to be more urban or suburban in character or maintain quaint villages and rural and forested expanses, the plan should describe this community desire in specific goals, objectives and policies.

Compatibility - to maintain the quality of life and economic viability of existing residents, farmers and businesses. The plan should contain specific policies in the Land Use, Housing, Agriculture and Economic Elements regarding protection of neighborhoods, farming operations and business districts from incompatible uses.

Conservation and Open Space - to maintain important natural features for wildlife and resident use. The plan should contain specific policies in the Land Use, Natural Resources, Parks and Open Space Elements regarding protecting natural areas and public open space systems. The policies should be based on environmental information and other considerations unique to your community rather than general preservation goals.

Capacity - to ensure that future development can be adequately served with public facilities and services and to minimize tax burdens on existing residents. The plan should contain specific policies, maps and background information in the Land Use and Infrastructure Elements on areas where urban level growth will (and will not occur) and how the transportation, water, sewer, schools, public safety and parks services will be funded to serve new residents.

Consistency with Other Plan Provisions - to ensure that other important community goals are realized. In addition to Land Use, Natural Resources and Infrastructure Elements, goals and policies related to other important community desires should be reflected in the plan (e.g., preservation of historic resources, farmland viability, special area plans, community design, airports and economic development)

Leave no room for legitimate differences of opinion..... don't make the courts search for a reason to uphold your plan

Developing and Using Findings during Rezoning and Other Development Requests

A reasonable master plan and clearly defined public purpose is only the first step in legal defensibility. The plan (and zoning ordinance) should have clearly defined criteria for reviewing and deciding on land use changes, rezoning requests and development proposals. In addition to promoting legal defensibility, including these tests in the master plan and zoning ordinance allows both the applicant and the public to provide meaningful information to decision makers during the rezoning hearings.

Findings are specific statements regarding the consistency of an application with the comprehensive plan or zoning ordinance. Findings are made after considering the applicant's proposal in light of consistency with the comprehensive plan and zoning ordinance and after considering public comments received. These findings are cited in the motion to approve or deny an application and become part of the record to be used in defending lawsuits. The process of developing findings is outlined below:

Staff Report: This report, published prior to public hearings, includes all the information developed prior to the hearing. This information includes the applicant's proposal, the results of staff's review of consistency with the comprehensive plan (5-Cs) and any public comment received to date. Staff's recommendation regarding consistency should reference specific plan goals, objectives, policies and master plan supporting information for the commission / board to consider.

Public Hearing: A usual sequence of events is for staff to present an overview of the proposal and their recommendations (with specific findings regarding consistency). This is followed by the applicant who presents the proposal and provides comments addressing staff recommendations. Next the hearing is open to public comment. The public should be made aware of the standards for consistency review (either verbally at the beginning of the hearing or through a handout at the sign up table) and the chair should urge each speaker to address the standards in their comments. Because one purpose of the public hearing is to receive input from residents on local or unique perspectives or circumstances, resident comments should not be totally limited to the standards of consistency.

Deliberation: This involves fact finding before a motion is made. The Board/Commission members discuss pertinent facts and comment made at the hearing in an effort to help each other understand the important issues and be able to craft a motion that is based on findings.

Motion on the Amendment. The motion on the application should reflect that the maker has considered all of the information presented. A sample motion (using the 5 - Cs) is provided below:

"After consideration of all the information presented and public comment received, I move to approve/deny the application based on the following findings:

Community Character - The proposal (will/ will not) change the character of the surrounding area and is (consistent/inconsistent) with (cite specific plan and ordinance provisions and paraphrase any pertinent public comment). When amending the plan or ordinance to the requested use could lead to other requests to amend the plan contrary to the adopted plan, this statement should also be included here

Note: Determination as to whether the proposal will change the character of the surrounding area starts with an evaluation of the property in light of similarly situated property. If the area is largely undeveloped and there are numerous parcels in the proximity of the proposed parcel that could also be used for the proposed use, rezoning the property to the requested use could lead to other requests to rezone. Once one property is changed, denying future requests to similarly situated property could be problematic.

Compatibility - The proposal (will/will not) have an adverse impact on surrounding uses and is (consistent/inconsistent) with (cite specific plan and ordinance provisions and paraphrase any pertinent public comment).

Note: Specific, rather than general compatibility statements should be developed based on an evaluation of visual, light, noise and traffic impacts and other potential effects such as reduced property values, disinvestment in property upkeep and agriculture viability.

Conservation and Open Space Systems - The proposal (will/will not) have an adverse impact on natural systems or other public natural areas and open space systems (cite specific plan and ordinance provisions and paraphrase any pertinent public comment).

Note: While development may not adversely impact natural riverine and wetland systems when modern state and local regulations are complied with, there are some examples where more intense development could have a deleterious effect. Gravel and mining operations could alter the groundwater table impacting surrounding wells or reduce stream flows, large regional shopping centers, with high traffic volumes, could conflict with a community's pedestrian and open space system etc.

Capacity - The proposal (can/cannot) be adequately served with public services at the established level of service (cite specific plan policies by number, (cite specific plan and ordinance provisions and paraphrase any pertinent public comment).

Note: In considering this test, developer proposals to provide all the services as part of the approval should not be the sole or deciding factor. Consistency with other plan provisions regarding community character, compatibility, conservation and other provisions should be considered.

Consistency with Other Plan Provisions – The proposal (is/ is not) consistent with the goals, objectives and policies found throughout the master plan (cite specific plan and ordinance provisions and paraphrase any pertinent public comment).

Note: This is a review of consistency of the proposal with the goals, objectives and policies found throughout the master plan. For example, a proposal may meet the other four tests but be inconsistent with policies regarding preservation of historic resources, farmland preservation, special area plans, open space plans, regional plans etc.

References

- (1) Recent Developments in Zoning and Land Use Law, Mika Meyers Beckett & Jones PLC. Presented to Michigan Township Association 1/24/06 Workshop
- (2) Current Issues in Zoning, Rentrop & Morrison P.C... Presented to the Legal Institute for Michigan Township Attorneys 1/28/03
- (3) Planning and Zoning Game: Playing to Win, paper presented to Michigan Twp. Association by Foster, Swift, Collins and Smith, P.C. and Langworthy, Stradler, LeBlanc & Associates, Inc.

Attachments

1. Estimated Costs to prepare a "Typical" Master Plan
2. Joint Planning Options

ATTACHMENT 1

Estimated Costs to Prepare a "Typical" Master Plan

<u>Plan Element</u>	<u>Four Townships & a City/Village</u>	<u>One Jurisdiction</u>
Project Kickoff	\$1,600	\$600
Background Studies	\$19,200	\$6,400
Population Characteristics		
Housing Characteristics		
Economic Characteristics		
Natural Resources		
Community Facilities		
Transportation & Traffic		
Existing Land Use Surveys		
Public Involvement	\$16,000	\$4,000
Public Visioning Sessions (4)		
Plan Development	\$24,000	\$8,000
Goals & Objectives		
Future Land Use Plan		
Implementation Measures		
Coordination Assistance	\$4,000	\$800
Meeting Attendance	\$12,800	\$4,800
	(16 meetings)	(6 meetings)
Total	\$77,600	\$24,600
Average Cost per Community	\$15,520	\$24,600

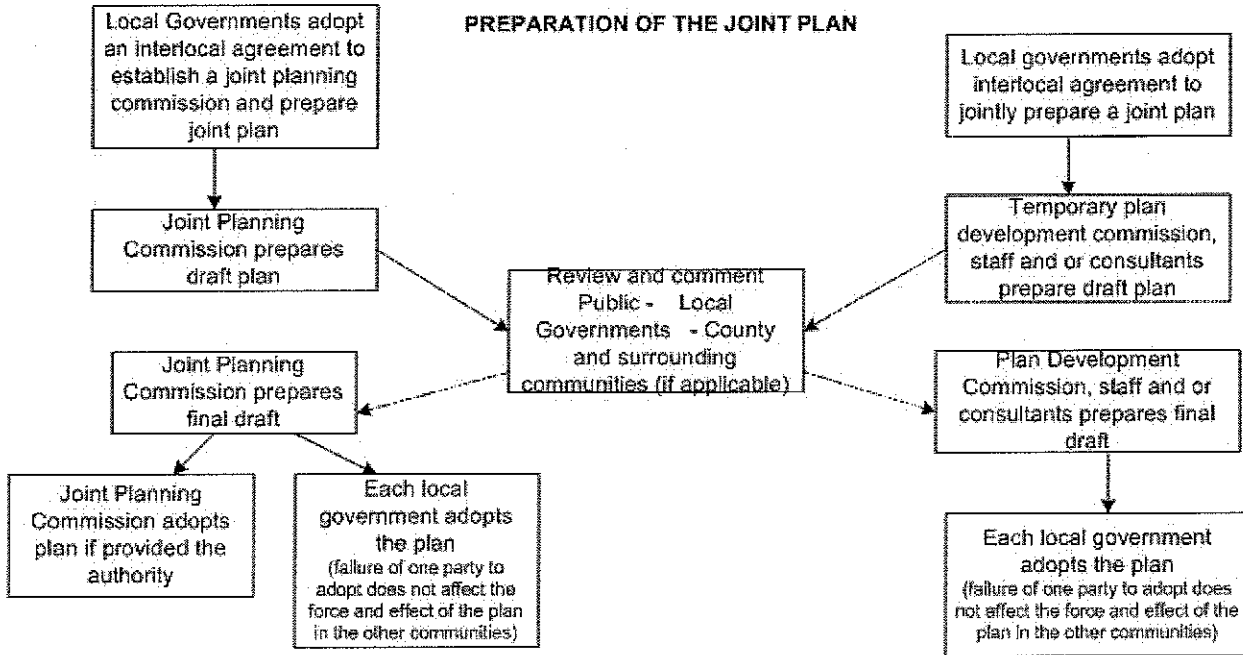
The costs portrayed in the tables above assume that the consultant would have access to prior Township/Village/City/County plans, as well as County GIS data, and that additional public input sessions and special focus areas/topics are not included. These costs are estimated for the "average" township in Washtenaw County (such as Lodi, Sylvan, Salem or Augusta). More urban areas would most likely incur greater costs.

ATTACHMENT 2

JOINT PLANNING OPTIONS

JOINT PLANNING COMMISSION

JOINT PLANNING AGREEMENT



PLAN AMENDMENTS

