STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MONROE

WHITMAN FORD,
a Michigan corporation,

Plaintiff,

v.

File No. 04-18604-CH
Hon. Joseph A. Costello, Jr.

TOWNSHIP OF BEDFORD,
a municipal corporation,

Defendant.
_____/

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_____/

ORDER OF JUDGMENT

At a session of said Court, in the
City of Monroe, State of Michigan,
On the 2nd day of February, 2007.

Present: Hon. Joseph A. Costello, Jr., Circuit Court Judge.

This matter having come before the court on the Complaint of the Plaintiff seeking relief against the Defendant, Township of Bedford; the Plaintiff, Whitman Ford, a Michigan corporation, appearing by and through its attorney, Thomas M. Hanson; the

Defendant, Township of Bedford, a municipal corporation, having appeared by and through its attorney, David B. Landry; a bench trial having been conducted, oral argument having been presented; and the Court being advised in the premises;

IT IS HEREBY ORDERED that the attached Memorandum of Law is hereby incorporated by reference.

IT IS FURTHER ORDERED that based upon said Memorandum of Law, Judgment shall enter in favor of the Defendant. To the extent the Plaintiff's Complaint may be construed to include compliance with the Township Zoning Act regarding the amendment of the zoning map, the Court directs the Defendant to appropriately amend its zoning map in compliance with Michigan law.

Date: February 2, 2007

Hon. Joseph A. Costello, Jr. (P33769)
38th Circuit Court
Monroe, Michigan

MEMORANDUM OF LAW

I. Chronology.

This civil action was based on the Plaintiff's multiple-count Complaint seeking various relief, including a money judgment, against the Defendant. The Plaintiff is an automobile dealership operating under the name "Whitman Ford", located at the corner of Sterns Road and Lewis Avenue, at 7555 Lewis Avenue, Temperance, Michigan. The Defendant is a local unit of government, namely, Township of Bedford, with its principal address at 8100 Jackman Road, Temperance, Michigan. The Plaintiff had previously abandoned their claim for "taking of property without compensation". The Court's striking of the testimony of Mr. Robert Mcauliffe effectively dismissed the claim for money damages. Therefore, the Plaintiff seeks relief under the following theories: 1) Estoppel, 2) Violation of the Township Zoning Act (improper amendment to the Defendant's zoning map), 3) Due Process and Equal Protection (illegitimate basis for governmental interest in the current zoning and/or arbitrary and capricious act in denying the rezoning request), and 4) Exclusionary Zoning.

The case was filed on or about September 16, 2004, and from thereon the parties prepared the matter for litigation while exploring other resolution than trial. The matter was scheduled for trial in January 2006, however, the parties secured an adjournment as they explored possible resolution. This involved the submission of various engineering plans to propose the placement of a large retail store ("big-box" store) on the premises known as Whitman Ford. The next trial date of September 2006 was also adjourned based on the statement of the parties that the Defendant could potentially approve the Plaintiff's proposal. The trial was scheduled for December 2006, and before the trial date arrived the Defendant rejected the Plaintiff's proposal following a public hearing. The December trial date was adjourned until January 2007 in favor of a criminal jury trial that involved a defendant who had been incarcerated for a prolonged period of time (People v. Demetric McGowan, file #06-35201-FH).

Prior to the December trial date individual neighbors in Temperance, Michigan, sought to intervene in the court action. Citing among other things that the request was late and that the Defendant adequately represented the interests of the petitioners, the Court denied the petition.

The bench trial began on January 2, 2007, and continued on various dates up and to its completion on January 24, 2007. The Plaintiff rested his case and the Defendant moved to strike the testimony of Mr. Mcauliffe based on MRE 702 and 703, and later moved for a Directed Verdict. The Motion to Strike the testimony of Mr. Mcauliffe was granted on January 20, 2007, and the Motion for Directed Verdict was denied on January 23, 2007. The parties presented their closing arguments at the close of evidence on January 24, 2007, and this written decision follows.

II. Summary of the Evidence.

The attorneys of record are once again to be commended for their succinct and thorough presentation of their respective cases. The Court will proceed to summarize the significant contributions of each of the various witnesses. The specific references to testimony are based on the Court's copious notes and/or the transcript where indicated.

Jon Whitman (direct examination)

The Plaintiff's first witness was Jon Whitman, the major stockholder of the Plaintiff-corporation. He testified that his father, Paul Whitman, originally operated Whitman Ford in downtown Temperance, Michigan. The current dealership has operated at its present location at the corner of Sterns Road and Lewis Avenue since 1977 on farmland that was purchased in 1973 (Plaintiff's Exhibits 20 and 77, Defendant's Exhibits 76 and 84). The southeast corner of the property was eventually transferred to Consumer Power for a power station and the north 10 acres was donated to the Monroe County Community College (MCCC) in 1990 and is now known as the "Whitman Center". MCCC purchased an additional 15 acres of mostly wooded land (Plaintiff's Exhibit 77). The immediate area of the neighborhood reflects other businesses located around the intersection of Sterns Road and Lewis Avenue (to the southeast of Whitman Ford), a Chevrolet dealership across the street, and a residential subdivision (Indian Acres) immediately to the west.

Mr. Whitman stated that he did not have any independent recollection of the zoning for the area when the property was purchased, or for the requests for rezoning in 1980. In 1993 the property was rezoned in order to expand the used car lot (Plaintiff's Exhibit 28).

He further indicated that he was not aware of the various levels of zoning for the subject property (C-1, C-2 [shopping center business district], or C-3 [general business district], each representing a more intense commercial use). [Note: Plaintiff's Exhibit 28, dated May 21, 1993, is one of the earliest indications by Wade-Trim Associates, Inc., the Defendant's consultant, that the entire parcel was "commercial". As will be seen herein, based upon the minutes of the Township Board, the applicable zoning ordinance, and as noted in various applications by the Plaintiff for rezoning, the western-most strip of land was zoned R2-A, or "one family residential"]. On July 23, 1993, Wade-Trim made a recommendation to table the request for rezoning, while continuing to claim that the entire property was classified as C-2 or C-3 (Plaintiff's Exhibit 44).

Mr. Whitman hired a commercial realtor, Steven Lennex, from Michael Realty to market the property in anticipation that a decade-long of good auto sales would "come to an end". Mr. Whitman noted that on several appearances at the township hall he observed a zoning and Master Plan map depicting the subject property as "commercial land" (see Plaintiff's Exhibit 18, revised in August 1992, and Exhibit 19). The Master Plan eventually changed part of the property to "Parks and Recreation", and eventually to a "mixed use" (see Plaintiff's Exhibits 32 [map between pages 98 and 99], and 28, page 2), but prior to marketing the property he believed it was zoned "commercial".

Mr. Whitman hired a long-time neighbor and friend, attorney Philip Goldsmith, in marketing the property. He was advised by Mr. Goldsmith that the property was zoned "C-2 and would support a large retail user". Dennis Jenkins, the Defendant's Planning Coordinator, had also advised Mr. Lennex, that the property was zoned C-2. Furthermore, the Monroe County Equalization Department Map also listed the subject property as being zoned C-2 and C-3 (Plaintiff's Exhibit 41). Tax bills and assessments listed the property as "Class 201" a "commercial property designation" in 2002 and 2003 (Plaintiff's Exhibits 30 and 42). In 2003 the tax bill reflects a classification of "Class 601", or "developmental" (Plaintiff's Exhibit 29). He testified that he relied upon the maps and various representations (Goldsmith and Lennex) in marketing the property as "commercial" (Plaintiff's Exhibits 39, 40, and 54).

Mr. Whitman retained Mr. Goldsmith to entertain various offers on the property in late 2000 and mid-2001, some for small parcels, offers from Miller Diversified

Development Company (backed out of the offer for undisclosed reasons), and an initial offer from Wal-Mart (Plaintiff's Exhibits 31, 33, 35, 52, and 73; Defendant's Exhibits 87, 89, 90, 92, and 93).

On June 6, 2001, Mr. Jenkins sent a letter indicating that the Defendant "no longer considered the property as commercial" (Plaintiff's Exhibit 21; Defendant's Exhibit 51). Mr. Whitman was "stunned" by the news. Mr. Goldsmith could no longer serve as his attorney due to a conflict as an attorney for the Defendant Township. Mr. Whitman received informal advice from various township officials, which included among other things, seeking a Property Unit Development (PUD) and not rezoning (see Plaintiff's Exhibit 21). He was advised by individual Township Board members not to "force it down their throats" or to "embarrass" us. He further stated that informal meetings took place with representatives from Wal-Mart providing some "give and take" with "lots of details".

In December 2001 Mr. Whitman held a "dinner meeting" with neighbors to alert them to the possible development of the property for a Wal-Mart store and it "went poorly". The response by unidentified residents was the defacing of the marketing signs, a boycott of his business, and media coverage. A township official, Joyce Hagen, in an individual capacity, wrote a critical letter to the Ford Motor Company in furtherance of the boycott (Plaintiff's Exhibit 49).

Despite knowing the Defendant's official position, Mr. Whitman continued to market the property as "commercial" and pursued negotiations with Wal-Mart as various township officials had never said "no to Wal-Mart or big-box store" (see Plaintiff's Exhibit 75, offer of $2.6 million for 33.6 acres). The day after Wal-Mart executed the purchase agreement on June 18, 2002, the Defendant approved the current Master Plan depicting the disputed strip of land as "Parks and Recreation" (Plaintiff's Exhibit 32). Various amendments to the Master Plan limited commercial space to 5,000 square feet, a cumulative 10,000 square feet, and eventually 25,000 square feet (Plaintiff's Exhibits 60 [Article 12, page 10; Article 13, pages 13-14], and 66). Wade-Trim again reported in December 2002 that the property was zoned C-2 and that the proposed use was not permitted unless it was rezoned to C-3 (Plaintiff's Exhibit 24). Mr. Whitman indicated that Mr. Goldsmith and Mr. Lennex had "repeatedly" advised him that a C-2

classification "could accommodate a Wal-Mart". At this point in time "Wal-Mart walked away" from the purchase proposal.

In 2003 Mr. Whitman was still interested in expansion of the dealership and considered consolidating the collision center (located at the former dealership lot) and adding an oil change service garage. In March 2003 he petitioned the Defendant for rezoning in order to expand the dealership (Plaintiff's Exhibit 1), however, it was denied. By April 18, 2003, Wade-Trim noted that the disputed strip of property was being projected for future land use as "Parks and Recreation" (Plaintiff's Exhibit 2). A second petition for rezoning on May 11, 2003, for the "extension of the Whitman Ford site" was also denied (see Plaintiff's Exhibits 4, 7, 8, and 9). At this point in time Mr. Whitman was "simply looking to get the case into court". Mr. Whitman claimed, "had he known" the true classification of the property he would have sought rezoning in 1998.

Since the denial of the second rezoning request Mr. Whitman entered into another purchase offer with Wal-Mart, dated June 6, 2006, and it is still pending (Plaintiff's Exhibit 76, offer of $4.5 million for 33.6 acres, and with the automobile dealership removed from the property). Mr. Whitman's "principal complaint" is that he had "done everything I am asked to and they changed the rules on me".

Jon Whitman (cross examination)

On cross-examination Mr. Whitman acknowledged the various petitions for rezoning made by his father, Paul Whitman, in 1976 (request for rezoning to C-4, Defendant's Exhibit 25), in 1977 (C-3 for dealership and the balance is R-2A, residential, Defendant's Exhibit 26), late 1979 (Defendant's Exhibits 27, 28, 29, and 78). The requests were granted with the exception of the request for the southernmost part of the property to "Professional Building Office" (PBO). Mr. Jon Whitman was "not aware" of the prior requests for rezoning but "knows it now". The Defendant's Exhibit 38 reveals that the western portion of the subject property in June 1987 was zoned R-2A, and was signed by a number of individuals including apparently Mr. Jon Whitman. Furthermore, although Mr. Whitman was "not aware" of the Monroe County Planning Department & Commission's letter and report of June 10, 1993, the report reflects the multiple zoning of the subject property including the western strip zoned R-2A (Defendant's Exhibit 79).

Mr. Whitman indicated that he did not attempt to market the property until 1998, and that he could have previously sold the property "as zoned" but chose not to. By October 12, 1998, the Michael Realty Company requested Mr. Whitman to review the listing of the property for "any errors" (Defendant's Exhibit 88, page 1). The exhibit in question reflects that the entire property was zoned C-2 (Defendant's Exhibit 88, page 2), however, Mr. Whitman "did not check the accuracy" of this information. The realtor proceeded with the creation and distribution of a flyer in the Toledo area seeking "Big-Box Users" (Defendant's Exhibit 85). In reference to the development of any commercial property abutting the Indian Acres subdivision (i.e., K-Mart and Lowe's) Mr. Whitman testified that he "would not want to see this kind of development so close" to the subdivision (Defendant's Exhibit 91).

Mr. Whitman met with several township officials after receiving Mr. Jenkins' letter of June 6, 2001, advising him that the property was not entirely zoned C-2. Mr. Goldsmith affirmed that Mr. Jenkins' information was correct. Mr. Whitman then met with several township officials (Sherri Meyer, Robert Schockman, Lamar Frederick, and Arnie Jennings) but no one "instructed me as to how to proceed".

By April 29, 2002, Steven Lennex was now working for his own realty company, the Lennex Realty Company, and he continued to actively list the property for sale (Defendant's exhibit 54). Mr. Whitman sent a letter to Sherri Meyer, and "maybe" all of the Township Board members and took out a full-page ad in the newspaper explaining to the local citizens of his plans to market the property (Defendant's Exhibit 55). Defendant's Exhibit 57 reflects the proposed Wal-Mart plan to place their store on the subject property. Wal-Mart's developer, CESO, submitted the proposal to Wade-Trim in order to have it "reviewed" (Defendant's Exhibit 59). By May 2002, Mr. Whitman signed an offer to sell the property to Wal-Mart (Defendant's Exhibit 75; compare to Defendant's Exhibit 94 [claim is that the language on page 4, paragraph 14a, had to be added based on the Township Board's action]) with the knowledge that part of the property was zoned R-2A; he intended to seek rezoning or a PUD. Wal-Mart eventually withdrew their offer for unknown reasons. Thereafter, Mr. Whitman sought to rezone the property to C-3 in order to expand the dealership (Defendant's Exhibits 3, and 5). Shortly thereafter he offered the property to Dennis Raab, a resident of Indian Acres, to

allow them "to buy land to buffer" themselves from further development on the property (Defendant's Exhibit 95). Eventually the request for rezoning was recommended for denial, and eventually denied, by all governmental bodies (Defendant's Exhibits 4, 7, 8; see 11, and 12). A subsequent request to rezone the entire property in order "to include all of the property in the lawsuit" was also eventually denied (Defendant's Exhibits 13, 14, 16, 17, 22, and 23).

Mr. Whitman acknowledged that Alexis Road in Toledo, Ohio, is approximately 2 miles away from the subject property [the importance of this evidence is discussed herein, however, it focuses on the report that the Alexis Road area is home to many big-box stores and can serve the Bedford Township community].

Steven R. Lennex (direct examination)

Mr. Lennex is a real estate broker, owner of the Lennex Realty Company, and focuses on the listing, selling and leasing of commercial realty in northwestern Ohio and southeastern Michigan. He relied on the statements of Mr. Jenkins that the property was zoned C-2, and further inquired of the "permissive uses" for the property. Mr. Jenkins advised him that the township did not need further residential development as the Plaintiff's property was zoned "commercial". He relied on this representation and the zoning map, and prepared the flyer promoting the property for commercial use (Plaintiff's Exhibits 39, and 40). He noted that in a previous battle with the proposed Meijer store at Smith Road "township officials and citizens" advocated that the store be built at Lewis Avenue and Sterns Road. He was "utterly astounded --- blown away" upon being advised that the zoning map was in error.

Mr. Lennex was present at a township meeting in June 2002 and learned that it was proposed to change part of the subject property to "Parks and Recreation". He opined that the other potential C-3 sites were not "suitable" (across the street is wetlands and would require other land acquisition; the LaVoy Road and Telegraph Road area had existing structures, "flea bag motels", lacked ingress and egress, and was "the armpit of Bedford Township"). He acknowledged that the difference between the two Wal-Mart offers to purchase was due to the second offer including a removal of the Whitman automobile dealership (Plaintiff's Exhibits 75, and 76, attachment A-3).

Steven R. Lennex (cross examination)

Mr. Lennex acknowledged that he stands to earn a sale commission of $225,000 for the sale of the property to Wal-Mart. He stated that he "looked at the map, spoke to an official, and probably looked at the property card" in determining the proper zoning for the property (see Defendant's Exhibit 97; reflects the property is zoned C-2, R-2A and PBO). He further acknowledged that "occasionally documents are wrong" and need to be "double-checked". Mr. Lennex stated that he sought "big-box clients" as Mr. Whitman "wanted it" (see Defendant's Exhibit 88). He focused on the Toledo area as "investors and developers have frequently been one and the same" (see Defendants Exhibit 85). He would not sell the frontage on Lewis Avenue "without tying up the back" of the property as it would not achieve the "maximum objective" (see Defendant's Exhibit 87).

He also relied on the statements of Mr. Goldsmith to Mr. Whitman that the property was zoned "commercial" and that he "never checked further". He could not state why Wal-Mart backed out of the first offer to purchase citing that it could be for a "myriad of reasons".

Philip Goldsmith (cross examination under the adverse witness rule)

Mr. Philip Goldsmith is a duly licensed attorney in the state of Michigan and has served as the principal attorney for Bedford Township since 1985. He acknowledged that he advised Mr. Whitman that the subject property was zoned C-2 based on the zoning map, and suggested that Mr. Jenkins also be consulted. He advised the Danberry Realty Company "zoning was not an issue" in responding to their August 31, 2000 offer to purchase the property (Plaintiff's Exhibit 35). Similar representations were made to other interested parties (Plaintiff's Exhibits 52, and 73). In April 2001 he corresponded with Mr. Lennex regarding the first offer to purchase by Wal-Mart (Plaintiff's Exhibit 31). The proposed purchase agreement indicates that if the property is not properly zoned the seller would seek the necessary rezoning, with the assistance of Wal-Mart (page 4, paragraph 14A). As indicated earlier, the first Wal-Mart purchase was not completed.

The second offer to purchase by Wal-Mart was executed by Mr. Whitman on May 7, 2002, and by representatives of Wal-Mart on June 18, 2002 (Plaintiff's Exhibit 75).

Mr. Goldsmith opined that based upon the classification of "non-center commercial" use in the Bedford Township Master Plan of 1997-2002, the subject property would allow a store like Wal-Mart (see Plaintiff's Exhibit 17, pages 10-11, section 5.3). He further testified that prior to June 2001 (Mr. Jenkins' letter) there was "no need to seek rezoning based upon the belief everyone was laboring under". Finally, he indicated that the Township never wanted to develop a park on the subject property but "citizen groups" did.

Philip Goldsmith (direct examination)

Mr. Goldsmith testified that upon seeing Mr. Lennex's "for sale" signs on the subject property advertising C-2 zoning he advised him to confirm the classification even though he had "no reason to doubt it" (see Plaintiff's Exhibits 62, and 63). Following Mr. Jenkins' letter of June 6, 2001 he directed him to review the Township Board minutes from 1977 to the current date to "verify the zoning ordinance amendments". It was confirmed that the western-most strip of land was zoned R-2A.

Dennis Jenkins (cross examination under the adverse witness rule)

Mr. Dennis Jenkins has served as the Bedford Township Planning Coordinator for 16 years, and had previously served as Community Development Director. He is the "developer's first contact" as it is "important to note the proper zoning" by relying upon the Master Plan map and Future Land Use report. In August of 1992 and again in June 1993, the subject property was listed as "C-2" (Plaintiff's Exhibits 18, and 19). He believes the error on the map "could have happened" some time in 1990 or 1991. He confirmed the error upon being informed by an unidentified citizen of the possible mistake. He believes the subject property was classified C-3 when the map was adopted by the Township Board in 1977. The zoning map that was adopted in February 1998 represented a "wholesale revision of the map" and used "cross-hatching scheme and labels" on the various parcels of land (Plaintiff's Exhibit 20).

The zoning districts and map is defined in section 400.301 of the Township's ordinance book and any changes require amendment via public hearing, recommendation of township and county planning commissions, and Township Board action (see Plaintiff's Exhibit 72). As of December 3, 1997, the subject property was classified

"non-center commercial" making it "compatible" with C-3 zoning and permitting a big-box retail store (Plaintiff's Exhibits 17, and 71).

On June 6, 2001, he advised Mr. Whitman, and others, of the mistake by letter and one week later corrected the map on his own (Plaintiff's Exhibit 21; see Defendant's Exhibit 52). He "assumed" the 1992 map was in error and relied upon his review of any amendments to the ordinance. On one prior occasion he allowed a property owner (Magdalena's Restaurant) to petition the Township for a zoning change prior to changing the zoning map.

Mr. Jenkins stated that the area of Lewis Avenue and Sterns Road is "still considered one of the main commercial" areas of the township. He further indicated that any change to "Parks and Recreation" was the work of citizen groups and that the map was "99% acceptable" and would be "tweaked later". He indicated that the change to a "mixed office and commercial" designation was made 16 months later on October 16, 2003. Meanwhile, in December 2002, Wade-Trim was acting upon CESO's request to review their proposal for the Wal-Mart store and had erroneously relied upon the old zoning map (Plaintiff's Exhibits 23, and 24). Wade-Trim's representative, Julie Johnston, was of the opinion that the property needed to be rezoned C-3 in order to accommodate the Wal-Mart store; Mr. Jenkins disagreed with this opinion.

On re-examination by Mr. Hanson, Mr. Jenkins indicated that he did not believe the Master Plan discouraged commercial development as long as it did not have a "significant" impact on the community.

Dennis Jenkins (direct examination)

On direct examination Mr. Jenkins testified to the various zoning classifications of the subject property since 1960, reflecting an initial zoning of R-1A, up until the current time of "mixed use" (Defendant's Exhibits, 25, 26, 27, 28, 29, 36, 39, 43, 45, 46, 78, and 79). He "speculated" that any confusion on the maps was the result of using cross-hatching patterns by Wade-Trim. As of 6-7 years ago the Township began creating its own maps.

Upon discovering the mistake on the zoning map he corrected it as he did not believe a public hearing was necessary. During Ms. Johnston's informal review of CESO's "concept plan" for Wal-Mart he eventually advised Ms. Johnston of the mistake

and directed her to use the "correct map" (see Defendant's Exhibits 56, 57, 58, 59, and 60). Ms. Johnston issued a letter to CESO correcting her earlier correspondence on January 8, 2003 (Defendant's Exhibit 60).

The Plaintiff's first and second requests for rezoning of the subject property was eventually denied (Defendant's Exhibits 3, 4, 7, 9, 10, 11; 13, 15, 16, 19, and 22). Mr. Jenkins opined that he would not recommend changing the R-2A designation to C-3 as it would not allow sufficient "berms" between the property and the residential subdivision. He would recommend the C-3 property across the street as it is not adjacent to residences, and although it is surrounded by property that is zoned R-2A, the land cannot be developed as a subdivision because "all of the houses need to be facing the road". He further stated that a big-box store could be located on the lot as there were "no wetlands". The Master Plan of June 19, 2002 (adopted October 22, 2003) was long-term and the prior square footage restrictions for retail businesses had been removed from the ordinances (Defendant's Exhibit 82).

Julie Johnston (cross examination under the adverse witness rule)

Ms. Julie Johnston is a Planning Consultant for Wade-Trim and Associates and has worked with the Defendant. She attended the "citizen visioning and planning session" in early 2001 and noted that the citizens proposed "low intensity use" for the Whitman property in "fear of commercial development". She would not suggest a "Parks and Recreation" use for the property "without plans for it". Her role was to "bring balance to the session" although no one from Wade-Trim discouraged the citizens' suggestion for a "Parks and Recreation" designation. In fact, she had never seen a commercial area changed to this designation in any Master Plan she had ever worked on.

As of December 3, 1997, she testified that the Whitman property was designated "non-center commercial" and that it "could accommodate" a Wal-Mart store. According to the current zoning ordinances big-box stores are a "retailer " and are "permitted" [see Defendant's exhibit 2, page 2101, section 400.1201(2) and (2)(a)]. She had been working on the informal review of a proposal by Wal-Mart in December 2002 and had been relying "on an old map (Plaintiff's Exhibits 23, and 24). She had sent a copy to Mr. Jenkins and he did not indicate any error at that time. She did not believe Wal-Mart was

precluded as she believed the property was zoned C-2, however, she did recommend rezoning the property to C-3 based, in part, on the Township's "Intent" section of the zoning ordinance book (Defendant's Exhibit 2, section 400.1200). She opined that the "City of Toledo is where regional development would take place" (Plaintiff's Exhibit 24, page 2). She believed that the objective was for Bedford Township to provide the "day to day business and shopping needs" and the larger stores would be located in the Toledo area (see Plaintiff's Exhibit 32, "objectives and strategies"; Plaintiff's Exhibit 24, "buffer treatments").

Ms. Johnston testified that she "does not support an outright exclusion of a big-box store", but that a "market study [had not been] done to determine the needs of the community". She believed that the Township did not preclude big-box stores but that the intent was to develop them in Toledo, Ohio. Under the 2003 Master Plan the "higher intensive use would be industrial, or all local commercial" with a 5,000 or 10,000 square foot restriction. By the date of the second rezoning request in late 2003 the Master Plan had been changed. She opined, "the smaller the parcel, the more likely it would comply with the Master Plan, and the larger the parcel, the more difficult" it would be. In her opinion the proper placement of a big-box store would be across the street from the Whitman property or the "cluster along Telegraph and LaVoy Roads". Finally, she indicated that the "designated Future Plan Use map . . . does not preclude [big-box stores] but does not support it". She believed that the "impact" could be minimized but not eliminated.

On re-cross examination she testified that she considered the "proposed use because the inquiry asked for it", including the submission of a PUD plan (Defendant's Exhibit 59).

Julie Johnston (direct examination)

Ms. Johnston treated the Wal-Mart proposal as a "concept plan" and not as a "formal submission" and treated the "unusual" submission as a "request for review of a site plan". The process included outlining several requests for information and other requirements before she would recommend submission of the site plan to the Planning Commission for approval (Defendant's Exhibit 58). Once she recognized the mistake in the zoning map she sent a second letter to Mr. Paul Hanson dated January 8, 2003, and

among other things she advised "there are many obstacles to the development of a Wal-Mart store at this location" (Defendant's Exhibit 60). By April 18, 2003, she sent a letter to the Bedford Township Planning Commission recommending denial of the request to rezone the property to C3 in part based upon her review of the future land use and Master Plan (Defendant's Exhibit 4). She testified that the planned use would allow a big-box store that would have a "major impact on the neighborhood". She further indicated that it would be difficult to screen or buffer the store from the surrounding properties.

Ms. Johnston also stated that the property across the street from the Whitman parcel is zoned C3 and could accommodate a Wal-Mart store, as could the C-3 parcels located at LaVoy Road and Telegraph Road. She testified that the matter would not even go before the Township Board, nor would the Master Plan be considered, and would proceed to the Planning Commission for site approval. She indicated that "transitional development" is "good planning" and that it makes a difference if the adjoining parcels are already developed as residential versus a vacant area zoned as "residential". She believed that it was "reasonable" for the Township Board to rely upon the Toledo, Ohio area for the development of big-box stores, and furthermore, that it was reasonable for the Board to deny the request to rezone the Whitman property as C-3 (see Defendant's Exhibit 82, page 86).

David Birchler (direct examination)

Mr. David Birchler testified as an expert in the area of "Planning and Zoning" (curriculum vitae, Plaintiff's Exhibit 79). He is of the opinion that a Wal-Mart store would "not be permitted in a C-2 zone" (Plaintiff's Exhibit 23). He was critical of Ms. Johnston's letter of December 20, 2002, (Plaintiff's Exhibit 24) for failing to consider the Defendant's ordinance on "Principal uses permitted" and for relying on the "intent" section (Defendant's Exhibit 2, page 2101, sections 400.1200 and 400.1201). In his opinion the language in section 400.1201(2)(a), "any retail business . . ." would include any large department store. He further opined that the prior zoning of the Whitman parcel as "non-center commercial" was "an appropriate designation" (Plaintiff's Exhibit 71) as it was served by "major streets" in all directions, had city water and utilities, and was located near the more populated area. He also recognized that there would be an

impact on residential properties and that efforts would need to be made to "mitigate or eliminate" the impact.

Mr. Birchler reviewed the ordinances regarding "Principal uses permitted subject to special approval", "Site development standards for C-2 Shopping Center Business Districts", and "Site development standards for C-3 General Business Districts", and found the requirements for C-2 or C-3 parcels to both be "compatible with the non-center commercial category" (Defendant's Exhibit 2, sections 400.2103, 400.2105, and 400.1303). In his opinion the designation of the property for "Parks and Recreation" was not preferred and he could not find an evaluation for it. He described it as "reactionary planning" while the Plaintiff marketed the property for large retailers and that the designation may "be a mechanism to deny a request in the future". Furthermore, he would not recommend "mixed use" at the site as it was better suited for "in town" while the Whitman parcel was "more usable for retail".

Mr. Birchler also noted that the C-2 and C-3 allowances "would conflict with the 5,000 and 10,000 square foot restrictions". He noted that the Indian Acres subdivision was "laid out with inter-connecting streets to the north and west" but that there were no "stub roads" into the Plaintiff's property. He further believed that Ms. Johnston's letter of December 20, 2002 (Plaintiff's Exhibit 24) would permit a big-box store as he would interpret her letter and the Master Plan differently. For instance, he interpreted the Master Plan to include the Bedford Township area as serving "as a center of activity" (Plaintiff's Exhibit 32, page 89). He believes that demand on utilities is greater by residential areas and therefore a "tax on resources", while the location of Bedford Township in and of itself places it in a unique position of possibly losing sales tax, personal tax, and property tax revenues to shopping locations in Ohio. He compared Bedford Township to White Lake, Michigan (Oakland County) with a population of 30,000 people serving as the "commercial center for its region" including "big box" stores. The fact that 70% of Bedford Township residents are employed in Toledo, Ohio, did not change his opinion.

He testified that the C-3 parcel across the street from the Whitman property "was not suitable for a Wal-Mart store" as it faced several constraints: heavily wooded, L-shaped size lot, isolated from view, access on Lewis Avenue only, and likelihood for

more traffic accidents. Furthermore that it is "preferred" to have access at a major intersection. He stated that the C-3 parcels at LaVoy Road and Telegraph Road was "not suitable" as it also faced several constraints: not related to the populated areas, not a primary artery in all directions (for the immediate township), and most of the property was already developed that would require removing various businesses.

Mr. Birchler stated that the public should rely on zoning maps but that the zoning map in question was improperly changed. He indicated that it should be changed through the Zoning Board of Appeals. Once properly corrected he believes "sound planning" would not reject the request for rezoning as the "compatibility issue is a site issue and not a zoning issue" which would include reducing the impact on residential uses (see Plaintiff's Exhibit 32, page 86 regarding "landscape screening"). Finally, in his opinion it was "inappropriate to deny the rezoning requests" as the Master Plan does not support any C-2 or C-3 developments and that a large parcel was "[particularly] doomed for failure", and that it was "impossible to pass the test of the Master Plan".

David Birchler (cross examination)

Mr. Birchler acknowledged that he was "unaware" of the Plaintiff's past requests for rezoning. He further stated that he was "not here to give an opinion on whether Bedford needs a big-box store". He did not know "every specific aspect of what is required" although he believed the Wal-Mart store could be located within 30 feet of the Indian Acres subdivision although the narrow berm would be ineffective. As a general planning principle he opined that one "should try to always" apply "transitional zoning".

He acknowledged that despite the constraints on the other C-3 parcels they were sufficient for a big-box store. In his opinion part of the Master Plan "supports commercial" property, and part of it opposes it. Lastly, if the Whitman dealership were removed from the property a big-box store could be constructed in its place without the need for rezoning.

Robert Schockman (direct examination)

Mr. Robert Schockman has served as the Bedford Township Clerk since 2000, and previously had served four years as a Trustee. He indicated in 11 years the Township "never had a plan to develop a park" on the Plaintiff's property. He had two meetings

with Mr. Paul Whitman and among other comments suggested that one way to resolve the dispute was "litigation".

Mr. Schockman was recalled to the witness stand during the Defendant's case-in-chief. He acknowledged that all of the Defendant's zoning amendments from 1977 to the present date were on file with the Township and reflected in Defendant's Exhibit 98. He also acknowledged the Master Plan map that was in existence in April of 1975. (Defendant's Exhibit 65).

Robert Schockman cross examination)

Mr. Schockman indicated one of the reasons for denying the request for rezoning was based on the fact that the Monroe County Planning Commission had denied it, and because of the "interference" with neighbors. He spoke with "several different planners and it did not change his opinion".

Michael Williams (direct examination)

Mr. Michael Williams was qualified as an expert witness as a Commercial Real Estate Appraiser. He testified that he conducted an appraisal of the Whitman property based upon the Wal-Mart proposal and seven "out lots" as reflected in Appendix A of Plaintiff's Exhibit 83. He based the appraisal and evaluation on the basis of data from the Southeast Michigan Council of Governments (SEMCOG) and from Bedford Township (Plaintiff's Exhibit 83, Appendix D). The population of Bedford Township in 2006 was 31,510, and by 2030 it is projected to be 39,288. He opined that under the Township's restrictions certain retail business would be precluded, and it would be "incompatible with Wal-Mart". He further opined the soil sample was "not an obstacle" (Plaintiff's Exhibit 83, page 2).

Mr. Williams conducted an analysis of the value of the Whitman property based upon "recent trends" (Plaintiff's Exhibit 83, page 23). He indicated that vacant land did not have an impact as a store like Wal-Mart would cause "vacant land [to fill up] fairly quickly" (see Plaintiff's Exhibit 83, pages 24-25). He further stated that the appraisal was based upon the "income approach" combined with a "subdivision analysis" resulting in "a projection of the future income stream" in order to determine the values of the out lots (see Plaintiff's Exhibit 83, page 27). He further estimated it would take 1-3 years to

sell the lots, considered the "absorption costs" (i.e., sales commissions), and calculated the "cash flow over the holding period" (see Plaintiff's Exhibit 83, pages 30-51; comparison between sale of property in 2004 and 2006). He further made allowances for a 3% per annum increase similar to the Consumer Price Index (CPI). He did not "question Mr. Ellis' rate of increase" (Defendant's proposed expert witness; see Plaintiff's Exhibit 88, page 145). In the end, Mr. Williams concluded that the value of the 7 out lots in January 2004 was $1.94 million dollars and by December 26, 2006 the value was $2.1 million dollars (Plaintiff's Exhibit 83, pages 45 and 49).

On redirect examination he could not recall if there were "other comparable C-3 properties".

Michael Williams (cross examination)

Mr. Williams testified his appraisal was based on "the assumption" of a Wal-Mart being constructed on the property or the approval of the site plan. He further assumed commercial zoning, including C-3 zoning. He was first asked to complete an analysis in January 2004 [Note: the second rezoning request was denied on January 6, 2004; see Defendant's Exhibits 23 and 24]. He was not able to indicate how long before a site plan could be completed, or the infrastructure completed. He acknowledged the soil sample report indicating "severe limitations" to construction (see Plaintiff's Exhibit 83, page 19). He further acknowledged the "neighborhood" in his report indicating:

> "Commercial development becomes more sporadic as you travel outward from both Lambertville and Temperance, aside from the commercial pockets discussed momentarily". (Plaintiff's Exhibit 83, page 15).

Mr. Williams also acknowledged the limited commercial developments in the area (Plaintiff's Exhibit 83, page 17, see pages 24-25). He opined that a "retail anchor store" would promote more commercial development and fewer vacancies. If the property were zoned C-3 "today" he could not indicate "how soon the lots would be available for sale" as it was not part of the analysis as his opinion is based on assumptions.

Mr. Williams indicated that he was also qualified to appraise residential properties but that he was not asked to appraise the R-2A portion of the Plaintiff's property. On re-cross examination he indicated that the presence of trees "might deter a developer".

Robert Mcauliffe

Mr. Robert Mcauliffe was qualified to give an expert opinion of "damages analysis in lawsuits" on behalf of the Plaintiff. His testimony was stricken by virtue of this Court's ruling and written decision of January 20, 2007.

Thereafter the Plaintiff rested his case. The Defendant's Motion for Directed Verdict was denied for reasons as stated in the written opinion and decision of January 23, 2007.

Paul LeBlanc (direct examination)

Mr. Paul LeBlanc was qualified as an expert in the area of "Planning and Zoning" (see his curriculum vitae in Defendant's Exhibit 72). Among other things he has been involved in the drafting of zoning ordinances and Master Plans for several municipalities. In the instant case he reviewed the rezoning requests, the consultant's letters, the minutes, of the Bedford Planning Commission, the memorandums from the Monroe County Planning Commission, and the Bedford Township Board minutes. In his opinion the actions and results of the rezoning requests were "in accordance with reasonable planning and practice".

Mr. LeBlanc opined that the subject parcel was "reasonable as zoned" and that it was "not uncommon" to have commercial development along the roadway and residential areas behind it (see Defendant's Exhibit 66). Upon review of the most recent Master Plan showing the mixed use, residential, commercial and office areas, he was of the opinion that the rezoning requests were "not consistent". He recognized that smaller parcels preclude certain uses and in that regard are "self-regulating". He noted that larger lots, like the Plaintiff's property, one rezoned could allow "anything" pursuant to the ordinance. Therefore, if a big-box store were permitted on the property, a berm "would not eliminate all adjacency concerns" (i.e., noise, light, traffic, and aesthetics; see Defendant's Exhibits 4 and 9).

The witness indicated that a Master Plan is a "long-range guide, a blueprint for future growth of the community" and may serve as the "foundation for zoning" but it cannot "in and of itself preclude" a change to zoning. Any changes to the Master Plan could "require a year or more" while seeking "widespread community input" and reviewing other criteria (i.e., demographics, traffic, and the ability to accommodate future

development). In his opinion the 2002 Master Plan "appropriately considered the public visioning sessions". Furthermore, pursuant to law Master Plans must be reviewed every five years.

In reviewing the 1975 Master Plan map he found the Plaintiff's property to include multi-family residential designation along the eastern boundary of Indian Acres, with a couple of different commercial classifications along Lewis Avenue. Mr. LeBlanc indicated this was a "reasonable transitional land use scheme" (Defendant's exhibit 65). By 1991 the parcel was listed as "office/service transitional" and adjacent to Indian Acres "high density residential", which he described to be "classic transitional planning" (Defendant's Exhibit 45). The 2002 Master Plan reflected a "mixed residential/office/commercial and local commercial along Lewis Avenue" which demonstrates a "stepped down kind of plan" (Defendant's Exhibit 82). He opined that it was "highly advisable" to change the earlier "Parks and Recreation" designation since there "was no plan for such".

Mr. LeBlanc disagreed with the size limits set for "local commercial (i.e., 10,000 square feet; see Plaintiff's Exhibit 32, page 95). He did find it to be appropriate to consider the "northern border of Ohio" and that the Defendant should consider available shopping opportunities. He stated that such opportunities should serve a radius of "3-5 miles and would address 90% of the [township's] population".

He analyzed the other C-3 parcels starting with the parcel across the street from the Plaintiff's property. The lot behind the Northtowne Chevrolet dealer is "L-shaped" and next to vacant land that although zoned R-2A would unlikely be developed, or if it was, it would be developed with the knowledge it would abut the commercial use. He acknowledged that the parcels along Telegraph Road would require acquisition of several pre-existing businesses but that it was not unheard of. In considering any of the C-3 parcels he would focus on "consistency" with the Master Plan, "compatibility" with the surrounding area, and "capability" to provide needed services. On re-direct examination he added a PUD plan based upon a site plan could "protect Indian Acres", but without it, a commercial building could be placed anywhere on the parcel.

Paul LeBlanc (cross examination)

Mr. LeBlanc testified that he has been retained by the Meijer corporation and therefore "refrains from representing Wal-Mart". He stated that he was unaware that Meijer had previously competed with Wal-Mart for the parcel. He acknowledged that several Meijer stores were adjacent to residential areas, but upon viewing various aerial photographs he could not judge the distance between the parcels, and whether the residences were all single-family homes (see Plaintiff's Exhibits 90, 91, 92, and 93). The photographs were allowed into evidence over the Defendant's objections.

Mr. LeBlanc indicated that he has been involved in "screening and lighting" issues between residential and commercial properties. He stated that it is "not bad planning in all cases" and that the "site plan process, PUD, and transitional zoning could address impact" issues. He acknowledged that "square footage restrictions" would not be suitable to big-box stores or supermarket chains, and that it "could significantly curtail intensity of commercial use" (see Plaintiff's Exhibit 32, page 95). Therefore, "any rezoning of a C-3 [parcel] will conflict with the Master Plan" which is designed to provide for "local commercial" (Plaintiff's Exhibit 32, page 82).

He agreed that a Master Plan is "subject to interpretation" and that it can have a "significant impact on denial of a rezoning request". He noted the changes of the Plaintiff's property since the 1977 zoning map (Plaintiff's Exhibit 65) and the 1991 Master Plan (Plaintiff's Exhibit 17, page 11) that showed the property as "noncenter commercial" which would support a big-box store.

Michael Ellis (direct examination)

Mr. Michael Ellis was qualified as an expert in "real estate appraisal" (see curriculum vitae, Defendant's exhibit 73). He evaluated the Plaintiff's property to determine whether "it could be economically developed as zoned, and what value it would have". He evaluated the various developments in the township noting "the number of building permits for residential property, speaking with builders and developers, and reviewing township records". In the end, his analysis appraised the commercial property to be $2.36 million dollars as of January 6, 2004, and $2.44 million dollars as of November 30, 2006. Including the out lots he appraised the property to be worth $2.96

million dollars and $2.98 million dollars respectively (Defendant's exhibit 99, page 5). He noted commercial property had tended to go up in value while the current economy caused residential to do the opposite.

Chris Renius (direct examination)

Mr. Chris Renius has served as the Defendant's assessor since April 2006. He referred to the Plaintiff's parcel as one lot being C-3, and the "rest is split-zoned" in the shape of a horseshoe around the C-3 parcel. He indicated that it was "not unusual" to list the property on the tax bill as "commercial" as it is classified by "[determining] the property value if it sold". He listed the 6 different categories for classifying properties, including "commercial" and "developmental" and state that by law he is "limited to one category" in listing the classification on the tax bill and selects the "category with the most value" (Plaintiff's exhibit 42). He noted that in 2006 the property is classified as "developmental" as this category describes the property as being "15 acres or greater" and its "value [is greater than its] use".

Chris Renius (cross examination)

He testified that he did not know why the classification was changed from "commercial" in 2002 (Plaintiff's Exhibit 30, winter tax bill for $5,575.16) to "developmental" in 2003 (Plaintiff's Exhibit 29, winter tax bill for $4,869.83).

Lamar Frederick (direct examination)

Mr. Lamar Frederick has lived in Bedford Township since September 1994, and from November 1996 until November 2004 he served as Township Supervisor. He recalled Dennis Jenkins' discovery of the zoning map error in June 2001 (and advised him to contact the township attorney; see cross-examination testimony). He vehemently and categorically denied making any threatening comments to Jon Whitman (i.e., "if you embarrass the township we will teach you a lesson").

He recalled meeting with Mr. Jon Whitman in the Plaintiff's Used Car office some time in July or August 2001, and he was advised that the Plaintiff was "thinking about bringing in Wal-Mart". Mr. Frederick advised him to "talk to the neighbors". He was later contacted by Jerry Parker, an attorney from Ohio, representing Wal-Mart. Mr.

Parker sought comment on a plan for rezoning being submitted to Wade-Trim. Mr. Frederick advised him to "go ahead" but that the Defendant "would not pay for it". He stated that Wal-Mart "never asked for rezoning or a PUD".

He acknowledged that neither Wade-Trim, nor the Monroe County Planning Commission recommended approval of the Wal-Mart inquiry (Defendant's Exhibits 11 and 12). He pointed out that there were "many concerns" including the "division of the land, potential and permitted uses, the health, safety and welfare [of the citizens], and the impact on the adjacent property". He believed that the C-3 parcels across the street and along Telegraph Road could accommodate a big-box store.

Lamar Frederick (cross examination)

Mr. Frederick acknowledged the changes to the Master Plan regarding Plaintiff's property from "noncenter commercial to Parks and Recreation" as he had attended the "visioning sessions" for the 2002 Master Plan. He agreed that the Defendant never intended to purchase the Plaintiff's land in order to develop a park, and that the Plaintiff never approached the defendant for that purpose. He further acknowledged the prior changes that affected C-2 properties (i.e., square foot restrictions), which were "quite controversial with business owners". He was aware of Mr. Jenkins' discovery of the zoning map error and advised him to "call counsel and work out [any] problems". He was aware that the zoning map was changed in order to "correct it".

III. Applicable law.

A. Estoppel.

1. Plaintiff's arguments.

In the instant case the Plaintiff outlines the sequence of events and the long-standing and publicly displayed zoning map in support of his claim of equitable estoppel. Mr. Jenkins is more or less the "point man" one goes to in order to learn the zoning of a particular parcel in Bedford Township. The township attorney, Philip Goldsmith, the Defendant's consultant, Wade-Trim, and the realtor, Steven Lennex, relied upon the zoning map and the representations of Mr. Jenkins, in their dealings with the Plaintiff or other entities. Tax bills listed the property as "commercial property" (Plaintiff's Exhibits 30 and 42).

The accuracy of the zoning map was brought to Mr. Jenkins' attention by an unnamed and undisclosed resident of Indian Acres. Mr. Jenkins reviewed the minutes of the Defendant's public record and confirmed the mistake and unilaterally changed the zoning map. In an earlier incident with the Magdalena Restaurant the property owner was permitted to petition the township for a zoning change in order to change the classification of their property from "residential" to "commercial". That "mistake" was learned when the property owner inquired of making changes to the business.

Mr. Jenkins immediately notified the Plaintiff and other interested parties of the mistake, including Ms. Johnston. In subsequent discussions with individual township officials the Plaintiff was advised to take various courses of action, including litigation, and was reportedly directed to not "embarrass us" or "force it down our throats". Meanwhile, the Master Plan was being processed and at one contemporaneous point in time it was suggested that part of the Plaintiff's property be changed to a classification of "parks and recreation". Lastly, the Plaintiff contends the Defendant has failed to apply its own ordinances and Master Plan in even trying to accommodate his rezoning requests.

The Plaintiff relies on the unpublished case of *Saginaw v Hurry,* No. 218885, (Decided August 11, 2000) whereby the Michigan Court of Appeals estopped a municipality from prohibiting a property owner from using a paved driveway for the parking of motor vehicles. [**Note**: this Court acknowledges that an unpublished case does not carry the authority of *stare decisis*, although the trial court is free to consider the rationale of the appellate case]. In part the Court sided with the property owner since the municipality had 9 years earlier compelled the same property owner to pave the driveway, and further found by implication that the parking of motor vehicles would be a legitimate use of the driveway.

The Plaintiff contends the actions of the Defendant invokes the "estoppel" doctrine and seeks to have the C-2 zoning restored as previously noted on the zoning map prior to June 2001.

2. Defendant's arguments.

The Defendant emphasizes that the true "Plaintiff" is Whitman Ford, a Michigan Corporation, that time and time again petitioned the Defendant for rezoning requests. On each request the Corporation acknowledged the split-zoned nature of its parcel including

a portion that was "R2-A" or "residential" (Plaintiff's Exhibits 13, 19, 20, and 78; Defendant's Exhibits 27, 28, 29 and 39). Furthermore, the Monroe County Planning Commission recognized the split-zoned nature of the parcel in 1990 by making reference to the R-2A portion of the parcel (Defendant's Exhibit 43). In addition, Mr. Jon Whitman "knew, or should have known" of the true nature of the property given his signature on a survey (Defendant's Exhibit 38). The Defendant also points to the entire record of the Township to demonstrate the true nature of the zoning of the property (Defendant's Exhibit 98). Lastly, the Defendant relies on a newspaper article from March 1980, reportedly citing comments made by Mr. Jon Whitman addressing the plan of constructing residential homes adjacent to Indian Acres (Defendant's Exhibit 75).

The Defendant states that the Plaintiff could not have relied upon the erroneous zoning map as he had, or should have had, knowledge or information to the contrary. The Defendant notes the Plaintiff was advised of the mistake in June 2001. Prior to 1998 it was of no consequence, as the Plaintiff had no plans to market the property. In 1998, the Plaintiff's realtor, Steven Lennex, began to circulate a flyer seeking big-box clients (Defendant's Exhibit 88) and requested the Plaintiff to confirm the accuracy of the flyer's information. It is argued that the Plaintiff, in actuality, Jon Whitman, did nothing more than to rely upon the erroneous zoning map, his realtor's first report, and the report of attorney Philip Goldsmith. Any offers to purchase were for unknown reasons never consummated. In June 2001 upon being advised of the error in the zoning map, the Plaintiff had approximately a year to petition for rezoning at a time when the Master Plan listed the property as "noncenter commercial" (Plaintiff's Exhibits 21 and 17). Despite the knowledge of the error the Plaintiff continued to market the property and it apparently did not discourage offers from being made within that time frame or thereafter (Plaintiff's Exhibits 73, 74, 75, and 76). It is noted that the Master Plan was not amended until June of 2002 (Defendant's Exhibit 82). The Master Plan map was reportedly revised and adopted on October 22, 2003.

In the unpublished case of *Prestige Community Developments v Sumpter Township,* Nos. 193390, 193772 (Decided August 26, 1997), the Michigan Court of Appeals ruled in favor of the township in a dispute over the premature change to a map prior to the passage of an amendment to an ordinance. [**Note**: this Court previously noted

in the written decision regarding the Motion for Directed Verdict that the facts of the *Prestige* case and the instant case are significantly different. Finally it is unknown whether the language of the ordinance in question in the *Prestige* case is similar or identical to the Defendant's ordinance, section 400.301, although both cases appear to indicate the zoning map was "incorporated by reference" in the ordinance (see Plaintiff's Exhibit 72)].

3. Conclusion.

The parties accurately state the principles for the doctrine of "estoppel" as cited in the cases of *Dimmitt & Owens v Realtek,* 90 Mich App 429, 433 (1979) and *Cook v Grand River Hydroelectric Power Co,* 131 Mich App 821, 828 (1984). For instance,

> "Estoppel arises where 1) a party, by representations, admissions or silence, intentionally or negligently induces another party to believe facts, 2) the party justifiably relies and acts on this belief, and 3) the other party will be prejudiced if the first party is permitted to deny the existence of the facts". *Dimmit & Owens, supra* at 433.

Furthermore, a township may regulate land use by way of enacting ordinances. MCL 125.271 (replaced by MCL 125.3101, et seq., effective July 1, 2006). Any amendments may be made in the same manner as in the enactment of the original ordinance, with notice to the property owner. MCL 125.283, and MCL125.284. If an individual township official acts outside of his capacity or without authority a property owner may be unsuccessful in compelling the governmental unit to permit a use in opposition to an existing ordinance. *Fass v City of Highland Park,* 326 Mich 19, 28-31 (1960).

Mr. Jon Whitman clearly contends that he did not "personally" know the true zoning of the property and relied upon the zoning map for over 9 years, and subsequent reports from the Defendant's Planning Coordinator, Dennis Jenkins, his realtor, Steven Lennex, and his former attorney, Philip Goldsmith. He points to "threatening" comments by various township officials to pursue relief by means other than rezoning. His attorney contends that informal inquiries through township officials is how "it really is done".

The fallacies of Plaintiff's contentions are multiple. The true "Plaintiff" is in fact the corporation, Whitman Ford, and over a continuous and significant period of time the

"Plaintiff" not only should have known but actually knew the true status of the zoning of the property as reflected in the earlier zoning maps, but more importantly based upon the multiple petitions to rezone the property from 1979 to 1990 (See Plaintiff's Exhibits 13, 19, 20, and 78; Defendant's Exhibits 27, 28, 29 and 39; see 45). On the face of each and every petition the Plaintiff acknowledges the portion of the property that was zoned R-2A (see enumerated paragraph #3, Defendant's Exhibits 27, 28, 29, and 39; see 45). There is no escape for the Plaintiff based on these facts alone. Some weight may be given to the survey of 1987 that reflects the signature of Mr. Jon Whitman, and which would reflect knowledge of the R-2A zoning (Defendant's Exhibit 38).

It is true that individual township officials may have misled Mr. Jon Whitman but the Defendant speaks through its legislative actions and those actions reveal the true split-zoned nature of the property (Defendant's Exhibit 98). Mr. Lamar Frederick vehemently and "categorically" denied making any threats to the Plaintiff. In fact, Mr. Frederick is the one who suggested the Plaintiff "hold a dinner" to inform the neighbors of his intentions. Mr. Robert Schockman suggested a number of avenues available to any aggrieved party including litigation.

No weight is given to the newspaper article submitted by the Defendant as it is inherently hearsay evidence and Mr. Jon Whitman never acknowledged whether or not it was accurate (see Defendant's Exhibit 75). Nonetheless, it is extremely significant that Mr. Whitman's own realtor and attorney each advised him to check the accuracy of the zoning. This indicates a directive to conduct a more in-depth investigation rather than relying on the zoning map, or the word of individual township officials. One may not rely upon the informal word of individual township officials in the first place. The "[c]asual private advice offered by township officials does not constitute exceptional circumstances" which would allow the Plaintiff to prevail. *Howard Township Board of Trustees v Waldo,* 168 Mich App 565, 575-576 (1988); See *Veldman v Grand Rapids,* 275 Mich 100, 113 (1936) and *Wayne Sheriff v Wayne Commissioners,* 148 Mich App 702, 705 (1983). Furthermore, it would not be an onerous task for one to not only make further inquiry with the township, but to simply review the property card (Defendant's Exhibit 97). The property card clearly reflects the property to be partly zoned R-2A.

The parties have not submitted any authority or case law that the classification on a tax bill reflects the actual zoning of a piece of property. It is not for this Court to find authority where none has been submitted. *Wilson v Taylor,* 457 Mich 232, 243 (1998). To the extent it is submitted as a "piece of the puzzle" the testimony of Mr. Chris Renius puts this issue to rest. He indicated that property is classified based upon by "[determining] the property value if it sold". Furthermore, since he is restricted by state law to limit the classification on the tax bill "to one category" he selects the "category with the most value". He also indicated that by law he is restricted to one classification and that he assigns the one with the "most value".

The Court also takes note that any submitted documents by representatives of Wal-Mart were independent and informal inquiries of a proposed store to be constructed on the Plaintiff's property. According to the former Township Supervisor, Lamar Frederick, it is clear they were dealing with the Defendant's Planning Consultant, Wade-Trim, on their own and furthermore, they were responsible for any consultant fees. It is questionable whether this Court should even consider the actions of any entity or individual in response to the informal inquiry.

It is plausible the Plaintiff considered the treatment of the informal Wal-Mart inquiry as a reflection of the likelihood of success for its own petitions for re-zoning. It did not stop the Plaintiff from proceeding with the petitions for rezoning even if either or both of them were done in preparation of litigation. It also did not stop the Plaintiff from entertaining offers to purchase the property. By re-enacting each step of the process of the Plaintiff's own prior petitions for rezoning it bears out that from the very beginning the true "Plaintiff", Whitman Ford, Inc., knew of the true zoning of the property. Despite the reliance on the erroneous map by Mr. Dennis Jenkins, he cannot solely speak for the entire Bedford Township Board; instead, he is but part of the process. [Note: as will be seen in the written opinion herein, in a conflict between a zoning ordinance and a zoning map, this Court would find the zoning ordinance to take precedence].

Therefore, the Defendant neither "silently, intentionally, nor negligently" induced the Plaintiff to "believe facts" as the Defendant does not speak through its individual officials. *Dimmitt, supra* at 433; *Howard Township, supra* at 576. Most people would find this troubling, however, before one invests or seeks investments of thousands or

millions of dollars in a project, one would be well served to thoroughly review the applicable zoning ordinance(s). Nonetheless, if one were to conclude the Plaintiff satisfied the first criteria of an "estoppel" claim, the Plaintiff has failed to satisfy the second criteria of "justifiable reliance" for the reasons as stated earlier (regarding Defendant's exhibits 27, 28, 29, and 78) coupled with the directives from his own advisors, Lennex and Goldsmith, to confirm the zoning classification. Lastly, as will be noted herein, there is no "prejudice" (the third criteria of an "estoppel" claim) to the Plaintiff as the property remains viable and marketable. *Dimmitt, supra* at 433; (Plaintiff's Exhibit 83, page 2, et seq., and Defendant's Exhibit 99, page 2, et seq.).

The Defendant's ability to enforce the zoning ordinance in this case remains focused on a central inquiry of whether the facts and circumstances viewed together "present compelling reasons for refusing a party's request for [relief]". *Howard Township, supra* at 575-576. In the instant case for all of the foregoing reasons this Court would answer the inquiry in favor of the Defendant.

B. Violation of the Township Zoning Act.

1. Plaintiff's arguments.

The Plaintiff categorizes this issue as "corollary" to the "estoppel" claim. It is clear that Mr. Jenkins unilaterally changed the zoning map in 2001 after reportedly reviewing the written minutes of the Township Board (Plaintiff's Exhibit 21; Defendant's Exhibit 52). He admittedly did not pursue an amendment as one would an amendment to a zoning ordinance. Therefore, the Plaintiff seeks to nullify the actions of Mr. Jenkins and restore the zoning map as it had existed for approximately 9 years prior to June 2001.

Secondly, the Plaintiff points to the procedure followed in the case involving Magdalena's Restaurant. Apparently it was discovered that the restaurant had been operating on a residential lot. The property owner was allowed to petition for rezoning before the zoning map was changed. One of the Plaintiff's experts, Mr. David Birchler, opined that changes to a zoning map should be done through the Defendant's Zoning Board of Appeals. The owner of Magdalena's Restaurant was permitted to do so, however, the Plaintiff was not.

2. Defendant's arguments.

The Defendant argues that the changing of the zoning map is a "procedural due process" violation. Furthermore, the Defendant contends that the zoning map was correct in its reflection of Magdalena's Restaurant being on a residential lot and that it was the zoning ordinance that needed to be amended if the business were to be allowed to continue to operate. The Defendant contends the proper relief is to compel the Defendant to properly change the map through a public process.

3. Conclusion.

The Michigan Legislature and the Michigan Court of Appeals have stated that changes to zoning ordinances may only be accomplished by "amendments or supplements" to the zoning ordinance and not by an alteration to the map. MCL 125.280 replaced by MCL 125.3101, et seq., effective July 1, 2006); See *Northville Corp. v Walled Lake,* 43 Mich App 424, 435 (1973). In the *Northville Corp.* case the governmental body was challenging the validity of its own ordinance based upon the alleged failure of a township official to publish notice of the proposed zoning ordinance amendment in the newspaper at the time of its proposed adoption. *Id.* at 426. In this case the amended zoning ordinance had been allowed to stand unchallenged for four years, and as a matter of "public policy" the Court held that the municipality could not challenge its validity. *Id.* at 435. Any remedy must be by "repeal or amendment, which course cannot adversely affect rights heretofore acquired under the sanction of the ordinance". *Id.* at 435 (citation omitted). Furthermore, the Court stated,

> "In the orderly process of handling real estate transactions where they are affected by provisions of zoning ordinances and amendments, it is essential that the members of the general public and the people buying or selling real estate must be able to rely on the validity of the public record, to wit: a zoning ordinance and the zoning map *issued in accordance with such zoning ordinance,* without the necessity of pouring over musty files and searching newspaper morgues, going back years in order to avoid a claim by other persons that there was a failure to comply with some technical requirement of law in the adoption of the ordinance in question. To hold otherwise would bring about chaotic conditions beyond all comprehension in the transfer and usage of real estate in any community having a zoning ordinance affecting such land". *Id.* at 435-436 (emphasis added).

This Court would apply even the apparent *dicta* of this case to direct one to look to both the zoning map **and** the zoning ordinance(s). A township board actually considers and votes on the language of a given zoning ordinance following publication and a public hearing on the proposed changes. MCL 125.284 (replaced by MCL 125.3101, et seq., effective July 1, 2006). The corresponding zoning map may be left to others to create (i.e., cartographers) and this Court would find it to be unconscionable to hold a governmental body to erroneous maps or improper changes to the maps without proper oversight, to wit: a formal amendment following notice to the public and a public hearing. The possibility of graft would be too great if a wrongdoer could change a map and hold the governmental body at its mercy. It is obvious that a governmental body would sanction a map that correctly corresponds with the written ordinance. Any amendments, including the correction of a "mistake" in either a zoning ordinance or a zoning map incorporated therein, need to be resolved through the Township Zoning Act. Furthermore, unlike the sentiment of the Court in the *Northville* case, it would not be an onerous task for one to not only make further inquiry with the township, but to simply review the property card (Defendant's Exhibit 97). The property card clearly reflects the property to be partly zoned R-2A.

It is problematic that the Defendant chose to include the language that it did in its own ordinance. The Defendant's ordinance defining "District boundaries", to wit: section 400.301, states:

> "The boundaries of these districts are hereby established as shown on the Zoning Map, Township of Bedford Zoning Ordinance, which accompanies this Ordinance, and which map with all notations, references, and other information shown thereon shall be as much part of this Ordinance as if fully described herein". (Emphasis added; see Plaintiff's Exhibit 72).

In ruling on the Defendant's Motion for Directed Verdict on this issue this Court stated:

> "One straightforward and objective reading of the foregoing language could clearly find that the "zoning map" is incorporated into the ordinance. The Defendant presumably drafted the language of the ordinance and they are charged with what they drafted. If their intent was to allow the zoning ordinance to stand on its own, there is no need to incorporate the map. Instead, reference could be made that the it is their "intent" to reflect the "district boundaries" on a corresponding zoning map but that the

> ordinance takes precedent. Therefore, any changes to the zoning map (one and the same as the ordinance) in 2001, required compliance with the Township Zoning Act, specifically MCL 125.284." (Court's written opinion of January 23, 2007).

The foregoing opinion was written in the vein of taking the evidence in the light most favorable to the nonmoving party pursuant to MCR 2.515. The burden is now clearly on the Plaintiff to demonstrate entitlement to relief.

It must be noted that even the Defendant's ordinance makes reference to consideration of the "zoning map" **together** with the "Township of Bedford Zoning Ordinance". Had the Defendant intended that either be considered independently the insertion of the word "or" could have been placed between "Zoning Map" and "Township of Bedford Zoning Ordinance". Common sense dictates an interpretation to include resolution where the two documents conflict. This Court would give preference and priority to the written word (i.e., an ordinance) over a published map for the reasons previously stated. [Note: certainly to the extent the unpublished decision of *Prestige Community Developments v Sumpter Township,* Nos. 193390, 193772 (decided August 26, 1997) may be relied upon, the Michigan Court of Appeals would favor the zoning ordinance over the zoning map and would rely upon the Township Zoning Act for any amendments].

To the extent the Plaintiff's Complaint may be construed to include compliance with the Township Zoning Act regarding the amendment of the zoning map, the Court directs the Defendant to appropriately amend its zoning map in compliance with Michigan law.

C. Due Process and Equal Protection.

Many of the competing parties' arguments overlap "due process" and "equal protection". Therefore, the Court combines the two issues.

1. Plaintiff's arguments.

The Plaintiff understands "a zoning ordinance is presumed valid" and he has the burden of demonstrating that either there is not a "legitimate state interest" being protected or pursued, or the actions of the governmental body was "arbitrary and capricious". The Plaintiff points to the numerous attempts to rezone the property

including the R-2A area in dispute and contends it is the very "transitional zoning" experts on both sides have articulated. Although he acknowledges the earlier "residential zoning" he relies on the zoning map as it existed prior to Mr. Jenkins' actions to change it. In essence the Plaintiff challenges the Defendant's contentions of precluding residential areas immediately adjacent to a C-3 property and whether a proposed use is "compatible" with the Master Plan.

The Plaintiff points to C-3 parcels adjoining residential areas throughout the township. Furthermore, that all experts indicated it was possible to "mitigate the impact" of a big-box store next to a residential area. The "site design requirements" (i.e., architectural, loading, lighting, and berming) should be considered in acting upon the request for rezoning. In addition, the Master Plan is but a guide and subject to a number of interpretations. In addition, no one agreed with the interpretation of the consultant, Ms. Julie Johnston. The Plaintiff contends her opinion is flawed and the expert opinion of Mr. Paul LeBlanc is biased due to his representation of Wal-Mart's competitor, the Meijer Corporation (the Court notes the witness appeared to be sincerely "surprised" to the report the two big-box stores were in competition with each other over this property). Despite his alleged bias even Mr. LeBlanc testified to big-box stores adjoining residential areas (Plaintiff's Exhibits 90-93).

The Plaintiff points to the changes of the classification of his property in the various Master Plans after he declared his intent to seek a big-box store and contends the Defendant intentionally "changed the rules" and the Master Plans to thwart his objective. He again alludes to "threats" by individual township officials or advice to sue the township to explain the actions he pursued. Furthermore, he points to the "disparate treatment" given to Magdalena's Restaurant and the unilateral change to the zoning map. Finally, the Plaintiff points to the amendments to the "site design guidelines" imposing the square foot restrictions to C-2 and C-3 properties. In essence the Plaintiff contends the process is indicative of "the very definition of *arbitrary* and *capricious*".

2. Defendant's arguments.

The Defendant contends "the Township Zoning Act specifically authorizes a township to zone to ensure the use of land be situated in appropriate locations and relationships" including the issue of "adjacency". In addressing the Plaintiff's earlier

petitions for rezoning one theme remained constant: no development near the Indian Acres subdivision, including professional business offices (PBO).

The Defendant notes that "every single reviewing entity came to the same conclusion" in recommending denial of the Plaintiff's petitions for rezoning (Defendant's Exhibits 9, 10, 11, 15, 19, 20, 30, 35, 43, 79, and 98). The Defendant indicates that the Monroe County Planning Commission had no prior history with Mr. Jon Whitman and no bias against him. Likewise, the Plaintiff's expert, Mr. David Birchler recommended against placing a big-box store within 30 feet of the residential subdivision. The Defendant's Planning Commission and the Monroe County Planning Commission each concluded the proposed use would be incompatible and contrary to "good zoning practice" when considering the "proximity" issue (Defendant's Exhibits 7, and 11). The "architectural" ordinances were mentioned but there is no evidence to consider how they would be factored in; furthermore, such issues are "site plan decisions".

The Master Plans and its changes since 1975 to 2002 (from "transitional" to "noncenter commercial" to "parks and recreation" and back to "transitional") are only one factor. The "parks and recreation" designation is a "red herring" as the Planning Commission specifically indicated it was not a consideration (Defendant's Exhibit 8, pages 79-80, 82-83).

In regard to "equal protection" the Defendant asserts "there is no similar circumstance in the township", to wit: "no other large C-3 adjacent to developed residential". The Defendant had "rational reasons" to deny the rezoning petitions.

3. Conclusion.

The Plaintiff acknowledges, "generally, zoning authorities will not be estopped from enforcing their ordinances unless there are 'exceptional circumstances'." *Howard Twp, supra* at 575-576. Both parties appreciate and understand that the Court does not sit as a "super zoning commission". *Kropf v Sterling Heights,* 391 Mich 139, 161 (1974). Nor is the Court to second-guess the local governing body in the absence of a showing of an "arbitrary or capricious" act. *Id.,* at 161; *Brae Burn, Inc. v Bloomfield Hills,* 350 Mich 425, 430-432 (1957). It is also true that the challenging party has the burden of proving the ordinance to be unconstitutional. *Belle River Associates v China Township, 223 Mich App 124, 129 (1997).*

In the case of *Kirk v Tyrone Township,* 398 Mich 429, 439 (1976), the Michigan Supreme Court continued to rely heavily upon the *Kropf* case, citing:

> "The principles and tests to use to determine whether the present zoning of plaintiffs' property is valid was detailed in *Kropf.*
>
> 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.
>
> The four rules for applying these principles were also outlined in *Kropf.* They are:
>
> > 1. [T]he ordinance comes to us clothed with **every presumption** of validity.
> >
> > 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 reasonableness.**
> >
> > 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.**
>
> 4. This Court, however, is inclined to give considerable weight to the findings of the trial judge in equity cases." *Id.* at 339 (Citations omitted; Emphasis added).
>
> * * * * * * * * * * *
>
> Therefore, [a] zoning ordinance will be presumed valid, *with the*

> *burden on the party attacking it to show it to be an arbitrary and unreasonable restriction upon the owner's use of his property.*" *Id.* at 440. (Citations omitted; Emphasis added).

The power to review the acts of a legislative body is subject to the doctrine of separation of powers, and certain decisions are best left to "that branch which is closest to, and most representative of, the people". *46th Circuit Court v Crawford County,* 476 Mich 131, 141-142 (2006). Nonetheless, if the legislative body makes a decision that totally excludes a legal use of one's property, the burden shifts to the legislative body to justify the ordinance. *Landon Holdings, Inc. v Grattan Twp,* 257 Mich App 154, 173, 174 (2003); *Kropf, supra* at 155. In the alternative, if the use is not totally excluded, the aggrieved party may still prevail if they can demonstrate disparate treatment, or if it can be demonstrated that there is "no reasonable relationship to a legitimate governmental interest". *Landon Holdings, supra* at 176-177. Furthermore, if it is established that the legislative body acted in "bad faith", such as amending the ordinance specifically to thwart the proposed use of the land, Plaintiff may obtain relief. *Id.* at 161, 162.

A review of the voluminous exhibits and testimony reflects a series of events, and discretion exercised by different members of various zoning and planning commissions, over a significant period of time (since approximately 1976!) with the same outcome: Bedford Township will not change the zoning of R-2A on the Plaintiff's property. The Master Plan may be utilized as a "guide" in conjunction with the zoning ordinance. *Fredericks v Highland Township,* 228 Mich App 575, 605 (1998). The Township Board may consider the roads, infrastructure and public welfare and safety, and it is apparent that they did. Even the Plaintiff's expert, David Birchler, agreed that it would be unreasonable to place a big-box store 30 feet from Indian Acres. If it is true that the Master Plans are "open to interpretation", than certainly the Defendant's interpretation and application is one possible outcome. It may be reasonably implied from Mr. Birchler's testimony, and all of the other evidence, that the denial to rezone the R-2A section of Plaintiff's property was not unreasonable. Hence, the Defendant is in compliance with the criteria of the *Kropf* case.

Mr. LeBlanc, the Defendant's expert on "Planning and Zoning" reviewed the rezoning petitions, the consultant's letters, the minutes of the Bedford Planning

Commission, the memorandums from the Monroe County Planning Commission, and the Bedford Township Board minutes. In his opinion the actions and decisions regarding the Plaintiff's rezoning requests were "in accordance with reasonable planning and practice". He would consider the "consistency" with the Master Plan, the "compatibility" with the surrounding area, and the "capability" to provide needed services. Although he acknowledged the aerial photographs showing big-box stores adjacent to residential areas in other parts of the state, he was unable to draw an immediate corollary to the instant case (Plaintiff's Exhibits 90-93). This Court cannot differ with his opinions.

The Plaintiff, through its former President, Mr. Paul Whitman, had tried again and again to rezone the property meeting mostly with success except for the western-most strip zoned R-2A (Plaintiff's Exhibits 13, 19, 20, and 78; Defendant's exhibits 27, 28, 29, and 39). Up until now the Plaintiff has not sought to litigate the issue. Mr. LeBlanc testified that it was "not uncommon" to have commercial development along the roadway and residential areas behind it (see Defendant's Exhibit 66). He opined that the property was "reasonable as zoned". Certainly the various bodies acting upon the rezoning petitions concurred, including the petitions which were filed long before anyone even hinted at a big-box store being placed on the property. Despite Plaintiff's assertions regarding individual Board members' alleged threatening comments (a fact vehemently and "categorically" denied by former Supervisor Lamar Frederick) or to consider litigation, when the Defendant spoke officially through its open meetings and minutes the final decision was to deny the request to modify the area zoned R-2A (Defendant's Exhibits 98).

The allegation that the Defendant may have "bowed to the will of a minority" portion of the population, even if true, is not fatal. The Michigan Court of Appeals has found it to be appropriate to consider "public opposition". *A & B Enterprises v Madison Township,* 197 Mich App 160, 164 (1992). Our system of government is based upon a "representative democracy", and one would hope that any legislative body would consider the wishes of their constituents.

Regarding "equal protection" the Defendant correctly contends that "similar circumstances be treated similarly". *Dowerk v Oxford Township,* 233 Mich App 62, 73 (1998). The Plaintiff has the burden of proving the Defendant's actions were "arbitrary".

Crego v Coleman, 463 Mich 248, 259-260 (2000). The Defendant focuses on the fact that the subject parcel is the only 50-acre parcel zoned C-3, and that other C-3 parcels may not be the most optimal places to develop new commercial property but they are available. It is clear to this Court that there are a number of C-3 parcels available to a developer for a big-box store, including the Plaintiff's parcel. One must not lose sight of the issue at hand, to wit: the denial of the rezoning petitions as it affects the R-2A portion of the Plaintiff's property. It has not been determined that a big-box store cannot be located along Lewis Avenue where the Plaintiff's property remains zoned as C-2 and C-3. Proximity of competing land uses is a very important issue for a township to consider. *Belle River, supra* at 132. The Court finds that the Defendant considered "proximity" issues and more.

Furthermore, there was no disparate treatment when compared to the situation involving Magdalena's Restaurant. The restaurant and surrounding area were already established. It appears the restaurant owner wanted to modify his commercial building and it was discovered to be on a residential lot. It is true the Defendant allowed the property owner to petition to have the parcel rezoned. In the instant case, the Indian Acres subdivision was well established before the construction of the Plaintiff's automobile dealership. Since the very beginning the western-most portion of the property was zoned "residential". The Defendant has remained consistent in maintaining this classification. The Court cannot find the two situations to be similar, and if one were to so find, the Defendant has demonstrated a legitimate governmental purpose in maintaining the buffer between the Plaintiff's property and Indian Acres. *Crego, supra* at 259-260. If someone wishes to develop the R-2A portion as residential, they do so with the knowledge of the immediate adjacent commercial use.

Lastly, as will be noted herein, the Plaintiff is not precluded from the use of his property as it remains viable and marketable. *Dimmitt, supra* at 433; (Plaintiff's Exhibit 83, page 2, et seq., and Defendant's Exhibit 99, page 2, et seq.). Thus the Defendant has not violated the well-established provisions of the *Kropf* decision. *Kropf, supra* at 339.

For all of the foregoing reasons this Court would find that the Plaintiff has not met his burden of demonstrating there is no legitimate interest being advanced by the Defendant. Furthermore, the Plaintiff has not met his burden that the Defendant's

decisions were "arbitrary or capricious". The Court would find the Defendant to be in compliance with the Township Zoning Act ("use of land shall be situated in appropriate locations and relationships"), MCL 125.271 (since replaced by MCL 125.3101, et seq.).

D. Exclusionary Zoning.

1. Plaintiff's arguments.

The Plaintiff acknowledged the "competing opinions as to whether these other sites in the township would be suitable for large-scale retail". He points to the testimony of Mr. LeBlanc and his criticism of the L-shaped property across the street from the Plaintiff's property. He emphasized the scathing criticism of Mr. Steven Lennex and his referral to the corridor along Telegraph Road as the "armpit of Bedford Township". The Plaintiff's parcel is more ideal as it has access to two roads, access to sewer and water, near the populated area, and "provided there's enough screening for the Indian Acres folks, this site is a good spot". Mr. Birchler is of the opinion that a Wal-Mart store would "not be permitted in a C-2 zone" (Plaintiff's Exhibit 23).

The Plaintiff also focused on the "demonstrated need" pointing to the lack of stores for local citizens "to buy clothes, electronics, appliances, [and] furniture". The Plaintiff is critical of the Defendant's reliance on the Toledo, Ohio commercial area to service these needs.

2. Defendant's arguments.

The Defendant contends "there isn't a total exclusion" as even Mr. Birchler testified "you can put a Wal-Mart right on the C-3" portion of the property. Furthermore, the location of a big-box store can also be placed on a C-2 parcel and the Plaintiff totally ignores these parcels. Most importantly, "this property is unlike any other in the township because it is next to Indian Acres". The "adjacency" issue together with "compatibility" issues warranted a denial of the Plaintiff's petitions for rezoning (see Defendant's Exhibit 11). Finally, the "architectural" ordinances are "irrelevant" in a zoning decision as it is a "site plan decision". Therefore, given there are other big-box stores in the township "the Master Plan prohibits nothing". Simply stated, a big-box store "is not appropriate for this location".

The Defendant also addressed the Court's references to case law in the written decision denying the Motion for Directed Verdict. The Defendant would apply the case of *Earl Anspaugh v Imlay Township,* No. 262492 (December 5, 2006), as a finding against "total exclusion" as long as the proposed "use exists in the township or within close proximity". The Defendant contends that the reference to the language "within the state" addresses the "need" of the local citizens. In reference to the *Landon Holdings* case the Defendant submits "it is not exclusionary zoning to designate a classification, even though you don't have any land" as it is "reasonable to await someone to come in and ask for a rezoning".

3. Conclusion.

The Defendant contends that the zoning map reflects C-3 parcels throughout the township. The Defendant acknowledges the Plaintiff's argument of the alleged exclusion of big-box stores and of relying upon Toledo, Ohio, for the placement of big-box stores to serve the township residents. The Defendant relies upon the case of *Guy v Brandon Township,* 181 Mich App 775, 785, 786 (1990). In the *Guy* case the Michigan Court of Appeals held,

> "The total prohibition requirement of this statute [MCL 125.297a] is not satisfied if the use sought by the land owner otherwise occurs within the township boundaries or within close geographical proximity". (Emphasis added); *Id.,* at 785-786.

The Defendant also relies upon the criteria outlined in the case of *Adams Outdoor Advertising v Holland,* 463 Mich 675, 684 (2000), wherein the Michigan Supreme Court held,

> "Accordingly, to sustain a claim that a city engaged in unlawful exclusionary zoning under section 12 of the CVZA, one must show that (1) the challenged ordinance section has the effect of totally prohibiting the establishment of the land use sought within the city or village, (2) there is a demonstrated need for the land use within the city or village or the surrounding area, (3) a location exists within the city or village where the use would be appropriate and (4) the use would be lawful, otherwise."

The Plaintiff states that the challenged ordinance "need not completely exclude a use on its face to violate" the Township Zoning Act, MCL 125.297a if it 'make[s] the use a practical impossibility'." *Landon Holdings, supra* at 168. Furthermore, that repeated

denials of similar zoning requests might substantiate a pattern (i.e., denial of earlier proposed Meijer store, and the prior refusal to rezone the Whitman property) and thereby constitute exclusionary zoning. *Smookler v Wheatfield Twp,* 394 Mich 574, 579 (1975); see *Landon Holdings, supra* at 169.

The Plaintiff relies upon the testimony of Steven Lennex and David Birchler in dismissing the utility of the other C-3 parcels (the L-shaped lot across the street from the Whitman property and the properties along LaVoy Road and Telegraph Road). Furthermore, the Plaintiff has consistently indicated an interest in achieving the maximum use of the property and to not sell it piecemeal, or to replace the current automobile dealership with a big-box retailer. The Plaintiff also points to the earlier Master Plans and the testimony of Mr. Birchler to demonstrate the Defendant's previous recognition of large-scale retail stores within the township.

The Township Zoning Act, MCL 125.297a [now replaced by MCL 125.31702(1)] provides a township may not totally eliminate a use "in the presence of a demonstrated need for that land use". To the contrary of the *Guy* case relied upon by the Defendant is the case of *Anspaugh*, wherein the Michigan Court of Appeals held that by creating a commercial classification the township acknowledged a "demonstrated need". The Court noted the former Township Rural Zoning Act, MCL 125.297a, included language that the "demonstrated need" must be,

> "within either the township or surrounding area within the state unless there is no location within the township where the use may be appropriately located . . ." (emphasis added).

Furthermore,

> "A zoning ordinance that creates a classification but does not apply that classification to any land is exclusionary on its face. (Citation omitted). *Id.*

Therefore, this Court would continue to find that one may argue that it is inappropriate to rely upon out-of-state resources in meeting the "demonstrated need" of a community. To this extent the Court would disagree with the Defendant's interpretation of the *Anspaugh* case. It is recognized that expert witnesses disagree with the Court's strict interpretation of the *Anspaugh* case as Mr. LeBlanc opined that one should consider the "northern border of Ohio" whose stores would have a radius of "3-5 miles and would

address 90% of the [township's] population". Despite this opinion, the Court would strictly construe the *Anspaugh* case. Nonetheless the Plaintiff may have the opportunity to develop a big-box store on his property, albeit different than as previously proposed (i.e., he may develop it as Mr. Birchler claims he may place a big-box store within the current zoning scheme of the C-3 portion of his property). Furthermore, any big-box developers have other parcels of land to consider as previously mentioned herein. Mr. Birchler also testified that despite the constraints on the other C-3 parcels they were sufficient for a big-box store. Therefore, the Court cannot find that the Defendant's ordinance, Master Plan, or adverse actions on the Plaintiff's petitions for rezoning are "exclusionary".

Ms. Johnston indicated that the Master Plan "may not preclude a big-box retailer but does not support it" supports the argument of "exclusionary" action by the Defendant. This evidence is not in and of itself conclusive, nor does it stand alone. Once again, Mr. Birchler is of the opinion that the Plaintiff could build a big-box store on the very spot of the automobile dealership. The Plaintiff's own expert testimony could support a finding in favor of the Defendant. Furthermore, the actions of the Defendant clearly demonstrates the consideration of all available information and that the Master Plan is in fact only a "guide". Mr. LeBlanc supports this finding as he testified that the Master Plan is a "long-range guide, a blueprint for future growth of the community" and may serve as the "foundation for zoning" but it cannot "in and of itself preclude" a change to zoning.

For all of the foregoing reasons the Court would find the Defendant's actions are within the confines of the *Adams* case, and that the actions of the Defendant do not constitute "exclusionary zoning".

IV. Judgment.

It is unfortunate that Mr. Jon Whitman has suffered some indignities in this litigation. The Court would take judicial notice that the Plaintiff has been a good corporate citizen. It is discouraging that unidentified individuals would trespass on his land and criminally deface the real estate signs of Mr. Steven Lennex (Defendant's Exhibits 62, 63). Disagreements can and will be resolved through the legal process.

For the reasons stated herein, the Court would render Judgment in favor of the Defendant, with the exception of the amendment to the zoning map on June 13, 2001 (Defendant's Exhibit 52).

WHEREFORE, IT IS FURTHER ORDERED that based upon said Memorandum of Law, Judgment shall enter in favor of the Defendant. To the extent the Plaintiff's Complaint may be construed to include compliance with the Township Zoning Act regarding the amendment of the zoning map, the Court directs the Defendant to appropriately amend its zoning map in compliance with Michigan law.

Date: February 2, 2007

Hon. Joseph A. Costello, Jr. (P33769)
38th Circuit Court
Monroe, Michigan