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.

"It is very important to aggressively pursue prompt LDA compliance."

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.

"It is usually best for a township to err on the conservative side and go with the smallest number of allowable divisions."

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.*

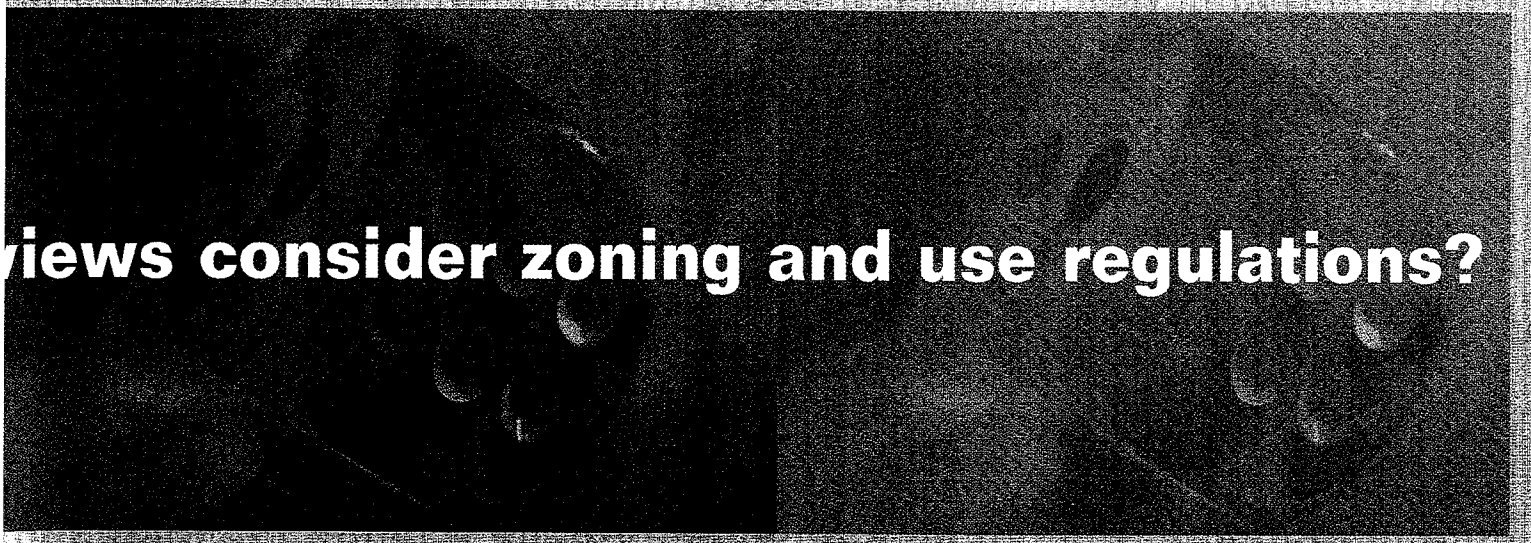
Pursuant to Section 109 of the Land Division Act, a township need not approve a proposed land division if each resulting parcel does not meet the lot width, depth and area requirements of the township's ordinance. Subsection 109(1)(c) mandates parcel "width" as required by local ordinances and Subsection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



iews consider zoning and use regulations?

"Anyone who attempts to obtain a land division approval that does not meet all zoning regulation and other ordinance requirements at the time of the division, based upon the gamble that they will obtain such approvals later, is playing a very dangerous game."

ponents of this distinction base their arguments on the changes made by the 1997 amendments, as well as the addition of Subsection 109(6), which states: "Approval of a division is not a determination that the resulting parcels comply with other ordinances or regulations."

The opponents of the land division vs. use approval theory argue that there is no such distinction under the LDA, and that the applicant must meet all applicable zoning and other ordinance requirements at the time of the land division. They believe that the Legislature intended that all such requirements be met at the time of the land division and that the LDA's language is broad enough to permit that view. They also believe Subsection 109(6) is boilerplate language that simply confirms that all local municipal ordinances must be met, particularly where a municipality approves a land division even though all other ordinance requirements are not met. The new language is not a wholesale license for landowners or developers to insist upon land division approval even though certain ordinance requirements other than lot width-to-depth ratios, size and width regulations are not met.

The narrow land division viewpoint can cause problems

It is the opinion of this author that anyone who would attempt to obtain a land division approval that does not meet all zoning regulations and other ordinance requirements at the time of the division, based upon the gamble that they will be able to obtain such approvals later, would be playing a very dangerous game. First, there is certainly no guarantee that approvals will come later, either by variance, court challenge or a change of local ordinances. Second, variances should not be granted under such circumstances because they would be purely "self-created." Quite simply, any purchaser of property is deemed to be responsible for any earlier land division errors or risks by his or her seller or predecessor in title with regards to zoning regulations and dimensions. In *Johnson* vs. *Robinson Township* (420 Mich 115, 1984), the Michigan Supreme Court unanimously held that no variance could be granted for minimum lot size requirements where the property owner's predecessor created an illegal lot that was substandard in size. Third, quite often, innocent third parties will end up buying parcels that do not comply with zoning or other ordinances, and they will not be able to build or utilize the property. That will breed lawsuits against the property seller or developer, as well as potentially against the municipality and realtor(s) or broker(s) involved.

It is highly unlikely that the Legislature would have intended these bizarre and sometimes even tragic results by sanctioning a system whereby a seller or developer could force a land division approval which clearly does not meet other local ordinance requirements and would put off the buildability or usability issue to be dealt with by innocent purchasers at a future date.

What to do with questionable land divisions

What can a municipality do to protect itself and innocent purchasers from a seller or developer who insists that a land division be approved, even if certain zoning regulations or other ordinances apart from lot width-to-depth, size or width issues are not met? There are basically two options:

1) After consulting with its legal counsel, the municipality might decide to refuse to approve the land division. Even if the municipality is sued and loses, it will have taken the high road to protect its ordinances and future innocent purchasers—it may even be able to convince the court involved to enter an order which states that the parcel(s) cannot be used until and unless they conform with all ordinances and that all prospective purchasers be given notice of that risk or at least that the order be recorded with the County Register of Deeds.

2) If the municipality becomes convinced, either by its legal counsel or future appellate cases, that it must approve the land division, it could place a disclosure or condition on the approval form or permit expressly pointing out that the approval is for land division only and that one or more of the resulting parcels may never be buildable/usable unless additional zoning or ordinance approvals are obtained and that the applicants/future owners proceed at their own risk. The applications could even be designed so that any approval with such a disclosure could be recordable with the Register of Deeds, although a municipality should consult with its legal counsel about the process beforehand.❖

—By Clifford H. Bloom. Excerpted from the July 1997 issue of the Planning & Zoning News, *pursuant to the permission of the Planning & Zoning Center, Inc., (517) 886-0555.*

FAQs ON THE LDA

The following are frequently asked questions regarding the Land Division Act. The LDA is unclear and the courts have not ruled on these issues, so the answers represent the majority viewpoint among municipal experts about what the courts might ultimately decide. Given the complexity and ambiguities of the LDA, it is particularly important to consult with your local township attorney should questions arise about the act.

Q Can townships require a survey for all land division applications?

A No. However, the LDA puts the burden on the applicant to show compliance with the statute and any applicable local ordinance, and it is likely that a township can require a survey if necessary to show compliance with all applicable laws. For example, a survey could be required if it is unclear whether new property lines under a proposed land division would cause an existing house to violate the setback requirements or where particularly complex metes and bounds legal descriptions are involved.

Q When does the 45-day time limit begin?

A Probably from the date when the application is complete and all required materials have been submitted by the applicant. This has not been addressed by the courts.

Q Can conditions be attached to a land division approval?

A No, not in the normal sense. Accordingly, it is usually best that the township require that all applicable dimensional zoning approvals it deems necessary occur prior to issuing a land division approval. Apart from conditions, it is recommended that the municipality include a list of all applicable disclosures on any land division approval notice that land division approval does not constitute zoning approval and does not guarantee "buildability," and that the land division permit is not a guarantee that the land divisions are correct and comply with the LDA or all other applicable laws.

Q Must a township enact a local land division ordinance?

A No. However, the township must administer the LDA and perform all land division reviews. It is prudent to have a local ordinance since it allows the township to "fill in" the LDA's gaps, utilize civil infraction penalties for violations, better define terms and establish procedures.

Q When does a land division actually occur?

A Typically, a land division occurs when the landowner executes a deed, land contract or lease for over a year. As a practical matter, township officials are not always notified of land divisions until such instruments or the equivalent are recorded with the County Register of Deeds. A land division does not occur when the township grants the land division permit, issues a property tax identification number or assesses a property as a separate parcel. Although the Attorney General ruled a survey to be a land division under the old Subdivision Control Act, it is highly likely that surveys, site plans and other "paper" maps do not constitute land divisions without a deed or land contract.

The issue of when a land division actually occurs is important for ascertaining when a property becomes a parent parcel or tract. It should also be considered when a township establishes an expiration deadline for a land division approval. It is usually not good to have unperfected land division approvals hanging out there for long periods of time; it makes it difficult for the township to keep track of them, and changes in zoning regulations could occur that affect parcel size before a division is perfected.

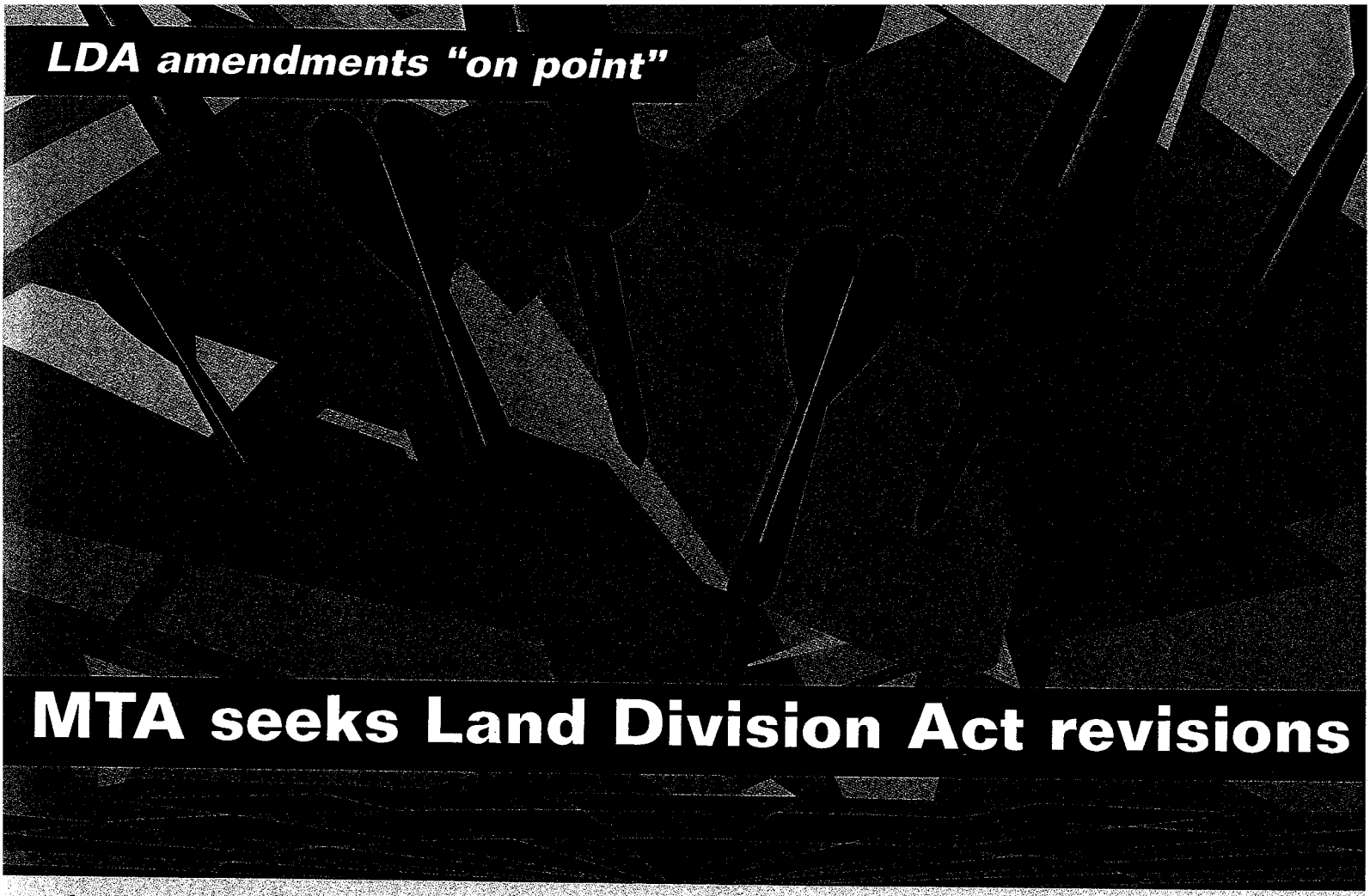
Q Since LDA administration and enforcement is unfunded, can townships receive any relief from state or county officials?

A This is unlikely. No state or county funds are presently available for defraying township LDA administration costs. The statute does permit a township to charge reasonable fees to review land divisions to cover the township's actual costs. Although theoretically, the Attorney General and county prosecutors can enforce the LDA, it is likely that such enforcement actions will be infrequent, which was the case under the old Subdivision Control Act. Accordingly, townships will have to bear the brunt of enforcing the LDA and local land division ordinances. The preferred method is to utilize the civil infraction ticket process, if authorized by the township land division ordinance. If the local ordinance does not authorize civil infractions, a criminal misdemeanor action can be pursued. In any case, the township can also file a lawsuit for injunctive or other equitable relief.

Q Will the county register of deeds officials refuse to record a deed or land contract that creates a land division that has not been approved by the township?

A No. Unfortunately, the LDA does not contain any language requiring a county register of deeds to refuse to record a document with a land division not approved by the township. In fact, a register of deeds probably has no inherent authority to refuse to record such documents. Once recorded, such documents create land divisions and transfer title. The resulting parcels may be illegal, but they do exist and will not go away without decisive township action.❖

—Clifford H. Bloom



LDA amendments "on point"

MTA seeks Land Division Act revisions

by Stacey Hanysak
MTA Legislative Liaison

By enacting Public Act 596 of 1996, as amended by PA 98 of 1997, the Legislature basically tied the hands of local government officials in their efforts to plan and manage development with sound land use policies. The Land Division Act is confusing and complex, making it hard to implement and subjecting townships to potential legal challenges when land divisions do not comply with local ordinances or regulations. This fall, the Legislature will attempt to correct some of the serious problems with LDA implementation.

Townships are forced to track numerous splits and approve unusable parcels

Prior to the LDA, a property owner could create four parcels under 10 acres and an unlimited number of parcels over 10 acres. That system was relatively easy to track and record. Now, the potential number of splits, bonus splits and exempt splits allowed under the LDA requires extensive recordkeeping to track how many splits have been made and how many splits remain for each parent tract or parcel.

Under the LDA, a township is required to approve a land division if it meets the lot width-to-depth ratio and area requirements of the LDA or the township's land division ordinance. However, approving a division does not mean that the resulting parcel is a buildable site that complies with other local or state ordinances or regulations.

Townships are also required by Department of Treasury policy to assign tax identification numbers to parcels regardless of whether a split is lawful. This gives a false impression to purchasers that many of these sites are buildable when they may not be.

Land division approvals based solely on the LDA's requirements can result in parcels that are not buildable or usable and embroil townships in litigation, particularly when third-party purchasers discover they cannot use their property.

The review process should consider a parcel's usability

How can the creation of unusable parcels be avoided? Townships should be able to consider other permits and approval requirements before approving a land division. For example, water and sewer permit review should be required as part of the land division approval process, not as part of the building permit review. Townships should also have the right to set public safety criteria for access roads to and within splits.

The Michigan Townships Association and other organizations recognize the need to rework the LDA. This fall, the MTA will ask the Legislature to amend the LDA to give local governmental units zoning approval authority over land divisions to ensure that lawful parcels are buildable parcels. At that time, it will be important for township officials to contact their legislators and indicate their support for revising the LDA. The MTA Grassroots Network will notify township officials as soon as action is needed. To join the Grassroots Network, contact your MTA district director or MTA Legislative Liaison Stacey Hanysak at (517) 321-6467, ext. 239, email: stacey@mta-townships.org.❖