

"LEGAL ISSUES - an ATTORNEY WRITES"

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"PREEMPTION" and "LOCAL CONTROL"

What are "preemption" and "local control," and why should riparian property owners be concerned about these terms? Local control is the ability of local municipalities (i.e., cities, villages and townships) to regulate areas of local concern and, in effect, control their own destiny. Zoning regulations and general police power or regulatory ordinances at the local level governing land use and development have traditionally been areas subject to local control. Preemption occurs where a higher level of government (for example, the State of Michigan) decides to take away local control or to lessen the regulatory powers of local or lesser units of government (such as cities, villages and townships).

Although many Michigan residents and property owners probably do not know it, there has been a steady erosion of local control over the last few decades. There have been numerous instances where the Michigan legislature has "preempted" or taken away local zoning or ordinance powers regarding certain uses or activities. For example, by legislative fiat, local governments have lost some or all zoning and regulatory control over prisons, landfills, oil and gas wells, foster care homes, daycare centers, wetlands, gun clubs, the keeping of racing pigeons, mobile home parks, satellite dishes, telecommunication towers, music lessons in homes, and many other uses and structures.

The increasing tendency of the Michigan legislature to preempt local control and zoning regulations is peculiar given the fact that so many politicians (from both major parties) go to great lengths to tout the benefits of local control. Everyone has heard the maxim that government which is closest to the people (i.e., the lowest levels of government) governs best. Yet many of these same legislators vote time and time again to take away local authority and to place it in the hands of a government further away from the people, and usually to replace local authority with controls at the state level. A cynical view of the process would be that legislators react to lobbying by special interests groups which desire to be exempt from local ordinances. Conversely, proponents of preemption often argue that the particular use at issue (i.e., prisons, telecommunication towers, mobile home parks, etc.) is so essential to the public good, or alternately, that there is such a need for uniformity across the state, that eliminating local government control is appropriate. Unfortunately, the proponents of virtually every use can make very effective arguments that their proposed use or activity is essential or requires uniformity. Pursuant to such arguments, it would not be unexpected for many of the following groups to request exemption from local zoning: sand and gravel pit operators (such materials are only found at certain limited locations and are essential to the economy and the building trades), multi-family housing developers (there is a shortage of such housing in many areas and it is a necessary component of the housing market), high-density waterfront residential developers (everyone is deserving of a vacation spot and it is the stated public policy of the State of Michigan to maximize access to waterways), etc.

The debate about local control and preemption is presently being played out as the Michigan State Police attempt to build almost 200 very tall telecommunication towers throughout the State of Michigan. Many property owners near the proposed towers have been shocked to find out that the State Police were able to obtain a zoning exemption/preemption from the Michigan legislature and that local municipalities have virtually no say or control over such towers. Obviously, the State Police provide essential public safety services and are an outstanding organization. Furthermore, it could be argued that such towers will prove extremely helpful for dispatch and public safety purposes. Nevertheless, the proponents of local control would assert that no matter how fine or essential the proposed use or structure is, the larger issue of preserving local control is more important. If a local municipality exercises its zoning or regulatory authority unreasonably or arbitrarily, the developers or property owners involved still have recourse through the courts. Many activities and structures are essential to the public health, safety and welfare - for example, nursing homes, hospitals, churches, and grocery stores. Nevertheless, they are still subject to local reasonable zoning regulations and controls.

Even as this column was being written, two issues directly affecting local control were being debated within the state legislature. First, the tourism industry was pushing hard for state legislation which would prohibit local school boards from holding classes before Labor Day. Second, various labor groups were lobbying for legislation which would prevent any local government from requiring that municipal employees live within the municipality involved. Reasonable people could certainly differ on the merits of these proposals. Nevertheless, it is highly unlikely that more than a handful of legislators will consider the broader issue - that is, whether the concept of local control is so important that local school boards and

municipalities should retain the power to make such decisions, or whether state officials should now be able to make decisions which have traditionally been local matters.

If you are a riparian property owner, you are probably wondering "while local control might seem like a positive abstract notion, how does this affect me?" Quite simply, it is highly likely that local governments will be much more concerned about prudent zoning and planning issues, preservation of wetlands and lakes, and other matters directly affecting riparians than state officials. To put it more bluntly, if local government cannot regulate matters of interest for riparians, it is highly likely that no other level of government will do so. If riparian property owners do not keep an eye on Lansing, there is a real possibility that decisions affecting local developments and land use issues will be decided in Lansing rather than locally, or perhaps not at all.

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