STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

GARFIELD NEIGHBORHOOD WATCH, a Michigan non-profit corporation; NORTHERN MICHIGAN ENVIRONMENTAL ACTION COUNCIL, a private non-profit organization; and JEROME L. SCHOSTAK d/b/a TRAVERSE CITY VENTURE,

Plaintiffs,

vs

File No. 90-8075-CE
HON. PHILIP E. RODGERS

CHARTER TOWNSHIP OF GARFIELD, a Michigan charter township; PLANNING COMMISSION OF GARFIELD TOWNSHIP; ZONING BOARD OF APPEALS OF GARFIELD TOWNSHIP; ZONING ADMINISTRATOR OF GARFIELD TOWNSHIP; GENERAL GROWTH COMPANY, INC., a foreign corporation; and GRAND TRAVERSE MALL LIMITED PARTNERSHIP, an Iowa limited partnership,

Defendants.
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DECISION AND ORDER

INTRODUCTION

This litigation arises out of zoning and environmental issues associated with the construction of the Grand Traverse Mall. Plaintiffs and Defendants have filed motions for summary disposition directed at various counts, and Defendants have also challenged Plaintiffs' standing to litigate several of the counts set forth in the Amended Complaint. Each of the issues has been extensively briefed and argued to the Court orally. To facilitate a review of this complex litigation and the voluminuous materials filed with the Court, the Court's findings and decisions on the issues raised pursuant to the various motions for summary disposition will be organized and described in reference to the specific counts of the Amended Complaint. This analysis will be preceded by a discussion of the issues of standing and vested rights which were raised by the Defendants and conclude with a review of the conflict of interest question.

Before this discussion begins, a brief factual history would be appropriate. The Grand Traverse Mall is currently under construction on a parcel of land which has long been under consideration for the development of a regional shopping center and which has been the subject of two prior township referenda, a Circuit Court injunctive action and a decision of the Court of Appeals. Committee for Sensible Land Use, et al v Garfield Township, et al. 124 Mich App 559; 335 NW2d 216 (1983).

The Sensible Land Use litigation was filed after Garfield Township adopted ordinance amendments on August 15, 1979, which rezoned approximately 37 acres of land from single and multiple family residential classifications to a planned shopping center district. These lands were under common ownership with adjacent lands which had been similarly zoned in 1974. Of the combined

acreage in the two parcels, the owner retained 11 acres and proposed to develop the remaining 73 acres as a regional shopping center, then commonly referred to as "Buffalo Mall." This owner/developer will be hereinafter referred to as "Oleson."

The Sensible Land Use litigation challenged the rezoning as contrary to Section 6.8.2 of the Garfield Zoning Ordinance and the Township's Comprehensive Plan. Other issues concerned an alleged failure to comply with the Michigan Environmental Protection Act, MCLA 691.1201, et seq.; MSA 14.528 (201), et seq., ("MEPA") and the purported failure to consider regional environmental impacts as well as a failure to obtain the approval of the County Zoning Coordinating Committee. See, Exhibit 7 (a), Appendix to Defendant Township's Motion for Summary Disposition.

Pursuant to a motion for summary disposition based upon the failure to state a claim upon which relief can be granted and the absence of any genuine issue as to any material fact entitling the Defendant to judgment as a matter of law, the trial court dismissed Plaintiff's Complaint. Among other holdings, the trial court found that the rezoning did meet the mandatory prerequisites under the Garfield Zoning Ordinance, Section 6.8.2, and that the site conformed with each of the criteria under the previously adopted or pending proposed Comprehensive Development Plan. See, Exhibit 7 (b), Appendix to Defendant Township's Motion for Summary Disposition.

The Court additionally found that approval of a County Coordinating Committee was not a prerequisite to valid zoning changes and that a de novo standard of review was not applicable to an appellate review of township zoning decisions. Finally, the trial court recognized that rezoning in and of itself did not create a judiciable issue under the Michigan Environmental Protection Act. With respect to MEPA, the trial court held as follows:

> "It is not necessary or appropriate that this Court review the potential environmental impact of zoning activities which, by their nature, have no likely environmental impact. The issues could be rendered moot by a

complete change in the zoning classification. The action is premature."

The trial court's opinion was upheld by the Michigan Court of Appeals, which reiterated a number of well-settled standards for determining the validity of municipal zoning decisions. The sum and substance of these standards impose upon Plaintiffs the burden of showing that the challenged zoning is arbitrary and capricious and, therefore, invalid. Not having met this burden of proof, the Court of Appeals affirmed the trial court's decision, both with respect to the zoning questions and the prematurity of the MEPA claim.

Following these decisions, no development activity occurred on the subject site. In fact, from the date of the second rezoning in August, 1979, there was no submission of final plans or a construction timetable, no building permits were issued and there was no indication of a proposed development until November, 1989, when a new developer (Defendant Grand Traverse Mall Limited Partnership) bought the land and indicated its intent to construct the Grand Traverse Mall.

Following a number of public hearings, the Planning Commission approved the Grand Traverse Mall project on July 6, 1990, and the Zoning Board of Appeals' approval followed thereafter on July 10, 1990. A building permit was issued on July 25, 1990, and construction began immediately.

The record indicates that Plaintiffs' Complaint was filed on June 27, 1990, challenging the zoning and appealing the decision of the Planning Commission. Following the Zoning Board of Appeals' approval, an Amended Complaint was filed on July 31, 1990, a Motion for Temporary Restraining Order was filed on August 3, 1990, and, following a hearing on August 6, 1990, the request for injunctive relief was denied as premature.

Construction has proceeded in the interim and, pursuant to the Court's inquiry, the Defendant Grand Traverse Mall disclosed that paving was scheduled to begin on June 15, 1991. With the understanding that paving may have an impact on surface and subsurface waters that could rise to the level of an

impermissible environmental impairment, the parties were placed on an aggressive time schedule to complete discovery, file dispositive motions, and prepare for the trial of those issues arising under the Michigan Environmental Protection Act.[1] The parties have worked diligently to meet this schedule and the substantive motions will now be addressed.

STANDING

The Defendants challenge the standing of Plaintiffs to assert those claims set forth in the Amended Complaint, with the exception of those brought under MEPA. To analyze the standing issue, it is necessary to review each Plaintiff separately. Garfield Neighborhood Watch ("GNW") is a Michigan non-profit corporation whose members are residents and property owners in the residential subdivisions immediately adjacent to the Grand Traverse Mall. GNW was incorporated on May 2, 1990. It is agreed that Plaintiff GNW is not an elector, property owner, or taxpayer of or within the township.

Plaintiff Jerome Schostak ("Schostak") is a property owner and taxpayer within the Township. He owns land and a business known as the Cherryland Mall.

Plaintiff Northern Michigan Environmental Action Council ("NMEAC") is a non-profit corporation organized for environmental purposes. It is agreed that it is not an elector, property owner or taxpayer of or within the Township.

The Defendants challenge Plaintiff GNW's standing on two levels. First, as an independent corporate entity which is not

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[1]The parties recently discovered significant facts regarding the subsurface waters beneath the proposed development's main storm water retention basin which caused Plaintiffs to dismiss the substantive MEPA claims in the First Amended Complaint. Over Defendants' objections, this Court remanded the environmental issues to the Township ZBA. See, transcript of June 6, 1991, Decision. Plaintiffs' Motion to file a Second Amended Complaint has been adjourned pending the completion of the remand process.

an elector, property owner, or taxpayer, and whose corporate existence postdates a number of the administrative actions which are the subject matter of the Complaint, Defendants argue that it has no independent basis to assert standing. Secondly, if Plaintiff GNW is to borrow its standing from its constituent members, then, say the Defendants, those members should be before the Court. If they were, the Defendants further contest their ability to establish a sufficient interest to support a finding of standing.

Given the broad standing conferred by MEPA, the Court's discussion will focus upon the standing necessary to pursue those claims which have their origin in the site's zoning or actions of the Planning Commission, Zoning Board of Appeals, or Zoning Administrator. Standing for purposes of pursuing these claims, say Defendants, requires that the Plaintiff be "aggrieved" or "a person having an interest affected by" such action. Specifically, it is Defendants' position that the Plaintiffs must meet the "aggrieved" party standard to challenge the existing zoning and have "an interest affected by" administrative action to pursue their administrative appeals. The Defendants' argument is summarized at pages 11 through 18, inclusive, of the Township's Memorandum in Support of Motion for Summary Disposition, dated July 25, 1990.

Plaintiffs' response and a discussion of the law they rely upon is found, among other documents, most succinctly stated in Plaintiff Schostak's Brief in Opposition to Motion for Summary Disposition, dated April 2, 1991, at pages 6 through 11.

A review of the authorities provided by the parties indicates that the "aggrieved party" standard is not applicable to township zoning decisions. Rather, that language is derived from Section 10 of the City or Village Zoning Act, MCL 125.590. As noted previously, Section 23A of the TRZA confers standing on a person with an "interest affected" by the zoning ordinance. MCL 125.293a(1); MSA 5.2963(23a); and Brown v East Lansing Zoning Board of Appeals, 109 Mich App 688, 699; 311 NW2d 828 (1981).

This standard applies both to appeals and to the review of existing zoning.

Despite the limited differences that seem applicable to the application of these varying standards in practice, both Plaintiffs Schostak and GNW have alleged special damages--the former from an alleged over development of retail sales which is injurious to community welfare arising from his ownership interest in the Cherryland Mall, and the latter due to the impact of the Mall on their homes which are located in the neighborhood immediately adjoining it. These claims also evidence an "interest affected" by the various decisions which form the subject of the Amended Complaint. Both Plaintiffs allege a substantial economic interest in the outcome of this litigation beyond that which will be felt by the community as a whole. See, Brown, supra, at page 701, quoting, Comment, Standing to Appeal Zoning Determinations: The "Aggrieved Person" Requirement, 64 Michigan Law Review 1070, 1084-1085 (1966).

Subsection 6.8.2 of the zoning ordinance sets forth a series of significant conditions precedent to the receipt of Planned Shopping District zoning. Subsection 6.8.2(1) requires a market analysis and further states that "[T]he purpose of this requirement is to protect the Township from the over development of retail sales and service establishments which could prove highly injurious to the community welfare." This Court recognizes those decisions which hold that a mere competitive interest does not generate standing. Here, however, the Township zoning ordinance prohibits the construction of projects in C-4 zones which will overdevelop available retail sales establishments. Plaintiff Schostak certainly has a competitive interest in preventing the construction of the Grand Traverse Mall, which interest would not be an appropriate basis for standing in the usual circumstance associated with site plan approval. Schostak's standing, then, must be derived from an alleged injury which exceeds mere competition and goes to the purported "overdevelopment of retail sales and service

establishments which could prove highly injurious to the community welfare."

Just as the purpose of subsection 6.8.2(1) is stated to be the protection of the township from overdeveloped retail sales, so does subsection 6.8.1 indicate an intent to "avoid and minimize...adverse affects upon property within adjacent zoning districts." Certainly, the residents and neighbors of the adjoining neighborhood have standing to contest decisions made under the township zoning ordinance where its clear purpose, in part, is the protection of adjacent zoning districts. Plaintiff GNW's corporate purpose is stated to be the promotion, protection and advancement of the interests of the residents and property owners of the residential neighborhood adjoining the Mall.

With respect to Plaintiff GNW, this Court finds the holdings in White Lake Improvement Assoc v City of Whitehall, 22 Mich App 262; 177 NW2d 473 (1970); Muskegon Building & Construction Trades v Muskegon Area Intermediate School District, 130 Mich App 420; 343 NW2d 579 (1983); and Wisniewski v Kelly, 175 Mich App 175; 437 NW2d 25 (1989) to be dispositive. In White Lake, the Plaintiff was also a non-profit membership corporation. Its members were riparian owners who banded together and sued to enjoin the pollution of White Lake. In finding that Plaintiff had standing to maintain the suit, the Michigan Court of Appeals held as follows:

> "No constructive purpose would be served by requiring the members of the Plaintiff association who are riparian owners to maintain this action individually and thereby require that they seek in some other fashion financial and other support from the other affected landowners. Additionally, allowing the landowners to associate together for this purpose may avoid a multiplicity of suits; the difficulties that are likely to be encountered where there are a large number of plaintiffs are all too familiar to anyone who has had experience in such litigation. The most expedient way for the riparian owners to obtain a determination on the merits is to allow them to combine and join together for this purpose with others of a like interest under a single banner both before and at the

> time of suit: 'The only practical judicial policy when people pool their capital, their interests or their activities under a name and form that will identify collective interests, often is to permit the association or corporation in a single case to vindicate the interests of all.'" Whitehall, supra, at 272-273.

White Lake and Wisniewski, then, require this Court to look through the Plaintiff GNW to derive standing from its members. See also, Muskegon Building & Construction Trades, supra, where an association organized to advance political and economic interests of its members, was found to have standing to challenge legislation adversely impacting its members, and National Motor Freight Traffic Assoc Inc v United States, 372 US 246 (1963), where an association was found to have standing as the representative of its members even in the absence of an injury to itself.

For these reasons discussed above, this Court finds that both Plaintiff Schostak and Plaintiff GNW have standing to pursue the non-MEPA claims found in the Amended Complaint. All Plaintiffs have standing to pursue the MEPA claims. The Court cannot find any basis, however, to confer standing on Plaintiff NMEAC to pursue any claim other than any substantive or procedural issues arising under MEPA.[2] The Court will grant Defendants' motions regarding standing as to Plaintiff NMEAC with respect to all claims except those arising under the Michigan Environmental Protection Act. The remaining motions as to standing are denied.

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[2]Although Plaintiff NMEAC has signed the Complaint and Amended Complaint without limitation as to those claims which it is pursuing, it has limited its submission of written documents and its presentation of oral argument to those issues related to alleged violations of the Michigan Environmental Protection Act. Consistent with Plaintiff NMEAC's actual role in pursuit of the Amended Complaint, is this Court's inability to find standing to pursue the non-environmental claims either in NMEAC as a corporate entity or in its membership at large.

VESTED RIGHTS

The Defendant Grand Traverse Mall Limited Partnership has filed a motion for summary disposition asserting the doctrine of vested rights. The Defendant partnership first argues that having submitted its site plan for approval on November 14, 1989, it was entitled to approval or disapproval within 60 days thereafter. Township Zoning Ordinance, 6.8.2(5).

In view of the Court's resolution of the issues raised in Count II and those discussed in Count VII ahead, it is clear that but for Amendments 133 A, B and C, which were not promulgated until March 15 of 1990, the Defendant partnership had no right whatsoever to proceed with its project within 60 days of its submission of a site plan. The Defendant partnership was a stranger to the 1979 zoning process and its project was significantly larger and envisioned a more intense use of the property than that approved in 1979. Further, there had been significant changes to the relevant market area which cried out for the submission of up-dated data.

The C-4 zoning designation placed upon this site in 1979 was granted subject to conditions. Among other conditions, the C-4 zoning amendment site envisioned a project constructed in substantial conformity with the site plan approved. Recognizing the significant differences in the site plan offered by the Defendant Partnership, no permit to approve construction could possibly have been granted absent the amendatory process which was completed in March of 1990. The Defendant Township completed its review in a timely fashion given the evolution of the site plan as a response to initial questions and objections. The Defendant partnership's motion for summary disposition based upon Section 6.8.2(5) must be dismissed as a matter of law. MCR 2.116(C)(10).

The Defendant Partnership's second argument refers to the pleadings. The Defendant partnership correctly notes that in the original Complaint, filed by Plaintiffs on June 27, 1990, it was not a named Defendant. In the Amended Complaint, filed on July 31, 1990, both General Growth Company, Inc., and Grand Traverse

Mall Limited Partnership were named as Defendants. The court file contains the Affidavit of Victor Stein, dated August 3, 1990, reflecting his receipt on August 3, 1990, of two certified mail packages addressed to Grand Traverse Mall Limited Partnership and General Growth Company, Inc., each package containing a summons, amended complaint, letter to the Clerk of the Court, motion for temporary restraining order, notice of hearing, motion for preliminary injunction, and various affidavits.

Mr. Stein's affidavit, which was filed on August 6, 1990, disclaims any relationship between General Growth Company, Inc. and Grand Traverse Mall Limited Partnership, identifies the Defendant General Growth Company, Inc.'s agent for service of process as Terry Tobin in Des Moines, Iowa, and identifies the designated agent for service of process for the Grand Traverse Mall Limited Partnership as the Corporation and Securities Bureau within the Michigan Department of Commerce.

Neither Defendant voluntarily appeared at the hearing on Plaintiff's petition for a temporary restraining order which occurred on August 6, 1990. Thereafter, on February 28, 1991, the Defendant Partnership filed its answer and affirmative defenses. The Defendant General Growth was dismissed pursuant to the parties' stipulation on March 13, 1991. Neither the Defendant General Growth nor the Defendant Partnership appeared at a pre-trial conference held on December 27, 1990, and did not submit to the jurisdiction of the Court until February 28, 1991, the time scheduled for the Court's second pre-trial conference.

The Defendant partnership's absence from the case was the subject of protracted discussion at the opening of the hearing on Plaintiffs' petition for a temporary restraining order on August 6, 1990. Transcript, pp 3-17, inclusive. During the course of that discussion, Plaintiffs' counsel, Thomas Dignan, described his efforts to serve the partnership in response to the Township's motion to add a necessary party. Plaintiffs' counsel, Mr. Winsten, further described the basis for service on Victor Stein. Mr. Winsten represented that Mr. Stein had appeared as

the partnership's agent at all of the township hearings related to the Grand Traverse Mall. Further, Mr. Winsten represented, and the file indicates, that counsel for the Defendant Partnership was also served with copies of all documents filed in the case.

There is no question that the Defendant Partnership had actual and timely notice of the amended complaint and the motion for a temporary restraining order. Both the complaint and amended complaint had been delivered to an agent of the partnership and its Traverse City attorneys. The suggestion that the developer was proceeding with construction following the issuance of a building permit on July 25, 1990, in peaceful ignorance of the whirlwind of litigation swirling about it is simply not supported by the facts.

In issuing the ruling on August 6, 1990, denying Plaintiffs' petition for a temporary injunction, this Court unambiguously warned the Defendant Partnership that in continuing construction it was proceeding at its own risk. Having notice of the litigation through service on its agent and separate service on its attorneys, and having chosen not to attend the hearing, the partnership now argues that its construction work through February 28, 1991, confers vested rights upon it.

The vested rights doctrine has its roots in equitable principles of estoppel. In support of its case, the Defendant partnership cites Parker v Twp of West Bloomfield, 60 Mich App 583, 591-592; 231 NW2d 424 (1975); Schubiner v West Bloomfield Twp, 133 Mich App 490; 351 NW2d 214 (1984) and Dingeman Advertising, Inc v Algoma Township, 393 Mich 89; 223 NW2d 689 (1974). Those cases establish the principle that estoppel may arise where one has relied, to one's detriment, upon the positive actions of government officials and, thereby, incurred a change of position or made expenditures in reliance upon those actions. The essence of the doctrine is a determination that "the public body...created a situation where it would be inequitable and unjust to permit it to deny what it has done or permitted to be done." Parker, supra, at p 592.

Here, the Defendant partnership commenced construction following the issuance of a building permit with notice of the original Complaint. Recognizing that the Defendant Partnership was not a party to the original litigation, the Court has reviewed that construction activity which took place following the issuance of the building permit on July 25, 1990, and the receipt of the amended complaint and petition for a temporary restraining order and associated documents by Mr. Stein on August 3, 1990.

Aerial photographs submitted by the Defendant partnership which were taken on August 1, 1990, substantiate that significant excavation work had occurred along the northerly edge of the site and in the area of the proposed storm water detention ponds. There is also evidence of excavation work in the form of initial berm construction along the east property line and south through the radius of the curve along South Airport Road. The remaining portion of the property is in a state consistent with that of its prior farmland use and a barn and outbuilding are still standing. There is no evidence of footings or the erection of structural steel.

Recognizing that vested rights arise in equity and viewing the circumstances in their totality, it is this Court's opinion that equity does not compel the application of the vested rights doctrine on the facts of this case. Here, the Defendant partnership was not proceeding with construction and then ambushed by Township efforts to change the zoning or with litigation of which it had no prior knowledge.

Assuming for the sake of this argument that the service on the Defendant partnership did not fully comply with the legal requirements of the court rules, such legal technicalities should not be used in equity to confer vested rights where the record unambiguously demonstrates timely notice of the August 6, 1990, proceedings as well as actual receipt of all pleadings filed in the case prior to that date. The Court instructed the Defendant partnership that it gained no special equity by proceeding with construction and that it continued with the project at its peril.

With full knowledge of this warning, the Defendant partnership has proceeded with construction and has expended substantial sums of money. It has done so at its peril, and this Court dismisses Plaintiffs' motion for summary disposition predicated upon the doctrine of vested rights and does so as a matter of law. MCR 2.116(C)(10).

COUNT I
INVALIDITY OF THE 1974 AND 1978 REZONINGS

Count I of Plaintiffs' Amended Complaint challenges the validity of the C-4 Planned Shopping District zoning as approved by Garfield Township in 1974 and 1979. The Planned Shopping District zoning on this property has been the subject of intense public scrutiny. Approximately one-half of the parcel was zoned C-4 when the Township first promulgated its zoning code and map February 14, 1974. Exhibit 4 (a), Appendix to Memorandum in Support of Motion for Summary Disposition. The zoning ordinance and associated map were the subject of a public referendum which was approved by the voters (65 percent yes; 35 percent no).

Following the rezoning of the remaining one-half of this parcel on August 15, 1979, another referendum election was held. Again, the rezoning was subjected to a referendum election and approved by the voters (65 percent yes; 35 percent no). Appellate Record, Garfield Township: General, Exhibit 1 (D). Further, as discussed above, the rezoning was the subject of a challenge in the Sensible Land Use litigation.

In Sensible Land Use, the trial court and the Court of Appeals commented upon the Defendant Township's review of the prerequisites to the rezoning which are set forth in Section 6.8.2 of the township zoning ordinance. These requirements included a traffic study, several market analyses, a study of the effect of the rezoning on the region's population, sewage disposal and water runoff, and a review of the rezoning's affect on the economic condition of the community. The Court of Appeals further noted that the record established that the Township Planning Commission had also considered the regional

environmental effect of its decision to rezone. After a review of the entire record, the Court of Appeals held as follows:

> "[T]he rezoning cannot be found to be arbitrary and capricious. We hold that Plaintiffs have failed to state a claim upon which relief may be granted and summary judgment in favor of defendants is affirmed on that basis."
> Id., at p 570.

Any procedural deficiencies in the 1973 and 1979 rezonings were cured by the referendum elections. The substantive requirements were found to have been met both by this Court and the Court of Appeals.

Recognizing this decision and the substantial identity between the claims contained in Count I of Plaintiffs' Complaint and those raised in the Sensible Land Use litigation, this Court is constrained to summarily dismiss Count I. As the Court has noted previously, Plaintiff GNW's standing to litigate this issue is derived from that of its members. The record before the Court indicates a substantial overlap between individuals participating in Garfield Neighborhood Watch and individual Plaintiffs named in the Sensible Land Use litigation. Although Jerome Schostak was not a party to the Sensible Land Use litigation, the record indicates that he did participate in the zoning process and opposed the zoning decision made by Garfield Township as recorded in the minutes of the Garfield Township Board for August 15, 1979. Appellate Record, Garfield Township: General, Exhibit 1 (G).

Whether the applicable doctrine is res judicata, collateral estoppel, or the "doctrine of prior judgments," as counsel have described it with reference to MCR 2.116(C)(7), it is clear that the issues which comprise Count I of Plaintiffs' Amended Complaint were litigated in the Sensible Land Use case, both at the trial court and appellate level. It is equally clear that there is a substantial identity of parties which precludes relitigation of these same questions or questions which could have been raised in that suit. Additional consideration of the 1973 and 1979 rezonings cannot be predicated upon the addition of

parties whose interests were identical to those who appeared as Plaintiffs in the prior action simply because they observed and did not participate in that action.

The relationship which is required between a prior lawsuit and the persons bound by the doctrine of prior judgments is discussed in 46 Am Jur 2d, Judgments, Section 535. There, the authors wrote as follows:

> "The strict rule that a judgment is operative, under the doctrine of res judicata, only in regard to parties and privies, is sometimes expanded to include as parties, or privies, a person who is not technically a party to a judgment, or in privity with him, but who is, nevertheless, connected with it by his interest in the prior litigation and by his right to participate therein, at least where such right is actively exercised by prosecution of the action, employment of counsel, control of the defense, filing of an answer, payment of expenses or costs of the action, the taking of an appeal, or the doing of such other acts as are generally done by parties. The rule stated broadly is that a judgment recovered in an action is res judicata or conclusive, as to the issues adjudicated therein, in favor of or against a person who, though not an actual party to the record in that action, prosecuted the action or the defense thereto, on behalf of a party, or assisted the latter or participated with him in the prosecution of such action or its defense, if the same issue should be raised again in a subsequent action between him and the adversary of the party to whom his assistance was given or with whom he co-operated."
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> St Clair Shores National Bank v State Banking Commissioner, 358 Mich 14 (1959); 99 NW2d 574. See also: Knoblauch v Kenyon, 163 Mich App 712; 415 NW2d 286 (1987); Darin & Armstrong v Ben Agree Co, 88 Mich App 128; 276 NW2d 869, lv app den (1979); Bousson v Mitchell, 84 Mich App 98; 269 NW2d 317 (1978); Senior Accountants v Detroit, 60 Mich App 606, 611; 231 NW2d, 479 (1975).

Having concluded that the principles which underlie the doctrine of prior judgments are applicable here, the Court

further concludes that they bar other matters which could properly have been raised and determined in that prior litigation. See, for example, 46 Am Jur 2d, Judgments, Sections 420, 422 and Gose v Monroe Auto Equipment; Sanders v General Motors Corp, 409 Mich 147, 174; 294 NW2d 165 (1980); Bhama v Bhama, 169 Mich App 73, 82; 425 NW2d 733 (1988); West Michigan Park Ass'n, Inc. v Fogg, 158 Mich App 160, 164; 404 NW2d 644 lv app den (1987). Based upon these principles and a reading of the issues which were raised or could properly have been raised and determined in the Sensible Land Use litigation, it is this Court's conclusion that Count I of the Plaintiffs' Complaint be, and the same hereby is, dismissed. MCR 2.116(C)(7).

COUNT II
Invalidity of the C-4 Classification
Due to Non-Use

As discussed above, the subject parcel gained its C-4 zoning through two separate actions of the Township Board. One half of the parcel was zoned C-4 with the original promulgation of the Township Zoning Ordinance and associated map. The remaining half was rezoned from Single and Multiple Family Residential uses in 1979. Both legislative actions of the Township Board were the subject of referendum elections and both were approved. However, the Buffalo Mall project which served as the predicate for the 1979 rezoning was never constructed. Ten years later, a new developer proposed to utilize the existing C-4 zoning to construct a significantly larger regional mall and more intensely use the available land.

Plaintiffs contest the availability of the existing C-4 Planned Shopping District zoning on this site to the Defendant Partnership and argue that the zoning was functionally extinguished through Oleson's failure to submit final plans for the Buffalo Mall and commence construction. The Defendants have moved for summary disposition on this claim. Defendants argue, also as a matter of law, that the zoning runs with the land and contains no "sunset provision."

A debate arose between Plaintiffs and Defendants regarding the characterization of the C-4 Planned Shopping District zoning as a "floating zone". To assist the Court in reviewing this issue, the Plaintiffs provided the Court with standards published by the American Society of Planning Officials and the Defendants have submitted the affidavit of Clan Crawford, author of Michigan Zoning and Planning, 3rd ed. A floating zone is defined by the ASPO Standards as follows:

> "Floating zones differ radically from mapped districts in that their exact location is not established on the zoning map until their development is imminent. They are similar, however, in that the text of the ordinance describes the standards, requirements, and conditions which will be applied to proposed development whenever future amendment of the map changes floating zones to mapped districts.
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> "Floating zones are created for certain commerical uses which eventually will be needed in a municipality but whose specific location cannot reasonably be determined in advance. These zones are necessary to indicate general future commerical location when existing residential development is not sufficient to support them.
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> "Use of floating zones encourages competition among property owners. For example, where there is more than one site proposed in the same general location and each is equally appropriate for a needed shopping center, the competitive effect of utilizing the floating zone (rather than favoring one site with a mapped district) prevents an undue inflation of the cost of acquiring the site for actual development.
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> "The use of floating zones is most appropriate either in instances where the municipality is sparsely developed and the pattern of its development is not yet clearly defined, or in old cities where portion (sic) of their urban areas have become obsolete and the future pattern of redevelopment has not yet emerged.
>
> "The floating zone is granted as a conditional type of mapped district. The

> zone is normally granted on the condition that construction will begin within one year. The one-year time period is adequate if the Planning Commission requires adequate evidence that the floating zone is needed. Normal requirements are as follows: (1) a valid market analysis; (2) construction plans (approval of shopping center site design should follow basic subdivision design procedure); and (3) evidence that the developer owns or has consummated the necessary arrangements to buy the site.
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> "If the construction of the proposed center is not started within one year or if the construction is terminated after any stage and there is ample evidence that further development is not contemplated, the ordinance establishing the district may be rescinded for the whole tract or the unused portion and returned to its former classification." Id., at p 41.

A far more general definition of a floating zone is found in Michigan Zoning and Planning, 3rd ed., Section 11.01, at page 261:

> "A floating zone is a district for which all the regulations are set forth in the zoning ordinance but which does not appear on the map, because no land has yet been placed in the district. It has, at least indirectly, been recognized as a legitimate means of making provisions for land uses that will be needed in the future but which do not yet exist in the municipality."

It is the Defendants' and Mr. Crawford's opinion that the C-4 Planned Shopping District is not a floating zone as it is one of 13 specific map-designated zoning districts. The Defendants note that the official zoning map adopted in 1974 specifically designated and zoned a part of the subject site as C-4. Other identified C-4 locations within the township included the then existing Cherryland Mall and Meijer Shopping Centers.

The Defendants further dispute that the authority within Section 6.8 of the township zoning ordinance to add more land to an existing C-4 district makes the C-4 Planned Shopping Center District a "floating zone." Rather, the Defendants argue that

the Township Board has statutory authority to amend its zoning ordinance and rezone land from one district to another. MCL 125.284; MSA 5.2963(14).

This Court agrees that a floating zone cannot simply be correlated with the rezoning of land from one district to another. As Mr. Crawford notes, "all zones would be floating zones if the test were that additional land could be added to them by rezoning." Crawford Affidavit, paragraph 6. Here, the issue is not the mere fact of rezoning but the import of the several specific and detailed conditions which must be satisfied as conditions precedent to securing the C-4 designation.

In view of the rigorous standards necessary to establish a C-4 Planned Shopping District, which requirements are set forth in 6.8.2 of the Township zoning ordinance, the Planned Shopping District is more akin to the floating zone described in the ASPO Standards. The fact that other C-4 uses exist within the township does not change the character of this special land use and the standards associated with it--including the submission of final plans and construction of the project. Yet, a C-4 rezoning, once made, does generate a site-specific amendment to the township zoning map. This Court finds the C-4 zone described by the township zoning ordinance to be a land use designation legislatively granted subject to conditions. Satisfaction of those conditions is the issue which drives the resolution of the Count II claims.

Plaintiffs have shown that the Defendant Partnership is a stranger to the 1974 and 1979 C-4 zoning decisions. Plaintiffs have further shown that this zoning was predicated on the construction of the Buffalo Mall, a project which was to be jointly developed by the owner of the property (Oleson) and the Dayton Hudson Corporation. Since the project was never built, Plaintiffs argue that the conditions upon which the Planned Shopping District were created were not satisfied, cannot now be satisfied, and that the whole tract has constructively been rezoned to its former land use classifications.

Conversely, Defendants argue that the C-4 zoning is not project specific but runs with the land; that is, once the Township Board rezoned the subject parcel to a Planned Shopping District, that zoning remains applicable thereafter. Given the Statement of Intent which introduces the Planned Shopping provisions of the township zoning ordinance, (Section 6.8.1), it is difficult to adopt the Defendants' analysis.

Recognizing that the lawful uses within a Planned Shopping District may be as disparate as a neighborhood shopping center designed to serve township residents or a regional shopping mall whose clientele are projected to reside in several surrounding counties, and recognizing the submission of data required by 6.8.2 of the zoning ordinance, C-4 zoning must be related to a specific class of project. Certainly, were the zoning on this parcel approved in 1979 following the submission of data under Section 6.8.2 for a "neighborhood shopping center," the subsequent issuance of a building permit for a regional mall would defy both the letter and policy underlying the township zoning ordinance.

The analysis of Section 6.8 has been rendered additionally complex by the township's failure to include a sunset provision in the ordinance. Similar ordinances cited to the Court from the city of Detroit, (Section 110.0500, Exhibit B to Plaintiff Schostak's Brief in Opposition to Motion for Summary Disposition, April 2, 1991), or the state of Illinois, American National Bank & Trust Co of Chicago v Village of Arlington Heights, 115 Ill App 3d 342, 450 NE2d 898 (1983), contain provisions which automatically revoke the benefit of the zoning change absent the completion of the project or the commencement of construction within a defined period of time. Another Illinois Court has read a sunset provision into the ordinance where one was not otherwise found. See, Goffinet v The County of Christian, 65 Ill 2d 40,

357 NE2d 442 (1976) A sunset provision is not contained within the Township Zoning Ordinance.[3]

It is this Court's opinion that the resolution of the claims made in Count II must turn on the interpretation of the Township Board-enacted Amendments 133 A, B, and C to Section 6.8.2 which were adopted effective March 8, 1990, and which alter the administrative procedure with respect to the development of a C-4, Planned Shopping Center. Appellate Record, Garfield Township: General, Exbibit 1 (G). Simply stated, those amendments require an additional submission of evidence and supporting data where the initial submission required by Section 6.8.2 is more than five years old. See, Affidavit of John F. Porritt, April 15, 1991.

In the course of reviewing the application of the Grand Traverse Mall, Plaintiffs' representatives brought to the Township Board's attention the absence of a sunset provision with respect to the original C-4 zoning, the significant potential for changed circumstances given the ten-year hiatus in which no construction had taken place, and argued the Township Board's obligation to review the Grand Traverse Mall proposal and relegislate the C-4 zoning. The Township Board chose not to follow this course of action.

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[3]A final complexity is added by the interplay between the phased development of a Planned Shopping District and the Planned Unit Development provisions found in Article 8 of the township ordinance. Here, the entire parcel was once under common ownership. Seventy-five acres were sold to the Defendant Partnership for a sum in excess of 4.5 million dollars, and 11 acres were reserved by Oleson. As counsel for the Defendant Township noted in his oral argument to the Court, neither Oleson nor his 11 acres are before the Court. Whether or not those 11 acres still retain their C-4 zoning will be for determination another day depending upon Oleson's proposed use of the property. These 11 acres are not part of a proposed "phased development" by the Defendant Partnership. The relationship between Section 16 of the Township Rural Zoning Act (MCLA 125.286; MSA 5.2963(16)) and Articles 6 and 8 of the Garfield Township Zoning Ordinance will be discussed further in Count VII ahead.

Instead, the Township Board adopted Amendments 133 A, B, and C, which required the resubmission of data and left review and approval of the project entirely with the Planning Commission, the Zoning Board of Appeals, and the Zoning Administrator. In so doing, the Township Board not only removed elected officials from the process of reviewing a development whose potential impact will be felt throughout northwestern Michigan, but also denied voters their referendum right on any legislative action which the Township Board may have taken with respect to the project.

In reviewing the amendments and the written objections of Plaintiffs, two facts appear. First, the Township Board made an intentional decision to remove itself from the politics surrounding the Grand Traverse Mall debate. Second, in making this decision, the Township Board also intentionally adopted an amended approval scheme for Planned Shopping Districts, essentially as alternatively proposed by Plaintiff Schostak.

As with any legislative action, one can always question its wisdom or the policy underlying it. Yet, there can be no effective separation of powers if courts substitute their judgment for that of the legislative body absent unconstitutional or arbitrary and capricious action. This rule of law was well stated in McDonald Pontiac-Cadillac-GMC, Inc v Prosecuting Attorney for the County of Saginaw, 150 Mich App 52, 55; 388 NW2d 301 lv app den (1986):

> "Preserving the separate functions of the executive, Legislature, and judiciary is fundamental to our system of government, and is embodied in the Michigan Constitution at Const 1963, art 3, sec 2. It is a well-established rule of law that, absent an infringement of a constitutional right, the judiciary may not inquire into the reasonableness of the policy the Legislature pursues in enacting a statute. Albert v Gibson, 141 Mich 698; 105 NW 19 (1905). Nor may the courts inquire into the knowledge, motives, or methods of the Legislature in passing legislation. C. F. Smith Co v Fitzgerald, 270 Mich 659; 259 NW 352 (1935) app dis 296 US 659 (1935)."

See also: 6 McQuillin (3d ed rev), Municipal Corporations, Section 20.03; 5 Callaghan's Michigan Civil Jurisprudence, Constitutional Law, Section 42; 17 Callaghan's Michigan Civil Jurisprudence, Municipal Corporations, Section 154.

The applicable standard governing this Court's review of a zoning ordinance is further set forth in Macenas v Village of Michiana, 433 Mich 380, 396; 446 NW2d 102 (1989). The standard is as follows:

> "When the question of law is the construction of an ambiguous ordinance, the constraints of the rules of statutory construction are of foremost importance. The Court is not free to substitute its judgment by imposing what it considers to be the wisest version of the ordinance, but is confined to an analysis of the text of the ordinance and, in the face of ambiguity, a determination of what the legislative body that enacted the ordinance intended by the language in question.
>
> "Where a construction has been applied over an extended period by the officer or agency charged with its administration, that construction should be accorded great weight in determining the meaning of the ordinance."

See also, Schwartz v City of Flint, (after remand) 120 Mich App 449; 329 NW2d 26 (1982); Belkin v City of Birmingham, 87 Mich App 690; 276 NW2d 465 (1978) mod 406 Mich 949; 278 NW2d 43 (1979); Lorland Civic Ass'n v DiMatteo, 10 Mich App 129; 157 NW2d 1 (1968).

The Charter Township of Garfield dealt with the lack of a sunset provision in Section 6.8 by requiring a submission of current data when the evidence supporting the C-4 zoning is more than five years old. Had the Township Board elected to recognize a functional sunset provision through the failure to build for more than a decade, it would have received and evaluated this same updated data, and would have made its decision on the proposed Grand Traverse Mall as a legislative body. The significance of the varying procedures, then, lies not in the substantive data that was reviewed, but in the loss of the referendum right attendant upon legislative action.

In enacting Amendments 133 A, B, and C, the Garfield Township Board deliberately chose to absent itself from the approval process and, in view of two prior referenda, to deny Township residents the right to once again vote on this project. Again, while one can debate the wisdom of this decision, one cannot find that it is arbitrary or capricious. Accordingly, it is this Court's determination, as a matter of law, that Count II of the Plaintiffs' Complaint must be dismissed. MCR 2.116(C)(10).

COUNT III
General Invalidity of the C-4 Classification of the Land

In Count III, the Plaintiffs challenge the current reasonableness of the C-4 zoning on the site of the Grand Traverse Mall. Plaintiffs specifically argue that this challenge cannot be barred by the application of res judicata or collateral estoppel principles. Plaintiffs note that one can always challenge zoning based on changed circumstances, subject to the applicable standard of review. Among other issues, Plaintiffs here raise questions concerning traffic and regional market impact.

The Defendants contest this count and assert that for the Court to grant Plaintiffs relief it would have to improperly substitute its judgment for that of the Township Board. Brae Burn, Inc v Bloomfield Hills, 350 Mich 425; 86 NW2d 166 (1957). The standards for determining the validity of municipal zoning decisions are well-settled and were concisely summarized by the Sensible Land Use court, supra, page 565:

> "The important principles require that for an ordinance to be successfully challenged, Plaintiffs prove:
>
> "'[F]irst, that there is no reasonable governmental interest being advanced by the present zoning classification itself *** or
>
> "'[S]econdly, that an ordinance may be unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area in

question.' Kropf v Sterling Heights, 391 Mich 139, 158; 215 NW2d 179 (1974).

"The four rules applying these principles were also outlined in Kropf. They are:

"'1. [T]he ordinance comes to us clothed with every presumption of validity.' 391 Mich 139, 162, quoting from Brae Burn, Inc v Bloomfield Hills, 350 Mich 425; 86 NW2d 166 (1957).

"'2. [I]t is the burden of the party attacking to prove affirmatively that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of his property ***. It must appear that the clause attacked is an arbitrary fiat, a whimsical ipse dixit, and that there is no room for a legitimate difference of opinion concerning its unreasonableness.' 391 Mich 139, 162, quoting Brae Burn, Inc.

"'3. Michigan has adopted the view that to sustain an attack on a zoning ordinance, an aggrieved property owner must show that if the ordinance is enforced the consequent restrictions on his property preclude its use for any purposes to which it is reasonably adapted.' 391 Mich 139, 162-163.

"'4. This Court, however, is inclined to give considerable weight to the findings of the trial judge in equity cases.' 391 Mich 139, 163, quoting Christine Building Co v City of Troy, 367 Mich 508, 518; 116 NW2d 816 (1962). Ed Zaagman, Inc v Kentwood, 406 Mich 137, 153-154; 277 NW2d 475 (1979), quoting Kirk v Tyrone Twp, 398 Mich 429, 439-440; 247 NW2d 848 (1976). Silva v Ada Twp, supra, pp 604-605. (emphasis added)'"

With due regard for this precedent, the trial court dismissed the earlier challenge to the zoning on this same parcel and held as follows:

"The compilation of extensive factual documentation considered by the Defendant Township and presented for this Court's review demonstrates that the rezoning action complained of cannot be successfully attacked as an arbitrary fiat, a whimsical ipse dixit such that there is not room for legitimate

difference of opinion concerning its reasonableness. Sensible Land Use, Trial Court Opn., p 10."

In view of the foregoing precedent, the Defendants challenge Count III for the failure to state a claim upon which relief may be granted. MCR 2.116(C)(8). The Defendants further claim that there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law. MCR 2.116(C)(10). The standard of review for a (C)(8) motion may be found in Mitchell v General Motors Acceptance Corp, 176 Mich App 23, 33; 439 NW2d 261 (1989).

> "A motion for summary disposition brought under MCR 2.116(C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone and examines only the legal basis of the complaint. The factual allegations in the complaint must be accepted as true, together with any inferences which can reasonably be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. Beaudin v Michigan Bell Telephone Co, 157 Mich App 185, 187; 403 NW2d 76 (1986). However, the mere statement of the pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action. NuVision v Dunscombe, 163 Mich App 674, 681; 415 NW2d 234 (1988), lv den 430 Mich 875 (1988). [Roberts v Pinkins, 171 Mich App 648, 651; 430 NW2d 808 (1988).]"

The standard of review for a (C)(10) motion was described in Ashworth v Jefferson Screw 176 Mich App 737, 741 (1989).

> "A motion for summary disposition brought under MCR 2.116(C)(10), no genuine issue as to any material fact, tests whether there is factual support for the claim. In so ruling, the trial court must consider the affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties. MCR 2.116(G)(5). The opposing party must show that a genuine issue of fact exists. Giving the benefit of all reasonable doubt to the opposing party, the trial court must determine whether the

> kind of record that might be developed would leave open an issue upon which reasonable minds could differ. Metropolitan Life Ins Co v Reist, 167 Mich App 122, 118; 421 NW2d 592 (1988). A reviewing court should be liberal in finding that a genuine issue of material fact exists. A court must be satisfied that it is impossible for the claim or defense to be supported at trial because of some deficiency which cannot be overcome. Rizzo v Kretschmer 389 Mich 363, 371-372; 207 NW2d 316 (1973).
>
> The party opposing an MCR 2.116(C)(10) motion for summary disposition bears the burden of showing that a genuine issue of material fact exists. Fulton v Pontiac General Hospital, 160 Mich App 728, 735; 408 NW 2d 536 (1987). The opposing party may not rest upon mere allegations or denials of the pleadings but must, by other affidavits or documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4). If the opposing party fails to make such a showing, summary disposition is appropriate. Rizzo, p 372."

Despite the rigorous standard of review applicable to such motions for summary disposition, this Court also finds that upon a review of the pleadings and documents filed in this case, including the certified record below, that the current zoning "cannot be successfully attacked as an arbitrary fiat, a whimsical ipse dixit such that there is not room for legitimate difference of opinion concerning its reasonableness." Count III is dismissed. MCR 2.116(C)(10).

COUNT IV
MICHIGAN ENVIRONMENTAL PROTECTION ACT

The Defendants recognize the broad standing conferred by the Michigan Environmental Protection Act, MCLA 691.1201, et seq.; MSA 14.528 (201), et seq., (being the Thomas J. Anderson, Gordon Rockwell Environmental Protection Act of 1970, otherwise, commonly referred to as MEPA), as well as the factual issues arising thereunder which are not capable of summary disposition. The Defendants, however, challenge the constitutionality of MEPA pursuant to MCR 2.116(C)(4).

The Defendant, Grand Traverse Mall Limited Partnership, correctly notes that MEPA has its origin in Article IV, Section 52 of the 1963 Michigan Constitution. With regard to the protection of our environmental resources, the Michigan Constitution there provides as follows:

> "The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction."

Defendants challenge MEPA as an over-broad and vague delegation of legislative power to the judiciary. MEPA, says the Defendants, violates traditional notions of separation of powers. Defendants also complain that the legislation lacks articulated standards and is "void for vagueness" because a reasonable person reading the statute has no means of ascertaining what he or she must do to conform his or her behavior to the statute in the absence of litigation.

Defendants further contend that any appellate opinion regarding the constitutionality of MEPA is dicta, as the issue has never been directly raised in any appellate proceeding including Ray v Mason County Drain Commissioner, 393 Mich 294; 224 NW2d 883 (1975).

The debate concerning the constitutionality of MEPA centers upon Ray v Mason County Drain Commissioner, and the following quotation which is found at page 306:

> "The legislature spoke as precisely as the subject matter permits and in its wisdom left to the courts the important task of giving substance to the standard by developing a common law of environmental quality."[10]

Footnote 10 states as follows:

> "Thomas J. Anderson, one of the legislative sponsors of the EPA underscored this purpose when he said that the EPA should: 'permit

> courts to develop a common law of environmental quality, much as courts have developed a right to privacy.' Press Release, Representative Thomas J. Anderson, Michigan Passes Landmark Environmental Law, 2 July 1970. Brief Amicus Curiae, p 6. While the language of the statute paints the standard for environmental quality with a rather broad stroke of the brush, the language used is neither illusive nor vague. 'Pollution', 'impairment' and 'destruction' are taken directly from the constitutional provision which sets forth this state's commitment to preserve the quality of our environment. In addition these and other terms used in establishing the standard have acquired meaning in Michigan jurisprudence. The development of a common law of environmental quality under the EPA is no different from the development of the common law in other areas such as nuisance or torts in general, and we see no valid reason to block the evolution of this new area of common law."

The Defendants argue that Ray did not deal with specific constitutional issues but with the findings of fact required by trial judges reviewing MEPA claims. Defendants likewise dispute the Plaintiffs' reliance on two unpublished circuit court opinions and a law review article, all predicated on fn 10 in Ray, supra. See, discussion in Defendant Partnership's Rejoinder Brief as to the unconstitutionality of MEPA at pages 7 and 8.

The law review article referred to is that of Jeffrey K. Haynes and is entitled "Michigan Environmental Protection Act in its Sixth Year: Substantive Environmental Law from Citizens' Suits," 53 Journal of Urban Law, 589 (1976). Assessing the impact of this same "dicta" contained in fn 10 of Ray, supra, Mr. Haynes wrote as follows:

> "The most important aspect of the Ray decision concerns MEPA's constitutionality. Although the decision's immediate impact was on the adequacy of the circuit court's findings of fact under the Act, the Court necessarily had to analyze the purpose behind the legislature's enactment of MEPA--an endeavor intimately connected to the Act's constitutionality. MEPA establishes

> environmental rights that are enforceable through the courts. The establishment of these rights by the Legislature, the Court said, does not delegate legislative power. Moreover, the rights are not without specific content: 'rather, the Legislature spoke as precisely as the subject matter permits and in its wisdom left to the Courts the important task of giving substance to the standard by developing a common law of environmental quality.'"

While the findings of the Michigan Supreme Court in Ray may be dicta, it is this Court's opinion that the analysis contained therein is nonetheless insightful and germane to the question before this Court. Here, this Court likewise agrees that the terms "pollution," "impairment" and "destruction" cannot be impermissibly vague when they are taken directly from the constitutional provision mandating environmental legislation to protect and preserve the state's natural resources. These terms have commonly-accepted meanings and have proven capable of analysis and application for the last 20 years. While it is true that a developer cannot avoid MEPA litigation by showing compliance with applicable state or local permit procedures or satisfaction of legislatively-articulated compliance criteria, those facts do not denigrate or in any sense invalidate the delegation of authority to the courts to develop an environmental common law, nor do they render the statute impermissibly vague. In granting the Michigan judiciary de novo review over environmental matters, and in granting broad-based standing to citizens to pursue such lawsuits, the Legislature's enactment of MEPA was a reasoned response to the broad scope of the issue.

Simply stated, MEPA envisions de novo review even where a developer has complied with all other applicable permit procedures and where state officials find the project otherwise unassailable. The fact that citizens have been empowered to raise independent challenges to development and the fact that the courts have been given de novo review over these challenges does not render MEPA unconstitutional or impermissibly vague. Rather, it speaks to the commitment of this state to the protection of

its natural resources, the responsibility of local government to make MEPA findings as a condition of site plan approval, and places upon developers the risk of noncompliance.

A review of the cases cited by the parties indicates that the courts have interpreted MEPA in a fashion consistent with the Michigan Constitution and consistent with their charge to develop an environmental common law. See, for example, West Michigan Environmental Council v Natural Resources Commission, 405 Mich 741; 275 NW2d 538, cert den 444 US 941 (1979); City of Portage v Kalamazoo County Road Commission, 136 Mich App 276; 355 NW2d 913 (1984); Rush v Sterner, 143 Mich App 672; 373 NW2d 183 (1985); Oscoda Chapter of PBB Action Committee Inc v Dept of Natural Resources, 403 Mich 215; 268 NW2d 240 (1978).

For all the foregoing reasons, this Court will decline the Defendants' invitation to rule the Michigan Environmental Protection Act invalid as an unconstitutional delegation of legislative power to the judiciary or find it impermissibly vague or overbroad. The Defendants' motion for summary disposition predicated upon MCR 2.116(C)(4) is denied.

COUNT V
INVALIDITY OF PLANNING COMMISSION ACTION

Within the Plaintiffs' Amended Complaint are three counts dealing with the Planning Commission's approval of the Grand Traverse Mall proposal on June 6, 1990. Count VII is an administrative appeal. Pursuant to the applicable standard of review and based upon the certified record, the Court will make a decision on it at a later point in these proceedings. Count VI requests this Court to exercise superintending control over the Planning Commission. Count V also questions the propriety of the Planning Commission's approval of this project. All three counts are based on the same operative facts.

Frankly, the Court cannot find a substantive issue which has independent life within the confines of Count V that is not more properly denominated as an administrative appeal within Count VII.

In Count V, as in Count VII, Plaintiffs' contest the evidentiary basis for the Planning Commission's decision, its reliance on the parking variance granted by the Zoning Board of Appeals, as well as its deferral to the interpretation of the transition strip requirement made by the Zoning Board of Appeals. Additionally, Plaintiffs raise a question concerning the applicability of Article 8, Planned Unit Development procedures, found in the township zoning ordinance to the Grand Traverse Mall project which, claim Defendants, is specifically governed by Section 6.8 of Article 6.

Whether described as matters of procedure or substance, all of the deficiencies attributed to the Planning Commission in Count V are necessarily incorporated by reference in Count VII. Further, there has been no substantiation for the proposition that this Court has jurisdiction to hear a collateral attack on the Planning Commission's activity outside the confines of a timely administrative appeal.

It is the Decision and Order of this Court, then, that to the extent that substantive and procedural allegations currently found within Count V are incorporated by reference into Count VII, they shall be decided there, but that in all other respects Count V is summarily dismissed. MCR 2.116(C)(8).

COUNT VI
SUPERINTENDING CONTROL

The applicable court rule dealing with superintending control is found at MCR 3.302 which, in part, provides as follows:

> "(B) Policy Concerning Use
>
> If another adequate remedy is available to the party seeking the order, a complaint for superintending control may not be filed. See subrule (D)(2), and MCR 7.101(A)(2), and 7.304(A).
>
> (D) Jurisdiction
>
> (2) When an appeal in...the circuit court...is available, that method of review

must be used. If superintending control is sought and an appeal is available, the complaint for superintending control must be dismissed."

Here, Plaintiffs seek superintending control arising out of alleged improprieties by the Garfield Township Planning Commission. Plaintiffs have an adequate remedy in the form of a direct appeal to circuit court. Given that the Planning Commission acted on June 6, 1990, it is clear that Plaintiffs' Complaint, filed on June 27, 1990, constitutes a timely appeal. MCR 7.101(B)(1) and Krohn v Saginaw, 175 Mich App 193, 196; 437 NW2d 260 (1988).

For the foregoing reasons, it is this Court's determination that superintending control is not a remedy available to Plaintiffs in this case and Count VI is thereby dismissed. MCR 3.302(B) and (D)(2). In re: People v Burton, Burton v Wayne County Prosecutor, 429 Mich 133, 144; 413 NW2d 413 (1987) and Schlega v Detroit Board of Zoning Appeals, 147 Mich App 79, 80-81; 382 NW2d 737 (1985).

COUNT VII
CLAIM OF APPEAL FROM PLANNING COMMISSION ACTION

Plaintiffs have filed a timely appeal of the Planning Commission action taken on June 6, 1990. While the Court will make a determination regarding this appeal based upon the certified record and subject to the applicable standard of review at a later point in these proceedings, it will address one of Plaintiffs' motions for summary disposition in the context of this count. Specifically, the Court will now consider the applicability of Article 8, Planned Unit Development Procedures, to the proposed phased development of the Grand Traverse Mall. The facts are not in dispute and the Court can make the interpretation of the ordinance as a matter of law. MCR 2.116(C)(10).

Plaintiffs raise a vigorous argument regarding the applicability of Planned Unit Development requirements to the Grand Traverse Mall. First, Plaintiffs state that the

developer's plans as presented for the proposed mall were not final and could not comply with the zoning ordinance since they did not cover the entire C-4 zoned parcel. Specifically, Plaintiffs object to the exclusion of the the 11 acres retained by Oleson, which land comprises a significant percentage of the entire C-4 parcel. Second, although less strenuously, Plaintiffs object to the exclusion of several "reserve" parcels which are identified on the Grand Traverse Mall site plan.

The legal basis for Plaintiffs' arguments are found in Section 16c of the Township Rural Zoning Act, ("TRZA"), MCLA 125.286c; MSA 5.2963 (16c) and Article 8 of the Township zoning ordinance. Section 16c of the TRZA sets forth the requirements for Township approval of Planned Unit Developments. Article 8 is the township's legislative response to the authority granted it under Section 16c of the TRZA and deals with uses authorized by special use permit, including regulations pertaining to Planned Unit Developments. Section 8.10.

The Defendants respond by stating that the Grand Traverse Mall is not a Planned Unit Development and not subject to the requirements of Section 8.10 of the township zoning ordinance. Rather, the Defendants contend that the development of their Planned Shopping District is controlled by the specific requirements of Section 6.2.

In interpreting the zoning ordinance, the TRZA, and its applicability to the issues at hand, it is important to note the legislative history as it overlays the development of this site. Section 16c of the TRZA was added by P.A. 1978, No. 637, with an effective date of March 1, 1979. Garfield Township did not amend its zoning ordinance pursuant to the statutory authority created by Section 16c until January 16, 1987. The Township zoning ordinance was promulgated in 1974 and one-half of the site was zoned C-4. The zoning ordinance and associated map were approved in a subsequent referendum. The remaining portion of the property was rezoned in 1979, following the passage of P.A. 1978, 637, but eight years prior to the amendment of the township

zoning ordinance to include provisions for Planned Unit Developments.

As with the issues raised in Count II, this Court believes that amendments 133 A, B and C control the resolution of this issue. When these amendments were promulgated on March 15, 1990, the Township Board was aware of the absence of a sunset provision in Section 6.2, that a decade had passed without construction since the 1979 rezoning, and that it had enacted provisions controlling the Planned Unit Development process in 1987. The Township Board's legislative response was to require the submission of up-dated data meeting the requirements of Section 6.8.2, and to delegate the review and approval process to the Planning Commission and the Zoning Board of Appeals.

Just as the township could have legislated a sunset provision or incorporated the Planned Unit Development provisions of Section 8.10 into the Section 6.2 review process, and thereby retained control over the development at the Township Board level, it chose not to do so. Similarly, when Section 8.10 was added to the township zoning ordinance in 1987, the Township Board likewise declined to incorporate its requirements into Section 6.2 but chose to retain the C-4 zoning requirements as an independent substantive and procedural track over which a developer must pass in order to obtain approval for a Planned Shopping District.

To further complicate the analysis, however, the Plaintiffs correctly note that the developer has identified several "reserve" parcels on the site plan and that the 11-acre parcel retained by the original owner/developer (Oleson) of the Buffalo Mall is part of a C-4 district which, by definition, calls for planned centers "located on a single, unified site and are designed and constructed as an integrated unit for shopping and other business activity." Section 6.8.1. Further, Plaintiffs' note that the Township Zoning Administrator referred to the Grand Traverse Mall proposal and the development of the "reserve" parcels identified in the site plan as development authorized under the authority of TRZA Subsection 16c(7). Subsection 16c(7)

deals with final approvals of each phase of multi-phased Planned Unit Developments.

The location of the 11-acre parcel on the intersection of two major thoroughfares and contiguous with a regional shopping mall clearly suggests that the development of the property will be commercial in character. If, as Defendants have stated, the development of the 11-acre parcel is not a part of the Grand Traverse Mall project and is not part of its phased development, then approval for any subsequent development on the Oleson parcel will not be part of a multi-phased approach to the development of the C-4 District identified as the Grand Traverse Mall and characterized by development located on a "single, unified site."

As noted above, the impact of this position by the Defendant Township and the Defendant Partnership and the risks associated with it as they pertain to the zoning on the 11-acre parcel are known to and assumed by the owner of that land. Oleson's agent has filed affidavits in this litigation (Affidavits of Jack Smith), and his attorneys are co-counsel for the Defendant Township. The zoning of the Oleson parcel, then, is not before the Court, as the Oleson parcel is not part of the Grand Traverse Mall site plan.

With regard to the "reserve" parcels, the parties agree that they are a small portion of the overall site plan for the Grand Traverse Mall and both their use and traffic impact are easily foreseeable. Specific uses would include banks, fast-food restaurants or small retail establishments. The traffic impact has been dealt with in the overall site plan through the limitation in the number of curb cuts and the requirement of traffic utilizing the interior circulation pattern of the larger mall development.

The future approval of development on these "reserve" parcels, however, is not specifically discussed in Section 6.8. If the phased development of an "integrated unit for shopping, and other business activity" is controlled by Section 6.8 and not by the Planned Unit Development provisions of Section 8.10, then

development of the "reserve" parcels must likewise be subject to the review procedures contained within Section 6.8.2.[4] Article 8 is inapplicable to future development on the Grand Traverse Mall site as a direct result of the legislative intent evidenced by the Township Board in the amendment of its zoning ordinance. Where that intent is clear, unambiguous and otherwise constitutional, this Court must defer to it. Macenas, supra, at pages 396-397.

Administrative action by the Defendant township, however, has been argued to be inconsistent with the Defendants' position that Section 6.8.2 is controlling. It is undisputed that on February 13, 1990, the Township Zoning Administrator, John Porritt, and its Planner, Gerry Harsch, presented to the Zoning Board of Appeals a "Request to Board of Appeals." See, Exhibit A to Plaintiff Schostak's Supplemental Memorandum in Support of its Motion for Summary Disposition as to the Invalidity of the Defendant Township Planning Commission actions of June 6, 1990, and dated April 19, 1991. The "Request" sought an interpretation from the ZBA that Section 16c of the TRZA, with respect to the Grand Traverse Mall Development, provided the following:

> 1. The basis for denial, approval or approval with conditions of a planned development;
>
> 2. That the zoning administrator was the official charged with the duty of denial, approval or approval with conditions of the planned development; and
>
> 3. That the zoning administrator may seek the counsel of the Garfield Township Planning Commission in recommending denial, approval, or approval with conditions of the

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[4]There is no language in either Section 6.8.2 or 8.10 that would provide the Zoning Administrator with the authority to make final decisions regarding the phased development of a Planned Shopping District in a C-4 zone. The ZBA's interpretation of February 13, 1990, lacks competent, material and substantial evidence on the record to support it but was rendered of no consequence by subsequent Township Board action on March 15, 1990.

planned development and that Subsection 16C(1) and (2) of the TRZA were the "Pertinent Sections" of the TRZA.

Despite the ZBA's adoption of this interpretation on February 13, 1990, the procedures followed thereafter were those set forth by Section 6.8.2, as amended, and not those governed by Section 16c of the TRZA and Section 8.10 of the zoning ordinance. The reason for the change in procedure seems evident. Following the ZBA action of February 13, 1990, the Township Board adopted Amendments 133 A, B and C on March 15, 1990, which amendments required that the Planning Commission hold a public hearing for purposes of approving, disapproving, or approving the project with conditions. Similarly, the Zoning Board of Appeals was charged with the responsibility for reviewing the Planning Commission's findings and the record before the Planning Commission together with all new evidence and supporting data in making its determination to approve or disapprove the project and to communicate its written decision to the Zoning Administrator.

Just as the courts are not bound by administrative "legal" interpretations of the zoning ordinance, Macenas, supra, at 395, neither is the Township Board. The Township Board's legislative action of March 15, 1990, rendered moot the "Request" to the ZBA and its interpretation of February 13, 1990.

Plaintiffs' motion for summary disposition on this issue is denied and this specific claim is dismissed based upon the Court's interpretation of the ordinance as a matter of law. MCR 2.116(C)(10).

COUNT VIII
INVALIDITY OF ZBA ACTION ON JULY 10, 1990 - SUPERINTENDING CONTROL

For the reasons set forth in this Court's discussion of Count VI, supra, it is this Court's determination that Count VIII of the Plaintiffs' Amended Complaint likewise be dismissed. MCR 3.302(B) and (D)(2).

COUNT IX
CLAIM OF APPEAL FROM ZONING BOARD OF APPEALS' ACTION OF JULY 10, 1990

While Plaintiffs have filed no motion specifically directed at their appeal from the Zoning Board of Appeals' approval of the Grand Traverse Mall project on July 10, 1990, they have filed motions for summary disposition predicated upon improper ZBA interpretations regarding parking variances and the transition strip which were relied upon in granting final approval on July 10, 1990. This Court has determined that the Plaintiffs GNW and Schostak have standing to appeal the ZBA action of July 10, 1990, and that their appeal is timely. A decision on the merits following a review of the certified record will occur at a later point in these proceedings.

At this time, and in the context of this count, the Court will consider the parking variance and transition strip issues as raised by Plaintiffs' Summary Disposition motions.

A. Parking Variances

Plaintiffs have moved for summary disposition alleging that a parking variance was improperly granted by the Zoning Board of Appeals, which variance was relied upon by the Planning Commission in its approval of the Grand Traverse Mall development. MCR 2.116(C)(10).

On December 19, 1989, the Zoning Board of Appeals granted a variance from the parking requirements otherwise applicable to the Planned Shopping District. The standards for granting a variance are set forth in Section 23 of the TRZA as follows:

> "Where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the zoning ordinance, the board of appeals in passing upon appeals may vary or modify any of its rules or provisions so that the spirit of the ordinance is observed, public safety secured, and substantial justice done. The board of appeals may impose conditions with an affirmative decision pursuant to Section 16d(2)."

As a "non-use" variance, the applicant was required to show "practical difficulty" and not unnecessary hardship to justify granting the variance. Indian Village Manor Co v City of Detroit, 5 Mich App 679; 147 NW2d 731 (1967); Heritage Hill Assoc, Inc v City of Grand Rapids, 48 Mich App 765; 211 NW2d 77 (1973).

A review of the appellate record and the minutes of the ZBA meetings of December 19, 1989, and those where the variance was renewed on July 25, 1990, indicate that it was improvidently granted and renewed. The record is devoid of any evidence whatsoever of "practical difficulties." Rather, the reasons supporting the variance were equally applicable to all such developments thereby requiring an ordinance amendment.

Subsequently, the zoning ordinance was amended, effective February 14, 1991, and the requirements for parking contained in the disputed variances granted by the ZBA have now been legislatively adopted into an amended township zoning ordinance. Section 7.8.3(3)(a). See, Affidavit of Gerry Harsch, April 29, 1991, paragraph 13.

In this Affidavit, Mr. Harsch further states that the movie theatres identified within the site plan are a permitted use within the Planned Shopping Center District under 6.8.4 (4) and no incremental parking requirement is imposed on such uses. Harsch, supra, paragraph 14.

The Defendants have cited several cases to the Court which stand for the proposition that where a subsequent enactment or repeal of an ordinance or statute addresses the precise questions involved in a pending dispute, so as to dispose of such questions, the entire matter is rendered moot. See, e.g., Dearborn Fire Fighters Assoc, Local No 412 v Herdzik, 319 Mich 345; 29 NW2d 830 (1947); McBroom v City of Flint, 266 Mich 679; 254 NW2d 468 (1934); City of Detroit v Killingsworth, Detroit Police Officers Assoc v City of Detroit, 48 Mich App 181; 210 NW2d 249 lv app den (1973); Howe v Doyle, 187 Mich 655 (1915).

> "Where an ordinance is repealed by a later ordinance governing the same subject matter and the earlier ordinance is therefore no

> longer in existence, the validity of the earlier ordinance becomes a moot question, the determination of which would profit no one." McBroom, supra, at p 681.

There has been no procedural challenge to the amendment of the zoning ordinance and it was not deemed of sufficient interest to generate a referendum election. Even recognizing the stringent standard of review applicable to a motion for summary disposition pursuant to MCR 2.116(C)(10), this Court must not only deny Plaintiffs' Motion for Summary Disposition but dismiss this specific claim as moot, and do so as a matter of law.

B. Transition Strip

A review of the certified record indicates that the Zoning Board of Appeals made an interpretation regarding the ability to include retention ponds in the transition strip required by Section 6.8 and that this interpretation was made on April 10, 1990. The Defendants contest the Plaintiffs' ability to raise this issue, first, on procedural grounds. It is the Defendants' position that the determination made on April 10, 1990, should have been appealed within 21 days and that the failure to do so precludes Plaintiffs from litigating the issue now. MCR 7.101(B)(1) and Krohn v Saginaw, supra.

Plaintiffs respond by referring to the Notice of Hearing which advised the public that this issue would be raised. Appellate Record, General, Tab 1(H), Minutes of ZBA meeting 4/10/90. The Public Meeting Notice indicated that "miscellaneous interpretations" would be made with respect to the zoning ordinance. A review of the appellate record indicates that public meetings involving the Grand Traverse Mall were well attended and the issue vigorously debated prior to April 10, 1990. The record further indicates that the only "miscellaneous interpretation" of the township ordinance which was considered on April 10, 1990, was the transition strip issue now before this Court and its specific application to the Grand Traverse Mall.

The Township's Meeting Notice, in view of the significant public interest in this project, was disingenuous if not a clear violation of the letter and policy which underlie the Open Meetings Act. Although the record indicates that a representative of the Plaintiff Schostak was present, this Court will not countenance the deception implicit in the April 10, 1990, Meeting Notice by suggesting that an appeal from the action taken at that meeting was not timely perfected. Were this Court to conclude otherwise, the equities demand that this Court grant leave to appeal. MCR 7.203(B).

The substantive objections relating to the transition strip require an interpretation of Subsection 6.8.5(8) of the zoning ordinance. In pertinent part, it provides as follows:

> "Transition Strips: All planned shopping center districts, when located...adjacent to [a]...residential district...shall include as an integral part of the site development a strip of land two-hundred (200) feet or more in width on all sides of the site except on the side fronting on a major thoroughfare. No part of such land may be used for any shopping center functions, except that up to one-hundred (100) feet of the strip width on the interior side may be used as part of the parking area. Except for the part that may be occupied by parking space, the strip shall be occupied by plant materials or structural fences and walls, used separately or in combination. The plans and specifications for shopping center development shall include the proposed arrangement of such plantings and structures and such proposals shall be subject to the approval of the Zoning Board of Appeals."

The site plan approved by the Zoning Board of Appeals on July 25, 1990, is found as Exhibit 3 to the Appendix to Memorandum in Support of Motion for Summary Disposition filed by the Defendant Township. The transition strip is located on the north side of the property where it adjoins the residential neighborhood along Day Drive. There is no dispute concerning the easterly half of the transition strip.

However, a storm water detention pond has been located within a portion of the westerly half of the transition strip. Plaintiffs argue that the inclusion of storm water detention ponds within the transition strip violates the clear language as well as the policy underlying Subsection 6.8.5(8).

A review of the minutes of the Zoning Board of Appeals' meeting of April 10, 1990, indicates that the request for an interpretation regarding the transition strip was presented by the Garfield Township Planner and then adopted by the ZBA. Both parties agree that the applicable standard of review is set forth in Macenas, supra, at page 395,[1] where the Supreme Court wrote as follows:

> "The statute instructs courts to defer to determinations of fact made by an appeals board if supported by competent, material, and substantial evidence on the record, MCL 125.585(11)(c); MSA 5.2935(11)(c). The board's decisions based on those determinations of fact are to be deferred to provided they are procedurally proper, MCL 125.585(11)(b); MSA 5.2935(11)(b); and are a reasonable exercise of the board's discretion, MCL 125.585(11)(d) and MSA 5.2935(11)(d). This deference, however, does not undercut the authority of the Court to decide questions of law as they arise in the course of a review of appeals board actions...."

Following the staff-initiated request for an interpretation, the Zoning Board of Appeals did conclude that the retention pond and mall service drive could be located within the transition strip area. The Planning Commission adopted this interpretation on June 6, 1990, when it approved the development proposal and found that the ZBA interpretation was "consistent with the intent and purpose of the zoning ordinance and the accepted practice followed in administrating the zoning ordinance." Plaintiffs challenge these interpretations "as being erroneous as a matter of law." See, Plaintiff GNW's Memorandum of Law Regarding the Transition Strip Requirements, dated April 2, 1991. The Court now will consider each issue in turn.

1. Service Drive

Subsection 6.8.5(8) of the zoning ordinance limits the use of the interior 100 feet of the transition strip to occupation by "plant materials or structural fences and walls, used separately or in combination" and "as part of the parking area." Plaintiffs dispute the ZBA interpretation which allows the mall service drive to be located within the interior 100 feet of the transition strip.

The Defendants argue that the interpretation of the ordinance reached by the ZBA is in accordance with the consistent uniform past practice of the township. See, Affidavit of Gerry Harsch, dated April 29, 1991, paragraph 7. Specifically, Mr. Harsch refers to an application requesting site plan review and variance regarding the Cherryland Mall, dated July 21, 1975, and similar applications requesting site plan review and variance for the Cherryland Mall dated November 15, 1976, October 14, 1980, and October 2, 1984. These applications, however, were acknowledged by counsel to be limited to the location of a retention pond within the interior 100 feet of the transition strip. These applications did not address the question of service drives.

The specific request of the Garfield Township Planning Department which is referenced in the minutes of the April 10, 1990, ZBA meeting was,

> "Is the service drive a part of the parking area, and, therefore, may legitimately be located within the interior 100 feet of the 200-foot transition strip and is the retention area landscape element sufficiently similar to the landscape elements of 'plant materials' or 'structural fences' that it also is appropriately located within the buffer area."

The minutes reflect discussion regarding the retention pond and limited discussion concerning the location of the service drive. Similarly, in the Planning Commission's findings of June 6, 1990, paragraph 2(i) discusses the transition strip with

respect to the location of the retention pond but contains no discussion of the location of the service drive within the interior 100 feet.

While this Court recognizes its obligation to enforce those interpretations of the township zoning ordinance that are supported by competent, material and substantial evidence, the record provided to the Court is devoid of any such evidence supporting the ZBA interpretation that a service drive is a land use sufficiently analogous to a parking area to allow its location within the interior 100 feet of the transition strip--other than the conclusory Affidavit of Mr. Harsch. Since a parking area and a service drive refer to distinct but related land uses, the Court cannot say that "no conceivable factual development" would prevent the Defendant from prevailing on this issue. Therefore, based upon the applicable standard of review, the Court must deny Plaintiffs' Motion for Summary Disposition.

The parties may provide the Court with references to supporting materials, if any, within this voluminous record so that the Court may appropriately consider this issue on the merits when it makes its findings with regard to the administrative appeals of both the Planning Commission action of June 6, 1990, and the Zoning Board of Appeals' action of July 10, 1990.

2. Retention Pond

A review of the Township Zoning Map indicates that three C-4 districts were in existence at the time the Defendant Grand Traverse Mall Limited Partnership presented its proposal to the Township. Other than the site of the Grand Traverse Mall, the other C-4 districts included the Cherryland Mall and Meijers Thrifty Acres. There is no evidence before the Court that either parcel has a retention pond located in the exterior 100 feet of the transition strip where it adjoins a residential district. Cherryland Mall has a retention pond in the interior 100 feet of its transition strip, and there is no evidence before the Court

which describes the precise location of Meijer's retention ponds relative to its transition strip and any abutting residential district.

The Affidavit of Township Planner Gerry Harsch offers the conclusion that both the location of service drives within the interior 100 feet of the 200-foot transition strip and the location of retention ponds within the transition strip are consistent with the uniform past practice of the township. Mr. Harsch draws his conclusion not only with respect to the past practice relating to shopping centers but to other land use classifications such as office and commercial and industrial uses. Affidavit of Gerry Harsch, dated April 29, 1991, paragraph 10.

Despite the conclusive nature of Mr. Harsch's Affidavit, and in the absence of specific references to support his identified uniform practice, this Court can decide this issue based solely upon the language of the relevant ordinance provision. With the exception of that portion of the transition strip which may be occupied by parking space, the zoning ordinance requires that it otherwise be occupied by plant materials or structural fences and walls, used separately or in combination.

The retention pond is proposed as a landscaped area which will retain storm water and offer the viewer a pond-like vegetated appearance, or, at periods of low water, it will present the appearance of a vegetated wetlands area. In either case, to the extent it occupies the transition strip, it does so as a planted, bermed, landscaped area containing trees, cattails and other vegetation as described on Defendants' site plan. Exhibit 3, Appendix to Motion to Support Summary Disposition. Harsch, supra, paragraph 8 and 9

Reviewing Section 6.8.5 in light of the intent and purpose of the Planned Shopping Center land use classification described in Section 6.8.1, where the Township Board stated its legislative intent "to promote safe and convenient access to shopping and business facilities by the automobile-conveyed customer and to avoid and minimize undue traffic congestion or other adverse

affects upon property within adjacent zone districts" (Emphasis added), it becomes clear that a great gulf lies between the Township's stated intent and the ordinance's actual requirements.

The plain language of the ordinance does not require that the transition strip be bermed, contains no specific standards regarding the type or volume of plantings, and does not designate the height or composition of structural fences and walls. There are no aural or noise abatement standards. Compliance with the strict language of the ordinance may be achieved in the exterior 100 feet by providing a level grassy area with or without a fence.

A review of the transition strip provision suggests that very minimal requirements are necessary to satisfy it. Were there an existing wetlands in the westerly half of the transition strip, a plain reading of the ordinance would not require that it be removed and replaced with a bermed, landscaped area. Similarly, it is equally clear that the interior 50 percent of the transition strip may be utilized as parking area, a use far more likely to generate noise, and certainly far less attractive, than an appropriately landscaped and maintained retention pond.

Plaintiffs' final argument is that a storm water retention pond is a shopping center function. Here, the Court must disagree. On-site storm water detention systems are required of most new nonresidential development. Storm water detention systems are an element of development infrastructure but are no more a shopping center function than they are an office, retail, or industrial function.

While this Court concedes that legislative action to draft meaningful transition strip criteria would be consistent with the stated intent of the ordinance and have strong underpinnings in policy and common sense, this Court may not write legislation or impose its views concerning policy on an independent branch of government. To the extent there is any meaningful residential buffer on this site plan, it can only have been generated by the developer's economic interest in promptly securing site plan

approval and not be reference to this toothless transition strip requirement.

For all the foregoing reasons, and based upon the standard of review set forth in Macenas, supra, it is this Court's determination that Plaintiffs' Motion for Summary Disposition regarding the transition strip be denied and this specific claim dismissed as a matter of law. MCR 2.116(C)(10).

COUNT X
MICHIGAN ENVIRONMENTAL PROTECTION ACT
APPLICABLE TO ZBA ACTION OF JULY 10, 1990

The Defendants have filed a Motion for Summary Disposition directed at Count X which is based upon MCR 2.116(C)(8) and (10). The gravamen of Count X is the ZBA's alleged failure to make the findings required by MEPA as well as the ZBA's approval of the project prior to the completion of the Kids Creek Watershed Study in violation of an announced Township policy. See paragraph 61 and 62 of Plaintiffs' Amended Complaint.

To the extent that the ZBA may have failed to make the findings required by MEPA, that issue has been rendered moot by this Court's decision of June 6, 1991, wherein the environmental issues were remanded for supplemental findings by the ZBA in accordance with Section 4(2) of MEPA. MCA 691.1204(2); MSA 14.528(204)(2).

Plaintiffs' second substantive allegation in Count X is the failure to await completion of the "Kids Creek Watershed Study" before issuing approval to this project violated a township policy. The policy alleged was voluntary in nature and was limited to rezonings only. It did not apply to the issuance of building permits and was not so interpreted by the Township. Again, while a compelling argument can be made to withhold the approval of significant development within the Kids Creek Watershed until such a study was completed, no such requirement was ever part of the approval process set forth in 6.8.2, as amended. Further, it now appears that the Kids Creek Watershed will not be meaningfully impacted by the proposed development as Plaintiffs' substantive MEPA claims have been voluntarily

dismissed. The approval of the Grand Traverse Mall site plan prior to the completion of the "Kids Creek Watershed Study" creates no claim upon which relief can be granted. MCR 2.116(C)(10).

The remaining issues raised by Count X, if any, will be considered following the issuance of supplemental MEPA findings by the ZBA pursuant to this Court's decision to remand on June 6, 1991.

COUNT XI
ZONING BOARD OF APPEALS' ACTION ON JULY 25, 1990 - SUPERINTENDING CONTROL

For the reasons set forth in this Court's discussion of Count VI, supra, it is this Court's determination that Count XI of the Plaintiffs' Amended Complaint be dismissed. MCR 3.302(B) and (D)(2).

COUNT XII
CLAIM OF APPEAL FROM THE ZBA ACTIONS OF JULY 25, 1990

Plaintiffs have timely perfected an appeal from the ZBA decision to renew a parking variance on July 25, 1990, which had earlier been granted on December 19, 1989. The parking variance has been discussed in the context of Plaintiffs' Motion for Summary Disposition in Count IX, supra. The Court has reviewed the parties' briefs and the certified record as it pertains to this issue.

For the reasons set forth in Count IX, this Court is convinced that the variance was improvidently granted. However, the issue has been rendered moot by a subsequent legislative amendment to the zoning ordinance. Count XII of the Amended Complaint is dismissed. MCR 2.116(C)(10).

COUNT XIII
INVALIDITY OF ACTION BY ZONING ADMINISTRATOR

In Count XIII of the Amended Complaint, Plaintiffs challenge the Zoning Administrator's approval and issuance of a building permit for construction of the Grand Traverse Mall. Plaintiffs allege that the Defendant Partnership's failure to satisfy certain procedural conditions precedent precluded the issuance of a building permit. Amended Complaint, paragraph 81. The duties of the Zoning Administrator are set forth in the zoning ordinance at Article 4, Section 4.1.2. The requirements regarding the issuance of land use permits are specified in Section 4.1.3(1).

Norman Hyman and Mark Schostak have both filed Affidavits substantiating their review of township files and the certified record, respectively, and denying the existence of either an application for a land use permit or the land use permit itself. The Zoning Administrator has filed an Affidavit indicating that he received the application and issued the permit. Porritt Affidavit, dated April 15, 1991. The documents were attached as Exhibits 3 and 5. No issue regarding their existence remains.

The certified record indicates that the development was approved by the Planning Commission on June 6, 1990, and by the Zoning Board of Appeals on July 10, 1990. Whether or not those approvals are "valid" and conform with existing zoning is the subject of administrative appeals previously identified in this Decision and Order. Those issues will be decided in the context of Counts VII and IX.

As a part of their procedural challenge, Plaintiffs allege that while the Defendant Partnership has filed a Soil Erosion and Sedimentation Control Permit with the Zoning Administrator, dated January 15, 1990, such permit relates to a site plan different than that approved by the ZBA. Therefore, Plaintiffs allege that the Soil Erosion and Sedimentation Control Permit requirement has not been met. Amended Complaint, paragraph 81(c).

The Affidavit of Maureen M. Kennedy, Grand Traverse County Drain Commissioner, dated August 6, 1990, sets forth the

chronology associated with the issuance of the permit. In paragraph 8 of her Affidavit, Ms. Kennedy described how the permit was issued on May 7, 1990, although dated January 15, 1990, in response to revised site plans that accommodated recommendations to the originally-proposed site plan, dated January 29, 1990. See, Exhibit One to Kennedy Affidavit. As to the compliance with the Soil Erosion and Sedimentation Permit process, the Grand Traverse County Drain Commissioner made the following statement in her Affidavit:

> "Based upon her own inspection and review, and taking into account the consulting advice provided to the Drain Commissioner by FTC&H, it is her professional opinion and judgment: (i) that all administrative review steps required by the Act, and the applicable administrative regulations, have been properly and fully completed; (ii) that site plan and storm-water drainage/detention systems, as revised, comply with all standards and requirements of the Act and regulations; and (iii) that the permit was properly issued in full compliance with the County's responsibilities for the administration and enforcement of the Act and its applicable regulations." Kennedy Affidavit, paragraph 9.

The Affidavits of Larry Hagburg and John Rice question the soil sedimentation permit process. Mr. Rice's Affidavit is dated April 2, 1991, and does not indicate that he has reviewed the Drain Commissioner's Affidavit of August 6, 1990. The Drain Commissioner's Affidavit clearly establishes that the soil sedimentation permit was based upon those plans which were finally approved by the Garfield Township Zoning Board of Appeals and as modified to meet her specific requirements.

The Court, in its Decision and Order of June 6, 1991, required the Defendant Partnership to notify all permit granting agencies of the functional changes to the storm water system. Any new issues raised thereby will be resolved at the agency level and are no longer properly before this Court.

Plaintiffs additionally challenge the failure of the Zoning Administrator to make independent findings required by MEPA and

for issuing the building permit prior to the completion of the Kids Creek Watershed Study. Amended Complaint, paragraph 85 and 86. These issues were discussed and dismissed by the Court previously in Count X. A similar result is required here. MCR 2.116(C)(10).

Plaintiffs further claim that the Defendant Partnership failed to produce and the Zoning Administrator failed to receive the necessary applications and permits prior to issuing a building permit. Amended Complaint, paragraph 81(a) through (f), inclusive. This claim is directly contradicted by the affidavits of the Zoning Administrator, John Porritt, dated March 14, 1991, and April 15, 1991. The issue lies not in the existence of these documents but in the ramifications of several contested case hearings surrounding their issuance.

The Court is sensitive to the fact that a number of the permits received by the Defendant Partnership are the subject of contested case hearings. See, Affidavit of Frederick Dilley. However, it is not the Zoning Administrator's obligation to look through a permit which is otherwise valid on its face and determine whether it may become the subject of a contested case hearing; and, if so, what the outcome of that hearing will be. To the extent that certain permits must be filed as a condition precedent to the issuance of a township building permit, the action of the Zoning Administrator in response to the production of these permits is simply ministerial.

Recognizing that some actions of the Zoning Administrator are discretionary, Plaintiffs allege that the final plans approved by the Zoning Board of Appeals and which form the basis of the land use permit issued by the Zoning Administrator on July 25, 1990, were in fact different in significant ways from those presented to the Road Commission on March 21, 1990, and which formed the basis of the Road Commission's permit of April 12, 1990. If the Zoning Administrator was aware of significant changes to the site plans which were material to the Zoning Board of Appeals' review process and issued a land use permit despite

this knowledge, then such discretionary action would be the appropriate subject of review.

However, the Court has been unable to locate in the certified record or the exhibits attached to the parties' motions and briefs any evidentiary basis to rely upon in resolving these issues. At the very least, the Court must be directed to the significant differences in the site plans, evidence identifying Mr. Porritt's knowledge of those significant differences, and evidence identifying his failure to bring these matters to the attention of the Zoning Board of Appeals prior to the issuance of a building permit.

Unless the road improvements and acquisition of right-of-way would change the location of curb cuts previously identified and approved by the Zoning Board of Appeals or otherwise reconfigure parking space, service drives, landscaping buffers, or transition strips in a significant way, the Court must profess some confusion as to how the precise engineering of the South Airport Road improvements would impact on the propriety of the April 12, 1990, driveway permit and the subsequent issuance of a building permit in reliance thereon.

Other than those issues which have been dismissed as noted herein, the Court will resolve Count XIII upon a review of the certified record at a later point in these proceedings.

CONFLICTS OF INTEREST

Plaintiffs have raised a substantial issue regarding conflicts of interest or the appearance of impropriety attributable to the participation in the Zoning Board of Appeals' approval process by two of its five members. The development of a regional shopping center on this site has been controversial since the time of the 1979 rezoning. The current project is disputed by neighbors, an environmental group, and one owner of a competitive mall located within the township.

Reduced to its essence, Plaintiffs allege that Frank McManus ("McManus") and Tony Wilhelm ("Wilhelm") should not have participated in decisions while members of the Zoning Board of

Appeals which pertained to the Grand Traverse Mall.[5] McManus and Wilhelm were two of five members on that board and participated both in the discussion and voting on a number of questions, including the issuances of parking variances, an interpretation regarding the transition strip and, ultimately, the final approval of the Grand Traverse Mall proposal.

It is undisputed that Wilhelm and McManus participated in a like-kind land exchange wherein they sold land to an entity or agent of the original owner/developer of the Buffalo Mall (Oleson) and, thereby, facilitated his sale of the Buffalo Mall property to the Defendant Partnership. The record indicates that the terms of this transaction were agreed upon shortly before the Defendant Partnership notified the Defendant Township of its intent to construct the Grand Traverse Mall and little more than a month before the Zoning Board of Appeals granted its first parking variance, a variance which this Court believes should not have been issued given the absence of any evidence of practical difficulties associated with construction on the existing site. See, discussion found within Count IX, supra.

The minutes of the December 19, 1989, Zoning Board of Appeals meeting indicate that the Chairman requested disclosure of any conflicts of interest and none were reported. Transcript, pp 3-4. Some months later, the potential conflict of interest issues associated with the like-kind land exchange were raised by others. The conflict question was complicated by the fact that the Defendant Township and Oleson were represented by the same law firm, which firm documented the real estate transactions between McManus and Wilhelm and Oleson. This firm also provided the initial opinion regarding the putative conflict of interest.

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[5]The facts concerning Wilhelm's residence within the township are alleged to now be at issue but are not before the Court in the record upon which this motion is being determined. The alleged lack of residency at the time the ZBA voted to approve this project on July 10, 1990, is an issue which has been rendered moot by his disqualification on other grounds.

Due to the controversy raised by the discovery of the like-kind land exchange and the role of Wilhelm and McManus in it, the Township Board appropriated funds and authorized the retention of an independent law firm to provide it with an opinion regarding the potential conflict of interest. This "independent" opinion was provided by the Dykema Gossett law firm and has been provided to the Court (over objection) as a part of the certified record. Both firms now represent the township as co-counsel in this litigation.

The Court finds that the factual statements contained in the Dykema Gossett opinion are supported by the documents related to the land exchange and fairly summarize the nature of the transaction between the Defendant Partnership as buyer, Oleson as seller, and Wilhelm and McManus. There is no question that Oleson was obligated to sell the land to the Defendant Partnership for approximately 4.5 million dollars, whether or not a like-kind land exchange could be facilitated. To the extent a like-kind land exchange transaction could be consummated within approved time periods, it was a matter of contractual indifference to the Defendant developer as it was obligated to pay no more or no less consideration for the land.

It is equally evident that both Wilhelm and McManus were aware that they were participating in the sale of their property as part of a transaction associated with the sale of the Buffalo Mall site to a new developer. Further, neither of these sales was contingent upon any other event or condition. The parties had agreed upon terms and funds were delivered in escrow by November 14, 1989. Wilhelm closed and was paid on December 7, 1989, and McManus closed and was paid on January 2, 1990. The ZBA meeting where the parking variance was granted was held on December 19, 1989.

Based upon a review of the undisputed facts, it is this Court's conclusion that neither Wilhelm nor McManus ever had a direct financial interest in the property Oleson sold to the Defendant Partnership, never negotiated directly with any representative of the Defendant Partnership or General Growth

Company, Inc., and that neither Wilhelm nor McManus had any contingent or conditional interest in the development of the Grand Traverse mall property. Similarly, upon the sale of their property, neither had any financial hopes of benefiting directly or indirectly from the construction of the mall in any sense that differed from that of any other taxpayer in Garfield Township. There was no conflict of interest.

Plaintiffs additionally argue that there was the appearance of impropriety and that the appearance of impropriety also precluded McManus and Wilhelm from voting. Defendants argue that such ethical considerations are not applicable to township officials in Michigan generally and are not otherwise applicable on the facts of this case.

A demonstrated appearance of impropriety has the potential to be every bit as damaging to the body politic as an actual conflict of interest. It destroys the faith and trust that is integral to the operation of government in a representative democracy. Objections to utilizing the appearance of impropriety as a basis for disqualifying legislators, members of the judiciary, attorneys, or local government officials from engaging in certain behavior or participating in certain decisions are not persuasively predicated on the standard being unworkable. As our government becomes increasingly more remote from its people, it seems important to strengthen the ethical requirements for those who participate in it. The people's confidence in government cannot long be sustained if we turn a blind eye to behavior that creates an impermissable appearance of impropriety. The doctrine, however, does have limits.

Plaintiffs have cited a number of cases which establish the "appearance" rule in several other states. No law on this issue was provided by the Defendants. The Court finds the reasoning contained in the cited decisions persuasive and well supported by the policies of due process and fundamental fairness which pervade our law.

The public policy served by the enforcement of the so-called "appearance" doctrine is an important one:

> "The evil lies not in influence improperly exercised but rather in the creation of a situation tending to weaken public confidence and to undermine the sense of security of individual rights which the property owner must feel assured will always exist in the exercise of zoning power." Mills v Town Plan & Zoning Commission of the Town of Windsor, 144 Conn 493, 134 A2d 250 (1957).

Fairly summarized, Courts in these cases have repeatedly questioned the participation by a board or commission member in a proceeding, including zoning proceedings, where such participation creates an appearance of impropriety, partiality, bias, or lack of fairness. This Court will highlight those cases which it finds particularly germane to the issues at hand.

First, in Abrahamson v Wendell, 72 Mich App 80; 249 NW2d 403 (1976), on reh 76 Mich App 278; 256 NW2d 613 (1977), the Court of Appeals ruled, as a matter of law, that the appearance of a township supervisor before the zoning board of appeals, where the supervisor had appointment power over the board, presented the potential for duress and rendered the action of the board void. The Court emphasized the need to create confidence in public officials by avoiding even the appearance of impropriety: "[i]t is hoped that this conclusion will help bolster the public confidence in the decision makers who must represent their interests and who must seek to avoid even the appearance of impropriety". 72 Mich App, at 83.

Similarly, in Barkey v Nick, 11 Mich App 381; 161 NW2d 445 (1968), the action of a zoning board of appeals was also invalidated due to the appearance of partiality. There, the Court held that a ruling of the zoning board of appeals was void due to the fact that a city commissioner who had zoning board of appeals appointment power represented his brother before the board. The appearance of the commissioner before the board was deemed improper because it created an appearance of partiality: "[i]t creates an abuse of trust imposed by the assumption of public office and creates a personal pecuniary interest conflicting with the fiduciary duty owed all members of the

public. Further, it creates a doubt in the public mind as to the impartiality of the board's action." 11 Mich App at 385; See also, OAG, 1979-1980, No. 5774, p 972 (Sept. 8, 1980). A member of a township board must avoid even the appearance of impropriety; any conflict of interest between personal profit and public duty must be scrupulously avoided.

The law of other jurisdictions is similar to that of Michigan, and there are limitations on the application of the doctrine. Mere contact with a party or the existence of a remote fact which might suggest the impropriety was held not to be sufficient to call the doctrine into play in King County Water District v King County Boundary Review Board, 87 Wash 2d 536, 554 P2d 1060 (1976). The Oregon Supreme Court declined to follow the doctrine in 1000 Friends of Oregon v Wasco County, 304 Or 76; 742 P2d 39 (1987), cert den, 486 US 1007 (1988). There, a member of the board of county commissioners had voted to call an election on a proposal to incorporate a city. His vote was challenged on the grounds that he had sold cattle to the petitioners before the vote at generally unfavorable terms. The commissioner in question had informed his fellow commissioners of this sale but not members of the public. The Oregon Court of Appeals invalidated the vote because the cattle sale created an appearance of impartiality. The Oregon Supreme Court reversed this decision, stating as follows:

> "...A reviewing body may find it less painful to order reconsideration of an official's action for insufficient respect for appearances than to determine whether the official in fact acted under the influence of bias or self-interest. But the two standards serve different interests. Actual impartiality protects the substantive quality of the official action as well as the parties' interest in its fairness. Invalidation for appearance alone, as the Swift court said, aims to preserve public confidence and it does so regardless whether the decision in fact was both correct and fair. The price of such invalidation is delay of what, but for appearances, is a proper application of public policy, at potentially heavy cost to an innocently

> successful proponent as well as to the agency." 742 P2d at p 44.

Other limitations on the doctrine do not allow the alleged appearance of impropriety to be speculative. A zoning commissioner was not disqualified merely because he was a member of an association opposed to an applicant's request for a special permit, Holt-Lock, Inc v Zoning and Planning Commission of the Town of Granby, 161 Conn 182, 286 A2d 299 (1971), or because he had once sold equipment to the applicant for a variance ten years earlier. Fail v LaPorte County Board of Zoning Appeals, 171 Ind App 192, 355 NE2d 455 (1976). Nor was the decision invalid simply because the law firm representing an applicant had in the past represented a corporation in which a commissioner owned a substantial amount of stock. Anderson v Zoning Commission of the City of Norwalk, 157 Conn 285, 253 A2d 16 (1968). Finally, in Dana-Robin Corp v Common Council of the City of Danbury, 166 Conn 207, 348 A2d 560 (1974), a planning commission member was held not disqualified upon the grounds of conflict of interest or an appearance of impropriety because he, his mother and sister were the sole stockholders in real estate corporations which owned properties in the city unrelated to the properties involved in the proceeding.

Recognizing the validity of the appearance doctrine, it remains to be determined whether it applies in this case. Here, despite a call by the ZBA chair for the disclosure of potential conflicts, neither Wilhelm nor McManus responded in public. Whatever private discussion subsequently occurred between these gentlemen and counsel for the Defendant Township and the substance of the advice they were provided is not before this Court. Rather, the ZBA went forward in its consideration of the request for a parking variance and both Wilhelm and McManus participated in the vote without any discussion of a potential conflict of interest or facts which might create the appearance of impropriety. Indeed, the facts associated with the like-kind land exchange were not made public by the Township or members of the Zoning Board of Appeals but were first reported by a local

newspaper. Only then was the issue addressed by the Township Board and, as discussed previously, another law firm was retained to provide the ethics opinion found in the certified record.

In considering the possible application of the appearance doctrine in this case, the Court recognizes that the legislative process at the township level in a rural area brings government closer to people than it does anywhere else in our state. Members of township boards, planning commissions, and zoning boards of appeals are friends, neighbors, and acquaintances and often members of families who have resided in the region for several generations. They serve for little or no compensation, are known to those who elect or appoint them, enjoy good reputations and, clearly, embody the concept of public service.

The juxtaposition of growth and rapid development with the lifestyle selected by those who live in a rural area can create, among these neighbors, hostile confrontations characterized by anger, frustration with the decision-making process, and a feeling of helplessness. In resolving such disputes at the township level, it is critically important that all parties be accorded the respect which they are due as township residents or persons otherwise properly appearing before the Township Board or its commissions and that they receive a fair hearing.

Actual or potential conflicts of interest should be disclosed on the record and resolved in public. Meeting notices should fairly describe the substance of the item on the agenda and the arguments raised in public hearings carefully evaluated and considered in formulating final decisions.

A public hearing is not merely a procedural condition precedent to the issuance of decisions previously made but the time and place to acquire additional substantive information to be used in formulating opinions and policy or in making interpretations and decisions on issues properly before a board or commission. If people do not believe they can obtain a fair hearing among their acquaintances and neighbors in a rural township, it is little wonder that they feel a sense of alienation from state and federal government.

One cannot review the transcripts of the public meetings found within the certified record without experiencing a disquieting sense of procedural unease. A perceived alliance between the Defendant Partnership and Garfield Township was reinforced by the noted common use of counsel by the Township and the predecessor developer, Oleson. Public participation was not encouraged, but only tolerated. Procedural technicalities were asserted, in the context of this emotionally-charged issue, which reduced due process concepts to their lowest common denominator.

It is also alleged that contrary to representations of the Township Board, its general counsel were involved in the selection of the law firm who prepared the independent opinion regarding conflicts of interest. Further, it is alleged that the Defendant developer's attorneys communicated ex parte with the ZBA and provided proposed MEPA findings which were adopted by both the Planning Commission, the Zoning Board of Appeals and the Zoning Administrator. The source of these findings was not revealed at any public hearing nor were opposing parties offered an opportunity to submit their proposed findings as would be the case in any judicial proceeding.

All of these facts were unfolding during the period when the Township Board enacted Amendments 133 A, B and C to delegate the review process for this C-4 Planned Shopping District to the Planning Commission and Zoning Board of Appeals rather than relegislate the district itself or control it through the implementation of planned unit development procedures. Elected officials were removed from direct participation in the project and a public referendum on this specific project was thereby avoided. Similarly, during this period, the ZBA approved and renewed a parking variance in the absence of any evidence of practical difficulties and made a controversial interpretation regarding the ability to locate retention ponds within the exterior 100 feet of the transition strip.

Although stated in the context of a different issue, Plaintiffs' frustration with the Township approval process in this matter may be crystalized in the following quotation:

> "An examination of the entire record in this case will review a zig-zagging pattern of administrative proceedings, patchwork zoning ordinance amendments, holding of key hearings without required notices, violations of the township's own rules of procedure, and abrupt, on-the-spot rule changes, which would do a broken-field runner proud, all designed to "steamroller" approval of the proposed mall." See, Plaintiff Schostak's Opposition to Defendant Township's Motion and Supplemental Motion for Summary Disposition, at page 16.

This Court cannot review the record below--the vigor with which all competing interests advocated their positions, the refusal of the Township Board to take part in the decision to approve the Grand Traverse Mall either by relegislating the C-4 zoning or by applying the planned unit development procedures to it, the social, economic and environmental ramifications of the review and approval process delegated to the Planning Commission and ZBA, and the facts associated with the like-kind land exchange--and reach any conclusion other than the participation of Wilhelm and McManus created an atmosphere which has weakened public confidence and created a doubt in the public mind as to the impartiality of the ZBA's action.

Substituting the names of Wilhelm and McManus and the ZBA for those of Bell and Jones and the Planning Commission, the Court could adopt the legal holding and policy analysis implicit in the following holding of the Washington Supreme Court:

> "It is the foregoing considerations that prompted us to state in Smith v Skagit County, 75 Wash 2d 715, 739; 453 P2d 832, 846 (1969): 'It is axiomatic that, whenever the law requires a hearing of any sort as a condition precedent to the power to proceed, it means a fair hearing, a hearing not only fair in substance, but fair in appearance as well.'
>
> "In the instant case, we find no evidence of, nor do we impute any, dishonest, dishonorable or self-serving motives or conduct on the part of any members of the planning commission in conducting the hearing and entering their findings of fact and

> recommendations. Neither do we hold that the respective individual actions, relationships and expressed views of the chairman of the planning commission, Mr. Bell, or Mr. Jones constitute any breach of public trust which, standing alone, would necessarily and fatally infect the hearing and fact-finding proceeding. Nevertheless, we, as was the trial court, are driven to the conclusion that the unfortunate combination of circumstances heretofore outlined and the cumulative impact thereof inescapably cast an aura of improper influence, partiality, and prejudgment over the proceedings thereby creating and erecting the appearance of unfairness condemned in Smith v Skagit County, supra." (Chrobuck v Snohomish County, 78 Wash 2d 858; 480 P2d 489, at 496 (1971). See also, Fleming v City of Takoma, 81 Wash 2d 292; 502 P2d 327 (1972).

In fashioning a remedy for the appearance of impropriety which has been created in this case, the Court is guided by an opinion which was not cited to it by either party. Murach v Planning and Zoning Comm of the City of New London, 196 Conn 192; 491 A2d 1058 (1985). Murach involved an appeal from a trial court decision upholding a zoning reclassification approved by the city of New London's Planning and Zonning Commission. While it was determined that one member of the commission had been illegally appointed and had made the motion to approve the disputed zoning reclassification, the Connecticut Supreme Court noted that while the appearance of impropriety was sufficient to require disqualification, it did not necessarily invalidate the commission's action. On this point, the Court wrote as follows:

> "..we have often stated that the test for disqualification 'is not whether personal interest does, in fact, conflict, but whether it reasonably might conflict.' [citations ommitted] In such matters, however, we have not always adhered to a per se rule of invalidation when a member of a board or commission had a conflict of interest that should have counseled disqualification in a matter upon which the member should not have participated. [Citation omitted] We note at this juncture that the trial court neither found, nor do the plaintiffs contend, that

Nunes had any personal or financial interest in this particular zoning classification.

"The statutes at issue, which we hold to have precluded Nunes' membership on the city of New London Planning and Zoning Commission, do not in their language provide any guidance as to what remedy a reviewing court should grant in the event of a post-hoc Sec. 8-19 and Sec. 8-4a disqualification. The case law on this point is also sparse. In Board of Commissioners v Thompson, 216 Ga 348, 116 SE2d 737 (1960), a challenge was made to commission's approval, by a six to three margin, of a zoning reclassification request. Five affirmative votes were needed to grant the request, but two of the members voting in favor of the approval were disqualified. One of those disqualified, a judge of the county juvenile court, was prohibited by a statute comparable to Sec. 8-19 from membership on the commission. In holding that the trial court properly held the zoning commission's action void, the court tallied up the remaining valid affirmative votes, four, and noted that "[e]liminating the two illegal votes, the resolution failed to carry by a vote of four to three." Id., 349.

"Significantly, the Court did not hold that the illegal votes per se tainted the entire action. In cases involving municipal councils, generally 'where the required majority exists without the vote of a disqualified member, his presence and vote will not invalidate the result.' 56 Am Jur 2d, Municipal Corporations, Sec. 172, p 225 (1971); See also, Marshall v Ellwood City, 189 Pa 348, 354, 41 A 994 (1899); Annot., 43 ALR 2d 698, 751, Sec. 27[b] (1955)." Murach, supra, at pp 1064, 1065.

The better-reasoned decision of courts which apply the appearance doctrine have not adopted a per se rule of invalidation. Here, the Court has concluded that there was no conflict of interest. While the appearance of impropriety had its origins in the like-kind land exchange and while the participation of McManus and Wilhelm in that transaction disqualified them from participation in proceedings involving the Grand Traverse Mall, public confidence was most affected by the

ill-advised decision not to promptly disclose and resolve this potential conflict in public and on the record. Wilhelm and McManus are not shown to have had any role in the selection of the subsequent "independent" counsel, nor have they been shown to be responsible for the unilateral submission of proposed MEPA findings by the developer's counsel. Neither Wilhelm nor McManus had an ongoing business relationship with the Defendant Partnership nor were they responsible for interpretations of township rules and their draconian application at the several hearings.

The ZBA votes throughout this period were unanimous. Defendants have argued that a quorum was present and the Wilhelm and McManus votes were not necessary to the final approval of the mall. Further, there was no immediate temporal nexus between the closing on the triangular land exchange and the project's final approval by the ZBA.

Recognizing that the Plaintiffs bear the burden of demonstrating that the disqualification of Wilhelm or McManus tainted the entire proceeding, the Court has reviewed the transcriptions which are a part of the certified record. The transcripts and the minutes of the relevant meetings which form the basis of contested issues which have not been previously been dismissed by this Court indicate that without the votes of Wilhelm and McManus a quorum was still present and the actions sustained by the unanimous votes of the remaining three ZBA members. Further, the transcripts do not indicate any effort by Wilhelm or McManus to unduly influence the ZBA.

Recognizing a strong presumption of regularity in the proceedings of a public body such as a township zoning board of appeals, the absence of an actual conflict of interest and no indication from the record that the participation of Wilhelm and McManus actually impaired the integrity of the decision-making process, it is this Court's conclusion that their participation did not render the ZBA's decision invalid.

Here, the Court has not disguised its concern for the combative atmosphere which has surrounded the underlying

proceedings. Although it assigns no fault to Wilhelm or McManus, the Court has likewise concluded that their participation in these proceedings was ill-advised and that they should have properly been counselled to disqualify themselves due to the appearance of impropriety. However, a substantive review of the record does not indicate either an actual conflict of interest, efforts to unduly influence the ZBA or other evidence which would rebut the presumption of regularity in the public proceedings of the ZBA. Like the Murach Court, this Court is constrained to find that the disqualification of these commissioners did not taint the entire proceeding and that any other determination would have to be premised on mere speculation or conjecture.

Plaintiffs' motion for summary disposition which is predicated upon conflicts of interest or the appearance of impropriety due to the participation of Wilhelm and McManus in the ZBA proceedings is denied and that claim dismissed as a matter of law. MCR 2.116(C)(10). McManus, however, may not participate in the deliberation or vote to adopt supplemental MEPA findings which will occur following the issuance of proposed findings by the presiding officer who is currently taking testimony in the MEPA remand proceedings. Wilhelm is no longer a member of the ZBA.

CONCLUSION

In summary, the Court finds that the Plaintiffs GNW and Schostak have standing to pursue all those counts found in Plaintiffs' Second Amended Complaint. Plaintiff NMEAC, however, has standing only to pursue those claims which arise under the Michigan Environmental Protection Act.

The Defendant Township's Motion to Dismiss the Second Amended Complaint, which is predicated on the doctrine of vested rights, is denied.

The environmental claims have been bifurcated from the consideration of zoning questions and the Court contemplates a de novo review of the remand record to resolve those remaining issues found in Counts IV and X. The Defendants' constitutional

challenge to the Michigan Environmental Protection Act has been denied.

The Court will consider the administrative appeals from the Planning Commission action of June 6, 1990, (Count VII) and that based upon the Zoning Board of Appeals' Action of July 10, 1990, (Count IX) following the conclusion of the MEPA remand process.

The Court likewise will review the certified record to resolve those aspects of Count XIII which were not resolved by the Court's decision herein.

The Court has otherwise dismissed Counts I, II, III, V, VI, VIII, XI and XII. The Court has also denied Plaintiffs' Motions for Summary Disposition predicated on Planned Unit Development arguments, the inappropriate granting of a parking variance, and the location of the retention pond. These issues have been resolved and dismissed as a matter of law. As noted in the Decision and Order, the issue pertaining to the location of the service drive remains open.

The Court Administrator will notify the parties of a scheduling conference upon the completion of the MEPA remand proceedings.

IT IS SO ORDERED.

HON. PHILIP E. RODGERS, Jr.
Circuit Judge

DATED: 7/16/91