STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MONROE

BEDFORD PARTNERS LLC, a Michigan Limited Liability Company,

Plaintiff,

v.

BEDFORD TOWNSHIP, a Michigan Municipal Corporation,

Defendant.

/

Case No. 05-20841-CH
Hon. Michael W. Labeau

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/

DEFENDANT'S TRIAL BRIEF

I. INTRODUCTION

This is a zoning case. Plaintiff sought to rezone approximately 80 acres from Agricultural Zoning Classification to residential. Defendant, Bedford Township, denied the rezoning. The property in question is in fact being used today as farmland. Crops are being cultivated on the land. Plaintiff makes several legal arguments regarding the denial of the rezoning from Ag, i.e. due process, equal protection and takings, but the undeniable fact is that the property has always been zoned agricultural and the property has always in fact been farmed.

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At the end of the day, this case comes down to this - can a municipality draw a line and say no? If the Township grants a rezoning request for one parcel of property in a Township section from agricultural to residential, is the Township thereafter unable to deny all subsequent rezoning requests in that Township section? Can a Township ever thereafter say no?

The answer to the above question is, of course, a Township can say no. Zoning is inherently a legislative act. The Township Board, as the legal representatives elected by the Township residents, decides how to regulate uses of property in the Township. This power is set forth in the statutory Zoning Enabling Acts and recognized in case law. Such law provides that the local legislative body has the authority to zone property within the Township in the interest of the overall public health, safety and welfare. Such authority overrides any individual property owner's desire to maximize monetary profit from a single piece of land. As long as legitimate governmental ends are served by zoning classifications and as long as property is not rendered worthless by a zoning classification, the legal authority to zone property in the overall interest of the public, health, safety and welfare is valid. The remedy for individual property owners who disagree with a particular zoning classification is the ballot box, not the courthouse. Courts do not sit as super Zoning Boards of Appeal. The fundamental principle of the separation of powers precludes as much.

The evidence in this case will show that the property in question has always been zoned agricultural, has always been used as agricultural land and is continued to be used today as farmland. Plaintiff, a limited liability company, purchased the land in question knowing its zoning classification, knowing its use and gambled on the chance that they could convince the Township to change the zoning classification to allow the plaintiff to

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combine this land with other land the plaintiff purchased at the same time and build the largest subdivision in the history of the Township, 450 homes, thereby maximizing their profit from the land. In the overall interest of the public health, safety and welfare, the Township said no. This case involves whether a Township has the ability, through its zoning powers, to maintain control over the demands on its public safety resources, its infrastructure and its very character. The defendant contends that this ability is clearly set forth in the Zoning Enabling Statute, recognized in case law and asks this court to rule in favor of the defendant dismissing the plaintiff's claims.

II. FACTS

The property in question is located in Section 14 of Bedford Township. (Defendant's proposed **Trial Exhibit 1**, Zoning Map). This is the northeast corner of the Township. This property is located in the least populated area of Bedford Township. (Defendant's proposed **Trial Exhibit 29**, Master Plan, p 22). According to SEMCOG projections, utilized by the Bedford Township Master Plan, the entire northeast corner of Bedford Township consists of six Township sections: Section 1, Section 2, Section 11, Section 12, Section 13 and Section 14. According to SEMCOG projections, the total population of this corner of the Township, all six Township sections, is only expected to grow between 2005 and 2010 by a total of 51 people. (Defendant's proposed **Trial Exhibit 29**, p 22, table 14). Virtually the entirety of these six Township sections are zoned agricultural. (Defendant's proposed **Trial Exhibit 1**).

In February 2005, plaintiff Bedford Partners LLC was created. (Defendant's proposed **Trial Exhibit 3**). It was created solely to purchase and develop the land which is the subject of this lawsuit. Bedford Partners LLC is a business venture, with all the risks which attend a land business venture. On February 22, March 10 and March 11, 2005, the

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plaintiff purchased approximately 160 acres of land in Section 14 of Bedford Township. Defendant's proposed **Trial Exhibit 2** is a map of a portion of Bedford Township. The color coded parcels are the properties purchased by the plaintiff. On March 10, 2005, the plaintiff purchased from the Albring family approximately 140 acres of property. This is the large yellow parcel depicted in Defendant's proposed **Trial Exhibit 2** and the larger pink parcel in that exhibit. The large yellow parcel, approximately 80 acres, has long been zoned R-2A. The large pink parcel has long been zoned agricultural. On February 22 and March 11, 2005, the plaintiff purchased the two smaller pink parcels, also zoned agricultural. Together this comprises approximately 160 acres of land. Plaintiffs have readily admitted that they purchased the property intending to develop it as one development - one large residential subdivision. (Defendant's proposed **Trial Exhibit 22**, deposition transcript of Ron Blank, p 39; Defendant's proposed **Trial Exhibit 23**, deposition transcript of Mark Brant, pp 8 and 21). Plaintiff Mark Brant admitted that he was fully aware that approximately one-half of the property which was purchased was zoned agricultural and would not allow the development of residential property to the density he expected. (Defendant's proposed **Trial Exhibit 23**, pp 18 and 19). Plaintiff Ron Blank testified that he was aware the zoning of the 80 acres was agricultural but he wasn't really concerned about the zoning. Mr. Blank testified that regarding whether residential homes could be built on property zoned agricultural, "What was allowed in agricultural was of little importance." (Defendant's proposed **Trial Exhibit 22**, p 40). Plaintiff intended to seek a rezoning of the pink parcels depicted on Defendant's proposed **Trial Exhibit 2**. Moreover, plaintiffs were fully aware that within six months prior to their purchase of the property, a different developer had obtained an option to purchase the same property and that prior developer had sought a rezoning. That prior rezoning was reviewed by the Bedford

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Township Planning Commission which recommended the denial of the rezoning from agricultural to residential and that prior developer withdrew its rezoning request. (Defendant's proposed **Trial Exhibit 22**, pp 71 and 72; Defendant's proposed **Trial Exhibit 20**).

On April 6, 2005, the plaintiff submitted its Application for Rezoning. (Defendant's proposed **Trial Exhibit 8**). Plaintiff sought a rezoning of the portion of the pink parcels east of the railroad tracks from agricultural to R-3 and the portion of the pink parcels west of railroad tracks from agricultural to C-1.

On April 22, 2005, the Ann Arbor Railroad Company sent a letter to Bedford Township opposing the rezoning to residential. The railroad company noted that not only does the railroad traverse the property but "there are several existing high pressure petroleum product pipelines located between the railroad and the proposed residential zoning." (Defendant's proposed **Trial Exhibit 10**).

On May 23, 2005, the plaintiffs sought to amend their rezoning request to include as an alternative to a rezoning from Ag to R-3, rezoning from Ag to R-2A.

The plaintiff's rezoning request was properly noticed for a public hearing pursuant to the provisions of the Township Zoning Act, MCL 125.271, *et. seq.*[1]

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[1]In 2003, at the time of the plaintiff's rezoning requests, the Zoning Enabling Statute applicable to Bedford Township was the Township Zoning Act, MCL 125.271. Effective July 1, 2006, the Township Zoning Act, as well as the County Zoning Act and City and Villages Zoning Act, were combined and replaced by the new Michigan Zoning Enabling Act, MCL 125.3101, *et. seq.* While the new Michigan Zoning Enabling Act specifically repealed the previous Township Zoning Act, MCL 125.31702(1), that same section of the new Michigan Zoning Enabling Act specifically states, "This section shall not be construed to alter, limit, void, affect, or abate any pending litigation, administrative proceeding or appeal that existed on the effective date of this act or any ordinance, order, permit or decision that was based on the acts repealed by this section." (MCL 125.3702(2). Therefore, the provisions of the Township Zoning Act control in this case.

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In Bedford Township, rezoning requests are processed as follows. A rezoning request is sent to the Township Planning Consultant, Wade Trim Associates Inc., for review and a recommendation. That review and recommendation is sent to the Bedford Township Planning Commission which conducts a public hearing and makes its recommendation to the Bedford Township Board. The Planning Commission's recommendation is then sent to the Monroe County Planning Commission for its review and recommendation. All of this information is then sent to the Bedford Township Board for its decision on the rezoning made at a public meeting.

Attached as Defendant's proposed **Trial Exhibit 14** is the June 6, 2005 review letter from Wade Trim and Associates, Julie Johnston, Professional Planner. Reviewing the existing land use pattern, Ms. Johnston pointed out, "The parcels located around the property, to the east of the Ann Arbor Railroad, are predominantly agricultural lands that are currently cultivated." She noted that to the south are a combination of large parcel single family homes and the developing Village Meadows Subdivision. Ms. Johnston pointed out that the existing zoning of the site is agricultural which is defined in the Township Zoning Ordinance, Article IX. Ms. Johnston noted, "The district is designed to protect agricultural areas of the township from urban encroachment, provide areas for those types of uses that need large acreages, and prevent unplanned development that would require a demand for urban services." Ms. Johnston further reviewed the Bedford Township Master Plan. She stated, "The properties in question, east of the railroad, are designated as Agricultural Farmstead, which is predominantly intended for agricultural uses on lands located outside the urbanized area of the township. Again, the future land use designations that surround these parcels are predominantly agricultural-farmstead and agricultural estates."

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Ms. Johnston did a thorough review of the Bedford Township Master Plan and noted that to the north of the 80 acres in question is the 80-acre Albring piece already zoned R-2A. (The yellow piece depicted on Defendant's proposed **Trial Exhibit 2**). To the south is a parcel that the Township had rezoned to residential in 2002, now called Village Meadows. Ms. Johnston noted that the Master Plan clearly indicates that with respect to land master plan designated as Agricultural Farmland, i.e. the land in question, "The Master Plan specifically states the need to preserve viable farmlands from the conversion to and encroachment of non-agricultural uses." Ms. Johnston also noted that one strategy of the Master Plan regarding residential areas was "that residential neighborhoods should be well integrated into the existing landscape and be logical extensions of existing neighborhoods." With a residentially zoned parcel to the north and the south, one might contend that the rezoning of the large pink parcel to residential would be an extension of existing neighborhoods. On the other hand, the pink parcels are viable agricultural land which is being farmed currently and the Master Plan specifically calls for the protection of such farmland. In weighing these considerations, Ms. Johnston concluded that the Master Plan had recently been adopted and was "crafted through an extensive public involvement process with the residents of Bedford Township. The map is designed to support their desired future development pattern for the community. With a designation of agricultural-farmstead at this location, it seems clear that the protection and preservation of farmland was intended. The rezoning of this parcel to an R-2A district would further deviate from the intent of the future land use map and the objectives of the Master Plan." Ms. Johnston recommended that the plaintiff's rezoning request be denied.

On June 22, 2005, the Bedford Township Planning Commission conducted a public hearing on the plaintiff's rezoning request. Numerous residents spoke out against the

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rezoning citing the proposed density of the overall parcel, i.e. 450 homes, the impact of such density on traffic, the poor condition of Erie Road to the north and its questionability to handle such increased traffic, decaying infrastructure, school enrollment, fire and police services and the maintaining of land available for farming. (Defendant's proposed **Trial Exhibit 15**). The Planning Commission recommended denial of plaintiff's rezoning request citing the Master Plan designation as agricultural farmland, the need to follow the desires of the citizens and the impact of such increased density on the neighboring residents. The Planning Commission also noted that there is no gray area in the Master Plan, i.e. the agricultural farmstead goals vs. the residential goals, because any residential presence in the area to the south of the land in question was a result of the rezoning of Village Meadows.

The Monroe County Planning Commission reviewed the plaintiff's rezoning request and recommended a denial. "The County Planning Commission believes the proposed revisions would not be consistent with sound planning and the land use." (Defendant's proposed **Trial Exhibit 16**).

The court should note - when a Township rezoning request is sent to the Monroe County Planning Commission for its review, a staff planner at the Monroe County Planning Commission generates a memorandum regarding the rezoning request. Such memorandum contains a recommendation which is ultimately reviewed by the Monroe County Planning Commission itself for the final recommendation. In this case, the Monroe County Planning Commission staff memorandum recommended approval of the plaintiff's rezoning request. (Defendant's proposed **Trial Exhibit 17**). However, the Monroe County Planning Commission itself took up the matter at a public meeting, heard a presentation by the plaintiff and voted to recommend disapproval of the plaintiff's rezoning request.

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(Defendant's proposed **Trial Exhibit 16**). It is important to look at the memorandum of the County Planning Commission and note that the staff did have concerns with the potential rezoning. The staff reviewed the rezoning as one large development project combined with the 80 acres to the north (the yellow parcel on Defendant's proposed **Trial Exhibit 2**), involving a total of 450 homes. The memorandum indicates, "Staff's main concern is the increased traffic on Erie Road which would result from the proposed development." (Defendant's proposed **Trial Exhibit 17**). Also, with respect to the small portion of the plaintiff's property to the west of the railroad track, which was sought to be rezoned to C-1, the memorandum states, "However, the proposed commercial district on Lewis Avenue is considered incompatible with the adjacent residential uses." The County Planning Commission noted that the Bedford Township Master Plan designated the plaintiff's property as agricultural farmland and concluded, "This district is the most rural designation in the plan and the proposed zoning district would be inconsistent with this future land use recommendation." In its summary, the memorandum recognized, "This is a complicated case . . . " The staff noted, "Staff's concerns regarding this request include: Proximity of residential uses to the railroad corridor, and the high density of the proposed district. Not only would the proposed residential district be located adjacent to a railroad corridor, with the potential for tragic accidents, spills, noise, and other conflict, the railroad corridor also contains a right of way for high pressure petroleum product pipelines as well as sewer lines." (Defendant's proposed **Trial Exhibit 17**).

While the County Planning staff ultimately recommended granting the rezoning request of that portion east of the railroad track but denying the rezoning request west of the railroad tracks, the Monroe County Planning Commission itself, at a public meeting, heard a presentation from the plaintiff and recommended denial of the plaintiff's rezoning

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request. It is also important to note that Mr. Mark Brant, a member of plaintiff Bedford Partners LLC, is himself a Monroe County Planning Commissioner. He recused himself from the hearing on his own case.

On August 2, 2005, the Bedford Township Board took up the plaintiff's rezoning request at a public meeting and voted unanimously to deny the request. (Defendant's proposed **Trial Exhibit 18**). Nineteen reasons were stated on the record which included the following:

- The requests are not consistent with the Master Plan, which was recently revised . . .
- Residential use is allowed on the subject property by the current zoning classification. The agricultural use promoted by the current Zoning Ordinance and Master Plan is a reasonable use for the subject property, is a use that has been in effect for years and is a use that advances and/or is rationally related to a legitimate government interest;
- The Township Planning Consultant, Wade Trim, recommended against the rezonings;
- The Township Planning Commission recommended that the rezonings be denied;
- The Monroe County Planning Commission recommended that the rezonings be denied;
- To grant the C-1 rezoning would interfere with use and development of the Temperance Village Overlay zoning district;
- In fact, the present use of the lands and surrounding area has, for the most part, remained a viable agricultural use;
- The size and scope of any projects that would result from the rezoning would adversely impact adjacent uses;
- The uses permitted as a result of the rezonings would completely change the character of the neighboring lands and uses, as well as extent an added burden on the infrastructure;
- The Township and other public and governmental agencies will be unable to provide services. The proposed use would adversely affect traffic, police,

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fire, education, and potentially other municipal services. The roads are not sufficient to handle the permitted uses of the sites if the rezonings were successful;

- Agricultural use is a use that deserves equal protection and promotion by zoning;
- Residential use, as being proposed by the applicant, is permitted under the current zoning and Master Plan designation, so no change in zoning is necessary for the lands being requested for residential zoning;
- The Township adopts all reasons and comments stated by Wade Trim, Bedford Township Planning Commission, and the County Planning Commission;
- The Ann Arbor Railroad has issued a written objection to the rezonings;
- The rezonings would promote a use that is too intense for the area and for the infrastructure, it will negatively affect the neighboring citizens and properties.

The Township Board denied the plaintiff's rezoning request on August 2, 2005. This lawsuit was filed on November 21, 2005. It is also important to recognize that the 80 acres to the north is already zoned R-2A. Plaintiff has submitted plans to develop a subdivision on that parcel with 204 homes. (Defendant's proposed **Trial Exhibit 24**). Tentative preliminary plat approval was given for Plat No. 1 in September 2006. Plaintiff has not moved forward with the development of that land. This is by the plaintiff's own choice as the plaintiff wishes to develop the entire site as one development. (Defendant's proposed **Trial Exhibit 22**, pp 94-96; Defendant's proposed **Trial Exhibit 23**, pp 21 and 22).

III. LAW

The plaintiff's Complaint set forth four separate counts: Count I alleges a violation of substantive due process; Count II alleges a violation of procedural due process; Count III alleges an unconstitutional taking of the plaintiff's property; and Count IV alleges an equal protection violation. This Trial Brief will set forth the general rules applicable to all

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zoning cases and thereafter address each count alleged by the plaintiff setting forth the legal standard to be applied by the court and the pertinent evidence to be introduced at trial.

It should also be borne in mind that this court previously ruled that the trial would be bifurcated and the initial trial process beginning February 26, 2007 would address liability only and thereafter, if necessary, a separate hearing on damages would be conducted. (See Court Summary of Civil Pretrial Conference dated October 10, 2006).

A. GENERAL PRINCIPLES OF ZONING LAW.

1. ZONING ORDINANCES ARE PRESUMED VALID.

"Ordinances are presumed to be valid and constitutional." *Bell River Associates v China Township*, 223 Mich App 124 at 129 (1997). See also *Gackler v Yankee Springs Township*, 427 Mich 562, 571 (1986); *A & B Enterprises v Madison Township*, 197 Mich App 160, 162 (1992).

2. PLAINTIFF BEARS THE BURDEN OF PROOF OF UNCONSTITUTIONALITY.

See *Kropf v Sterling Heights*, 391 Mich 139, 156 (1974); *A & B Enterprises v Madison Township*, 197 Mich App 160, 162 (1992); *Gackler v Yankee Springs Township*, 427 Mich 562, 571 (1986).

3. COURTS DO NOT SIT AS SUPER ZONING COMMISSIONS AND ARE NOT CONCERNED WITH THE WISDOM OF MUNICIPAL DETERMINATIONS

"It is not for this court to second guess the local governing bodies in the absence of a showing that that body was arbitrary or capricious in its exclusion of other uses from a single family residential district. Justice Smith aptly pointed this out in *Brae Burn Inc. v Bloomfield Hills*, *supra*, pp 430-432.

This court does not sit as a super zoning commission. Our laws have wisely committed to the people of a community themselves the determination of their municipal destiny, the degree to which the industrial may have precedence over the residential, and the areas carved out of each to be devoted to commercial pursuits. With the wisdom or lack of wisdom of the

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> determination we are not concerned. The people of the community, through their appropriate legislative body, and not the courts, govern its growth and its life. Let us state the proposition as clearly as may be: It is not our function to approve the ordinance before us as to wisdom or desirability. For alleged abuses involving such factors, the remedy is the ballot box, not the court's. We do not substitute our judgment for that of the legislative body charged with the duty and responsibility in the premises . . . Unless it can be shown that the council acted arbitrarily or unreasonably, their determination is final and conclusive and no court may alter or modify the ordinance as adopted." *Kropf v Sterling Heights,* 391 Mich at 161.

4. THIS TRIAL COURT IS NOT LIMITED TO THE EVIDENCE PRESENTED BELOW.

> "However, 'because rezoning is a legislative act, its validity and the validity of a refusal to rezone are governed by the tests which we ordinarily apply to legislation.' [Citation omitted]. . . . Accordingly, plaintiff was entitled to a hearing *de novo* on the issues raised and the trial court therefore erred in limiting plaintiff's proofs to those presented before the township and county commissions and boards." *Arthur Land Co v Otsego Co.,* 249 Mich App 650, 664, 665 (2002).

B. SUBSTANTIVE DUE PROCESS.

Count I of the plaintiff's Complaint challenges the application of the Bedford Township Zoning Ordinance under a substantive due process standard. Such a challenge and the legal standard to be applied was discussed by the Michigan Supreme Court in *Kropf v Sterling Heights*, 391 Mich 139 (1974), as follows:

> "A plaintiff-citizen may be denied substantive due process by the city or municipality by the enactment of legislation, in this case a zoning ordinance, which has, in the final analysis, no reasonable basis for its very existence... Different degrees of state interest are required by the courts, depending upon the type of private interest which is being curtailed, when first amendment rights are being restricted we require the state to justify its legislation by a 'compelling' state interest. With regard to zoning ordinances, we only ask that they be 'reasonable'. And, as we have stated, they are presumed to be so until the plaintiff shows differently.
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> In looking at this 'reasonableness' requirement for a zoning ordinance, this

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court will bear in mind that a challenge on due process grounds contains a two-fold argument: First, that there is no reasonable governmental interest being advanced by the present zoning classification itself, here a single family residential classification, or secondly, 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." 139 Mich App at 157 and 158.

In *A & B Enterprises v Madison Township*, 197 Mich App 160 (1992), the court succinctly stated the test to be applied in substantive due process challenges of the zoning ordinance as follows:

> "In order to successfully challenge a zoning ordinance, a plaintiff must prove (1) that there is no reasonable governmental interest being advanced by the present zoning classification, or (2) that the ordinance is unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area under consideration.
>
> * * *
>
> Plaintiff in this case challenges the ordinance on substantive due process grounds. Judicial review of such challenge requires application of three rules: (1) the ordinance is presumed valid; (2) the challenger has the burden of proving that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of the property; that the provision in question is an arbitrary fiat, a whimsical ipsi dixit; and that there is not room for a legitimate difference of opinion concerning its reasonableness; and (3) the reviewing court gives considerable weight to the findings of the trial judge." 197 Mich App at 162.

In applying this two-part test, this court must first determine whether there is any reasonable governmental interest being advanced by the zoning classification. In the instant case, the plaintiff's property is zoned Ag. Plaintiff sought rezoning to R-2A. The court must first determine if a reasonable governmental interest is being advanced by Ag classification. In looking at the ordinance itself we find as follows:

> Section 400.900 Intent. The AG Agricultural Districts are designed to apply to the rural agricultural areas of the Township which should not develop for urban purposes in the foreseeable future. These districts are also intended to provide protection to the agricultural areas from the encroachment of untimely and unplanned urban type uses which would create use conflicts

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> with agricultural activities and which could create a premature demand for urban services. The districts also provide for the establishment of uses which require large land areas and which, because of their nature, can be developed in rural areas."

Certainly, providing areas for agricultural farming is a legitimate governmental interest. In fact, under the Township Zoning Act MCL 125.271 et. seq. the state legislature specifically authorized townships as follows:

> "(1) The township board of an organized township in this state may provide by zoning ordinance for the regulation of land development and the establishment of districts in the portions of the township outside the limits of cities and villages which regulate the use of land and structures; to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land; to ensure that use of the land shall be situated in appropriate locations and relationships; to limit the inappropriate over crowding of land and congestion of population, transportation systems, and other public facilities; to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility requirements; and to promote public health, safety, and welfare. For these purposes, the township board may divide the township into districts of such number, shape and area as it considers best suited to carry out this act . . ." (Emphasis added).

Thus, we know that township boards are specifically authorized/enabled to divide a township and regulate land development "to meet the needs of the state's citizens for food, fiber" and to "limit the inappropriate overcrowding of land and the congestion of population, transportation systems, and other public facilities." Finally, the legislative enabling statutes specifically provide that "the township board may divide the township into districts of such number, shape and area as it considers best suited to carry out this act." MCL 125.271(1). Thus, the regulation of land use for agricultural purposes is a legitimate governmental interest under a substantive due process analysis.

The second prong of the substantive due process test is that the challenger of the statute has the burden of proving that the ordinance is an arbitrary and unreasonable

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restriction of the owner's use of property and "that there is not room for a legitimate difference of opinion concerning its reasonableness." *A&B Enterprises v Madison Township*, 197 Mich App at 162.

It cannot be said that the designation of land in question as agricultural is arbitrary. First of all, the land has always been zoned agricultural. Defendant's proposed **Trial Exhibits 27, 28, 29 and 1** show that this land has always been zoned agricultural since the very first zoning ordinance in Bedford Township in 1960. Secondly, the property is currently being used for farming. Plaintiff will admit this. There is no better evidence of the fact that an agricultural designation is not arbitrary than the fact that in the very land contract by which the Albring family sold this land to the plaintiff, the Albrings reserved the right to farm the land themselves for the next five years. (See Defendant's proposed **Trial Exhibit 4**, Land Contract, Paragraphs 4e, 4f and 4g). Not only is the land suitable for farming, the Albrings intend to farm it for the next five years!

Indeed, farming in this area of the Township is substantial. The court will note that in the Warranty Deeds for all the property in question, the two smaller pink parcels and the larger pink parcel (Defendant's proposal **Trial Exhibits 5, 6 and 7**), the following language appears on the face of the Deed:

> "This property may be located within the vicinity of farmland or a farm operation. Generally accepted agricultural and management practices which may generate noise, dust, odors, and other associated conditions may be used and are protected by the Michigan Right to Farm Act."

Moreover, there is a railroad track that traverses the property with a high pressure petroleum line running adjacent to it.

The Bedford Township Zoning Ordinance agricultural classification, Section 400.900 (Defendant's proposed **Trial Exhibit 26**), indicates that the agricultural districts are areas

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of the Township which should not develop for urban purposes in the foreseeable future. The Master Plan, Defendant's proposed **Trial Exhibit 30**, p 22, reveals that SEMCOG estimates the population for the entire six Township sections in this area of the Township is only expected to increase by 51 people between 2005 and 2010 and a total of 104 people between 2005 and 2015. Indeed, if the plaintiff built 450 homes in this area, each having an average of 2.8 residents (census data), that would increase the population in these six Township sections by 69.7% over the 2005 figures.

Such an increase in population will unquestionably increase the demand on police, fire, schools, roads and other infrastructure. It is important for the court to recognize, studies may be contracted for by anyone to show that a municipality has the theorereticaI capacity to handle increased population. However, that entirely misses the point. The point is that a municipality has the authority to control the rate at which demand on its infrastructure and services increases. To increase demand to peak levels in a very short time is simply poor planning. A Township must have the ability to control the increase on the demand for its services to allow a Township to prepare, to train its staff, to maintain and construct infrastructure and hire personnel to adequately and safely service such demand. To do otherwise is simply unsound planning and is not safe.

Reviewing the Minutes of the Township Board of August 2, 2005 (Defendant's proposed **Trial Exhibit 18**) reveals that the Township thoroughly considered the impact of such a huge increase on the density in this area of the Township. Indeed, this was also discussed in the Monroe County Planning Commission memorandum and was obviously seized upon by the Monroe County Planning Commission in its review and denial of the plaintiff's rezoning request. Even plaintiff Mark Brant admitted, "I understand that it, the subdivision, would contribute to the demise of the road but Erie is in disastrous shape

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now." (Defendant's proposed **Trial Exhibit 23**, p 66).

Michigan law regarding due process challenges to a Zoning Ordinance recognizes quite clearly that the reasons upon which Bedford Township based its denial of the plaintiff's rezoning requests are not arbitrary and in fact substantiate a legitimate rezoning denial. In *Bell River Associates v China Township*, 223 Mich App 124 (1997), the court addressed an attempt by a plaintiff to rezone agricultural lands to a mobile home park. The court stated:

> "The development would increase the township's number of residences by 40%, which would increase the need for police and fire services. The township contracts with other communities for police and fire protection and does not provide police protection 24 hours a day. [Citation omitted]. The above reasons comprise legitimate governmental interests and constitute a reasonable exercise of police power for public health and safety. *Gackler [Land Company v Yankee Springs Township*, 427 Mich 562 (1986)] *supra* at 570. The AG classification is a reasonable means to advance these legitimate government interests. *Rogers [v Allen Park*, 186 Mich App 33 (1990)] *supra* at 38.
>
> Plaintiff has not shown that the ordinance is arbitrary and that is unreasonably restricts the use of its property. The stated intent for the AG zoning supports a finding that the classification is not arbitrary." 223 Mich App at 131, 132.

In the instant case, Bedford Township does not have its own police department but rather contracts with Monroe County Sheriff Department for police protection. Bedford Township also has a paid on call fire department.

In *ACC Industries Inc. v Mundy Township*, unpublished Court of Appeals' Decision No. 242392, February 24, 2004 (see attached **Exhibit A**), the court noted the following:

> "Pertinent considerations in determining the reasonableness of a particular exclusion include the use of surrounding areas, traffic patterns, and available water supply and sewage disposal systems. *Johnson v Lyon Township*, 45 Mich App 491, 494; 206 NW2d 761 (1973). Further, 'the fact that other sites are better suited, in light of these considerations, for the proposed use and are predesignated for the proposed use, pursuant to a master plan adopted in compliance with statutory requirements, may also be evidence of

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reasonableness.' *Id.*

> We conclude that plaintiff has failed to meet its burden of proving that the current zoning classification was unrelated to a legitimate governmental interest or that the ordinance was an arbitrary and unreasonable restriction on the use of its property . . . Evidence was presented at trial demonstrated that; plaintiff's proposed development would be inconsistent with the established land use pattern for this area; the proposed zoning classification would be inconsistent with the established zoning pattern and would introduce a substantially greater residential density (dwelling units per acre) . . .; that traffic generated by the proposal would substantially increase and the capacity of the roads to handle such traffic was questionable . . ." See *ACC v Mundy Township*, Slip Opinion, p 5, **Exhibit A**).

In *Kropf v Sterling Heights*, 391 Mich 139 (1974), the court noted the following with respect to a substantive due process analysis:

> "Proofs were presented showing that the city had considered the possibility of allowing multiple dwellings to be erected on plaintiff's property and had rejected same for, among others, the following reasons: that Clinton River Road was an inadequate thoroughfare to handle the increased traffic; that multiple dwellings were inconsistent with the proposed development plans for the general area and since plaintiffs' land was not unique for the area, rezoning of plaintiffs' property would probably necessitate similar action on the other properties and the end result would be intolerable.
>
> To these proofs, plaintiffs' main, if not sole response, was that the instant land was more valuable when used for multiple residences and that this would constitute the 'highest use' of said property. While such arguments may be relevant in a Fifth Amendment attack on the ordinance, they do not rebut the showing of reasonableness on the part of the city, nor do they meet the burden plaintiffs have in showing that exclusion of other uses from this property was arbitrary and capricious." 391 Mich at 160.

In Bedford Township, there is plenty of land already zoned for higher density residential use. (Defendant's proposed **Trial Exhibit 1**). Indeed, it not necessary to rezone this parcel to develop residential uses in Bedford Township.

Finally, the court in *Gackler v Yankee Springs Township*, 427 Mich 562 (1986), stated, "The zoning ordinance will improve the aesthetics of the area, thereby advancing a reasonable government interest." 427 Mich at 572.

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In the instant case, the AG zoning classification clearly advances a legitimate governmental interest as recognized by the Township Zoning Act, MCL 125.271. Also, the zoning of the land in question is certainly not arbitrary. Indeed, Wade Trim recommended a denial of the plaintiff's rezoning request, the Township Planning Commission recommended a denial of the plaintiff's rezoning request and the Monroe County Planning Commission recommended a denial of the plaintiff's rezoning request stating that it "would not be consistent with sound planning and land use." (Defendant's proposed **Trial Exhibit 16**). To succeed on a substantive due process challenge, the plaintiff must prove "there is not room for a legitimate difference of opinion concerning its reasonableness." *A&B Enterprises v Madison Township, supra.* Given these recommendations for denial by virtually every entity that reviewed the plaintiff's rezoning request, it cannot be said that there is not room for a legitimate difference of opinion. Plaintiff cannot prove a substantive due process challenge.

A word must be mentioned about the Master Plan of Bedford Township. Much will be made at trial concerning this Master Plan. A consideration of a Master Plan is one factor in a rezoning decision. It is not the only or even the determining factor. A Master Plan is a general guide. In *Frericks v Highland Township*, 228 Mich App 575, 605 (1998), the court stated:

> "We also disagree with plaintiff's contention that Highland Township's Master Plan establishes that Section 1720 is unreasonable. The Master Plan clearly recognizes that central water systems exist and will continue to be developed. In any case, because the reasonableness of a zoning ordinance is determined in light of the zoning ordinance as it now stands [citation omitted] we consider the Master Plan only as a general guide for future development."

In *ACC Industries Inc. v Charter Township of Mundy*, unpublished Court of Appeals opinion February 24, 2004, No. 242392 (attached as **Exhibit A**), the court stated:

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> "The validity of a zoning ordinance must be tested by existing conditions [citation omitted]. A township's master plan is but one factor to be considered in determining the reasonableness of the zoning classification and does not replace the balancing of interests required under an assertion of legislature or police power." **Exhibit A**, p 7.

One additional factor must also be borne in mind. The plaintiff argues that it is somehow inappropriate for the Township to consider the preferences of the Township residents when concerning a rezoning application. This was flatly denied in the case of *A & B Enterprises v Madison Township*, 197 Mich 160 (1992), where the court stated:

> "Another reason for the trial court's conclusion that the denial of the rezoning petition was arbitrary was its belief that the township board placed too much emphasis on public opposition. A petition containing 374 signatures opposing the rezoning request was presented to the township planning commission. The purpose of the Township Rural Zoning Act would be defeated if a township board could not consider public opposition to a proposed rezoning classification. MCL 125.271 et. seq.; M.A. 5.2963(1) et. seq. The act requires a public hearing and notice to affected and neighboring property owners on any proposal for rezoning. MCL 125.284; M.A. 5.2963(14); MCL 125.279; M.A. 5.2963(9)." 197 Mich App at 164.

B. PROCEDURAL DUE PROCESS

Count II of the plaintiff's Complaint attempts to set forth a challenge to the rezoning denial based on procedural due process. This challenge fails factually and legally. The crux of the plaintiff's procedural challenge is that because Township Clerk Robert Schockman read from prepared notes as he made the motion to deny the plaintiff's rezoning request at the Township Board Hearing, that is somehow improper. From this simple fact, the plaintiff makes the quantum leap to the conclusion, "The township made the decision to deny the application before the hearing and without affording Bedford Partners a fair opportunity to be heard by an impartial decision making tribunal." (Plaintiff's Complaint, Paragraph 49). At the deposition of plaintiff member Ronald Blank, Mr. Blank testified as follows:

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"Q. So if I understand your testimony correctly, you believe that a board member appeared at the township board meeting with a motion that had been written out prior to the meeting?

A. Correct.

Q. Okay. In your complaint, paragraph 48 you allege: 'The township clerk prepared a 19 point list of alleged reasons for denial and handed it out to all board members prior to the decision on the application which the township board adopted verbatim in their motion to deny Bedford Partner's application.' Did you see the township clerk hand out a prepared list?

A. Yes.

Q. When did that occur?

A. Towards the end of the meeting just before the motion was made.

Q. While your rezoning request was being discussed?

A. This would have been after Mr. Brant finished making his presentation and before the board voted on it.

Q. Okay. And what did you see? Describe for me what you saw the township clerk do.

A. My recollection is that he passed out this multi-page report.

Q. That he ultimately read from?

A. Oh, every word.

Q. Did he stand up and walk or did he just pass it to his colleagues around the table?

A. I don't recall." (Defendant's proposed **Trial Exhibit 23**, pp 92, 93 and 94).

Plaintiff member Mark Brant testified at his deposition with respect to this issue as follows:

"Q. Mr. Blank testified that he saw the clerk pass out at the meeting, after you spoke and after the motion was made, a copy of whatever he was reading from. Did you witness that?

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A. I do not recall the sequence of events that they all received their copy.

Q. So it's possible that they did not receive their copy of Mr. Schockman's document until that night at the meeting. Correct?

A. It's possible, yes.

Q. You don't have any independent evidence that Mr. Schockman gave whatever document he was reading from to the other board members prior to the meeting, do you?

A. I don't have any evidence that Mr. Schockman gave it to them, but I do have evidence that they all had a copy of it.

* * *

Q. Do you think that's it improper for an elected official on a rezoning, if the elected official is going to state numerous reasons for his or her vote, to write those reasons down on a piece of paper prior to the meeting?

A. For that individual to write his own comments down?

Q. Correct.

A. No.

Q. Do you have any evidence that there was actually a meeting among township board members prior to the time that the township board met to consider your rezoning?

A. No." (Defendant's proposed **Trial Exhibit 23**, pp 60 and 63).

There is nothing untoward about an elected official preparing notes prior to a Township Board Meeting. The plaintiff admitted that the plaintiff was given an opportunity to be heard at the Township Board Meeting of August 2, 2005 and that the rezoning request was properly noticed for public hearing and properly proceeded through the normal channels, i.e. the Township Planning Consultant, a public hearing at the Planning Commission, a review and recommendation by the Monroe County Planning Commission and an ultimate decision by the Township Board. This process is set forth in MCL 125.279,

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125.280, 125.281 and 125.284. Factually, there is no procedural due process violation.

As a matter of law, the plaintiff has no procedural due process cause of action regarding the zoning classification of the plaintiff's land. In *City of Livonia v DSS*, 123 Mich App 1 (1983), the court held that there is no procedural due process right with respect to a zoning classification. The court stated:

> "Before any procedural due process protection attaches, one must demonstrate an interest within the contemplation of the 'liberty or property' language of the 14th Amendment. [Citation omitted]. Property owners have no vested rights in the zoning of their property. *Baker v Algonac*, 39 Mich App 526, 535; 198 NW2d 13 (1972). 'No owner has a right in the continuance of a zoning once established. *Lamb v City of Monroe*, 358 Mich 136, 147; 99 NW2d 566 (1959). Thus, we conclude that the mere fact that the individual plaintiffs may have relied upon the continuance of existing zoning does not give them a vested property interest entitling them to due process protection." 123 Mich App at 20, 21.

Therefore, the plaintiff has no procedural due process cause of action as a matter of law.

C. TAKINGS.

Count III of plaintiff's Complaint alleges that the denial of plaintiff's rezoning requests constituted a taking of its property without just compensation. The seminal Michigan case on the subject of takings is *K & K Construction v D & R*, 456 Mich 570 (1998). The court set forth the takings analysis as follows:

> "While all taking cases require a case specific inquiry, courts have found that land use regulations effectuate a taking in two general situations: (1) where the regulation does not substantially advance a legitimate state interest, or (2) where the regulation denies an owner economically viable use of his land. *Keystone Bituminous Coal Association v DeBenedictis*, 480 US 470, 485; 107 S Ct 1232; 94 L Ed 2d 472 (1987).
>
> The second type of taking, where the regulation denies an owner economically viable use of land, is further subdivided into two situations: (a) a 'categorical' taking, where the owner is deprived of 'all economically beneficial or productive use of land.' *Lucas v South Carolina Costal Council*, 505 US 103, 1015; 112 S Ct 2886; 120 L Ed 2d 798 (1992); or (b) a taking

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recognized on the basis of the application of the traditional 'balancing test' established in *Penn Central Transportation Company v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978).

In the former situation, the categorical taking, a reviewing court need not apply a case specific analysis, and the owner should automatically recover for a taking of his property. *Lucas, supra*, at 1015. A person may recover for this type of taking in the case of a physical invasion of his property by the government (not at issue in this case), or where a regulation forces an owner to 'sacrifice all economically beneficial uses [of his land] in the name of the common good . . .' " *Id* at 1019, emphasis in original.

In the latter situation, the balancing test, a reviewing court must engage in an 'ad hoc, factual inquiry,' centering on three factors: (1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment backed expectations. *Penn Central*, 438 US 124." 456 Mich at 576, 577.

While the test set forth in *K & K Construction, supra*, asks first whether the land use classification advances a legitimate governmental interest, that aspect of the takings analysis has been disavowed by the US Supreme Court in the case of *Lingle v Chevron USA Inc.*, 544 US 528, 125 S Ct 2074, 161 L Ed 2d 876 (2005). The *Lingle* court stated as follows:

"We hold that the 'substantially advances' formula is not a valid takings test, and indeed conclude that it has no proper place in our takings juris prudence. In so doing, we reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories discussed above - by alleging a 'physical' taking, a lucas type 'total regulatory taking,' a penn central taking, or a land use exaction violating the standards set forth in *Nollan* and *Dolan*." 544 US at 548.

See also *Dorman v Clinton Township*, 269 Mich App 638, 646 n23 (2006); *City of Gaylord v Maple Manor Investments et. al.*, unpublished Court of Appeals Opinion August 8, 2006 No. 266954 (attached **Exhibit E**).

Therefore, the takings analysis to be applied asks whether the owner of property has been denied economically viable use of the land. This test is further broken down into

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two categories. First, a categorical taking. Has the government literally and physically entered upon the plaintiff's land and taken it or has the government regulation forced the owner to sacrifice all economically beneficial use? Neither one exists in the instant case. Bedford Township has not physically taken the plaintiff's land and the plaintiff's land clearly has some economically viable use as it continues to be farmed currently and such farming activities are sufficiently economically viable that the Albring family insisted that the land contract by which they sold the property to the plaintiff include a provision allowing the Albrings to retain the right to farm the land for the next five years, including a provision that the plaintiff will pay the Albrings money damages if crops are damaged. (See Defendant's **Exhibit 4**, Paragraph 4e, 4f and 4g).

In *Dorman v Clinton Township*, 269 Mich App 638 (2006), the court further expounded on the test to be applied in a regulatory takings and stated as follows:

> "An inverse condemnation claim may be based upon the government's 'regulatory taking' of private property. A regulatory taking occurs when the state effectively condemns, or takes, private property for public use 'by overburdening that property with regulations.' There are two situations in which a property owner is automatically entitled to just compensation: (1) 'where the owner is deprived of 'all economically beneficial or productive use of [his or her] land,' ' or (2) when the government physically and permanently invades any portion of the property. Where the government's actions merely diminish the owner's ability to freely use his or her land, the court the court must apply the balancing test set forth by the United States Supreme Court in *Penn Central Transportation Co v New York City*. In determining whether such actions amount to a taking under *Penn Central*, the court must consider: '(1) the character of the government action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment backed expectations.'
>
> * * *
>
> Plaintiff's argument rested on the alleged reduction in the value of his property due to its rezoning to residential use. However, it is well established that a municipality is not required to zone property for its most profitable use, and that 'mere diminution in value does not amount to [a] taking.' 'Disparity in values between residential and commercial uses will always exist' '; yet a

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municipality clearly is not required to favor the latter use at the expense of the former. A plaintiff who asserts that he was 'denied economically viable use of his land' must show something more - 'that the property was either unsuitable for use as zoned or unmarketable as zoned.' " 269 Mich App at 646, 647, footnotes omitted.

The takings analysis engages in a balancing of factors. The *K & K* court went on to rule that when applying this test and examining the economic impact on a plaintiff's property, the court must consider the value of all of the plaintiff's property, not just a portion of it. This is known as the non-segmentation principle. This principle is particularly applicable to the plaintiff's property. The non-segmentation principle is uniquely applicable in this case and the *K & K* court gave a detailed explanation of it which merits understanding by the court as the court considers the evidence in this case:

> "Before we decide whether the regulations imposed on plaintiffs' property constitute a taking, we must first address an important preliminary matter. The first step in our analysis is to determine which parcel or parcels owned by plaintiffs are relevant for the taking inquiry. The determination of what is referred as the 'denominator parcel' is important because it often affects the analysis of what economically viable uses remain for a person's property after the regulations are imposed. Plaintiff urge us to focus our analysis only on parcel one, while defendant argues that we must look at all four of plaintiffs' parcels as a single unit.
>
> One of the fundamental principles of taking juris prudence is the 'non-segmentation' principle. This principle holds that when evaluating the effect of a regulation on a parcel of property, the effect of the regulation must be viewed with respect to the parcel as a whole. *Keystone*, 480 US 498; *Corby v Redford Township*, 348 Mich 193, 198; 82 NW2d 441 (1957). Courts should not 'divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.' *Penn Central*, 438 US 130. Rather, we must examine the effect of the regulation on the entire parcel, not just the affected portion of that parcel.
>
> The denominator parcel is also not limited to each parcel of property. As explained by the United States Court of Appeals for the Federal Circuit in *Tabb Lakes, Limited v United States*, 10 F3d 796, 802 (CA Fed 1993):
>
> > 'Clearly, the quantum of land to be considered is not each individual lot containing wetlands or even the combined area

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> of wetlands. If that were true, the corps' protection of wetlands via a permit system would, ipso facto, constitute a taking in every case where it exercises its statutory authority [citations omitted].'

This court has previously found the non-segmentation principle applicable to two adjoining parcels of property with unity of ownership. *Bevan v Brandon Township,* 438 Mich 385; 475 NW2d 37 (1991). In *Bevan*, the plaintiffs purchased two continuous lots of land separately. The plaintiffs were only allowed to build a single house on the two lots because of township land use ordinances adopted after they had purchased the property. The plaintiffs sued, claiming that the regulations constituted an unconstitutional taking of their property. The lower courts agreed with them, finding that the regulation of the property constituted a regulatory taking of one of the plaintiffs' two parcels. This court reversed, stating:

> 'As a general rule, a person's property should be considered as a whole when deciding whether a regulatory taking has occurred. 1 Rathkopf, Zoning and Planning, section 6.07(5), page 6-45.
>
> This court has recognized that contiguous lots under the same ownership are to be considered as a whole for purposes of judging the reasonableness of zoning ordinances, despite the owner's division of the property into separate, identifiable lots. [438 Mich 393-395.]'

This court refused to apply the takings analysis to only one the two lots; instead, it viewed the property 'in its entirety.' *Id.* at 397." 456 Mich at 587-580.

Under the non-segmentation principle, it is appropriate when considering a takings analysis to consider all the property owned by the plaintiff which was specifically intended to be developed as a single project even if such property consisted of separate parcels and even if the separate parcels had different zoning classifications. This was recognized by the *K & K* court:

> Determining the size of the denominator parcel is inherently a factual inquiry. As explained in *Ciampitti v United States*, 22 Ct Cl 310, 318-319 (1991):
>
> > 'Factors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as single unit, the extent to which the protected lands enhance

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> the value of remaining lands, and no doubt many others would enter the calculus. The effect of a taking can obviously be disguised if the property at issue is too broadly defined. Conversely, a taking can appear to emerge if the property is viewed too narrowly. The effort should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment.'

In this case, it is neither realistic nor fair to consider only parcel one for purposes of the taking analysis. Parcels one, two, and four are bound together through their contiguity, the unity of JFK's ownership interest in all three of these parcels, and plaintiffs' proposed comprehensive development scheme. Thus, the Court of Appeals erred when it concluded that it was proper for the trial court to consider only parcel one in the taking analysis.

* * *

As explained in *Bevan*, contiguity and common ownership create a common thread tying these three parcels together for the purposes of the taking analysis.[6]

---

[6] We acknowledge that these three parcels of property do have different zoning classifications. However, the fact that plaintiffs intend to use all three of them in a single development plan negates the fact that they were zoned differently, in this case. See *Zealy v City of Waukesha,* 201 Wis2d 365; 548 NW2d 528 (1996)(Although zoning changes by the city resulted in three different zoning classifications of the plaintiffs' parcel of land, the entire 10.4 acres of the parcel were considered relevant to the taking analysis rather than the 8.2 acres that were rezoned).

Third, the connection between parcels one, two, and four is further solidified by plaintiffs' comprehensive development plans. The plaintiffs' proposed use of the property is highly relevant to establishing the denominator parcel. Where 'a property owner treats a series of properties as one income producing unit, the value lost to the claimant is not simply the loss of the segregated parcel affected by the government action,' rather it is the loss as it relates to the value of the entire unit. *Forest Properties, Inc. v United States*, 39 Ct Cl 56, 73-74 (1997) . . . Indeed, it is inappropriate to allow a person to 'sever the connection he forged when it assists in making a legal argument.'" 456 Mich at 580, 581, 582. (Emphasis added).

In the instant case in determining whether a regulatory taking has occurred, it would be incorrect for this court to only consider the Ag zoned parcel, i.e. the pink parcels on

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Defendant's proposed **Trial Exhibit 2**. Plaintiff admitted that the plaintiff purchased both the pink and the yellow parcels, depicted on Defendant's proposed **Trial Exhibit 2**, at virtually the same time with the intention to develop the entire property as a single residential development. (Defendant's proposed **Trial Exhibit 22**, p 39; Defendant's proposed **Trial Exhibit 23**, p 8). Indeed, the very Application for Rezoning filed by the plaintiff with Bedford Township (Defendant's proposed **Trial Exhibit 8**) stated in Paragraph 1 of the attachment that the Ag zoned parcel "site will be combined with the 80 acres more or less parcel owned by applicant which has over 800 feet of frontage on Erie Road and developed as a part of that total acreage." Indeed, when plaintiff member Mark Brant spoke before the Bedford Township Planning Commission on June 22, 2005, the Minutes reflect that he indicated, "Mr. Brant said the entire project consists of approximately 160 acres." (Defendant's proposed **Trial Exhibit 15**, p 2). Mr. Brant continued to explain how he would agree to limit the density on the entire 160 acres to 450 units in a zoning contract and "the entire 160 acres would be a part of the contract." (Defendant's proposed **Trial Exhibit 15**, p 3). The Monroe County Planning Commission memo, Defendant's proposed **Trial Exhibit 17**, refers to "this request involves 156 acres in Bedford Township, proposed to be rezoned as follows . . ." (Defendant's proposed **Trial Exhibit 17**). Clearly, plaintiff purchased all of this property, 160 acres, with the intent to develop it as one single residential development. Accordingly, in applying the balancing test set forth in *K & K, supra,*, this court must consider all 160 acres and determine whether the plaintiff's economic value in all 160 acres has been unconstitutionally taken.

Numerous court decisions have examined this analysis of the takings claims and several principles have been developed as follows:

"Plaintiff carries the burden of proving that the value of her land has been

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destroyed by the regulation or that she is precluded from making use of the property, which typically requires proof that the land is unsuitable or unmarketable as zoned . . . Plaintiff has not investigated the feasibility of developing and marketing her property as one large single residential parcel . . . Mere disparity in value between potential uses for property does not meet the threshold necessary to establish a taking." *Dowerk v Oxford Township*, 233 Mich App 62, 68 (1998).

"In determining whether zoning regulation effects a taking, the owner must show that the property is either unsuitable for use as zoned or unmarketable as zoned. [Citation omitted]. The diminution of property value by application of regulations, without more, does not amount to an unconstitutional taking." *Forner v Allendale Charter Township*, unpublished Court of Appeals opinion May 26, 2000, No. 212531, **Exhibit B**, p 8.

"The trial court held that plaintiffs failed to sustain their burden of proving that the zoning ordinance precluded use of the property for any purpose to which the land is reasonably adapted.

* * *

Diminution in property value, standing alone, does not establish unconstitutional confiscation. *Penn Central Transportation Company, supra,* p 131; *Gackler, supra,* p 572." *Cryderman v Birmingham*, 171 Mich App 15, 27, 28.

"Disparity in values between residential and commercial uses will also exist. In the leading case of *Village of Euclid v Ambler Realty Company*, 272 US 365 (47 S Ct 114, 71 L Ed 303, 54 ALR 1016 [1926], Mr. Justice Sutherland, in upholding the ordinance, noted that the property involved was worth about $10,000.00 pre acre for industrial use, as compared to $2,500.00 per acre for residential use. If such a showing serves to invalidate an ordinance, the efforts of our people to determine their living conditions will be hopeless. To avoid 'confiscation' in this sense (the obtaining of the highest dollar for one particular lot) will result in confiscation of far greater scope in property values in the municipality as a whole due to its inability to control its growth and development." *Drummer Development v Avon Township*, 51 Mich App 21, 24 (1973) quoting from *Braeburn Inc v Bloomfield Hills*, 350 Mich 425; 86 NW2d 166 (1957).

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> "Plaintiffs submitted evidence that it would not be economically viable to develop their property to a maximum density of 130 residential lots. However, plaintiffs failed to show that this was the only means of developing the property, and that all other permissible developments were not economically viable. At most, plaintiffs have demonstrated that their property would be worth more if rezoned, not that it is currently worthless. 'A zoning ordinance is not unconstitutional merely because the land would be worth more if rezoned.' *Albert v Kalamazoo Township*, 37 Mich App 215, 217; 194 NW2d 425 (1971)." *Brookside Acquisitions LLC et. al v Charter Township of Lyon*, unpublished Court of Appeals opinion November 17, 2005, No. 257416, p 6, attached hereto as **Exhibit C**.

In the instant case, the plaintiff paid a total of $2,750,000.00 for all 160 acres. As zoned, the plaintiff can develop the 80-acre parcel already zoned R-2A for residential use. Indeed, the plaintiff has submitted a proposed plat for this parcel depicting 204 single family homes. (Defendant's proposed **Trial Exhibit 24**). Attached as Defendant's proposed **Trial Exhibit 25** is an appraisal of the Albring Farm Plat 1 which includes only 57 lots. However, that appraisal also includes an appraisal of the remaining vacant land, i.e. 137.9 acres. The court will note that this appraisal, which includes only developing 57 potential lots on the northern 80-acre parcel, reveals a total appraisal of the 57 lots as developed of $2,200,000.00 and the remaining vacant land at $2,319,000.00 for a total of $4,519,000.00. Thus, if the plaintiff only developed 57 units on the northern 80 acres (and we know the plaintiff can develop and intends to develop a total of 204 units) the plaintiff would make a profit of $1,769,000.00, 64% on the plaintiff's initial investment of $2,750,000.00.

Plaintiff has admitted in answers to interrogatories (Defendants' proposed **Exhibit 21**) and in depositions (Defendant's proposed **Trial Exhibits 22 and 23**) that the plaintiff has never attempted to market the Ag zoned property for sale as Ag property. The plaintiff has admitted that the plaintiff has never attempted to farm the Ag property or to lease the Ag property for farming. (Defendant's proposed **Trial Exhibit 23**, p 10). Most importantly,

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the plaintiff has never attempted to develop the Ag property as zoned. Under the Ag zoning classification, the property can be developed residentially with 5-acre minimum lot sizes. After developing the streets and other infrastructure, the plaintiffs admit that they develop approximately 15 residential units on the property. Plaintiff has not attempted to develop the property in this manner. Moreover, the Ag zoning classification also would allow the property to be used for stables, cemeteries, greenhouses, private kennel or family daycare homes. Plaintiff has not even attempted to develop or market the property for these uses as zoned.

Finally, and most importantly, the property not only can be used for farming, it is being used for farming! It is also important for the court to know that the larger pink parcel, approximately 61 acres, appears on the Zoning Map to be land locked. (Defendant's proposed **Trial Exhibit 2**). However, it is not. In addition to access which it has through the proposed Albring Farms Subdivision to the north and the existing Village Meadows Subdivision to the south, that 61-acre parcel also includes a 16½ ' wide strip of land that proceeds west across the railroad tracks all the way to Lewis Avenue. (Defendant's proposed **Trial Exhibit 12**). This 16½ ' wide strip of land was specifically intended as ingress and egress for the 61-acre parcel. Plaintiff member Ronald Blank testified, "There's an old easement for farming access. That was its original purpose." (Defendant's proposed **Trial Exhibit 44**).

In this case, the plaintiff cannot show that the land, either all 160 acres or the 80 acres zoned Ag, is worthless as zoned. Mere diminution in value does not constitute a taking. Plaintiff is not entitled to the highest use of its property. In balancing all the factors, there has been no taking. Indeed, as explained in *Bell River Associates v. China Township, supra*:

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"The ordinance and zoning classification were in effect before plaintiff purchased the property. Thus, plaintiff assumed the risk that it would not be permitted to build over 400 mobile home units on land that had no practical or proximate access to public utilities and water. At most, plaintiff could only hope that the township would permit it to build despite these deficiencies. [Citation omitted]. Giving considerable weight to the factual findings of the circuit court, we conclude that plaintiff's property should remain zoned as agricultural." 223 Mich at 137.

The court in *Dorman v Clinton Township, supra,* also discussed the "distinct, investment backed expectations" aspect of a takings test and stated the following:

"Furthermore, plaintiff cannot establish that the township's rezoning of its property interfered with legally recognized 'distinct, investment-backed expectations' under *Penn Central.* Plaintiff conducted minimal research before expending a large sum of money on this property. He admitted that he closed on the property only 12 days after first visiting the property and speaking to the owner. A simple visual inspection of the area would have placed plaintiff on notice that his proposed development was inconsistent with the character of the neighborhood. Moreover, plaintiff did not have a constitutionally protected right to develop his property under the 'light industrial' zoning classification. To claim a vested interest in the zoning classification, the property owner must 'hold a valid building permit and [have] completed substantial construction.' . . . 'In this regard, preliminary operations such as ordering plans, surveying the land, and the removal of old buildings are insufficient . . .' Plaintiff had made no changes to the land itself and had yet to begin construction on the two additional buildings proposed in his site plan. Plaintiff had merely removed the interior walls from the lodge in preparation for reconstruction. Under these circumstances, we cannot find that the plaintiff created a question of fact that he suffered an economic hardship amounting to a taking, regulatory or otherwise." 269 Mich App at 648, 649, 650, footnotes omitted.

Indeed, in the instant case, the plaintiff assumed the risk that it might not be successful in rezoning the property. Quite simply, there has been no taking in this case. The plaintiff purchased 160 acres of property and the plaintiff can clearly develop that property at a financial profit. Once again, the case of *Dorman v Clinton Township* is instructive:

Plaintiff cited *Sheffield Dev Company Inc. v Glenn Hts.,* 140 SW3d 660, 677 (Tex, 2004), in support of the proposition that 'lost profits are clearly one relevant factor to consider in assessing the value of property and the severity

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of the economic impact of rezoning on a landowner.' We are not bound by the decisions of other state courts. However, we note that the *Sheffield* court clarified this general proposition:

> 'It must be kept in mind, however, that 'the takings clause . . . does not charge the government with guaranteeing the profitability of every piece of land subject to its authority. Purchasing and developing real estate carries with it certain financial risks, and it is not the government's duty to underwrite this risk as an extension of obligations under the takings clause.' ' [*Id.* Citation omitted].

Plaintiff, an experienced real estate investor, should have been prepared for the financial risks involved in this project." 269 Mich App at 648, n 29.

In the instant case, plaintiff is an experienced real estate developer and should have been prepared for all financial risks involved in this project.

D. EQUAL PROTECTION.

In Count IV of plaintiff's Complaint, plaintiff challenges the decision of the Bedford Township Board to deny the plaintiff's rezoning on equal protection grounds. Plaintiff avers that Bedford Township has approved a rezoning of property to the south on which Village Meadows is being developed. In *Dowerk v Oxford Township*, 233 Mich App 62 (1998), the court enunciated the legal standard for an equal protection challenge as follows:

> "The doctrine mandates that persons in similar circumstances be treated similarly. [Citation omitted]. However, unless the dissimilar treatment alleged impinges on the exercise of a fundamental right or targets such protected classifications as those based on race or gender, the challenged regulatory scheme will survive equal protection analysis if it is rationally related to a legitimate governmental interest. [Citation omitted]. In such cases, the party raising the equal protection challenge has the burden of proving that the challenged law is arbitrary and thus irrational." 233 Mich App at 73.

In *Hazel Park Development LLC v City of Hazel Park*, unpublished Court of Appeals decision February 16, 2006 No. 264903 (attached hereto as **Exhibit D**), the court stated:

> "Plaintiff next argues that the trial court erred in granting summary disposition of its equal protection claim. We disagree. When no suspect or somewhat suspect classification is alleged, the courts uphold legislation that is rationally

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related to a legitimate governmental purpose. *Crego v Coleman*, 463 Mich 448, 259-260; 616 NW2d 218 (2000). To prevail under this standard, a plaintiff must show that the legislation is 'arbitrary and wholly unrelated in a rational way to the objective of a statute. *Id* at 259." See **Exhibit D**, p 2.

In *Cryderman v City of Birmingham*, 171 Mich App 15 (1988), the court stated:

". . . Equal protection analysis substantially overlaps due process analysis. The state and federal guarantees of equal protection do not preclude all classification in the application of statutes and ordinances, but only require that the classification be based on a real distinguishing characteristic and bear a reasonable relation to the object of the legislation." 171 Mich App 25 and 26.

Thus, an equal protection challenge to a zoning ordinance requires a two-step analysis. First, is there disparate treatment of similar situations? If so, secondly, is the disparate treatment rationally related to a legitimate governmental interest? In *Crego v Coleman*, 463 Mich 248 (2000), the court expounded on the second aspect of this equal protection standard as follows:

"Under rational-basis review, courts will uphold legislation as long as that legislation is rationally related to a legitimate governmental purpose. [Citation omitted]. To prevail under this highly differential standard of review, a challenger must show that the legislation is 'arbitrary and wholly unrelated in a rational way to the objective of the statute.' [Citation omitted]. A classification reviewed on this basis passes constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable. [Citation omitted]. Rational basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with 'mathematical nicety' or even whether it results in some inequity when put in practice. [Citation omitted]. Rather, the statute is presumed constitutional, and the party challenging it bears a heavy burden of rebutting that presumption." 463 Mich at 259, 260.

In the instant case, the plaintiff points to the 2002 rezoning of 65 acres to the south of the plaintiff's property from Ag to R-3 and claims that constitutes an equal protection violation. The Village Meadows situation was not similar to the instant case. In 2002, Bedford Township was attempting to revitalize downtown Temperance. A village overlay

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district was created and significant efforts were undertaken to revitalize this area. The 65 acres to the south of the plaintiff's property actually borders on Temperance Road. It is nearer to downtown Temperance. Also, in that case, the developer was requesting a rezoning to build a total of 100-115 homes. That is a far cry from the plaintiff's proposed 450 unit development. Moreover, the homes to be built in Village Meadows are "affordable homes ranging between $150,000.00 to $170,000.00 including lot." (Defendant's proposed **Trial Exhibit 31**, p3). This is different than the plaintiff's plan, described by the plaintiff to the Planning Commission (Defendant's proposed **Trial Exhibit 15**) wherein the plaintiff described the proposed development as including "higher end homes, $320,000.00 to $350,000.00 range, would be on the larger lots near Erie Road, $240,000.00 to $260,000.00 range on the 80' lots, and $200,000.00 to $230,000.00 range on the 60' lots." (Defendant's proposed **Trial Exhibit 15**, p 3). The rezoning by the Township of the Village Meadows property to the south specifically to revitalize downtown Temperance by providing for the building of affordable homes was grounded on a reasonable basis rationally related to a legitimate government purpose.

It must also be kept in mind that Village Meadows consists of 120 lots over 65 acres of land. That is a density of only 1.8 dwelling units per acre. That is a far cry from the plaintiff's proposed density of 450 units on 160 acres.

The situation at Village Meadows was unique and it served a legitimate government objective to revitalize downtown Temperance. Does that mean that thereafter the Township cannot say no to any further rezoning requests? If that were the case, the Township would lose those powers given to it by the Township Zoning Act, MCL 125.271. If the Township is prohibited from saying no because it said yes once before, the zoning enabling legislation is meaningless.

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The Village Meadows case was different. The Township here has legitimate reasons for denying the plaintiff's rezoning request. The zoning of the plaintiff's land is not arbitrary. Under case law "a classification reviewed on this basis passes constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable. [Citation omitted]. Rational basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with 'mathematical nicety' or even whether it results in some inequity when put in practice. [Citation omitted]. Rather, the statute is presumed constitutional and the party challenging it bears a heavy burden of rebutting that presumption." *Crego v Coleman*, 463 Mich 259, 260.

There is no equal protection violation in this case.

IV. SUMMARY

Based on the existing law and the facts to be introduced in this case, Defendant respectfully requests that this Honorable Court enter a Judgment in favor of Defendant dismissing plaintiff's Complaint.

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DATED: February 15, 2007

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