June 2003

Public Policy Brief

State & Local Government Area of Expertise Team

Recent Planning and Zoning Court Decisions: 2003

Gary D. Taylor, J.D., State & Local Government Specialist
Department of Agricultural Economics
Michigan State University Extension

This is the first of an annual series of public policy briefs summarizing the relevant federal and state land use court cases. Future briefs on this topic will be limited to the year preceding the publication.

Adult-Oriented Businesses/Multiple Business Establishments

City of Los Angeles v. Alameda Books, Inc., ___ US___, 122 S.Ct. 2585 (May 13, 2002)

A ban on multiple-use adult entertainment facilities is not unconstitutional.

In a plurality opinion, the Court ruled that the City of Los Angeles's ban on "the establishment or maintenance of more than one adult entertainment business in the same building, structure or portion thereof" does not violate the First Amendment. The Court concluded that the city may rely on a study it conducted years before enacting the ordinance that concluded that such an ordinance would serve the city's interest in reducing crime.

> "Our cases require only that municipalities rely upon evidence that is reasonably believed to be relevant to the secondary effects they seek to address."

The concurring opinion disagrees with the reasoning (but not with the judgment) of the plurality, arguing that the opinion doesn't require the city to show that the ordinance does not substantially reduce speech as was required by the holding in *Renton v. Playtime Theaters*.

Adult-Oriented Businesses/Business Definitions

Executive Arts Studio, Inc., d/b/a Velvet Touch v City of Grand Rapids, No.1 :01-CV-196. (W.D. Mich., August 30, 2002).

A zoning ordinance definition of "adult bookstore" was not sufficiently narrow; the result being that the dispersal restrictions for adult businesses in the city do not allow for adequate alternative avenues of communication in violation of the First and Fourteenth Amendments to the US Constitution.

The City of Grand Rapids' zoning ordinance defines "adult bookstore" as an establishment having sex-related books, magazines, videos or other such materials as a "substantial or significant portion of its stock in trade" or an establishment with a "segment or section" devoted to the sale or display of such material. Additionally, the City's ordinance prohibits the concentration of adult businesses within close proximity to each other (the "dispersal method" of zoning for adult businesses). The Federal District Court for the Western District of Michigan concluded that the definition of adult bookstore would include not just the types of businesses that are traditionally recognized as adult businesses, but also any business that has a section or area of the store devoted to such materials, regardless of the secondary effect.

> "The inclusion of such businesses is an unintended consequence because, unlike adult-oriented businesses such as The Velvet Touch, there can be no serious argument that those non-adult businesses are the types of businesses that have been shown to cause deleterious effects which the ordinances are designed to eliminate. In other words, the City would be hard-pressed to cite any evidence that a Schuler Books, Barnes & Noble, and Waldenbooks located in close proximity to each other would contribute to an increase in crime in the neighborhood or a decline in property values. Yet any of those stores carrying as few as two or three sexually explicit magazines, e.g. Playboy or Penthouse, grouped together would fall under the [ordinance's] definition of an adult bookstore…."

Considering that mainstream bookstores would also constitute adult bookstores under the zoning ordinance provisions, the Court concluded that the ordinance is unconstitutional because it renders inadequate the number of sites where such businesses could locate within the city. The city was prevented from enforcing its adult use regulations.

Building Inspector/Negligence

O'Neill v. Soils and Structures, Inc., et al, No. 228364, (Mich. App., October 11, 2002) (unpublished).

The dismissal of a gross negligence claim against city building officials on theory that they owed no duty to the plaintiff homeowner was improper. The "public duty" doctrine precluding liability is applicable only to cases involving police protection.

Plaintiffs bought a new home that they later found to have several structural defects, including improperly-constructed roof trusses and exterior brickwork. After selling the home at a substantial loss because of the defects, Plaintiffs sued the building contractors and Defendant Soils and Structures, Inc., a private home inspection company that inspected the structure for the Plaintiffs. Plaintiffs also sued the two building inspectors employed by the City of Norton Shores who were primarily responsible for conducting city inspections throughout the construction process. The city inspectors moved for dismissal asserting that they owed no duty to the Plaintiffs. Any duty on their part was owed to the public at large, not to any individuals; thus no "special relationship" existed between the inspectors and Plaintiffs. The trial court dismissed the claims against the city building inspectors and the case proceeded to trial against the privately-hired inspection company and its employee. The jury found in favor of the Plaintiffs.

The private defendants appealed, and the Plaintiffs cross-appealed, challenging the dismissal of the two city building inspectors. The Court of Appeals upheld the determination by the jury that the private inspection was inadequate and further upheld the damage calculation arrived at by the jury. However, the Court found that dismissal of the Plaintiff's claims against the city inspectors on governmental immunity grounds was improper.

The Court found that the "public duty" doctrine limiting liability for public servants, and the corresponding special relationship exception to that doctrine, applied only to police protection cases, citing the recent Michigan Supreme Court case of *Beaudrie v Henderson*, 465 Mich. App. 124 (2001). Under *Beaudrie*, in all cases not involving police protection, a court is required to apply "traditional" common law duty analysis for a gross negligence claim against public servants. The Court of Appeals remanded the case to the trial court for a determination, as a matter of law, whether the city building inspectors owed Plaintiffs a duty to discover and disclose the construction defects.

Cellular Tower/ ZBA Variance

New Par, d/b/a Verizon Wireless v City of Saginaw, No. 01-2083 (6th Circuit., August 14, 2002).

ZBA's denial of a variance request violated the Telecommunications Act because the denial was not supported by substantial evidence in the written record. Proper remedy for the U. S. District Court to grant is to order City to grant Plaintiff's request, instead of remanding to the ZBA.

Plaintiff, New Par d/b/a Verizon Wireless sought a variance from the City's minimum frontage and area zoning requirements within a light industrial zoning district for purposes of constructing a 150-foot tall cellular telephone monopole. After two meetings, the ZBA denied New Par's variance request. Plaintiff filed a complaint in the Federal District Court for the Eastern District of Michigan alleging that the ZBA's denial violated the Telecommunications Act of 1996, violated Plaintiff's substantive due process rights and constituted a regulatory taking. The District Court granted Plaintiff's motion for summary judgment, concluding that the ZBA's decision was not supported by "substantial evidence contained in a written record" as required under 47 U.S.C. §332(c)(7)(B)(iii), and the District Court ordered the City to grant the requested variance.

On appeal to the Sixth Circuit Court of Appeals, the Court affirmed the District Court's ruling. The Court of Appeals ruled that the ZBA's decision did not meet the "in writing" requirement for a decision under the Act, and did not meet the "substantial evidence requirement" under the Act. In doing so, the Court established a three part test for meeting the Act's "in writing" requirement as follows: "It must (1) be separate from the written record; (2) describe the reasons for the denial; and (3) contain a sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record that supports those reasons."

With respect to substantial evidence supporting the decision of the ZBA, the Court noted that only three concerns about cellular towers were raised at the ZBA meetings; those being: (1) aesthetics; (2) health and safety issues regarding electro-magnetic emissions; and (3) whether New Par could instead put the tower on other property. With respect to such concerns, the Court ruled that electromagnetic emissions are not a valid consideration under the Telecommunications Act; a few generalized expressions of concerns with aesthetics cannot serve as substantial evidence on which the City could base its denial; and third concern does not go to any criteria set out in connection with considering a zoning variance. Choosing not to remand the case to the ZBA for further findings, the Court concluded that such a remand would serve no "foreseeable useful purpose and only cause further delay."

Commercial Vehicles/Agricultural Zoning

Township of Rome v. Timothy Halliwill, No. 224221. Decided February 1, 2002 (unpublished).

The storage and servicing of commercial trucks on a farm was not a permitted use in the zoning district.

Defendant kept several large trucks on his farm parcel in Rome Township. Defendant used the parcel for both agricultural purposes and for the operation of a trucking business. The township brought suit against Defendant for conducting a separate commercial trucking business on the farm parcel in violation of the township's zoning ordinance. A trial court issued an injunction against the Defendant, prohibiting the unauthorized use.

Defendant argued that the parking of his commercially-plated trucks on the farm parcel did not violate the zoning ordinance. The Court of Appeals disagreed with his characterization of his operation. "Not only does the record reflect that defendant's trucking business grossed over $400,000 in the year preceding trial, the record also contained testimony from defendant's neighbors that the trucks traveled to and from defendant's farm on a daily basis from 5:00 a.m. to 10:00 p.m., all year. "

The Court then assessed whether Defendant's commercial business on the farm parcel constituted a violation of the township's zoning ordinance. The Court found that while the zoning ordinance permitted uses "similar in nature" to other permitted uses in the subject district, the commercial trucking operation as described by the evidence "is not similar in nature" to a farming operation. The Court of Appeals affirmed the trial court.

Consent Judgment/Zoning

Bill Knapp Properties, Inc. v. Township of Bloomfield, No. 225445. (Mich. App., December 18, 2001) (unpublished).

A consent judgment does not require the defendant township to rezone land subject to the judgment.

In 1974, the Telegraph-Long Lake Company (Company) owned two outlot parcels in defendant Bloomfield Township. Outlot A was zoned B-2, Community Business District, and Outlot B was zoned

R-3, Single-Family Residential District. In an effort to use the residentially-zoned Outlot B as a parking lot for the commercial use of Outlot A, the Company filed an action in circuit court requesting the Township be enjoined from interfering with the use of Outlot B as a parking lot. The circuit court found that the R-3 zoning of Outlot B was unreasonable and ruled that ".. .Plaintiff shall be and is hereby authorized to utilize said Outlot B for uses permitted within the P-1 Zone District..." The court also prohibited the Township "from interfering with the use of said Outlot B for those uses permitted in a P-1 Zone District as set forth in the Bloomfield Township Zoning Ordinance."

Subsequent to the court action, the Township prepared a new master plan and rezoned both outlots to O-1, an office-based zoning district. The Company then sued the Township, claiming that the rezoning violated the stipulated consent judgment. The trial court granted the Township's motion for summary disposition, and the Court of Appeals affirmed the trial court's ruling, stating:

> "In this case, the language in the consent judgment, as well as the partial summary judgment and pretrial summary, is unambiguous and does not support plaintiff's proposed interpretation. The circuit court merely authorized Outlot B, now known as parcel B, to be used consistent with a P-1 zoning classification and enjoined defendant from interfering with such use. All references to Outlot B by the circuit court pertained to its use for parking. The court did not address rezoning Outlot B to a B-2 classification."

Consent Judgment/Right of Referendum

Green Oak Township v. Green Oak MHC, et al., ___*Mich. App. ___ (February 4, 2003).*

The right of referendum does not exist to challenge consent judgments.

Defendants Green Oak Mobile Home Community (GOMHC) and Lipshutz petitioned to rezone 233 acres from Residential Farming (RF) to Residential Mobile Home Park (RMH), in order to develop a 912-unit park. The township board denied the petition. A lawsuit followed in Livingston County Circuit Court. The parties agreed to a settlement that allowed Defendants to develop the mobile home park initially proposed. The settlement passed the township board by a 4-3 vote, and a consent judgment was entered in the circuit court case. Munzel, a property owner in Green Oak Township, filed a notice of intent to file a petition for referendum on the adoption of the terms of the consent judgment. The Township then filed for a declaratory judgment regarding whether a referendum election can properly be invoked to overturn a consent judgment.

Munzel contended that the consent judgment constituted a rezoning for which a right of referendum exists under the Township Rural Zoning Act. The Township argued that the judgment did not constitute a rezoning, nor does a right of referendum on a consent judgment exist under the TRZA. Interpreting the "plain language" of the TRZA, the Court of Appeals concluded that the right of referendum applies only to zoning ordinances, and that a consent judgment could not be interpreted as being the adoption or amendment of an ordinance:

> Adopting defendant Munzel's argument would not only be in conflict with the plain language of the statute, but would also lead to an unreasonable result whereby any zoning board decision could potentially be subject to a right of referendum. That result would be untenable because even the most routine zoning decisions could be subject to a costly and time consuming referendum election."

In a footnote, the Court of Appeals noted that allowing a right of referendum on a consent judgment would violate the separation of powers among the legislative and judicial branches of government, citing MI CONST Art. 1, Sec. 23 and Art. 3, Sec. 2.

Federal Railway Safety Act/Preemption
CSX Transportation, Inc., v. City of Plymouth, 283 F3d 812 (6th Circuit, 2002).

The Federal Railway Safety Act preempted a Michigan state statute regulating trains blocking grade crossings.

In 1994, Michigan adopted a statute that prohibits trains from continuously blocking grade crossings for more than five minutes, subject to two exceptions. CSX was issued numerous citations under the statute. CSX did not contest the citations, but filed a complaint in US District Court for the Eastern District of Michigan claiming that the statute was preempted by the Federal Railway Safety Act (FRSA). The District Court ruled for CSX and the case was appealed to the Sixth Circuit.

The FRSA contains language specifically providing that the laws related to railroad safety shall be "nationally uniform to the extent practical." A state may regulate railroad safety only if the Secretary of Transportation has not regulated the subject matter or if the regulation (1) is necessary to eliminated an essentially local hazard; (2) does not conflict with federal law; and (3) does not unreasonably burden interstate commerce. The Sixth Circuit that the subject matter of the state statute regulated train speed, length and use of airbrakes, and that the Secretary of Transportation had developed regulations that covered the same subject matter. The Court further found that since the Michigan statute was applicable statewide it was not specifically designed to "eliminate essentially local hazards." Therefore, the Michigan statute was preempted by FRSA.

Federal Railway Safety Act/Preemption
LaVigne v. CSX Transportation, Inc., No. 224872 (Mich. App., June 28, 2002)(unpublished)

The Federal Railway Safety Act does not prevent a court from issuing an order requiring a railway company to prevent a private access from being blocked for more than 45 minutes at a time if the blocking constitutes a safety hazard.

The only access to the LiVigne's property was by a driveway bisected by railroad tracks owned by CSX Transportation. Mrs. LaVigne lived on the property and her son and son-in-law operated a nursery and landscaping business on the property, as well. Ever since the LaVinges purchased the property in 1952 trains had periodically blocked the driveway, but the problem worsened in 1996. Mrs. LaVigne testified that her husband was very ill during the last years of his life, and that trains blocked access to the property several times when he needed emergency care. She also testified that she was in ill health, as well, and the trains posed the same problem when she needed emergency care. Her son testified that the trains were dangerous to nursery employees because the employees often had to cross the tracks on foot or climb through the space between the train cars.

The Court of Appeals concluded that the trial court properly granted Mrs. LaVigne an easement by necessity over the tracks for ingress and egress to the property. The trial court ordered CSX to direct trains using the northbound tracks to move up so as not to block the crossing, and to cut trains blocking access for more than 45 minutes. Distinguishing the *Plymouth* case (discussed above), the Court determined that the FRSA did not preempt the trial court's order. Even if the injunction was a law, regulation or order related to railroad safety, the Court of Appeals concluded the order fell under one of the FRSA's savings clauses that allows more stringent state action when such action was necessary to eliminate or reduce "an essentially local safety hazard."

Land Division Act/Mandamus
Stephen and Ida Trachsel v. Auburn Hills City Council, No. 236545. (Mich. App., November 26, 2002) (unpublished).

A city ordinance requiring a showing that a proposed development is harmonious and compatible is contrary to the requirements of the Land Division Act.

Plaintiffs sought approval of a land division under the Land Division Act. The Act requires that a division be approved if it satisfies sections 108 and 109 of the Act, which largely pertain to the allowable number of divisions available to the parcel, access to such divisions, and the width and area of such divisions. The City denied the division on the basis that the division was not harmonious or compatible with the

character of the surrounding neighborhood. Plaintiffs sought a writ of mandamus to compel the City to approve the division. The circuit court denied the request. On appeal to the Court of Appeals, the Court concluded "…the [Act] does not permit such a consideration of harmoniousness and compatibility except as a factor for allowing a depth to width ratio different from that authorized by the statute or a local ordinance, and mandates approval of any proposed split that meet the requirements of [the Act]." The Court found that the local ordinance was in conflict with, and therefore preempted by state statute. Because plaintiffs' proposed split complied with sections 108 and 109 of the Act, the city was required to approve the application.

Land Division Act/Divisions

Sotelo v. Grant Township, 255 Mich. App. 466 (2003).

The division of a parcel of land after it was reconstituted through a transfer of acreage from neighboring parcel was a proper "division," and was not subject to platting requirements of the Land Division Act.

The land involved in this dispute was divided into two adjacent parcels in the Grant Township. Sotelos owned a 2.35 acre parcel of land immediately to the north of Robert Filut, who owned a 7.63 acre parcel. On July 15, 1999, Filut conveyed 3.25 acres from his parcel to the Sotelos, which gave the Sotelos a 5.6-acre parcel and reduced the Filut parcel to 4.38 acres. By deeds dated July 15, 1999, the remaining portion of the Filut parcel was divided into four separate parcels, each of which were more than one acre in size. By deeds dated August 10, 1999, the Sotelo parcel was divided into four separate parcels, each of which were also more than one acre in size. The property owners structured the size of the resulting divisions in an apparent attempt to comply with the Township's zoning ordinance that required a minimum parcel size of 1 acre. However, they made the divisions of land without first obtaining the approval from the Township as required by the Section 109 of the LDA.

The Township informed the property owners that they were in violation of the LDA, and the owners responded by requesting the Township to approve the divisions previously made from their land. All the divisions were denied by a resolution passed on July 27, 2000 because the Township concluded that the divisions made within these parcels exceeded the number allowed under the LDA. The Sotelos commenced this lawsuit to compel the township to approve all of the land divisions. While the lawsuit was pending, the issues involved in the case were reduced to deciding the legality of the divisions from the reconfigured Sotelo parcel because the parties agreed that the transfer of a portion of the Filut parcel to the adjacent Sotelo parcel and the divisions made from the reconfigured Filut parcel were consistent with Michigan law and the Township's ordinances.

The Township argued that the splitting of the Sotelo parcel was not a "division" and, therefore, it was subject to the platting requirements of the LDA because "while land can be transferred between parent parcels for a 'buffer' or to increase the size of a parcel which would have been created anyway, such land transfers cannot be utilized to let property owners take land divisions they would not otherwise be able to create due to zoning size limitations applicable to the original parent parcel." In other words, before the transfer of acreage from the Filut parcel, the original 2.35 acres of Sotelo property could not have been split into four parcels, each having one acre as required by the local zoning ordinance.

The Court of Appeals pointed out that the definition of "division" specifies that, following "a property transfer between 2 or more adjacent parcels, if the property taken from 1 parcel is added to an adjacent parcel ... any resulting parcel shall not be considered a building site unless the parcel conforms to the requirements of this act or the requirements of an applicable local ordinance." The Court went on to state that "by converse implication, the statute thus allows for the development of a parcel created by a transfer between adjacent properties if the LDA and local ordinances are satisfied. Noting that the resulting enlarged Sotelo parcel would thus be a proper building site; the parcels into which it was divided conformed to the LDA and applicable local ordinances."

The Court of Appeals rejected the trial court's application of subsection 108(5), which states that "[a] parcel or tract created by an exempt split or a division is not a new parent parcel...." The Court of

Appeals used the definitional language of the LDA to conclude that the Sotelo parcel was not a "parcel ... created by an exempt split or a division." In doing so, it also rejected the trial court's reliance on a 1981 Attorney General Opinion (No. 5929), concluding that there was "no statutory support for its conclusions" and, further, that subsequent to the 1981 OAG the statute has been amended to include a definition for "division" that contains language suggesting that, "following a transfer of property between adjacent parcels, the 'resulting parcel' (not the prior parcels) should be considered in determining whether the requirements of the LDA are satisfied."
The Court of Appeals ruled that the division of the Sotelo parcel into four separate parcels satisfied the requirements of Section 108, and that the Township was required to approve that division under the LDA.

Mobile Home Width Requirement
Lynn Township v. Clarence Marter et. al., No. 226472. (Mich App., December 28, 2001)(unpublished).

A zoning ordinance that requires mobile homes outside of mobile home parks to be a minimum of 20 feet wide wasn't exclusionary when the requirement applied to all single-family dwellings.

Defendant placed a mobile home on his property in plaintiff Lynn Township. The Township notified defendant that the mobile home violated the Township's zoning ordinance, which required all single family dwellings to be a minimum 20 feet in width. Defendant's home measured 12 feet in width. Defendant refused to remove the mobile home. The Township filed a complaint, claiming that the violation of the zoning ordinance constituted a nuisance. Defendant argued that the Township's zoning ordinance violated the Mobile Home Commission Act which provides, in part, that a local ordinance can not "be designed as exclusionary to mobile homes generally whether the mobile homes are located inside or outside of mobile home parks or seasonal mobile home parks." The trial court granted the Township's motion for summary disposition, finding that the zoning ordinance was not exclusionary because it treated mobile homes in the same manner as all other single family dwellings.

On appeal to the Court of Appeals, the Court affirmed the trial court's ruling:

> "A blanket exclusion of mobile homes from all areas not designated as mobile home parks is not a permissible exercise of police power; however, mobile homes can be excluded from an area if they fail to meet reasonable standards designed to ensure the favorable comparison of mobile homes with site-built housing. Here, plaintiff's ordinance requiring that a single-family dwelling be at least twenty feet wide treats all single-family dwellings, including single-wide mobile homes and site-built homes, equally. The ordinance specifies that the size requirements do not apply to mobile homes located in licensed mobile home parks. The ordinance is not exclusionary to mobile homes generally…."

Municipal Zoning/Immunity From Own Ordinance
Morrison, et al., v. City of East Lansing, ___Mich. App. ___ (February 28, 2003).

A municipality is not bound by its own land development regulations.

The City of East Lansing purchased a former school building and property for use as a community center. Plaintiffs, a group of concerned neighbors, objected to the city's site plan for the community center because of concerns of traffic on the neighboring streets. One of Plaintiffs' specific complaints was that the site plan allowed access to the community center from a minor residential street. The City's ordinance specifically prohibits vehicular access to minor residential streets if adequate access is otherwise available, including access for emergency vehicles. The Plaintiffs proposed an alternative site plan that limited access points to Abbott Road, a neighborhood arterial. The trial court dismissed Plaintiffs' suit, except for a claim of violation of the Open Meetings Act.

The Court of Appeals affirmed the trial court. The Court held that the City was immune from not only land use regulations but also from the plan of development ordinances, as well. The city need not

comply with regulations for building height, setback parking and road access.

> "In other words, we believe that the reasonable basis exists for allowing a governmental unit to develop the land according to its needs without binding it to its own land regulation ordinances."

No Wake Ordinance/Federal Jurisdiction
Andrews v Holly Township, No. 01-7443. (E.D. Mich., August 21, 2002).

Federal court is not the proper forum for adjudicating claims that the Michigan Natural Resources and Environmental Protection Act's (NREPA) procedures were not properly followed in the Township's adoption of a no-wake ordinance.

Plaintiff initiated a lawsuit in the Federal District Court for the Eastern District of Michigan claiming that Holly Township's adoption of an ordinance making Marl Lake a no wake lake violates their constitutional rights and is invalid under Michigan's NREPA. Citing the "Burford Abstention Doctrine," the Court determined that a decision by the Federal Court in this case is likely to "interfere with the proceedings or orders of State administrative agencies" and that "there are difficult questions of State law whose importance transcends the issues in this case, such as to the proper procedure for adopting ordinances under the NREPA and the interplay between the MDNR and local municipalities." The Court concluded that such issues are best left to the Michigan courts to resolve. Plaintiff's complaint was dismissed.

Nonconforming Use/Abandonment
City of St. Clair Shores v Andler, et al, No. 232277, (Mich. App., October 11, 2002) (unpublished).

When rental unit was not used for six-year period nonconforming use status was lost by abandonment.

In 1993, Defendant purchased a home from the Perrines. The Perrines listed the home as a duplex, and told Defendant that they had rented the second floor out to various people over the years. In 1999, responding to complaints from neighbors, the City of St. Clair Shores filed a lawsuit against Defendant, claiming that the building was being used illegally as a multiple-family dwelling. (The City enacted the current zoning ordinance restricting the use of the land to single-family dwellings in 1986).
At trial evidence was submitted that the Perrines had rented the second floor to various people from approximately 1961 to early 1987, when they decided, because of disputes with the last renters, to cease renting the second floor. The Perrines signed affidavits attesting that they had determined in 1987 never to rent out the upstairs area of the home again.

The Court found a specific intent by the Perrines to abandon the nonconforming rental use after the tenant disputes in 1987, and concluded that under the circumstances the City met the test set forth in *Rudnik v Mayers*, that requires a showing that the abandonment of a nonconforming use must be "voluntary and manifested by some act or omission on the part of the owner." The Court of Appeals also noted that, under the St. Clair Shores zoning ordinance, a nonconforming use can be lost if it "ceases to exist" for a period of six consecutive months, or eighteen months during any three-year period. The Court found that the rental use in fact had ceased to exist for the specified period of time until Defendant bought the home.

Nonconforming Use/Expansion of Use
Century Cellunet of Southern Michigan Cellular, LPD v Summit Township, 250 Mich. App. 543 (2002).

A ZBA denial of a variance to expand the use of a wireless telecommunication tower was improper when the ZBA relied upon a definition of nonconforming use in the township's ordinance that was inconsistent with the Township Zoning Act.

Plaintiff Century Cellunet built a telecommunications tower in Summit Township in 1996. At the time, the tower was permitted as of right in the C-2 Commercial District. The township amended its ordinance the following year, and Plaintiff's tower became a nonconforming use within that district. In 1999, Plaintiff sought permission to replace the six existing antennas with nine smaller but more powerful antennas. The township treated the request as an application to expand a nonconforming use. The ZBA denied the request, stating that the expansion or

enlargement of a nonconforming use was prohibited under the township's zoning ordinance. Plaintiff appealed the ZBA's decision to the circuit court, which affirmed.

The Court of Appeals reversed, finding that the mere fact that Plaintiff's request was for expansion or enlargement of a nonconforming use did not in and of itself constitute a basis for the denial. The Court of Appeals agreed with the township that the proposed changes to the tower constituted an expansion or enlargement of the existing nonconforming use. Even though the total area of the proposed nine antennas was smaller than the originally-approved six antennas, the change did, in the Court's opinion, constitute an expansion or enlargement of the use. However, the Court then determined that the township's zoning ordinance was inconsistent with the Township Zoning Act. The ordinance stated that no nonconforming use or structure could be enlarged, expanded, extended, or altered except in a way that changed the use or structure to one permitted in the district. The Court found that this limitation on its face was inconsistent MCL 125.286, which specifically recognizes a property owners' right to "reconstruction, extension or substitution of nonconforming uses upon reasonable terms" and mandates that local zoning ordinances preserve that right.

The Court further stated that the mere fact that the language of the township's zoning ordinance appeared to conflict with the statute did not automatically invalidate the ordinance as a whole, since the township ZBA had the authority to modify the rules, regulations, or provisions of the ordinance. The Court remanded the matter to the ZBA for a new hearing to "consider whether a denial of petitioner's request would cause any practical difficulties or unnecessary hardships," instructing it to take into account both the ordinance provisions and the statutory requirements of MCL 125.286.

Planning Commission Decision/Right of Appeal

Hurst v. Meridian Charter Township, No. 232084, (Mich. App., Aug. 23, 2002)(unpublished).

No right of appeal to circuit court exists from a recommendation of a planning commission. A recommendation does not constitute a "final decision from which an appeal may be taken.

In 1999, an application was filed with Meridian Township, seeking to rezone an 9.1 acres from "RAA" and "RB" (residential) to "PO" (professional office). The property sought to be rezoned bordered Plaintiff's property on the west and north. A public hearing was held before the township planning commission. Plaintiff acknowledged that she attended the hearing and lodged an objection to the rezoning. At a hearing on July 12, 1999, the planning commission recommended rezoning two acres of the proposed 9.1-acre area. Plaintiff again attended that hearing and lodged objections at the close of the hearing. Thereafter, plaintiff wrote a letter to the Township, indicating the desire to "appeal" the planning commission's decision. A township representative informed plaintiff that she could not appeal the planning commission's recommendation, but plaintiff's letter and appeal were forwarded to the Meridian Township Board. On August 6, 1999, Plaintiff filed an action in circuit court, seeking declaratory and injunctive relief. Plaintiff claimed defendants failed to give proper notice of the rezoning hearings.

The circuit court ruled, and the Court of Appeals agreed, that the planning commission lacked authority to rezone property. Only the Township Board has authority to rezone property. Given that Plaintiff's action in circuit court challenged the Planning commission's mere recommendation, and not a final decision by the Township Board, plaintiff's claim was properly dismissed on the basis that she failed to exhaust her administrative remedies.

Riparian Rights/Backlots

Little v Kin, 249 Mich. App. 502 (2002)

Owner of riparian properly may grant an easement to back lot owners to enjoy rights that are traditionally regarded as exclusively riparian, including the right to build and maintain a boat dock at the lakefront.

In 1974, the original owner of a parcel of property on Pine Lake in West Bloomfield Township subdivided the parcel into two three-lot "columns," consisting of two lots with approximately 100 feet of lakefront each, designated as Lots A and B, and two lots stacked behind each lakefront lot. The intent of the original owner, in order to maximize the market value for the lots, was to guarantee all lot purchasers substantial

access to and use of Pine Lake. The owner thus further divided each of the shoreline lots into three equal sections and specified that the front lot owners had the exclusive use of 33 feet of shoreline, and, in a recorded easement provided further that the back lot owners held a non-exclusive, permanent easement over the remaining 66 feet of shoreline "for access to and use of the riparian rights to Pine Lake."

Plaintiffs bought Lake Front Lot B in 1977. The easement appeared in their title commitment. Defendants, the Trivans and the Kins, bought the two lots behind Lot B substantially later. A prior owner of back Lot D had built and maintained a dock in the 66-foot easement, and had used it for launching his boat, sunbathing, and picnicking. The Trivans and the Kins continued to use the dock after they bought their back lots. In 1998, Plaintiffs filed an action to prevent the Trivans and the Kins from maintaining the dock, alleging that the easement permitted only access, and did not allow the building and maintenance of a dock. The Trivans and the Kins filed a counterclaim alleging interference with the use and enjoyment of their easement rights.

The parties filed cross motions for summary disposition. The circuit court found in favor of the Littles, holding that the Trivans and the Kins, as owners of the backlots, were not riparian owners and that their easement rights permitted only access to and use of the lake, and did not confer the right to construct a boat dock. The Court of Appeals reversed.

The Court of Appeals disagreed with the circuit court that the riparian right to construct a boat dock could not be conveyed by means of an easement:

> "While Michigan law does not permit the severance and transfer of riparian ownership or riparian rights normally enjoyed exclusively by owners of riparian land, it clearly allows a grantor to confer to non-riparian owners and back lot owners an easement to enjoy such rights. Further, our courts have made clear that such a grant is not to be assumed; rather, a court must determine the scope of the non-riparian owner's rights as a question of fact, by examining the language of the easement and the surrounding circumstances at the time of the grant. Further, in determining these rights, the court must consider whether the use would unreasonably interfere with the riparian lot owner's use and enjoyment of their property."

The Court of Appeals found that the circuit court had erred by concluding, as a matter of law, that a riparian owner could not grant an easement conveying the right to build or maintain a dock. The Court remanded the case for a determination of the scope of defendants' rights under the easement. The Court cautioned that, on remand, the circuit court should consider the easement language and the circumstances existing at the time of the grant to determine if the right to build and maintain a dock was intended to be included in the easement. The Court described these questions as questions of fact, not questions of law.

Schools/Exemption From Local Zoning

Charter Township of Bloomfield v. Birmingham Public Schools, No. 230996 (Mich. App., January 31, 2003)(unpublished).

The revised school code preempts local zoning as it pertains to school buildings, but not as to the construction of wireless communications towers on school grounds.

Bloomfield Charter Township filed suit against the Birmingham Public Schools, seeking to prevent the construction of a wireless communication tower on school grounds in violation of the township's zoning ordinance. The school district defended the suit on the grounds that MCL 380.1263(3) of the Revised School Code exempts public school districts from the operation of local zoning ordinances. The trial court denied the school district's motion.

On appeal the school district argued the applicability of *Schulz v. Northville Public Schools,* 247 Mich. App. 178 (2002) (which was decided during the pendency of the present case), which determined that the Revised School Code lawfully delegates legislative authority to the superintendent of public instruction regarding the design and construction of school buildings, and therefore that the Code preempts local

zoning. Focusing on the definitions and phrases "school buildings" and "school purposes," the Court of Appeals distinguished *Schulz* from the present case:

> "Reading MCL 380.1263(3) and MCL 388.851a together, it is clear that the superintendent was granted sole and exclusive jurisdiction (1) to review and approve plans and specifications for the construction, reconstruction, or remodeling of school buildings used for instructional or noninstructional school purposes; and (2) to review and approve site plans for those school buildings "used for school purposes." On appeal, defendant expressly concedes that the project is not a "school building." Therefore, given the plain language of MCL 380.1263(3), we conclude that the superintendent does not have sole and exclusive jurisdiction over the project because it is admittedly not a school building."

The Court further observed that it could not be inferred from the language of the Code that the Legislature assigned to school districts the authority over the construction and leasing of wireless communications towers for profit.

NOTE: The Michigan Supreme Court has granted leave to appeal this case and the *Schulz* case

Takings/Prior Regulation
Palazzolo v. Rhode Island, 533 US 606 (2001).

Plaintiff's purchase of coastal wetlands with knowledge that lands are subject to restrictive regulations does not automatically preclude takings claim.

In 1959 Anthony Palazzolo, along with a partner, purchased an interest in eighteen acres of Rhode Island coastal wetlands. Palazzolo and the other landowner transferred their interests to a Rhode Island corporation of which Palazzolo was the president. Palazzolo then bought out his associate and became the sole shareholder. Three times in the 1960s Palazzolo attempted to develop his land. His first two applications proposed to dredge portions of the pond and to use the dredge material to fill the eighteen acres. The third application proposed to fill the land for use as a private beach club. The state agency initially granted approval of the latter application, but the approval was withdrawn shortly thereafter due to environmental concerns. For more than ten years Palazzolo made no additional attempts to develop his land.

In 1971 Rhode Island created the Coastal Resources Management Council, which enacted coastal protection regulations. In 1977 the council promulgated a regulation requiring special permits for wetland development. Then, in 1978 the corporation of which Palazzolo was the sole shareholder failed to pay its state income taxes. The state revoked the corporate charter. Title to the land then passed to Palazzolo by operation of state law.

In 1983 Palazzolo applied to build a bulkhead and to fill the entire wetlands area to build a beach club. The application was denied, and Palazzolo did not appeal. Palazzolo submitted a new application in 1985 that sought to fill eleven acres of the wetlands to build a beach club. When this application was denied Palazzolo filed suit, claiming that the state's wetlands regulations constituted a taking. Citing *Lucas v. South Carolina Coastal Council*, 505 US 1003 (1992) (see discussion under Inverse Condemnation/ Taking/Denial of Septic Permit below). Palazzolo asserted that the state agency had deprived him of "all economically beneficial use" of his land. He sought $3.15 million in damages based on the speculative value of a 74-lot subdivision. The Rhode Island Supreme Court denied Palazzolo's takings claim on several grounds. Because Palazzolo acquired his land subsequent to the enactment of the wetlands regulations, the "notice defense" prevented him from maintaining a taking claim. Additionally, Palazzolo's *Lucas* taking claim was defeated because the development value of the "upland" portion of the parcel was at least $200,000.

With multiple concurring and dissenting opinions, the US Supreme Court affirmed the Rhode Island Supreme Court in part, reversed in part, and remanded the case to be considered under the *Penn Central* multi-factor test (see discussion under Inverse Condemnation/Taking/Denial of Septic Permit below).

The Court examined the state court's holding that a landowner who acquires title after regulations are adopted cannot claim compensation for a regulatory taking; the so-called "notice defense." The theory is that a purchaser or successive titleholder who has notice of earlier enacted regulations should not be permitted to recover for lost value when they acquired title knowing of the limitation. The Court held that "[t]he State may not put so potent a Hobbesian stick into the Lockean bundle." The Court reasoned that while certain regulations can limit the value of land because they are reasonable, other regulations are not reasonable and cannot become reasonable with the passage of time or title. "Future generations," according to the Court, "have a right to challenge unreasonable limitations on the use and value of land." "A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken."

The Court agreed with the lower court that because Palazzolo retained at least $200,000 in development value under Rhode Island's wetlands regulations, he was not deprived of all economically beneficial use. This was not, according to the Court, a mere "token interest." "A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property 'economically idle.' "

Accordingly, the Court reversed the lower court's rulings that Palazzolo's claims were unripe and that his post-regulation acquisition of title barred his takings claims. The Court upheld the lower court's ruling that Palazzolo could not claim a deprivation of all economic value because his land still retained significant value. Since Palazzolo's claims were not considered under the *Penn Central* multi-factor analysis, the Court remanded the case to be reconsidered under those tests.

Among the various concurring and dissenting opinions, the separate concurring opinions of Justices O'Connor and Scalia have received considerable attention. Justice O'Connor expressed her view of how the "notice defense" should be analyzed. The post-regulatory acquisition of title, according to Justice O'Connor, should be a factor considered under the third prong of the *Penn Central* analysis (the extent to which the regulation has interfered with distinct, investment-backed expectations), saying that "the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations."
Justice Scalia wrote a concurring opinion in which he took the opposite view. According to Justice Scalia, "the fact that a restriction existed at the time a purchaser took title….should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking." In other words, he would not consider the notice defense as a factor under the third prong of the *Penn Central* analysis.

Takings/Denial of Septic Permit
Johnson v Oakland County Department of Human Services, No. 229410, (Mich. App., April 23, 2002) (unpublished).

Plaintiff did not establish that the county's septic regulations deprived him of all economically viable use of the property, when plaintiff purchased property with knowledge of the septic regulations and the restrictions were reflected in the purchase price.

Plaintiff Johnson bought a platted subdivision lot for $38,000 in 1995, despite knowing that the property had failed perk tests and that the prior owner's application for a permit for an on-site septic system had been denied. The property was zoned for single-family residential use. The property could not presently be served by municipal sewage, nor were there prospects for service in the foreseeable future.

When Johnson purchased the property, Oakland County regulations required a 48-inch separation between the natural grade of the property and the water table for installation of a "traditional" septic system. Johnson submitted two plans for a traditional system in 1995, both of which were denied because soil borings revealed ground water at only two feet below natural grade. In March, 1996, Johnson submitted an application for a sand filtration septic system. In May, 1996, the County promulgated sand-filtered system guidelines requiring that the water table must be greater than 48 inches below grade. Johnson's subsequent application was also denied because it failed to meet those requirements.

In January, 1998, Johnson filed an action in the circuit court seeking a writ of mandamus directing the County to issue an on-site septic permit consistent

with his third application, claiming that the 48-inch separation requirement deprived him of all economically beneficial and productive use of the property, and that the policies and guidelines of the County bore no rational relationship to any legitimate public interest (a takings claim). Alternatively, he sought damages in the amount of $82,000, the estimated value of the lot as a residential building site if developable. The County argued that Johnson had not established that there was no economically beneficial and productive use of the property, arguing that he could, for example, petition for installation of a municipal system, build sewage holding tanks, or partition his property and sell it to his neighbors.

Citing *K & K Construction, Inc. v. Department of Natural Resources*, 456 Mich 570 (1998), the Court stated that there are two situations where a land use regulation will effect a taking: (1) where the regulation does not substantially advance a legitimate state interest, or (2) where the regulation denies an owner of economically viable use of the land. The second situation is further subdivided into two separate situations: (a) "categorical" taking, where the owner is deprived of "all economically beneficial or productive use of the land," as described in *Lucas v. South Carolina Coastal Council*, 505 US 1003 (1992); and (b) takings recognized on the basis of the application of the traditional "balancing test" established in *Penn Central Transportation Company v. City of New York*, 438 US 104 (1978).

> "In the [categorical taking] situation…a reviewing court need not apply a case specific analysis, and the owner should automatically recover for a taking of his property….A person may recover for this type of taking in the case of a physical invasion of his property by the government ... or where a regulation forces an owner to 'sacrifice all economically beneficial uses [of his land] in the name of the common good. . . .' 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."

Applying this analysis, the Court found that the 48-inch separation requirement imposed by the County advanced legitimate governmental interests, and therefore did not in and of itself affect a taking of the property. The Court further concluded that there was no "categorical" taking under the *Lucas* rationale, because Johnson had not established that other potential uses of the property (sale of the property to neighbors, use of sewage holding tanks, installation of municipal sewage system, etc.) had been foreclosed. The Court acknowledged that the regulations may have diminished the value of Johnson's land, but noted that mere diminution of value does not result in a categorical taking.

The Court finally addressed the claim under the traditional balancing test set forth in *Penn Central*. The Court relied on its categorical takings analysis to conclude that Johnson could not prevail under the first two prongs of the test "because, as we have concluded above, he has not established that the 48-inch separation requirement is unreasonable or that the parcel is either unusable or unmarketable in light of that regulation." The Court finally concluded that Johnson did not demonstrate that he had a reasonable "investment-backed expectation" that he could build a house on the parcel at the time of purchase. Johnson was aware of the original separation requirement and the previous owner's failure to obtain a permit. This recognition was reflected in the discounted price he paid for the lot ($38,000) compared to the $82,000 value he claimed. Quoting from *Loveladies Harbor, Inc. v. United States*, 28 F3d 1171 (1994) the Court explained "investment-backed expectations" by saying:

> "…[T]he owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of any economic loss. In economic terms, it could be said that the market had already discounted for the risk, so that the purchaser could not show a loss in his investment attributable to it."

The Court found that Johnson "gambled unsuccessfully" that that requirement would be

relaxed when he bought the property.

Takings/Moratoria

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, ___ US ___ (April 23, 2002).

Moratoria on development do not automatically give rise to takings claim.

With concerns over the degradation of the water quality of Lake Tahoe, the Tahoe Regional Planning Agency (TRPA) embarked on an effort to develop a comprehensive land use plan to regulate commercial and residential development in the **Tahoe** Basin. After earlier planning efforts failed to adequately limit development in the region, California and Nevada - with congressional approval - amended their compact to instruct TRPA to produce a new plan that, based on a series of specifically determined "environmental thresholds," more effectively limited the timing and location of development as necessary to protect the lake. Because of the immense scientific and political complexity of that undertaking, such a comprehensive land use plan could not be created without several years of scientific research and public discussion and debate. In an effort to call a temporary halt to further destructive development of the most ecologically sensitive lands in the Basin while that necessary planning process took place, TRPA instituted a moratorium on development in August 1981, and reinstated a second moratorium after the expiration of the first in 1983. TRPA's final moratorium on development in the most sensitive lands ended in April 1984 with TRPA's adoption of a new comprehensive plan, In total, the moratoria blocked construction of new development on affected lands for 32 months.

About two months after the plan was adopted, a group of approximately 2,000 landowners affected by the moratoria filed suit in federal courts in California and Nevada. These suits were consolidated for trial in the District of Nevada. The District Court first applied the *Penn Central* three-factor test and concluded that the moratoria had not affected a "partial taking" of petitioners' property. On the other hand, the court found a temporary "total taking" when it considered the effect of the moratoria under *Lucas*. As a result, both parties appealed.

The Ninth Circuit reversed the District Court's categorical takings findings under *Lucas,* concluding that the petitioners' challenge raised only the question whether the enactment of the moratoria constituted a taking. The Court of Appeals concluded that no categorical taking had occurred because the moratoria had only a temporary impact on the ownership interests of the lands in question. According to the Ninth Circuit, a regulation that affects only the temporal dimension of fee ownership is not a compensable taking because it does not deprive the owner of all economically beneficial use, the Court of Appeals concluded. "Because of the importance of the case," the Supreme Court granted certiorari limited to the question "whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a *per se* taking of property requiring compensation under the Takings Clause of the United States Constitution."

Writing for the majority, Justice Stevens stated that the answer to the "abstract question whether a temporary moratorium effects a taking is neither 'yes, always' nor 'no, never'; the answer depends on the particular circumstances of the case." He drew heavily on Justice O'Connor's concurring opinion in *Palazzolo* advising the Court to resist "[t]he temptation to adopt what amount to *per se* rules in either direction" in concluding that "the circumstances in this case are best analyzed within the *Penn Central* framework."

In concluding that the *per se* rule of *Lucas* is not the answer to the issue posed by the Tahoe moratoria, Justice Stevens emphasized that the Court consistently has chosen a multiple-factor analysis rather than a *per se* rule for partial regulatory takings. He stressed that the Court has consistently refused to apply "conceptual severance" analysis (dissecting the fee simple interest into temporal slices) because that runs counter to *Penn Central's* "parcel as a whole" analytical focus. "The starting point for the [district court's] analysis should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* was the proper framework." Justice Stevens emphasized that the *Lucas*

categorical rule was for the "extraordinary case;" the normal regulatory taking case is subject to the "[*Penn Central*] rule…requiring a more fact specific inquiry."

> "A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive and encourage hasty decisionmaking. Such an important change in the law should be the product of legislative rulemaking rather than adjudication."

Justice Stevens stressed the fact that moratoria are viewed by the "planning community…[as] an essential tool of successful development." He rejected the idea advanced by petitioners that they should be considered takings "regardless of the good faith of the planners, the reasonable expectations of the landowners, or the actual impact of the moratorium on property values." A major reason for avoiding a *per se* rule is the effect it could have on "informed decisionmaking" by governmental bodies. Costs of compensating property owners during a moratorium may force communities to "rush through the planning process or abandon the practice altogether." Without moratoria, a rush to develop may occur before planning can be completed, "thereby fostering inefficient and ill-conceived growth."

Noting that temporary bans on development reduce the risk that individual landowners will be "singled out" for excessive burdens and that all landowners share a "clear reciprocity of advantage against immediate construction that might be inconsistent" with a plan later adopted, Justice Stevens concluded that "fairness and justice" are best served by the "familiar" *Penn Central* approach, rather than "attempting to craft a new categorical rule" focusing solely on the duration of the restriction.

Dissenting opinions were filed by Chief Justice Rehnquist, joined by Justices Scalia and Thomas, and by Justice Thomas, joined by Justice Scalia. Justice Rehnquist stressed that nothing in the Fifth Amendment caselaw supports a distinction between permanent and temporary takings, thus *Lucas* should apply because petitioners could make no use of their land during the moratoria period. He disagreed with the majority's characterization of *Lucas* as emphasizing "value" rather than "use," and argued that *Lucas* should apply when all use is denied, even though temporarily.

Justice Thomas wrote to emphasize his disagreement with the majority's conclusion that there was no taking of "the parcel as a whole." In his view, previous cases put to rest any "notion that the 'relevant denominator' is land's infinite life." The fact that property may have useful life after a moratorium is lifted "bears on the amount of compensation due and has nothing to do with the question whether there was a taking in the first place…."

Takings/Condemnation /Public Necessity

City of Novi v. Robert Adell Children's Funded Trust, et al., 253 Mich. App. 330 (2002)

City's condemnation action property dismissed where proposed public road serving an industrial area found to primarily benefit private property interests and the public benefit was not sufficiently clear.

Plaintiff City of Novi has long experienced traffic congestion at the intersection of Grand River Avenue and Novi Road. The City proposed to construct two roads to deal with this situation. The first was to be the "Ring Road" or "Crescent Boulevard," that would form a ring around the congested intersection. The second was to be A.E. Wisne Drive that was to serve as an "industrial spur" and that would traverse the Adell trusts' property and give access to two private landowners, Wisne Corporation and General Filters, who would be cut off without the spur. As part of this road project, the city commenced a condemnation action pursuant to the Michigan Home Rule City Act and the Uniform Condemnation Procedures Act, principally to acquire property for the A.E. Wisne Drive. The Adell trusts filed their answer to the complaint, challenging both the public purpose and the necessity of the condemnation as it related to the A.E. Wisne Drive. The Adell trusts argued that the city abused its discretion and committed clear legal error as well as fraud in seeking to condemn the property for the benefit of two private property owners.

In its opinion the Court of Appeals analyzed previous cases that created a "fog of terminology" in Michigan condemnation laws. It concluded that the terms

"public use" and "public purpose" are interchangeable, but that "public necessity" is a separate concept requiring a separate inquiry. In determining whether a public purpose/public use exists the Court of Appeals turned to prior cases, including *Poletown Neighborhood Council v. City of Detroit*, 410 Mich 616 (1981), where the court articulated the "primary benefit" test; that is, "whether the proposed condemnation is for the primary benefit of the public or the private user determines if the taking is constitutional." In cases where the sole and fundamental constitutional challenge is whether there is a public use to support the proposed condemnation, public necessity is a relevant factor. Then the Court of Appeals went on utilize an "instrumentality of commerce" test articulated by Justice Ryan in the *Poletown* dissent to examine the public necessity question. In cases where the public is condemning land *to be turned over to private interests*, three relevant inquiries must be made:

> "(1) public necessity of the extreme sort; (2) continuing accountability to the public; (3) selection of land according to facts of independent public significance."

The Court of Appeals concluded that the public interest did not predominate over private interests, as it primarily served only two private industrial users, and that it failed the first and third prongs of the "instrumentality of commerce" test. The Court of Appeals also stated that the fact that the spur road was to be *publicly owned* by the City of Novi did not automatically mean that the public purpose/public use would be advanced by its construction."

Truck Routes/Townships

C & T Transport v. York Township, 252 Mich. App. 524 (2002)

Plaintiffs cannot challenge the reasonableness of a township ordinance limiting vehicles in excess of 10,001 pounds to designated truck routes.

Plaintiffs challenged the constitutionality of York Township Ordinance No. 75, which required, in pertinent part, commercial vehicles in excess of 10,001 pounds to use designated truck routes when passing through the township. Plaintiffs argued that the ordinance created an "unreasonable prohibition against the operation of commercial motor vehicles in York Township" by adding several miles to their trip, and that the added time and distance imposed a financial burden that would threaten their competitiveness in the marketplace. The trial court dismissed the complaint.

The Court of Appeals affirmed the dismissal. The Court found that MCL 257.726 grants local units of government the power to specifically impose weight limitations and designate certain routes for commercial carriers. Because the state legislature has prescribed the specific method of implementation (weight limits and truck routes) to local units of government through legislative action, and York Township exercised its authority consistent with the statute, a constitutional challenge to its reasonableness was unavailable.

Use Variances/Townships

Janssen v. Holland Charter Township ZBA, 252 Mich. App. 197 (2002)

The Michigan Court of Appeals gives tacit approval to townships' powers to grant use variances.

A landowner and developer filed a request with the Holland Charter Township Board requesting that roughly 115 acres be rezoned from agricultural to single family residential. The township's planning commission voted to recommend that the board deny the application. Landowner and developer amended the application to remove 15 acres from the request and resubmitted. The planning commission again voted to recommend denial. The landowner and developer then filed a use variance with the township's ZBA to vary the density requirements in order to allow them to build a 400-unit residential development. After the request was reduced to allow for 250 units the ZBA granted the request. Surrounding landowners filed suit. The trial court upheld the decision of the ZBA.

In appealing to the Court of Appeals, Plaintiffs argued that a 100-acre parcel is too large to be subject to a use variance. The Court of Appeals noted that nowhere in statute or caselaw does a size limitation reside on use variances. Without addressing the longstanding debate among the planning community

whether townships are given the power under the Township Rural Zoning Act to grant use variances, the Court of Appeals simply noted that under the township's zoning ordinance a variance may be granted "where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the zoning ordinance." It went on to articulate the four-part test for demonstrating unnecessary hardship:

> "(1) the property cannot reasonably be used in a manner consistent with existing zoning; (2) the landowner's blight is due to unique circumstances and not to general conditions in the neighborhood that reflect the unreasonableness of the zoning; (3) a use authorized by the variance will not alter the essential character of a locality; and (4) the hardship is not the result of the applicant's own actions."

The Court of Appeals found that the variance request met the four-part test. Importantly, the Court stated that in order to consider the essential character of this particular locality, one could not just look at the immediate neighboring properties. Rather "with growing consolidation of farming operations throughout the country, and the fewer children willing to follow their parents in farming, the family farm, once a mainstay of both the economic and cultural landscape in rural America, has begun to disappear." Focusing particularly on the "essential character of the locality," the Court noted the importance of the existence of the Right to Farm Act in protecting neighboring farming operations from nuisance suits. Also important was the fact that evidence presented at trial showed fifty other instances of residential use of land in areas zoned agricultural. "Thus, change in the character of the locality has not only been countenanced by the master plan, but the zoning history of the case reveals a steady, incremental movement in that direction." The Court of Appeals stated that it supported restrained and managed development in part through the issuance of use variances, as changing conditions create hardships for those remaining agricultural lands.

Public Policy Brief: Contacts

Room 88, Agriculture Hall, MSU, East Lansing, MI 48824-1039 (http://www.msue.msu.edu/aoe/slg/)

State & Local Government Area of Expertise Team Members:

John Amrhein (amrheinj@msue.msu.edu, 231-779-9480)
Dave Fenech (fenechd@msue.msu.edu, 810-244-8522)
Lynn Harvey (harvey@msue.msu.edu, 517-355-0118)
Roy Hayes (hayes@msue.msu.edu, 517-546-3950)
Hal Hudson (hudson@msue.msu.edu, 989-539-7805)
Elizabeth Moore (mooree@msue.msu.edu, 517-353-9694)
Ann Nieuwenhuis (nieuwenh@msue.msu.edu, 269-383-8830)
Julie Pioch (piochj@msue.msu.edu, 269-657-7745)
Marilyn Rudzinski (rudzinsk@msue.msu.edu, 586-469-5180)
Gary Taylor (taylorg@msue.msu.edu, 517-353-9460)

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