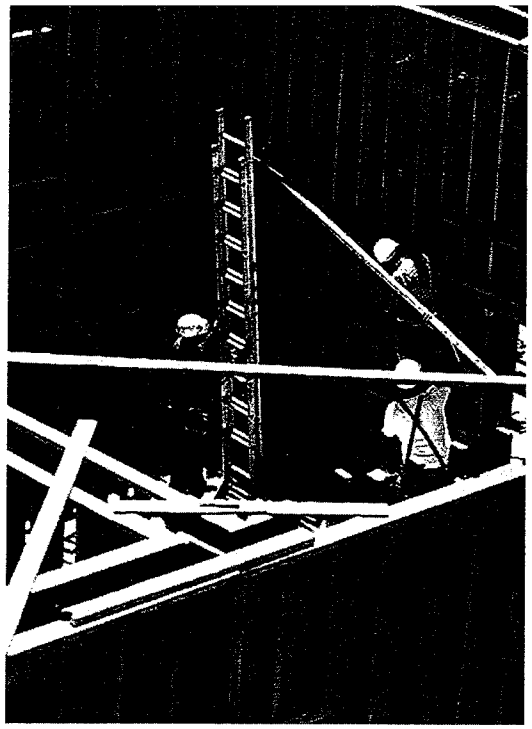
COVER STORY

Uncharted Territory:



The Impact of PA 577 on Rezonings

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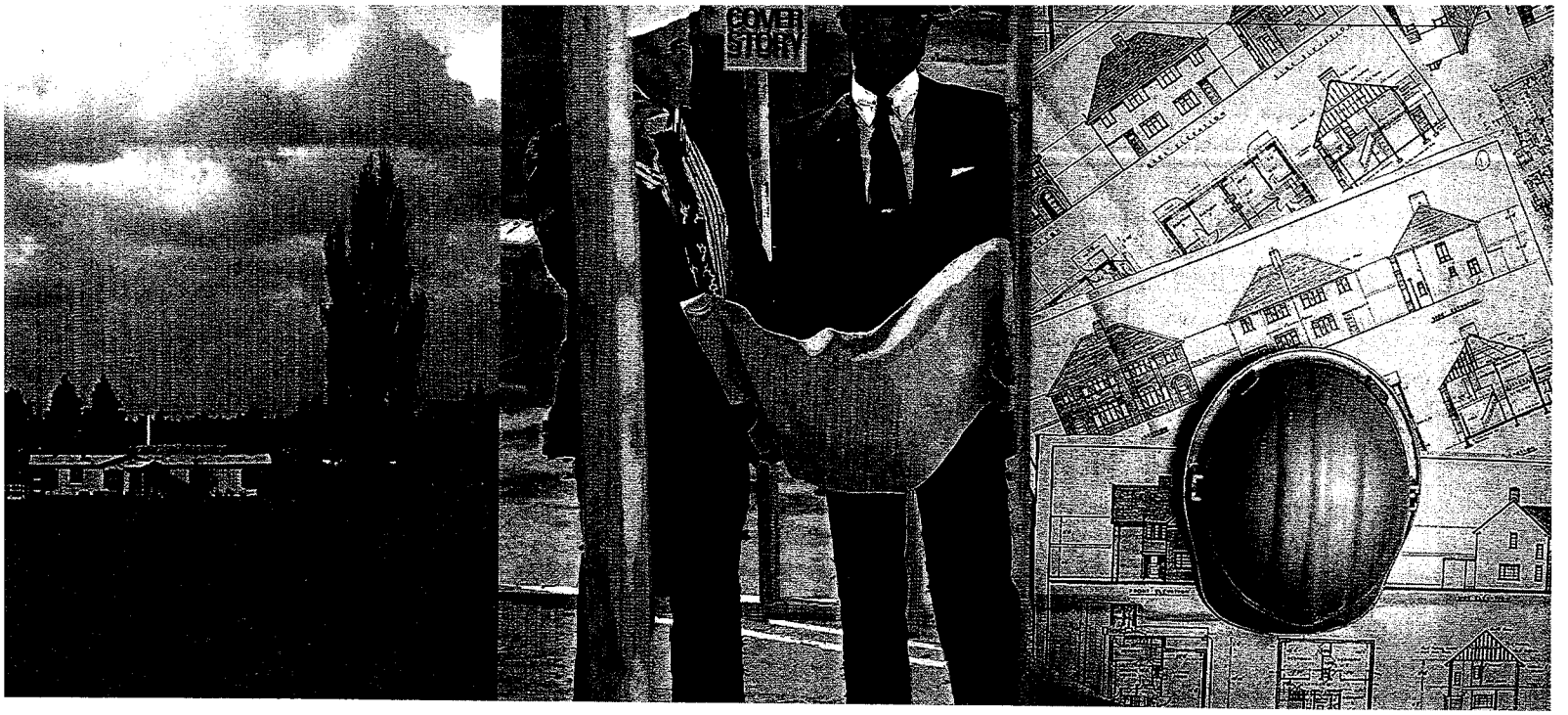
At the usually quiet township board meeting, several residents sit in the audience. A local developer is asking the board to rezone a residential piece of property along a main road in the township to commercial zoning. His hope: to build a small, multi-office professional building on the two-acre parcel.

The residents whose property borders the parcel in question express concerns about increased traffic, and people coming and going during the day, disturbing their peace and quiet, and personal enjoyment of their property. The board weighs the benefits of the new business for the community and the residents' concerns.

The developer makes a suggestion: What if he agrees to not permit the property to be used for the uses the neighbors feel may be objectionable, and provides landscaping and fencing to shield the business from neighbors? The residents consider the compromise, and agree that the modifications would soften the situation. But they are concerned about the property being rezoned commercial—what if the office closes, and a bar or high-traffic business opens in its place?

Thanks to a recent amendment to the Township Zoning Act, the township board can address those concerns, and work with developers and property owners to put voluntary conditions on a rezoning such that, if the conditions are not met, the original zoning classification is returned. The following article provides a comprehensive look at the unprecedented new law—MCL 125.286i—and explains what township officials may consider if and when they find themselves in a rezoning situation.



For the first time in Michigan, legislation has been enacted that permits a township to depart from the "all or nothing" stance once applicable to any rezoning application. Prior to the enactment of Public Act 577 of 2004, which amended the Township Zoning Act, a township was restricted in its ability to review a standard rezoning with respect to any specific use or intensity of use. Unlike other zoning decisions (such as a planned unit development or special land use), conditions could not be attached to a rezoning.

While townships had a minimal amount of input–via the site plan review process–once rezoning was granted, the property owner had a right to pursue any of the permitted uses allowed by the zoning district (or to apply for any special land use), regardless of what the property owner may have promised or represented during the rezoning process.

This led to frequent refusals to rezone property, based on the possibility of allowing a wide range of uses–some of which might have been disruptive in individual neighborhoods or contrary to some part of the comprehensive plan. In some cases, more specific issues, such as the lack of sufficient utilities or roadway improvements, might have caused the denial.

For some members of township boards and planning commissions, the inability to attach specific conditions to rezonings, or otherwise address these issues, was frustrating.

A new tool is now available to townships to allow a greater degree of flexibility in reviewing and deciding rezoning requests. The amendment to the Township Zoning Act (MCL 125.286i) was brief, authorizing voluntary offers to be submitted by applicants for rezonings. This brevity left a number of unanswered questions.

Contract vs. Conditional Rezoning

The terms being used by some for this legislation are "contract zoning" or "conditional zoning." In common practice, these terms have tended to become interchangeable, even though there are clear differences between them, as well as clear differences between these terms and the new Township Zoning Act language.

Contract zoning usually involves attempting to place requirements on a straight rezoning that commits the municipality to rezone property in exchange for certain conditions and requirements, often negotiated between the applicant and the municipality. Contract zoning was generally considered an illegal practice in Michigan, as well as other states, because of the "contracted" commitment on the part of the municipality to rezone property (i.e., a "quid pro quo" rezoning). Contract zoning was therefore seen as improper because it bargained away the municipality's police power.

Because of the confusion in terminology in those states that permit some form of contract zoning, the term most often applied to the inappropriate use of this practice is "illegal contract zoning." Two key components of illegal contract zoning are the promise on the part of the municipality to rezone the property if certain requirements were fulfilled, and a restriction against changing the zoning at some future date.

Conditional zoning was likewise a problem in that the municipality imposed certain conditions and requirements on the property owner as a precedent to a straight rezoning. These conditions and requirements could be unilateral–i.e., with or without the property owner's agreement. This can be contrasted with the new Michigan legislation that requires a *voluntary* initial offer by the owner of the land.

Accordingly, neither "contract zoning" nor "conditional zoning" accurately describes the process now authorized by the Township Zoning Act. In an attempt to avoid confusion with these other practices and terms, this article will use the term "zoning agreement" to specifically describe the process authorized by the unique Michigan legislation.

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continued from page 11

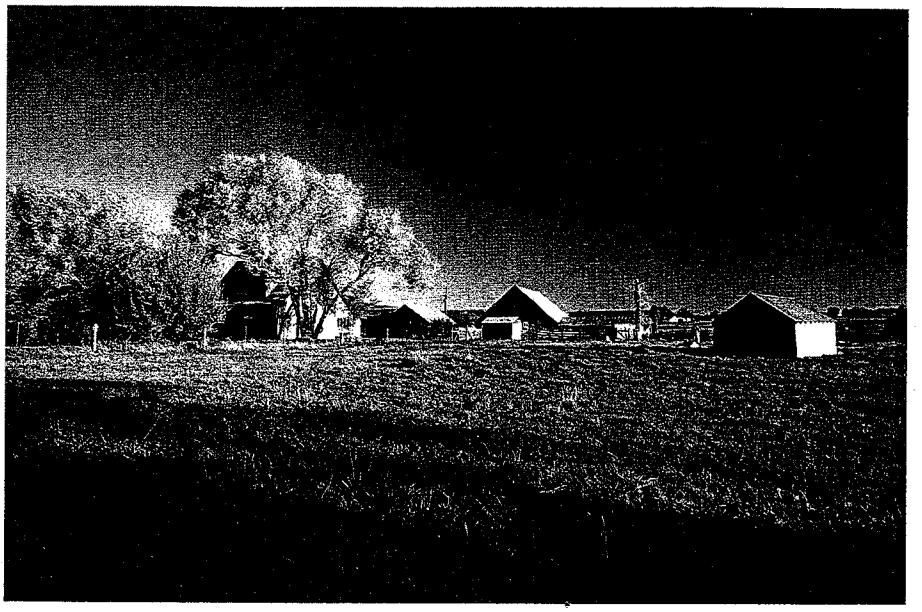
Development Agreements

Another practice commonly used in some communities is the use of development agreements. A development agreement is an entirely different means of attempting to impose commitments on the development of land. Development agreements are often used to further document, substantiate and implement discretionary zoning approvals, such as special land uses, planned unit developments, site plan reviews, variances, etc. Generally, the agreements and conditions imposed on these approvals are reduced to writing (separate from the minutes or other approval resolutions that may be generated) and recorded in legal form at the county register of deeds as an attachment to the land.

The use of a development agreement for a simple rezoning may fail for the same reasons as an illegal contract or conditional zoning. However, it is possible for the state of Michigan to specifically authorize the use of development agreements for straight rezonings by appropriate legislation. The current legislation regarding zoning agreements is not generally considered as proper authorization for development agreements, again largely due to the voluntary offer requirement.

Key Elements to Zoning Agreements

The Township Zoning Act authorization to enter into zoning agreements (MCL 125.286i) raises numerous questions since it lacks detail, has not been widely implemented by local communities in their zoning ordinances, and has yet to be applied in a wide range of real world situations. Without doubt, additional concerns and issues will be raised as communities gain more experience–and perhaps learn some harsh lessons–about zoning agreements. However, some guidance may be gleaned from other states that have used various forms of "contract zoning" and zoning agreements as authorized by state legislation.



There are three key elements to the zoning agreement legislation and its effects:

1) the "offer"
2) reversion of zoning if the agreement is not fulfilled
3) the rate of zoning agreements when evaluating rezoning applications

The Voluntary Offer

MCL 125.286i states that "An owner of land may voluntarily offer in writing, and the township may approve, certain use and development of the land as a condition to a rezoning of the land or an amendment to a zoning map." This part of the Township Zoning Act amendment requires a *voluntary* initial offer in writing by a property owner. Caution is required to avoid any statements to an applicant that may suggest that certain types of offers are *"required"* in order to receive favorable consideration of a rezoning request. The township should only make clear its concerns regarding the potential effects of the proposed zoning change. The applicant may then choose what offers, if any, to include in the zoning agreement that might address the township's concerns.

The ultimate test of the voluntary nature of an offer is ensuring that the applicant not be able to imply that the conditions were coerced, either directly or indirectly, or that promises of a rezoning were made in exchange for the offer. While some degree of negotiation is inevitable, it must be a true negotiation made after the initial voluntary offer, rather than an attempt by any party to coerce an agreement. Township officials must make it clear that approval of a rezoning is not guaranteed, even if an offer is made and initially accepted.

The timing of the offer is also important. Ideally, an offer should be submitted along with the initial application for rezoning. In practice, however, an applicant may not know what offers might be acceptable, or indeed, that an offer would be useful, until well into the application review process.

Some of this may be resolved with a pre-application meeting with township staff, or even a meeting with the planning commission after an application is filed (conducted in accordance with the Open Meetings Act), where concerns may be identified that the applicant may have the opportunity to address.

If not submitted with the initial application, offers or revisions to offers

Don't Try This at Home!

The negotiations and documentation for zoning agreements may be quite complex. It is important that the township receive competent and thorough planning and legal assistance in dealing with this issue. There are a number of potential pitfalls that can arise during the process and its implementation must be addressed earlier, not later.

should at least be submitted well before a public hearing to allow the public to know the nature of the offer. If the offer comes later in the rezoning process, it may be necessary to conduct additional public hearings.

It is also important to understand that the initial offer made by the landowner may rarely be the same as the final zoning agreement. More often than not, the landowner's initial offer may be shorter and less comprehensive than the final zoning agreement. The offer may begin a negotiation process between the land-owner and the township that can, if both parties agree, culminate in a final written comprehensive zoning agreement document to be signed by both parties.

The Offer

While the legislation is silent with respect to the nature of acceptable offers, most courts in those states that authorize these practices have recognized the need for a relationship between the offer and the rezoning. The intent of the zoning agreement is to provide a means to offset some of the potential negative effects of the proposed rezoning. It is equally clear that the zoning agreement cannot permit a land use or activity that would not otherwise be allowed in the new zoning district.

For example, a zoning agreement cannot be used to allow a greater density or a smaller lot than would normally be allowed in the new zoning district. It could, however, be used to lower the allowed density to something that might be less objectionable to the community and surrounding area landowners. Similarly, the agreement cannot be used to vary the basic requirements of the district, such as the number of parking spaces required, sizes of signs, etc. The zoning board of appeals must still address these issues if they arise.

Accordingly, zoning agreements do not replace the normal procedures of the zoning ordinance. Other zoning approvals that are available to allow a degree of development flexibility, such as variances, planned unit developments and others are still necessary parts of the ordinance. In addition, if a site plan review or special land use approval is required for any uses being considered as part of the agreement, those processes must still be pursued.

A common landowner offer may be one which would limit the number of uses allowed after the rezoning is in place. Rezoning denials are often based on the concern that the new district would allow a wide range of permitted uses, some of which might be disruptive to the area. To address this concern, a zoning agreement can include a commitment on the part of the property owner to exclude those objectionable uses. However, it may not be prudent to use this process to limit development to only a single use.

To highlight this concern, consider this example: A commercial rezoning is approved limiting the use of the property to a "professional office." What might happen if the office building is constructed, but the use fails to thrive, and a vacant building results? Presumably, under the terms of the agreement, if a professional office use is not in place for the property, the terms would not be met, and under the Township Zoning Act, the property ***must*** revert to the previous zoning classification. However, this leaves the township with an office building on a residentially zoned lot.

To avoid this, allowing a wider range of uses might be useful or, as noted above, a list of uses not allowed–those that would have the most negative effects on the area–might be part of the agreement, along with screening provisions, sign limitations, and other restrictions that might not otherwise be enforceable through a straight rezoning.

Zoning ordinance language to implement zoning agreements should not attempt to address every possible offer or issue that may be presented–there are simply too many. (Further, a listing of offer types could be misconstrued to provide a list of the only types that would be accepted by the township, thus implying coercion.) Instead, the ordinance should address standards to describe acceptable offers in general.

For example, one standard should be that the offer be reasonably related to the property under consideration. It would not be appropriate, for example, to allow an applicant to contribute to the construction of a new township hall or a community park that was otherwise not part of or connected to the property being rezoned. Township officials must be cautious and avoid the perception that an applicant is "buying" a rezoning. To do otherwise could lead to widespread abuse.

The following are examples of zoning agreement provisions that would ***not*** be appropriate:

- The new zoning district limits the height of buildings to 35 feet. The applicant offers to increase the setback of the building in exchange for a 50-foot building height. (The agreement cannot permit something that would not otherwise be allowed in the new district.)
- An applicant suggests a zoning agreement that offers a cash payment to the township to use as it sees fit. (The offer must bear some relationship to the land and rezoning under consideration.)
- The agreement includes a clause that prohibits the township from changing the zoning of the property for a period of two years. (The agreement cannot be used to "bargain away" the township's zoning authority.)

While a complete listing of possible acceptable offers is simply not feasible, some examples may be useful:

- The township's comprehensive plan notes that rezonings for high-density residential uses will not be considered until public utilities are available to the property. The owner offers a zoning agreement to extend public utilities to the site at his/her expense.
- Concerns about the small lots allowed in the new district are expressed by neighboring property owners during a rezoning public hearing. The applicant submits a zoning agreement that increases the sizes of the lots (lowers the density) that will be available in the new development.
- A commercial rezoning request is submitted on property next to a residential use. The owner offers to install a landscape screen between the existing home and the commercial uses where a land-

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continued from page 13

scaping requirement is otherwise not part of the current ordinance.

Zoning Reversion

The Township Zoning Act states that if the provisions of the zoning agreement fail to be fulfilled, or are not met within a period of time specified by the agreement, the property *shall revert* back to the previous zoning classification. Other states where contract or conditional zoning is valid have found this to be an important enforcement tool to control development and help guarantee the implementation of these agreements.

Under Michigan's statutory language, the actual meaning or intent of reversion is unclear. For example, if the legislation would have stated that the zoning "automatically" reverts to the previous classification, it could have been interpreted that no formal township action, such as public hearings or notices, would be necessary. However, the language merely states that a reversion is required.

Courts in other areas of the country where zoning agreements are used have held that a reversion actually constitutes a second rezoning. Absent further interpretation or legislative clarification, following all statutory procedures and requirements for public notice and a hearing for reversion may be necessary. This also permits the public to be made aware of the rezoning and expiration or nullification of the zoning agreement.

Zoning Reversions

According to the Henrico County, Virginia zoning ordinance, once conditions (in Virginia they are known as "proffers") have been accepted by the legislative body, any changes require submitting an amendment request and a public hearing before the Planning Commission and the Board of Supervisors. This process is akin to a rezoning.

A unique situation could arise if a project is partially implemented and the zoning agreement is not completely fulfilled by the owner. In this instance, a decision is necessary as to whether to return the entire property to the previous classification, or only that portion not yet affected by the agreement. If the entire property is reverted to the previous zoning, it is likely that nonconforming uses, buildings or lots will be created.

Maryland courts found in *Colwell v. Howard County*, 31 Md. App. 8, 354 A. 2d 210 (1976) that a "... use it or lose it provision to be an effective tool for controlling premature land development and inhibiting land speculation and ...that the reversion clause bore a rational relationship to zoning purposes."

On the other hand, if the earlier phases complied with the terms of the agreement, the areas affected could remain in the new zoning district. Of course, a myriad of problems could arise. For example, suppose that the less desirable buildings and amenities under the zoning agreement have been completed at the time the agreement expires, but the more desirable components have not been commenced. Reverting to the prior zoning designation could actually let the developer "off the hook" being able to avoid the expense of building the portions of the development, which the township originally saw as a key justification for the rezoning.

The Township Zoning Act stipulates that a local government cannot alter the provisions of the zoning agreement during a specified period of time. This provides some level of protection for the landowner or developer by locking in the agreement provisions for at least some specified time. However, since the agreement cannot include a restriction against rezoning a property to another district or changing code requirements, a property owner who has received a desired rezoning may desire to move quickly to establish vested rights. (See sidebar at right).

If conditions are not met during the stated time limits of the agreement, the township has two choices: either extend the time frame or, as noted earlier, initiate the process to return the zoning for some or all of the property to its previous classification.

Vested Right

Heath Township v Sall
442 Mich 434; 502 NW2d 627 (1993)

"To establish a prior nonconforming use, a property owner must have engaged in work of a substantial character done in preparation for an actual use of the premises. The actual use which is nonconforming must be apparent and manifested by a tangible change in the land, and preliminary operations are insufficient. Work of a substantial nature beyond mere preparation must materially and objectively change the land itself."

Evaluating Rezonings with Zoning Agreements

While zoning agreements may prove a useful tool in tailoring land development to individual sites and situations, they should not be used to avoid the fundamental planning principles upon which communities are built. Zoning agreements should not be viewed as a panacea that cures all problems related to zoning. Instead, they should be entered into only after careful consideration and deliberation.

Legal challenges associated with zoning agreements are often not based on the terms of the agreement (except where the terms are clearly inappropriate). Rather, courts tend to evaluate the rezoning decision itself, testing the decision by the same standards that are used for any rezoning. Normal rezoning considerations, such as consistency with the comprehensive plan and ensuring that the uses or activities covered by the agreement (and the subsequent rezoning) are compatible with the neighborhood, are still valid and necessary.

Unlike a typical straight rezoning, it may be useful, where applicable, to include a site plan with the zoning agreement. This may not be necessary where the agreement does not affect any site plan issue. However, even if a site plan is included with the agreement, it does not replace the other site plan review requirements required by the zoning ordinance.

Implementing the Zoning Agreement

Before taking any steps concerning zoning agreements, the township should first consider whether it wants to participate in the process. The language of the Township Zoning Act consistently uses the term "may." Accordingly, a township is not required to participate in any zoning agreement or other offer made by an owner/applicant for a rezoning. If agreements will not be

considered, this should be clearly stated as a township policy.

The new legislation does not require a township to amend its zoning ordinance in order to implement the zoning agreement process. In fact, a few municipal experts believe that these ordinance amendments are unnecessary and a potential waste of time. The authors of this article believe that amendments to township zoning ordinances are both worthwhile and desirable to give townships maximum flexibility, and to assist them with the implementation of the zoning agreement process.

The new legislation is somewhat vague and leaves many terms undefined. This is a perfect situation for townships to "flesh out" both the meaning of the legislation and the authority of the township by using its local zoning ordinance to supplement statutory language. Normally, that is lawful so long as the zoning ordinance amendments do not conflict with or appear contrary to the statutory language. Townships have been quite successful in utilizing this process for other less artfully drawn statutes, such as the Michigan Land Division Act (MCL 560.101, *et seq*) and the open space preservation changes (MCL 125.286h). to the township zoning act.

Therefore, amendment of the township's zoning ordinance can be an effective first step to implement the zoning agreement process. Since the process is voluntary, the amendment will not replace the current procedures for a straight rezoning. Rather, the zoning agreement process should be written as a separate procedure. At a minimum, the following issues should be addressed as part of the amending ordinance.

• *Offers*

As noted earlier, the ordinance language should not attempt to address every possible type of offer or issue that may be presented–there are simply too many. Instead, the ordinance should address criteria that make the offer a valid one. The timing of the offer should also be addressed. For example, a procedure should be in place that addresses the possibility of an offer being submitted by the landowner after the planning commission has already conducted its required public

hearing, and forwarded a recommendation to the township board. The board may be given the option of holding its own public hearing, or returning the application back to the planning commission to conduct its own hearing and forward a revised recommendation back to the board.

• *Process*

Application procedures should be put into place which clearly describe the process, from the point when an offer to enter into a zoning agreement is first submitted, to the final step of recording of the signed agreement. Careful review by the township's attorney and consultants must also be part of the process. Finally, staff and decision-makers should be made aware of these requirements, and educated as to the advantages and potential dangers for misuse and abuse of zoning agreements.

The normal rezoning procedures of the Township Zoning Act must still be followed, including notice and public hearing requirements.

The ordinance amendment should also include a requirement that the final executed zoning agreement be recorded with the county register of deeds to ensure that its provisions "run with the land," that subsequent buyers of the land have notice, and that the terms are carried over to future owners.

• *Expiration*

The ordinance amendment should require the zoning agreement to include a time period during which the provisions of the agreement are to be completed. Any changes to the agreement during this period must be mutually agreed upon by the township and the owner. An extension period may also be included. Make sure that any application for an extension is required to be submitted in writing, well in advance of the planned expiration date.

The ordinance amendment should require that a zoning agreement be thoroughly reviewed by the community's planner, attorney and other appropriate professionals, both for content as well as legality.

What's In the Zoning Agreement?

The zoning agreement itself may either be a separate document, or part of the particular rezoning's amending ordinance document implementing the rezoning. Municipal attorneys may have their own preferences about which format to use. Over time, "model" agreements may become available as well. Regardless of form, zoning agreements can only ultimately be approved by the township board, after receiving recommendations from the planning commission, not only as to the rezoning, but on the agreement provisions as well.

In discussions with a number of Michigan municipal attorneys, some basic

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