

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MONROE

BEDFORD PARTNERS LLC, a Michigan
Limited Liability Company

Plaintiff,

v.

BEDFORD TOWNSHIP, a Michigan
Municipal Corporation,

Defendant.

Case No. 05-20841-CH

HON: Michael W. Labeau

Susan K. Friedlaender (P41873)
HONIGMAN MILLER SCHWARTZ
& COHN LLP
Attorneys for Plaintiff
38500 Woodward Ave., Ste. 100
Bloomfield Hills, MI 48304
(248) 566-8448

Kerry L. Bondy (P42786)
PETRANGELO & BONDY
Attorneys for Plaintiff
214 E Elm Ave Suite 208
Monroe, MI 48162
(734) 241-6470

David B. Landry (P32055)
NEMIER, TOLARI, LANDRY, MAZZEO
& JOHNSON
Attorney for Defendant
37000 Grand River, Suite 300
Farmington Hills, MI 48335
(248) 476-6900

PLAINTIFF'S TRIAL BRIEF

STATEMENT OF FACTS

1. The Plaintiff

This action concerns the Plaintiff, Bedford Partners, LLC's (the "Partners" or "Plaintiff") attempt to rezone approximately 78 acres of land located in Bedford Township south of Eric Road between Lewis and Crabb Road in response to meeting Bedford Township's self-described housing needs. Two of the parcels collectively contain approximately 18 acres. The Ann Arbor Railroad bisects these two parcels. The southernmost of the two parcels has approximately 400 feet of frontage on Lewis Road west of the Railroad tracks. The Plaintiff is the fee simple owner of these parcels. The Plaintiff is the land contract vendee of a third parcel that contains approximately 60 acres of land (the "60 acre parcel"). The 60 acre parcel is located immediately southeast of the two other parcels (collectively the "Property"). (EXH A).

2. The Township

Bedford Township is located on the southern border of Monroe County and the northern border of Lucas County in Ohio. It is a general law township and contains three unincorporated villages, which include Lambertville, Temperence and Samaria. The US Census classifies Lambertville and Temperence as "census defined places", which means that they meet the population density definitions of a city, but are not incorporated as cities. The evidence at trial will show that Bedford Township is the most populated civil division located within Monroe County. It has slightly more population than the City of Monroe. The Township is uniquely situated on the border of Ohio, which creates a local economy that is not dependent on Michigan's economy alone. According to the Township's Master Plan, over 60% of Township residents work outside of the State and presumably in Ohio.

Bedford Township is the most urban of all Townships in Monroe County. According to US Census classifications, it is 87% urban. The combined city and township of Monroe has a combined 97% urban population located on significantly less land area than Bedford Township.

The Township has outpaced Monroe County in population growth and new housing. The Southeastern Council of Governments (SEMCOG), which includes Monroe County, estimates that Bedford Township will continue to be the most urbanized area in Monroe County outside of the City of Monroe in the planning period that extends to 2030.

The Township has twice during the last 5 to 7 years analyzed its housing needs in terms of type of housing and price range. The Township's 2002 Master Plan contains a housing needs analysis. The Township also contracted for a housing assessment and strategy analysis performed in 2000 presumably as a means to qualify for federal and state funding of community development projects (the "CHAT Report "). Although there are some discrepancies between the two reports, they both agree that the Township comparatively has a very small amount of vacant land available for residential development.

The evidence will further demonstrate that the Township has manipulated its Master Land Use Plan to ensure that the Township, contrary to the findings and recommendations of the 2000 CHAT report and its own 2002 Master Plan, will prevent residential development unless it is proposed for relatively unaffordable and oversized parcels that do nothing to preserve agricultural lands and open space.

The evidence will show that the Township's Master Land Use Plan in fact contradicts statewide policy on housing and land development, planning policy as articulated by the American Planning Association, and the text of its own Master Plan. The evidence will also

show that the Township has taken no steps to effectuate any of the objectives of its Master Plan for residential development.

3. The Character of the Property and Surrounding Area

The Property is currently zoned Agricultural (“AG”). The AG zoning classification permits farming and the development of residential parcels at a density of 1 unit per 5 acres of land as uses by right. Approximately $\frac{3}{4}$ of the perimeter of the 60-acre site is surrounded by land either zoned or zoned and used for residential land uses on platted lots.

The land located immediately north of the Property consists of an approximately 80-acre parcel zoned R-2A, Single Family Residential. The permitted density under this classification is approximately 4 units per acre of land. The Plaintiff owns the 80-acre parcel and currently has an approved tentative preliminary plat for phase one of the planned development of the entire parcel, which ultimately may only be feasible as part of a unified development including the Property involved in this lawsuit. Approximately 160 acres of land located immediately north of the 80-acre parcel across Erie Road is zoned R-2B, which permits densities comparable to the R-2A zone and contains a platted subdivision.

The land located east of the Property is occupied by single-family homes constructed on individual parcels and is zoned R-2A. There is an approximately 40 acre platted subdivision located directly east of the R-2A land and is zoned R-3, which permits a density of approximately 6 units per acre of land with a public sewer connection.

The land located to the south and southwest of the Property consists of approximately 65 acres and is zoned R-3 Single Family Residential. The Township rezoned this formerly active farm in 2002 for development of an approximately 119 lot subdivision known as “Village Meadows”. The Township required Village Meadows to leave a stub street for connection to

Plaintiff's 60-acre parcel. The Village Meadows subdivision fronts on Temperence Road and has frontage along the railroad right-of-way. The Township's sewer system generally runs north along the Ann Arbor Railroad. The sewer extends along Lewis Road further north of Erie Road to Samaria.

The land located immediately west of the 80-acre parcel contains an existing platted subdivision on approximately 40 acres of land and is zoned R-2A. There are several large lot residential parcels zoned AG located north of the 18-acre parcel. The Ann Arbor Railroad right-of-way is located west of the 60-acre parcel and bisects the two combined 18-acre parcels. The Village of Temperence is located adjacent to and directly west of the railroad tracks. The frontage of the southernmost of the combined 18-acre parcel is located in the Village. The land uses in Temperence west of the Property and north and south of the southern part of the 18-acre combined parcels include land zoned for office, commercial and residential uses.

The Property is located within a one-mile radius of and in walking distance to the Village of Temperence. In 2005, the Township adopted a Village Overlay Zoning District which promotes and encourages a mix of C1 and C2 (Commercial Zoning) along with residential zoning within the Village. The intent, in part, of the Village Overlay Zoning District, which also applies to the unincorporated Villages of Lambertville and Samaria, is to serve the surrounding neighborhoods and not attract traffic from outside the neighborhood. The Township's 2002 Master Plan identifies the Villages as "Village Centers". The Master Plan describes the objective for these Centers is to be "concentrated, pedestrian-oriented environment(s) where residents can live, work, shop, and socialize." (Master Plan ("MP"), p. 95). The site is also located within one mile of the Samaria Village Center. The Township recently updated its Recreation Plan, which is part of a regional effort, to provide a connected system of bike paths

that link parks and other areas of interest. The draft of the updated plan contains the Township's recreation objectives for implementation between 2007-2011. The Recreation Plan depicts approximately 2000 lineal feet of the planned bike path traversing through or on the border of the Plaintiff's Property from Erie Road to Temperence Road. (EXH B). This leg of the path connects to the Village of Temperence.

4. The Demise of the Agriculture Uses On and Surrounding The Property

The land contract vendors, the Albrings, have been farming land in Bedford Township and other areas of Monroe County for many years. They still own farms in Bedford Township. The Albrings were forced to sell the 60-acre and 80-acre parcels because of their precarious financial situation. The Albrings chose to sell their Erie Road Property rather than other property that the family is farming because of the residential encroachment that the Township has permitted in the vicinity of the Albring farm over the years. The evidence will show that the Albrings had been suffering conflicts with neighboring residential property owners who would trespass on their property with off road vehicles and ruin crops. After the Township approved Village Meadow to the south, the Township itself put more pressure on the Albrings to abandon farming on the 60-acre parcel. The Albrings used the sale of the Property to help save their more viable and existing farming operations located in Bedford Township and other communities. The Plaintiff has allowed the Albrings to continue farming the Property on a temporary rent-free basis until the Plaintiff's pay the remaining balance of the land contract.

The Master Plan states that its objectives related to agricultural lands are in part to "preserve viable farmlands from conversion to and encroachment of non-agricultural uses and to mitigate conflicts between farm and non-farm uses in designated agricultural areas." (MP, p. 83). The Master Plan describes the agricultural areas as those "lands within the Township

having minimal road access and public sewer and water service.” (MP, p. 83). The Township has master planned the Plaintiff’s parcels along with the newly platted Village Meadows subdivision, as Agricultural Farmstead property. The minimum lot size in the AG district is one dwelling unit per 5 acres of land. The purpose of the Agricultural Farmstead designation is to preserve farmland. (MP, p.91). Although the Master Plan discourages large lot residential zoning on land designated as Agricultural Farmstead (MP, p. 92) dwelling units may be built in Agriculture Farmstead areas at a density of one unit per 5 acres of land.

The Township’s Master Plan also identifies a land use category called “Agricultural Estates”. The AG ordinance has an open space option for land zoned for AG use but master planned for Agricultural Estates. Under the option, the minimum lot size is one unit per 2.5 acres, which with the Township’s permission may be reduced to 1 unit per acre.

The evidence will show that the Township has master planned all the land in Section 14 east of the railroad tracks as either Agriculture Farmstead or Agriculture Estates despite that a majority of the land with those designations will likely never be developed or used consistent with those master plan designations because they contain existing platted subdivisions. The evidence will also show that the AG zoning and master plan designation of the Property is patently unreasonable.

5. The Denial of the Plaintiff’s Zoning Request

On approximately May 25, 2005, Plaintiff submitted an application to rezone the Property. The Plaintiff proposed to rezone the three parcels to residential classifications and then combine those parcels with the existing 80-acre parcel already zoned for residential use. The Plaintiff offered conditions on the rezoning as permitted under MCL 125.3405. The Plaintiff offered to restrict the entire development to no more than 450 units and thereby forego using the

maximum density permitted under the existing zoning classification of the 80-acre parcel and the maximum density permitted under the classifications requested for the Property. The Plaintiff also offered as a condition to help pay for improvements to Erie Road, which the Plaintiff did not cause and which the Township could not impose as a condition of approval.

The Township Planning Commission heard the rezoning request on June 22, 2005. Wade Trim, the Township's professional planning consultants, submitted an analysis of the Plaintiff's proposed rezoning request dated June 6, 2005. Although the planner recommended denial of the rezoning based solely on the Master Plan classification for Agricultural Farmstead, the planner added that the proposed rezoning could be seen as a logical extension of the current zoning pattern, and emerging development pattern in the area. The planner also suggested that the Planning Commission review the development trends in the relevant area to determine if the future land use map properly reflected the current and emerging needs of the Township. The planner had also recommended that the Township review the Master Plan designation of the 60-acre parcel in September 2004 when a contract purchaser had attempted to rezone only the 60-acre parcel.

The Planning Commission recommended denial of the conditional rezoning application. As required under the Zoning Enabling Act, the Township then referred the application to the Monroe County Planning Commission. The County Planning Department Staff, issued a memorandum dated July 13, 2005 in which the professional planning staff recommended that the Township grant the rezoning request. The staff found that the Property is well suited for residential development due to its proximity to paved roads, public utilities, schools, fire halls, and other urban services and its location adjacent to a high-density subdivision. The County

staff also found that the remaining agricultural zoned district is less and less viable for both production and preservation.

Despite the recommendation of the staff, the County Planning Commission, the political body of the County, recommended denial of the application on July 13, 2005.

The Township Board held a hearing on the rezoning on August 2, 2005. Without any public deliberation, the Township Board denied the application reading from a prepared statement that contained 19 alleged reasons, mostly repetitive and unfounded, to deny the rezoning request. The Plaintiff's Property therefore remains saddled with a zoning classification that is unsuitable, confiscatory and patently unreasonable.

I. APPLICABLE LAW

A. Standard of Review and Proof In A Zoning Case

In a rezoning case, which, as here, the Plaintiff has alleged a due process and taking claim, the court's analysis focuses on whether the challenged zoning ordinance as applied to the land is invalid. The inquiry is not focused on whether sufficient evidence existed or did not exist to support the Township's rezoning decision. The court's analysis is not an administrative review of a zoning decision. *Arthur Land Co, LLC v Otsego County*, 249 Mich App 650, 662-664 (2002). The denial of a rezoning request is a legislative act subject to a trial de novo. The court reviews de novo or "with fresh eyes" the evidence presented at trial.

The court initially presumes that the ordinance as applied to the Plaintiff's land is constitutional. *Spanich v Livonia*, 335 Mich 252 (1959). Once, however, the Plaintiff presents some evidence that rebuts the presumption, it fades out of the case. *Id.* at 494-495. Citing *Christiansen v Hilber*, 282 Mich 403 (1938) *Christiansen* held that once an opposing party rebuts a presumption in its favor, it has no weight as evidence and the party who has the

presumption must introduce supporting evidence or lose the case. After the plaintiff rebuts the presumption and it disappears, the court must weigh the actual evidence produced by the plaintiff and defendant without regard to the presumption. *Id.* at 406-407.

Although the Plaintiff will retain the ultimate burden of persuasion and proof to prove its case under the normal civil standard of preponderance of the evidence, the Township has the intermediate burden of coming forward with evidence to meet the Plaintiff's evidence or lose the case. The Township cannot rest on the laurels of the presumption of validity but has some burden to affirmatively demonstrate the validity of the ordinance as applied to the Property.

B. The Application Of The AG Zoning Ordinance To The Plaintiff's Property Violates Its Right To Due Process Of Law

1. Due Process Requires That A Zoning Ordinance As Applied Is Effective In Advancing Its Stated Goals

A municipality's power to rezone land is not absolute; it is limited by the due process clause of the Michigan Constitution, Article I, § 17. *Kropf v Sterling Heights*, 391 Mich 139, 157 (1974). Recently in *Lingle v Chevron*, 544 US 528 (2005), the Court explained that under a due process challenge to a regulation of property, the admonition that an ordinance substantially advance the public interest requires the court to inquire whether the challenged regulation is effective in advancing a legitimate public purpose. *Id.* at 542. The Court noted that the "Due Process Clause is intended, in part, to protect the individual against the 'exercise of power without any reasonable justification in the service of a legitimate governmental objective.'" *Id.*

In other words, a zoning ordinance may have a legitimate public purpose, but if it does not actually substantially advance that purpose, it is arbitrary and therefore violates the due process clause.

The *Kropf* Court, years before *Lingle*, similarly held that a zoning ordinance as applied to a particular parcel of land violates the owner's due process rights if: 1) the ordinance fails to substantially relate to or further the goals of the land use classification to which the land is limited, or 2) is an arbitrary exclusion of a legitimate land use of the property in question. *Kropf, supra.* at 158

Kropf also held that a zoning ordinance as applied fails to substantially relate to or further the goals of a land use classification, or is an arbitrary exclusion of a lawful land use, when the facts demonstrate that the municipality did not restrict the land to the challenged classification for the reasons and grounds the Township has advanced for the classification. Additionally, the Plaintiff can demonstrate that the classification is unreasonable because the reasons or grounds for the restriction or exclusion do not reasonably exist with respect to the subject property. *Kropf.* 391 Mich at 160-161; Accord, *Hecht v Niles Township*, 173 Mich App 453, 159-160 (1988). This formulation of the due process test echoes the *Lingle* Court's explanation that a regulation of property may violate due process protections when the ordinance is ineffective in advancing its stated goals.

2. **The Michigan Zoning Enabling Act Provides Standards For Choosing Land Use Classifications of Property In Zoning Districts**

The Michigan Zoning Enabling Act, MCL 125. 3101 ("MZEA") provides statutory guidance to evaluate whether a zoning ordinance is valid. The MZEA requires that property be zoned in a way that reflects its character in relation to surrounding lands. MCL 125.3203. The MZEA provides in relevant part, that "[t]he zoning ordinance shall be made with reasonable consideration to the character of each district, its peculiar suitability for particular uses, the conservation of property values and natural resources, and the general and appropriate trend and character of the land, building, and population development." See also *Alderton v Saginaw*, 367

Mich 28, 34 (1962) (The Court held invalid a zoning ordinance as applied that did not meet the statutory standards) (Internal citations omitted).

C. The Facts Will Demonstrate That the AG Zoning of the Plaintiff's Property Is Entirely Ineffective in Furthering its Alleged Goals and Objectives

The evidence at trial will show that the AG land use classification as applied to the Plaintiff's property fails to further the goals and purpose of the AG zoning ordinance and Master Plan category of Agricultural Farmstead. The Township's Master Plan provides that the primary purpose of the AG zoning district is to protect farmland from conversion to uses that would prohibit farming and related uses. The plan further provides that these agricultural lands are typically parcels that have minimal road access and no public sewer and water service. The further purpose of the Township's AG zoning classification is to forestall development of agricultural areas for urban purposes and "to protect agricultural areas from encroachment by untimely and unplanned urban-type uses, which will create conflicts with agricultural activities and a premature demand for urban services."

1. The Plaintiff's Property Does Not Fit The Description Of Rural Land

The Plaintiff's Property does not fit the classification of rural land because it is no longer part of a rural area. The site has access to paved county roads; it is within minutes of the fire station; it can easily be served with sewer and water; it is located close to both Temperence and Samaria; and it is located adjacent to and in close proximity to compact and dense residential development. The Township itself recognized this fact by planning to extend a bike path that connects Township areas to the Village of Temperence and surrounding parks straight through the Plaintiff's Property. The Township cannot reasonably believe that the Plaintiff's Property should be actively farmed when it has planned to construct a bike path through or on the border

of the Property. It clearly would be unsafe for bikers and pedestrians to have a path so close to active farming and be detrimental to the agricultural operation.

The fact that the Property may be farmed is irrelevant because the material and compelling facts demonstrate that it is no longer located in the rural area of the Township. The use of the Property for agricultural production is no longer feasible from a land use perspective because it is in conflict with the single-family residential uses that have long been encroaching into the area with the Township's tacit permission. The Township cannot turn back the clock in Section 14, and environs, which the Township has encouraged to develop into a residential area through its own zoning policies. The Township permitted the residential encroachment that has driven the Albrings from farming the Property and now wants to prevent them from selling the land for reasonable residential uses. The evidence further will also show that the Master Plan designation for most of Section 14 is a sham. Section 14 will never develop in the unreasonable and unrealistic manner proposed by the Master Plan. The evidence will show that the Defendant's expert planner even agrees that it is very unlikely that the land areas in Section 14 with existing platted neighborhoods will be developed as proposed under the Master Plan.

2. The Township Has Taken No Action To Further Its Purported Plan For Preserving Agriculture Land And Continues To Promote Policies That Decimate True Rural Lands

The facts will show that the Township's entire plan for preserving agricultural land is completely ineffective. The Township's Master Plan does not preserve agricultural land, but is intended only to limit Township development to residential units on large lots, even in areas in which such zoning conflicts with the character of the district and the land does not have any peculiar suitability to that use.

The Township's AG zoning ordinance in fact contravenes rather than supports the Master Plan goals for Agricultural Farmstead property. Contrary to the clear text of its Master Plan, the zoning ordinance permits the development of 5-acre lots, and does not permit open space development on AG zoned land that is planned for Agriculture Farmstead use. The Master Plan exhorts that 5-acre lot zoning **defeats** rather than promotes the preservation of land for Agricultural Farmstead uses. The Master Plan is correct, but the Township has not even attempted to implement the strategies for preserving farmland as described and recommended in the Master Plan by developing zoning ordinances that effectuate the Master Plan goals.

The Township cannot effectuate its Agriculture Farmstead goals with the large lot residential zoning permitted in its AG zoning ordinance. The Master Plan has the objective to prevent a pattern of scattered rural housing on overly large lots, particularly in areas of viable agriculture and wooded lands. Restricting the Plaintiff's Property to Agriculture Zoning densities promotes a pattern of scattered rural housing on overly large lots in direct conflict with Master Plan goals. In *Scots Ventures Inc v Hayes Township*, 212 Mich App 530 (1995), the Court invalidated a zoning ordinance that restricted development to 10-acre lots under the guise of protecting rural land. The Court held that the 10-acre lot minimum was unreasonable because it could not preserve agriculture production. *Id* at 533. The evidence in this case will also demonstrate that the AG zoning of, and Agricultural Farmstead plan for, the Plaintiff's Property bears no relationship to the goal of preserving agriculture land.

3. The Plaintiff's Property Is Unsuitable For Continued Agriculture Production Based On The Character of the Property and Surrounding Land Uses

The evidence will also show that the Plaintiff's Property is not suitable for continued agriculture use because it only has access to Temperence Road to the south through the Village Meadows Subdivision or to the north, through the Plaintiff's own future subdivision. There will

be no way for farming vehicles to access the main roads other than driving through the two subdivisions. Both the Township's planner and its expert have testified that this could cause major conflicts with the abutting residential developments. They agree that it would not be good planning to farm the Property with that limited access.

The evidence will show that the Township's primary reason for designating the Property as AG in its Master Plan was not related to legitimate future land use goals, but only because the land was being farmed. The Land Contract vendors can no longer farm the land and the continued use of the Property for a farm is inconsistent with the predominant land use in the immediate area, including the higher density residential property located south and north of the Property. The original historic basis for master planning the 78.5 acre parcels for AG has been substantially altered as a result of the rezoning of the 65 acre parcel to the south and other long-standing development trends in the Township within Section 14 itself and within the adjacent Village of Temperence. Continued farming activities on the Property will cause the very land use conflicts that the AG zoning is supposed to avoid.

The evidence will demonstrate that the Township's Master Plan designation of the Property is unreasonable and contrary to the Zoning Enabling Act because the character of most of the lands near the Property is urban and not rural. The Township itself has delineated its urbanized area by the extension of water and sewer in close proximity to the Plaintiff's Property and even properties north of the Plaintiff's Property to the unincorporated Village of Samaria. The evidence will show that the only way to preserve the actual rural area of the Township is to satisfy the demand for more compact single-family development in areas of the Township, which have the capacity for residential development in terms of roads, sewer, water, and police and fire protection.

4. The Township's Land Use Policies Promote Urban Sprawl

The Township's Master Plan and zoning scheme related to the Plaintiff's Property is also unreasonable because it ignores the character of the Township as a whole and its relationship to surrounding municipalities.

The Township contends in its Master Plan that it is taking into consideration the regional area. The Township is the most populated governmental subdivision of the 19 government subdivisions in Monroe County. The Township serves, in large part, as a bedroom community for the City of Toledo to the south. The Township, along with Frenchtown Township, Monroe Township, and the City of Monroe, contain over 50% of the County's population. Projections for Bedford Township made by SEMCOG shows that, based on past development trends and history, Bedford Township is on course to continue as the most populated and most densely developed municipality within Monroe County.

The evidence will show that according to accepted planning standards, and State and Federal land use policies, the most optimal way to preserve rural lands and avoid urban sprawl is to concentrate development in existing urban areas such as Bedford Township, so that development is not forced to spread to the truly rural areas in Monroe County located mostly north and west of Bedford Township. The evidence will show that Bedford Township's Master Land Use Map in direct contradiction to its text, State and Federal land use policy and professional standards of land use planning, promotes regional urban sprawl.

The Township's Master Land Use Plan ignores the true nature and character of Bedford Township. Bedford is not a predominantly rural community. It has more urban development than any Township in the County. It is true that it still has a rural component in its northern sections. The Township's land use policies and actions, however, are putting those areas at risk

for more urban development. The Township has extended sewer services to the far northern portions of the Township along Lewis Road to Samaria, which is in the center of the most rural areas of the Township. The way to avoid premature urban development along the path of the sewer line to Samaria, and within the truly rural areas of the Township, is to focus development in the areas most suitable for residential development, which includes the Plaintiff's Property.

The facts will show that the Township's political leaders have failed twice to take the advice of its own professional planner to review its Master Plan as it applies to the Plaintiff's Property. The Township's planner and the Monroe County Planning Staff, the planning professionals, both agree that the emerging trend and development of the area is for the residential uses that the Plaintiff has proposed

5. The AG Restriction Serves Only To Further The Scarcity of Land For Compact Residential Development Which Fights Urban Sprawl

The facts will show that the way to preserve open space and agriculture lands, combat sprawl and provide reasonable and diverse housing opportunities, is by promoting a pattern of compact development in areas close to existing sewer, water and paved roads. The Plaintiff's Property is the poster child for this type of development. It is in close proximity to existing sewer and water; it has access to paved roads and has adequate fire protection, it is also located in close proximity to a village center. The Court will see that the overwhelming State, Federal and planning policy is to permit densities at 4 units per acre and even higher in areas with the character that the Plaintiff's land possesses.

The Township has no need to restrict the Property to AG uses, but it does have a need for more land zoned for compact development. The Plaintiff's Property does not represent one of the last rural parcels in the Township. The facts will show that the northern portion of the Township contains thousands of acres of rural land that is amenable to very low-density

development on large lots. There are thousands of acres of land that have no access to sewer and water and are more adaptable to very low residential density and some farming.

In contrast, the Plaintiff also will show that the Township's vacant land in areas zoned for residential use and served or which can be served with sewer and water is very scarce. The scarcity of land zoned and available for compact residential development can do nothing but increase the pressure on development of truly rural land and increase the price of new homes in Bedford. The facts will show that the Master Plan's purported goals for affordable housing are a sham based upon its actual land use policy as reflected in its future land use plan.

Bedford Township has had strong demand for residential housing for years. There is no need to restrict the Plaintiff's Property to an incompatible and inappropriate land use classification in order to promote any goal to conserve AG land especially when the very farmer who was farming the land, can no longer afford to do so and who could not do so because of existing land use conflicts created by the Township itself. It is also unreasonable to restrict the Plaintiff's Property to very low-density residential use on 5 acre lots when the Property contains all the elements to further the Township's stated goals for compact urban development in areas with access to sewer and water and in close proximity to the Village Center Area. The Plaintiff's Property in fact is unique in all the respects listed immediately above as compared to other land in the Township.

6. The AG Zoning Arbitrarily Excludes Legitimate Residential Uses From The Property In Contravention To The Goals And Strategies Of The Master Plan Relating To The Need For Housing In The Township.

The evidence will show based upon the Township's 2000 CHAT report and its Master Plan text that the AG zoning only serves to exclude legitimate and needed land uses from the Plaintiff's Property. The evidence will also show that the Township's Land Use Plan Map

completely ignores the Master Plan recommendations for future housing development in the Township. The evidence will show that the Township constructed its Master Plan Map to preclude the use of land in the Township for compact residential development and promotes only residential development in the rural areas of the Township on oversized residential lots that do nothing to conserve farmland.

7. The Land Use Map Fails To Effectuate The Master Plan Goals Related To Housing Needs

The Township has forecasted in its 2002 Master Plan that it will require between 2,840 and 3,229 new housing units by the year 2020. The Master Plan, however, has significantly underestimated the housing need in the Township, since building permits for more than 50% of the projected units were issued between 2000-2004 alone. The Master Plan has also underestimated household growth in the Township and the need for more housing based upon the shrinking population of persons in households. During the 1990-2000 census period, non-family households and one-person households have increased significantly in the Township compared to family households. There is a strong demand in the Township for new housing that meets the needs of existing and future residents. This is despite the current downturn in residential development which, like all downturns, will be rectified. Moreover, the majority of Township residents work in Ohio and are not impacted by the downturn in the Michigan economy.

The Master Plan also forecasts a need for approximately 1,300 affordable housing units from 2000-2020. The Master Plan's statistics regarding the affordability of housing in Bedford Township, which relies on 1990 census data, is outdated. More recent statistics show that housing in the Township is becoming less affordable due to the exclusionary land use policies adopted in the Master Plan, which include limiting almost all of the remaining vacant residential land in the Township to large lot zoning, which the evidence will show drives up the cost of

housing. The Township's Master Plan and zoning policies and its failure to set aside sufficient land for the housing needs identified in the Master Plan and CHAT report will continue to make.

The exclusion of reasonable residential development on the Plaintiff's Property is further contrary to the Master Plan goals and objectives for residential development because the Master Plan has the objective to provide a range of residential land use and densities to meet the needs of the Township's diverse population and to encourage the development of residential neighborhoods which are well-integrated into the existing landscape and compliment the character of the existing neighborhoods. The strategies include, in part, laying out new residential development as logical extensions of existing neighborhoods. The Township has in fact required Village Meadows, the new platted subdivision adjacent to the southern border of the 60-acre parcel to leave a stub street for connection to the Plaintiff's Property. The plan also advises that the Township rezone land to encourage higher density housing on lands that have the capacity to support such development by means of public roads and utilities. The Township's arbitrary denial of the Plaintiff's Application conflicts with the Master Plan's goal and strategy to encourage higher or more compact density on lands that have or are planned to have the capacity to support such development with the appropriate infrastructure.

The AG classification of the Plaintiff's Property is therefore unreasonable because the Property is not suitable for the uses under the AG category, the classification does not promote any of the goals for the retention of Agricultural uses; and results only in arbitrarily excluding the most suitable and compatible land use for the site based upon existing uses, zoning and development trends that have been marching along Section 14 for the last 20 years or more.

**D. The AG Zoning Ordinance As Applied to the Property
Effectuates a Regulatory Taking**

Under Article 10, § 2 of the Michigan Constitution and the 5th Amendment of the Federal Constitution as incorporated within the 14th Amendment, a zoning ordinance is invalid if it deprives the owner of all or a substantial portion of the value of the owner's land for the public's benefit and without the payment of just compensation. *K & K Construction, Inc v Dep't of Natural Resources*, 456 Mich 570, 576 - 577 (1998). Under Michigan's taking clause, a zoning ordinance is also invalid if it restricts property to uses for which the property is not reasonably adapted. *Kropf*, 391 Mich at 162-163

The zoning of the Property for agricultural use is confiscatory under state and federal law because it prevents the Property from being used for any purpose to which it is reasonably adapted and prevents a beneficial and economically viable use of the Property. The evidence will show that the Property cannot reasonably be used for any of the principal permitted or special land uses under the AG ordinance.

The Property is no longer adaptable to agricultural uses since the Township appropriately approved a dense residential development directly south of the Property and has appropriately zoned the north 80-acre parcel for residential uses. The Township long ago initiated the trend that this area should be developed in a more compact residential pattern similar to Temperence by making utilities available to this area. The use of the Property for agricultural uses will cause land use conflicts with the more densely populated residential areas.

The Property also is not adaptable to the farm and other uses permitted under the AG zoning classification because the Property has no direct access to any road and can only access Temperence Road through the south 65 acre parcel and Erie Road through the north 80 acre parcel. Once the north and south properties are developed, which development is imminent,

there will be no way for trucks, tractors and other farm equipment to access the Property other than through the adjoining residential neighborhoods to the south and north, which would be a nuisance.

The Property also cannot be developed for residential use under the AG zoning classification because the classification only permits the development of only one dwelling unit per 5 gross acres of land. The ordinance permits a maximum of 15 units or less on the 78 acre parcel. The facts will show that it is not economically feasible to develop the Property with 15 or less residential units because the cost of development exceeds the value of the land.

The Township will likely argue that there is no taking if the Plaintiff's use of the R-2A parcel can be developed as an R-2A zoning development. Under *K&K, supra*, however and the federal precedent on which it relies, a plaintiff can establish a taking under the so-called balancing test. Under the balancing test, the court evaluates the economic impact of the land use restriction and the magnitude of its interference with distinct investment backed expectations. In *Lingle, supra*, the US Supreme Court held that the so-called "balancing factors" are not absolute. The aim of the taking clause is to bar "[g]overnment from forcing some people alone to bear public burdens which in all fairness and justice should borne by the public as a whole." *Id.* at 537 (citation omitted). The aim of any taking test is to help the court determine 1) the burden imposed by the regulation; 2) the magnitude of the burden; 3) the manner in which the government has allocated the burden and whether the burden would be allocated among all taxpayers rather than imposed on a single property owner. *Id.* at 543. The Plaintiff therefore can establish a taking under the "balancing test" by showing that it is economically infeasible to develop the property as a whole without the rezoning of the 78 acres.

The Plaintiff can also establish a taking claim if it can show that that the Township has burdened the Plaintiff with retaining useless land to serve the public interest and that this is an unjust and unfair burden to impose on the Plaintiff. If the public wants the Plaintiff's land to remain as open space as part of the Township's recreation plan, it must pay for it rather than artificially drive down the value of the property by refusing to allow the Plaintiff to make a reasonable use of it.

E. The Plaintiff's Proposed Use of the Property is Reasonable

If the Plaintiff demonstrates that the AG ordinance as applied to its Property is unreasonable or confiscatory or both, the next phase of the trial requires the Plaintiff to demonstrate that its proposed use is reasonable. *Schwartz v Flint*, 426 Mich 295, 329 (1986)

The evidence will show that the Plaintiff's proposed use is reasonable. It is reasonable because it is compatible with the surrounding uses and is a logical extension of the existing residential neighborhood in the area and directly to the south of the Property. The Plaintiff's proposal will preserve the significant natural features and will not develop to the full density permitted under the zoning classification. The development will provide a variety of housing styles and price points consistent with Master Plan goals. It will also support the vibrancy of the Village Center area in Temperence. The only reasonable development of the Plaintiff's Property is for the compact development that it has proposed, which furthers state, federal and professional housing polices and goals that are intended to curb urban sprawl, while providing a variety of housing styles and price points.

CONCLUSION

The Plaintiff strongly submits that the evidence will show that the AG zoning ordinance as applied to the Plaintiff's Property along with the unreasonable and unrealistic Master Plan

designation for the Property are patently unreasonable and confiscatory. The Plaintiff strongly submits that the evidence will show that there is a clear disconnect between the text of the Master Plan and the Master Plan Map. The Township cannot rely on the Master Plan to maintain the unreasonable zoning classification because the Master Plan designation itself is unreasonable and a sham. The Township's reliance on its Master Plan to deny the Plaintiff's rezoning request is also a sham because the Township has made no effort to implement the goals of the Master Plan by using the strategies set forth in the plan.

The Plaintiff therefore requests that the Court:

A. Enter a declaratory judgment in its favor finding that the AG ordinance is invalid as applied to its Property because it is both unreasonable and confiscatory;

B. Enter a declaratory judgment in its favor finding that the Plaintiff's proposed use of its Property is reasonable;

C. Enter a permanent injunction against the Township from interfering with the Plaintiff's reasonable use of the Property;

D. Award the Plaintiff damages for a temporary taking of its Property;

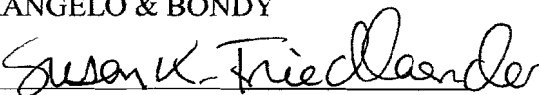
E. Award the Plaintiff its attorney fees and costs; and

F. Award such other relief that is just and applicable to this case.

Respectfully Submitted,

HONIGMAN MILLER SCHWARTZ AND
COHN LLP

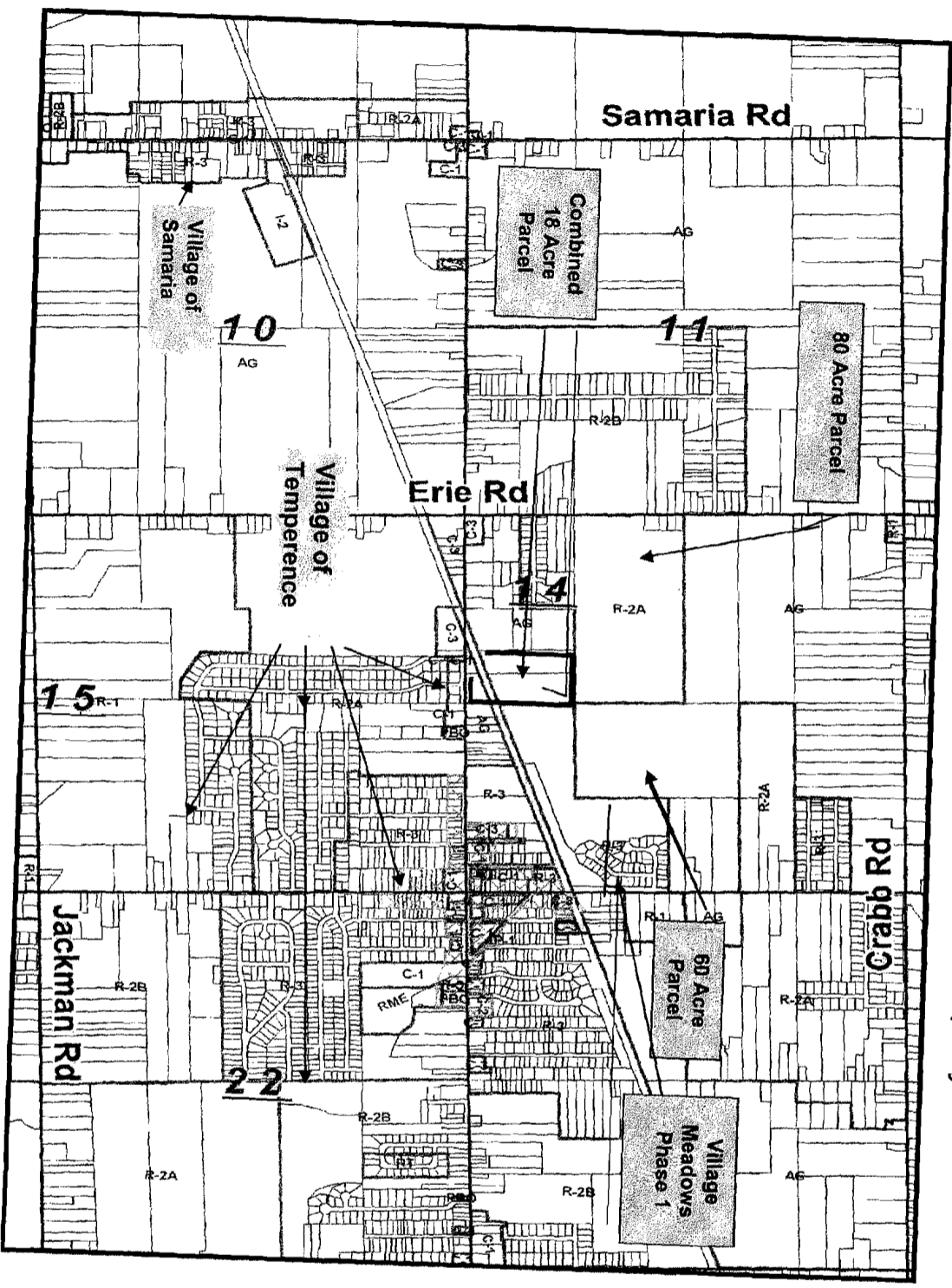
and
PETRANGELO & BONDY

By: 
Susan K. Friedlaender (P41873)
Kerry L. Bondy (P42786)
Attorneys for Plaintiff

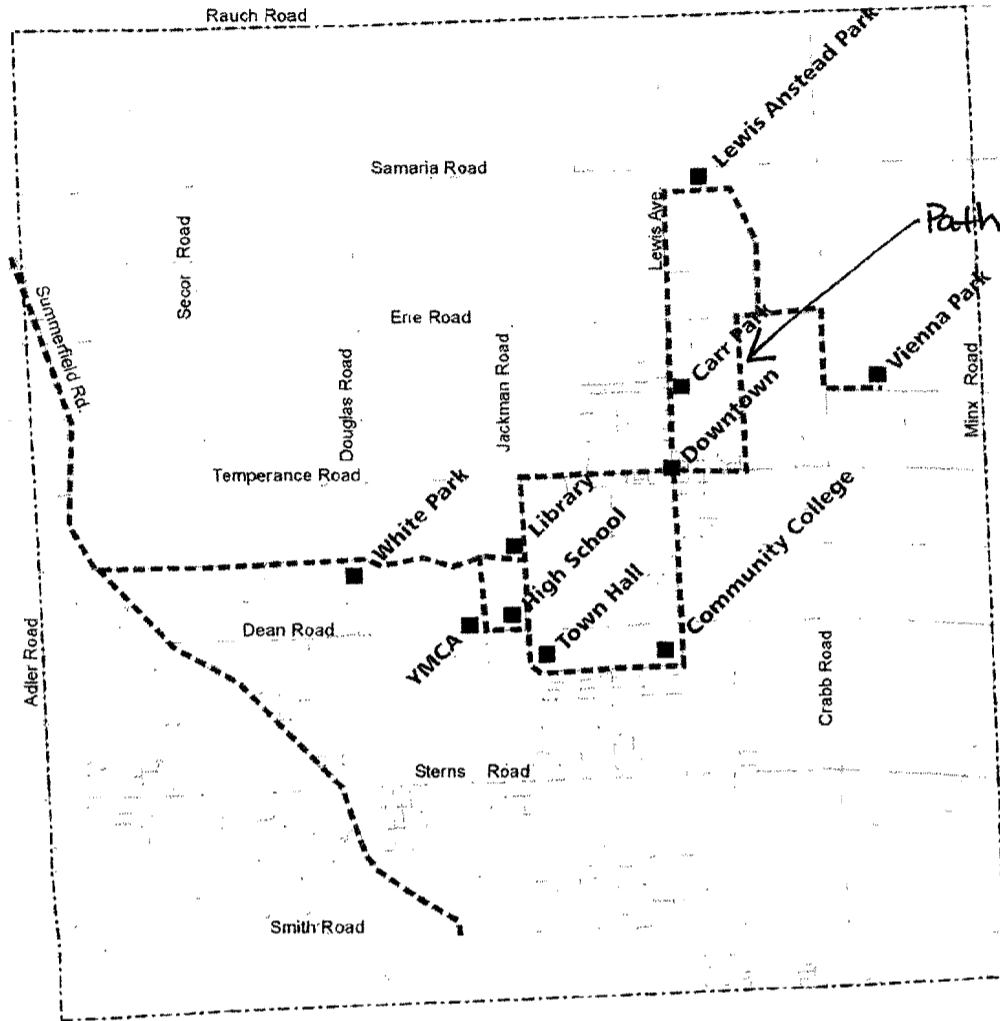
Dated: February 9, 2007

OAKLAND.1249604.1

Zoning Classifications Surrounding The Plaintiffs Property



**Concept Plan for A Township Pathway System
Connecting Major Points of Interest**



STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MONROE

BEDFORD PARTNERS, LLC,
A Michigan limited liability company,

Plaintiff,

File No: 06-22033-CH

v.

HON. Michael W. Labeau

BEDFORD TOWNSHIP,
a Michigan municipal corporation,

Defendant.

KERRY L. BONDY (P42786)
Petrangelo & Bondy, P.C.
Attorney for Plaintiff
214 E. Elm Avenue, Suite 208
Monroe, MI 48162
(734) 241-6470

DAVID B. LANDRY (P32055)
NEMIER TOLARI LANDRY
MAZZEO & JOHNSON
Attorney for Defendant
37000 Grand River, Suite 300
Farmington Hills, MI 48335
(248) 476-6900

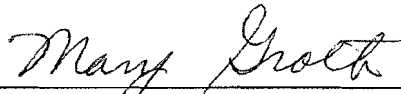
SUSAN K. FRIEDLAENDER (P41873)
Honigman Miller Schwartz and Cohn LLP
Co-Counsel for Plaintiff
38500 Woodward Avenue, Ste. 100
Bloomfield Hills, MI 48304
(248) 566-8448

CERTIFICATE OF SERVICE

Mary Groth, first being duly sworn, says that she is employed by the firm of Honigman Miller Schwartz and Cohn, LLP and that on February 9, 2007, she served a copy of PLANTIFFS' TRIAL BRIEF, and a copy of this Certificate of Service, via email, facsimile and by depositing the same in the United States Mail with postage fully prepaid thereon and addressed to:

David B. Landry (P32055)
NEMIER TOLARI LANDRY
MAZZEO & JOHNSON
Attorney for Defendant
37000 Grand River, Suite 300
Farmington Hills, MI 48335
dlandry@ntlmj.com
(248) 476-6564 (fax)

KERRY L. BONDY (P42786)
Attorney for Plaintiff
214 E. Elm Avenue, Ste. 208
Monroe, MI 48162
kbondy@monroelaw.biz
(734) 241-3849



Mary Groth

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