CHARTER TOWNSHIP OF GARFIELD
PLANNING COMMISSION MEETING

Wednesday, September 9, 2015 @ 7:00 pm
Garfield Township Hall
3848 Veterans Drive
Traverse City, MI 49684
Ph: (231) 941-1620

A G E N D A

Call Meeting to Order

Roll Call of Commission Members

1. **Review and Approval of the Agenda - Conflict of Interest**

2. **Minutes**
   a. August 12, 2015

3. **Correspondence**
   a. Planning & Zoning News
   b. Blair Township - Notice of Intent to Plan
   c. Conservation District Monthly Parks Report
   d. Notice of Planning and Zoning Workshop

4. **Reports**
   a. Township Board
   b. Planning Commissioners

5. **Business to Come Before the Commission**
   a. PD-2015-55 Discussion of Residential Density
   b. PD-2015-56 Discussion of Residential Uses in Commercial Zones

6. **Public Comment**

7. **Items for Next Agenda – September 23, 2015**
   a. Consideration of allowing Child Care (7-12) as conditional use
   b. To be determined.

8. **Adjournment**

Joe Robertson, Secretary
Garfield Township Planning Commission
3848 Veterans Drive
Traverse City, MI 49684

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CHARTER TOWNSHIP OF GARFIELD
PLANNING COMMISSION MEETING
August 12, 2015

Call Meeting to Order: Chair Racine called the meeting to order at 7:00pm at the Garfield Township Hall, 3848 Veterans Drive, Traverse City, MI 49684.

Commission Members Present: Pat Cline, Kit Wilson, Gil Uithol, Joe Robertson, Terry Clark, and John Racine

Absent and Excused: John Nelson

Staff Present: Rob Larrea

1. **Review and Approval of the Agenda – Conflict of Interest: (7:00)**
   Clark moved and Wilson seconded to approve the agenda as presented.
   Ayes: Clark, Wilson, Uithol, Cline, Robertson, Racine
   Nays: None

2. **Minutes**
   a. **July 22, 2015 Minutes (7:01)**
      Clark moved and Robertson seconded to adopt the July 22, 2015 Regular Meeting minutes as presented.
      Ayes: Clark, Wilson, Uithol, Robertson,Cline, Racine
      Nays: None

3. **Correspondence (7:01)**

4. **Reports:**
   a. **Township Board (7:01)**
      Wilson said that the Board asked the Sheriff's Department to put their speed control machine in the Lonetree subdivision. The machine must be attached to a post and their posts were not of the correct size. The Sheriff's Department will continue to work with the residents.

   b. **Planning Commissioners (7:03)**
      No reports

5. **Business to Come Before The Commission**
   a. **PD 2015-52- Conceptual Review (7:03)**
      The applicant requests possible rezoning for a multi-family development on North Country Drive located off of US 31 South of W. South Airport Road. The existing C-3 Highway Commercial zoning district does not allow for multi-family developments and the property is master planned for a mixed use business development. The site plan does not meet a number of zoning ordinance requirements particularly on required setbacks. Miller Creek may

also pose a problem. The applicant would like consideration to conditionally rezone the property to R-3 Multi-Family residential.

Doug Mansfield was present to discuss the conceptual review. He said the buildings would be two or three stories and would hold a maximum of 32 units which would be a mix of one and two bedroom apartments. He said the design would be affordable and provide some workforce housing in that area. Commissioners were divided on whether the idea was acceptable. There was concern with lack of sidewalks, possible spot zoning and whether the development fit with the surrounding area. Sean McCardel, owner of the property, said he has tried several things on this property including a VA Health Center and has also tried selling it, but to no avail. Larrea asked Commissioners to look at the broader picture of the request rather than the site itself and consider a possible amendment to the district to allow for multifamily as an option. Commissioners agreed to consider an amendment but were not in favor of a rezoning to the property. They discussed traffic circulation, housing needs and affordable rent for the apartments, as well as, gauging the interest from workers of surrounding businesses on living in such a location.

b. Joint Meeting East Bay Discussion (7:40)

Larrea said the joint meeting is two weeks from tonight and he is looking at an agenda which includes corridor planning, compatibility of master plans and access management along Hammond Road; planning and zoning along Townline Road and non-motorized trail connectivity. He said it will be a roundtable discussion with County Planner John Sych leading the meeting. Commissioners also wanted to discuss the South Airport corridor.

6. Public Comment (7:46)

None

7. Items for Next Agenda – August 26, 2015 (7:46)

a. Garfield Township / East Bay Joint Meeting

8. Adjournment (7:46)

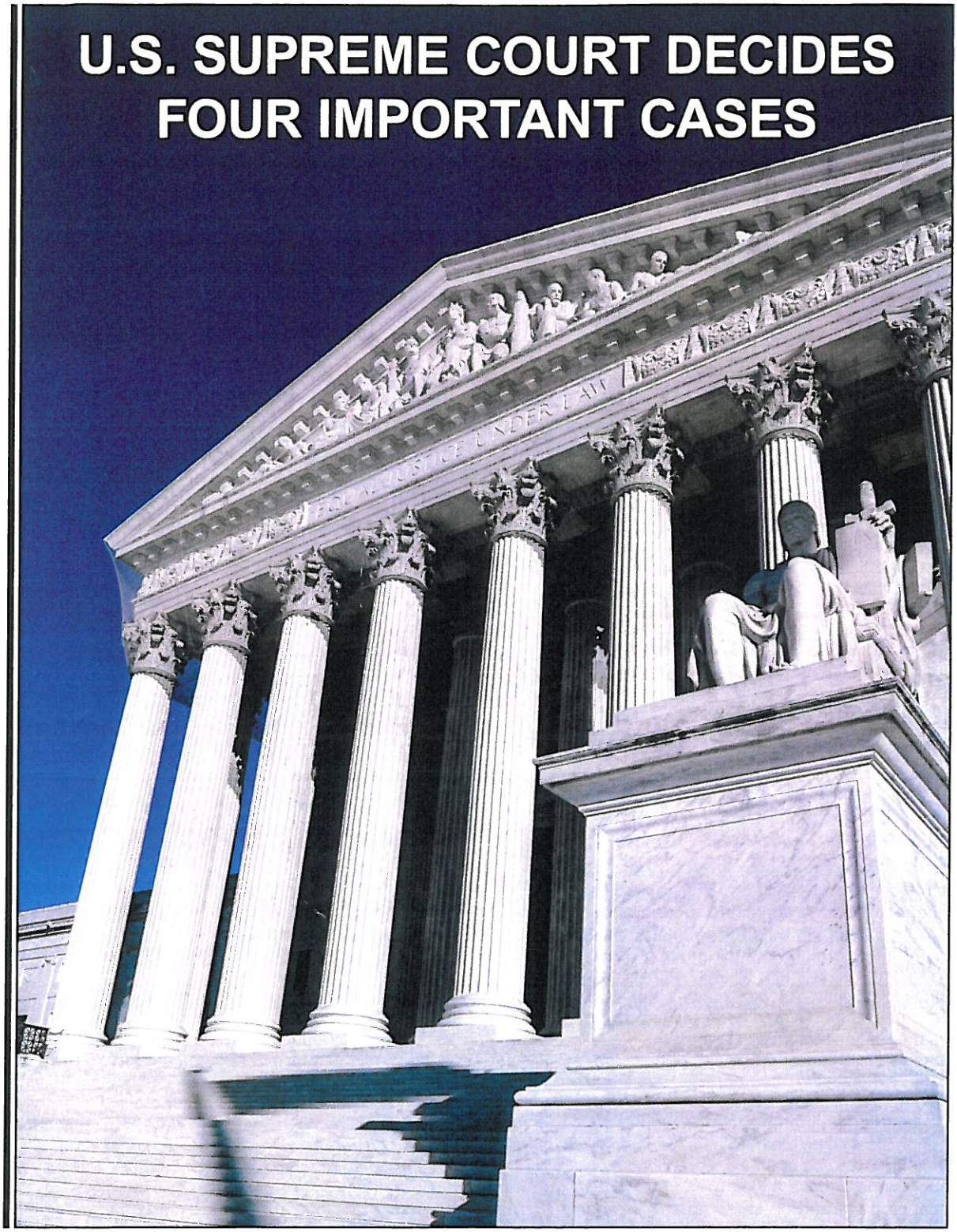
Wilson adjourned the meeting at 7:46pm.

_____

Joe Robertson, Secretary
Garfield Township Planning Commission
3848 Veterans Drive
Traverse City, MI 49684

Vol. 33 No.9, July 2015

U.S. SUPREME COURT DECIDES FOUR IMPORTANT CASES



PLANNING & ZONING NEWS

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INSIDE

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U.S. SUPREME COURT REITERATES FIRST AMENDMENT REQUIRES CONTENT NEUTRAL SIGN REGULATIONS

By **Brian Connolly**, *Otten Johnson Robinson Neff & Ragonetti, PC, Denver, Colorado*

Reed et al. v. Town of Gilbert, Arizona, et al. U.S. ___, 135 S. Ct. _____ (2015).U.S. Supreme Court No. 13–502. Decided June 18, 2015.

Regulating signs in a content neutral manner satisfying First Amendment limitations will be more difficult for local governments following June's U.S. Supreme Court decision in the case of **Reed v. Town of Gilbert**.[1] In **Reed**, all nine Supreme Court justices agreed that the Town of Gilbert, Arizona's sign code failed the First Amendment's content neutrality requirement, although the justices arrived at that conclusion in different ways.

The ruling, which resolves a long-standing split between federal circuit courts of appeal on the meaning of *"content neutrality,"* carries significant consequences for the validity of local sign regulations. Indeed, many local codes may become unconstitutional as a result of the case's outcome. Sign litigation can be expensive and risky, and it is likely to become more frequent after **Reed**. Local governments are therefore strongly advised to review their sign codes with a lawyer versed in First Amendment issues to avoid potential liability and invalidation of local sign codes as a result of the **Reed** decision.

Many local codes may become unconstitutional as a result of this case. Sign litigation can be expensive and risky, and it is likely to become more frequent after Reed.

Factual Background

Reed was the first U.S. Supreme Court case since **City of Ladue v. Gilleo**,[2] decided in 1994, to address local sign regulations. The issue in **Reed**: Gilbert's sign code contained a general requirement that all signs obtain a permit, but then exempted several categories of signs from its permitting requirement.[3] These exemptions from the permitting requirement treated certain categories of exempted signs differently. As with many other sign codes around the Unite States, Gilbert's sign code recited traffic safety and aesthetics as the reasons for its existence.

Of relevance to the case were three of these categories: *"political signs," "ideological signs,"* and *"temporary directional signs."* While the town did not prohibit any of these categories of speech, each category was treated differently by the sign code. The town's regulations of political signs, defined as a *"temporary sign designed to influence the outcome of an election called by a public body,"* allowed such signs to have a sign area of up to 16 square feet on residential property and up to 32 square feet on nonresidential property, and such signs could be displayed for up to 60 days before a primary election and up to 15 days following a general election.[4]

Temporary directional signs were defined as a *"[t]emporary [s]ign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.'"*[5] A *"qualifying event"* was any *"assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization."*[6] Temporary directional signs could not exceed six square feet in sign area, could be placed on private property or in the right-of-way, and no more than four signs could be placed on private property at once. Additionally, temporary directional signs could be displayed for up to 12 hours before the qualifying event, and no more than one hour after the qualifying event, and the date and time of the qualifying event were required to be displayed on each sign.

Finally, *"ideological signs"* were defined as any *"sign communicating a message or ideas for noncommercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency."*[7] Ideological signs could be as large as 20 square feet and could be placed in any zoning district without limitations on display time.

Good News Community Church, of which Clyde Reed is pastor, was a *"homeless"* church. The church rented space in local community facilities, such as elementary schools, for Sunday services. In order to inform passersby of its services and the locations thereof, Good News and Pastor Reed placed temporary signs in street right-of-ways advertising religious services. The signs were typically posted for a period of approximately 24 hours. Because the time of the posting exceeded the time limits provided for temporary directional signs, Gilbert attempted in July 2005 to enforce its sign code against the church's signs, and town officials removed at least one of the church's signs.

Court Proceedings

Having failed to reconcile its differences with the town, in March 2008, the church filed an action in federal district court claiming violations of the Free Speech Clauses of the First Amendment.[8] The district court denied the church's motion for a preliminary injunction, and the Ninth Circuit Court of Appeals affirmed.[9] The Ninth Circuit found that the temporary event sign regulations were content neutral as applied, but remanded the question of whether the town impermissibly distinguished between forms of noncommercial speech on the basis of content.

On remand, the district court granted summary judgment in favor of the town, and determined that the town's exemptions from permitting were content neutral, despite the fact that the code regulated on the basis of the messages' category.[10] The Ninth Circuit again affirmed, finding that the code's distinctions between temporary event signs, political signs, and ideological signs were content neutral, since the own *"did not adopt its regulation of speech because it disagreed with the message conveyed."*[11] The Ninth Circuit determined that the town's regulatory interests were unrelated to the content of the signs being regulated.[12]

The Ninth Circuit's decision in **Reed** focused principally on the government's *regulatory purpose* in determining that the town's sign regulations were content neutral, and specifically rejected the suggestion that the Gilbert sign code was content based because it discriminated between categories of noncommercial speech on its face. That decision paralleled similar decisions in other federal circuit courts of appeal, including the Third,[13] Fourth,[14] and Sixth[15] (covering Michigan) circuits. These courts generally rejected arguments raised by sign owners that sign codes differentiating among sign types based on broad categories—*i.e.*, political, real estate, construction, etc.—was indicative of the type of content discrimination prohibited by the First Amendment.

Two other circuits, the Eighth[16] and Eleventh,[1] took a much stricter approach that demanded that sign regulations should not

About the Author

Brian Connolly is an attorney with Otten Johnson Robinson Neff & Ragonetti, PC in Denver, Colorado. He has two degrees in urban planning from Cornell University, and is co-author of the **Michigan Sign Guidebook**. He can be reached at: bconnolly@ottenjohnson.com. ❑

in any way differentiate among signs based upon message. Under this approach, if a code enforcement officer was required to read the text of a sign to properly enforce the code, the sign code should be found content based. Thus, distinguishing between, for example, political signs and event signs would be constitutionally fatal under this latter approach.

Recognizing this split among the courts of appeals, the Supreme Court granted *certiorari* review in **Reed**.

Loss for the Town

In the Supreme Court's **Reed** decision, justices unanimously agreed that the town's sign code was content based.

The majority opinion, authored by Justice Clarence Thomas and joined by five other justices, held that regulations of speech must be both *facially* content neutral and content neutral in their *purpose*. As the Court said, the *"commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys."*[18] Thus, if a sign code makes *any* distinctions based on the message of the speech, the sign code is content based. According to the majority, only after determining whether a sign code is neutral on its face should a court inquire as to whether the law is neutral in its justification. Because Gilbert's sign code differentiated between political, ideological, and event signs based on the message of the sign, the code was found content based.

Upon making that finding, the majority applied *strict scrutiny*, the most demanding form of constitutional review, which requires the government to show that *"the restriction furthers a compelling interest and is narrowly tailored to achieve that interest."*[19] As exemplified by **Reed**, regulations subjected to strict scrutiny rarely survive a court's review. Because the code placed strict limits on temporary event signs but more freely allowed ideological signs—despite the fact that both sign types have the same effect on traffic safety and community aesthetics—the code failed the narrow tailoring requirement of strict scrutiny.

> ***"Because Gilbert's sign code differentiated between political, ideological, and event signs based on the message of the sign, the code was found content based. *** Because the code placed strict limits on temporary event signs but more freely allowed ideological signs—despite the fact that both sign types have the same effect on traffic safety and community aesthetics—the code failed the narrow tailoring requirement of strict scrutiny."***

Three concurring opinions were filed in the case. Justice Samuel Alito filed a concurrence, joined by two other justices, in which he agreed with the majority's ruling, but listed nine forms of sign regulation that he would find to be content neutral. These forms included regulation on the basis of size, location, lighting, fixed versus electronic messaging, public versus private property, residential versus commercial property, on- and off-premises distinctions, and display time limits.[20]

In two concurring opinions, one by Justice Stephen Breyer and the other by Justice Elena Kagan, three justices concurred in the judgment but disagreed with the majority's application of strict scrutiny to the Gilbert code. Justices Breyer and Kagan would have applied *intermediate scrutiny*, a less demanding constitutional standard that requires the government to demonstrate that a speech regulation is narrowly tailored to a significant (as opposed to compelling) governmental interest. Traffic safety and aesthetics, for example, are significant governmental interests.[21] Still, however, both Justices Breyer and Kagan found the Gilbert sign code unconstitutional, because its sign categories were not tailored to the code's stated regulatory purposes. As the majority found, the distinctions between temporary event signs, political signs, and ideological signs did nothing to further the government's goal of beautifying the community and reducing traffic hazards.

Answers and Questions After *Reed*

Reed clarified some aspects of sign regulation, but also left several questions unanswered. Four points of clarification from **Reed** are worth mentioning. First, the decision reaffirmed the principle that content based regulations are subject to strict scrutiny and presumptively unconstitutional. Second, the majority opinion resolved the prior split between the circuit courts of appeal by requiring *both* facial content neutrality and a neutral purpose for sign regulations, and determined that a regulation's purpose is irrelevant if the regulation is not neutral on its face. Third, the Court determined that categorical signs, such as directional signs, real estate signs, construction signs, etc., are content based where they are defined by aspects of the signs' message. Fourth, the Court stated that categorical signs which purport to be *"speaker based,"* that is, the regulation applies to certain speakers but not others, may be found content based and subjected to strict scrutiny.

As for unanswered questions following **Reed**, there are many, including the following:

- Is there any form of sign regulation by category or function which is still constitutional? For example, is there any way for a local government to regulate temporary event signs, political signs, real estate signs, construction signs, directional or wayfinding signs, or are all of these distinctions now constitutionally fatal?
- Is distinguishing between on-premises and off-premises signs still constitutional? This distinction has, for example, allowed states and local governments to regulate billboards and standard onsite business signs differently. The **Reed** majority did not address this question, nor did it specifically overrule **Metromedia v. City of San Diego**, which previously upheld the on-premises/off-premises distinction.
- What does **Reed** mean for commercial speech regulation? Technically, **Reed** applies only to noncommercial speech, but some of the references in **Reed** point to cases that reviewed commercial speech regulations. Specially, **Reed** cites extensively to **Sorrell v. IMS Health**,[22] a 2011 case in which the Supreme Court applied a content neutrality analysis typically reserved for regulations of noncommercial speech to a Vermont regulation of commercial speech. If **Sorrell** implicitly gave more constitutional protection to commercial speech, does **Reed** expand upon this protection?
- What is **Reed**'s impact on the highway advertising acts that exist in all 50 of the states? For example, the Michigan Highway Advertising Act of 1972 prohibits signs *"that purport to regulate, warn, or direct the movement of traffic or that interfere with, imitate, or resemble any official traffic sign, signal, or device."*[23] Under the **Reed** majority's analysis, many of these prohibitions could be deemed content based and subject to strict scrutiny.
- Is sign regulation on the basis of land use still constitutional? The **Reed** majority marginalized Gilbert's defense that its sign code did not regulate the content of signage, but rather regulated on the basis of the sign owner or speaker, and noted that speaker-based regulation could also be subject to strict scrutiny if *"the legislature's speaker preference reflects a content preference."*[24] What constitutes speaker-based regulation? When does a speaker preference reflect a content preference? Is sign regulation by land use speaker-based if, say, residential property owners get less signage than commercial property owners?
- Does the **Reed** majority opinion overrule prior cases which upheld special regulations for adult businesses based on the *"secondary effects"* doctrine? The secondary effects doctrine holds that regulations of certain types of speech, such as adult entertainment, are content neutral when they are justified on the grounds that certain types of speech have negative *"secondary effects"* on the surrounding community.[25]
- What governmental interests, if any, are sufficiently compelling for sign regulations to survive strict scrutiny? Lower courts have held that aesthetics is not a compelling interest,

and some have similarly held that traffic safety is not compelling. The **Reed** majority suggests some sign regulations which might survive strict scrutiny, but does not provide much guidance on this question.

Suggestions for Practice

The result in **Reed** puts a much greater obligation on local governments to ensure that sign regulations are content neutral both on their face and in the government's underlying purpose for the regulations. Some observers anticipate that the decision will result in more freedom for sign owners to display signs of various messages, while others have suggested that the result in **Reed** might encourage governments to take a more cautious approach to sign regulation that more broadly suppresses speech. In any event, **Reed** is almost certain to provide sign owners with additional firepower to challenge local sign codes, and puts local governments at increased risk of a sign code challenge.

Local governments are not without options, however. *As a first step, local governments should review their sign codes carefully, with an eye toward whether the code is truly content neutral.* Consult a lawyer knowledgeable in First Amendment and sign issues to conduct an initial review and provide recommendations. If the sign code contains some potential areas of content bias—for example, if the code contains different regulations for political signs, construction signs, real estate signs, or others—consider amending the code to remove these distinctions.

In cases where a sign code update might take time, local planners and lawyers should coach enforcement staff not to enforce distinctions which might cause problems. Gilbert was steadfast in its sign enforcement, but that steadfastness resulted in ten years of litigation and excessive legal fees for the town. If a local sign code contains content based distinctions and a private party complains of differential treatment, it may be wise for the local government to avoid enforcement action on questionably content based rules.

Local governments should also ensure that sign codes contain all of the *"required"* elements of a sign code.

1. The code should contain a *purpose statement* that, at the very minimum, references traffic safety and aesthetics as purposes for sign regulation.
2. The code should contain a message substitution claus that allows the copy on any sign to be substituted with nor commercial copy.
3. The code should contain a severability clause to increas the likelihood that the code will be upheld in litigation, eve if certain provisions of the code are not upheld.

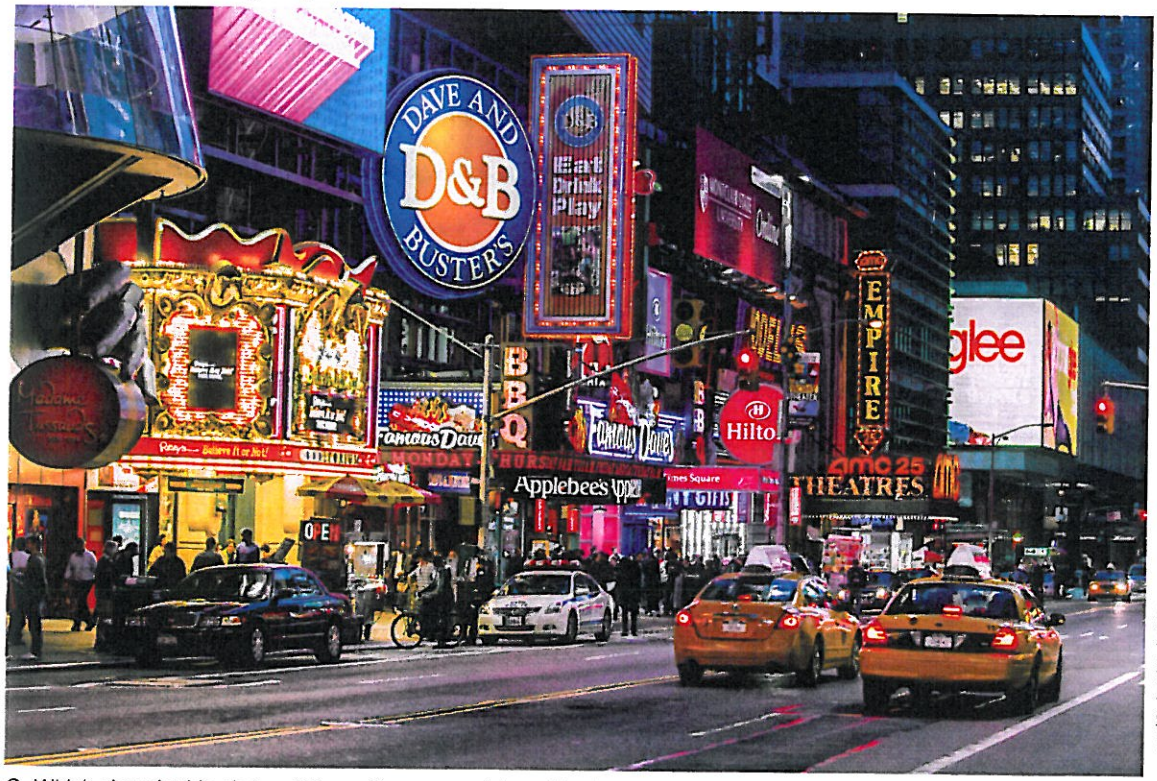
In preparing the purpose statement, it is always best to lin regulatory purposes to data, both quantitative and qualitative. Fo example, linking a regulatory purpose statement to goals of th local comprehensive plan, such as community beautification, in creases the likelihood that the code will survive a challenge. I traffic safety is one of the purposes of the sign code (it should be consult studies on signage and traffic safety to draw the connec tion between sign clutter and vehicle accidents.

In conducting the review of the sign code recommended above planners and lawyers should look to whether the code contain any of the sign categories that most frequently lead to litigation For example, if the code creates categories for political signs, ide ological or religious signs, real estate signs, construction signs temporary event signs, or even holiday lights, it is likely that the code is at greater risk of legal challenge. As a general rule o thumb, the more complicated a sign code is, *i.e.*, the more cat egories of signs the code has, there will be a higher risk of a lega challenge.

Conclusion

Reed is likely to precipitate a significant shift in courts' treatment of sign codes under a First Amendment challenge. Loca governments thus would be wise to undertake sign code reviews and, if necessary, revise now to ensure that the code does no contain any of the content based distinctions that created prob lems for Gilbert. Where necessary, local governments shoulc consult resources—including planners and lawyers knowledge able in First Amendment issues—to be certain that sign codes do not carry more risk than the local government desires to bear.

Readers are encouraged to obtain a copy of **Michigan Sign Guidebook: The Local Planning and Regulation of Signs**, *published by Scenic Michigan. More information can be found at http://scenicmichigan.org/sign-regulation-guidebook/.*



Q. Which signs in this photo of Times Square must be subject to content neutral sign regulations?
A. All noncommercial signs, and perhaps commercial signs as well. Are your sign regulations content neutral?

Note: Portions of this article are excerpted from Brian J. Connolly, *Supreme Court Will Review Sign Case With Significant Consequences for Governments, Businesses*, ***Rocky Mountain Real Estate Law***, http://www.rockymountainrealestatelaw.com/2014/07/supreme-court-will-review-sign-case-with-significant-consequences-for-governments-businesses/ (Jul. 31, 2014); and Brian J. Connolly, *U.S. Supreme Court Deals Significant Setback for Local Governments in Sign Case*, ***Rocky Mountain Real Estate Law***, http://www.rockymountainrealestatelaw.com/2015/06/u-s-supreme-court-deals-significant-setback-for-local-governments-in-sign-case/ (Jun. 18, 2015).

FOOTNOTES

1 576 U.S. ___, 135 S. Ct. 2218 (2015).
2 512 U.S. 43 (1994).
3 **Reed,** 135 S. Ct. at 2224.
4 *Id.* at 2224. Note that Arizona has a statute which prohibits local governments from removing certain political signs placed in connection with an election. A.R.S. § 16-1019(C).
5 *Id.* at 2225.
6 *Id.*
7 *Id.* at 2224.
8 The church also asserted Free Exercise Clause and Arizona Religious Freedom Restoration Act claims, however, only the Free Speech Clause claims were at issue on appeal.
9 **Reed v. Town of Gilbert,** 587 F.3d 966 (9th Cir. 2009).
10 **Reed v. Town of Gilbert,** 832 F. Supp. 2d 1070 (D. Ariz. 2011).
11 **Reed v. Town of Gilbert,** 707 F.3d 1057, 1071-72 (9th Cir. 2013).
12 *Id.*
13 *See, e.g.,* **Rappa v. New Castle County,** 18 F.3d 1043 (3d Cir. 1994).
14 *See, e.g.,* **Brown v. Town of Cary,** 706 F.3d 294 (4th Cir. 2013).
15 *See, e.g.,* **H.D.V.-GREEKTOWN, LLC v. City of Detroit,** 568 F.3d 609 (6th Cir. 2009).
16 *See, e.g.,* **Neighborhood Enters., Inc. v. City of St. Louis,** 644 F.3d 728 (8th Cir. 2011).
17 *See, e.g.,* **Solantic, LLC v. City of Neptune Beach,** 410 F.3d 1250 (11th Cir. 2005).
18 **Reed,** 135 S. Ct. at 2227.
19 *Id.* at 2231 (citation omitted).
20 *Id.* at 2233.
21 **Members of City Council of Los Angeles v. Taxpayers for Vincent,** 466 U.S. 789, 807 (1984).
22 131 S. Ct. 2653 (2011).
23 M.C.L. § 252.318.
24 Slip op. at 13.
25 *See, e.g.,* **City of Renton v. Playtime Theatres, Inc.,** 475 U.S. 41 (1986). ❑

TAKINGS CLAUSE BARS GOVERNMENT FROM DEMANDING A CROP SET ASIDE TO MAINTAIN AN ORDERLY MARKET WITHOUT JUST COMPENSATION

By **Steven P. Joppich,** Johnson, Rosati, Schultz & Joppich, P.C., Farmington Hills

Horne, et al v Department of Agriculture, 576 U.S.____(2015). U.S. Supreme Court Case No. 14-275. Decided June 22, 2015.

The Supreme Court's opinion in this case is divided into three *"Parts."* Part I is generally the facts and procedural history of the case. Part II addresses three questions pertaining to a Takings Clause analysis, but not including the issue of just compensation. Part III addresses the relevance of the just compensation portion of a takings analysis.

PART I

The Agricultural Marketing Agreement Act of 1937 is a federal statute that authorizes the U.S. Secretary of Agriculture to adopt what are called *"marketing orders"* for the purpose of maintaining stable markets for particular agricultural products. The California Raisin Marketing Order *("Order")* at issue in this case requires growers in certain years to physically turn over a percentage of their crop to the federal government, free of charge. The required percentage is determined by the Raisin Administrative Committee, which is appointed by the Secretary of Agriculture. In 2003 – 2004, this Committee ordered raisin growers to turn over 30% of their crops, and 47% in 2002 – 2003.

The process involves growers generally shipping their raisins to a raisin *"handler,"* who separates out the raisins that are due to the government under the Order (the *"reserve raisins"*), pays the growers only for the remainder, and packs and sells that remainder on the open market. The Raisin Committee takes physical possession of the raisins that have been set aside for the federal government, and decides how to dispose of them in its discretion. The Committee sells some of them on the noncompetitive markets (e.g., to exporters, federal agencies or foreign governments), donates some to charitable causes or other growers who agree to reduce their raisin production voluntarily, and disposes the remainder by any other means consistent with the purposes of the raisin program. The growers retain an interest in any net proceeds from the Committee's sales, after deductions for certain subsidies and federal government administrative expenses. In some years, such net proceeds were less than the cost of producing the crop or nothing at all.

The plaintiffs are both raisin growers and handlers (i.e., they *"handle"* both their own raisins and those produced by other growers). In 2002, the plaintiffs refused to set aside any raisins for the government. The federal government sent trucks to plaintiffs' facility to pick up the raisins, but the plaintiffs refused entry. The Department of Agriculture then assessed a fine equal to the market value of the missing raisins (approximately $480,000.00) and a civil penalty for disobeying the Order to turn them over (approximately $200,000.00). The plaintiffs then filed this suit claiming that the reserve requirement was an unconstitutional taking of their personal property under the Fifth Amendment.

Initially, the federal government argued that the lower courts did not have jurisdiction to consider the plaintiffs' constitutionally-based *"takings"* defense to the fine imposed by the Department of Agriculture. In 2013, that issue came before the U.S. Supreme Court, which rejected the government's argument and returned the case back to the Court of Appeals in order to address the plaintiffs' constitutional arguments.

Upon receiving the case back from the Supreme Court, the Court of Appeals entered a ruling that rejected the plaintiffs' argument. In support of this ruling the lower court asserted that *"the Takings Clause affords less protection to personal than to real property,"* and it found that growers *"are not completely divested of their property rights,"* because growers retain an interest in the proceeds from the federal government's sale of reserve raisins (as this summary describes above). The Court of Appeals went on to explain that the government in this case is imposing a reserve requirement in exchange for a government benefit (being an orderly raisin market), and the plaintiffs could avoid the reserve requirement by planting different crops. The lower court likened this case to a situation where a landowner could avoid a governmental requirement for a land use permit simply by using the land for another purpose that does not require a permit, which circumstance generally serves to mitigate against a regulatory

About the Author

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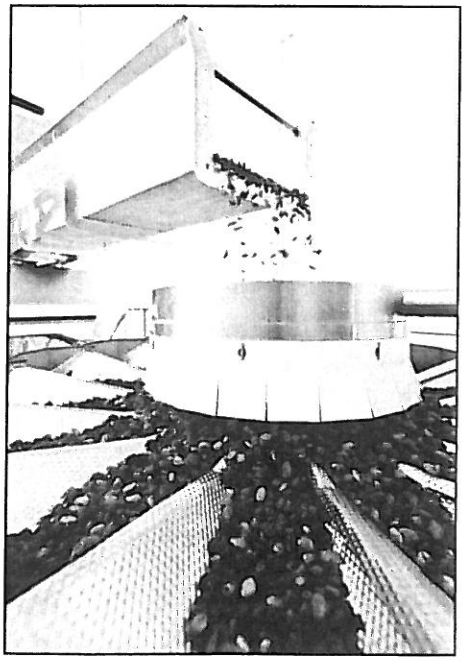
taking claim. Using this analysis, the Court of Appeals found that the reserve requirement was a *"proportional response"* to the government's interest in ensuring an orderly raisin market, and not a taking under the Fifth Amendment.

PART II

The U.S. Supreme Court disagreed with the Court of Appeals and reversed under an Opinion that addressed three questions, which are summarized below.

Question A: *Does the government's duty under the Fifth Amendment to pay just compensation when it "physically takes possession of an interest in property" apply only to real property and not to personal property?* The Supreme Court said *"no."* The Court noted that there is nothing in the text or history of the Takings Clause or any case law to suggest that the rule does not apply to the physical appropriation of personal property in the same manner as it applies to land. The Court recognized, however, that there are two types of takings with distinct legal review standards applicable to each. The first is a *"categorical"* or *"per se"* takings, in which the property is physically appropriated and taken away from the private property owner by the government. The second is referred to as a *"regulatory takings,"* being a governmental restriction on the use of property that goes *"too far."* In this case, the Supreme Court found that the Raisin Orders constitute an actual physical appropriation of a portion of the raisin crops by the government. The Court further found that the government takes title to and becomes the owner of the reserve raisins to the exclusion of the grower and handlers. While the government may return a portion of the proceeds from its sale of the reserve raisins, the Court concluded that physical ownership of the raisins has nevertheless been taken away by the government. As a result of this conclusion, the Court determined that there was no need to enter into a regulatory taking analysis, as it did not apply in this case.



Raisins being readied for packaging

Question B: *Can the government avoid the duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion?* The Supreme Court again answered *"no."* The Court concluded that, while such economic considerations (e.g., whether the government's regulation or action has deprived the owner of all economically viable use of the property) are relevant in a *regulatory* takings analysis, they do not apply in the context of a *per se* or *categorical* takings case. In other words, the question ends at the point in time when the Court concludes that a physical appropriation of the property by the government has occurred. At that point, it becomes what is called a *"per se"* taking of the property, and the only remaining question is whether the federal government has paid just compensation for the property it has taken. The Court agreed that, as a general matter, if there are some net proceeds that are returned to the growers or handlers by the federal government after the raisins have been appropriated, such net proceeds can be considered in terms of ascertaining whether adequate just compensation has been paid to the prior owner.

Question C: *Does a governmental requirement to relinquish specific property as a "condition" to governmental permission to engage in commerce constitute a per se taking?* The Court answered *"yes,"* at least in this case. The government argued that the reserve requirement is not a per se taking because raisin growers voluntarily choose to participate in the raisin market. In making this argument, the government stated that they can *"plant different crops"* or *"sell their raisin-variety grapes as table grapes or for use in juice or wine."* The Supreme Court began its analysis of the government's argument with the somewhat rhetorical statement *"'Let them sell wine' is probably not much more comforting to the raisin growers than similar retorts have been to others throughout history."* The Court then turned to the substance of the issue by reviewing one of its prior decisions in a takings case in which the Court had rejected an argument that a New York law requiring a landlord to allow the installation of a cable box on her rooftop could be avoided by ceasing to be a landlord. In that case, the Supreme Court found that *"a landlord's ability to rent his property may not be conditioned on his forfeiting the right to just compensation for a physical occupation [or takings of his property by the government]."* The Court then distinguished two other prior Supreme Court decisions in cases that involved takings claims based on governmental regulations—permits and taxes applicable to private company's sales of their products or goods. In those cases, the Court found that there had been no unconstitutional takings due to the valuable or special benefit conferred to the companies in exchange for the regulations or permission. In comparing those prior cases to the present case, the Court concluded that permission to sell produce in interstate commerce in the case at hand is not a similar type of special benefit that the government can *"hold hostage, to be ransomed by the waiver of constitutional protection."* Accordingly, the Court rejected the government's argument regarding this Question.

PART III

The Opinion concluded with a separate analysis of an additional issue related to whether there is a need for the plaintiffs to have established that just compensation would not have been afforded to the plaintiffs in this case had they complied with the California Raisin Marketing Order in 2002. The government claimed that the plaintiffs never provided evidence to support that conclusion. The government further asserted that if the case were sent back to the lower courts to engage in evidence gathering on the question of what just compensation would have been owed to the plaintiffs had they complied with the Order, the answer would be zero because without the price support program, the plaintiffs would likely have had a net gain as a result of the government's appropriation of the raisins. The majority opinion of the Court began with an indication that just compensation is to be measured *"by the market value of the property at the time of the taking,"* and concluded that there is no need to address that issue in this case, noting the government assessed a fine of $483,843.53 based on its calculation of the fair market value of the reserve raisins at the time of the enforcement action by the government – i.e., the government had already calculated the amount of just compensation and cannot now claim that the market value for just compensation purposes is something less. The Court's opinion also noted that the case has been pending for over a decade and *"has gone on long enough."*

Judgement of the Court of Appeals was reversed. Justice Roberts delivered the opinion of the Court summarized above. He was joined by Justices Scalia, Kennedy, Thomas, and Alito. Justices Ginsburg, Breyer, and Kagan also agreed with Justice Roberts, but only as to Parts I and II, above. Accordingly, Justice Breyer issued a separate written opinion that concurred in part and dissented as to Part III of Justice Roberts' majority opinion, and Justices Ginsburg and Kagan joined in Justice Breyer's opinion. Justice Sotomeyer filed a dissenting opinion disagreeing with all Parts of the majority opinion. ❑

FEDERAL FAIR HOUSING ACT ALLOWS CLAIMS ALLEGING A DISPARATE-IMPACT FOR DISCRIMINATORY HOUSING PRACTICES

By **Marc Daneman,** *AT&T Mobility Corp.*

Texas Department of Housing and Community Affairs, et al. v The Inclusive Community Project, et al. 576 U.S. ___ (2015). U. S. Supreme Court Case No. 13-1371. Decided June 25, 2015.

Opinion of the Court

The Inclusive Community Project (ICP) and others brought suit against the Texas Department of Housing and Community Affairs, City of Dallas, and others. ICP alleged that the way housing tax credits were distributed to developers, to build low-income housing, was having the effect of placing those residences in low income areas and fostering segregated housing practices in violation of the federal Fair Housing Act (FHA). The Department asserted its practices were neutral and intended to benefit those needing housing; and further the act did not allow for disparate-impact claims. The U.S. Supreme Court ("Court") held, on a five to four decision, that the FHA allows disparate-impact challenges and remanded the case back to the federal district court to determine if the State's actions had the effect of continuing segregation.

Although lower courts had recognized this type of challenge under statutes prohibiting discrimination, this was a case of first impression before the U. S. Supreme Court. The Court took the case to establish whether a claim of discrimination could be based on a theory of *"Disparate-Impact"* as applied to the FHA. Up to that point the Court only recognized a challenge under the theory of *"Disparate-Treatment"* under FHA. In a *"disparate-treatment"* claim the *"'plaintiff must establish that the defendant had a discriminatory intent or motive,' [whereas] a plaintiff bringing a disparate-impact claim challenges practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale."* The disparate-impact challenge could be made against what would otherwise be a rational policy intended to satisfy the statutory purpose; but as applied has an otherwise *disproportional adverse effect.*

In this case ICP challenged how the state and city were issuing low income tax credits to housing developers. The Federal Department of Housing and Urban Development (HUD) encouraged the use of low income tax credits in low income neighborhoods, where low income waiting lists were high, and where it was consistent with community revitalization plans. Texas' point system included those standards; however, it added other criteria. ICP claimed that those practices resulted in placing more credits in low income areas and less in higher income neighborhoods, thus contributing to segregation. ICP offered statistical data that showed about half of the credits going to areas with less than 10% white residents, and about only a third into predominantly white neighborhoods; and over 90% were issued in census tracts with less than 50% Caucasian residents.

The Federal District Court found a *prima facie* case for a discriminatory practice based on the numerical data presented. The District Court held that Texas had *"failed to meet [its] burden of proving that there are no less discriminatory alternatives."* The court then went on to require the State to consider other criteria, such as locations near good schools and to disqualify areas of high crime and hazardous conditions.

Texas appealed to the 5th Circuit Court of Appeals. During that appeal, HUD issued new regulations recognizing a disparate-impact *liability* where actions show a discriminatory impact that causes or will cause a prohibited result. Following the new HUD regulations, the Court of Appeals, based on earlier precedents, held disparate-impact cognizable under the FHA. But on the merits of this case, it reversed and remanded the case back to the District Court. It found that the District Court should not have placed the burden on the state to prove there were no less discriminatory alternatives for distributing tax credits. A concurring opinion suggested that the lower court relied too heavily on the statistical data without looking at causation. Again Texas and others appealed.

The U.S. Supreme Court took the case to address whether there could be disparate-impact liability. It began its analysis by looking at both historical and statutory actions in the area of residential segregation and discrimination in general. It noted that *de jure* segregation was made unconstitutional nearly a hundred years earlier (in **Buchanan v. Warley**, 245 U. S. 60 (1917)); however, segregation continued, particularly in housing because of economic and social practices. It was not until the mid-Twentieth Century when laws began to address racial and residential segregation by prohibiting racially restrictive covenants and redlining. The racial unrest of the 1960s lead to the **Kerner Commission Report**, which warned that racial separation was beginning to split the country. It recommended a number of practices to eliminate housing practices that fostered racial segregation. Coming from that Report and on the heels of the death of Dr. Martin Luther King, came the Fair Housing Act, 42 USC §3601 *et sec,* the Civil Rights Act of 1968, and later the amendments to the FHA in 1988. All of which the Court holds as critical to its decision.

The Court begins its legal analysis of disparate-impact by looking at two other anti-discrimination statutes – Title VII of the Civil Rights Act of 1964, and the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602 *et seq.*, as amended. Both acts predate the FHA and both require that one look beyond mere disparate-treatment. Under Title VII, **Griggs v Duke Power Co.**, 401 US 424 (1971), an employment discrimination case, the Court *"reasoned that disparate-impact liability furthered the purpose and design of the statute."* It found that, Congress *"proscribe[d] not only overt discrimination but also practices that are fair in form, but discriminatory in operation."* The Court read into **Griggs** that *"Congress directed the thrust of [the act] to the consequences of employment practices, not simply the motivation."* In addition the **Griggs** Court put on limits, on such liability by allowing *"business necessity"* as a defense.

Under ADEA the Supreme Court also found age discrimination could be challenged by disparate-impact practices even though the policy may be rational. In **Smith v City of Jackson**, 544 US 228 (2005), the Court affirmed **Griggs**. The **Smith** plurality emphasized that both Title VII and ADEA contained language *"prohibit[ing] such actions that 'deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's' race or age."* The Court said that *"the text of these provisions 'focuses on the effects of the action on the employee rather than the motivation for the action of the employer' and therefore compels recognition of disparate-impact liability."* [Em-

About the Author

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phasis in the original.] The Court then held

"that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose. These cases also teach that disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system. And before rejecting a business justification—or, in the case of a governmental entity, an analogous public interest—a court must determine that a plaintiff has shown that there is 'an available alternative . . . practice that has less disparate impact and serves the [entity's] legitimate needs.'"

The Court then looks at the FHA and specifically at the two sections ICP challenged — Section 804(a) and 805(a). Section 804(a) makes it unlawful:

"To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U. S. C. §3604(a).

Section 805(a) states:

"It shall be unlawful for any person or other entity whose business includes engaging in real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." §3605(a).

The Court sees Congress' use of the phrase *"otherwise make unavailable"* as a reference to "*consequences of an action rather than the actor's intent. ... This results-oriented language counsels in favor of recognizing disparate-impact liability. ... The Court has construed statutory language similar to §805(a) to include disparate-impact liability. ... (holding the term discriminate encompassed disparate-impact liability in the context of a statute's text, history, purpose, and structure).*" The Court found that all three statutes (FHA, Title VII and ADEA) look to results, even though they did not use the exact same language.

The Court also said the 1988 amendments to the FHA confirms this holding. By the time the FHA was amended, nine of the circuits had adopted an interpretation of the FHA that encompassed disparate-impact liability. Congress could have overruled those holdings in the 1988 amendments had it intended; but took no such action. In fact, Congress rejected a provision that attempted to remove disparate-impact liability from certain zoning decisions. The Court noted that what Congress did do was to build in three exemptions to avoid an overreaching of such claims of disparate-impact. It would recognize defenses in matters of business appraisals, prohibiting individuals who committed certain criminal acts, and setting residential occupancy limits. Congress would not have taken those actions if it did not find disparate-impact liability as a viable theory to challenge discriminatory practices.

The Court recognized that discriminatory practices have found their way into

"zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Suits targeting such practices reside at the heartland of disparate-impact liability."

Towards this end the Court said *"disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."*

The Court, however, recognized there must be limits to avoid serious constitutional questions and to protect potential defendants from abusive claims. Disparate-impact liability has some key exceptions. Liability is limited *"to give housing authorities and private developers leeway to state and explain the valid interest served by their policies. This step of the analysis is analogous to the business necessity standard under Title VII ... ."* Disparate-impact liability cannot be based solely on a showing of statistical disparity. If statistics are used, a statistical disparity will fail if one cannot point to a policy(s) that would cause such disparity. Statistical evidence may establish a *prima facie* case, but more is needed. Looking to that alone could lead to the use of quotas, which the Court emphasized, "*raises serious constitutional concerns.*" Where a legitimate *"business"* justification is shown, the challenger must show that there is an available alternative that has less impact and still serves the legitimate needs.

The Court states:

"It would be paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation's cities merely because some other priority might seem preferable. Entrepreneurs must be given latitude to consider market factors. Zoning officials, moreover, must often make decisions based on a mix of factors, both objective (such as cost and traffic patterns) and, at least to some extent, subjective (such as preserving historic architecture). These factors contribute to a community's quality of life and are legitimate concerns for housing authorities. The FHA does not decree a particular vision of urban development; and it does not put housing authorities and private developers in double bind of liability, subject to su whether they choose to rejuvenate city core or to promote new low-incom housing in suburban communities. A HUD itself recognized in its recent rule making, disparate-impact liability 'doe not mandate that affordable housing b located in neighborhoods with any pa ticular characteristic.'"

Where a court finds disparate-impact l ability it may order remedial actions whic concentrate on eliminating the offer sive practice(s). It must use race-neutr means, not targets or quotas which ar often suspect, in a fashion which foster diversity and combats segregation. How ever, "*the mere awareness of race in a tempting to solve the problems facing ir ner cities does not doom the endeavor a the outset.*"

Justice Kennedy, joined by Ginsburg Breyer, Sotomayor and Kagan JJ, con clude by holding

"that disparate-impact claims ar cognizable under the Fair Housing Ac upon considering its results-oriente language, the Court's interpretatio of similar language in Title VII and th ADEA, Congress' ratification of dispa rate-impact claims in 1988 against th backdrop of the unanimous view of nin Courts of Appeals, and the statutor purpose."

The Court of Appeals is affirmed an the case is remanded to determine if dis parate-impact liability does in fact exist i the State's (and City's) actions.

Dissenting Opinions

Two dissenting opinions were offered Justice Thomas challenged the major ity's foundation in upholding the **Griggs** opinion. He believes that Congress dic not intend disparate-impact liability ir drafting the Civil Right Act, rather it was an outgrowth of the EEOC's aggressive efforts. The **Griggs** case was in error an this case uses *stare decisis* to perpetuate it in the FHA. He noted that "*[r]acial imbal ances do not always disfavor minorities.* Thomas gave as an example the fact tha over 70 percent of the NBA was made o black players; reminding the Court that no all imbalances are indicative of disparate treatment or impact.

Justice Alito, joined by Roberts, C.J. and Scalia and Thomas JJ, dissentec holding that disparate-impact alone cannot give rise to liability. Alito argued that it is the *intention* of the party/agency that establishes disparate actions. The statutory language that the majority holds as controlling, which reads *"otherwise make unavailable"* (from §804(a)) is not operative. To the dissenters, the better reading is in the wording from Section 805(a) *"because of."* This phrase leads to the reason of – the intention behind – the discriminatory action. Alito warned that opening

up liability for disparate-impact will lead to perverse outcomes on both sides. He cites a case where a landlord (slumlord) sued a municipality who forced him to address rat infestation and other unsanitary conditions in his housing development. The landlord argued by taking those actions he was forced to raise the rents, which disproportionally impacted the poor. The Dissenters would hold that the original reading of the FHA does not allow for such liability. It only now comes as an expanded view from what Congress first wrote.

Commentary

The Supreme Court affirmed what most of the appellate courts had already established – that there can be disparate-impact liability under the FHA. What the Supreme Court added was this liability can be rebutted; and there are limits which may otherwise allow actions that have that apparent effect. What is still suspect are the use of quotas. The Court made clear that there could be difficult choices between two appealing and otherwise neutral policies. The dissent warns that this will result in abuse and further litigation.

The case also specifically highlights that zoning laws and many housing regulations can be used to thwart their intended policies. For that reason it made clear that disparate-impact liability continues to exist for those that abuse it. Planners, zoning officials, and community leaders must be vigilant to insure that their decisions and actions, although well intentioned, do not have the effect of creating or fostering discrimination and segregation. And, that any actions taken are the least intrusive necessary to achieve the intended result.

This case comes on the heels of HUD's release of new regulations, which are designed to give guidance on fair housing practices. Its Affirmatively Furthering Fair Housing (AFFH) Final Rule will simplify and clarify how communities can build and use better information to analyze segregation pattern; come up with community revitalization plans to reduce segregation; and set fair housing priorities. The Court acknowledged these efforts in its opinion. HUD will soon be releasing new tools and information to assist in making better choices and policies. Clearly the consideration of disparate-treatment and disparate-impact liability will play a role in this process. ❑

EPA MUST CONSIDER COST BEFORE DECIDING WHETHER NEW AIR POLLUTION REGULATIONS ARE *APPROPRIATE* AND *NECESSARY*

By **Mark A. Wyckoff**, *FAICP, Editor*

Michigan et al. v. Environmental Protection Agency et al. 576 U.S.____(2015). U.S. Supreme Court Case No. 14-46. Decided June 29, 2015.

This case was brought by Michigan Attorney General Bill Schuette who was joined by A.G.s from 22 other states. They challenged regulations by the Environmental Protection Agency (EPA) imposing harsher standards to regulate emissions of hazardous air pollutants from stationary sources such as factories and refineries. Coal power electric generating facilities were particularly affected.

The EPA concern was over the health impacts of the air pollutants. The industry concern was over the significant additional costs that would be imposed relative to the benefit.

The litigation was over provisions of the Clean Air Act, 42 USC §7412. Under this section, power plants could be regulated only if the EPA concluded that *"regulation is appropriate and necessary"* after examination of studies of impacts to human health created by power-plant emissions. The EPA conducted three studies and found that power-plant emissions (especially from coal-fired power plants) were *"appropriate"* because they pose public health and environmental risks, and *"because controls capable of reducing these emissions were available."* The EPA found regulation *"necessary"* because compliance with other requirements of the Clean Air Act did not eliminate those risks.

In a 5-4 opinion, a majority of the U.S. Supreme Court was generally comfortable with these conclusions by the EPA as far as they went, but sided with plaintiffs who argued that cost was a consideration that had to be taken into account in making the decision. However, the EPA refused to take cost into consideration despite its own studies which estimated *"that the cost of its regulations to power plants would be $9.6 billion a year, but the quantifiable benefits from the resulting reduction in hazardous-air-pollutant emissions would be $4 to $6 million a year."* These were direct benefits. The EPA argued when ancillary benefits of the regulations were considered, there would be between $37 and $80 billion in benefits and up to 11,000 premature deaths and 130,000 asthma cases would be prevented annually. However, these costs and benefits were not formerly considered by the EPA when making the rules at the front end of the rulemaking process.

The case was on appeal from the U.S. District Court in Washington, D.C. that had upheld the EPA's refusal to consider the cost of the regulation. Justice Scalia delivered the opinion of the Supreme Court, in which Chief Justice Roberts, and Justices Kennedy, Thomas, and Alito joined. Justice Thomas filed a concurring opinion. Justice Kagan filed a dissenting opinion, in which Justices Ginsburg, Breyer, and Sotomayor joined.

Majority Opinion

The majority carefully considered the Clean Air Act and the EPA's analysis and concluded:

1. The EPA had to consider *"the relevant factors."* In the majority's opinion, *"the EPA strayed well beyond the bounds of reasonable interpretation in concluding that cost is not a factor relevant to the appropriateness of regulating power plants."*
2. While *"appropriate and necessary is a capacious phrase,"* when read *"against the backdrop of established administrative law, this phrase plainly encompasses cost. It is not rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits."*
3. The EPA argued unsuccessfully that cost was not expressly listed in the statute as a relevant factor and cited other case law in their defense. The majority was unpersuaded and pointed out the whole reason the Clean Air Act has a separate provision for regulating power plants is because they are different and need to be treated differently and that cost is very relevant in regulating them.
4. The majority held that the *"EPA must consider cost – including the cost of compliance – before deciding whether regulation is appropriate and necessary."* The Court left it up to the EPA *"within the limits of reasonable interpretation,"* to decide how to account for cost.

The majority reversed the lower court and remanded.

Concurring Opinion

Justice Thomas in a concurring opinion went further than the majority opinion. He argued it was time for the Court to abandon the presumption of deference to federal agencies altogether. An older U.S. Supreme Court case, **Chevron U.S.A. v Natural**

Resources Defense Council in 1984, had laid down a two-part test for reviewing agency interpretations of federal statutes. The first step required judges to determine if the agencies interpretation of the law is consistent with the clear meaning of the text of the statute. Second, if there is no clear conflict, then judges should uphold the agencies interpretation, especially where the text is ambiguous, as long as the agency interpretation is reasonable. Thomas argued that **Chevron** went too far and disrupted the constitutional order by giving agencies the ability to *"legislate"* through *"reasonable"* interpretation of ambiguous federal law or by rulemaking that Congress should be doing by statute. Thomas argued that since the Constitution vests judicial power in the courts, it must be the courts—not administrative agencies—that are interpreting the law. He argued that this transfer of power occurred because judges were acquiescing to it. No other justices signed on to his concurrence.

Dissenting Opinion

Justice Kagan took a more nuanced look at the actions of the EPA and was joined by four justices in her dissent. She argued that the majority missed the impact of the *process* that the EPA was obligated to follow, and that as a result of that process, the EPA reached a reasonable conclusion to not include cost in their decision at the front end of the process as the majority felt was necessary. The minority conclusion was that it was reasonable for the EPA to consider costs at a later stage in the regulatory process. The courts have allowed this in prior decisions.

Kagan argued the EPA must follow an incremental process and be sensitive to facts that require treating different parties differently. In this case, *"plants designed to burn low-rank virgin coal"* from *"plants designed to burn high-rank coal."* Kagan wrote the EPA is better suited than the courts to figure out how to handle its statutory responsibilities and that per the **Chevron** decision, Congress has left those decisions to the agencies.

Commentary

In classic Washington form, this opinion is a partial victory for the two major sides. Those who think federal agencies are exercising too much unfettered authority, saw a majority of the Supreme Court knock down a major rule by a powerful federal agency. To those who supported the new power plant rules, the EPA has not really lost yet, as the case was remanded and the EPA could now consider costs and rewrite the rule, essentially keeping it in place.

Ironically, the EPA has already won in the eyes of many observers'. Since the EPA regulation was put in place in 2011, many, if not most coal-fired power plants have either converted to natural gas (or are in the process of doing so), or are being retired, or will be retrofitted with the required anti-pollution equipment. Plus, coal orders, and hence, coal mining have been sharply cut back, and with them, there is less pollution from mining coal. Plus the EPA's carbon limits are expected to shut down even more coal-fired power plants and with them coal air pollution. And last year the Supreme Court upheld the EPA cross-state pollution rule in **EPA v EME Homer City Generation** (2014) further signaling the need for electric generation plants to produce less polluting power.

Perhaps the immediate lesson to the EPA is that with ambiguous federal statutes, agency discretion to reach a reasonable decision is not unfettered, and that costs and benefits have to be seriously considered early in the process, not later. A more subtle message is that efforts by federal agencies to act as if they were legislative bodies in the interpretation of statutes will at some point likely result in the significant curtailment of agency interpretation and rulemaking authority, and that it is wise to sooner, as opposed to later, factor this into agency decisions by not over-reaching. ❑

MICHIGAN'S BLUE ECONOMY: The World's Freshwater Capital and Center for Freshwater Innovation

By **Michigan Economic Center at Prima Civitas**

A new report documenting Michigan's Blue Economy was released in April by the Michigan Economic Center at Prima Civitas and Grand Valley State University's Annis Water Resources Institute. It is titled **MICHIGAN'S BLUE ECONOMY - Making Michigan the World's Freshwater and Freshwater Innovation Center.** The interactive report (with stunning aerial photographs), available at www.michiganblueeconomy.org, is designed to spur strategic actions to expand and grow the State's already impressive Blue Economy, and help Michigan to become the world's freshwater capital and water innovation center. A PDF version is available at: http://michiganblueeconomy.org/wp-content/uploads/2015/03/Michigan-Blue-Economy-Report.pdf.

This visually rich report tells the story of how water and water innovation powered the rise of Michigan's economy. It lays out an agenda for how Michigan can realize new economic opportunities as *"smart water"* business innovators; a global water education and research powerhouse; and leverage our abundant and beautiful waters to make Michigan the most attractive place to live, work and play.

The website defines Michigan's Blue Economy and details it's size, scope and power. Water and water innovation already creates nearly $60 billion annually in economic activity

"More than one in five Michigan jobs already are linked to water, and given Michigan's unique natural water, and water innovation assets, we can be the world's center of water work, and seize more than our share of growing global water-solutions business, and related jobs," said John Austin, lead author of the report.

"There is only so much waterfront real estate, and with 3,000-plus miles of Great Lakes freshwater coast, 11,000 inland lakes, hundreds of rivers, and coastal and inland wetlands, Michigan is a magical place to live, work and play--if the water is clean, you can get to it, and we use it in a sustainable fashion," said Alan Steinman of Grand Valley State University, co-author of the report.

"Taking advantage of our incredible water resources has become an exciting priority for communities across Michigan who are reclaiming and reconnecting to their waterfronts, and making them the Main Street of their communities."

The Michigan Blue Economy report defines the five ways that water matters to jobs and the economy—and details the economic impact of Michigan's water-based economy, including:

- Transportation, ports, shipping: contributing over 65,000 jobs and $3 billion dollars annually;
- Big water-using sectors such as farming and manufacturing, which account for 581,000 Michigan jobs;
- Emerging water growth sectors, including water technology product and service firms that account for 138,000 jobs;
- Economic activity driven by water placemaking: water cleanup, water-

front development and recreation and enjoyment, which collectively account for more than 175,000 jobs and $12.5 billion annually;
- Water research, education centers and conservation organizations: the Urban Research Corridor (URC) research universities alone conducted $300 million worth of water research over recent years. Water conservation organizations employed 2,700 people and contributed $80 million to incomes.

The report tells the stories of how Michigan companies like Ford Motor Company became one of the greenest companies in the world through smart water use; Dow Chemical claims worldwide water technology innovation leadership; Whirlpool finds a future in making hyper-water efficient appliances and kitchens; auto parts makers like Cascade Engineering re-engineer to make life-saving water cleaning products for developing countries, and Steelcase pioneers water and energy conservation tools in its global supply chain. Newer firms are emerging as Blue Economy leaders, too, including Somnia Global, which finds innovative ways to clean hospital waste and manufacturing water-byproducts, and Limnotech, which engineers water cleanup and ecosystem management efforts worldwide.

"Michigan already is a leading center of water R&D, invention, and new smart water technologies and business development," said Austin. *"Michigan can show the rest of the world how to be smart stewards of freshwater, and become the nation's leader in water-based jobs and economic development."*

The report also documents the work of more than 40 Michigan communities focused on water placemaking for economic development, including Manistee, Grand Rapids, Marquette, Muskegon, and the necklace of Southeast Michigan communities from Port Huron to Monroe. All are reclaiming once-industrial waterfronts, and re-orienting community life to face and enjoy the water.

"Our water and natural resources first propelled our economy, and today Michigan communities are cleaning and reconnecting to their waterways as a central strategy for community revitalization" said Austin.

The report features the significant water research, innovation and education programs at Michigan's colleges and universities, like Northwestern Michigan College, the University Research Corridor institutions (Michigan State University, University of Michigan, and Wayne State University), Central Michigan University, Delta College and Grand Valley State University, who are pioneers in solving local, Great Lakes and truly global freshwater challenges. In the process, they are educating the water problem solvers, and providing future stewards that the world needs.

At these institutions global water problems are being treated and solved: MSU tackling water borne disease; CMU water cleanup in China, new technologies are being incubated at WSU around IT monitoring for water infrastructure/repair; Lawrence Tech is pioneering green infrastructure design; and the University of Michigan and MSU are focused on how to grow food without fouling freshwater, and mitigation of the water crisis as hit Lake Erie and Toledo.

"With nine university water research centers, 190 water programs, and 18 community colleges training water workers from scientist to environmental engineer, from waste water technicians to marine submersible operators, Michigan is already a center of excellence in water education and research," said Steinman. *"We can market Michigan as THE place to solve global and local water challenges, and train the water talent the world needs,"* said Steinman.

The report also provides a set of recommendations for strategic actions by state and local public officials, business, nonprofits, education and philanthropic leaders that can accelerate Michigan's already impressive Blue Economy growth and leadership including:
- Create a business-led "Blue Economy Council" to forge public-private partnerships bringing companies and researchers together to solve thorny water treatment and new technology development issues, and spur new business lines and companies;
- Create a new state Office of Water Innovation to re-fashion water use, regulatory standards and financing tools to encourage new sustainable water technology deployment and business growth;
- Organize a Pure Michigan Water Technology Innovation Fund: a catalyst organization to commercialize new water product and services, and develop new firms;
- Market Michigan as the Center of Water Education and Research Center of Excellence, and expand its footprint;
- Develop the World's Freshwater Innovation Center in Detroit - where Michigan's leading research universities, corporations and philanthropies focus water research, innovation, and commercialization of new ideas and technologies;
- Create Blue Economy Compacts: challenging communities and regions to organize around their Blue Economy as a priority economic development opportunity;
- Put Blue Economy enhancement at the core of Michigan's state, regional, and community placemaking and economic development strategy;
- Create a Blue Economy "Prize" for innovative community water and Blue Economy development strategies; and,
- Extend and make more flexible the Natural Resources Trust Fund to support Blue Economy building.

"Water is our history, and water is our future if we reconnect our communities to it and leverage the innovation horsepower in our companies, colleges and universities," said Austin. *"Pure Michigan is our calling card, and we can use it, and our waters can once again propel us to the economic front ranks."*

Website

The interactive website tells Michigan's water story. It is a story designed to inspire; showing how water and water innovation built Michigan's economy, and can renew it again. With exciting and infectious examples of companies, communities, and institutions already growing the Blue Economy that can guide us as we grow it further.

Readers are invited to explore this report, share it with your friends and colleagues, and through your own organizations and social media networks. You can share particular Blue Economy stories and features in the report (including your own) directly to social media (just hit the "Share" button for that page).

For example:
- You can note your own leadership role in water conservation, as Ford Motor Corp. has done as "green" corporate leaders. https://media.ford.com/content/fordmedia/fna/us/en/news/2015/04/07/ford-s-water-achievements-profiled-in-michigan-blue-economy-repo.pdf.
- If you are a community, you can share your own story about reconnecting to your beautiful water for local economic development as Port Huron has done. http://www.voicenews.com/articles/2015/04/15/life/doc5526bacc7aaac426203516.txt.
- And if you are an education or research institution, you can showcase your own contributions to water education and problem solving as Central Michigan University did: www.cmich.edu/news/article/Pages/Institute-for-Great-Lakes-Research-featured-in-Blue-Economy-Report.aspx.

For More Information

Michigan Economic Center at Prima Civitas

The Michigan Economic Center is a center for ideas and a network of state and local leaders and citizens working to: Advance a vision for Michigan's economic renewal; Provide policy ideas and solutions that realize the vision; and Engage

(continued on Backcover)

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FIRST CLASS MAIL

AUGUST

5 **DEQ WEST MICHIGAN REGIONAL GREEN INFRASTRUCTURE CONFERENCE.** Grand Valley State University's Eberhard Center, Grand Rapids. This conference expands on the 2014 statewide conference to highlight a broad range of benefits and opportunities provided by Green Infrastructure (GI) planning and preservation in western Michigan. Find out how GI is already being used in the region, and how working together through partnerships can make GI a success in your own area. Along with two plenary sessions, this conference will include concurrent sessions in three tracks: Finance and Policy, Stormwater and Flood Management, and Infrastructure at the Regional Scale. Optional pre-conference activities on August 4 include an evening networking event with vendors at the Eberhard Center and three sponsored field trips: Grand Rapids Green Infrastructure Tour; Holland Green Infrastructure Tour; and Muskegon—Lakeshore Trail Green Infrastructure Bicycle Tour. Conference Cost: $65. For more information visit: http://www.michigan.gov/deq/0,4561,7-135-3308_3333_4169_21606-348153--,00.html.

11,12,25,26 **HOT TOPICS IN PLANNING & ZONING.** Michigan Townships Association. Get updates on Medical Marijuana, zoning and building code enforcement, wind farms, GAAMPS as they related to agriculture in residential areas, and oil and gas and gravel extraction regulation. All programs have dinner starting at 4:00 PM with the program running from 5-8:30 PM. Online registration is at www.michigantownships.org or call 517-321-8908. Locations are:

Aug. 11 – Bavarian Inn Lodge, Frankenmuth

Aug. 12 – Radisson Plaza, Kalamazoo

Aug. 25 – Evergreen Resort, Cadillac

Aug. 26 – Garland Resort, Lewiston

18-21 **MEDA ANNUAL MEETING.** Shanty Creek Resorts, Bellaire. MEDA's biggest education and networking event of the year is its Annual Meeting. This three-day conference includes educational sessions covering the most important economic development topics and issues of the time as well as several networking opportunities. Cost: $280 MEDA Members/$400 Non-Members. For more information visit: https://medaweb.org/2014-03-07-03-45-34/2014-03-05-19-47-14/annual-meeting.

SEPTEMBER

2-4 **NATIONAL BROWNFIELDS TRAINING CONFERENCE.** Hilton Chicago, IL. Brownfields 2015 is the premier conference and trade show focused on environmental revitalization and economic redevelopment. This the 16th National Brownfields Training Conference, which promises to attract thousands of stakeholders to the "windy city" for three days of training, networking and business development. The heart of the conference is a dynamic educational program of speakers, discussions, mobile workshops, films and other learning formats that are calibrated to provide you with case study examples, program updates, and useful strategies for meeting your brownfield challenges head on. Who should attend? Local, state, and federal government leaders, Federal and state contractors, Real estate developers and investors, Financial and insurance providers and risk management practitioners, Economic development officials and community development organizations, Construction and building firms, Environmental and civil engineers, Planners and public works officials, Information technology professionals, Academic institutions and students, and Attorneys. For more information, visit http://www.brownfieldsconference.org/en/home.

FOR A COMPREHENSIVE LISTING OF CALENDAR EVENTS, VISIT THE PLANNING & ZONING NEWS WEBSITE AT http://www.pznews.net
PLEASE SEND US YOUR EVENTS FOR INCLUSION ON THE CALENDAR!

(continued from page 11)

and support a diverse network of citizens, leaders, and organizations in advancing the vision and making ideas for a more competitive, innovative, and global Michigan a reality. More information is available at www.MiEconomicCenter.org.

The GVSU Annis Water Resources Institute

The Robert B. Annis Water Resources Institute (AWRI) is a multidisciplinary research organization committed to the study of freshwater resources. The mission of the institute is to integrate research, education, and outreach to enhance and preserve freshwater resources. More information is available at www.gvsu.edu/wri. ❑

JOB AVAILABLE

The City of Lapeer Downtown Development Authority (DDA) is seeking **an Executive Director** to oversee the development, execution, implementation and documentation of DDA activities in the City of Lapeer.

The Director works with the City and DDA in determining overall development objectives and action plans and other developmental activities, and has responsibility for project oversight and administration. The Director enthusiastically and consistently promotes downtown development through various public relations initiatives; works cooperatively and effectively with businesses and property owners and prospective developers, identifies and secures grant-funding, and performs all administrative functions associated with DDA activities.

Responsibilities include but are not limited to:

- Implementation of the DDA Development Plan activities with the support of the City Manager and City departments;
- Representation and marketing of the DDA and its programs within the community as well as regionally and nationally;
- Potential implementation of the Michigan Main Street program.

Send letter of interest, resume, and reference list to City of Lapeer DDA, 576 Liberty Park, Lapeer MI 48446, Attn: Tracey Russell.

Full job description and application instructions are available at http://www.ci.lapeer.mi.us/hr_jobs.htm .

Application deadline: Friday August 7, 2015.

B R i
Beckett&Raeder

Landscape Architecture
Planning, Engineering &
Environmental Services

August 20, 2015

Regarding: Blair Township Master Plan

To whom it may concern:

This letter is to provide notification to your office that Blair Township will begin the process of writing a Community Master Plan pursuant to Public Act 33 of 2008, the Michigan Planning Enabling Act.

Once a draft plan is approved for distribution, you will be provided a link to an electronic copy for your organization's review and comment. Please feel free to contact me about any land use or community development issues pertinent to your organization, or to the participating community, which should be reviewed during the preparation of the plan.

Regards,

John Iacoangeli, AICP, PCP

Partner

Enclosure: List of organizations receiving this notification
Project website: www.blairmasterplan.org

Beckett & Raeder, Inc.
535 West William, Suite 101
Ann Arbor, MI 48103

734 **663.2622** ph
734 **663.6759** fx

Petoskey Office
616 Petoskey St., Suite 100
Petoskey, MI 49770

231.347.2523 ph
231.347.2524 fx

Traverse City Office
921 West 11th St., Suite 2E
Traverse City, MI 49684

231.933.8400 ph
231.944.1709 fx

Toledo
419.242.3428 ph

www.bria2.com

Monthly Parkland Responsibilities

Coordinated trail steward activities, performed routine maintenance on all trails, and performed trailhead maintenance tasks where appropriate

Nature Center Visitation this Month

Program Participants this month **353**
Drop ins this month **302**
Nature Center Visitation this year **4,451**
Nature Center Visitation since 2008 **5,705**

Nature Center Visitation Aug 20
Program Participants Aug 2014
Drop ins Aug 2014

Activity Detail	Conservation District Pillar	Location of activity	Property Owner
8/3 – Met with Ryan McCarty (NMC student) re: research project	Stewardship (Boardman River and Non-parklands ISN)	Leelanau/Benzie/Manistee Counties	N/A
8/4 – Attended & reported at Betsie River Restoration Committee meeting (~10 attendees)	Stewardship (Boardman River and Non-parklands ISN)	Leelanau/Benzie/Manistee Counties	N/A
8/5 – Met with Vickie Smith, DJ Shook, & Buzz Long re: PH in Northport & Leelanau County	Stewardship (Boardman River and Non-parklands ISN)	Leelanau/Benzie/Manistee Counties	N/A
8/6 – Met with Mike Kanitz re: messaging	Stewardship (Boardman River and Non-parklands ISN)	Leelanau/Benzie/Manistee Counties	N/A
8/11 – Attended & reported at Frankfort Tree Board mtg (6 present)	Stewardship (Boardman River and Non-parklands ISN)	Leelanau/Benzie/Manistee Counties	N/A
8/12 – Call with Drew Rayner, WM CISMA Coordinator	Stewardship (Boardman River and Non-parklands ISN)	Leelanau/Benzie/Manistee Counties	N/A
8/14 – Meeting with Vickie Sawicki, NC CISMA Coordinator	Stewardship (Boardman River and Non-parklands ISN)	Leelanau/Benzie/Manistee Counties	N/A
8/20 – Presented Habitat Matters and edible invasives to Portage Lk Garden Club (15 present)	Stewardship (Boardman River and Non-parklands ISN)	Leelanau/Benzie/Manistee Counties	N/A
8/21 – Shared invasive species information with East Lake village, Arcadia Bluffs Golf Course (4 contacts)	Stewardship (Boardman River and Non-parklands ISN)	Leelanau/Benzie/Manistee Counties	N/A
8/24 – Attended & promoted Habitat Matters at Kingsley butterfly release program (~60 present)	Stewardship (Boardman River and Non-parklands ISN)	Leelanau/Benzie/Manistee Counties	N/A
8/26 – Phone call with Leelanau Conservancy re: match and workbees	Stewardship (Boardman River and Non-parklands ISN)	Leelanau/Benzie/Manistee Counties	N/A
8/31 – Phone call with Nick Cassel, EUP CWMA	Stewardship (Boardman River and Non-parklands ISN)	Leelanau/Benzie/Manistee Counties	N/A
Applied to US Forest Service's GLRI CWMA grant opportunity (8/28)	Stewardship (Boardman River and Non-parklands ISN)	Leelanau/Benzie/Manistee Counties	N/A
Visited 3 prospective nurseries about *Go Beyond Beauty*	Stewardship (Boardman River and Non-parklands ISN)	Leelanau/Benzie/Manistee Counties	N/A
Contacted knotweed landowners (35 contacted)	Stewardship (Boardman River and Non-parklands ISN)	Leelanau/Benzie/Manistee Counties	N/A
Treated and re-treated knotweeds (48 stands, 4 acres)	Stewardship (Boardman River and Non-parklands ISN)	Leelanau/Benzie/Manistee Counties	N/A
Surveyed ~1/2 of Lake Bluff Bird Sanctuary for Top 20 invasives (36 acres)	Stewardship (Boardman River and Non-parklands ISN)	Leelanau/Benzie/Manistee Counties	N/A
Surveyed invasives at East Lake village (5 acres)	Stewardship (Boardman River and Non-parklands ISN)	Leelanau/Benzie/Manistee Counties	N/A
Completed Nature Day camp serving 215 campers this summer	Education	Boardman River Nature Center	
Completed exit interview with seasonal staff	Education	Boardman River Nature Center	
Program for Learning Partners of the District Court	Education	Boardman River Nature Center	N/A
Planned and completed Peepers fall schedule	Education	Boardman River Nature Center	N/A
Received our provisionary day camp license from the State of Michigan	Education	Boardman River Nature Center	N/A
Prepared report to for the Northwest Michigan Farm Bureau on progress of AFB Grant	Education	Boardman River Nature Center	N/A
Sent out post camp surveys to parents. 17 response so far. All extremely positive feedback	Education	Boardman River Nature Center	N/A
Working on setting up a project learning tree work shop at the Nature Center	Education	Boardman River Nature Center	N/A
Creating curriculm for Kids Creek stream monitoring grant	Education	Boardman River Nature Center	N/A
Continued to assist growers as they work towards verification	Agriculture	On Farm	Private Property
Provided MAEAP updates for Antrim, Benzie, and Leelanau board of directors	Agriculture	Other	N/A
Conducted 9 on farm risk assessments	Agriculture	On Farm	Private Property
Conducted 2 MAEAP re-verifications	Agriculture	On Farm	Private Property
Met with American Waste, keeping track of recycled pesticide containers	Agriculture	Other	N/A
Attended and presented at the Hops Field Day tour on August 14	Agriculture	On Farm	Private Property
Attended and presented at the Grand Traverse Regional Land Conservancy farm tour on August 17	Agriculture	On Farm	Private Property
Met with Fisher Insurance to discuss on farm liability	Agriculture	Other	N/A
Attended and provided MAEAP update at NW Farm Bureau board of directors meeting	Agriculture	Other	N/A
Attended NRCS staff meeting to discuss RCPP	Agriculture	Other	N/A

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www.grandtraverse.org/planning

Planning
Land Bank
Housing Initiatives
Economic Development
Brownfield Redevelopment

To: All Local Units of Government in Grand Traverse County
FROM: John C. Sych, AICP, Planning Director
DATE: August 10, 2015
RE: **Planning & Zoning Essentials Workshop – Wednesday, September 30**

The Grand Traverse County Planning Commission is pleased to announce the upcoming **Planning & Zoning Essentials Workshop** being conducted expressly for the planning commissioners, zoning board of appeals members, and elected officials in Grand Traverse County.

This workshop will be held on **Wednesday, September 30, 2015** in the Second Floor Training Room of the Governmental Center from 5:30p.m. to 9:00 p.m. Registration starts at 5:00 p.m. This the same Planning & Zoning Essentials workshop offered by the **Michigan Association of Planning (MAP)**. The Grand Traverse County Planning Commission is sponsoring this workshop to provide a more convenient time and location for all local officials around the County to learn the basics of land use planning and zoning.

The fee for the workshop is significantly reduced! The individual rate is **only $15.00 per person** for any official from a township, city or village in Grand Traverse County. The group rate is **only $75.00 for five or more** officials from one township, city or village in Grand Traverse County! Cost includes workshop program, instructor, materials, and light dinner.

Paul LeBlanc, AICP, an authorized trainer for MAP, will conduct the workshop. This information-packed program is perfect for new planning commissioners and zoning board of appeals members, but it's also a great refresher course for more experienced officials or elected officials looking to learn more about these boards. Roles and responsibilities of the board, site plan review, comprehensive planning, zoning ordinances, planned unit developments, and standards for decision-making are all on the agenda. This is also a great opportunity for planning & zoning officials to get to know their neighbors from around the County.

Planning & Zoning Essentials Workshop
for all planners in Grand Traverse County

Wednesday, September 30
5:30 p.m. – 9:00 p.m.

Second Floor Training Room
Governmental Center
400 Boardman Avenue, Traverse City

If you have any questions or comments, please feel free to contact Marcia Carmoney at 922-4676.

Registration and payment is due by 5:00 p.m. on Friday, September 11

Charter Township of Garfield

Planning Department Report No. PD 2015-55

Prepared:	September 1, 2015	Pages:	1 of 3
Meeting:	September 9, 2015 Planning Commission	Attachments:	☐
Subject:	Residential Density		

STAFF COMMENT:

At its meeting on August 12th, the Planning Commission held a brief discussion regarding potentially allowing multi-family residential uses to be located within the commercial zoning districts. To further that conversation, Staff prepared report PD 2015-56; discussion of that report will take place as the next agenda item.

While Staff was preparing report PD 2015-56, however, we began to evaluate residential densities, both as they are currently described in the Zoning Ordinance and also as zoning density regulations compare with the current and proposed Master Plan.

We started this evaluation with by comparing the R-3 Multi-Family District to the Master Plan's High Density Use, but it quickly became apparent that a broader look at all of the residential zoning districts and land use classes would be appropriate. Therefore, the purpose of this report is to provide the Planning Commission with information on how our zoning ordinance relates to ongoing Master Planning efforts. Some findings of this comparison are as follows:

- **R-R (Rural Residential) Zoning District.**
  - Current zoning ordinance maximum densities of 1 unit per acre.
  - This correlates nicely with the Rural Land Future Land Use category of 1 unit per acre.
  - Recommendation: no change.

- **R-1 (Single Family) Zoning District.**
  - Allows maximum densities up to 3 units per acre (based on availability of public sewer).
  - This correlates with the lower limits of the Moderate Density Residential Category (which calls for 2 to 6 units per acre).
  - Recommendation: Consider creating a new Master Plan Category of Low Density Residential to be from 1 to 3 units per acre
  - Reasoning:
    - This would allow the Master Plan to more closely follow existing zoning districts and land use patterns. For example, subdivisions such as Heritage Estates, Stone Ridge, Silver Farms, etc are all generally zoned R-1 One-Family Residential. Accordingly, these would be indicated as Low Density Residential on the Master Plan.

- This would also allow the Commission to plan for compatible densities on remaining vacant land surrounding existing subdivisions.

- **R-2 (Single and Two Family) Zoning District.**
  - Allows from 3 to 5 units per acre
  - This correlates with the upper limits of the Moderate Density Residential Category
  - Recommendation: Consider revising the Moderate Density Residential to be from 3 to 6 units per acre.
  - Reasoning:
    - As with the R-1 Discussion, this change would allow the Master Plan to more closely follow existing zoning districts and land use patterns. In this case, developments approved with this density include Lone Tree and Brookside Commons.

- **R-3 (Multi-Family) Zoning District.**
  - Allows up to 9 units in acre, based on a requirement that one multi-family unit may be built for each 5,000 feet of lot area. The previous zoning ordinance, which calculated density in a different (and more complicated) way allowed densities of roughly 10 units per acre. Reducing the area required to 4,000 or 4,500 would be a simple way to at least allow development densities permitted in the past, and is recommended at a minimum.
  - The R-3 District does not correlate directly with any Future Land Use Plan. It is closest to Medium Density Residential, which calls for densities from 7 to 14 units per acre.
  - Recommendation: None yet, pending discussion. Possibilities, however, may include the following:
    - Revise the Master Plan description for High-Density to a level which is more in line with what is allowed in the R-3 District (limited to 10 units per acre); or
    - Revise the Zoning Ordinance to allow densities in line with what is described in the Master Plan (up to or over 14 units per acre); or
    - Some combination or middle ground of the above.
  - Discussion point:
    - The recent Maple Ridge property was approved in the multi-family zoning district with a density of approximately 10 units per acre (approved under the older standard referenced above.
    - At 10-units per acre, is the Maple Ridge project a good example of what we would consider a somewhat dense project?
    - Consider that the High Density Residential land use category presently calls for development of 14+ units per acre. None of our current zoning districts even come close to allowing that level of density. (It *could* be approved as a PUD, but is definitely not a guarantee).

- **High Density Residential Land Use Category (on Master Plan)**
  - As noted above, the current Master Plan calls for densities of 14+ units per acre. Nothing in the Zoning Ordinance presently allows for that level of intensity.
  - Recommendation: None yet. Pending discussion. See the possibilities listed under R-3 discussion above. Another possibility may be to create another land use category, such as Very High Density Residential (14+).

Implications of above:

The broad implications of the above changes would be that the draft master plan would be revised to more closely follow existing zoning districts and land use patterns. This would provide protections to existing neighborhoods and uses that neighboring development would be compatible.

In certain cases, of course, we may wish to describe higher densities even if it was adjacent to a lower density district. Generally, this will apply to vacant property, but could also serve to incentivize the redevelopment of certain residential areas which have been discussed by the Planning Commission in the past.

ACTION REQUESTED:

No formal action is necessary. The Planning Commission's discussion will provide Staff with guidance on how to continue with the Master Plan development and to potentially consider necessary zoning ordinance amendments.

Attachments:
None

Charter Township of Garfield Planning Department Report No. PD 2015-56			
Prepared:	September 1, 2015	Pages:	1 of 5
Meeting:	September 9, 2015 Planning Commission	Attachments:	☒
Subject:	Multi-family dwellings in commercial zoning districts; supplemental multi-family setbacks; group housing		

STAFF COMMENT:

At its meeting on August 12th, the Planning Commission reviewed an application for conceptual review of an apartment building in a commercial zoning district. This led to a broader Planning Commission discussion of potentially allowing multi-family residential uses to be located within the commercial zoning districts. This report is intended to further that discussion.

In addition, Staff is requesting Planning Commission discussion on supplemental setback requirements for multi-family developments, as well as consideration of possibly eliminating the "group housing" standard from the Zoning Ordinance.

Multi-family developments in Commercial Districts; which zones?

Presently, there are four distinct commercial zoning districts in the Township: C-G General Commercial, C-H Highway Commercial, C-L Local Commercial, and C-O Office Commercial. Additionally, the C-P Planned Shopping center is commercial in nature.

As indicated on the attached zoning map, the C-H (dark purple) and C-G (red) districts are similar in that they are the most prevalent, and located along major corridors such as US-31 and South Airport Road. From an overall standpoint, if multi-family development is going to be allowed in the C-H district, it would also make sense to allow it in the C-G.

The C-P Planned Shopping district includes three geographic areas of the Township: the Grand Traverse Mall, the Cherryland Mall, and Meijer (which as a PUD). For Cherryland Mall specifically, a redevelopment or infill development which included high-density housing would seem to be a great fit. Whether or not Grand Traverse Mall would ever desire to provide multi-family is a big question; but again, it wouldn't seem to have any negative impacts.

The C-L Local Commercial district is scattered about, with the most consolidated "pockets" being located on Veterans Drive and Barlow Street. In each of these locations, nearby or adjacent property is already zoned R-3. Additional pockets exist on Cass Road, on Garfield Road just south of South Airport, and at the intersection of Garfield/Hammond—development of these sites into multi-family does not seem likely. Authorizing multi-family development as an allowable use in the C-L district would not really seem to help, or hurt.

The C-O Office Commercial district is primarily located in the West Royal Drive complex, though a pocket does exist on McCrae Hill Road, and some other parcels are scattered around. Only around 100 acres of land is zoned C-O, and most of it is already developed with offices.

Implications:
There are a number of pros and cons to allowing multi-family developments within the commercial zoning districts. Allowing people to live within easy walking or biking distance of their place of employment, as well as within easy reach of goods and services, is probably the biggest "pro."

Additionally, increasing the locations where multi-family units may be built could help the development community to satisfy existing high demand for rental units in Grand Traverse County. Presently, there are just under 650 acres of land zoned R-3 Multi-Family Residential (orange on the zoning map). An additional 831 acres is currently zoned C-G and C-H, more than doubling the area where this type of housing could be built. Including the C-P district would add another 150 acres of land where apartments could be built.

Ensuring that the apartment would actually be a nice place to live is probably the most challenging part of this discussion. Commercial centers are often brightly lit at night, have nightly deliveries, and conduct routine maintenance such as snow plowing at all hours of the day. For these reasons, when multi-family uses have been approved as part of a commercial center in the past (Grand Traverse Crossings PUD), the nightly activities of the commercial uses were restricted to protect the residents. In allowing this use to establish "after the fact," the Township lacks the authority to impose these "quiet time" restrictions on the commercial elements.

Traffic:
The Planning Commission also discussed impacts of increased traffic a multi-family use could have. Generally, the uses already allowed within the commercial zoning districts are expected to have higher traffic impacts then an apartment building.

For example, an average apartment building may contain 30 dwelling units. Based on a trip generation book published by the Institute of Transportation Engineers (ITE), each dwelling unit is expected to generate 6.63 trips per unit on a weekday. So, a 30-unit building would generate approximately 200 trip-ends (arrivals and departures) to and from a site over an entire day.

For comparison, a 7,000 square foot high-turnover restaurant (where patrons are present for an hour or less) creates over 900 vehicle trip-ends per day. Meanwhile, a 250,000 square foot supermarket (roughly the size of Meijer) is expected to generate over 300 vehicle trips over a one-hour period in the evening rush, and nearly 3,000 trips over the course of a weekday.

Again, these are just a couple of examples, but it is commonly held that an apartment would generate a lot less traffic than common commercial uses.

Multi-Family Development Supplemental Setbacks

If the Zoning Ordinance is going to be opened up for an amendment, Staff would also like the Planning Commission to discuss the supplemental setback standards for multi-family developments. The following is a screenshot from the former zoning ordinance, which prescribes 50-foot front and 30-foot side setbacks for all PUDs, mobile home parks, and group housing:

> **Section 7.4.3 Supplemental Setbacks for Planned Unit Developments, Mobile Home Parks and Other Group Housing Developments:**
>
> **(1) It is the intent of this Ordinance that residential developments other than conventional subdivisions be designed, constructed, operated and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity of the Township in which they are located, and that such a use will not change the essential character of the area in which it is proposed. Inasmuch as planned unit developments, mobile home parks and other group housing developments may involve higher densities of land use or building types which distinctly differ from the single family conventionally built dwellings which predominate through the Township, periphery setbacks for such developments are established as follows.**
>
> **(2) Periphery Setbacks: All buildings, including single family homes within a planned unit development or group housing development and mobile homes within a mobile home park development shall be placed at least fifty (50) feet from any public right of way line for existing roadways bordering a site and at least thirty (30) feet from a development boundary line which is not a public road right of way. Setback spaces shall be occupied by plant materials and appropriately landscaped.**

Notably, the above does not include supplemental setbacks for regular multi-family developments. The new ordinance does, however:

> **SECTION 777 SUPPLEMENTAL SETBACKS FOR PUD'S, MOBILE HOME DEVELOPMENTS AND OTHER GROUP HOUSING or MULTI-FAMILY DEVELOPMENTS**
>
> A. REGULATIONS AND CONDITIONS.
>
> It is the intent of this Ordinance that residential developments other than conventional subdivisions be designed, constructed, operated and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity of the Township in which they are located, and that such a use will not change the essential character of the area in which it is proposed. Inasmuch as planned unit developments, mobile home parks and other group housing developments may involve higher densities of land use or building types which distinctly differ from the single family conventionally built dwellings which predominate through the Township, periphery setbacks for such developments are established as follows.
>
> All buildings, including single family homes within a planned unit development, group housing, or other Multi-Family development and mobile homes within a mobile home park development shall be placed at least fifty (50) feet from any public right of way line for existing roadways bordering a site and at least thirty (30) feet from a development boundary line which is not a public road right of way. Setback spaces shall be occupied by plant materials and appropriately landscaped.

Staff has reviewed the numerous Planning Department reports which were prepared as the new zoning ordinance was under preparation. It does not appear that the Planning Commission ever discussed or intentionally added multi-family developments to this supplemental setback standard. It seems that it was inadvertently or mistakenly added to this section.

In the R-3 zone, where apartments are permitted as an SUP, setbacks are 25-feet front, 10-feet side, and 30-feet rear. As the ordinance is currently written, the larger supplemental setbacks of 50-feet front and 30-feet on all sides would take precedent. This is contrary to our current planning goals of infill development, redevelopment, and higher density in the R-3 zones than has been considered in the past.

Furthermore, the new zoning ordinance requires a developer to set aside 300-square feet of open space per apartment unit, likely negating the need for larger perimeter setbacks as a way to keep some areas of the site open for the use of the residents. As such, Staff would like the Planning Commission to consider taking multi-family developments back out of Section 777.

However, in considering the above, a 10-foot side setback for an apartment building does not seem adequate. Staff would recommend that the Planning Commission consider increasing the side setback in the R-3 zone to 20-feet. If that is acceptable, then it does not really make sense to differentiate between side and rear setbacks, and it may be appropriate to reduce the 30-foot rear setback to 20-feet as well. Discussion on the above is warranted.

Group Housing

Staff considered bringing up the topic of group housing while the current zoning ordinance was under its final revisions, but decided to not risk delaying adoption because of it. At this point, however, we would like the Planning Commission to discuss the group housing development procedure.

Group housing (Section 430) is an antiquated standard which has not been used for any development in decades. In theory, the idea is that group housing is a multi-family development which provides common open areas, and building coverage of not more than 35% of a lot (the same 35% is a requirement for all development in the R-3 zone, however). Common open space area is required at 30 square feet per dwelling unit, and buildings are subject to spacing requirements. Additionally, these developments are subject to the supplemental setback standards described by Section 777.

The biggest problem with the group housing standard is that there is no control of density. While the R-3 zone describes allowable density based on dwelling unit (5,000 square square feet of lot area is required for each dwelling unit), density is not described for a group housing development. Conceivably, density could far exceed even the highest densities described by the Master Plan, and the Planning Commission would have little to no control over this.

In the R-3 zone, there is no benefit to the Township to allow a group-housing development, and the big negative of unregulated density. Furthermore, it is a redundant standard, because a developer who wanted to build a group housing type of development could do so as a PURD or regular multi-family development.

Recommendation:
Based upon the above, Staff's preliminary recommendation is to allow for multi-family development in limited commercial zones by Special Use Permit, and to establish certain supplemental requirements on top of that. This would give the Planning Commission a much greater level of control over site design and compatibility issues. The SUP process would also provide notice to neighboring property owners who may feel that a residential use is incompatible with established commercial uses in the vicinity.

A bullet point list of recommendations is as follows:

- C-G, C-H, and C-P: allow by Special Use Permit with supplemental conditions such as adequate screening from the commercial use, demonstrating compatibility with surrounding uses (e.g., nighttime plowing), open space requirements, provisions for pedestrians, etc., each of which would be intended to address the proper "integration" of the residential use into the commercial setting.
- C-L: neutral; as noted above, this is a relatively small district with small, individual parcels and it is unlikely that these sites would be developed for multi-family uses. If asked to lean one way or the other, Staff would probably be disinclined to allow.
- C-O: do not recommend to include multi-family due to limited area zoned Commercial Office, and because the majority of this land is already developed for office uses.
- Remove multi-family developments from the supplemental setback standards of Section 777, but change R-3 setbacks from 25-10-30 (F-S-R) to 25-20-20.
- Remove Group Housing standard from zoning ordinance.

ACTION REQUESTED:
No formal action is necessary. The Planning Commission's discussion will provide Staff with guidance on how to draft a possible Zoning Ordinance amendment.

Attachments:
11x17" Zoning Map

Charter Township of Garfield
Grand Traverse County, Michigan

Zoning Map

Legend

- Inner - Outer Airport Overlay Boundary
- Parcel Line
- Section Line
- A-1 Agricultural
- R-R Rural Residential
- R-1 One-Family Res
- R-2 Two-Family Res
- R-3 Multi-Family Res
- R-M Mobile Home Res
- C-O Office Commercial
- C-L Local Commercial
- C-G General Commercial
- C-H Highway Commercial
- C-P Planning Shopping
- I-G General Industrial
- I-L Limited Industrial
- P-R Park-Recreation
- GTC - Grand Traverse Commons
- Conditionally Zoned
- Township Line

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0 0.5 1 2 Miles

Document Path: I:\GarfieldGIS\Printable Map Projects\Garfield Township Zoning Map 11x17.mxd

Document Print Date: 2/12/2015