STATE OF MICHIGAN

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Opinion No. 6892

March 5, 1996

ENVIRONMENTAL PROTECTION:

Regulation of wetlands and land adjoining wetlands by local units of government

Local units of government may not regulate land adjoining a wetland by imposing a buffer or setback on that land to protect the wetland under the authority of the Natural Resources and Environmental Protection Act, and that act preempts any zoning authority to impose buffer or setback zones for the specific purpose of protecting the wetland. However, local units of government are empowered, under their zoning authority, to regulate wetland buffer or setback areas for other purposes utilizing the same types of criteria as they might generally use for setback or buffer zones in their zoning ordinance.

A local unit of government may not require the owner of land containing a wetland under two acres in size, when filing an application for a wetland use permit, to prove that the wetland is not essential to the preservation of the natural resources of the local unit of government.

Honorable Paul Hillegonds

Speaker of the House

The Capitol

Lansing, MI 48913

You have asked two questions relating to the regulation of wetlands by local units of government.

Your first question may be stated as follows:

> 1. Whether a local unit of government may, under its zoning ordinance, regulate land adjoining a wetland by imposing a buffer or setback on that land?

Local government authority to regulate wetlands is limited in the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, MCL 324.101 et seq; MSA 13A.101 et seq. Section 30307(4), which was added to the NREPA by 1995 PA 59, provides in pertinent part:

> (4) A local unit of government may regulate wetland within its boundaries, by ordinance, only as provided under this part. This subsection is supplemental to the existing authority of a local unit of government. An ordinance adopted by a local unit of government pursuant to this subsection shall comply with all of the following:
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> (a) The ordinance shall not provide a different definition of wetland than is provided in this part, except that a

wetland ordinance may regulate wetland of less than 5 acres in size.

(b) If the ordinance regulates wetland that is smaller than 2 acres in size, the ordinance shall comply with section 30309.

(c) The ordinance shall comply with sections 30308 and 30310.

(d) The ordinance shall not require a permit for uses that are authorized without a permit under section 30305, and shall otherwise comply with this part. [Emphasis added.]

While the first sentence of section 30307(4) states that a local unit of government "may regulate wetland within its boundaries, by ordinance, only as provided under this part," the second sentence provides that the regulatory authority granted under subsection 4 is "supplemental to the existing authority of a local unit of government." (Emphasis added.) The question thus arises whether the Legislature intended by this additional language to recognize the continued existence of some other statutory authority of local units of government to regulate wetlands.

1995 PA 59, in pertinent part, amended the NREPA to add Part 303 WETLAND PROTECTION while repealing the Goemaere-Anderson Wetland Protection Act, 1979 PA 203. The purpose was to "to recodify current natural resources management statutes concerning wildlife conservation, recreation, habitat protection, and environmental issues" into a single cohesive statute. Senate Legislative Analysis, HB 4350, April 6, 1995. Section 30307(4) of the NREPA reenacted, in substance, language formerly contained in section 8(4) of the Goemaere-Anderson Wetland Protection Act. Prior to 1992, section 8(4) had permitted a municipality to provide a "more stringent" definition and regulation of wetlands than the provisions of that act. However, this authority was excised from section 8(4) of the Goemaere-Anderson Wetland Protection Act by amendments made in 1992 PA 295.

Where ambiguity exists in a revised code incorporating a statute, the prior legislative history of the incorporated statute may be examined to assist in determining legislative intent. 1A Sutherland Statutory Construction (5th ed, 1993) Sec. 28.10, p 489. See, also Luttrell v Dep't of Corrections, 421 Mich 93, 103; 365 NW2d 74 (1984).

Review of the legislative history of 1995 PA 59, which amended the NREPA to add section 30307(4), gives no insight into legislative intent since no substantive changes were made. A review of the legislative history of amendatory 1992 PA 295, however, is informative. It was introduced as 1991 SB 522 and, as finally enacted [as Substitute (S-3)], it amended section 8(4) of the Goemaere-Anderson Wetland Protection Act, limiting the recognized scope of supplemental authority, as well as removing the previous grant of authority to municipalities to provide a more stringent definition and regulation of wetlands than that provided by 1979 PA 203. The changes wrought by 1992 PA 295 are best illustrated by quoting Substitute (S-3). In Substitute (S-3) the new language is in capital letters and the deleted language has a line through it, as follows:

(4) A municipality MAY REGULATE WETLAND WITHIN ITS BOUNDARIES, by ordinance, ONLY AS provided under this act. This subsection is supplemental to the existing authority of a municipality. AN ORDINANCE ADOPTED BY A MUNICIPALITY PURSUANT TO THIS SUBSECTION SHALL COMPLY WITH ALL OF THE FOLLOWING:

(A) THE ORDINANCE SHALL NOT PROVIDE A DIFFERENT DEFINITION OF WETLAND THAN IS PROVIDED IN THIS ACT, EXCEPT THAT A WETLAND ORDINANCE MAY REGULATE WETLAND OF LESS THAN 5 ACRES IN SIZE.

(B) IF THE ORDINANCE REGULATES WETLAND THAT IS SMALLER THAN 2 ACRES IN SIZE, THE ORDINANCE SHALL COMPLY WITH SECTION 8B.

(C) THE ORDINANCE SHALL COMPLY WITH SECTIONS 8A AND 8C.

(D) THE ORDINANCE SHALL NOT REQUIRE A PERMIT FOR USES THAT ARE AUTHORIZED WITHOUT A PERMIT UNDER SECTION 6, AND SHALL OTHERWISE COMPLY WITH THIS ACT.

Prior to this amendment, section 8(4) of the Goemaere-Anderson Wetland Protection Act clearly stated that its provisions were supplemental to a municipality's existing authority "to protect wetland." The removal of this phrase from the supplemental authority, concurrently with the restriction of the authority to regulate wetlands only as provided in the Goemaere-Anderson Wetland Protection Act, clearly indicates the Legislature's intent to preempt any local regulation of wetlands inconsistent with the provisions of the Goemaere-Anderson Wetland Protection Act, including regulation under general zoning authority. (1)

This interpretation is bolstered by Senate Legislative Analysis, SB 522 (Substitute S-3 as reported), March 24, 1992, which explained the change:

> Local Ordinances
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> Currently, a municipality by ordinance may provide for more stringent definition and regulation of wetland than is provided under the Act. The Act specifies that this provision is supplemental to a municipality's existing authority to protect wetland. The bill provides, instead, that subject to other powers of a municipality authorized by common law, statute, or rule, a municipality could regulate wetland within its boundaries by ordinance. An ordinance would have to comply with all of the following:
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> -- The ordinance could not provide a different definition of wetland than is provided in the Act, except that a wetland ordinance could regulate wetland of less than five acres in size. [Emphasis added.]

Thus, it is clear that local units of government are not authorized to impose the same permit requirements on buffer or setback areas for the purpose of protecting wetlands since under NREPA those areas cannot be included in the definition of wetland. Conversely, however, the NREPA only restricts local regulation of wetlands as defined in the statute. Nothing in the act restricts municipal regulation of any non-wetland areas under general zoning authority so long as the regulation is based, not on the protection of the wetland itself, but rather on the same type of reasonable public health, safety and welfare considerations as are generally used in establishing setbacks and buffers for other non-wetland areas.

It is my opinion, therefore, in answer to your first question, that local units of government may not regulate land adjoining a wetland by imposing a buffer or setback on that land to protect the wetland under the authority of the Natural Resources and Environmental Protection Act, and that act preempts any zoning authority to impose buffer or setback zones for the specific purpose of protecting the wetland. However, local units of government are empowered, under their zoning authority, to regulate wetland buffer or setback areas for other purposes utilizing the same types of criteria as they might generally use for setback or buffer zones in their zoning ordinance.

Your second question may be stated as follows:

> 2. Whether a local unit of government may require the owner of land containing a wetland under two acres in size, when filing an application for a wetland use permit, to prove that the wetland is not essential to the preservation of the natural resources of the local unit of government?

Section 30309 of the NREPA deals specifically with wetlands less than 2 acres in size. It provides:

> A local unit of government that has adopted an ordinance under section 30307(4) that regulates wetland within its jurisdiction that is less than 2 acres in size shall comply with this section. Upon application for a wetland use permit in a wetland that is less than 2 acres in size, the local unit of government shall approve the permit unless the local unit of government determines that the wetland is essential to the preservation of the natural resources of the local unit of government and provides these findings, in writing, to the permit applicant stating the reasons for this determination. In making this determination, the local unit of government must find that 1 or more of the following exist at the particular site:
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> (a) The site supports state or federal endangered or threatened plants, fish, or wildlife appearing on a list specified in section 36505.

(b) The site represents what is identified as a locally rare or unique ecosystem.

(c) The site supports plants or animals of an identified local importance.

(d) The site provides groundwater recharge documented by a public agency.

(e) The site provides flood and storm control by the hydrologic absorption and storage capacity of the wetland.

(f) The site provides wildlife habitat by providing breeding, nesting, or feeding grounds or cover for the forms of wildlife, waterfowl, including migratory waterfowl, and rare, threatened, or endangered wildlife species.

(g) The site provides protection of subsurface water resources and provision of valuable watersheds and recharging groundwater supplies.

(h) The site provides pollution treatment by serving as a biological and chemical oxidation basin.

(i) The site provides erosion control by serving as a sedimentation area and filtering basin, absorbing silt and organic matter.

(j) The site provides sources of nutrients in water food cycles and nursery grounds and sanctuaries for fish. [Emphasis added.]

A plain reading of the underscored language in the foregoing section indicates that it is the obligation of the local government, if it wishes to deny a permit, to determine that a wetland of less than two acres is essential to preservation of its natural resources and to provide the applicant with its written reasons for this determination. The legislative history of the predecessor statute, 1992 PA 295, which added this provision to the Goemaere-Anderson Wetland Protection Act as section 8b, confirms this conclusion. The Senate Legislative Analysis of SB 522 (Substitute S-3 as reported and enacted without change as 1992 PA 295), March 24, 1992, notes the following objection to the bill:

> [A] municipality would have to approve an application for wetland use unless it determined that the wetland was essential to the preservation of the municipality's natural resources.... Thus, the burden of proof would rest on the local government and not on the person proposing to develop the wetland. Undoubtedly, many municipalities would have to hire persons who were experts in various environmental and scientific fields to make these determinations. [Emphasis added.]

Further, unlike section 30306(f) of the NREPA, which requires persons filing permit applications directly with the Department of Natural Resources to provide "[a]n environmental assessment, on a form supplied by the department, of the proposed use or development if requested by the department," section 30309 contains no similar requirement. No similar requirement may be read into section 30309 since it was intentionally excluded by the Legislature. See Ficano v Lucas, 133 Mich App 268, 275; 351 NW2d 198 (1983).

It is my opinion, therefore, in answer to your second question, that a local unit of government may not require the owner of land containing a wetland under two acres in size, when filing an application for a wetland use permit, to prove that the wetland is not essential to the preservation of the natural resources of the local unit of government.

Frank J. Kelley

Attorney General

(1) It is well established that local governments have no inherent authority to zone and that the state may restrict zoning authority previously granted under the various zoning enabling acts. See, e. g., City of Livonia v Dep't of Social Services, 423 Mich 466, 492-496; 378 NW2d 402 (1985).
