

# *Zoning Ordinance Open Space Preservation Provisions*

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## **Public Act 177 of 2001, MCL 125.3506**

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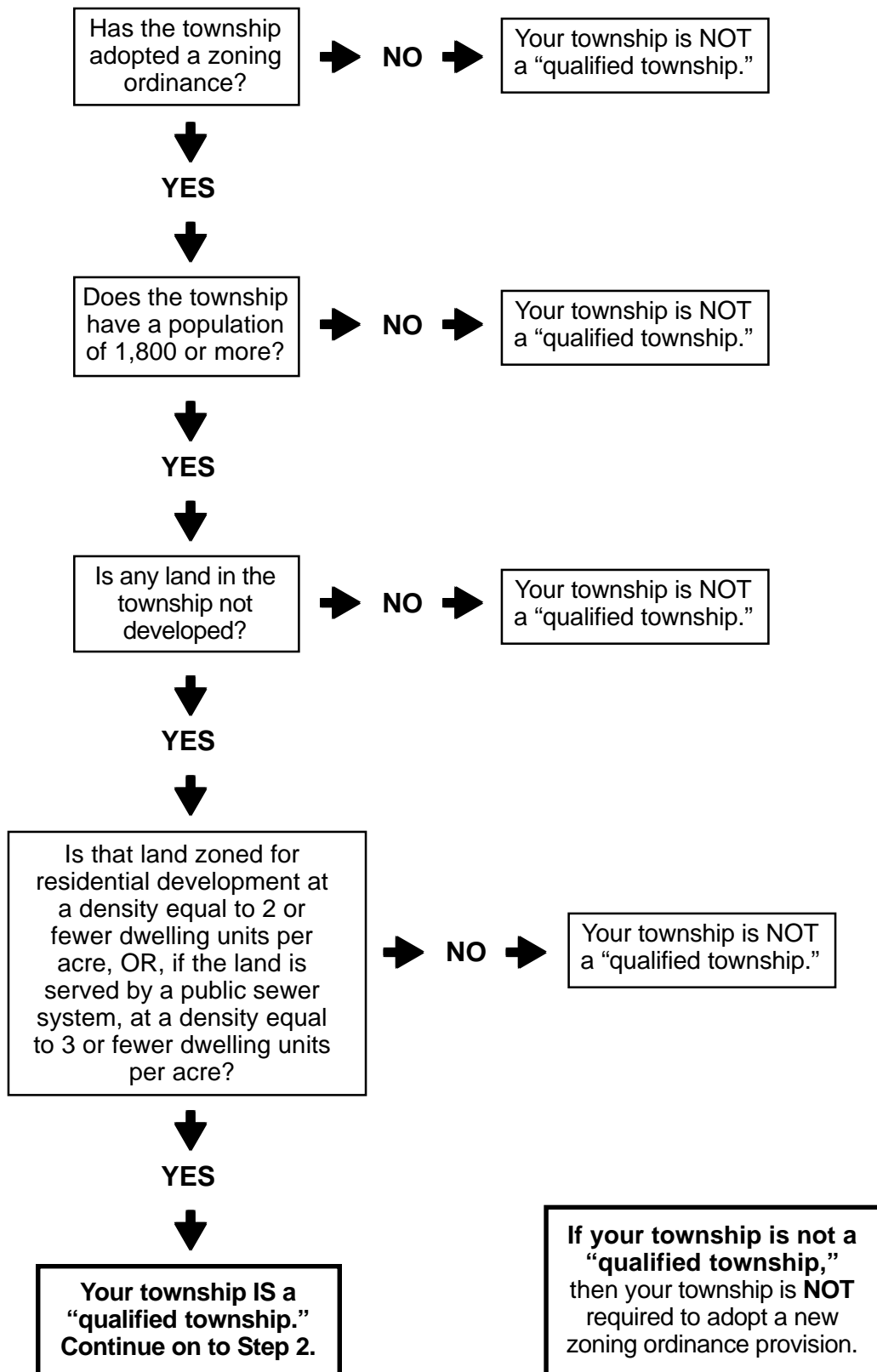
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*Updated October 2006*



# Does your township have to adopt “Open Space Preservation” zoning ordinance provisions?

## Step 1: Determine if your township is a “qualified township.”





## **NEW “OPEN SPACE PRESERVATION” ZONING REQUIREMENTS**

Section 506 of the Michigan Zoning Enabling Act (MCL 125.3506) requires certain townships to provide in their zoning ordinance for a cluster housing development option (required to be referred to as “Open Space Preservation”) that entitles a landowner to meet residential density requirements specified in the ordinance for the entire parcel on not more than 50% of such parcel and restrict the balance of the parcel to remain in an “undeveloped state” in perpetuity as defined by the statute.

The residential land subject to this new requirement is undeveloped land restricted by ordinance to a maximum density of two or fewer dwelling units per acre where not served by public sewer and three or fewer units per acre where served by public sewer.

An “undeveloped state” is defined to mean “a natural state . . . scenic or wooded condition, agricultural use, open space or similar use or condition.” It does not include a “golf course” but may include a “recreational trail, linear park, picnic area, greenway, or children’s play area.” These areas do not have to be dedicated to the public.

MCL 125.3506 is convoluted on the issue of what townships it applies to and accordingly, may result in different interpretations. It applies to a “qualified township,” which is defined as meeting the following requirements:

- (1) Has adopted a zoning ordinance.
- (2) Has a population of 1,800 or more.
- (3) Has undeveloped land zoned for residential development at a maximum density of 2 or fewer dwelling units per acre where not served with public sewer and 3 or fewer units per acre where served by public sewer.

If any of the foregoing requirements are not met, the township is not a “qualified township” and accordingly, is not required to adopt these “Open Space Preservation” provisions (commonly known as cluster housing provisions).

Even if a township is a “qualified township” as hereinbefore defined, it still may not be required to add the new “Open Space Preservation” provisions to its zoning ordinance if it has an existing zoning ordinance provision meeting the following requirements:

- (1) A landowner is given the option in the ordinance of developing a portion of his/her residentially zoned property with the same number of dwelling units as would be required for the entire residential property owned.
- (2) The undeveloped portion of the property under the option exercised by the owner is required by the ordinance to remain perpetually in an “undeveloped state.”
- (3) The option has actually been exercised by an owner prior to December 15, 2001 and has resulted in at least 50% of the owner’s residentially zoned land remaining perpetually in an “undeveloped state”.

Assuming a township is not exempt from having to adopt an amendment to its zoning ordinance providing for "Open Space Preservation", it must by December 15, 2002, have adopted a zoning ordinance amendment that accomplishes the following:

- (1) Permits land zoned residential at a maximum ordinance density of two or fewer dwelling units per acre where not served by public sewer and three or fewer units per acre where served by public sewer to be developed by the owner with the same number of dwelling units permitted by the ordinance on the entire land area, on not more than 50% of the subject land area.
- (2) Requires the balance of the land area to perpetually remain in an "undeveloped state" under restrictive covenants or other legal means that run with the land.
- (3) The development of 50% or less of the residential land area owned is not dependent on the extension of public water or public sewer unless the entire residential land area is so dependent.

The form of any amendment to conform to the cluster zoning requirements will depend on the local township zoning ordinance currently in effect. Although MCL 125.3506(2) provides that, "After the landowner exercises the option provided pursuant to Subsection (1) (a cluster development), the land may be rezoned accordingly", it is our opinion rezoning is not necessary if the ordinance contains other appropriate text provisions to accomplish the cluster development option. This could be accomplished either by appropriate special use provisions or by a general amendment describing the "Open Space Preservation" (cluster housing) option available to a landowner for residential development as prescribed and restricted in the statute hereinbefore discussed.

Any amendment would have to comply with the procedural requirements for adopting a zoning ordinance involving a public hearing before the zoning commission or planning commission, county planning commission or coordinating committee review (unless waived) and final township board adoption preceded and followed by all statutory required notice, publications and mailings. It would also be subject to a properly petitioned for referendum under MCL 125.3402.

Any ordinance amendment required to be adopted to comply with the MCL 125.3506 should be entitled "Open Space Preservation" as specified in MCL 125.3506(5).

Professional help should be secured in analyzing the township's current zoning ordinance for compliance with this new statute and for drafting and adopting any new provisions required to meet these statutory requirements.

**From: Bill Anderson, MTA Legislative Liaison**  
**Re: Issues related to MCL 125.3506**

For those townships that are required to comply with MCL 125.3506, the ordinance modification could probably be as simple as including a statement within the zoning ordinance that your zoning is subject to the open space preservation provisions found in MCL 125.3506. However, doing nothing more leaves many issues open to the discretion of the developer and may lead to a type of development that was unanticipated by the community. The following are some issues that a township may want to consider in its new open space preservation ordinance in order to maintain continuity of development within the township.

MCL 125.3506 states that, “a qualified local unit of government shall provide in its zoning ordinance that land zoned for residential development may be developed, at the option of the landowner, with the same number of dwelling units on a smaller portion of the land than specified in the zoning ordinance, but not more than 50% for a county or township or 80% for a city or village, that could otherwise be developed, as determined by the local unit of government under existing ordinances, laws, and rules on the entire land area ... ”

This section raises some very important issues that would be wise to consider in the local zoning ordinance. The key issue is determining how many units may be developed on a particular piece of land. This issue is “determined by the local unit of government,” and a lack of careful consideration of this issue within the ordinance can lead to unexpected results.

If a developer chooses to create an open space preservation development, MCL 125.3506 states that any such development shall have at least 50% of the development remain in an undeveloped state. The ordinance may define that unbuildable areas, such as wetlands, may not count towards the 50% open space minimum.

MCL 125.3506 states that a developer may develop the same number of units that would be allowed under existing zoning. One way to determine how many units would be allowed under existing zoning and under the open space provision could be to require that the developer submit two plans. The first plan should be a viable plan under the existing ordinance, which would then establish the number of units that could be developed in the open space preservation plan.

MCL 125.3506 establishes the minimum amount of land area that must be kept in open space, but it places no limitation on how small the resulting clustered lots could be. In theory, a developer could combine all of the housing units in one multi-unit building or town houses with virtually no separation, if no other restrictions are established in ordinance.

-If the township wishes to continue to establish standards for the configuration of the clustered homes, they should establish a minimum lot size requirement within the ordinance for the new open space preservation developments. One might consider referring to existing guidelines in other zoning classifications, if possible. For example: A cluster-zoning project in R-1 must meet all lot requirements (size, setbacks etc.) found in the R-3 category.

**Define Open Space Uses:**

The ordinance must specify what types of legal restrictions will be placed on the open space created within the development, (Section 506(1)(b)). The allowed uses of the open space are found in MCL 125.3506, but could also be restated within the ordinance.

**Define the areas that are subject to the ordinance:**

In a qualified township, the ordinance must be applicable to any property “zoned for residential development” under statute. This would include agriculturally zoned areas if they allow any residential development as well as residentially zoned areas of the township. Section 506(1)(a) exempts areas zoned with lots smaller than ½ acre in areas not serviced by sewers or 1/3 acre in areas serviced by sewers. For the sake of clarity, the open space preservation ordinance might specifically identify which zoning classifications it applies to in the township.

**Special Use Considerations:**

Section 506(2) states, “After the land owner exercises the option provided pursuant to subsection (1), the land may be rezoned accordingly.” This was written to eliminate delays to the developer while waiting for rezoning approval. This would seem to prohibit any conditional approval of the plan contingent on rezoning. While the statute prohibits any rezoning requirement as part of the ordinance, there is no such prohibition to making the option a special use. This may be a consideration for the ordinance.

**Multiple Clustering Ordinances:**

A township may have a cluster zoning ordinance in addition to the open space preservation ordinance. If a township does not believe that this new law meets the needs of the community, they may also pass a cluster ordinance under the PUD sections of the zoning act. However, the township can't force a developer in any one direction. One reason to adopt a separate ordinance may be to allow mixed-use developments that are not contemplated under the open space preservation provisions.

## Using a Basic Model Open Space Zoning Ordinance Provision

### Introduction

MCL 125.3506 requires most townships with a zoning ordinance and a population of at least 1,800 to provide an open space preservation/cluster development option in the zoning ordinance.

While some townships already have provisions in their ordinances that comply with MCL 125.3506, other townships may wish to develop comprehensive additions to their ordinances to recognize open space preservation as one of several innovative development techniques such as planned unit development, open space communities or the clustering of dwellings. Still other townships may not have much demand or eligible land for applying an open space preservation option. They must still comply with MCL 125.3506, but may not wish to make extensive ordinance revisions.

To assist all townships in complying, MTA Legal Counsel developed the following Basic Model Open Space Zoning Ordinance provision, which complies with the minimum requirements of the law:

### Basic Model Open Space Zoning Ordinance Provision

**Open Space Preservation:** In order to comply with MCL 125.3506, notwithstanding the generally applicable minimum lot frontage/lot width and minimum lot area per dwelling unit requirements of this Ordinance, land zoned for residential development may be developed, at the option of the landowner, with the same number of dwelling units that could otherwise be developed on the land under existing ordinances, laws, and rules, on not more than 50% of the land, if all of the following apply:

1. The land is zoned at a density equivalent to 2 or fewer dwelling units per acre; or, if the land is served by a public sewer system, 3 or fewer dwelling units per acre.
2. Not less than 50% of the land area 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.
3. The development does not depend upon the extension of a public sewer or public water supply system, unless development of the land without the exercise of the development option provided by this provision would also depend upon such an extension, and
4. The development option provided pursuant to this section has not previously been exercised with respect to the subject property.

The development of land under this section is subject to all other applicable ordinances, laws, and rules, including but not limited to:

- a. The provisions of the Zoning Ordinance that are not in conflict with and preempted by Section 506 of the Michigan Zoning Enabling Act.
- b. The Land Division Act (formerly the Subdivision Control Act, MCL 560.101, *et seq.*).
- c. Any ordinance regulating the division of land, the platting of land into subdivisions, or the creation of a site condominium.
- d. Rules relating to suitability of groundwater for on-site water supply for land not served by public water.
- e. Rules relating to suitability of soils for on-site sewage disposal for land not served by public sewers.

As used in this section, the term “undeveloped state” means a natural state preserving natural resources, natural features, or scenic or wooded conditions; agricultural use; open space; or a similar use or condition. This term does not include a golf course, but may include a recreational trail, picnic area, children’s play area, greenway, or linear park.

### **Considerations in adopting Open Space Ordinance language**

#### *Undeveloped land area*

MCL 125.3506 provides townships some discretion to determine the percentage of land area specified in the zoning ordinance that will remain in an “undeveloped state,” as long as the prescribed percentage is not *less* than 50% of the land area. The township may also determine the percentage of the land on which the permissible number of dwelling units may be clustered, as long as the portion specified in the zoning ordinance is not *more* than 50%. The percentages in the sample text may be adjusted, subject to all other legal requirements governing zoning ordinances, including the requirement of reasonableness. For example, requiring not less than 95% of the land area to remain in an undeveloped state, with the dwelling units clustered on 5% of the land would not likely survive a legal challenge.

#### *Land zoned for residential development*

The phrase “land zoned for residential development” probably includes land in any zoning district where dwelling uses are permissible, not just zoning districts which include the word “residential” in the name of the district. Thus, land in agricultural zoning districts that make allowance for non-farm residential uses is likely subject to open space preservation development opportunities under the new law.

*Subject to other applicable ordinances*

MCL 125.3506 provides that the development of land under its open space preservation option is “subject to other applicable ordinances.” MTA Legal Counsel believe townships can require open space development projects initiated at the option of the landowner to comply with the review process and approval requirements specified in an applicable ordinance that would otherwise govern such a land development proposal (except for requirements relating to the permissible number of dwelling units that may be clustered on the allowable portion of the land and the specified portion of the land required to remain in an undeveloped state, to the extent those requirements conflict with what is allowed by MCL 125.3506 at the option of the landowner).

**Balancing existing ordinance provisions with open space preservation compliance**

What should a township do if it has existing ordinance provisions specifically addressing planned unit development, open space zoning, clustering, or other similar types of zoning and development options?

A township may choose to: 1) change its existing ordinance provisions so they conform with the new open space provision requirement, or 2) a township may choose instead to add a new general provision, such as the basic model ordinance language, in addition to the existing ordinance provisions. The choice between these options is specific to each township, and is based on factors unique to the specific zoning ordinance and policies in effect in the township.

*Change existing ordinance provisions to comply*

Some townships with existing ordinance provisions may wish to retain the development options currently provided in those provisions, in addition to complying with MCL 125.3506. Each township in this situation is encouraged to consider the following factors to determine if their existing ordinance provisions can or should be amended to comply:

- 1) Many zoning ordinances make allowance for approval of a PUD project with less than 50% of the land area designated as undeveloped open space, but the new law requires the open space preservation ordinance provision to specify “not less than 50%” of the land area to remain perpetually in an undeveloped state.
- 2) Existing language addressing what land qualifies as “open space” may not be consistent with the requirements for land remaining in an “undeveloped state” as that term is defined in MCL 125.3506, and will need to be amended.
- 3) Existing PUD text may limit that development opportunity to a specific zoning district or districts. The open space preservation option of MCL 125.3506 applies to “land zoned for residential development” at a density equivalent to two or fewer dwelling units per acre or, if the land is served by a public sewer system, three or fewer dwelling units per acre. This may encompass land in zoning districts that are not designated for PUD consideration in the existing zoning ordinance.

## **What Public Act 177 of 2001 Was Intended to Accomplish**

Public Act 177 of 2001, MCL 125.3506, requires every township that has a population of at least 1,800 and that zones to amend its zoning ordinance to include open space preservation provisions, with certain exceptions. If a township has a cluster zoning option in place that has resulted in a development within the community with at least 50% open space, the township is not required to enact a new ordinance, nor is a township that has no land area where the ordinance would be applicable because of existing development or zoning.

The open space preservation provisions were required to be added by December 15, 2002. There is no specific penalty prescribed if a community failed to adopt the required ordinance, but the township would more than likely lose the right to regulate any such development .

The Legislature enacted the PA 177 to allow developers, at their choice, to cluster new homes on smaller lots and then to surround the home sites with permanently preserved open space. The open space may be left in a natural state. A more manicured park-type area or children's play area is also allowed, however, more intensive uses such as a golf course would not be allowed.

The development community supported the concept because it reduces the cost of many infrastructure components, including roads and public utilities. The environmental community supported the concept because it allows developers to avoid disturbing and preserve unique characteristics of a given parcel including small wetlands, tree lots, and steep terrain.

The open space preservation provisions must apply to all areas of the township that are zoned for residential development. The only statutory exclusion is that areas zoned for at least two home sites per acre serviced by septic tanks or three home sites per acre in areas served by sewers do not need to be subject to open space preservation options.

MCL 125.3506 states that the resulting lots may only be approved if they meet county health standards for separation of water and septage, but the statute offers no other guidance on other minimum lot standards such as setback requirements. The act also leaves the method on how to calculate the total number of houses allowed on the open space development to the local ordinance.

The township may not require rezoning prior to approval of the clustering plan, but may rezone the development after the plan is approved. MCL 125.3506 is mute on any other provision for approval that would then leave the issue to the local township as to whether a simple site plan process should be used or a special use approval is required.

Finally, MCL 125.3506 does not prohibit a township from adopting clustering ordinance provisions as allowed under MCL 125.3503, in addition to the open space preservation ordinance provisions.

*Add basic model ordinance language*

If a township has existing PUD text that does not strictly comply with MCL 125.3506, but it still wishes to retain that different text, the township may comply by adding language such as the basic model ordinance provision to its ordinance. The township should clearly understand that its zoning ordinance would then provide a property owner with the choice to either:

- Develop property through the township's existing PUD process in accordance with all of the substantive PUD requirements,

or

- Develop the property through the mandated open space provision, outside the scope of the township's PUD process. This would require the property owner to cluster the permissible number of dwelling units on a specified portion of the property and retain the requisite portion of the property in an undeveloped state. The property owner would have to otherwise comply with all applicable existing ordinance requirements, but without regard to the PUD requirements.

**Consult legal counsel**

All townships would be well-advised to obtain appropriate expert legal assistance to guide them in complying with PA 177, whether by amending the township zoning ordinance to include the model ordinance text, or by changing existing ordinance provisions to comply.