



THE SMART GROWTH CYCLE Ann Arbor's Lower Town Project vs. East Lansing's City Center II

BY KURT BOUWHUIS

SMART GROWTH CAN be viewed as any combination of strategies, planning, policies, legislation, regulations or procedures that attempt to manage the growth of a community. The following is just one example of a typical set of goals for smart growth policies, according to smartgrowthamerica.org:

- Neighborhood livability.
- Better access, less traffic.
- Thriving cities, suburbs and towns.
- Shared benefits.
- Lower costs, lower taxes.
- Keeping open space open.

Although these are all admirable goals, there tends to be a disconnect between the desired ends and what actually is achieved by smart growth policy. This essay will provide key information about two specific smart growth projects in Michigan, and help trace each project's development. These two projects include Ann Arbor's Lower Town Project and East Lansing's City Center II.

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AP PHOTO

Governor Is Right to Call for Returning Wetland Permitting to Feds

BY RUSS HARDING | Gov. Jennifer Granholm made the right policy call in announcing her decision to return wetland permitting to the federal government.

The announcement was met with heavy applause as she delivered her State of the State address. Since that time, however, there has been much criticism of the proposal from environmental groups and members of both parties in the Legislature, including Sen. Patty Birkholz, R-Saugatuck Township, chair of the Senate Natural Resource and Environment Committee. Opponents claim that wetlands in the state will go unprotected, but estimates of potentially unprotected

wetland acreage are as unreliable as the state's wetland inventory is inaccurate.

Michigan was the first state to take control of federal wetland permitting when it assumed the program in 1984 — New Jersey is the only other state that operates the federal program within its borders. The rationale for taking over the program was sound then, but much has changed since 1984. The expected benefits from operating the federal program never materialized:

Funding — The feds promised funding, but Michigan currently spends more than \$2 million per year in tax dollars to operate the program.

Autonomy — State officials reasoned that they would make better decisions than their federal counterparts. In reality, federal

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A Heroic Victory The McCarter Wetland Dispute

BY KURT BOUWHUIS

HOWARD MCCARTER IS the third generation of his family to live on a four-acre parcel located in Washtenaw County's Webster Township. He and his wife Amy faced losing that homestead in a battle that is becoming all too

familiar in Michigan — a legal dispute with the Department of Environmental Quality over wetland regulation.

The McCarters' story, recounted in the Sept. 30, 2008, Michigan Farm News (and the basis for much of the story here), begins in 1979, when an excavation company was hired to dig out a drainage area. The material removed was dispersed in a way that caused runoff from the neighboring farm to be diverted onto the McCarters' property.

Howard McCarter's father subsequently joined with three other neighbors to have a ditch dredged out on the McCarters' property. The ditch resolved most of the drainage issues, and is wet only after a heavy rain.

The ditch divides the McCarters' property and impedes the use of their tractor, so they decided to

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Destroying the Environment to Save It The Saga of the Delenes

BY DR. STEPHEN DRESCH

THIRTY YEARS AGO, a native of Michigan's Upper Peninsula had a vision. On a large tract of land in the UP's Baraga County, he would create a dynamic system of ponds and wet-

lands that would attract and support a rich array of waterfowl and other wildlife. The land Richard Delene and his wife Nancy chose had highly acidic soil supporting a largely valueless scrub forest and little wildlife.

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One view of the wetlands created by Richard Delene. Delene used to create projects just like this one as a contractor-for-profit. Now he is under orders from the state to destroy the one he has created at his own expense. The cabin where the Delenes had hoped to commune with nature in their retirement years is in the background.

“I appreciate your efforts on behalf of the people of Michigan and encourage you to continue to make Michigan a great state.” – Francis Goetz

“Keep up the good work.” – Bonnie Friend

“Everyone on the list looks forward to keeping up with what the Mackinac Center is doing to promote and preserve property rights in the state of Michigan. This work must be done, by all of us, before it’s too late.”

– Cheryl Walton and 25 property rights advocates

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Whether you are a new reader of The Refuge or not, we would like to thank you for taking the time to look over this publication. The Mackinac Center’s Property Rights Network created The Refuge to inform Michigan residents about property rights issues around the state.

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The nonpartisan Property Rights Network is a statewide organization established to protect and advance property rights in Michigan by helping the state’s property owners. The Network’s goals are to elevate public awareness of property rights and how to protect them;

encourage policymakers to respect property rights when crafting laws and regulations; and organize property owners across Michigan into a powerful statewide coalition.

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MCCARTER

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create a culvert in 2005. Because they live on agricultural land, they saw no problem with the culvert's placement. They used the leftover dirt from digging out the ditch to fill around the three-foot diameter culvert.

In the spring of 2006, Washtenaw County notified the McCarters that they needed a soil erosion permit for the culvert. The McCarters obtained the permit only to discover that they needed an additional permit from the Michigan Department of Environmental Quality. They applied for the DEQ permit and were denied. The DEQ inspected the site, and found that the McCarters had placed fill on 0.06 acres of a regulated wetland and had built a culvert in a "regulated stream."

In February 2007, the McCarters received a letter stating that they had to remove the culvert by the following June. At the time, the McCarters had an environmental lawyer who urged them to comply with the DEQ, saying it would be difficult to beat the DEQ in court. After working with the lawyer, Howard McCarter observed, "I'm convinced that, for the most part, environmental lawyers are not on our side."

The McCarters did not comply with the DEQ's request. Shortly after, in January 2008, the Jackson district office of the DEQ filed criminal charges through the local prosecutor. The McCarters faced up to \$11.5 million in fines, assessed at \$12,500 per day since the culvert went in, and an additional \$2,500 fine each for violating regulated wetlands. This left the McCarters in a dilemma. If they fought this case in court with a lawyer, it would cost them around \$50,000 whether they won or lost. Essentially, the McCarters would have to sell their property to pay the lawyer fees. This left them with only one way to keep their property: represent themselves in a case against the DEQ.

They chose to do so and Reuel Long, Amy McCarter's father, helped them with the case. The McCarters began spending most of their free time studying law and preparing for court.

The court date was set for May 8, 2008. The McCarters were charged on two counts: depositing or permitting the placing of fill material in a wetland without a permit, and constructing or enlarging a structure on the bottomland of a stream without a permit.

In response to the first charge, the McCarters argued that there was no regulated wetland because there was no stream nearby — a precondition of DEQ jurisdiction under state statute. If there was no stream in the area, they observed, then the wetland was too small to regulate.

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They also claimed that even if the wetland were regulated, the DEQ's environmental quality analyst did not adequately demonstrate there was fill in the wetland. The analyst used photos taken on a single day (as well as some subsequent sketches) as evidence that fill had been placed on the wetland in the past. The McCarters argued that it is impossible to use a photo taken on a single day, with no past photos to compare to, as evidence of fill.

The McCarters contested the second count by stating that agricultural drains like theirs are exempt from permit requirements. They also argued once again that there was no stream nearby, as the statute required, but rather a private agricultural drainage ditch that is dry for most of the year. The McCarters believed that under the DEQ's overbroad definition of a stream, any agricultural ditch could be considered a stream.

The DEQ argued on the first count that there is a stream, not an agricultural ditch, on the McCarters' property. The DEQ acknowledged that its analyst failed to conduct a proper dye test to determine if there was a regulated stream. The analyst also stated that he had not walked the entire length of the ditch and only inspected the property three times. The bulk of the DEQ's argument was that its analyst was the only expert to testify, and thus that his opinion trumped all others.

On the first count, the court found the McCarters' evidence more persuasive and concluded that the alleged stream is nothing more than an agricultural ditch, which was dug many years prior. Because there was no stream, the second charge was dropped as well. Against the odds, the McCarters won their case.

The DEQ could bring a civil suit against the McCarters. But the Michigan Farm News quoted a DEQ official who said the department is unlikely to do so, since the DEQ considers this case a low priority among the plethora of cases pending at the attorney general's office. The official nevertheless defended the DEQ's decision to prosecute such a minor case, telling the Farm News: "[O]ur action sends a message to small farmers that the DEQ still cares, even about the small stuff. And the message has been sent out that even though we lost, it doesn't mean we won't take someone else to court, and next time, we may win."

In an email to the Refuge, Robert McCann of the DEQ stated: "Wetland regulations are often the most difficult regulations the DEQ administers because they often have the most direct impact on Michigan's property owners. The DEQ, however, makes every effort to administer the laws passed by the Legislature in as uniform and fair way as possible."

But for property owners, the McCarters' heroic defiance is a reminder that the DEQ's interpretation of the wetland statute, while usually deferred to by the courts, contains serious flaws. With popular resolve and common sense, reason may yet prevail in Michigan wetland law. ■

RIGHT CALL

from Page One

officials continue to micromanage the program. Almost every wetland permit decision in Michigan is reviewed by the Environmental Protection Agency; the same level of scrutiny does not occur in the other 48 states.

Efficiency — This may have been true at one time, but in responding to criticism from Congress, the Army Corps of Engineers has streamlined the process by adopting nationwide general permits. (While the EPA has review authority, the Corps does the actual permitting.) The Michigan Department of Environmental Quality, however, in the last few years has moved in the opposite direction, making wetland permits more difficult or impossible to obtain for many landowners and businesses in the state. The Legislature's attempt to mandate permit adjudication timelines has been less than successful. The DEQ bureaucracy has circumvented legislative intent by routinely declaring wetland permit applications incomplete, thereby resetting the permit time clock.

It is curious that state environmental groups are now lobbying to keep the state in the business of issuing federal wetland

permits. The Michigan Environmental Council in 1997 petitioned the EPA to take the wetland delegation back from the state, claiming the Corps would do a better job.

The \$2 million that could be saved by returning the program is helpful, but the largest benefit is regulatory certainty for job providers in Michigan. Returning the program to the federal level will ensure wetland permit applicants will be subject to the same set of rules as the rest of the nation. The definition of wetlands used by the Corps is easier to understand than state law and provides more certainty for developers who are used to complying with federal requirements in the other states.

Currently in Michigan an area is a wetland if the DEQ considers it to be a wetland. The lack of regulatory certainty in Michigan is chasing jobs to other states. Hardly a week goes by when I do not receive a call from a frustrated landowner, farmer or business owner who has given up on investing in Michigan due to the state's overzealous regulation of wetlands. Relying on the Corps for wetland permitting is not a panacea, but it is a step in the right direction. ■

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BY PATRICK WRIGHT

EMINENT DOMAIN HAS been called the “despotic power” for good reason. The government is given the power to force an owner to “sell” his or her property on only the conditions that the land be put to a “public use” and that “just compensation” is paid. While cases like *Kelo v. New London*, where private property was allowed to be taken for “economic development,” show that the federal courts have watered down the public-use requirement, at least those property owners who are ousted from possession of their property are paid for it. That is often not the case with regulatory takings, where the owner retains possession of the land, but governmental restrictions limit its use.

The U.S. Supreme Court has recognized that the rationale behind the Fifth Amendment’s Taking Clause was to bar “Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” But the Supreme Court has recognized that its “regulatory takings jurisprudence cannot be characterized as unified,” which has hampered achievement of this goal.

In 1922, the Supreme Court began its examination of regulatory takings by stating “if regulation goes too far it will be recognized as a taking.” It is once a taking has occurred that the courts scrutinize the public-use question and mandate the property be paid for. But the case law developed by the Supreme Court often prevents

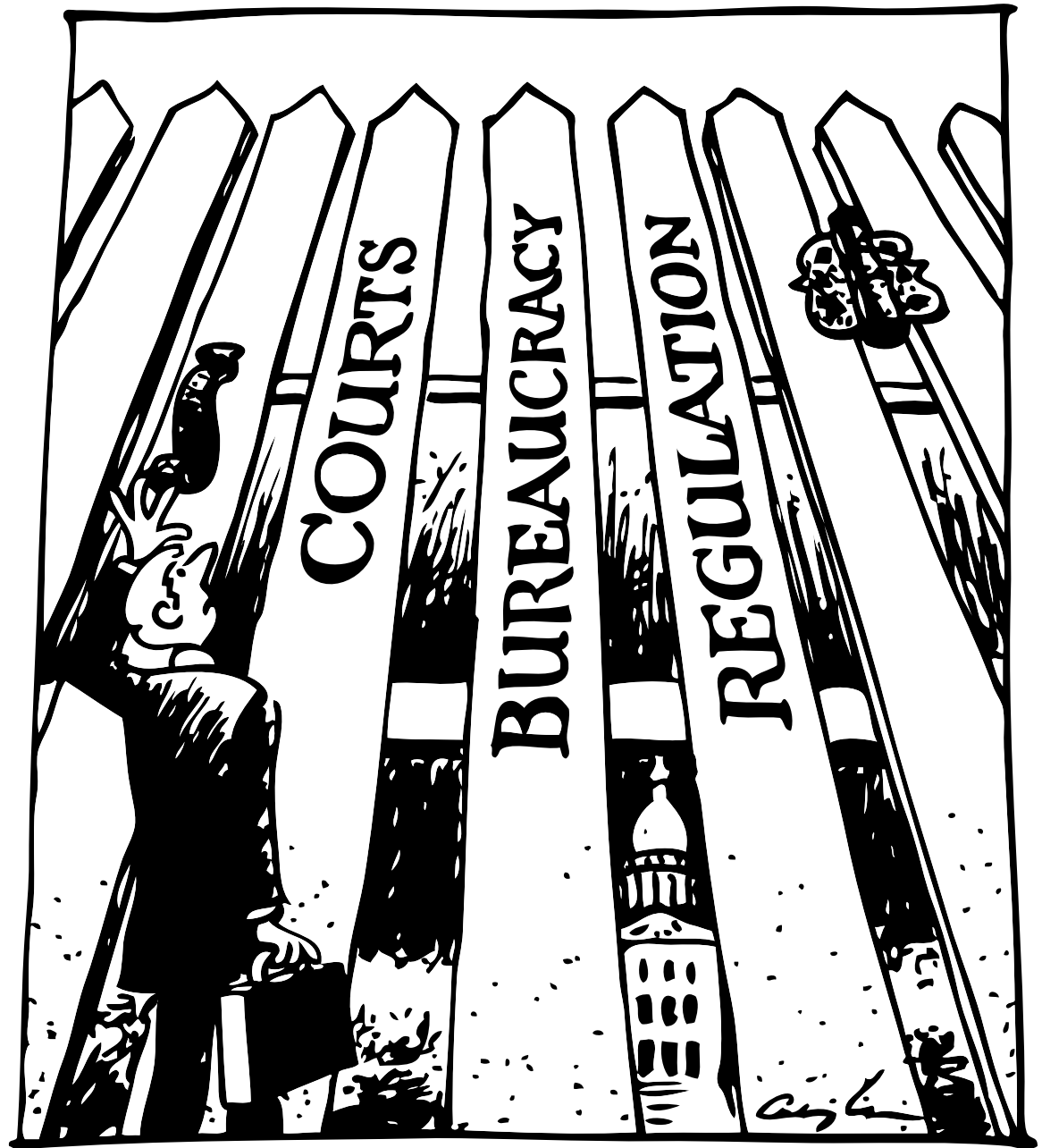
a finding of a regulatory taking in the first instance.

There are two main cases related to regulatory takings, *Penn Central Transportation Company v. New York* and *Lucas v. South Carolina Coastal Council*. An examination of these cases will show the difficulties a typical owner faced with a burdensome regulation has.

Penn Central involved New York City’s historical landmark law. The six-member majority opinion began by noting that historical preservation laws protect “structures with special historic, cultural, or architectural significance [and] enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today.” The city justified the law as: (1) fostering civic pride in “noble accomplishments of the past”; (2) enhancing the city’s value to tourists; (3) supporting and stimulating business and industry; (4) strengthening the city’s economy; and (5) promoting the use of historical landmarks for “the education, pleasure and welfare of the people of the city.”

The majority discussed how historic preservation laws typically work:

The New York City law is typical of many urban landmark laws in that its primary method of achieving its goals is not by acquisitions of historic properties, but rather by involving public



WELCOME TO MICHIGAN

entities in land-use decisions affecting these properties and providing services, standards, controls, and incentives that will encourage preservation by private owners and users. While the law does place special restrictions on landmark properties as a necessary feature to the attainment of its larger objectives, the major theme of the law is to ensure the owners of any such properties both a “reasonable return” on their investments and maximum latitude to use their parcels for

purposes not inconsistent with the preservation goals.

The majority noted that most municipalities do not try to either buy or condemn the property to be preserved:

The consensus is that widespread public ownership of historic properties in urban settings is neither feasible nor wise. Public ownership reduces the tax base, burdens the public budget with costs of acquisitions and maintenance, and results in the preservation of public buildings as

museums and similar facilities, rather than as economically productive features of the urban scene.

The city’s law initially required a city commission to designate a building as a historical landmark. Such a designation “results in restrictions upon the property owner’s options concerning use of the landmark site,” such as requiring the owner to keep the exterior in good repair and requiring city approval of any change to exterior architectural features, which thereby “ensur[es] that decisions concerning construction

on the landmark site are made with due consideration of both the public interest in the maintenance of the structure and the landowner's interest in use of the property."

The building at issue was Grand Central Station. Its original plans called for a 20-story building that was never constructed. The owners wanted to construct a building with around 50 floors over the station. The majority first rejected any argument based on diminution of value (the addition of the skyscraper would have been worth millions annually) noting that the court's prior cases had found no takings occurred where up to 88 percent of the value of a property was lost due to a zoning regulation. It also held that the fact that this law differed from zoning laws in that it could single out a sole building for this treatment did not cause a taking.

The majority claimed that there were situations where a land owner could recover due to a burdensome regulation. The factors to be considered included: (1) the economic impact of the regulation on the claimant; (2) the extent it has interfered with investment-backed expectations; and (3) the character of the invasion. Former Justice O'Connor later admitted that the subsidiary questions created by this test were "vexing." Some law professors have not been so kind. One declared this test as "well nigh useless" and "a disaster in terms of clarity and predictability." Another referred to it as "a confused test that can be manipulated to justify any outcome."

The test from Lucas is easier to apply. But, it only applies in rare circumstances.

In Lucas, a man purchased two beachfront lots for close to \$1 million. He planned to build homes on the lots. After his purchase, South Carolina enacted a law meant to protect its coastline. This law had the direct effect of prohibiting construction on the two lots, and led to a state court finding the properties valueless.

A six-member majority of the U.S. Supreme Court held that when a regulation makes a property entirely valueless then the owner is entitled to full compensation for the value of the property. But they admitted that there may be situations where a landowner

loses 95 percent of the value of the land due to a regulation and is then forced into the Penn Central test and gets nothing:

It is true that in at least some cases the landowner with 95 percent loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5 percent of its former value by the highway (who recovers nothing). Takings law is full of these "all-or-nothing" situations.

Thus, if the South Carolina law had left the property owner with \$50,000 of value out of his \$1 million purchase, the state might have not had to provided the owner with any compensation.

These two cases show the difficulties that face an owner seeking to bring a constitutional claim for regulatory takings. The Penn Central test is arbitrary and easily manipulated, and the facts from that case show the level of general platitudes from the legislature that the courts will defer to. Further, seeking a remedy under that case will likely lead to high legal costs as the test is so amorphous that both sides often feel the need to pursue any and all appeals. Lucas, meanwhile, only applies in rare instances.

Reform through the courts must remain an option, if only to highlight injustices as was done in Kelo. That case raised public awareness of problems with the public-use question in regard to physical takings and led to many state law changes through legislation and the initiative process. Legislation and the initiative process are the most likely avenues for fundamental regulatory takings reform at this moment. In the last five years, both Arizona and Oregon enacted regulatory takings reforms through the initiative process, although many of the Oregon reforms were watered down in a subsequent initiative. Whatever path is taken, achieving reform will not be easy. But reform is necessary to reinvigorate the property rights that are so important to a free society. ■

CITY CENTER *from Page One*

ANN ARBOR'S LOWER TOWN PROJECT	EAST LANSINGS CITY CENTER II
Ann Arbor's Lower Town Project is a redevelopment project that replaces a vacant shopping center and a handful of other old commercial buildings on 7.3 acres at the southeast corner of Plymouth and Maiden Lane, kitty corner from the Northside and thrift store. The project features seven buildings that will include residential, retail, medical and office space in a walkable, urban setting. There will be upscale residential condominiums, commercial retail space, office space, as well as a parking structure. This project will complement the nearby University of Michigan Hospital and Lower Town district. (www.metromodemedia.com/devnews/AALowerTown0029.aspx)	The proposed 5.46-acre project includes a 10-story, mixed-use building at the corner of Grand River Avenue and Abbot Road, which will include residential units, retail, restaurant and office space, along with a boutique hotel, public exhibition space and a performing arts theater. To the north would be a five-story, mixed-use building with retail and restaurant space on the first floor and residential units on the upper floors. Along Evergreen Avenue, a parking structure is proposed to serve the development. An overhead skywalk is proposed to connect the buildings along Abbot Road to the parking structure. To the west of the parking structure is a four-story residential building. The last building being proposed includes nine townhouses backing up to Valley Court Park. (www.cityofeastlansing.com/Home/Departments/PlanningDevelopment/MajorInitiatives/CityCenterII/)
The Lower Town Project was launched in 1999. In 2003, The City of Ann Arbor approved the Lower Town Project.	The East Lansing City Council approved the application from CADA Investment Group, LLC for the project known at City Center II on June 17, 2008.
The total amount of funding necessary for the Lower Town project was \$210 million.	By August 27, 2008, the City Center II received \$57.8 million in state aid through tax credits and grants.
The project appeared to be running smoothly until a check for 2007 property taxes totaling \$45,157.98 on the Lower Town project bounced.	On Sept. 2, 2008, it was announced that construction on the East Lansing City Center II would begin in the spring of 2009.
Multiple dates for financing were set in 2008 to secure debt of more than \$1.3 million.	It was announced that the City Center II developer had secured a major loan for the project on Sept. 24, 2008.
By September Sept. 11, 2008 the Lower Town project was on the verge of closing on a construction loan. (http://www.mlive.com/businessreview/annarbor/index.ssf/2008/09/e_lansings_strathmore_developm.html)	On Sept. 30, 2008, it was announced that construction was to begin in late 2008 on the City Center II building designed to house a major "boutique" hotel.
Several avenues for funding were tried, including an attempt to secure funding from a labor union life insurance company for the entire \$170 million project on September Sept. 18, 2008.	The City Center II developer was to first present financing plans Oct. 1, 2008, but missed the deadline.
On the same date, the Lower Town developer announced that funding for each building was being pursued separately.	The second deadline was set to Jan. 1, 2009, then to April 1, 2009.
The announcement of the pursuit of several financing sources was delivered on February 9, 2009.	The most recent deadline for submission of financing plans for City center II is now July 1, 2009.
By this point, the total amount of state funding lost was around \$1 million.	The estimated amount of money being sought in the courts by creditors due to the financial difficulty currently faced by this developer is \$50 million.
On March 15, 2009, the Lower Town developer announced a continuation in the pursuit of funding.	

Both projects are in different stages of development, and offer valuable insights about the typical development of Smart Growth projects.

It would appear as though there is a typical pattern of development that arises amongst smart growth projects. Unfortunately, the bulk of the problems for these projects may still lie ahead. As Russ Harding, director of the Property Rights Network, says, "No matter how much smart growth is extolled as the preferred land-use policy, it will not succeed. Smart growth suffers from the same fatal flaw that plagues all central planning: a misguided belief that the planners somehow know what choices people

should make and that people will make those 'correct' choices if the planners institute the proper incentives." Time will tell whether

or not these projects are a success, and PRN will continue to keep you updated in future issues of The Refuge. ■

Phil Bellfy, Ph.D. is a Professor at Michigan State University, East Lansing, Michigan

East Lansing officials said they were not concerned about the City Center II developer's ability to secure funding from the U.S. Department of Housing and Urban Development for a significant portion of this \$125 million project.

When HUD was contacted by Phil Bellfy, he was told that HUD had "no official involvement [in the project], as [HUD had] yet to receive an application" from the developer.

Additionally, Bellfy was told by HUD that it would conduct extensive credit checks

and financial reviews of the developer, researching all "liens and claims and judgments. A negative finding in any of these items is cause for rejection of an applicant."

Through Bellfy's research, he discovered that the developer faces liens, claims or judgments totaling more than \$28 million.

From a May 8, 2009, article featured in the Lansing State Journal

<http://www.lansingstatejournal.com/article/20090508/OPINION02/905080315/1087/OPINION02#pluckcomments>

Property Rights and Prosperity

BY KURT BOUWHUIS

THERE HAS BEEN a strong connection between private property rights and prosperity throughout history. As a nation obtains more private property rights, it also obtains higher degrees of prosperity. There are three fundamental reasons for this relationship. Private property rights:

- Lower the cost of self-defense
- Reduce uncertainty
- Allow individuals to reveal their preferences through trade.

The first key benefit to a system of private property rights is that it reduces the cost of self-defense. In most cases, a central authority places high costs on those who violate property law. For example, if someone steals your car, a central authority will send police to conduct an investigation. If the criminal is caught, he/she will be brought to court. If proven guilty, the criminal will be forced to pay a fine or serve jail time. This system of private property rights allows you to spend less time protecting your car and more time being productive.

In the absence of a system of private property rights, self-defense is much more costly. Suppose you lived in a place with no private property rights enforcement. You would have to protect all your property yourself, and constantly waste time keeping

that property safe. A robber could easily hit you over the head and take everything, leaving you with no way to recover the stolen property.

Under such circumstances, individuals would not produce more than they could defend by themselves. Additionally, there would be limited trust amongst individuals, which prohibits productive and cooperative behavior such as specialization and the division of labor. Entrepreneurs would not be able to trust others in production or trade, as workers could easily steal goods with little or no consequence.

The second key benefit of a system of private property rights is that it reduces uncertainty. This concept ties into the first and helps increase the productive capacity of each individual. Uncertainty is reduced because individuals know that their property will be stolen less on average, and that there is a higher probability of receiving compensation for lost property. Under these circumstances, individuals are willing to own more things, which enhances trade opportunities and offers incentives for entrepreneurs to begin organizing resources.

The third key benefit to a system of private property rights is that it allows for individuals to reveal their preferences through trade. If you are not allowed to own anything, it would

be impossible to trade. If individuals are not trading, it would be difficult to know what those particular individuals desire.

For example, under a system of private property rights, you are allowed to voluntarily trade your labor for a wage. Once you begin earning a wage, you are free to spend the earnings on whatever you desire. If you were not allowed to own property, on the other hand, you would not be able to go to a market and trade things you value less for things you value more. Under these circumstances, it would be difficult for anyone to know what to produce for you or anyone else, since preferences would not be expressed through trade.

Eventually, the preferences of every individual in society evolve into prices that naturally emerge in a market. Prices offer valuable information to all those trading in the market. A high price signals to producers to produce more and consumers to consume less, which prevents a shortage. A high price also signals to producers to search for cheaper substitutes, which guides producers to use each resource to its most valued use. When prices fall, producers produce less, and consumers consume more to prevent a surplus. Additionally, a low price attracts producers to use the good as a substitute to any material they are currently using.

Private property rights are essential to the development of a prosperous economy. The system allows individuals to pursue their

own goals with minimal interference from external factors. As private property rights are eroded, the individual becomes more restricted, which makes it harder for individuals to achieve their respective goals.

The state of Michigan is a showcase example, as additional regulations and taxes restrict individuals from using their property in ways they see best. ■

Guest Editorial

The Course of Planning: Unexplored Consequences

BY DON HAMILTON

LAND-USE PLANNING, PERHAPS even more than politics, is a profession in which courses of action are proposed without consideration of potential negative outcomes. For example, many contemporary urban planners subscribe to such fads as “Smart Growth” and “New Urbanism,” among others, and presume that a citizenry is best served by what is, in effect, social engineering rather than the spontaneous order of a free society.

Unfortunately, these new planning orthodoxies are as soundly based on careful reflection and consideration of all their possible consequences as urban renewal was when it began destroying neighborhoods and downtowns 50 years ago.

Planners seldom resist the urge of social engineering, which generally leads to a rush for implementation of the next quick fix. One problem with this approach, however, is that the plans implemented have never been tested before, which is no way to test planning theories. Unfortunately, the citizens subjected to these experiments are

often not voluntary nor are the results predictable or satisfactory.

Local zoning ordinances should feature designs that are beneficial to their specific communities, rather than contain a set of rules that mandate untested theoretical standards. Additionally, we should remember that although it is easy to create and promulgate new ordinances — they will be enforced, good or bad, and it is vastly more difficult to extinguish unwanted rules and regulations than to create them.

From my personal experience, what members of my profession lack is humility and caution. Given the relative lack of success of land-use planners, we might take Calvin Coolidge’s advice to the Massachusetts Senate in 1914: “Don’t hesitate to be as revolutionary as science. Don’t hesitate to be as reactionary as the multiplication table. Don’t hurry to legislate. Give administration a chance to catch up with legislation.” ■

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The Refuge

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DELENES *from Page One*

Delene earned a living as a “dirt contractor” who specialized in preparing building sites, constructing roads and implementing “wetlands mitigation projects” for state agencies in Michigan and Wisconsin. (Wetland mitigation projects were designed to construct wetlands in one area to offset “natural” wetlands that were lost due to state road or other construction.) Ironically, many of the projects Delene put together included the creation of the kinds of ponds he would create on his own land — ponds state officials would order him to destroy years later.

Delene designed each pond to have at least one island to ensure the safety of migratory waterfowl. Natural predators, such as the fox, are less likely to chase after ducks safely ensconced on an isle with 360-degree views.

Over a 15-year period, the Delenes accumulated 2,500 acres of land. By the mid-1980s, Richard had begun a project he knew would occupy him for the rest of his life. With permits from the U.S. Army Corps of Engineers, which then had authority within Michigan to administer the federal Clean Water Act, he began construction of three ponds, removing the thick mat of decaying vegetation that trapped the water below the dry, almost arid surface. He also built a two-story log home, nestled in the trees near one of the ponds.

By the spring of 1991, Delene was prepared to move forward with the more ambitious phases of his project, including construction of a 90-acre shallow pond to provide nesting habitat for waterfowl. He applied for permits to the Michigan Department of Natural Resources, which had acquired permitting authority under a compact between the state of Michigan and U.S. Environmental Protection Agency.

And he waited. When the statutory 90-day period for action by the DNR had passed, his local attorney advised him that the permits had been awarded by act of law by default because the time had run out. State law says that if a permit is not denied within 90 days, then it is awarded by default (or by act of law). So, in the fall of 1990, Richard Delene began construction.

A year later the state of Michigan issued a cease-and-desist order, demanding that he halt the project. A year after that, in November 1992, the DNR filed suit in Lansing, charging Delene with violating the state’s Wetlands Protection Act and numerous other statutes.

Because the DNR filed a civil suit as opposed to a criminal suit, Delene had no right to be judged by a jury of his peers. In addition, the action was brought not in Baraga County, but in Lansing, 500 miles from Delene’s home. Because Delene and his local lawyer could not afford the expense and time associated with travel to the Lansing court, Delene was forced to retain a Lansing-area lawyer with whom he had no previous relationship. Unfortunately, despite reminders by Delene and his UP lawyer, this new lawyer allegedly failed to file the required reply to the complaint within the time permitted and Delene was found guilty by default.

Almost a year passed before Delene was able to find another Lansing attorney to take over his case. In the meantime, the court issued a bench warrant for his arrest for violating court orders of which he said he was unaware. The Delenes fled the state to avoid arrest. Only after his new attorney appeared in court was the bench warrant canceled, permitting the Delenes to return to Michigan.

To pay their legal bills, the Delenes, by no means wealthy, were reduced to selling logging rights to the small portions of their land that had timber. In other words, in the name of protecting natural habitat, the government had forced a family concerned with such protection to alter the natural habitat.

Delene had ample evidence to present in his defense. Whitewater Associates, a consulting firm highly respected by environmental groups in the state, had found that his project significantly enhanced the environment, including the wetlands’ environment. Civil-engineering professors at Michigan Technological University concluded that virtually all of the state’s claims of environmental damage — for example, its accusation that the Delene project had resulted



Delene designed each pond to have at least one island to ensure the safety of migratory waterfowl.

in serious sedimentation of the Sturgeon River — were entirely without foundation.

But none of this mattered. The court might have been asked to set aside the conviction-by-default and hear the case on its merits. But, the first attorney allegedly decided that the default “doesn’t mean that much,” and the second of Delene’s attorneys allegedly delayed filing the necessary motion, despite Delene’s repeated requests that he do so. When the motion to set aside the default was finally filed, the judge ruled that it was simply too late.

Shortly before the commencement of court proceedings to determine the sanctions to be imposed for Delene’s guilt-by-default, Delene’s second attorney was permitted by the court to withdraw from the case. This was significant for two reasons: first, it left Delene without representation at a critical phase of the proceeding. Second, it set the stage for the second attorney’s later suit against Delene. A third attorney was retained. Again a motion to set aside the default was denied by the court. And when the penalty hearings began, Delene’s attorney was not permitted to present witnesses who could establish that Delene was not even guilty, simply because Delene had already been adjudged guilty by default.

In the meantime, the court had again found Delene in contempt for refusing to take interim actions

demanding by the DNR, the consequences of which Delene and his advisors were convinced would be environmentally harmful.

In May 1997, the court issued its judgment. It ruled that the Delenes had to pay \$1.3 million in fines, destroy those parts of the wetlands project that had been completed, and refrain from taking any further action without the express permission of the Department of Environmental Quality (DEQ), the successor to the Department of Natural Resources.

Under the court’s judgment, Richard Delene was to retain a licensed engineer to oversee the mandated “restoration.” Delene did so, and the engineer studied the judgment and surveyed the site. He then submitted a letter of resignation to Delene’s attorney, on grounds that he did not want to be associated with an environmentally destructive project.

Financially devastated by a then eight-year battle with the state, Delene was unable to pay his lawyer, the state fines, or the cost of “restoring” his property to the sterile condition it was in when he began the project, as the state demanded.

Ironically, the Delenes’ former attorney, seeking restitution, has won a sheriff’s deed to the land on which Delene had hoped to build his own Garden of Eden. For more than two years the attorney held title to the property. Over this period, the DEQ took no action to enforce its restoration

order (that is, to return the Delenes’ wetlands to their original state).

In September 2001 the DEQ asked that the court allow the state to pursue the attorney as a defendant in its action against Delene. The state’s objective appeared to be to seize all property owned by Delene in 1992, when the state commenced its action against him. In order to accomplish this goal they must strip the attorney of his deed to the Delene property. In addition, it must take property deeded to the Delene children by their father. The state has signaled its willingness to do so.

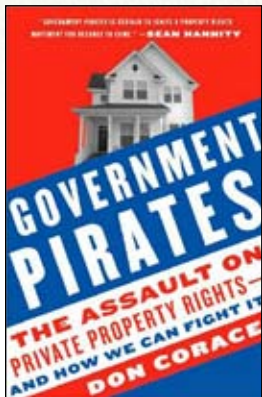
The marriage of the state’s high-frown environmental values and the perverse incentives under which it operates leads to every sort of mischief. The state needs to examine the way it enforces its environmental laws to ensure that individual property rights are accorded more respect, lest the Delene case become a rule for state action, rather than a tragic exception.

Nearly a decade later, the Delenes are still fugitives. In June 2005, Baraga County Sheriff Bob Teddy auctioned off 700 acres of the Delenes’ property to pay off the \$164,000 judgment lien placed on their property. ■

Editor’s note: This article is an edited version of a piece originally published in the winter 2002 issue of Michigan Privatization Report and was written by the late Dr. Stephen P. Dresch, a former member of the Mackinac Center’s Board of Scholars.

The Back Forty BOOK REVIEWS

Government Pirates: The Assault on Private Property Rights



GOVERNMENT PIRATES

BY DON CORACE
HARPER PAPERBACKS 2008

Reviewed by Russ Harding

DON CORACE HAS done a service to all freedom-loving Americans by detailing government abuses that threaten a bedrock

principal of a free people — the right to own and use private property — in his book “Government Pirates.” Corace takes a balanced and reasoned approach in making a case for the constitutional and historic importance of private property rights in the founding and development of our country.

Corace’s approach is more practical than ideological, and he makes a concerted effort to stick to constitutional principals. However, he recognizes there is legitimate government use of eminent domain when there is a clear public benefit. From this perspective, Corace details how the courts have expanded the definition of public benefit from such public projects as roads and schools to include economic development. Abuses of this sort

culminated in the U.S. Supreme Court *Kelo v. New London* decision. In the *Kelo* decision the Supreme Court declared that it is legally permissible for government to take property from a private owner and give it to another private party for the purpose of economic development.

The author places most of the blame for the loss of private property rights on courts that through rulings have disregarded constitutional protection of private property from government takings. While these court decisions play a large part in property rights abuses by government, there is less attention given in the book to the role of elected officials in allowing government bureaucrats to trample property rights while

pursuing their own agenda. Many state legislatures have strengthened physical takings protection, but there has been much less progress made to protect property owners from regulatory takings.

The case stories detailed in the book are both real and compelling. The detailed accounts of property owners running afoul of government regulators and planners should send a chill down the spine of any reader. The common thread running through these accounts is one of ordinary law-abiding citizens discovering that government is not an impartial, benevolent institution but rather a police power with the force of law. The outcomes of these accounts vary but the force of government is a constant.

Students of property rights will find “Government Pirates” easy to use as it is subdivided by categories of government takings such as eminent domain, zoning regulations, wetlands and endangered species.

The book should be required reading for any government official with regulatory or zoning authority. Corace has done a great service in telling the stories of real people that have been harmed by the government and makes some excellent recommendations on how to prevent these private property abuses in the future. ■

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