Taking aim at the LDA

What we've learned about the confusing Land Division Act

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The Michigan Land Division Act (MCL 560.101, *et seq*) took effect just over two years ago, and two facts about the statute have become clear in that time.

First, most township officials are now familiar with the LDA's basic features and know that:

- There is a new, more complex formula for the permitted number of land divisions.
- It is prudent to have your own local township land division ordinance.
- Townships must approve or deny all land divisions within 45 days.
- The LDA does not displace local zoning.
- If a property owner or developer utilizes a plat or site condominium for development, the LDA's land division provisions do not apply.

Second, it is clear that many parts of the statute are incomprehensible and impractical, and many township officials balk at the LDA's provisions requiring them to approve parcels that may be unbuildable lots. This article will examine the parts of the LDA that have generated the most problems for township officials and will offer practical strategies to minimize future concerns.

We may not be able to rely on the courts to clarify the LDA

The LDA has generated very little litigation to date. No appellate decisions have yet addressed any aspect of the statute. The Attorney General has issued only a few opinions relating to more trivial than useful issues. The lack of significant litigation should not surprise anyone. Although the previous Subdivision Control Act was in effect for approximately 30 years prior to the LDA, very little litigation resulted under the land division provisions of the old statute. This lack of litigation was not due to the legislation's clarity; the old statute was also ambiguous and confusing. Rather, it often made little sense for a property owner or developer to litigate over a land division issue. It was normally quicker and cheaper to follow the local municipality's decision or pursue a plat or site condominium project that allowed the property owner to avoid the land division provisions. It is highly likely that those same factors will minimize the amount of litigation that will occur under the LDA. This is significant because judicial rulings could clarify some of the confusion regarding the LDA.

The LDA and zoning

Clearly, the LDA does not negate local zoning regulations. One of the controversies that still rages around the LDA involves the issue of whether a township can require a land division to comply with all the dimension and access provisions of the township's zoning ordinance when the land division is approved. The chances of litigation being commenced by a property owner or developer against a township that pushes the envelope to require all applicable zoning approvals prior to approving a land division probably remains relatively low. For a discussion of land division versus use approvals, see the accompanying article on Page 14.

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Creating tax assessable parcels

Another area of major concern to township officials involves whether a township assessor must issue a permanent parcel number for parcels created in violation of the LDA or without township approval. The State of Michigan, through the Department of Treasury, has taken the position that a township assessor must authorize permanent parcel numbers even for illegally created parcels, notwithstanding that the municipality has not granted land division approval. State officials are not requiring that the land division itself be approved, but they do assert that even illegally created parcels must be issued property tax identification numbers and be assessed as separate parcels for taxation purposes.

Not all legal experts are convinced that the state's position is correct. Nevertheless, since local assessors are subject to various forms of state oversight and could be sanctioned for refusing to recognize illegally created parcels for tax purposes, the consequences for a township tax assessor who refuses to issue new tax identification numbers for illegal parcels could be severe. Accordingly, the wisest course is to issue tax identification numbers and assess parcels separately if the property owner refuses to comply with the LDA.

Even state officials do not assert that the tax identification numbers must be issued immediately. The recommended procedure is to notify the property owner that there has been a LDA violation and refer the matter to the county prosecuting attorney and the Department of Consumer and Industry Services. State officials indicate that if such action does not result in LDA compliance, the township assessor must still issue the tax identification number and assess the illegally created parcels for the following year's assessment roll.

Of course, issuing tax identification numbers and assessing illegally created parcels creates a whole new set of problems for townships. Refusing to issue new tax identification numbers for illegally created parcels was one of the most effective enforcement mechanisms for townships—often more effective than refusing to issuing building permits, zoning permits or other approvals for illegally created parcels. As much as township and state officials might publicize that issuing a tax identification number for or taxing an illegally created parcel does not render the parcel lawful, that distinction will be lost on most property owners. Most people will inevitably argue that issuing a tax identification number and recognizing a parcel for assessment purposes constitutes a municipal seal of approval for the parcel. In the past, one of the red flags for innocent third-party purchasers of an illegally created parcel was the absence of a tax identification number. Unfortunately, the state's position does not seem to take such problems into account.

Is there any way to remedy problems associated with the state's mandatory policy of granting tax identification numbers for and assessing illegal parcels? There are two possible courses of action. First, the municipality could take quick legal action against the property owner(s) by criminal prosecution, civil infraction proceedings or a civil lawsuit to promptly force LDA compliance or recombining of the parcels prior to the time that tax identification numbers must be issued. Normally, this would be the best course of action to prevent creating a reservoir of illegal parcels with tax identification numbers in a township.

It is very important for townships to aggressively pursue prompt LDA compliance. Simply alerting property owners that illegally created parcels will not be eligible for future building, zoning or other permits creates many problems for a township over time. It is almost always easier to reverse an illegal land split or obtain compliance if these matters are dealt with quickly. Otherwise, adjoining parcels are sold, the seller may leave town or go bankrupt, and other factors could arise to complicate the undoing of illegal divisions. When tax identification numbers are issued, it is likely that innocent third-party purchasers will unknowingly buy illegally created parcels. Eventually, the new owners of each parcel will want a building, zoning or other permit and will be denied. There will be great pressure on the township zoning board of appeals to grant the appropriate variances, which should not occur. In many cases, property owners will be left with worthless parcels and will have no option but to initiate litigation against the township.

Second, if the township does not or cannot take prompt legal action prior to issuing a tax identification number for an illegal parcel, the township should send a firm, clear letter to the property owner(s) that states the township's position. The letter should point out the illegality and demand prompt compliance.

The letter should also indicate that issuing a tax identification number and assessing the property as a separate parcel does not "cure" illegal status or imply LDA compliance. Unfortunately, this will not normally give notice to innocent third parties who might purchase any of the illegal parcels.

Townships should investigate the possibility of filing an affidavit with the county register of deeds to put everyone on record notice of an illegal parcel's status. MCL 565.451a permits any person to record an affidavit with the county register of deeds stating any factual matter that may affect title to the property. Care must be taken to ensure that the statement in the affidavit is entirely correct. There is also some uncertainty whether affidavits can be utilized for LDA violations, since it is not entirely clear if violations of MCL 565.45la "affect title to the property involved." Do not use an affidavit without prior consultation with the township's attorney.

How many splits are allowed?

Given the LDA's complexities and ambiguities, reasonable people can disagree about the statute's split provisions. What should a township do if its officials and the property owner disagree over how many land divisions are permitted? Unfortunately, the LDA has no variance procedure. Apart from circuit court action, the LDA has not designated any official to have final interpretive authority regarding the statute.

It is usually best for a township to err on the conservative side and go with the smallest number of allowable divisions. Township liability and harming innocent third parties is less likely with the conservative approach. For example, assume a land owner is able to convince the township to approve seven parcels instead of the five parcels which the township initially believed was proper. After the seven parcels are created, they are sold to seven different buyers. Years later, one of the property owners is unhappy with his property and becomes involved in a dispute with the property seller. MCL 560.267 permits a purchaser of property in violation of the LDA to void the purchase and recover the purchase price and incidental damages from the seller of the illegal lot. Under this scenario, the property owner asserts that only five parcels could be created, not seven, making his lot illegal. The trial court agrees and permits the lot owner to recover the purchase price, interest and incidental damages from the seller.

The seller may attempt to sue the township for approving seven parcels. Although it is likely that the township will ultimately prevail due to governmental immunity–although that is not always a sure thing–township officials will have gone through a major ordeal. Had township officials originally insisted on only five parcels, it is highly likely that this scenario would be much different. In that case, the property owner would reluctantly go along with the township's decision, file a circuit court action or pursue a plat or site condominium development. Even if the township were to lose in circuit court, the action would likely occur relatively quickly and no damages would be involved. Furthermore, innocent third parties would not have been dragged into the dispute.

Parent parcel records help track land divisions

It is important for townships to keep good records, particularly aerial tax maps, for property configurations that existed on March 31, 1997, for two reasons. First, such maps or information will serve as a baseline to help establish whether a parcel was lawfully in existence as of the LDA's effective date. This is important since it will determine whether a property was a parent parcel or parent tract on that date for the purpose of divisions. Second, after 10 years, some parcels will be eligible for redivision. Accordingly, 2007 will be a key year. It is highly likely that township officials will need to refer back to the March 31, 1997, parcel configurations, and it will be important for townships to have kept accurate maps and information as to what existed as of that date.

What constitutes a land division?

Section 102(2) of the LDA defines a division as "the partitioning or splitting of a parcel or tract of land...for the purpose of sale, or lease of more than one year, or building development..." It is not difficult to see how splitting off parcels via a conventional deed or land contract would constitute a land division. However, what if there is no deed or land contract, but a lease of over one year? Or what if there is no deed, land contract or lease, but several building developments occur on one parcel? Generally, all of these constitute land divisions under the LDA. In the real world, these issues normally arise for long-term leases for cellular towers, billboards and strip malls. Generally, if someone wants to locate a cellular tower or billboard on a parcel pursuant to a long-term lease, that would constitute a land division. It is less clear whether long-term leases in a strip mall would be considered land divisions.

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Under the old Subdivision Control Act, the Michigan Court of Appeals held in *Oshtemo Charter Township* vs. *Central Advertising Company* (125 Mich App 538, 1983) that a billboard lease was not a land division under the prior statute. It is not clear whether *Oshtemo Charter Township* remains good law since the new LDA's definition of a land division differs slightly from the old statute. Some have attempted to avoid this controversy by utilizing a license instead of a lease.

The township land division ordinance should define the lot width-to-depth ratio

Under the LDA, each resulting parcel cannot have a depth of more than four times its width. This ratio does not apply for resulting parcels over 10 acres in size or the remnant of the parent parcel or tract retained by the property owner. The LDA permits a municipality to require a smaller or larger lot depth-to-width ratio if expressly specified in a local township ordinance. If the municipality desires to allow a greater lot width-to-depth ratio than four to one, it must be based on specific standards stated in the local ordinance. Can a local municipality apply the lot width-to-depth ratio to parcels larger than 10 acres and remnant parcels? Probably, if expressly covered by the local ordinance. ➤

Unfortunately, many township officials overlook remnants altogether. It is not prudent to disregard remnant parcels since such parcels can potentially violate zoning regulations and other local ordinances.

The LDA does not define how the lot width-to-depth ratio should be measured. Accordingly, the township land division ordinance should define how to measure such ratios. For instance, is depth measured within the parcel from the road to the furthest tip of the parcel or should only the average depth be counted? How is the depth measured if the parcel is "L"-shaped with a back portion of the property running parallel with the street? Townships can avoid problems by defining measurement methods for width-to-depth ratio.

Who should review land division applications?

An increasing number of township assessors are uncomfortable reviewing and approving land divisions. Clearly, the LDA permits township boards to designate any person, persons or body to perform this function. Absent express delegation of such functions elsewhere, however, the township assessor is the responsible official under the LDA's default provisions.

Who is the most likely candidate for the job if not the township assessor? In rural townships, it would normally be the zoning administrator. In more urban townships with in-house staff, it is likely to be the township planner or equivalent official. Should a body such as a planning commission, the township board or some subcommittee perform the function? Although that is permissible, reaching timely decisions on an application, such as 45 days or less, may be a problem if a board or committee is involved. Furthermore, many of these bodies are already overworked.

A land division may not be the final option for the property owner

Many township officials feel a certain amount of regret when turning down a land division request, even where the law clearly requires denial. In most cases, a land division application can be redrawn to comply with all legal requirements. If that occurs, it can ultimately be approved. However, the day when a developer or property owner can split up land with the same ease as cutting a cake is long gone. Too much is at stake to have land divisions occur willy nilly, not only in terms of township zoning and planning, but also regarding otherwise unprotected innocent third-party purchasers. Even where a final land division denial has occurred, it is almost always possible for the property owner or developer to pursue a plat or site condominium project. Although they might not desire to do so due to cost or time constraints, that option is almost always available to them.

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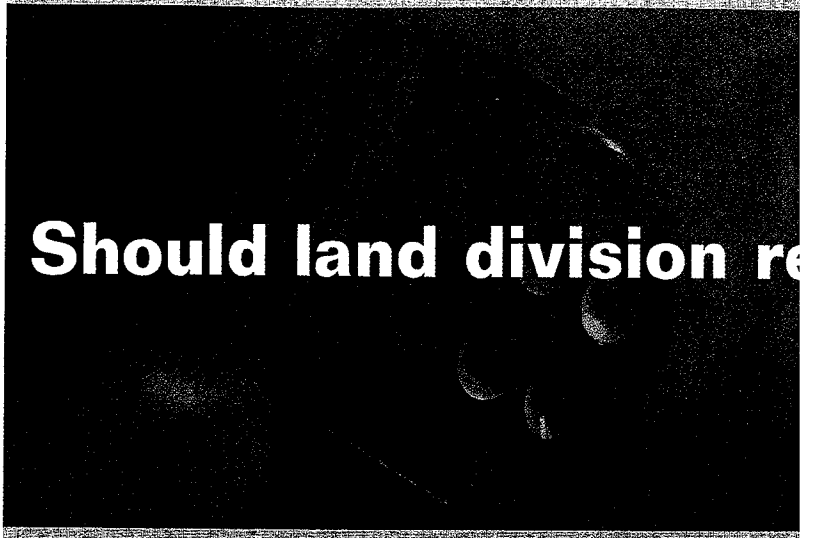

Should land division re

Public Act 87 of 1997, effective July 26, 1997, amended Section 109 of the Land Division Act to enable a municipality to adopt an ordinance requiring land divisions to meet the width-to-depth ratio, width and area requirements specified in the local ordinance. This article, first published under the title "The 'Land Division' Approval vs. 'Use Approval' Issue" in the July 1997 issue of the Planning & Zoning News *shortly after PA 87 took effect, discusses two interpretations of how the amendments affect land division approvals. The issue remains controversial and relevant today. The article has been excerpted and edited as follows.*

Pursuant to Section 109 of the Land Division Act, a township need not approve a proposed land division if each resulting parcel does not meet the lot width, depth and area requirements of the township's ordinance. Subsection 109(1)(c) mandates parcel "width" as required by local ordinances and Subsection 109(1)(d) requires parcels to meet the "area" standards of a local ordinance.

It is interesting to note that the Legislature used the word "area" rather than "size." Area is a much broader term and can probably be defined by local ordinance to encompass other zoning dimensions and spatial requirements, including minimum lot size, setbacks, frontage requirements and others. Additionally, a local municipality presumably could define "width" as requiring a mandated minimum parcel width to be measured on a public road or approved private road, and that any private road so utilized must also meet local municipal ordinance requirements.

Two competing views of approvals have emerged

A few people argue that the LDA now sets up a distinction between land division approval and use approval. They assert that at the time a land division application is made, a township must approve a land division if it meets the lot width-to-depth ratio, minimum lot size and minimum lot width requirements of the municipality's zoning ordinance, even if other zoning regulations and police power ordinance standards are not met.

For instance, a township's zoning ordinance might require a discretionary private road approval for the proposed development or site plan approval because a certain number of lots are proposed. Additionally, that township may also have police power ordinance requirements that pertain to the proposed development, including private road spacing requirements and flood plain regulations. The proponents of the land division approval vs. use approval distinction would argue that the township must approve the land division now and it will be up to the owners or individual parcel purchasers to worry about additional zoning or other approvals later. The pro-