

MUNICIPAL LEGAL BRIEFS

A Publication of the Michigan Municipal League printed in partnership with the Michigan Association of Municipal Attorneys

GUEST ARTICLE

Reinventing Michigan 2011—Don't Forget the Public Interest

Written by Thomas R. Schultz, partner, Secrest Wardle

Incoming Governor Rick Snyder and the new Michigan legislature have their work cut out for them. They have taken charge of a perpetually beleaguered state economy in a heated political climate and promised to deliver real change—to make Michigan a more competitive place for attracting businesses, jobs, and residents. Governor Snyder has said that he will concentrate on cutting or reforming taxes, shrinking the size of government, and “reducing regulation.” These are familiar themes for anyone talking about government at any level in 2011, and they require reevaluation of some basic things that government, both state and local, does—education, public services, infrastructure—and how they are paid for. So who gets a say in that conversation, and what their interests are, is important.

Governor Snyder is new to statewide office, and fully half of this term's senators and representatives are new to their jobs. Between that lack of tenure and the rising chorus of voices offering advice for rescuing the state, these officials are likely in for an unusual amount of attention from a broad range of interest groups. Some will be traditional public interest organizations—the Michigan Municipal League, the Michigan Townships Association, and the like—whose advocacy on behalf of public entities and elected officials is generally known. Others will be organizations whose open promotion of specific actions needed to address the state's current straits is the whole point of their existence—The Center for Michigan and Business Leaders for Michigan being two of the more recently visible.

And there will still be the less visible lobbying for particular interests that always goes on in the capital. Not all those interests will necessarily coincide, and not all of what they argue for will necessarily be in the broader public interest. There will be plenty of generic calls for the elimination of unnecessary and stifling regulations that impede business innovation and entrepreneurialism, and more generally for the elimination of as much government as possible. These things need to be discussed, and that discussion might lead to reforms that everyone can get behind. But even in a time of fundamental reassessment regulatory reform still needs to be talked about in the context of Michigan's long history charging both state and local government with deciding and doing what's in the public interest. Without that context, the conversation can run quickly off the tracks.

December 2010 - Municipal Legal Briefs

Guest Article	1
United States Supreme Court	5
Sixth Circuit Court of Appeals	5
Michigan Court of Appeals	7
Upcoming Events	10

Land use regulation—a perennial issue here in Michigan, with our home rule tradition and considerable natural resources—is a good example of how that can happen. Property rights groups are well-organized in the state (as they are nationally) and particularly well-represented in Lansing. Their favorite targets are land use planning, zoning, and environmental regulations in virtually any form. They produce a steady stream of articles, often aimed at government officials in particular, about economic and political theory and the impact of

Municipal Legal Briefs

(ISSN-0076-8014)

Municipal Legal Briefs is a publication of the Michigan Municipal League printed in partnership with the Michigan Association of Municipal Attorneys

Office

1675 Green Road
Box 1487
Ann Arbor MI 48106-1487
Phone: 734-662-3246
Fax: 734-662-8083

Board of Directors

Stephen K. Postema

President

City Attorney - Ann Arbor

Randall L. Brown

City Attorney - Portage

Andrew J. Mulder

Immediate President

City Attorney - Holland

Eric D. Williams

City Attorney - Big Rapids

Lori Grigg Bluhm

City Attorney - Troy

Clyde J. Robinson

City Attorney - Kalamazoo

James O. Branson III

City Attorney - Midland

James J. Murray

City Attorney - Boyne City,
Petoskey

Robert J. Jamo

City Attorney - Menominee

John C. Schrier

City Attorney - Muskegon

William C. Mathewson

Secretary-Treasurer

General Counsel

Michigan Municipal League

Publisher

Legal Affairs Division
Michigan Municipal League
Editor
Sue A. Jeffers

regulation on property and liberty rights. The most ambitious of these argue about what Locke or Madison would make of zoning ordinances mandating setbacks and parking requirements or dictating where the local McDonald's can be built, or of rules limiting the filling of wetlands or cutting down trees. Such regulations, the argument goes, have no place in a market society and are and always have been an affront to natural law, the Bill of Rights, and the Founders (as if it's perfectly obvious what that diverse group would think today, 200-plus years, 320 million inhabitants, and at least one Industrial Revolution after they set up this new and experimental form of government we still operate under).

And yet, as a nation we have a 150-year history, including now countless judicial decisions, recognizing that sensible land use regulations on the whole enhance rather than diminish land values and property rights (especially for developers), and are and always have been both constitutional and the normal province of local governments. As our own state Supreme Court said some 60 years ago in the *Brae Burn* case: "Our laws have wisely committed to the people of a community themselves the determination of their municipal destiny, the degree to which the industrial may have precedence over the residential, and the areas carved out of each to be devoted to commercial pursuits. With the wisdom or lack of wisdom of the determination we are not concerned. The people of the community, through their appropriate legislative body, and not the courts, govern its growth and its life."

"Reducing regulation," whether at the state or local level, is a policy choice—and, in the current situation, probably a good idea. In the land use context, for example, local governments are finding themselves looking hard at master plans, zoning ordinances, and review procedures to make sure they've got the right balance of interests, both public and private, to ensure that growth and life. That's a smart thing to do at any time, and even more so when the margin between success and failure for business enterprises and development projects seems to have gotten narrower.

But the national model for property rights advocates goes beyond mere policy prescriptions, calling for things like a "taxpayer's bill of rights," which might look like the Stop Over Spending (SOS) initiative that was floated here a few years ago, which included things like a requirement that any special assessment imposed by a local government (for roads, sewers, etc.) be subject to voter approval. Or requiring cash payments by local governments for any land use regulation that adversely affects the value of property—like when your city's planning commission decides that the big box retailer and strip mall don't belong next to that single-family subdivision, or that a lot in an industrial park isn't the best place for a child care center or a strip club.

This is a vision of severely limited government that has no historical foundation in Michigan. Taking away or drastically restricting the well-grounded right of a community to regulate land uses and decide its own character wouldn't be "restoring" the law to some prior or rightful condition; it would be radically departing from our constitutional and legal history. That's one reason why some statewide groups are talking about possibly using the legislative process to change basic rules like who has the burden of proof in land use litigation—upsetting the current constitutional presumption

that the local community has acted reasonably and in the public interest, which results in the burden being the affected landowner's. That sort of change could make even a limited regulatory scheme costly enough that many communities might think of foregoing it (which is presumably the point). Attention seems to have turned to *policymakers*—legislators and regulators—because the courts haven't yet bought this kind of property rights advocacy.

Maybe that's why the eminent domain issue won't seem to go away either. Even in 2011, property rights groups are still not done capitalizing on the national panic stirred up by the 2005 U.S. Supreme Court *Kelo* case, which they claim proved that the power is regularly abused by local officials bent on stealing private property. But that isn't true here in Michigan in any real way. Eminent domain is used here primarily to do things that most folks think of as publicly beneficial. Property is acquired for public places like schools, libraries, and police and fire stations, and more than anything for infrastructure improvements—roads, water lines, sewers, sidewalks—all accepted by most people as appropriate uses of the constitutional power.

True, we had the *Poletown* case from 1981, where the state Supreme Court allowed a number of private properties, including homes, to be condemned for a General Motors plant. But the facts of that case were so specific, and the public use claimed was so obviously dependent on the truly distressed conditions of the cities of Detroit and Hamtramck at the time, that the idea of "economic development" takings remained an outlier here. There were some notable later exceptions—e.g., the Detroit casino cases, the airport technology park in the *Hathcock* case—but Michigan never really became a hotbed of property seizures on behalf of private entities, *Kelo*-style, and it's fair to cite the relative lack of later Michigan appellate case law on the subject as evidence of that. In fact, before *Kelo* was even decided, *Poletown* was overturned by the Michigan Supreme Court in *Hathcock*, which held that our state constitution had never allowed the taking of private property for a non-public use. That decision was eventually codified further in the state constitution by vote of the people, and then in the eminent domain statutes, and under those the courts can and will handle overreach and abuse if they occur.

To hear property rights advocates tell it, though, property is being taken from homeowners and businesses and given to other private landowners all over Michigan in the normal course. That just isn't happening, and demanding further limitations on the exercise of this traditionally-accepted governmental authority, or for the arbitrary payment of "more" just compensation, will not benefit the residents of this state—or its businesses—at a time when basic infrastructure and public places need serious attention and upgrade. When it's no longer unusual, for example, for the cost of right-of-way for a public road or infrastructure project to approach or even exceed the cost of the physical improvements, it might be time to acknowledge the capacity of existing condemnation laws to protect property rights. And to realize that those who talk about eminent domain as "legalized theft" and argue for still greater curbs on the authority are really advocating a different view of property rights than the courts of this state have ever held.

Why argue about things like land use regulations and eminent domain when the issues facing the state and its municipalities are so much broader? Because the incoming Governor and legislature are going to hear a chorus of government-is-the-problem arguments, and these will be among the examples. These arguments are about the impact of government on the private sector generally, and even more basically about whether there is such a thing as the public interest, so it's important to get them right. Sometimes government *is* a problem—but not always and not inherently, and more importantly not in the tradition of this state.

And also because local public officials regularly hear from their business leaders that a key factor in attracting jobs and workers is the existence of places where companies want to locate and people and families want to work and live. That means places with not just working infrastructure and safe streets, but also the other things—amenities, natural features, culture, recreational opportunities—that complete a community. In one way or another, that in turn means public sector involvement through a combination of allocating public resources and designing and applying regulations. More specifically, it means some level of community planning, enforcement of some degree of targeted land use regulation, investment in affordable public infrastructure, and sometimes even economic development incentives toward a specific and articulated public goal.

Property rights groups aren't ever going to support those things. They scoff at government participation in the kinds of community planning and economic development activities that actually enjoy broad popular support, like smart growth reforms and redevelopment projects using incentives and public funding where necessary. They argue that market forces reject planning, because it interferes with private property rights or competes unfairly against private investors, and that government can't "do" things that savvy private developers can.

These arguments are demonstrably untrue. The MML's Center for 21st Century Communities (21c3) provides information and other resources to help communities in their efforts to create or enhance vibrant, diverse, and modern places. A quick tour of just a couple of the recent issues of the MML's publication *The Municipal Review* highlights some success stories. The City of Marquette redeveloped a portion of its waterfront area (the Lower Harbor) partly with brownfield redevelopment funds, into a community-designed public open space now surrounded by a vibrant mix of new private residential and commercial uses. In Jackson, state and local governmental agencies worked with local non-profit groups to retrofit an old prison building for lofts and art studios using brownfield redevelopment funds and funding from MSHDA. Maybe these projects won't yield all of the planned or expected benefits, but without local government involvement likely nothing would have happened there. The public and local businesspeople, including the local developers involved, weren't offended by these projects, and no one's property rights were trampled to make them happen.

There are all sorts of similar public projects underway all over the state, and they should probably be even more regularly noted in *The Municipal Review* and elsewhere. Brownfield redevelopment, tax credits, historic preservation, economic development incentives—even planning and zoning authority generally—are among the tools that communities use now to accomplish specific public goals. They are all, in the current climate, likely targets for elimination or revision. But support for doing away with petty regulations on the use of property, or for streamlining regulatory procedures, or even for the idea that communities just need to make better and more-informed decisions, does not require supporting much more extreme arguments for things like changing the burden of proof or the presumption of constitutionality in land use cases, or cash payments to property owners for the imposition of basic land use regulations, or undercutting the authority to protect important natural resources or assist in development opportunities that will appreciably benefit a community.

Just a few years ago, in the *Jackson v Greater Bible Way* case, our plenty conservative Michigan Supreme Court reached back over 75 years and cited with approval case law establishing that "local governments have a compelling interest in protecting the health and safety of their communities through the enforcement of the local zoning regulations," and that "property is held subject to the right of the government to regulate its use in the exercise of the police power so that it shall not be injurious to the rights of the community or so that it may promote its health, morals, safety and welfare." Circumstances here in Michigan are demanding discussion about the purposes and effects of regulation, both in general and "as applied." That's a good discussion to have, whether the subject is land use or some other private sector activity. But as specific programs and rules are reevaluated, and as particular changes are suggested, whether in name of property or liberty interests or just efficiency and being business-friendly, due consideration of how they square with Michigan's long history recognizing that there is, in fact, a public interest at stake is also required.

Editor's Note: The preceding article was written by Tom Schultz at the request of the Editor for publication in *Municipal Legal Briefs* and expresses his thoughts, and not necessarily those of the Michigan Municipal League. Thanks to Tom for providing his thoughts as Michigan communities continue to create and maintain places where people want to live and work.