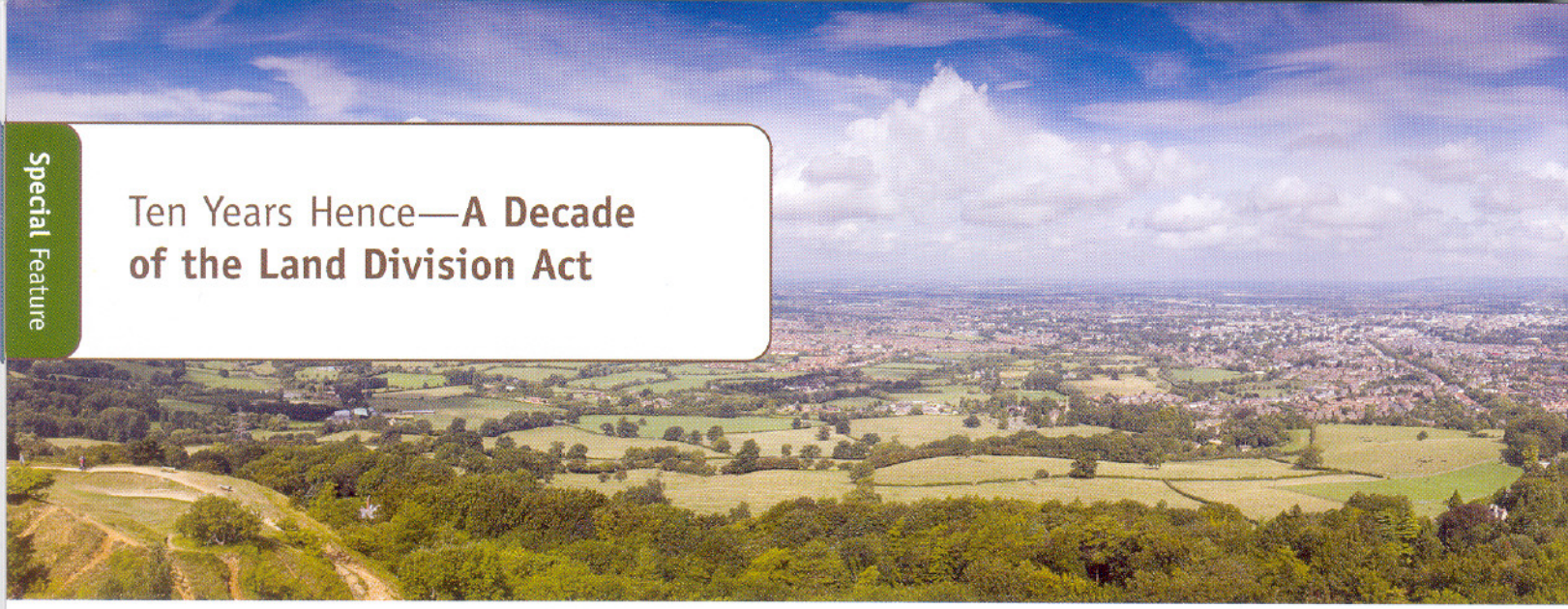
Special Feature

Ten Years Hence—**A Decade of the Land Division Act**



The Michigan Land Division Act (MCL 560.101, *et seq.*) (LDA) became effective on March 31, 1997. At that time (and for years thereafter), many municipal officials around Michigan were quite apprehensive about the new statutory provisions. They were not sure how to administer several provisions of the LDA, since many of its terms were ambiguous while other portions of the statute had huge "holes." Some experts were forecasting that the LDA would pre-empt a significant amount of local control (especially zoning regulations), overwhelm tax assessors and other municipal officials, and result in endless litigation. A few believed that municipal Armageddon was at hand! Happily, 10 years later, the LDA has proven not to be a monster, but it is not quite a gem either.

In this article, we will look backward to summarize 10 years of experience under the LDA. We will also look to the future under the LDA, particularly with regard to so-called "redivision rights" which come into play after March 31, 2007.

THE PAST

Surprisingly, the LDA has proven to be more pro-local control than pre-emptory. When the LDA was adopted, many municipal attorneys predicted that it would take years of appellate court cases to clarify many aspects of the LDA. That prediction was, in fact, correct. And in general, the Michigan courts have held that the LDA pre-empts (i.e., precludes) very few areas from local control. *(See sidebar on page 29 for a summary of Michigan LDA court cases.)* In fact, courts have generally sanctioned the use of the LDA by townships in order to exercise an increased degree of local control.

While there have been a modest number of cases which have reached the Michigan appellate courts regarding the LDA over the past decade, the LDA has not sparked a significant amount of litigation against townships, as some predicted. In an overwhelming majority of situations, property owners, Realtors and developers have gone along with municipal interpretations of the LDA, even where they vigorously disagree with such interpretations. Rather than litigate, disappointed parties typically simply go along with a municipality's ruling, or seek alternative avenues such as reconfiguring proposed land divisions or developing a plat or site condominium development so that the unplatted parcel provisions of the LDA are not applicable.

Some lessons that township officials throughout Michigan have learned over the past decade include:

- Stick to your principles and render a fair interpretation of the LDA and local ordinances. Generally, applicants will comply, and if they do not, it is better to have a trial court resolve the matter than for township officials to violate the LDA or a local township ordinance by twisting language in the statute or ordinance.
- It is generally not prudent to make the township assessor solely responsible for handling all aspects of land division requests. Rather, a better procedure is to either (a) make the zoning administrator responsible and require the zoning administrator to consult with the assessor (particularly with regard to the number of lot splits available or involved), or (b) designate *both* the township assessor and zoning administrator as being co-responsible for approving all land division requests.
- Do *not* give advisory opinions regarding land divisions or any aspect of the LDA. Wait until a formal application and all required supporting materials are filed. Off-the-cuff opinions have gotten many township officials into a great deal of trouble.
- The burden is on the applicant to prove that its application meets all requirements of the LDA, any local LDA ordinance, any applicable dimensional zoning requirements, etc. Do not hesitate to require additional documentation from the applicant if necessary.
- If your township does not have a local LDA ordinance, adopt one. If you have one, review it periodically and update it as necessary. Furthermore, your township should

consider making a violation of the local land division ordinance a municipal civil infraction offense, which enhances the remedies potentially available to the township when a violation occurs.

- Document, in detail, *everything* regarding an LDA application. Keep a permanent separate file for each LDA application (which would include not only the application, but supporting materials, any written approval or denial, etc.). Each approval or denial should be in writing.

- If you are forced to approve a land division application but have concerns about side matters such as "buildability," toxic waste, etc., disclose those concerns on the land division approval document in writing.

- When a violation occurs (for example, land is divided without municipal land division approval, parcels are created that do not match the configuration approved by the municipality, etc.), pursue the violators *immediately*. A letter should be sent to both the buyer and seller of the parcel involved right away and if the matter is not resolved quickly, appropriate court action should be instituted. Innocent subsequent purchasers should be protected. Furthermore, your township does not want to build up a "reservoir" of illegal land division parcels over time.

- When township officials receive follow-up recorded deeds from the county register of deeds records which effectuate a land division, they should carefully review each deed to ensure that the legal description, parcel configuration, etc. comply with the land division approval granted earlier by the township.

- It is amazing how often township officials overlook the remaining or "remnant" parcel when reviewing proposed land divisions.

- If the township desires to modify the four-to-one parcel depth-to-width requirement contained in the LDA for parcels 10 acres in size or less (including applying the lot depth-to-width ratio to parcels over ▶

LDA in the Courts

The Michigan Court of Appeals has issued the following LDA-related rulings:

***Grant Twp* v *VanderWall* (unpublished, decided June 13, 2006; Case No. 258102)**—Townships could regulate land divisions by ordinance *before* the LDA became effective on March 31, 1997. The Court ordered the retroactive recombining of the illegal parcels as a remedy. [Grant Township prevailed.]

***For the Kids, LLC* v *Charter Twp of Chesterfield* (unpublished, decided November 2, 2006; Case No. 259986)**—What constitutes a "parcel" so that a property can be a parent parcel? [The landowner prevailed.]

***Orion Homes, Inc* v *City of Royal Oak* (unpublished, decided August 16, 2005; Case No. 262386)**—Implies that the division of platted lots is subject to MCLs 560.108, 560.109 and MCL 560.263. [The City of Royal Oak prevailed.]

***Camburn* v *Macon Twp* (unpublished, decided May 26, 2005; Case No. 260197)**—Through its zoning ordinance, Macon Township limited the number of single-family residential parcels that could be created in its agricultural zoning district. Such limits were stricter than the number of parcels that could be created under the LDA. The Court held that the density provisions of the zoning ordinance were not pre-empted or precluded by the LDA. [Macon Township prevailed.]

***Capital Region Airport Authority* v *Charter Twp of DeWitt*, 236 Mich App 576 (1999)**—Capital Region Airport Authority, a state agency charged with operating a city airport, was a corporation and thus a "proprietor" under the LDA, such that it is subject to the LDA. [DeWitt Charter Township prevailed on this issue.]

***Brown* v *Ada Twp* (unpublished, decided May 9, 2000; Case No. 216099)**—Ada Township approved a land division. Neighbors sued and argued that the accessibility requirements of the LDA were not met. The Court held that the township did not need to hold a public hearing before deciding the land division request. Also, courts should be fairly deferential to municipalities regarding this type of administrative decision. Finally, the township was entitled to rely on the county road commission's permit when assessing "accessibility." [The township prevailed.]

***Merry* v *Tyrone Twp* (unpublished, decided April 11, 2006; Case No. 265122)**—The Court held that there is no penalty or sanction for a municipality that does not act within 45 days (except being ordered by a court to act). Also, the township can require that a landowner obtain a shared driveway permit from the county road commission (where new parcels will share a driveway) before an LDA lot split approval must be given. [The township won.]

***Ribick* v *Inverrary, LLC* (unpublished, decided June 6, 2006; Case No. 257468)**—A platted lot (or lots) can be turned into a site condominium development without having to pursue a circuit court plat vacation or revision proceeding.

***Jaikins* v *Rose Twp* (unpublished, decided May 4, 2006; Case No. 264695)**—The township would not approve the landowner's land division application before the landowner had obtained township approval for a new private road. The landowner asserted that the LDA pre-empted or precluded the township from requiring a private road approval before or as a condition of a land division approval. The Court disagreed and held in favor of the township. Also, the 45-day time limit never ran because the land division application was not complete until the landowner had obtained a private road approval. [The township prevailed.]

***Slater* v *DeWitt Charter Twp* (unpublished, decided April 1, 2006; Case No.** ▶

244791)—An ordinance requirement that all new lots or parcels have frontage on a public road (and thus effectively banning new private roads and access easements) does not violate the LDA and a township can deny a land division application which would create a lot or parcel which does not have the required public road frontage. [The township won.]

***Hilts* v *Sylvan Twp* (unpublished, decided November 22, 2005; Case No. 256797)**—The township refused to approve a land division application until the applicant presented proof of approval of a driveway permit by the county road commission for each lot to be created by the proposed land division. The road commission refused to issue a driveway permit until and unless the property owner paid for the bed of the public roadway to be excavated and flattened. The Court rejected the landowner's contention that the LDA pre-empted township ordinance requirements regarding accessibility. The township had the authority to adopt an ordinance mandating a stricter driveway requirement than those provided in the LDA. [The township prevailed.]

***Swiecicki* v *City of Dearborn* (unpublished decision released September 12, 2006; Case No. 262892)**—Pursuant to the local subdivision ordinance, the city council decides land division applications. The Court rejected the complaining neighbors' contention that only the zoning board of appeals could hear this case initially, instead of the city council, since a zoning regulation was not involved. The Court held that the city council's decision regarding land division requests is administrative, rather than legislative, in nature. The Court also found that the two lots at issue were separate parcels as of March 31, 1997, and hence, each was a parent parcel. However, since they were adjacent to each other and under common ownership, they were also considered part of a "parent tract." Since the permitted number of land division rights had already been used up, the landowner was required to utilize a plat or site condominium now in order to create more lots or parcels. [The city prevailed in part and lost in part.]

***Orion Homes, Inc* v *City of Royal Oak* (unpublished decision decided August 16, 2005; Case No. 262386)**—The Court noted that where a platted lot split or lot reconfiguration is involved, LDA provisions governing unplatted parcels (MCLs 560.108 and 560.109) do not apply. Rather, the provisions of MCL 560.263 are applicable. Under that statute, a platted lot cannot be split and platted lot lines cannot be reconfigured unless either a formal replat occurs or if the municipality involved has an ordinance provision which governs platted lot line alterations and the municipality has approved the platted lot alteration involved.

***Rochau* v *Horan, LLC* (unpublished decision decided December 13, 2005; Case No. 256454)**—In this case, the sellers of property withheld a portion of the land involved in the sale (which made the excluded portion inaccessible) until the buyer paid off a certain amount of the funds owed on the portion of the parcel transferred to the buyer. The defendants alleged that such a financing scheme was a *de facto* land division, which had not received municipal approval. The Court essentially sidestepped the issue of whether or not a *de facto* land division was involved without municipal approval. Rather, the Court pointed out that the LDA primarily governs relationships between property owners and local municipalities, and that the local municipality had not been involved in this dispute. The Court pointed out that under MCL 560.267, a purchaser has the right to void a sale of land that is in violation of the LDA. The Court also noted that the final land transfer either did occur or would occur, thus eliminating any potential violation of the LDA land division approval requirements.

For information on additional LDA court cases, see the August 2004 and September 2005 issues of Michigan Township News.

10 acres in size or adopting more strict or lenient regulations), the township should have an express ordinance provision governing the matter.

- If the township desires to allow the division of platted lots without requiring the property owner to go through an expensive replat process, the township's land division ordinance or subdivision control ordinance should contain a specific review and approval or denial process regarding platted lot division requests.
- If a proposed land division will result in one or more parcels which utilize or create a private road, access easement or the equivalent, and the township has a review and approval process for private roads or access easements, with the proper ordinance language in place, the township can deny a land division request until the township has approved the private road or access easement.

For additional information about the LDA, please see the August 2004 issue of the *Michigan Township News*, or visit www.michigantownships.org.

THE FUTURE

The future is coming fast regarding the next phase of the LDA. As of March 31, 2007, some landowners (but not all) will be able to take advantage of the "redivision" rights under the LDA. The redivision rights are found in Section 108 of the LDA (MCL 560.108) and are governed by the following:

"(5) A parcel or tract created by an exempt split or a division is not a new parent parcel or parent tract and may be further partitioned or split without being subject to the platting requirements of this act if all of the following requirements are met.

(a) Not less than 10 years have elapsed since the parcel or tract was recorded.

(b) The partitioning or splitting results in not more than the following number of parcels, whichever is less:

(i) Two parcels for the first 10 acres or fraction thereof in the parcel or tract plus one additional parcel for each whole 10 acres in excess of the first 10 acres in the parcel or tract.

(ii) Seven parcels or 10 parcels if one of the resulting parcels under this subsection comprises not less than 60 percent of the area of the parcel or tract being partitioned or split.

(c) The partitioning or splitting satisfies the requirements of section 109.

(6) A parcel or tract created under the provisions of Subsection (5) may not be further partitioned or split without being subject to the platting requirements of this act, except in accordance with the provisions of Subsection (5)."

Township officials will be challenged with regard to land division applications involving redivision rights for at least two reasons. First, the redivision language of Section 108 of the LDA is not entirely clear. For example, the following issues will likely arise due to the lack of clarity in the statute:

- If there are original land division rights remaining for a parcel created after March 31, 1997, which have not been used, can redivision rights be used for that parcel after March 1, 2007, even if the original land division rights have not been used up? If so, must the original land division rights be taken first (and must it so indicate in the appropriate recorded document)?
- What if the parcel at issue is illegal—can redivisions lawfully occur?
- What language should be utilized for redivision rights in deeds?
- Is a parcel that was retained by the proprietor/landowner (often called a "remnant parcel") eligible for redivision rights?
- In order for a parcel to qualify for redivision rights, "not less than 10 years [must] have elapsed since the parcel or tract was recorded." What if a memorandum of land contract was recorded but not the land contract itself—did the 10-year time period begin to run upon the recording of the memorandum of the land contract or only when the later deed is recorded in satisfaction? What type of "recorded" documents comply or qualify?
- Since there is no statutory language that must be placed in a deed regarding redivision rights, should similar language be used for redivision rights as land division deeds?
- Why was the word "tract" included in the statutory redivision language and what does it mean?

Second and most problematic, after March 31, 2007, arrives, township officials will have to look back in time to March 31, 1997, and examine all land divisions (and resulting parcels) that have occurred involving a given property or properties since that date. In some cases, that will be a relatively easy task—for example, where no or few land divisions have occurred. In other cases, it will be a monumental undertaking involving one or more brainteasers—for instance, where many land divisions have occurred which have been complicated by numerous readjustments of common boundary lines.

Townships may desire to consider setting higher land division application review fees where redivision rights are involved given the additional administrative time entailed.

As continued questions linger related to the LDA, township officials are encouraged to consult with their township attorney over any uncertainties regarding the LDA or redivision rights.

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