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## OPEN SPACE PRESERVATION ZONING PROVISIONS

**House Bill 4995 as enrolled**  
**Public Act 177 of 2001**  
**Sponsor: Rep. Ruth Johnson**

**House Bill 5028 as enrolled**  
**Public Act 178 of 2001**  
**Sponsor: Rep. Randy Richardville**

**House Bill 5029 as enrolled**  
**Public Act 179 of 2001**  
**Sponsor: Rep. Chris Kolb**

**House Committee: Land Use and  
Environment**  
**Senate Committee: Farming,  
Agribusiness and Food Systems**

**Second Analysis (12-19-01)**

### ***THE APPARENT PROBLEM:***

Advocates of open space preservation zoning or cluster zoning say it can be an effective alternative to traditional zoning approaches in protecting and preserving valuable land resources, such as woodlands, fields, wildlife habitats, farmland, scenic rural land features, and recreation areas. Generally speaking, this kind of zoning allows the same amount of residential development that is allowed in an entire given land area to be concentrated or clustered on a portion of the land, with the remainder to be protected permanently through conservation easements or some similar legal device. For example, instead of putting 20 houses on 100 acres, each on a 5-acre lot, cluster zoning could result in the 20 houses being concentrated on 10, 20, or 50 acres, with the remaining land left open for whatever purposes were suitable. (Cluster zoning can result in either townhouse or condominium style developments or developments of single family homes on private lots.) Proponents of this concept, which is said to be at least three decades old, point out that it offers economic and quality-of-life advantages to land owners, builders, preservationists, local governments, and the community as a whole. It allows land owners to take the equity out of undeveloped land, yet it can preserve large portions of it. At the same time, it allows the same number of residences to be built (balancing smaller home lots

with common open space), thus not penalizing developers. Given the widespread concern about the steady loss of land to development in Michigan, it makes sense for this kind of planning and zoning measure to be part of the arsenal available to be used in preserving valuable land resources. While many units of government make use of open space or cluster zoning, many others do not. Legislation has been introduced that would make cluster zoning a mandatory part of local zoning ordinances.

### ***THE CONTENT OF THE BILLS:***

The bills would require counties, townships, cities, and villages to include certain open space preservation provisions in their zoning ordinances. The requirement would begin one year after the effective date of the bills. The mandatory open space provisions would allow an owner of land zoned for residential development to build in a portion of the developable land area the same number of dwelling units that otherwise could have been built in the entire developable area, provided certain conditions were met. For townships, dwellings could be concentrated in up to 50 percent of the land area, and for cities and villages in up to 80 percent of the land area.

House Bills 4995, 5028 and 5029 (12-19-01)

The bills would only apply if a township, city, village, or county 1) had an adopted zoning ordinance; 2) had a population of 1,800 or more; and 3) had undeveloped land that was zoned for residential development at the required density (i.e., two or fewer dwelling units per acre or, if the land was served by a public sewer system, three or fewer dwelling units per acre).

Further, the required adoption of open space preservation provisions would not apply if a county, township, city, or village already had specific kinds of zoning provisions in effect on or before October 1, 2001 that had been used by a land owner. (See below.)

House Bill 4995 would amend the Township Zoning Act (MCL 125.282 et al.). House Bill 5028 would amend the County Zoning Act (MCL 125.240 and 125.216h). House Bill 5029 would amend the City and Village Zoning Act (MCL 125.600 and 125.584f).

Land owner's option. Under the bills, a land owner could use the open space preservation option if the following conditions were met.

- 1) A percentage of the land as specified in the zoning ordinance, but at least 50 percent for a township (and for zoning under the County Zoning Act) and 20 percent for a city or village, would have to remain perpetually in an undeveloped state by means of a conservation easement, plat dedication, restrictive covenant, or by other legal means;
- 2) The land would have to be zoned at a density equivalent to two or fewer dwellings per acre or, if the land was served by a public sewer system, three or fewer dwellings per acre;
- 3) The development could not depend on the extension of a public sewer or public water supply system, unless development of the land would otherwise (without exercise of the option) have depended on such an extension; and
- 4) The option provided to the land owner could not have been previously exercised with respect to the land.

The development of land under these provisions would be subject to other applicable ordinances, laws, and rules, including rules relating to suitability of groundwater for on-site water supply for land not served by public water and rules relating to suitability of soils for on-site sewage disposal for land not

served by public sewers. The bills would specify that after a land owner exercised the option permitted under the open space preservation zoning provisions, the land could be rezoned accordingly.

Undeveloped state. The term "undeveloped state" would mean a natural state preserving natural resources, natural features, or scenic or wooded conditions; agricultural use; open space; or a similar use or condition. The term would not include a golf course but could include a recreational trail, picnic area, children's play area, greenway, or linear park. Land in an undeveloped state could be dedicated to the use of the public (but would not have to be). The term "greenway" would refer to a contiguous or linear open space, including habitats, wildlife corridors, and trails, that link parks, nature reserves, cultural features, or historic sites with each other, for recreation and conservation purposes.

Exempted local units with existing cluster zoning. As noted above, the requirement that a county, township, city, or village adopt open space preservation zoning provisions would not apply if the unit of government met two conditions. First, the local unit would have to have had in place, at least by October 1, 2001, a zoning ordinance that provided for both of the following:

- 1) land zoned for residential development may be developed, at the option of the land owner but subject to any approvals or other conditions imposed by the unit of government, with the same number of dwelling units on a portion of the land that, as determined by the unit, could otherwise be developed on the entire land area under existing ordinances, laws, and rules; and
- 2) if the land owner exercises the option provided above, the portion of the land not developed will remain perpetually in an undeveloped state by means of a conservation easement, plat dedication, restrictive covenant, or other legal means that runs with the land.

Second, for the unit of government to be exempt from the requirement, the bills would require a land owner to have exercised the "open space" option under the local zoning ordinance provision on or before the bills' enactment date, with at least 50 percent of the land area (for townships and counties) or 20 percent of the land area (for cities and villages) remaining perpetually in an undeveloped state.

Referendum. The mandated provisions would be subject to referendum as if they were locally

generated zoning ordinances or revisions. House Bill 4995 would amend the section dealing with referendums to increase the number of signatures required on a petition from 10 percent to 15 percent of the total votes cast for all candidates for governor at the most recent general gubernatorial election. This would make the referendum petition requirement in the township act the same as in the county act.

### ***FISCAL IMPLICATIONS:***

The House Fiscal Agency has reported that the bills would have no direct fiscal impact on the state or on local units of government. (Fiscal note dated 10-11-01)

### ***ARGUMENTS:***

#### ***For:***

Open space preservation zoning, or cluster zoning as it is sometimes called, is a useful tool in protecting the state's woodlands, farmland, wetlands, and other open spaces, while still permitting market-driven residential development. Ordinances that allow land owners to concentrate development on a portion of land while leaving common open spaces have the potential to protect and preserve open spaces without raising taxes and without reducing development opportunities. It is a way to enhance the quality of life for homeowners (and the community) without affecting the profits of builders and land owners. Cluster development can be cost effective, by reducing the costs of infrastructure, such as roads and water lines, and reducing the future costs of maintaining them (plowing, resurfacing, protecting from fire, etc.). Developments combining smaller house lots and preserved open spaces (whether for agriculture, parks, playgrounds, picnic areas, wildlife habitats, or greenways) are often preferable to developments that control density through single homes on large lots. They can preserve more land in larger parcels and are often more environmentally friendly.

The preservation of open space is an important public policy issue. The Michigan Environmental Council cites studies showing that the state could lose up to 17 percent of its farmland, 8 percent of its forests, and 10 percent of its wetlands within the next 40 years. Some people believe that local units of government have not taken seriously enough the loss of these precious resources. Some local governments have cluster zoning, but many do not. While this approach is not a cure-all, it does offer a tool for the

promotion of sensible land development. The adoption of such zoning statewide is a step in the right direction. It should be noted that the bill does not require cluster developments. The decision would be left in the hands of the land owners and driven by market considerations. But it would make such development a viable option in more areas of the state. The bills contain a number of important safeguards, such as the requirement that in townships 50 percent of the land in cluster zoning development be perpetually in an undeveloped state (and 20 percent for cities and villages) and that the land in question be zoned at a density of two or fewer dwellings per acre or, if there was a public sewer, three or fewer dwellings per acre. Plus, the development in question could not depend upon the special extension of a public sewer or water supply system.

#### ***Against:***

Representatives of local units of government are very concerned about the state mandating provisions in local zoning ordinances. They point out that these bills (one for counties, one for townships, and one for cities and villages) would apply equally to the Keewenaw Peninsula and Wayne County. They would apply to areas where there is little or no space of any kind left to develop, to areas where there is little development pressure of any kind, as well as to those parts of the state where pressures to develop open space are the most sharply felt. If the state is to involve itself in this way in local zoning decisions, it at least ought to do it in a more targeted way than this. Township representatives have suggested perhaps using population thresholds (population per square mile). Representatives of cities have recommended at least requiring that a certain acreage of open space be available before cluster zoning is an option, so that preservation of open space will be meaningful. These mandated ordinances won't fit all cases. The administration of cluster zoning requires expertise, warn some planners, and some communities may not have the wherewithal to administer such zoning provisions.

Moreover, the bills ought to allow local units to decide in given cases that cluster zoning is not appropriate. Note that the package of bills puts the decision in the hands of the land owner or developer whether land will be subject to cluster zoning. It does not allow the local unit discretion over a plan by a developer to use cluster zoning (based on, for example, whether a cluster development is compatible with existing neighborhood development). It gives the local unit no discretion over the size of the open spaces involved (which

gives rise to the question whether the bills aim at promoting the meaningful preservation of open space or at micromanaging local decision making). Further, it gives the local unit no discretion over the character of open space. The bills appear to deny the right of the local community to negotiate with developers over the nature of land development. The mandating of these provisions could lead to many local controversies, litigation, and to attempts to circumvent the requirements.

***Response:***

It should be noted that the bills do allow local units to opt out from under the mandate if they already have zoning ordinances that address cluster zoning in certain specified ways. Further, the bills say that the development of land would be subject to other applicable ordinances, laws, and rules, such as groundwater restrictions and soil suitability restrictions. The bills do not require the use of cluster zoning; they require that local units permit land owners the option of developing property under such provisions. Also, the bills would not apply to communities with a population under 1,800.

Analyst: C. Couch

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.