Navigating Private Road Issues

Few issues cause so many Michigan township officials as much grief as private roads. This article attempts to address a wide variety of private road issues in "bite-size" fashion.

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1. *Do Townships Even Have to Allow Private Roads?*

While most townships permit private roads, it's never come up with a simple solution for avoiding the headaches of private roads: they simply prohibit them. Logistically, the townships require that all new parcels, lots and site condominium units have a required amount of frontage on a fully improved public road. Existing private roads and properties along them are deemed lawful nonconforming ("grandparented") uses, but such private roads cannot be extended or expanded, nor can the parcels along them be further split or subdivided.

Is it legally permissible to ban new private roads? Probably, although no Michigan appellate court has yet addressed the issue.

Why don't more townships prohibit private roads? There are several reasons. First, many townships have found it politically difficult to tell property owners that they cannot develop their property by means of private road easements. Also, private roads allow them to avoid the further expenses associated with installing a new public road. Second, private roads tend to have less negative impacts upon the natural terrain which installed than public roads. Normally, fewer trees have to be removed due to the narrower private roads, and not as many hills have to be leveled due to more liberal grade regulations. As such, private roads are often more "environmentally friendly" than public roads. Finally, more often than not, the use of private roads tends to breed less dense housing developments given the lower costs associated with installing private roads and the typical purchasing practice.

2. *Can Townships Regulate New Private Roads?*

Yes, townships can regulate new private roads (and extensions or expansions of existing private roads, including further division of lands serviced by existing private roads) via either a local zoning ordinance under the Michigan Township Zoning Act (MCLA 125.271, *et seq*) or by means of a general nonzoning police power ordinance pursuant to MCLA 41.181, *et seq* (general law township) or MCLA 42.15, *et seq* (charter township).

3. *Can Townships Regulate Existing/Grandparented Private Roads?*

Probably, although few townships do so. If new private road regulations are adopted by a township as an amendment to a zoning ordinance, all pre-existing lawful private roads (and parcels thereon) have lawful nonconforming status. However, a lawful nonconforming private road cannot be extended (nor can existing lands served by the nonconforming road be further subdivided or additional lands be added to the private road), since that would constitute an unlawful expansion of a nonconforming

use. Under Michigan law (MCLA 125.286) and pursuant to both the Michigan and federal Constitutions, new zoning regulations cannot cut off or adversely affect prior vested rights or lawful nonconforming uses. Interestingly enough, however, ordinances adopted by a township under its police powers probably can regulate existing roads, even if they are lawfully nonconforming. *See Natural Aggregates Corp.* vs. *Brighton Township*, 213 Mich App 287 (1995), and *Casco Township* vs. *Brame Trucking Co.*, 34 Mich App 466 (1971).

How might a township regulate existing substandard private roads? Via a police power ordinance, a township could set certain minimum design and maintenance standards for existing private roads. For example, such an ordinance could require that all private roads be fully snowplowed within eight hours of a snowfall of three inches or more. Or a township could require that a private road serving one to five parcels have a traveled road surface at least 12 feet wide, comprised of at least four inches of gravel or two inches of asphalt. Or such an ordinance could require that all existing private roads be designed and maintained so as to fully support travel by a 40,000-pound fire truck year-round.

This type of ordinance must be reasonable, however, or it could be subject to a successful court challenge based on a property owner's assertion of unreasonableness or claim that it constitutes a "taking."

4. Are Private Roads Best Regulated by the Zoning Ordinance or a Stand-alone Police Power Ordinance?

This is a close call, and the experts disagree. Theoretically, private road regulations can be adopted as either a zoning ordinance amendment or police power ordinance. Ideally, a township will enact parallel provisions in both its zoning ordinance and in a stand-alone police power ordinance. That way, if one ordinance is successfully challenged in court, the township might have the other to fall back on.

If a township is given a choice between one or the other type of ordinance and the township is not overly concerned with regulating existing private roads, it is probably better to adopt private road regulations as an amendment to the zoning ordinance for at least two reasons:

Private road regulations can be adopted as either a zoning ordinance amendment or police power ordinance.

- a township's ordinance authority seems to be broader under the Township Zoning Act than under the general ordinance statute; and

- placing the regulations in the zoning ordinance permits appeals to the zoning board of appeals in difficult cases, although theoretically one can also put an appeal or variance process into a police power ordinance.

5. Can an Escrow Fee Provision be Utilized for the Private Road Review, Approval and Inspection Process?

Zoning escrow fee policies are a natural for the private road review and inspection process. Zoning escrow fees are monies that the applicant must deposit with the township involved, and are in addition to the normal fixed fees. Typically, such zoning escrow fees are used to reimburse a township for costs directly incurred by it in the zoning review, approval and inspection process, including applicable expenses of the township attorney, planner and engineer. Utilizing a zoning escrow fee policy in the context of private roads tends to lead to a better review process and follow-up, as well as alleviating the need for the township to spend significant amounts of unreimbursed money for such processes. Zoning escrow fees were generally upheld by the Michigan appellate courts in *Cornerstone Investments, Inc.* vs. *Cannon Township*, 459 Mich 908 (1999); *after remand*, 239 Mich App 98 (1999).

Note: A workshop, "How to Save Your Township Money–Escrow, Zoning and Building Fees," will be conducted at the MTA Annual Educational Conference in Grand Rapids, January 15-18, 2002.

6. Can a Land Division Request be Denied if the Means of Access is a Proposed Private Road Until the Private Road has been Approved by the Township?

There is a split of opinion in Michigan regarding whether a township can delay or deny a land division request where the proposed parcels are to be served by a private road and the private road has not yet been approved by the township. There may be lawful ways for a township to deny a land division application involving a new, unapproved private road or access easement based on a township's definition of lot area or lot width. Nevertheless, this is an area where legal experts disagree. Accordingly, your township should consult with its own legal counsel should these issues arise.

7. Can a Township be Held Liable for Approving or Regulating Private Roads?

Under current Michigan law, it is unlikely that a township would be held liable in the courts for torts arising out of the regulation, approval or inspection of a private road. This is based on several legal theories.

- First, townships have governmental immunity. Although governmental immunity is not absolute, it would present a formidable obstacle against a plaintiff prevailing in a tort action against a township for injuries occurring on a private road.

- Second, in the past, the courts have generally held that municipalities owe no legal duty to the injured party in such a situation, although this defense may no longer be applicable.

- Finally, the courts have usually also held that there is not sufficient causation or control to impose liability upon the municipality. *See Kuriakuz* vs. *West Bloomfield Township, 196 Mich App 175 (1992); Robinson* vs. *City of Detroit,*

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462 Mich 439 (2000); Beaudrie vs. *Henderson and the City of Dearborn, 465 Mich 124 (2001).*

Obviously, if townships did not generally have immunity in these cases, it would have a severe chilling effect on the desirability of having townships enact zoning, disorderly conduct, building code and other ordinances, let alone private road regulations.

Some believe that the liability potential might be greater for townships where private road regulations are involved than for other types of regulations, since people can be injured in vehicle accidents on private roads. That belief is probably misguided. Townships approve a wide range of other structures and activities wherein people could be injured. If a township desires to enact private road regulations but is concerned about liability, it should check with its insurance agent or carrier to determine whether it will be covered (and if so, for how much) in the relatively rare event that it is sued for a calamity which occurs on an approved private road.

8. *Can a Township Improve a Private Road Pursuant to a Special Assessment District?*

Yes. MCLA 41.722(1)(m) and 247.391, *et seq* expressly authorize special assessment districts to improve and maintain private roads. Such provisions might strike some as strange, since a substandard existing private road would appear to be a private problem for which a public solution would normally be unavailable. Solving what appears to be a "private problem" is not unusual for special assessment districts, however. Many townships set up special assessment districts for lighting, even in private developments with private roads. Special assessment districts for aquatic weed control often occur on private lakes with no public access. Drainage districts are frequently set up via special assessment to primarily benefit private properties. The key is that only the property owners who benefit from the improvement pay for the improvement–the governmental unit is merely facilitating that process via the special assessment procedure.

Should a township become involved in setting up a special assessment district for a private road? Some very good arguments can be made that numerous public purposes will be served where a substandard private road is upgraded by special assessment when not all of the property owners along the road can agree on how to accomplish such an upgrade.

- First, a public safety issue exists. Not all vehicles using a private road involve the property owners or their families–third parties such as mail carriers, utility readers and visitors often use private roads.
- Second, emergency personnel such as firefighters, police and ambulance/EMS professionals have to be able to easily access properties on a private road, not only for the safety of occupants of the property, but also for the emergency personnel themselves.
- Third, anyone who has been involved in a private road dispute knows that it is very common for owners of properties along a private road to be unable to agree on key items such as what maintenance work should be done, when it should be done, who should do it, and who should pay for the work. Absent unanimity or a good permanent

Typical Private Road Regulations Used by Townships

Township regulations vary significantly. Nevertheless, the following are some common provisions:

- As-built drawings of the installed road to be supplied by the applicant as stamped by a registered engineer
- Minimum construction standards, which are often done on a sliding scale, depending on how many parcels are to be served (for example, 1-5 parcels, 18-foot-wide road bed, 5 inches of compacted gravel over 12 inches of sand)
- Fees
- Maximum grade limits
- Spacing requirements between entrances to private and other roads
- Minimum private easement width (usually 66 feet)
- Definitions of a private road
- Maximum length of a private road without a second access
- Provisions regarding what to do with prior lawful nonconforming roads and additions thereto
- Maintenance/easement agreement required and must be reviewed and approved by the township before hand
- Snowplowing and maintenance
- The township approval process (whether the private road requires simple site plan approval, a special use approval or other approval)
- Inspection requirements
- Permits
- Requirement that the private road be named and that a private road name sign be maintained at all times
- Shoulder, drainage, bridge and similar standards
- Stop sign requirements
- Maintenance agreement requirements and disclosure statements
- No building permits until the private road has been installed and approved (or alternately, posting of security)
- Requiring a certain amount of frontage on a private road for each parcel benefited
- Limiting the degree of curves or turns

maintenance agreement, the special assessment procedure is a way to ensure that proper maintenance and repairs will occur.

• Finally, like it or not, township officials are often sucked into private road disputes and a special assessment district is one way of either resolving the situation or indicating politely to citizens that if a special assessment district does not occur, there is nothing else that the township can do.

9. *What is the Opening of Private Roads and Temporary Highways Act and How Does It Affect Townships?*

Public Act 283 of 1909, the Opening of Private Roads and Temporary Highways Act (MCLA 229.1, *et seq*), permitted townships to force adjoining property owners to give private access easements for landlocked parcels pursuant to the impaneling of a township jury. On May 15, 2001, the Michigan Supreme Court in *Tolksdorf* vs. *Griffith*, 464 Mich 1 (2001), held that the act was unconstitutional, since it essentially constituted the taking of a private property interest (i.e., an access easement) for a private benefit and purpose (to assist the landlocked property owner). Accordingly, the act is now invalid and of no effect.

10. *If a Property Owner Desires to Add Onto a Nonconforming Private Road (or Add Additional Parcels to It), is It Lawful to Make that Property Owner Upgrade the Entire Length of the Private Road?*

Remember, a lawful nonconforming private road (as well as the parcels located thereon) is only "grandparented" at its exact scope and configuration as of the date when the private road regulations became effective. Accordingly, any proposal to extend, add additional parcels onto or to split existing parcels along a nonconforming private road would constitute an illegal expansion of a nonconforming use. In such situations, the proponent of expansion has three options.

1)The proponent could upgrade the entire length of the existing private road so that it becomes "conforming." Rarely does a developer or property owner agree to do this, since it can prove to be quite expensive. Furthermore, there are many cases where it is impossible to upgrade the existing private road or make it fully conforming.

For example, some existing easements or maintenance agreements preclude alterations to a private road without a majority (or even supermajority) vote of all property owners. Thus, even if a property owner is willing to physically upgrade the entire length of a private road to serve additional parcels, the existing property owners along the private road can sometimes block any upgrade by not voting in favor of the improvements. Likewise, current private road regulations could require a 66-foot-wide easement and a maintenance agreement with specific provisions which binds all parties, such that an existing private road cannot be made conforming without having both of those requirements in place. Other property owners along the nonconforming private road could easily block the road from becoming conforming by refusing to give additional easement or right-of-way width to

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meet the 66-foot-wide requirement or by refusing to sign a new maintenance agreement which complies with current ordinance requirements.

2) A developer or property owner could seek a variance to allow a nonconforming private road expansion or the addition of more parcels thereon without any road upgrades. This option would theoretically be available where private road regulations are contained in the township zoning ordinance or a police power ordinance that contains a variance procedure. Although a property owner might have a right in most cases to apply for a variance, the township zoning board of appeals should almost never approve such a variance due to the simple fact that the applicable variance standards could almost never be met. This is analogous to the situation where someone desires a variance to split a parcel on a public road to create two parcels, wherein one or both parcels don't meet minimum lot size, width or frontage requirements. Such variances should almost never be granted.

3) If a developer or property owner does not desire to (or cannot) upgrade the entire length of a nonconforming private road and has been denied a variance, the township can be sued. Assuming that the applicable township ordinances have been carefully drafted, it is unlikely that the developer or property owner will prevail in court. Happily, townships have the Michigan Court of Appeals case of *Dowerk* vs. *Charter Township of Oxford*, 233 Mich App 62 (1998), which directly addresses these issues. The Dowerk court held that:

- The township was not obligated to create a special assessment district to improve the private road so that the plaintiff could divide her property.
- The township could require that the property owner upgrade the entire length of the private road to meet current standards as a prerequisite to splitting the property.
- The township did not have to grant a variance to the property owner to permit her to split her property without upgrading the entire private road.

Absent unanimity or a good permanent maintenance agreement, the special assessment procedure is a way to ensure that proper maintenance and repairs will occur.

11. Does the County Road Commission have Jurisdiction Over Private Roads?

The jurisdiction and regulatory authority of county road commissions are very limited when it comes to private roads. Generally, a county road commission can only regulate those portions of a private road that intersect with a public road. County road commissions do not usually attempt to regulate portions of a private road located beyond its intersection with a public road. Accordingly, if a township does not regulate the construction and maintenance of private roads beyond those areas that intersect with public roads, there will be a "void" in government regulation, since no other governmental unit would normally be involved.

Although county road commissions usually only regulate those portions of a private road which intersect with a public road, such regulation is important, and on some occasions, can even preclude the installation or use of a private road. County road commissions typically require certain designs for the "curb cut" or approach where a private road intersects with the public road. During construction of the private road, a county road commission can require the posting of security (such as a cash deposit, bond or letter of credit) to ensure that the improvements required by the county road commission are made. Many road commissions also require a private road name street sign at the intersection of the private road with the public road, and some require that such signs be made and installed by the road commission.

Road commissions also have the authority to determine where along a public road a new private road can put its curb cut. The county road commission involved will normally look at visibility of the private road approach as it relates to the topography of the public road and spacing between private roads and intersecting public roads. The ability of a county road commission to dictate the location of the entrance to a private road along a public road can have a major impact upon a proposed private road or development involving a proposed private road. In a few situations, the road commission might force a developer or property owner to move the entrance to a private road to a much more expensive site or even preclude the use of a private road altogether, thus allowing only a simple driveway use by one parcel, so that a larger development could not occur.

12. Why Should a Township Require Maintenance Agreements and Require that Specific Language be Placed in Such an Agreement?

The phrase "maintenance agreement" is often used to mean language in a document creating a private road easement that should address such issues as main-

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tenance, usage and voting. Officials in some townships view private road maintenance agreements as a private matter, with which townships should not become involved. For one response to such concerns, see question 8 above. Another response is that maintenance agreements are different than most other agreements between private parties.

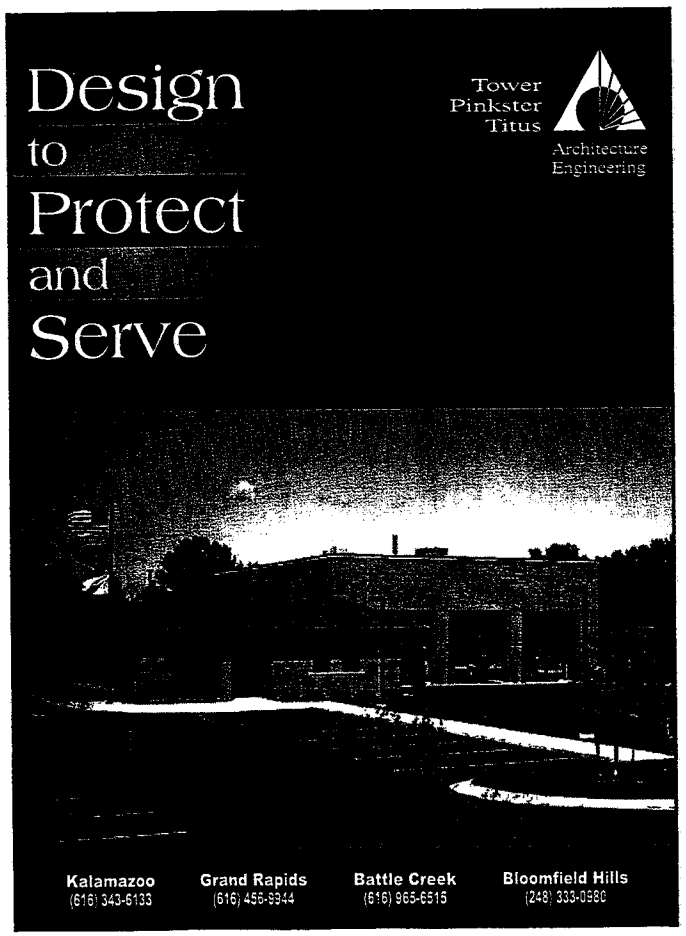
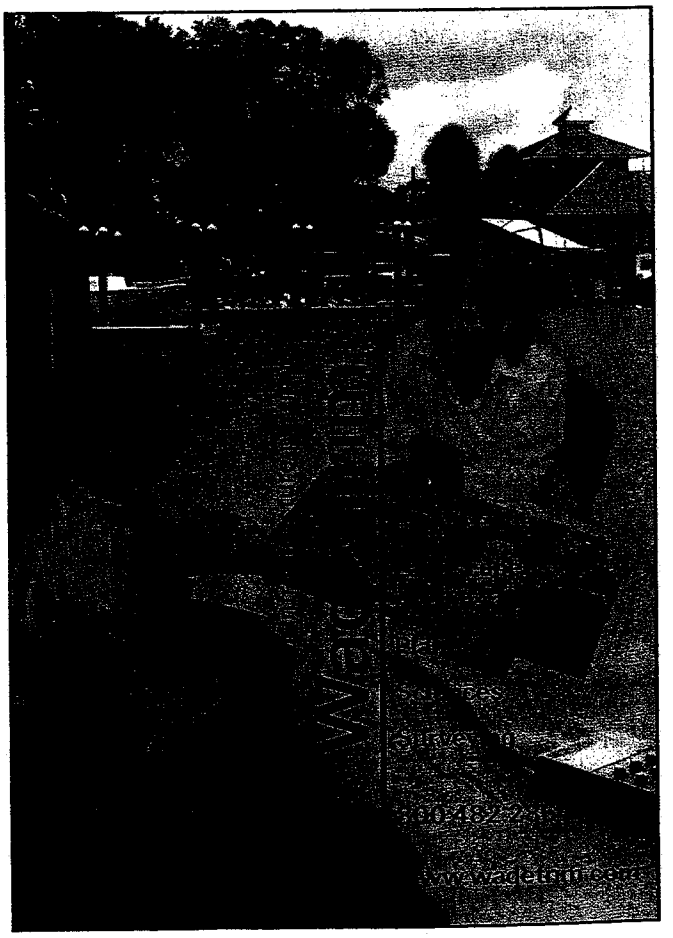
A maintenance agreement is akin to a constitution that will likely forever govern the interrelationship between property owners along a private road for very important matters such as maintenance, repair and upgrading of a private road. Furthermore, once a maintenance agreement is signed and recorded at or prior to the time a private road is installed, it is more or less set in stone–experience has shown that it is virtually impossible to get all property owners along a private road to agree to add items to or otherwise amend a maintenance agreement later.

If a maintenance agreement is done right the first time, it will often alleviate a large number of headaches in the future, not only for the property owners involved, but also for township officials who would otherwise have to mediate disputes or receive midnight calls due to disputes based on a nonexistent or defective maintenance agreement.

It is fairly common for townships that regulate private roads to require that a proposed maintenance agreement be submitted for review and approval by the township attorney prior to its execution and recording.

13. *How Do Private Road Easements Relate to Zoning Area Requirements Such as Setbacks and Minimum Lot Size Requirements?*

To prevent confusion and possible court challenge, a township's zoning ordinance should specifically deal with the following issues:

- Whether land underlying a private road easement can be counted for purposes of minimum lot size requirements.
- Whether front yard or other setback requirements apply to private road easements as well as public road rights-of-way.
- Whether a private road easement along the edge of a parcel is counted for purposes of whether or not the parcel meets the minimum lot width requirements.
- Whether property owned by the same person located on opposite sides of a private road easement constitutes a single parcel or two separate parcels. ■

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