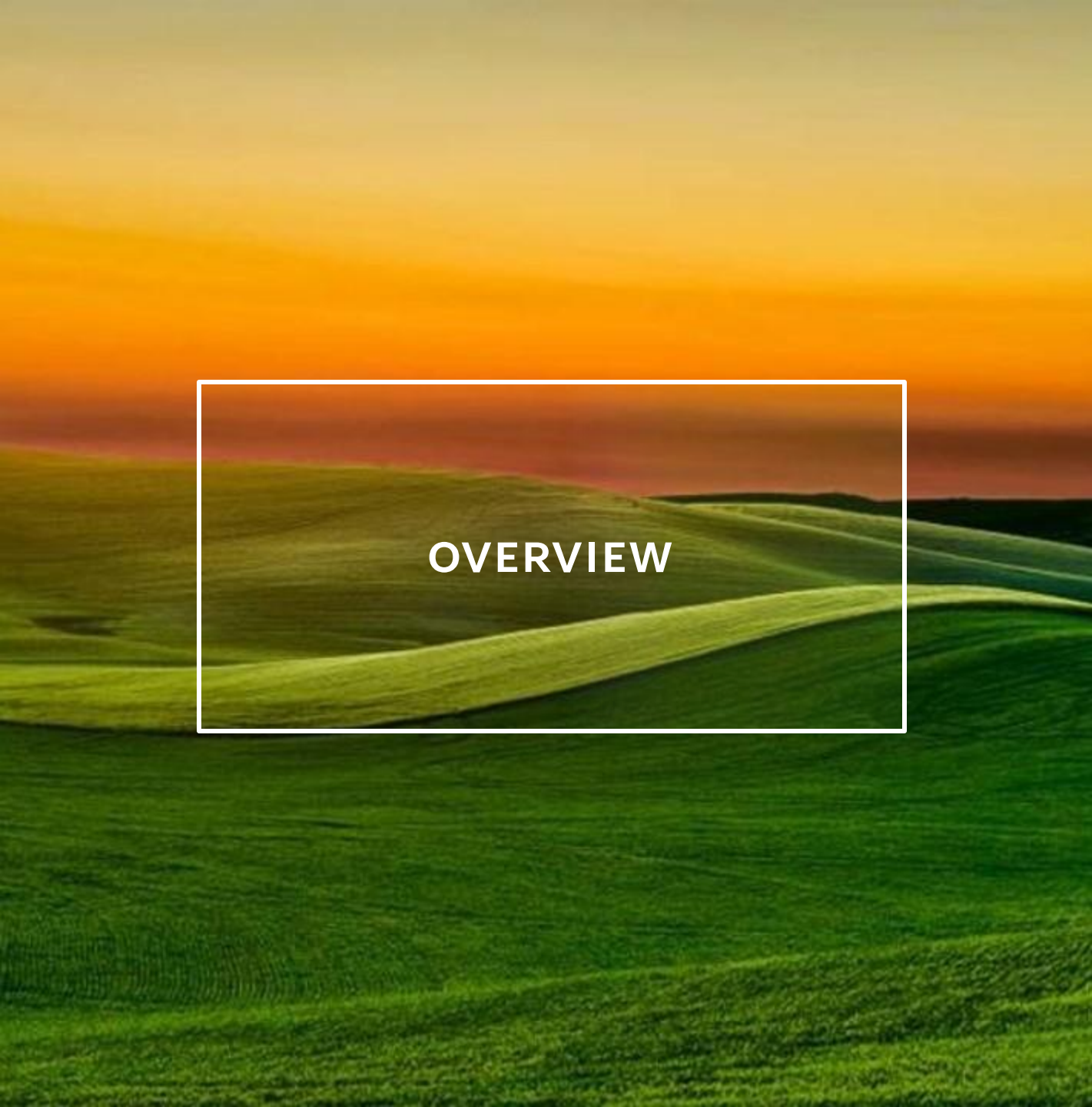




ADAPTING COMMUNITY BENEFIT AGREEMENTS FOR RURAL LAND USE PRACTICE

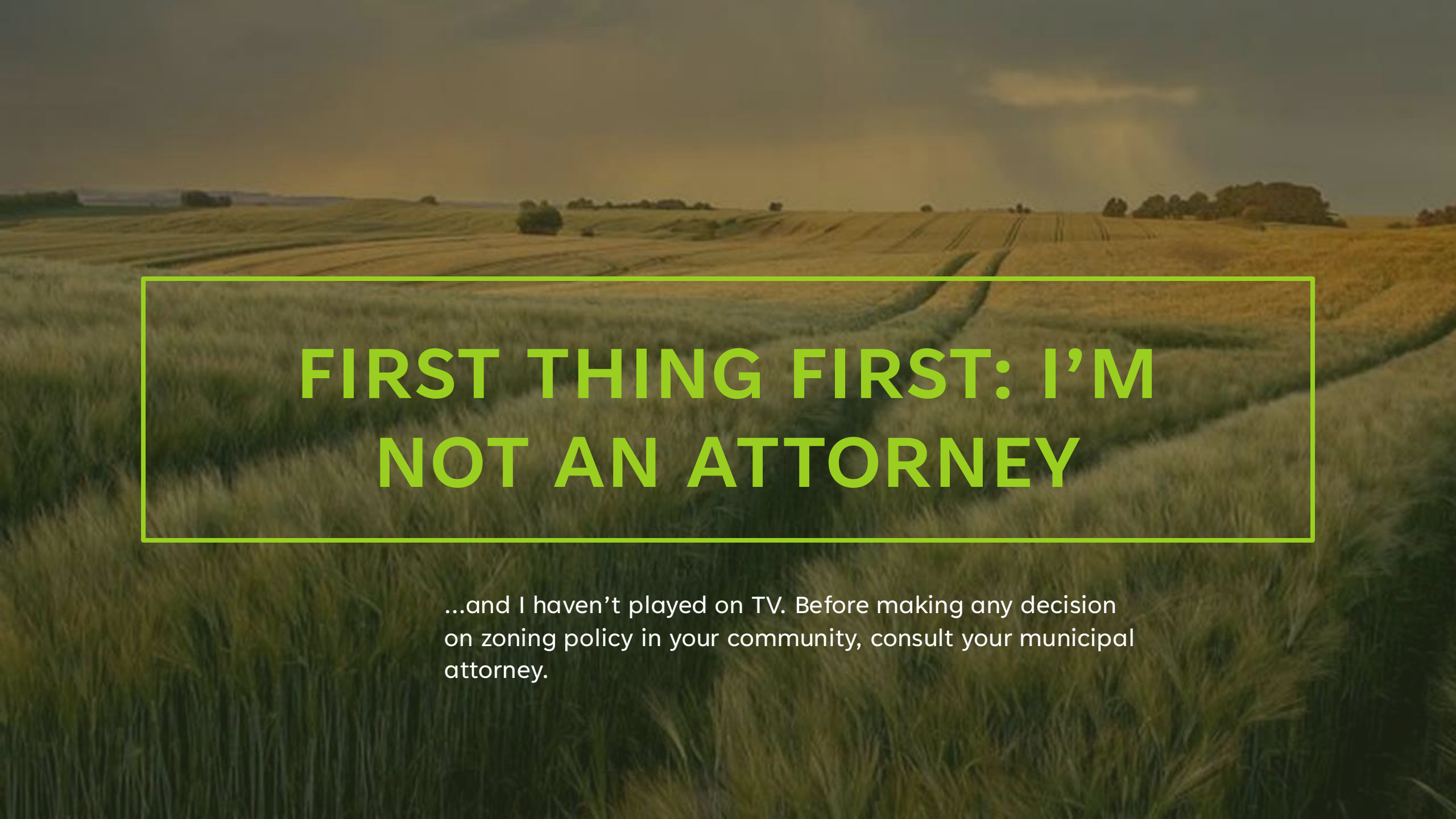
Meeting Demand for Data Centers and Other Controversial
Proposals

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OVERVIEW

- 2025: The Year of the Data Center
- Kalkaska County
- Current Regulatory Framework
- CBAs and CBOs: Detroit and Arnstein's Ladder
- Legal Cases and the Unconstitutional Conditions Doctrine
- Survey of Northwest Lower Michigan Leadership
- Options for Negotiating Benefits (probably legally)



FIRST THING FIRST: I'M NOT AN ATTORNEY

...and I haven't played on TV. Before making any decision on zoning policy in your community, consult your municipal attorney.

2025: THE YEAR OF THE DATA CENTER IN MICHIGAN

- 16 sites assessed by developers for large-scale data centers in 2025
- Most in southeast Michigan
- Most on previously undeveloped farmland
- Vast amounts of public pushback

High impact uses are sited all the time; why are data centers different?



Updated March 24, 2026.

Map: Lucas Smolicz Larson | MLive.com • Source: MLive reporting • Created with Datawrapper

KALKASKA COUNTY



- Local energy company sought to develop between 1-1,500 acres of state land near the Village of Kalkaska (Kalkaska Township)
- Developer sought letter of support to explore the idea from County Board of Commissioners
- DNR denied selling land for data center development
- 3 public input sessions were scheduled
- Only 2 sessions occurred before idea was withdrawn from consideration
- Two key findings:
 - **1- Members of the public knew very little about the development process**
 - **2- Zoning is a limited tool in ensuring high impact developments are mutually beneficial**





THE CURRENT REGULATORY FRAMEWORK



PERMITTED BY RIGHT

- Administratively approved
- Typically low impact or impact matches desired character of the zoning district
- Examples – single family houses in residential; retail in downtown commercial; car washes in auto-oriented commercial
- Site plan still required

SPECIAL USES

- Approved by Planning Commission (usually)
- Matches desired character of district but has potential for outsized impacts
- Examples – childcare centers in residential; drive-thru restaurants in commercial; storage facilities
- Allows for discretionary opinion on certain impacts (to neighboring property, environment, etc.)





SPECIFIC USE STANDARDS

- Administratively approved
- Requires standards specific to that use
- Benefit – more expedited process than special uses – developer knows exactly what is required
- Example – dog kennel with outdoor area in residential area

PLANNED UNIT DEVELOPMENT

- Intentionally ambiguous to allow flexibility in development
- Can also be specific in certain respects
- Can be a standalone district (special use) or an overlay zone
- Planning Commission often negotiates the terms of the development agreement
- Flexible, but slow





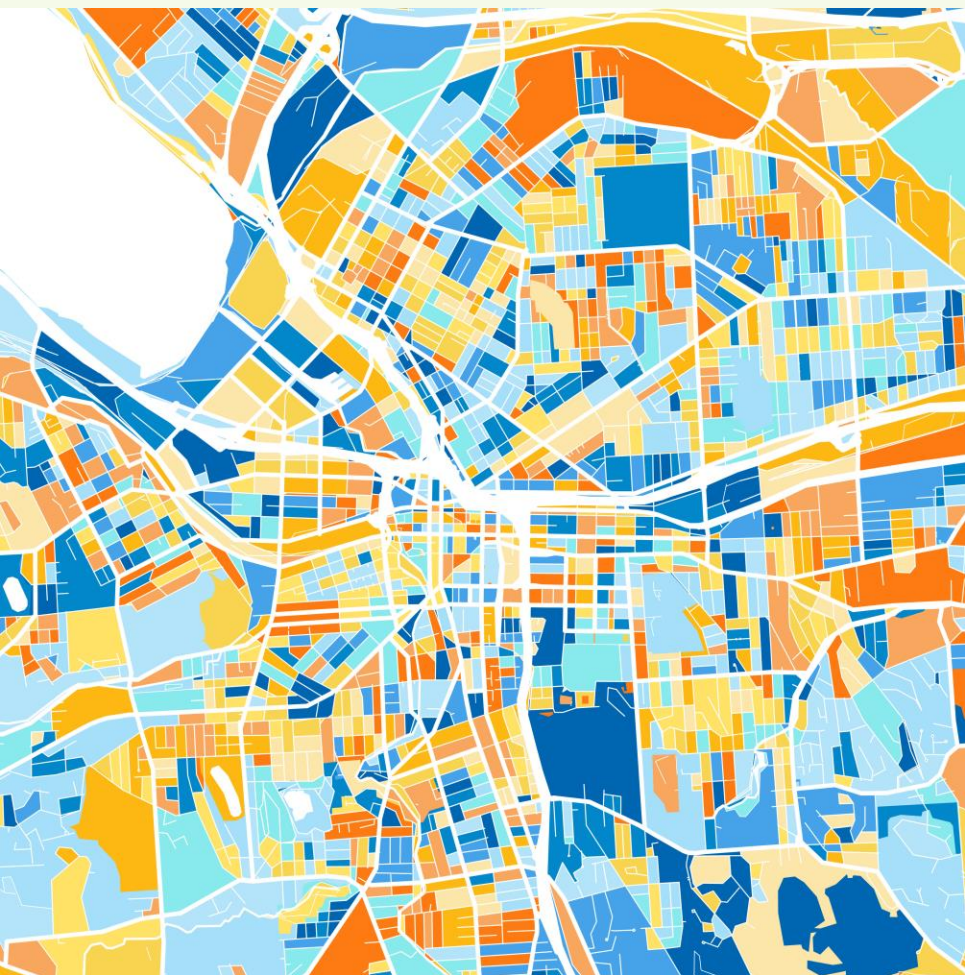
INCENTIVE ZONING

- Mitigation benefits in exchange for developer getting more than allowed by standard zoning
- Developer can earn greater building height or density for a set list of offsetting strategies
- Offsets must be site/impact related to not be contract zoning or “buying zoning”
- Examples – Affordable housing, open space preservation, non-motorized improvements, larger setbacks, more buffering, etc.

OVERLAY ZONES

- Standards “on top of” existing district standards
- Examples – airports, historic districts, conservation districts





WHAT MOST COMMUNITIES ARE DOING: EXCLUSIONARY ZONING

- Most communities are not adding data centers to their zoning ordinance or map
- Most zoning ordinances use **permissive zoning**: only those uses listed are allowed
- This is the “**wait and see**” approach
- Benefit – May deter developers from trying to go there; Can put costs of developing a data center ordinance on the developer (legal and planning costs); May be able to prove the use can be excluded
- Concern – Developer can sue; This is legally termed exclusionary zoning by the Michigan Zoning Enabling Act

An aerial photograph showing a long, straight row of green trees planted along a road. To the left of the trees is a large field of bright yellow flowers, likely rapeseed. To the right is a green agricultural field. The trees cast long, dark shadows onto the green field to their right.

COMMUNITY BENEFIT AGREEMENTS AND ORDINANCES

- CBAs were traditionally between private entities (developer and citizen group)
- Picked up steam during urban renewal in the past 20 years but were around before then
- Meant to offset negative community impacts with positive ones (displacement, affordable housing, local hiring, public spaces)
- Detroit was first major U.S. city to adopt a Community Benefits Ordinance
 - Changes paradigm from private-private to public-private; many legal questions to come

DETROIT'S CBO: A LANDMARK POLICY



- Adopted in 2016, amended in 2021
- Applies to Tier 1 developments, which are those that...
 - Are valued at \$75 million or more **AND**
 - The City is transferring land for the development valued at \$1 million or more **OR**
 - The City is providing \$1 million or more in tax abatements or other tax breaks for the term of the abatement
- If Tier 1, the development triggers the activation of a Neighborhood Advisory Council (NAC) and a development agreement



DETROIT'S CBO: WHAT THE COMMUNITY HAS GAINED AS A RESULT

- According to Lamore et al. (2024), Detroiters have negotiated “55,000 estimated construction and permanent jobs, over 4,000 new housing units, and millions of square feet in new commercial and industrial space.”
- Berglund & Butler (2021) cite an array of benefits including public park developments, school scholarships, local hiring, a reduction in construction nuisances, and historic preservation, amongst others

DETROIT'S CBO: PROBLEMS WITH THE PROCESS

- Berglund & Butler (2021) provide a robust analysis by interviewing participants on the NAC, city officials, and developers, and by reviewing CBO documents.
- Four key areas of concern: fairness & inclusion, representation, timeline issues, and overlapping agreements/policies



The background of the slide is a blurred, close-up photograph of green grass or reeds, creating a textured, organic feel. The colors are various shades of green, from light to dark, with some highlights and shadows. A white rectangular border is centered on the slide, enclosing the text.

CASE LAW & THE LEGAL HURDLES TO COMMUNITY BENEFITS

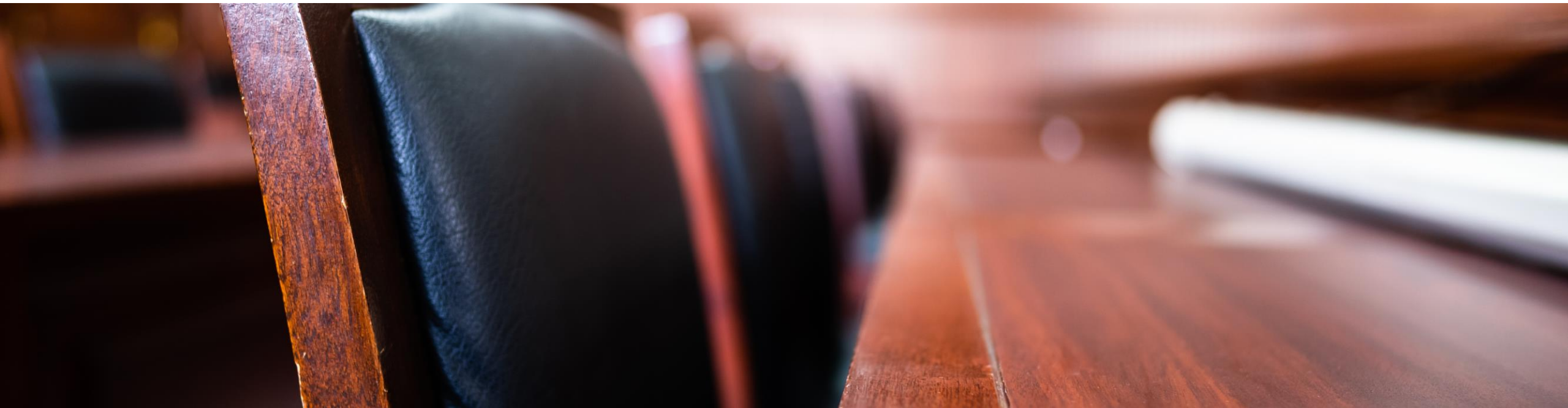
NOLLAN V. CALIFORNIA COASTAL COMMISSION (1987)

- Establishes the **essential nexus** test
- Requirements on the site plan must be related to project impacts
- Nollan's wanted to redevelop beachfront bungalow to be larger; commission demanded an easement to link 2 beaches, citing the new development as a "psychological barrier"
- Finding: California Coastal Commission's requirement for Nollan's to provide an easement on their property was an unconstitutional exaction – unrelated to protecting views



DOLAN V. CITY OF TIGARD (1994)

- Establishes the **rough proportionality** test
- City of Tigard asked property owner to dedicate part of land for public greenway and another part for a non-motorized path to offset building footprint and parking lot expansion in a flood-prone area
- The demands met the essential nexus test, but were excessive proportionally



KOONTZ V. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT (2013)

- Next step in clarifying the Nollan/Dolan framework for unconstitutional conditions doctrine
- Coy Koontz wanted to develop portion of land which consisted of wetlands; offered to offset impact by deeding 11 acres as conservation easement; request denied; District asked for a smaller development size, larger easement, and for payment to improve a district property miles away
- Koontz case had 2 main effects:
 - 1 – Includes permit denials in the Nollan/Dolan test, not just conditions on approvals
 - 2 – Monetary exactions, not just land use conditions, must meet the nexus and proportionality tests

C O U R T H O U S E

**SHEETZ V.
COUNTY OF EL
DORADO (2024)**

- Clarifies that the Nollan/Dolan test applies to **legislatively enacted conditions**, not just administrative
- Property owner wanted to build a manufactured home; County charged \$23,420 for a Traffic Impact Mitigation fee based on development type and location; plaintiff sued and Supreme Court ruled 9-0 in favor of Sheetz
- Nollan/Dolan test must be passed even if the standards are for everyone, not just case by case



KEY EFFECTS ON THE USE OF CBA'S AND THE LAND USE PERMITTING PROCESS

1. Conditions required by the permitting process **must be related** to the impact of the development (essential nexus).
2. The conditions **must be proportional** to the impact of the development (rough proportionality).
3. The Nollan/Dolan test is relevant to permits accepted with conditions as well as **permit denials** when the developer refuses to accept the conditions.
4. **Monetary exactions** and physical takings are subject to the Nollan/Dolan test.
5. The Nollan/Dolan test applies whether the conditions were prescribed by an administrator or a **legislative body**.



DETROIT'S CBO: HOW IT AVOIDS NOLLAN/DOLAN SCRUTINY

- The Detroit CBO is tied to benefits (access to public land and/or tax benefits)
- It is NOT tied to a land use permit
- Good for large cities and municipalities with high enough development demand and resources to trade, but **how do rural places use CBOs to offset high impact land uses?**

SURVEY OF NORTHWEST LOWER MICHIGAN



Survey sent via email to the following:

- **Kalkaska County leadership** – Kalkaska County Planning Commission, two Kalkaska County Board of Commissioners, County Zoning Administrator, Conservation District Manager, all local township elected officials whose emails could be found online.
- Local township supervisors, village managers, clerks, and treasurers in **Antrim** (52), **Benzie** (46), **Manistee** (59), and **Missaukee** (46) counties.
- County planning directors in Emmet, Manistee, and Missaukee counties.
- Regional planners at **Networks Northwest** (Northwest Michigan Council of Governments).
- Three **MSU Extension** land use educators.

SURVEY RESULTS

- 45 total responses
- Mostly local elected officials (28) or appointed officials (13)
- 92% said that there is either widespread opposition or lacking support for data centers in their community
- 86% said community members either probably or definitely do not know the MZEA prohibits exclusionary zoning
- Most think the best approach is to zone for data centers rather than wait for an application submittal – to avoid legal fees and a rushed timeline to create an ordinance
- 30 out of 36 respondents said a public input process should be required for high impact use applications

SURVEY RESULTS

- Advisory committee should be made up of (top responses): local elected officials, a watershed council representative, a conservation district representative, county appointed officials, at-large community members, and local appointed officials (e.g. planning commissioners).
- Top site impacts that would trigger CBO: water usage (88%), power demand measured by Megawatt (MW) threshold (81%), projected noise (78%), proximity to homes or schools (75%), whether the use requires a rezoning (72%), required grid upgrades to accommodate (72%), public infrastructure support from the municipality (extension of roads, water, sewer, fiber) (69%), and land scale (projects exceeds a specified acreage) (69%).

SURVEY RESULTS

- All site impact conditions received at least 64% support (resource reduction, infrastructure expansion/upgrades, public safety funding, buffering requirements, utility price protections, a decommissioning plan with surety bonds, and minimum tax revenue guarantees)
- The top 5 voluntary community benefits desired to offset impacts were: **farm and forest preservation** (developer agrees to purchase and retire the development rights of another parcel or parcels elsewhere in the county, or provide conservation easements to preserve land for public use) (76%), **updates to infrastructure outside of the affected area** (70%), **contributions to a general community fund** (67%), **funding to parks and open space improvements** (67%), and an **agreement to hire local contractors as a first priority for the development** (61%).

CBO IMPLEMENTATION: THE MASTER PLAN, TRIGGERING IMPACTS, AND DEFINING “RURAL CHARACTER”

1. Triggering impacts should be defined in the Master Plan
2. Many Master Plans cite “maintain rural character” – this needs to be defined
 - a. Does this mean... large setbacks, low density/large minimum parcel sizes (what is a large minimum – is it 5 acres or 40?), recreation amenities, prime farm preservation, locally owned businesses, development clustered near existing infrastructure?
3. The Master Plan is a guiding document, the Zoning Ordinance is the legal enforcement
 - a. Just because the Master Plan says “preserve rural character”, and the Zoning Ordinance has 1 acre minimums, the developer can build to the ordinance standards
4. Triggering a CBO will depend on the community. Everyone cares about something different (water usage, developing on undeveloped land, viewsheds, etc.)

PRE-APPLICATION INPUT SESSION(S)

- MZEA allows a broad range of supporting documentation for a land use permit application
- Municipality can require a public input session(s) for high impact uses (Van Buren Charter Township)
- The triggering definitions of high impact should be written into the code; “or at the discretion of the Municipal Planner”
- Can require a Community Impact Report
- Important: The results of the community input cannot be the gatekeeper for a permit submittal, only the process itself
- At a minimum this puts the developer in a room with members of the public





POST-APPLICATION STAKEHOLDER ADVISORY COMMITTEE

- Could also be a public input session
- Easier to not appear as a gatekeeper to application submittal
- Stakeholder makeup pre-determined by ordinance language
- At-large community members could be selected apolitically (e.g. random sample) to avoid Detroit concern
- Cannot make final decision – role must be advisory only

NON-GOVERNMENTAL NEGOTIATOR

- The traditional method
- Non-profit or citizen led entity
- Easiest to get non-site community benefits legally
- Not tied to land use permit process
- Probably only works for communities with high market demand and high civic participation





BONUS STANDARDS: PUD'S AND INCENTIVE ZONING

- PUD and incentive zoning could be used as bonus standards following a minimum allowance for high impact uses
- PUD process can require public input sessions
- PUD is intentionally vague (e.g. show that the development is harmonious with neighboring land uses and properties)
- PUD allows **discretion** from the overseeing body (planning commission)
- Incentive zoning is a pre-determined **menu of options** to offset higher impacts than what is allowed
- **Community Benefits Document** – to cite or not to cite – probably don't cite – just have at the side



EXAMPLE TO PONDER: BRECKENRIDGE, COLORADO

- Breckenridge, CO has a hybrid performance based standard, incentive, and Euclidean zoning model
- **Performance** – Absolute standards and relative standards with positive and negative points – development must achieve a score of 0 or higher
- **Incentive** – Applicant can get density and height bonuses in exchange for community benefits to offset impact
- **Euclidean** – Uses are still set by zoning district
- Site mitigation (positive points) still related to impacts even if off-site
- Unclear if the MZEA would support this model – data centers may be the impetus to review the balance between private property rights and local zoning authority

IN CONCLUSION

- The Unconstitutional Conditions Doctrine and the Michigan Zoning Enabling Act create significant legal uncertainty regarding the use of the land use permitting process to negotiate non-site related community benefits
- Community benefits are best negotiated when the municipality is giving up their own benefit, not related to zoning (tax benefits, public land)
- Public input has proven effective in garnering informal community benefit agreements, therefore making public input a procedural requirement for high impact uses could be a useful strategy for legally acquiring non-site related community benefits
- For communities seeking to limit data center development, conservative baseline zoning standards paired with legislatively adopted development bonuses may provide a mechanism to encourage additional community benefits while avoiding exclusionary zoning
 - It is unclear the degree to which these incentives can be non-site related under Michigan law
- **Public input and bonus incentives with minimal zoning allowances may be the best way to acquire site and non-site related benefits**
- In practice, community benefit are commonplace, and many communities will agree to these benefits as a result of litigation, settlement negotiations, or voluntary commitments offered by the developer

THANK YOU.

QUESTIONS?

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