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REPORT AND RECOMMENDATION FOR THE AMENDMENT OF WETLAND AND ZONING ORDINANCES TO CLARIFY REGULATORY INTENT

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With Assistance from the Southeast Michigan Wetland Coalition

On April 23, 1996, the Southeast Michigan Wetland Coalition had an opportunity to meet for the purpose of evaluating Attorney General Kelley's Opinion No. 6892, dated March 5, 1996 (see PZN, April 1996, p.16). The opinion addresses the subjects of: (1) zoning ordinance requirements for setbacks or buffers from wetlands; and (2) wetland ordinance regulation of wetlands two acres or less in area.

It was the unanimous consensus of the Coalition members present at the meeting that the model ordinance provisions previously disseminated by the Coalition in 1993 were fully appropriate and defensible (see PZN, June 1993, p.13). In addition, it was the unanimous consensus of the Coalition members present that it would be appropriate for communities to adopt supplements to their wetlands ordinance and zoning ordinance for the purpose of clarification relative to the two subjects addressed by the Attorney General.

With regard to the matter of natural feature setbacks/buffer regulation, it would appear that the Attorney General deliberated without the benefit of considering the strong, and perhaps dispositive, impact of the following on the issue:

1. In the Michigan Constitution, Article 7, Section 34, there is a directive that the provisions of law concerning counties, townships, cities and villages shall be liberally construed in their favor.

2. In the Michigan Constitution, Article 4, Section 52, Michigan public policy is stated to be that the conservation of natural resources of the state are of "paramount public concern", and the Constitution directs the Legislature to enact laws to provide for their protection.

3. The Michigan Supreme Court in **Hess v Charter Township of West Bloomfield** 439 Mich 550 (see PZN, July 1991, p.6), has held that the zoning enabling acts represent legislation intended to carry out the constitutional directive of Article 4, Section 52, of the Michigan Constitution to conserve natural resources (which include wetlands).

4. In the Wetland Act (now codified as Part 303 of the NREPA) the Legislature specifically and expressly states that: "This part (of the act) shall not be construed to abrogate rights or authority otherwise provided by law", i.e., municipalities retain the right to protect wetlands under other applicable law. Other applicable law, according to the Michigan Supreme Court, interpreting

Article 4, Section 52, of the Michigan Constitution, includes the zoning enabling acts.

Thus, it would appear to be quite clear that a municipality may include within a zoning ordinance a requirement for a setback or buffer from a wetland in order to protect natural resources. Moreover, the Attorney General has expressed agreement that zoning setbacks or buffers from wetlands may be required for purposes other than the protection of wetlands. The amendment below spells out language which clarifies the other purposes for regulating wetland setbacks or buffers. Also, please recall that there is the option to require a setback from other natural features.

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With respect to the regulation of wetlands which are two acres or less in area, the earlier model ordinance language required an applicant to submit data and analysis. The model ordinance language was very careful not to place a burden of proof upon the property owner. Nonetheless, in order to remove any doubt on this subject, the amendment below expressly addresses the matter of burden of proof.

MODEL LANGUAGE FOR ORDINANCE AMENDMENT

I. Wetland Ordinance — Regulation of Wetlands Two Acres or Less

The following amendments may be incorporated as part of the wetland ordinance relative to regulation of noncontiguous wetlands less than two acres in area (underlining refers to language to be added to earlier model language printed in June 1993 PZN, and strike-out language to be deleted):

1. A permit shall be approved with respect to a noncontiguous wetland less than two acres in area unless the municipality determines that the wetland is essential to the preservation of the natural resources of the municipality. It shall not be the burden of the property owner to prove that the

wetland is not essential to the preservation of the natural resources of the municipality.

2. All noncontiguous wetland areas of less than two acres which appear on the wetlands inventory map, or which are otherwise identified during a field inspection by the municipality, shall be analyzed for the purpose of determining whether such areas are essential to the preservation of the natural resources of the municipality. If there is to be a denial of a permit to dredge, fill, construct, or otherwise undertake an operation, in a noncontiguous wetland area of less than two acres, then, on the basis of data presented by the applicant, or supplemental data gathered by or on behalf of the municipality, findings shall be made in writing and given to the applicant stating the basis for the determination that such wetland is essential to preservation of the natural resources of the municipality. In order to make such a determination, there shall be a finding that one or more of the following exist within such wetland:

- (a) The site supports state or federal endangered or threatened plants, fish, or wildlife appearing on a list specified in Section 6 of the Endangered Species Act of 1974, Act No. 203 of the Public Acts of 1974, being Section 299.226 of the Michigan Compiled Laws.
- (b) The site represents what is identified as a locally rare or unique ecosystem.
- (c) The site supports plants or animals of an identified local importance.
- (d) The site provides groundwater recharge documented by a public agency.
- (e) The site provides flood and storm control by the hydrologic absorption and storage capacity of the wetlands.
- (f) The site provides wildlife habitat by providing breeding, nesting, or feeding grounds or cover for forms of wildlife, waterfowl, including migratory waterfowl, and rare, threatened, or endangered wildlife species.
- (g) The site provides protection of subsurface water resources and provision of valuable watersheds and recharging groundwater supplies.
- (h) The site provides pollution treatment by serving as a biological and chemical oxidation basin.
- (i) The site provides erosion control by serving as a sedimentation area and filtering basin, absorbing silt and organic matter.

- (j) The site provides sources of nutrients in water food cycles and nursery grounds and sanctuaries for fish.

3. The date which must be submitted by the applicant for purposes of making the determination whether the wetland is essential to the preservation of the natural resources of the municipality, shall include the property owner may make an election and response under subparagraph (a) or (b), below, relative to each noncontiguous wetland area less than two acres:

- (a) In lieu of having the municipality or its consultant proceed with the analysis and determination, the property owner may acknowledge that one or more of the criteria in subparagraphs 2(a) through 2(j), above, exist on the wetland in question, including a specification of the one or more criteria which do exist; or
- (b) An analysis prepared by the applicant's qualified wetlands consultant, with respect to each criterion in Paragraphs 2(a) through 2(j), detailing an election to have the municipality or its consultant proceed with the analysis on whether each of the criterion in Paragraphs 2(a) through 2(j) exist or do not exist in the wetland in question, including specific reasons for the conclusion in respect to each criterion.

II. Zoning Ordinance Amendment — Natural Feature Setback Regulation

The following amendment may be adopted as part of the separate article of the zoning ordinance enacted to regulate natural (or environmental) feature setbacks:

1. Intent and Purpose

It is the intent of this article to require a minimum setback from natural features, and to regulate property within such setback in order to:

- a. Prevent physical harm, impairment and/or destruction of or to a natural feature. It has been determined that, in the absence of such a minimum setback, intrusions in or onto natural features would occur, resulting in harm, impairment and/or destruction of natural features contrary to the public

health, safety and general welfare.

- b. Achieve the following objectives in relation to setback areas:

- (1) Protect unique wildlife habitat and habitat transition, including, without limitation, feeding, nesting, resting and traveling areas for numerous animals.
- (2) Protection of surface water run-off and water quality for pollution prevention purposes, and assistance in beneficial water recharge for drinking, irrigation and other purposes.
- (3) Provide water storage area in storm events.
- (4) Provide areas for recreational or other functional uses which are unique due to geographic relationship to natural feature.
- (5) Preserve aesthetic views and areas for the enjoyment of natural resources.
- (6) Preserve threatened and endangered species habitat, including upland species.
- (7) Reduce the need for on-site and off-site stormwater storage capacity based upon the availability of a greater area of absorption and a smaller impervious area.
- (8) Stabilize and protect soil resources, including the prevention of erosion and prohibition of loss due to moving water resulting in destruction of upland, structures and infrastructure on the upland, and prevention of the alteration of the course of moving waters.

This regulation is based on the police power, for the protection of the public health, safety and welfare, including the authority granted in the Zoning Enabling Act.

It is the purpose of this article to establish and preserve minimum setbacks from natural features in order to recognize and make provision for the that there is a special relationship, interrelationship between natural features and the adjoining upland in and terms of: Spatial relationship; interdependency in terms of physical location, plant species, animal species and an encouragement of diversity and richness of plant and animal species; overland and subsurface hydrology; water table; water quality; erosion or sediment deposition.

2. Regulation

A natural feature setback shall be maintained in relation to all areas defined in this ordinance as being a "natural feature," unless, and to the extent, it is determined to be in the public interest not to maintain such a setback.

3. Definition of "Natural Feature"

A "natural feature" shall mean a wetland, and shall mean a watercourse.

4. Authorization and Prohibition

- (a) The natural feature setback shall be an area or feature with boundaries and limitations determined in accordance with the standards and provisions in this article in relation to respective types of natural features.
- (b) In conjunction with the review of plans submitted for authorization to develop property or otherwise undertake an operation in or on, or adjacent to, a natural feature, applicable natural feature setbacks shall be determined, and authorizations and prohibitions established, by the body undertaking the plan review.
- (c) Within an established natural feature setback, unless and only to the extent determined to be in the public interest by the body undertaking plan review, there shall be no: Deposit of any material, including structures; removal of any soils, minerals and/or vegetation; dredging, filling or land balancing; and/or constructing or undertaking seasonal or permanent operations. This prohibition shall not apply with regard to those activities exempted from this prohibition, below.
- (d) In determining whether proposed construction or operations are in the public interest, the benefit which would reasonably be expected to accrue from the proposal shall be balanced against the reasonably foreseeable detriments of the construction or other operation, taking into consideration the local, state and national concern for the protection and preservation of the natural feature in question. If, as a result of such a balancing, there remains a debatable question whether the proposed project and/or operation is clearly in the public interest, authorization for the construction and/or operation within the natural feature setback shall not be granted. The following general criteria shall be applied in undertaking this balancing test:
- (1) The relative extent of the public and private need for the proposed activity.
 - (2) The availability of feasible and prudent alternative locations and methods to accomplish the expected benefits from the activity.
 - (3) The extent and permanence of the beneficial or detrimental effects



Graphic by John Warbach, Planning & Zoning

GROWING COMMUNITIES AND QUALITY OF LIFE

The Growing Communities and Quality of Life Conference on June 13, 1996 attracted more than 225 people to the Crowne Plaza in Grand Rapids. A majority of conference participants were local officials from Kent County and its surrounding area. It was sponsored by the Partnership for Sustainable Development which includes business and environmental groups, educators and local officials.

The conference featured nationally recognized speakers who have taken steps in their own growing communities to preserve quality of life. Among them was Peter Katz, acting Executive Director of the Congress of New Urbanism, San Francisco, California, who highlighted the need to integrate modern urban and suburban life into compact, pedestrian-friendly communities.

Tom Daniels, Director of the Agricultural Preserve Board in Lancaster, Pennsylvania, discussed the nationally recognized Purchase of Development Rights Program he administers in Lancaster. He has been involved in preserving 11,500 acres of prime farmland in the region.

Jeff Lacy, Chief Environmental Planner for the Metropolitan District Commission in Belchertown, Massachusetts, in a presentation titled The Value of Open Space, compared the mass appreciation of homes in an open space development to those in a conventional suburban development.

Terry Moore, Vice President and Project Manager of ECONorthwest, Portland, Oregon, educated the conference participants on what works and what doesn't in setting up a Metropolitan Growth Management Plan based on his experiences in Portland.

The conference also featured many speakers from around Michigan including Mark A. Wyckoff, President of the Planning & Zoning Center, Inc., Lansing; Keith Charters, Implementer of the Grand Traverse Bay Region Growth Management Guide Book; and Representative Bill Bobler, of District 101.

which the proposed activity may have on the public and private use to which the area is suited, including the benefits the natural feature and/or natural feature setback provides.

- (4) The probable impact of the proposed construction and/or operation in relation to the cumulative effect created by other existing and anticipated activities in the natural fea-

ture to be protected.

- (5) The probable impact on recognized historic, cultural, scenic, ecological, or recreational values, and on fish, wildlife and the public health.
- (6) The size and quantity of the natural feature setback being considered.
- (7) The amount and quantity of the remaining natural feature setback.
- (8) Proximity of the proposed construction and/or operation in relation to the natural feature, taking into consideration the degree of slope, general topography in the area, soil type and the nature of the natural feature to be protected.
- (9) Economic value, both public and private, of the proposed construction and/or operation, and economic value, both public and private, if the proposed construction and/or operation were not permitted.
- (10) The necessity for the proposed construction and/or operation.

5. Exemptions

If and to the extent the municipality is prohibited by its ordinances and/or law from regulating the proposed activity in or on the respective natural feature, regulation under this article shall be exempted, subject to the

following exceptions...

6. Application Form (To be inserted.)





7. Setback Standards

Unless otherwise determined by the body undertaking the plan review, the following setbacks shall apply:

- (a) A 25 foot setback from the boundary or edge of a wetlands as defined and regulated in Ordinance No. ____ [If the municipality does not have a wetlands ordinance, the following phrase may be inserted:... from a wetland, as defined by Act 203 of the Public Acts of 1979, as amended Act 59 of the Public Acts of 1995, Part 303 of the NREPA.]

- (b) A 25 foot setback from the ordinary high water mark of a watercourse, i.e., from a natural or artificial lake, pond or impoundment, river, stream or creek which may or may not be serving as a drain as defined by Act 40 of the Public Acts of 1956, as amended, or any other body of water which has definite banks, a bed and visible evidence of a continued flow or continued occurrence of water. □

DID YOU KNOW . . .

-  Michigan's population in 1990 was 9,295,297.
-  The number of housing units in Michigan increased from 2.3 million in 1960 to 3.5 million in 1990.
-  The average Michigan household had only 2.66 persons in 1990 compared to 3.42 persons per household in 1950.
-  The poverty rate for persons and households in Michigan increased in the 1980s, with 18.2% of children under age 18 falling below the poverty level.

WHAT DOES THIS MEAN TO YOU?

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DEMOGRAPHIC TRENDS WORKING PAPER

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