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Guideline Number

CVZEA, 207 of 1921, Sec.4(f)
TZEA, 184 of 1943, Sec.16(h)
COZEA, 183 of 1943, Sec.16(h)

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**OPEN SPACE PRESERVATION ZONING PROVISIONS
CLUSTER ZONING OPTION
(required for non-exempt communities)**

Background Information

The Problem: Cluster zoning is now a mandatory part of the zoning enabling acts. Non-exempt communities are obligated to provide cluster zoning as an option to a developer within one year of the effective date of the Act. An owner/developer of land zoned for residential developable land must be allowed to build the same number of dwelling units on a part of a site that otherwise could have been built in the entire developable area when certain conditions are met. It appears the Legislature believed this option would result in greater preservation of open space and other valuable land resources.

Required adoption of an open space preservation/cluster zoning ordinance would not apply under the act if a city/village, township or county had comparable zoning ordinance provisions that had been used by a developer in effect on or before the December 15, 2001. (***See MTA Open Space Decision Tree***)

The Zoning Dictionary Millennium Edition 1999; Lehman & Associates defines "Cluster Development" as: "A development design technique that locates buildings in limited areas on a site to allow the remaining land to be used for a variety of open space purposes."

Statutory Citation: See Sections 16(h) in both the Township Zoning Act and County Zoning Act and Section 4(f) of City and Village Zoning Act. Both TZEA and COZEA are amended to add section 16(h), Open Space Preservation provisions. CVZEA is changed by the addition of section 4(f). All three statutes have similar regulatory provisions with differences between what is required by CVZEA and the identical language found in TZEA and COZEA.

Regulatory provisions include: land zoned for residential development may be developed using cluster development designs at the option of the land owner, the development of the specified land to be not more than 50% of the land that could have been developed (CVZEA 80%), density equivalency to be 2 or fewer dwelling units per acre, or if land is served by public sewer and water, 3 or fewer dwelling units per acre (all three statutes), land to remain perpetually in an undeveloped state to be not less than 50% for both TZEA and COZEA while CVZEA would be allowed 20%, all undeveloped land would be maintained as conservation easements, plat dedications, restrictive covenants, or other legal means; however land development would not depend upon the extension of public sewer or water unless the exercise of the option for development would depend upon an extension.



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History of the Requirement: Before January 2001, cluster zoning saw very little practical application in many rural Michigan communities. With Governor Engler's State of State address in January 2001 and his support for land preservation, Michigan communities were, for the first time, in a real position to see legislation that would provide a much-needed open space preservation tool. The legislators also became actively interested in the preservation movement. Through the Urban Vision2 Summit, coincidentally held in January 2001, "new" coalitions were being formed recognizing the need for bipartisan attention to open space preservation. Now with the preservation ball in play, Rep. Ruth Johnson, chair of the House Land Use and Environment Committee, introduced HB 4995, an amendment to Township Zoning Act on June 26, 2001. The amendment provided a mandatory open space preservation option to owners/developers. To follow were HB 5028 and HB 5029 County Zoning Act and City and Village Zoning Act respectively on July 11, 2001.

The APA **Growing Smart Legislative Guidebook** places an equal importance on the need to provide options for the application of preservation techniques. Chapter 8, "Local Land Development Regulations" contains model statutes that authorize local governments to adopt a variety of development regulations, which include, open space preservation techniques.

Recommended Best Practice

MAP recognizes the need for an open space preservation tool as prescribed in its **Community Planning Principles**. This guideline encourages all counties and townships, cities and villages to recognize the need to preserve open space land in Michigan by implementing regulations that provide owners/developers options for employing preservation techniques, whether or not a community is exempt from the requirement. Communities should attempt to establish standards for review and approval, especially in terms of what qualifies as open space. A carefully crafted definition of what will be considered open space is paramount. The review process should also include issues surrounding the use and maintenance of the preserved open space. Considerations for ways of encouraging the option to preserve undeveloped land, by and through the use of incentives or bonuses, should be evaluated for their potential effectiveness and optimal success. A community's current **Land Division Act** and **Condominium Act** ordinances should be consistent with the proposed open space preservation ordinance.

Even though the amendments don't speak to the issue of penalties, communities should be concerned about potential litigation resulting from their failure to comply with the mandate. Exempt communities should not passively ignore their "exempt" status. MiSP recommends that the planning commission in exempt communities formally adopt a resolution, placing on the record in their commission minutes, the facts that demonstrate the community is exempt. Doing so can help with any defense to future legal challenges.



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Also, because the amendments require that this cluster zoning option be selected by the applicant, it arguably must be provided as a “use by right” or “permitted use” rather than as a “special land use” or “conditional use.” A cluster zoning application could be required to go through site plan review. Consult your attorney for further information. Also see the text on this issue on the Michigan Townships Association website cited at the end of this guideline.

Legal Considerations

There could be legal questions about what constitutes an “exempt community” – “qualified communities” and their respective current ordinance language. See the **MTA Open Space Preservation Decision Tree Chart**.

In 1974, the Michigan Court of Appeals ruled on a case that dealt with a cluster zoning option. It ruled, *“The existence of a cluster option apparently is not, by itself, a sufficient reason to uphold single-family zoning in a situation in which such zoning is otherwise unreasonable.”* **Land Development Corp. v. Bloomfield Twp, 55, Mich App 438; 222 NW2d 768 (1974)**

Case Example

Several communities have in place ordinances that, in some way, employ a form of cluster development and they, in and of themselves provide evidence of the success or failure in the use of an open space preservation tool. A comparison between those ordinances in place before the amendments and after the implementation of the amendatory acts may be useful. Communities with open space provisions for many years include Bloomfield Township, Hamburg Township and Farmington Hills.

References

- See *“New Zoning & Planning Amendments: Open Space Zoning Mandated & Coordination Requirements Added to Planning Enabling Acts”*, **Planning & Zoning News**, February, 2002, vol. 20, no. 4
- See also *“Land Preservation Plat Act Proposed”*, **Planning & Zoning News**, April, 2001, vol.19, no. 6
- **Clan Crawford, Jr. Michigan Zoning and Planning 3rd. Sec. 11.03 Cluster Options**
- APA **Growing Smart Legislative Guidebook**, 2002 Edition
- MAP **Community Planning Principles**
- *Land Use Pamphlets; Better Designs for Development in Michigan; Putting Conservation into Local Land Use Regulations*, **Michigan State University Extension**, <http://www.msu.edu/~schindl9/khsLUpamphlets.htm#pamphlets>
- Michigan Township Association, **Outline of Amendments and Requirements and Open Space Preservation Decision Tree**
http://www.mta-townships.org/information_department/sample_planning_zoning_ordinances.htm



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***Amendatory Provision Affecting Section 12**

TZEA provision for right to referendum was changed with the statutory amendment (P.A. 177 of 2001). Section 12 changed the total vote cast for all candidates for governor from 10% to 15%. COZEA section 12 was already at the 15% requirement. Section 4f in CVZEA incorporates, by charter reference only, the right to referendum.

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