



Municipal Law News

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NOT IN MY BACKYARD! IS YOUR MUNICIPALITY PREPARED TO HANDLE UNPOPULAR CONTROVERSIAL ZONING DECISIONS?

- Ronald D. Richards Jr.

We – and probably you too – have seen this scenario many times, where a municipality has one or two people who attend each planning commission meeting. But when a new application is submitted for a use that neighbors strongly oppose, the municipality sees hundreds attend its planning commission's meeting.

Dealing with “not in my backyard” zoning issues can be challenging for many municipalities. Whether it is wind turbines, gravel or sand mines, composting operations, high-density subdivisions, apartments or landfills, each municipality should have a process or plan in place to deal with handling these often controversial requests. When faced with a request to approve an unpopular land use proposal, we recommend each municipality consider the following:

1. Understand the Law. If a new or challenging issue arises, make sure your municipality understands the law on the issue and the legal requirements of the Michigan Zoning Enabling Act (“MZEA”). Depending on the issue, there may be other Michigan statutes and court cases governing the board, commission or council's decision. For example, in 2012 the Michigan Legislature amended the MZEA, changing the law on how a municipality must handle an extraction request. The amendment re-imposed the “very serious consequences” test as the controlling standard to evaluate an extraction request, and required

the deciding body to consider certain standards and also allowed the deciding body discretion to consider other listed factors. For example, an ordinance must not prevent the extraction, by mining, of valuable natural resources from any property unless very serious consequences would result from the extraction of those natural resources. Natural resources are considered valuable for the purposes of this section if a person, by extracting the natural resources, can receive revenue and reasonably expect to operate at a profit. There may be specific laws or court cases that govern the issue before your community.

2. Ordinances. Given the many changes in the law over the last decade, it is hard to keep current. It can be equally as hard to keep municipal ordinances compliant with changes in the law. So when faced with a hugely unpopular land use proposal, municipalities should consider whether their ordinances comply with current law or require updating. For example, ordinance provisions governing notices for certain zoning decisions may contain deadlines that are inconsistent with the MZEA, especially if the municipality has not significantly updated its zoning ordinances. The municipality should consult with its planner and attorney to make sure the relevant ordinance provisions are up-to-date, the municipality is complying with all relevant deadlines and it considers all applicable laws when making a decision or recommendation.

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1. **Fee Schedules.** Handling certain zoning requests can be very expensive and time-consuming. The municipality may be required to hold special meetings and hire experts. Certain zoning requests can often consume a large portion of municipality's staff time to handle the non-routine aspects that come along with the requests. The municipality should make sure its fee schedules are up-to-date, allowing it to charge or recoup expenses as permitted. The municipality should also consider and know its budgeted expenses to make sure any amendments to the budget are handled properly and in a timely fashion.
 2. **Alternative Meeting Location.** Unpopular or controversial requests tend to increase the amount of people who attend meetings and want to comment. If your municipal hall is not adequate to accommodate large groups, you might consider arranging alternative meeting locations as the law allows. While not going as far as requiring a municipality to adjourn a meeting to a larger room, the Attorney General has opined that a public body must exercise "reasonable efforts" to accommodate members of the public who wish to attend, including reconvening in a larger room if it is practical. OAG, 1979, No. 5614, p 519 (December 21, 1979). Certainly, the municipality would be in a better position to make sure the public had the "opportunity to be heard" if it arranged to accommodate larger audiences.
 3. **Experts.** Many zoning requests involve complicated issues for which a municipality should strongly consider retaining outside experts – such as a planner, engineer, attorney, hydro-geologist, or other specialists. These experts are critical in assisting the municipality to make an informed decision about the request. Though it is not necessarily critical to have hired such experts in advance, a municipality would do well to have a "short list" of each of those experts ready upon receipt of a controversial application.
 4. **Freedom of Information Act.** Along with an increased number of members attending meetings, municipalities that receive a controversial application often see a sharp rise in the number of FOIA requests submitted. Requests often seek specific documents, such as a particular part of the initial application documents, or broad categories of documents, such as all e-mails the municipality may have received regarding the request. A municipality should be ready to respond timely to the FOIA requests and have its corresponding FOIA fee schedule already in place.
 5. **Follow the Proper Procedure.** Though some overlook their importance, following the procedural requirements of the Open Meetings Act ("OMA") and the MZEA could save your municipality from unnecessary, costly litigation. Often when the applicant, public or other interested parties do not like the decision, they attempt to collaterally attack it, alleging there were problems with the process. To preempt such an attack, make sure that your municipality provides the notice the MZEA requires for a particular request and the notice the OMA requires for regular or special meetings.
- Also, avoid making some common mistakes that could result in OMA violation claims. For example, the OMA provides that the right to attend a meeting of a public body includes the right to tape-record or videotape the meeting. MCL 15.263(1). Do not ask a member of the public to turn off a video camera.
- Further, the OMA states, a person must be permitted to "address a meeting of a public body under rules established and recorded by the public body." MCL 15.263(5). There have been various decisions and opinions on the OMA's meaning that a municipality should heed while handling a controversial request.

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At one time or another, most public bodies face an issue that results in a great deal of public outcry, increases attendance at meetings, and adds additional scrutiny of the municipality's ordinances and processes. In those situations, the age-old axiom can often unfortunately ring true: "by failing to prepare, you are preparing to fail." In other words, preparing in advance is very helpful to successfully navigating "not in my backyard" zoning requests.

Does your municipality have proper procedures in place? When was the last time an attorney reviewed your municipality's ordinances? Make sure you keep up-to-date with the latest laws. Contact Ronald Richards at 517.371.8154 or rrichards@fosterswift.com with any questions you may have regarding municipal law.

CASES TO WATCH

- Ronald D. Richards Jr.

MUNICIPALITIES' RIGHTS UNDER MICHIGAN'S CABLE FRANCHISE LAW

A case pending in federal court involves whether Michigan's franchise law – or the federal cable law – controls a municipality's decision to enter into a franchise with a cable provider. This case is technically entitled *City of Detroit v Michigan et al* but is often called the Comcast case. A federal judge ruled that the federal cable law does not trump Michigan's cable law's renewal provisions; and that Michigan's cable law allows a municipality to refuse to approve a cable provider's franchise renewal proposal as long as it acts on the proposal within Michigan law's 30-day limit. Since the city timely rejected Comcast's renewal proposal and Comcast later stopped negotiating, Comcast had no proper franchise and so was a trespasser. Of course, Comcast appealed. So the case is now pending in a federal court of appeals. A decision is expected in 2014. Any municipality presented with a cable franchise renewal request in the near future should stay tuned and keep aware of the pending federal court decision.

IS A TOWN'S PRACTICE OF STARTING MEETINGS WITH A PRAYER CONSTITUTIONAL?

The United States Supreme Court will decide soon whether a town's practice of starting each board meeting with a short prayer is Constitutional, (*Galloway v Town of Greece*). The federal trial court ruled in favor of the town. But the appellate court reversed and ruled against the town, finding the prayer practice illegal. Interestingly, the appellate court cited some related decisions in striking down the practice: it cited the Supreme Court ruling in 1983 that the Nebraska Legislature's practice of opening sessions with prayer by a state-appointed clergyman was legal. And it cited the 1989 Supreme Court suggestion that legislative prayers that invoke particular religious beliefs may be illegal. It also noted the 1987 decision in the 6th Circuit appellate court (which covers Michigan), which stated that prayers that "go beyond the American civil religion may be illegal." The Supreme Court heard arguments in *Galloway* in November 2013. A decision is expected in June or July 2014.



OUR GRAND RAPIDS OFFICE IS EXPANDING



We recently completed our Grand Rapids office expansion. Still in the same building, Foster Swift now occupies both the upper and lower levels.

Our Grand Rapids office space has increased

by 50 percent. We have added 10 offices, four support staff areas, two conference rooms with video conferencing abilities, a kitchen and a copy room.

The expansion is a result of accommodating our firm growth. In the past five years, the office has grown to 22 attorneys. Under the leadership of our current executive committee, Foster Swift's succession planning has led to opportunities to further develop our West Michigan practice.

The firm plans to continue the growth trend in West Michigan by progressing its Grand Rapids and Holland offices and considering additional opportunities in Michigan.

"Growth will remain a key focus in 2014," Michael Homier, Foster Swift vice president for West Michigan, said.

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