

REGULATING PRIVATE ROADS

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The number of private roads in Michigan has exploded in recent years. Due to the expense and time required by the formal platting process, private roads have become an attractive alternative—particularly for smaller developments. Private roads also lend more privacy to the residence and the smaller grade and right of way helps to preserve trees and enhance landscaping.

The increased use of private roads has generally not been a problem in urbanized areas due to the imposition of very strict standards which almost always approximate those of public roads. However, many rural and semi-rural townships have struggled to enact reasonable private road regulations which meet the needs of the community without being unduly restrictive.

The Problems

Joint residential driveways and private roads present many problems. Some municipalities have simply decided that private roads and joint driveways will not be allowed in residential areas—that is, each residential parcel must have the requisite frontage on a public road without exception. An increasing number of rural municipalities, however, have rejected bans on all private roads as being unrealistic or even undesirable. Even if private roads are forbidden in a given municipality, many private roads will “sneak by” either based on their prior lawful nonconforming status or because many are simply created pursuant to a deed split which is not discovered by the governmental unit until a much later date.

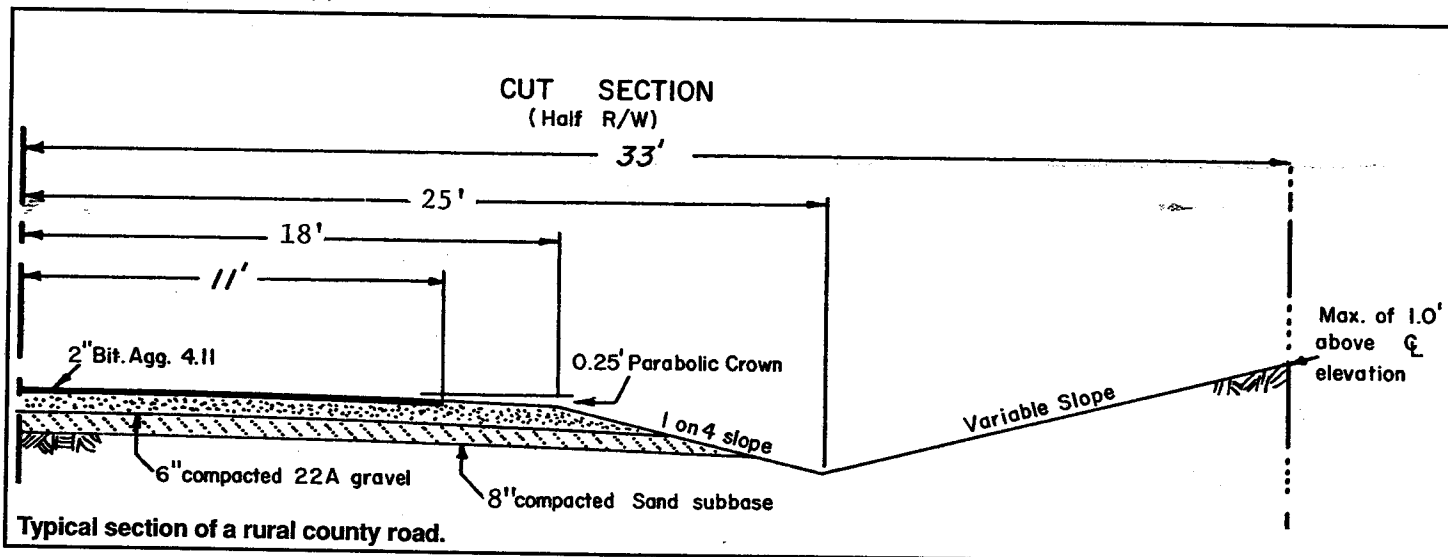
The three main problems associated with private roads are: (a) substandard design and construction; (b) inadequate easement or right-of-way; and (c) lack of a re-

corded joint maintenance agreement that runs with the land. The first two affect a municipality's interest regarding easy access for emergency vehicles and clearly defined easements for utility lines. The third problem affects the property owners or buyers because without such a recorded agreement, other owners benefitted by the private road cannot be forced to contribute to its upkeep unless the municipality steps in pursuant to a special assessment district. Other common problems associated with private roads include:

- Determining what to do with prior lawful nonconforming private roads and additions thereto.
- Determining what to do with private roads which historically were not constructed within (or entirely within) an established easement.
- Dealing with lack of proper documentation (or any documentation at all) as to the exact location or nature of the easement or private road.
- Resolving uncertainty regarding which parcels or properties have the legal right to use the private road.
- Determining whether a given private road was built to certain specifications, and whether those specifications were applied uniformly across the road's entire length and width.
- Ascertaining who is responsible for the maintenance and improvement of the private road.
- Dealing with subsequent owners who want to improve the private road or change it to a public road.
- Preventing neighborhood conflict when the respective parties' rights and re-

sponsibilities for decisions regarding the private road are not clear.

- Determining who is liable if someone is injured or emergency vehicles cannot traverse the private road.
- Deciding what notice (if any) should be given to invitees warning that the road is not public. In particular, is a road sign sufficient notice?
- Developing adequate measures to inform prospective purchasers prior to a sale that the land is serviced only by a private road, and that many lending institutions will not loan funds for properties serviced solely by private roads, which they may not consider legitimate accesses.
- Assuring that a private road which is presently adequate to meet the needs of the few parcels which it services is not overburdened in the future by unforeseen subdivision of those parcels.
- Addressing concerns that private roads constitute poor planning and promote haphazard development.
- Dealing with inadequate easement or right-of-way language which does not provide for public utilities, including telephone lines, electrical lines, cable television, natural gas, municipal water and municipal sewer.
- Some communities avoid requirements pertaining to minimum construction standards and inspections because they do not have staff capacity to administer these and because they also fear potential liability if a road failure occurs.
- The separation between counties and townships creates lot split review problems, because parcels have usually already been recorded at the county reg-



Graphic from Clinton County Subdivision Control Procedures

ister of deeds office before a township is aware that they exist.

- Use of private roads is growing in areas with lakes or rivers where frontage is at a premium. There is a huge demand to access the waterfront via two-track trails.

Until recently, many municipal officials in rural areas did not feel that private road ordinances were necessary due to existing regulation by the Michigan Subdivision Control Act of 1967 (MCLA 560.101 *et seq*; MSA 26.430(101) *et seq*) (the "Plat Act") and county driveway regulations. It is true that the strict platting and road requirements of the Plat Act do apply if a developer subdivides property to create five or more parcels of less than 10 acres within a ten year period. But the Plat Act does *not* apply to many developments which have avoided the statute by creating parcels which exceed 10 acres in size. Further, while many counties have driveway regulations on the books, it is rare for counties in rural areas to enforce such regulations against private roads (other than for purposes of curb cuts and traffic control at the point where the private road abuts a public road).

Thus, many low density developments or unplatted subdivisions in rural areas are not subject to the Plat Act. As a result, the local municipality is the only effective regulator of private roads and joint driveways.

One Solution

Some township attorneys question whether townships have the authority to regulate private roads. They argue that the field is preempted by state and county regulatory schemes. Some attorneys also believe that townships cannot regulate private roads absent explicit statutory authorization, and that there is no express statutory authorization for such regulation. Despite those arguments, township regulation of private roads appears to be authorized by the following:

- MCLA 41.181; MSA 5.45(1) (General Township Police Powers)
- MCLA 125.271; MSA 5.2963(1) (Township Rural Zoning Act)

- MCLA 247.321 *et seq*; MSA 9.140(21) *et seq* (Driveways, Banners, Events and Parades Act—by implication). *This Act does not expressly authorize local regulation of private roads. Rather, it implies that local regulation is permissible.*
- MCLA 560.101 *et seq*; MSA 26.430(101) *et seq* (Subdivision Control Act).

Municipal attorneys also disagree over whether private road ordinances should be placed in a zoning ordinance or whether they should be placed outside of the zoning ordinance in a general regulatory ordinance. Prior to enacting an ordinance—or deciding whether to include the private road ordinance in the zoning ordinance, general police regulations, or both—local officials should consult with their municipal attorney. There are pros and cons to each approach.

Typical Approaches

Many municipalities do not allow private roads at all. Instead, they strictly enforce minimum lot frontage requirements on public roads. Other municipalities allow private roads as a "permitted use" in all or some zoning districts subject to certain standards. Still other municipalities allow private roads only as a special or conditional use after a private road proposal has been approved by a planning commission or its equivalent.

As with all other aspects of private road ordinances, design and construction specification approaches vary across municipalities. Most municipalities have little or no regulation of driveways that serve only one residence. Some require that all private roads serving two or more residences be built to county road specifications—that is, the developer or private property owners benefited by the road must build what is, in effect, a county-size road. While that approach might be acceptable in an urbanized area, it is often not practical for rural and semi-rural areas due to cost and site considerations. It may be unreasonable to require a private road which accesses only a gravel road to be paved.

You can imagine the outcry in a rural area if a family wants to carve two 10-acre parcels off of the "back forty" for family member home sites, only to be told that they must build the required county-specifications road back 2,000 feet to those home sites at a cost of tens of thousands of dollars. Conversely, it would be poor planning to allow a developer to split an 80-acre parcel into eleven (11) home sites (which, if carefully planned, can be done without having to plat a formal subdivision under the Plat Act) and allow that developer to access those eleven parcels by anything less than a county-specification road. The trick is to allow modest splits to occur without having regulations so onerous that they prevent small developments, while at the same time requiring larger projects to provide adequate permanent access.

The Sliding Scale Approach

One regulatory approach for private roads in rural and semi-rural areas is a "sliding scale" ordinance. Pursuant to the sliding scale ordinance, a modest number of parcels (say 2, 3, or 4 parcels) could be serviced by a private road built to less than county road specifications. That middle-of-the-road category (2-4 parcels) still requires a 66-foot wide easement and right-of-way. Typically, such ordinances require a gravel road between 12 and 18 feet in width, with a surface of at least 6 inches of finished gravel, a 6 to 12 inch base, proper drainage and specified maximum grades and side slopes. Larger developments of five or more parcels would be subject to county road specifications.

Under the sliding scale approach, the entire road must be upgraded to county specifications whenever the number of parcels on a private road becomes five or more prior to that additional lot split being approved. Otherwise, a variance must be obtained.

Road Surfacing

Another question is whether "to pave or not to pave..." Paving a private road obviously increases expenses dramatically. Many ordinances in rural townships do not require paving when county gravel road specifications are met. Other municipalities require paving when the number of houses served by a private road exceeds a particular number.

The Universal "66" [4 Rods]

Virtually every contemporary private road ordinance in Michigan I have seen requires a 66-foot wide easement and right-of-way. The theory behind the 66-foot requirement is that most county road commissions require a 66-foot wide right-of-way for public road purposes and private road easements should be at least that wide in case a governmental entity ever wants to take over the private road.



It is important that the details of future maintenance be worked out prior to municipal approval of a private drive.

The 66-foot specification is almost uniformly recognized in Michigan as a width which should be able to accommodate foreseeable future uses and contingencies. It is a wise provision. While it may be appropriate to allow a lesser width in a given circumstance by variance, ordinances should generally require a 66-foot wide easement and right-of-way (with express utilities provisions) for private road purposes.

Municipal Supervision

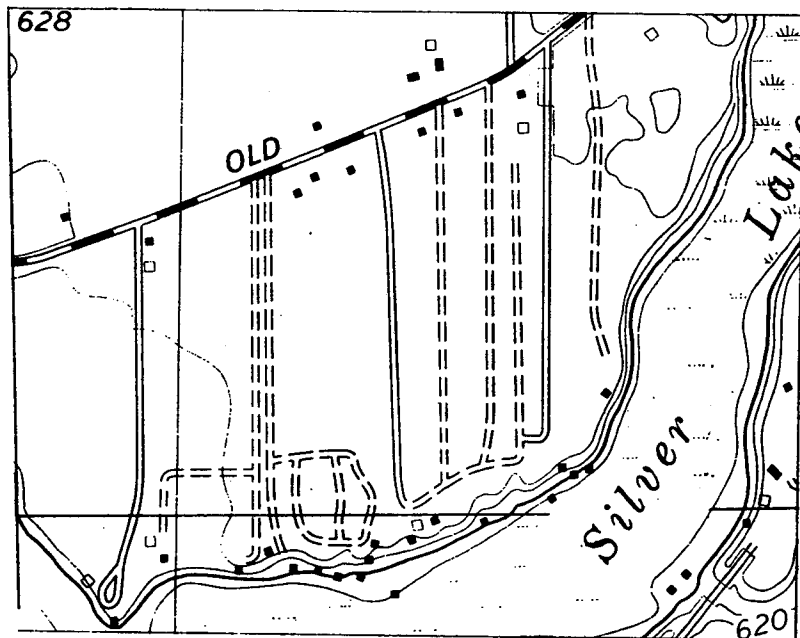
While the construction, improvement, and maintenance of private roads are the responsibility of the property owners adjoining the private road and those being benefited by it, private road ordinances should set up mechanisms whereby responsibilities and duties are clearly laid out. Toward that end, private road ordinances should provide for the following:

Construction Plans: Municipalities should require that detailed plans be submitted for approval and review. Such plans should include detailed survey drawings showing the easement, proposed road location and all parcels benefited by the road. The plan should also incorporate the construction standards which must be satisfied.

Municipal Review of Easement Documents: Prior to approval of a private road, the municipality should review all applicable easement documents to ensure proper location and width, and to determine that the easement/right-of-way is drafted properly to provide for utilities as well as general access.

Joint Maintenance Agreement: This is one of the most important aspects of private road regulation. Townships should require, review, and approve joint maintenance agreements for private roads. The agreements should be recorded and must run with the land and bind benefited properties. Joint maintenance agreements should contain detailed legal descriptions of the easement and right-of-way, as well as all adjoining parcels. The agreements should contain provisions for majority vote rules regarding road maintenance and improvement decisions. Each agreement should also provide that the municipality has the option of maintaining or improving the private road and charging the cost thereof back to the benefited properties should the property owners fail to do so. There is disagreement, however, over how much townships should get involved in private road maintenance. Some feel that a township's role in review and approval should involve simply setting minimum standards and should not constitute consumer protection.

Permits—Preliminary and Final: Municipalities typically require two private road permits. The preliminary private road permit is obtained prior to the commencement of any construction work on the road, and is issued after the initial plans, specifications,



Source: USGS topographic map

Private drives in a slightly larger area than is depicted on the cover photo.

easement language, and joint maintenance agreement have all been approved. The final private road permit is issued after the private road has been constructed and the municipal inspector or municipal engineer has given final approval.

Reasonable Permit Fees: Since the municipality will need professional assistance during the review process, the ordinance should require the applicant to pay a reasonable permit fee to defray such expenses. Municipalities may also want to consider having applicants pay into an escrow fund to cover review and inspection costs, with unspent balances being returned to the applicants.

Typical Private Road Ordinance Provisions

The following is a checklist of typical private road ordinance provisions:

- easement and right-of-way width (usually 66 feet)
- easement and right-of-way language for both access and utilities
- definition of private road
- joint maintenance agreement in recordable form that runs with the land and binds benefited parcels
- a recorded statement running with the land informing subsequent purchasers that it is a private road which might never be taken over by a governmental unit
- a provision in the recorded joint maintenance agreement stating that if the private road is not properly maintained, the municipality has the option of making the repairs and charging the costs back to the benefited properties
- prohibiting any building or commencement of construction on a private road until all appropriate permits and approvals have been obtained
- prohibiting private roads for non-agricultural, commercial, industrial or business uses (i.e. requiring public road frontage for such uses)
- requiring a certain amount of frontage on the private road for each parcel benefited
- blueprints, plans, and site-plan approval
- preliminary private road permit (before construction begins)
- final private road permit (after construction and inspection)
- which zoning districts private roads are allowed in as of right or upon approval of the planning commission as a special or conditional use
- private roads should be formally named and have street signs to assist location of the site by emergency vehicles
- whether or not to regulate driveways involving only a single residence
- road standards or specifications (often a sliding scale)
- maximum grade standards
- requiring that brush and trees be cleared for a certain specified distance on either side of the road
- requiring all other county and state permits to be obtained
- requiring private stop or curve signage
- prohibiting the issuance of building permits until private road standards are met
- nonconforming or grandfather clause for existing roads (optional)
- permit and inspection fees for certification by a municipal or other registered engineer confirming that the road, as built, meets the specifications and plans (optional)
- mandatory upgrades of the road if additional parcels or residences are added
- paving vs. gravel

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Land Division & Access Controls

Communities throughout Michigan are wrestling with a multitude of problems associated with access to and the division of private land. These problems are the focus of this new training program that examines various options for addressing common problems.

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- waiver or indemnification and "hold harmless" agreement to benefit the municipality (optional)
- requiring the posting of a bond or execution of an escrow agreement
- setting a maximum length for private roads
- specifications for the end "turnaround" (cul-de-sac)
- requiring an alternate or back-up access or private road if the number of residences served is large
- regulation of minimum lot size or maximum density along private roads (for example, requiring that lots serviced by private roads be 25% larger in area than the normal lot size requirements for the zoning district)

Local Lot Split Regulation

It is surprising how few rural municipalities have mechanisms in place requiring municipal review and prior approval for parcel splits in situations not governed by the Plat Act. Requiring municipal review and prior approval of all proposed lot splits ensures that all provisions of the zoning ordinance will be met and also prevents violations of the Plat Act before they can occur. Such regulations dramatically cut down on the creation of non-buildable lots. To ensure proper access to newly created parcels, lot split ordinances can require that parcels created without the required frontage on a public road must be given a 66-foot wide easement and right-of-way to a public road that runs with the land.

But mandatory review is not without its own problems. It does nothing to slow the rate of land subdivision, and is often frustrating to those involved. Realtors, developers, and buyers become frustrated by the delays, and planning officials quickly tire of agendas bursting with lot split reviews. Yet mandatory review is the only solution at present. It is essentially a last ditch effort to stop nonconforming lot splits, absent a re-

quirement in the Plat Act that all divisions of land conform with local minimum lot size and other zoning requirements.

Other practical difficulties interfere with local lot split regulation. Presently, most rural townships do not receive or review copies of recorded deeds or memoranda of land contracts from the county register of deeds until weeks or even months after they have been recorded. Even then, splits which violate zoning ordinances but were not challenged at the time of creation invariably create unpleasant problems later when a subsequent innocent purchaser wants to build on a substandard parcel. A simple requirement that counties obtain local governmental approval of all lot splits within their jurisdiction prior to recording would solve this quandary. Unrecorded land contracts also create problems. Legislation should be enacted requiring that either the land contract itself or a memorandum of land contract must always be recorded.

Thus private road ordinances with lot split regulations are not without practical difficulties. Nevertheless, they are the best method for controlling access to newly created lots. Local officials should consult with counsel to determine whether a lot split ordinance should be adopted as a police power ordinance or as part of a zoning ordinance.

Pitfalls of Regulating Private Roads Regulatory Takings

As with all zoning and police power regulations, private road ordinances must be reasonable. If a private road ordinance is so rigid or restrictive that its requirements cannot reasonably be met, or if the costs or logistics of meeting its requirements are disproportionately large in relation to the public benefits of the regulation, it could be found to constitute an unconstitutional "taking of private property without due process of law" (i.e. without compensation).

In the recent case of **Bevan v Brandon Township**, 176 Mich App 452 (1989), the Michigan Court of Appeals not only ruled that the Township could not apply its private road ordinance to two parcels serviced by a substandard easement (where the parcels and easement pre-dated the private road ordinance), but the Court also ordered the Township to pay the property owners' attorney fees (see **PZN**, June 1989, p. 2). While **Bevan** involved grandfathering and nonconforming rights issues, it and many other cases stand as warnings that private road ordinances must be reasonable. What constitutes a reasonable regulation in an urban setting might not be considered reasonable in a rural or semi-rural setting.

Nonconforming Roads and Grandfathering

The most troublesome situation facing planners and municipal officials involves

private roads or easements which are substandard but pre-date the enactment of the private road ordinance. What should be done when the owner of a 40-acre parcel which only has access to a public road via a 33-foot wide easement pre-dating the enactment of the private road ordinance decides to split the parcel into four lots? Does the "grandfathering" apply only to one house on the 40-acre parcel, or would it extend to permit the proposed subdivision? What should be done when the owner of the last of twelve existing parcels serviced by a nonconforming private road on a substandard easement wants to create an additional parcel by a lot split? Can that property owner add a parcel even though the easement width is substandard? Must that owner bear the entire cost of upgrading the full length of the road to meet the new standards? What if it is impossible for the owner to obtain the additional easement width from his or her neighbors?

Many planners wonder whether to raise the grandfather or nonconforming issue in the private road ordinance itself or whether to simply leave it up to a zoning board of appeals or planning commission to "do equity" in a given situation. Most ordinances do not specifically deal with this issue. They simply leave it up to a zoning board of appeals to grant variances in cases of hardship or practical difficulty. The problem with a "hands off" approach is that if a zoning board of appeals reaches the wrong decision on a particular variance, the municipality could face very large civil liability for a regulatory taking pursuant to **Bevan v Brandon Township**.

While the "taking" issue is not unique to private road ordinance situations and can arise in any land use regulation area, the potential for a court finding that a regulatory taking has occurred looms larger in private road controversies. A few ordinances try to remedy the situation by expressly providing a different set of standards for grandfathering and nonconforming use situations, or by providing that existing substandard private roads or easements can be expanded pursuant to the special use or conditional use procedures of the planning commission.

Conclusion

Since state and county regulation of private roads has been minimal, effective regulation can often only come from local municipalities. Local private road ordinances can be very effective, but balance is important. If an ordinance is overly rigid or strict, it can be unduly burdensome and can even cause a "taking" to occur. Unless the zoning board of appeals or planning commission is given the power to make exceptions in cases of pre-existing private roads or cases where unique circumstances exist, a reviewing court could well find that a "taking" has occurred. □