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Selected Planning and Zoning Decisions: 2009
May 2008-April 2009

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This public policy brief summarizes the important state and federal court cases and Attorney General Opinions issued between May 1, 2008 and April 30, 2009.

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Restrictions on Zoning Authority

Whether the Detroit International Bridge Company (DIBC) (a private actor) was a limited federal instrumentality

Court: Michigan Supreme Court (481 Mich. 899; 750 N.W.2d 165; 2008 Mich., May 7, 2008)

Case Name: *City of Detroit v. Ambassador Bridge Co.*

JUDGE(S): CAVANAGH, TAYLOR, WEAVER, KELLY, CORRIGAN, YOUNG, JR. AND MARKMAN

The Supreme Court affirmed the judgment of the trial court, reversed the judgment of the Court of Appeals, and held the Detroit International Bridge Company (DIBC) was a federal instrumentality for the limited purpose of facilitating traffic flow across the Ambassador Bridge and was immune from any state law or local regulation directly inhibiting the purpose.

The city sought to enforce its zoning ordinance on the DIBC (the bridge's private operator) to stop the DIBC's construction projects located in and around the Ambassador Bridge's footprint. Part of the Ambassador Bridge sits on land owned by the DIBC within the city's geographical boundaries. The DIBC was working with the several federal agencies operating in and around the bridge to gain approval for the installation of new tollbooths for cars and trucks, a diesel fuel station for its duty-free plaza, and truck weighing stations. After making changes suggested by the federal agencies, the DIBC gained the federal government's approval for the projects. The DIBC requested the city's approval to begin construction, which the city denied, citing its zoning ordinance. Nonetheless, the DIBC went forward with its projects.

The trial court primarily relied on federal-instrumentality preemption in holding the DIBC was immune from the city's zoning ordinance. The trial court found the DIBC was a federal instrumentality for the limited purpose of facilitating traffic across the Ambassador Bridge, which supported the federal purpose of free-flowing interstate and foreign commerce. The Supreme Court held there is no bright-line rule for determining if a private actor is a federal instrumentality. Under both the test in *United States v. Michigan* and the conduct based test in *Name.Space, Inc. v. Network Solutions, Inc.* (2nd Cir.), the Supreme Court held the trial court correctly held the DIBC was an instrumentality of the federal government for the limited purpose of facilitating traffic flow over the bridge and DIBC's construction projects were actions within its scope of immunity.

The court noted the DIBC's status as a federal instrumentality was limited to actions clearly and directly associated with the facilitation of traffic across the Ambassador Bridge. Accordingly, the DIBC may not fit its non-traffic facilitative actions into this status. In accepting the trial court's statement "[t]here was sufficient evidence presented by DIBC for the [c]ourt to conclude that DIBC's proposed construction will have a positive impact on traffic flow and reduce delays for traffic at the bridge," the Supreme Court accepted such an action was in furtherance of the DIBC's federal mandate to maintain and operate the bridge. Like the instrumentality in *Name.Space*, which had immunity for conduct it was required to do under its contract with the federal agency, the DIBC has immunity for its conduct in the operation and maintenance of the Ambassador Bridge. While operating the bridge, the DIBC must keep the flow of bridge traffic an optimal level. Thus, the DIBC's conduct-based immunity extends to its conduct facilitating bridge traffic.

JUDGE(S): CONCURRENCE - CORRIGAN

Justice Corrigan concurred in Justice Cavanagh's analysis, but wrote separately to emphasize the limited scope of the federal-instrumentality status of the DIBC as to commercial operation of fueling stations and similar activities less directly related to taking tolls or facilitating bridge traffic. The justice also wrote to underscore Justice Cavanagh's point even activities related to the DIBC's federal purpose are not entirely immune from local regulation. (Source: State Bar of Michigan *e-Journal* Number: 39271, May 8, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/supreme/2008/050708/39271.pdf

Whether the trial court correctly held the plaintiff's proposed gravel mining operation would not result in "very serious consequences"

Court: Michigan Court of Appeals (Appeals: 278 Mich. App. 743; 755 N.W.2d 190; 2008 , May 6, 2008)

Case Name: *Kyser v. Kasson Twp.*

(Note: On March 13, 2009 the Michigan Supreme Court denied hearing this case on appeal. Then on April 3, 2009 the Supreme Court, on the Court's own motion, VACATED its March 13, 2009 order and decided to hear the appeal of the May 6, 2008 judgment of the Court of Appeals. Justice Corrigan dissented[1] from the

[1] Today's decision denies this Court the opportunity to inquire about the justification for past decisions of this Court that have read into the law provisions that were never placed there by the Legislature itself. As a consequence, the general rule of judicial deference to the decisions of local zoning authorities has been altered with regard to the extraction of natural resources, and the judiciary has been [*2] afforded a considerably greater role in questioning the judgments of such authorities and effectively acting as a super zoning commission.

I respectfully dissent from the order denying defendant's application for leave to appeal. I would grant leave to appeal because I believe that this Court should examine the unconstitutional implications of the "very serious consequences" rule first adopted in *Silva v Ada Twp*, 416 Mich 153; 330 N.W.2d 663(1982).

Defendant Kasson Township denied plaintiff Edith Kyser's application to rezone her property for gravel mining. Defendant asserted that granting plaintiff's application would undermine its comprehensive zoning scheme and engender applications from numerous other property owners for a similar rezoning of their properties. Plaintiff filed suit, contending that defendant's refusal violated her substantive due process rights because gravel mining on her property would cause no "very serious consequences" under *Silva*. After a bench trial, the Leelanau Circuit Court held that because plaintiff's request for rezoning would not result in very serious consequences, plaintiff could mine gravel on her property. The Court of Appeals affirmed in a divided decision. *Kyser v Kasson Twp*, 278 Mich App 743; 755 N.W.2d 190 (2008). [*3] Defendant now seeks leave to appeal to this Court.

In *Silva*, the Court held that "zoning regulations which prevent the extraction of natural resources are invalid unless 'very serious consequences' will result from the proposed extraction." *Silva, supra* at 156. The *Silva* Court characterized its holding as "reaffirming" the rule of *Certain-teed Products Corp v Paris Twp*, 351 Mich 434; 88 N.W.2d 705 (1958). *Id*. As Justice Ryan noted in his partial concurrence and dissent in *Silva*, however, "the supposed 'rule' favoring the removal of natural resources unless 'very serious consequences' would result was merely obiter dictum" in *Certain-teed Products* and an earlier case on which the *Silva* majority also relied, *City of North Muskegon v Miller*, 249 Mich 52; 227 N.W. 743 (1929). *Silva, supra* at 165. Therefore, although ostensibly reaffirming the rule of *Certain-teed Products*, the *Silva*

(continued...)

[1](...continued)

Court adopted the "very serious consequences" rule for the first time. In so doing, *Silva* created a new rule without fully grappling with the unconstitutional implications of that rule.

In my view, this Court should reexamine the "very serious consequences" rule for myriad reasons. First, the rule upsets the traditional separation of powers [*4] because it compels courts to engage in an expansive review that essentially crafts state and local zoning and environmental policy. This Court "does not sit as a superzoning commission"; instead, "[t]he people of the community, through their appropriate legislative body, and not the courts, govern its growth and its life." *Robinson v Bloomfield Hills*, 350 Mich 425, 430-431; 86 N.W.2d 166 (1957). In contrast, the "very serious consequences" rule violates this Court's well-established principle of not substituting "our judgment for that of the legislative body charged with the duty and responsibility in the premises." *Id.* at 431. If a reviewing court wishes to follow the *Silva* rule, the court must, in effect, substitute its opinion regarding the appropriateness of the designation at issue for the opinion of the local zoning authority, thereby exercising a legislative function.

Moreover, the rule stands in stark contrast to the traditional rules under which plaintiff may challenge the validity of a zoning ordinance. According to the traditional rules, plaintiff has the burden of proving, "first, that there is no reasonable governmental interest being advanced by the present zoning classification itself [*5] . . . or secondly, that an ordinance may be unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area in question." *Kropf v Sterling Hts*, 391 Mich 139, 158; 215 N.W.2d 179 (1974). Under the "very serious consequences" rule, however, the burden shifts from the plaintiff to the municipality. Plaintiff no longer must "prove affirmatively that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of his property." *Id.* at 162 (quotation marks and citation omitted). Instead, the municipality must convince the trial court that because the anticipated consequences of allowing mining cannot be otherwise mitigated, it has a compelling interest in preventing "very serious consequences" by denying a rezoning application.

The amici curiae briefs of the State Bar's Public Corporation Law Section (PCLS), the American Planning Association (APA), and the Michigan Association of Planning (MAP) underscore the jurisprudential significance of the "very serious consequences" rule. The PCLS argues that the subsequent enactment of MCL 125.3207, which prohibits townships from excluding lawful land uses, has superseded the *Silva* [*6] Court's "very serious consequences" rule. The APA and the MAP also challenge two faulty justifications often cited to support the *Silva* rule. They argue that the mere presence of minerals on property is not so unusual that courts should elevate it above general land use regulations. Moreover, the APA and the MAP note that the appropriate forum in which to establish statewide natural resource management policies is the Legislature, not the courts. Because our Legislature has yet to adopt any policy establishing mining or extraction as a preferred land use, the *Silva* Court erred when it legislated that policy by judicial decree.

Accordingly, I would grant leave to appeal to examine the unconstitutional implications of the "very serious consequences" rule.

order to deny appeal, which may have had weight for the court reversing itself. The supreme court's ruling on the case is still pending. [Judge Weaver did not participate in this case because she has a past and current business relationship with Kasson Township Supervisor Fred Lanham and his family.])

The trial court properly held rezoning the plaintiff's property would not result in "very serious consequences," entered an order permitting the plaintiff (Kyser) to mine gravel on her property, and enjoined the defendant-Kasson Township from interfering with plaintiff's gravel-mining operation, even though the township's zoning ordinance purports to disallow gravel mining on her land.

Defendant attempted to resolve its gravel-related problems by adopting a zoning ordinance establishing a township Gravel District where gravel mining and extraction operations were permitted inside the Gravel District, but were not permitted outside the Gravel District. Although plaintiff's property abutted the Gravel District, her land was originally zoned for agricultural use. She sought to have a portion of her property rezoned and included in the Gravel District, with the goal of selling the rezoned portion to a gravel-mining operator. Defendant refused to grant her rezoning request, citing the comprehensive nature of its Gravel District. The court held the trial court correctly found the gravel underlying plaintiff's land was a valuable natural resource. The evidence established plaintiff's land was underlain by high-quality gravel and the gravel could be extracted and sold at a profit. The record supported the trial court's finding the public interest in plaintiff's gravel was not high, and the trial court therefore properly concluded it was incumbent upon her to "make a stronger showing" no very serious consequences would result from her proposed operation. However, she was not required to prove no consequences whatsoever would result from her proposed operation. The trial court did not err by finding truck traffic, truck safety, traffic noise, loss of property values, impact on residential development, and the "domino effect" did not constitute "very serious consequences."

Although certain evidence established some adverse effects might result from plaintiff's proposed gravel-mining operation, these limited adverse effects simply did not rise to the level of "very serious consequences" in this case. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 39242, May 8, 2008.)

Full Text Opinion: http://www.michbar.org/opinions/appeals/2008/050608/39242.pdf

Scope of the priority of the County Commissioners Act over the Township Zoning Act (since replaced with the Michigan Zoning Enabling Act

Court: Michigan Supreme Court (81 Mich. 352; 750 N.W.2d 570; 2008 Mich., June 18, 2008)

Case Name: *Herman v. County of Berrien*

JUDGE(S): CAVANAGH, TAYLOR, WEAVER, KELLY, CORRIGAN, YOUNG, JR., AND MARKMAN

Addressing the scope of the priority of the County Commissioners Act (CCA) (M.C.L. 46.1 *et seq.*) over the Township Zoning Act (TZA) (M.C.L. 125.271 *et seq.*) (since replaced with the Michigan Zoning Enabling Act [M.C.L. 125.3101 *et seq.*]) relating to a county's power to "site" and "erect" "building(s)," the Michigan Supreme Court in defining the CCA's term "site" held land uses "ancillary to the county building and not indispensable to its normal use are not covered by the CCA's grant of priority over local regulations." Thus, the defendant-county's outdoor shooting ranges did not have priority over the township ordinances the plaintiffs relied on because they were land uses "not indispensable to the normal use of the county building."

The master plan for the county's firearms training facility included constructing an over 3,000-square foot building at the center of the parcel to serve as a training and support building. The building had a parking lot, outdoor light poles, and a driveway. The facility also had several outdoor shooting ranges. Operation of the shooting ranges contravened several local ordinances, including the township's zoning and anti-noise ordinances. Plaintiffs, who own property in close proximity to the shooting ranges, filed a declaratory judgment action to stop operation of the facility. The Court of Appeals held the county's shooting ranges had priority over the township's ordinances.

The Supreme Court disagreed and reversed. The definition of "site" in *Northville Charter Twp. v. Northville Pub. Sch.*, relied on by the Court of Appeals, was not controlling since it derived from a different priority-giving statute, the Revised School Code (RSC). The CCA gives counties the power to determine "the site of, remove, or designate a new site for a county building," and to erect "the necessary buildings for jails, clerks' offices, and other county buildings...." A

county's power under the CCA "is limited to the siting of county buildings, which does not equate to the power to review and approve site plans." The "CCA's limited term 'site' does not carry the same meaning as the RSC's expansive phrase 'site plan.'"

Articulating a standard to test whether an ancillary land use is encompassed in the use of the building and thus, is given priority under the CCA, the court held the scope of the CCA's priority over the TZA is limited to ancillary land uses indispensable to the building's normal use. The building's normal use was limited to conducting indoor training and support. The outdoor shooting ranges were not indispensable for the building's indoor training and support because the indoor training and support could be conducted without the outdoor shooting ranges being located next to the building. However, the building, parking lot, driveway, and lighting poles had priority over the local regulations because they were indispensable to the normal use of the building. Reversed and remanded to the trial court. (Source: State Bar of Michigan *e-Journal* Number: 39709, June 19, 2008.)

Full Text Opinion: http://www.michbar.org/opinions/supreme/2008/061808/39709.pdf

Whether the denial of the zoning variance imposed a "substantial burden" on the plaintiff's religious exercise (whether the denial of the variance "coerce[s] individuals into acting contrary to their religious beliefs")

Court: Michigan Court of Appeals (280 Mich. App. 449; 761 N.W.2d 230; 2008 Mich. App., August 16, 2008)

Case Name: *Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp.*

This case was first heard in in 2003 (*Shepherd I*) and again in May 2007 (*Shepherd II*), and subject to a Michigan Supreme Court order (480 Mich. 1143; 746 N.W.2d 105; 2008 Mich., March 28, 2008), see page 3 of *Selected Planning and Zoning Decisions: 2008* (May 2007-April 2008) (http://web5.msue.msu.edu/lu/pamphlet/Blaw/SelectedPlan&ZoneDecisions2007-08.pdf found at web page http://web5.msue.msu.edu/lu/pamphlets.htm#court). The case was remanded back to the Appeals Court for reconsideration in light of *Greater Bible Way Temple of Jackson v. City of Jackson* (478 Mich. 373; 733 N.W.2d 734; 2007 Mich., June 27, 2008) (see page 2 of *Selected Planning and Zoning Decisions: 2008*).

On remand from the Supreme Court for reconsideration, the Appeals Court held the trial court correctly granted summary disposition to defendants on the Religious Land Use and Institutionalized Persons Act (RLUIPA) claims. Plaintiff-Shepherd Montessori Center Milan claimed Ann Arbor Charter Township-defendants' denial of a variance for plaintiff to use property adjacent to its Catholic Montessori day care center to operate a faith-based school violated 42 USC 2000cc of the RLUIPA and the Equal Protection Clause.

In light of the Supreme Court's interpretation of RLUIPA in *Greater Bible Way*, in which the Supreme Court affirmed judgment for the municipal defendants, the court held it was compelled to reach a similar result. As set forth in *Greater Bible Way*, to establish a RLUIPA violation, plaintiff must show the denial of the variance request "coerces" individuals into acting contrary to their religious beliefs. Plaintiff did not show the denial of the variance forced plaintiff to do something its religion prohibits, or refrain from doing something its religion requires. Plaintiff did not allege the property at issue has religious significance or plaintiff's faith requires a school at this particular site. Rather, evidence suggested notwithstanding substantial evidence of prohibitive cost and a lack of available, suitable space, plaintiff could operate its school at another location in the surrounding area, and plaintiff conducted a real estate search toward this end. In other words, plaintiff may operate a faith-based school, but it must do so on property zoned for schools. Under the Supreme Court's reasoning, the denial of the variance did not constitute a substantial burden on plaintiff's religious exercise. However, with regard to plaintiff's equal protection claim, the court concluded the Supreme Court's remand order did not alter its prior holding plaintiff was entitled to summary disposition.

Although the Supreme Court's holding in *Greater Bible Way* compelled the court to affirm the trial court's grant of summary disposition to defendants on plaintiff's RLUIPA claim, the court reaffirmed its holding the application of the zoning ordinance violated the equal protection guarantee of the United States Constitution. In light of this violation, the defendant-Zoning Board of Appeals' decision was contrary to law and the trial court erred when it affirmed the Zoning Board of Appeals' denial of plaintiff's request for a variance. Again the court remanded the case to the trial court to enter judgment in favor of

plaintiff and to reverse the appeal board's denial of plaintiff's variance request. The court retained jurisdiction. (Source: State Bar of Michigan *e-Journal* Number: 40331, August 28, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/082608/40331.pdf

DNR's proposal to build a public-access boat launch on Crystal Lake in defendant-Benzie County; Whether the trial court correctly held the DNR was exempt from local zoning ordinances

Court: Michigan Court of Appeals (280 Mich. App. 603; 760 N.W.2d 802; 2008, September 11, 2008))

Case Name: *Crystal Lake Prop. Rights Ass' v. Benzie County*

Concluding the defendant-DNR's project was subject to the county zoning ordinance despite the DNR's compliance with M.C.L. 324.78114 (a provision of the The Waterways Commission Act (WCA) (MCL 324.78101 *et seq.*) contained in part 781 of the Michigan Natural Resources and Environmental Protection Act (NREPA) (MCL 324.101 *et seq.*)) and an earlier settlement involving a trail running adjacent to Crystal Lake did not prohibit the proposed boat launch, the Appeals Court reversed in part, and remanded for further proceedings in accord with its opinion.

A settlement was reached in a class action suit brought by certain property owners against the Michigan Department of Transportation (MDOT) as to their claim of title to a railroad right-of-way running along the south shore of Crystal Lake (now the Betsie Valley Trail). Under the settlement, the Michigan Department of Natural Resources (DNR) was entitled to a permanent easement for a 10-foot wide public trail subject to limitations and restrictions in the agreement and the DOT's superior right to resume rail use within the easement. A judgment was entered based on the settlement.

Later, the DNR took steps to acquire property fronting Crystal Lake for a public-access boat launch on land abutting the trail. The state acquired 20 acres of property to be used as a boat launch. Earlier the Benzie County Board of Commissioners and the Benzonia Township Board expressed approval of the development but had no interest in buying the land. The Michigan Department of Environmental Quality (DEQ) issued the DNR a permit to allow construction of a "public boat launch." The permit stated in part, it did not waive the necessity of seeking "federal assent [and] all local permits or complying with other state statutes."

The trial court granted the DNR's motions for summary disposition. Crystal Lake Property Rights Association-plaintiff argued on appeal the DNR's project was subject to local zoning. The trial court had held as long as the DNR complied with MCL 324.78114, it could build the public boat launch without being subject to the local zoning ordinance. The Appeals Court disagreed and held there was no language in §78114 or in any other part of the WCA, indicating the DNR has exclusive jurisdiction in the placement of public-access boat launches. Significantly, §78114(2)(a) does not purport to exempt the DNR from local zoning requirements, but only requires the site be operated in a manner agreed to by the parties. The statute can be reasonably construed as merely requiring the DNR, in creating a public-access boat launch, to follow specific procedures to involve local government. The court reversed the trial court's ruling on this issue. (Source: State Bar of Michigan *e-Journal* Number: 40448, September 15, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/091108/40448.pdf

Whether a building is only considered a church if its "principal use" is public worship, Effect of the fact non-worship activities and uses would occur in the building

Court: Michigan Court of Appeals (281 Mich. App. 396; 761 N.W.2d 371; 2008, October 30, 2008)

Case Name: *Great Lakes Soc'y v. Georgetown Charter Twp.*

In an issue of first impression, the court held under the correct legal analysis the record did not support the Zoning board of appeals' (ZBA) determination the proposed building was not a "church" for purposes of the defendant-Georgetown Charter Township's ordinances, and as a church, plaintiff-Great Lakes Society (GLS) could qualify for a special use permit to construct its building, if a variance should have been granted for the proposed location. However, the court further held GLS was subject to the amended version of the ordinance and the decision to deny GLS a variance was based on competent, material, and substantial evidence. Thus, while the court reversed the trial court's decision affirming the ZBA's conclusion the proposed building was not a church under the zoning ordinance, it affirmed the ZBA's decision denying

GLS's variance request, and remanded for entry of an order granting defendants summary disposition of GLS's statutory and constitutional claims.

The trial court erred in concluding Michigan law requires a proposed building constitutes a church only if its "principal use" is public worship. "Rather, the correct standard is whether the building is used for public worship and reasonably closely related activities or uses." The evidence was undisputed the proposed building was to be used for regular public worship. The issue was whether despite the public worship use, the proposed building was not a church because of the non-worship activities and uses to occur in it. Since there was no Michigan precedent on this issue in the zoning context, the court reviewed precedents from other states in considering whether the building's other uses were reasonably closely related, in space and substance, to the public worship use. Since all of the proposed activities would occur in the same building, the spatial relationship test was not at issue. The court concluded almost all of the other activities were reasonably closely related in substance to the public worship function. While GLS's health ministry "co-op" activities were not relatively commonplace among churches, the court concluded the health ministry use was "not so far afield" from the public worship purpose, or so extensive, it undermined the proposed building's status as a church. However, because defendants properly denied a variance, and did not violate the Religious Land Use and Institutionalized Persons Act (RLUIPA) (42 USC § 2000cc *et seq.*) or any constitutional guarantees in making the decision, they were entitled to summary disposition. Reversed in part, affirmed in part, and remanded. (Source: State Bar of Michigan *e-Journal* Number: 40902, November 3, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/103008/40902.pdf

Civil Rights

Violated the plaintiff's Fourth Amendment rights when he entered plaintiff's property without a warrant

Court: U.S. Court of Appeals Sixth Circuit (531 F.3d 385; 2008 U.S. App., July 3, 2008)

Case Name: *Jacob v. Township of W. Bloomfield*

The U.S. District Court correctly concluded the Township of West Bloomfield (defendant) land ordinance enforcement officer was conducting a criminal, not purely administrative, investigation during his warrantless intrusions onto plaintiff's property and he was not entitled to qualified immunity in light of *Widgren v. Maple Grove Twp.* Thus, the district court properly denied defendant summary judgment.

Plaintiff pleaded guilty to misdemeanor criminal charges for violation of a local land use ordinance in October 1999 and was given 14 days to clean up his property. A plea agreement provided if he failed to achieve compliance within the 14-day period, he would be sentenced to 30 days in the county jail. Twice in October, defendant entered the curtilage of plaintiff's property without a warrant and determined he remained in noncompliance with the ordinance. As a result, plaintiff served 30 days in jail. While he was still in jail, defendant again entered the curtilage of plaintiff's property without a warrant and determined he was not in compliance with the ordinance. After plaintiff was released, defendant continued to enter his property and cite him for violations of the ordinance.

The court concluded this case was distinguishable from *Widgren v. Maple Grove Twp.* because defendant did not enter plaintiff's property for a purely administrative purpose. His warrantless search of plaintiff's property "carried with it the very real threat of criminal sanctions," a threat made real by the fact plaintiff had already been jailed for 30 days as a result of defendant's intrusions on his privacy.

Defendant argued the searches were not governed by the Fourth Amendment because they were performed by an unarmed officer, who did not rifle through plaintiff's private papers or conduct an involved investigation, and were not conducted at night. The Sixth Circuit U.S. Court of Appeals disagreed, noting, *inter alia*, "the Fourth Amendment does not excuse an invasion of privacy merely because the official conducting the search could have intruded even further upon an individual's privacy." There was no question the Fourth Amendment's protection of the intimate area surrounding plaintiff's home was clearly established at the time. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 39848, July 8, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2008/070308/39848.pdf

Land Divisions & Condominiums

Whether the Land Division Act (LDA) (MCL 560.101 *et seq.*) can be used to create substantive property rights such as a utility easement

Court: Michigan Supreme Court (482 Mich. 484; 759 N.W.2d 178; 2008, December 30, 2008)

Case Name: *Tomecek v. Bavas*

LEAD OPINION – JUDGES KELLY AND TAYLOR:

The Michigan Supreme Court held the original grantors intended to allow utility access to the plaintiffs-Tomeceks' property through a central drive easement.

Plaintiffs sought an easement for the purpose of connecting to a city sewer across the lots of their neighbors. The lead opinion concluded in 1975, when the O.T. Henkle subdivision was platted, it was the intent of the grantors the central easement could include utilities. This holding was supported by the fact, on the plat, the central easement and the south easement were both labeled the same. It was undisputed the south easement was a driveway and had utilities at the time of platting. The language of the restrictive covenant running with the plat also supported the holding. The covenant prevented a house from being built on Lot 2 until a municipal sewer system could be made available to the lot. Once a sewer line became available, the covenant allowed a house to be built on Lot 2. The lead opinion agreed with the Court of Appeals the restrictive covenant did not bar the easement. However, the court reversed the Court of Appeals holding the Land Division Act (LDA) (MCL 560.101 *et seq.*) can alter substantive property rights. The lead opinion also concluded it was unnecessary for the Court of Appeals to address whether an easement by necessity should be recognized in Michigan and applied in this case. Affirmed in part, reversed in part, and vacated in part.

CONCURRING IN PART, DISSENTING IN PART – JUDGES CAVANAGH AND WEAVER:

Justices Cavanagh and Weaver would affirm the Court of the Appeals result and vacate its reasoning. The justices believed the easement language was latently ambiguous and the circumstances surrounding its writing showed the grantors intended plaintiffs' property to access utilities through the central drive easement. The justices respectfully dissented from the holding the LDA never enables a court to alter property rights.

SEPARATE CONCURRING IN PART, DISSENTING IN PART – JUDGE WEAVER:

Justice Weaver partially concurred with and dissented from the lead opinion's conclusions for the reasons stated in Justice Cavanagh's partial concurrence and partial dissent, which she joined.

SEPARATE CONCURRING IN PART, DISSENTING IN PART – JUDGES YOUNG, JR., CORRIGAN, AND MARKMAN:

Justices Young, Jr., Corrigan, and Markman concurred with Justice Kelly's opinion insofar as it held the LDA does not give trial courts the authority to alter substantive property rights and it declined to address the common-law doctrine of easements by necessity. The justices wrote only to express misgivings with regard to the disposition on whether the grantors of the plaintiffs' easement intended to give the plaintiffs utilities access in addition to ingress and egress. Rather than affirm the Court of Appeals result, which granted plaintiffs summary disposition, the justices would remand the case to the trial court for trial. (Source: State Bar of Michigan *e-Journal* Number: 41427, January 2, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/supreme/2008/123008/41427.pdf

Substantive Due Process

Substantive due process claim, "shocks-the-conscience" test

Court: Michigan Court of Appeals (281 Mich. App. 184; 761 N.W.2d 293; 2008, October 2, 2008)

Case Name: *Mettler Walloon, L.L.C. v. Melrose Twp.*

The Appeals Court held the trial court in this bench trial did not err in rejecting plaintiff's substantive due process claim under §1983 because plaintiff failed to produce evidence the "defendants' behavior was so arbitrary as to shock the conscience," and the trial court did not apply an incorrect legal standard to the procedural due process claim since whether an official has a personal pecuniary interest in the outcome of the proceedings is relevant to whether there was an objective decision maker, the court affirmed the trial court's finding of no cause of action on plaintiff's damages claim.

The case arose from a land use planning dispute. The plaintiff-developer Mettler Walloon, L.L.C. expressly stated, *inter alia*, a substantive due process claim and the trial court and defendants essentially also

consented to trial of a procedural due process claim. The court noted the "shocks-the-conscience" test had been applied in Michigan to a substantive due process claim, and there were decisions from other states applying the shocks-the-conscience test to land use planning disputes.

The court concluded plaintiff did not produce evidence of any conduct by township officials "so outrageous or arbitrary as to shock the conscience." Instead,

> "the evidence indicated conduct intended to further the legitimate land use planning interests of the township (maintaining the integrity of the village commercial zone in the village, and furthering the vitality of the village's commercial center)."

Thus, the trial court did not err in rejecting plaintiff's substantive due process claim. The court also rejected plaintiff's argument the trial court applied an incorrect legal standard to the procedural due process claim when it held plaintiff failed to prove the township supervisor had a personal pecuniary interest in the outcome of the proceedings. The court concluded in light of the fact having a personal pecuniary interest in the outcome

> "would indicate a lack of an objective decision maker, it was logical for the trial court to conclude that not having such an interest (and not being motivated by such an interest) would point to the existence of an objective decision maker, and to the lack of merit of a procedural due process claim."

Plaintiff's other claims also failed or were abandoned. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 40651, October 6, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/100208/40651.pdf

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Procedural Due Process and Equal Protection

See *People v. Stross* on page 11.

Whether defendants violated plaintiff's due process rights where the allowance of the gas station on the adjacent commercial property was a taking of her residential property

Court: U.S. District Court Western District of Michigan (___ F.3d ___; 2009 U.S. Dist. [2009 U.S. Dist. LEXIS 28379; No. 1:08-cv-778], April 2, 2009)

Case Name: *Stewart v. City of Lansing*

Concluding the gas station with a canopy was a reasonable use of the commercial property, the plaintiff could not show a taking occurred by the approval of the gas station on commercial property adjacent to her property, defendants did not actively cause plaintiff harm by approving the gas station and canopy on commercial property, the application of the zoning ordinance was not unconstitutional, and there was no evidence supporting her civil conspiracy claim, the court granted the defendants summary judgment and dismissed plaintiff's claims with prejudice.

The plaintiff alleged her constitutional rights were violated when the defendant-City (1) allowed a 24-hour gas station to operate on commercial property adjacent to her residential property and (2) when the City demolished what was left of her brick walled detached garage. When plaintiff purchased her residential property, the adjacent property was commercial and was zoned for commercial use, such as a gas station. Plaintiff claimed as a result of the gas station opening, the property value of her home decreased and her home was unlivable at times because of the constant noise due to the 24-hour traffic. Plaintiff also argued the City violated her rights when it demolished her garage after it was determined to be unsafe and unsuitable.

The City inspected the garage in May 2002, and determined it was in major disrepair. She was notified the violations had to be corrected by a specific date, she received a building permit to rebuild the roof, but it was never rebuilt. Plaintiff simply removed the roof. After a hearing, the garage was ordered demolished. She failed to respond after being given adequate notice and the garage was finally demolished in March 2007. The court held none of the plaintiff's claims had merit and

granted the defendants summary judgment.. (Source: State Bar of Michigan *e-Journal* Number: 42395, April 15, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/district/2009/040209/42395.pdf

Court, Ripeness for Court's Jurisdiction, Aggrieved Party

See *People v. Stross* on page 11.

Whether exhaustion is a prerequisite to enforcement of rights under the Religious Land Use and Institutionalized Persons Act

Court: U.S. Court of Appeals Sixth Circuit (544 F.3d 609; 2008 U.S. App., October 10, 2008)

Case Name: *Grace Cmty. Church v. Lenox Twp.*

The district court properly awarded summary judgment to the defendant-Lenox Township, holding the action was not ripe because the plaintiff had failed to exhaust administrative remedies and obtain a final decision before filing suit.

Plaintiff applied for and was granted a special land use permit by the Township Planning Commission to operate a residential facility for religious instruction and spiritual counseling. The special use permit included certain restrictions. A month later, the Planning Commission, faced with evidence the restrictions had been violated, revoked the permit. Instead of attempting to rebut or explain the evidence or appealing the revocation to the Zoning Board of Appeals, plaintiff filed suit challenging the revocation as a violation of their rights under Religious Land Use and Institutionalized Persons Act (RLUIPA) (42 USC §§2000cc *et seq.*). Plaintiff claimed the district court erred as a matter of law in its evaluation of ripeness. Plaintiff insisted notwithstanding *Murphy II* (*Murphy v. Zoning Commission of the Town of New Milford* (D. Conn.) (*Murphy I*) and (2nd Cir.) (*Murphy II*)), that *DiLaura v. Ann Arbor Twp.* (Unpub. 6th Cir.) remains the controlling law of the Sixth Circuit. Plaintiff recognized *DiLaura* was unpublished and thus, lacked binding precedential effect, but maintained it represented the best Sixth Circuit authority on the question and, in holding exhaustion is not prerequisite to assertion of an RLUIPA claim, represented sound law.

The district court distinguished *DiLaura*, noting unlike the *DiLauras*, plaintiff had not even sought relief from the Zoning Board of Appeals (ZBA). With reference to the Lenox Township Zoning Ordinance, the district court observed the ZBA had express authority to reverse, modify, or affirm the Planning Commission's revocation of plaintiff's special use permit. By failing to appeal the revocation decision, the district court concluded plaintiff, in effect, denied itself a ruling on its position the Planning Commission had relied on erroneous information, and denied itself a final decision on the propriety of the revocation. The district court also noted the decision cited in *DiLaura* for the proposition exhaustion is not prerequisite to an RLUIPA claim, *Murphy I*, was reversed in *Murphy II*. The record was devoid of any efforts by plaintiff to complete the factual record, to more fully explain its position to the Commission, to seek reconsideration, or to appeal the revocation decision to the ZBA.

It was undisputed plaintiff made no effort to resolve the dispute locally before filing the action in federal court some 10 months later. Under these circumstances, it was clear all three of the lack-of-finality reasons cited in *Insomnia, Inc. v. City of Memphis, TN.* were equally present. Finality is a prerequisite to litigation. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 40712, October 14, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2008/101008/40712.pdf

Open Meetings Act, Freedom of Information Act

Voting in proxy violates the Open Meeting Act

Michigan Attorney General Opinion Number 7227, March 19, 2009:

In answer to the question, does "a provision in the bylaws of a city's downtown development authority violates the Michigan Open Meetings Act (OMA or Act), MCL 15.261 *et seq*, by allowing board members to vote by proxy"?

A provision in the bylaws of a city's downtown development authority that allows board members to vote by proxy violates the Michigan Open Meetings Act, MCL 15.261 *et seq*, because proxy voting fails to make the important deliberative aspects of the absent board member's decision-making process open to the public when rendering a decision that effectuates public policy.

Copy of Opinion:
http://www.ag.state.mi.us/opinion/datafiles/2000s/op10305.htm

Signs: Billboards, Freedom of Speech

Whether the ordinance satisfied the *United States v. O'Brien* test applicable to regulation of sexually oriented businesses, and if the ordinance was overbroad or vague

Court: U.S. Court of Appeals Sixth Circuit (526 F.3d 291; 2008 U.S. App., May 20, 2008)

Case Name: *Sensations, Inc. v. City of Grand Rapids*

The U.S. Court of Appeals affirmed the federal district court's denial of plaintiffs' motion for a preliminary injunction and grant of defendants' motion for judgment on the pleadings, but reversed the award of attorney fees to the non-city defendants, holding *Deja Vu of Nashville, Inc. v. Metropolitan Gov't of Nashville* (*Deja Vu of Nashville I and III*) foreclosed plaintiffs' argument they were entitled to discovery, the challenged ordinance satisfied the *United States v. O'Brien* test (*O'Brien* test), and the non-city defendants did not create a "symbiotic relationship" to the state by offering to pay (and making substantial payments) for the defense of the ordinance.

Sensations, Inc. – plaintiffs sought a preliminary injunction against the defendant-city's ordinance regulating sexually oriented businesses, asserting it violated their First Amendment and due process rights. As to whether plaintiffs were entitled to discovery, which might yield evidence enabling them to disprove negative secondary effects at the local level, the court found unconvincing their arguments *Deja Vu of Nashville III* could be distinguished.

The court further held the ordinance satisfied the *O'Brien* test, noting it had previously ruled "regulating sexually oriented businesses to reduce negative secondary effects lies within the scope of a city's authority under the *O'Brien* test." The secondary effects the city sought to reduce were undeniably important government interests, and the district court "offered sound reasons why" the ordinance was "narrowly tailored to the reduction of secondary effects."

However, the court concluded the district court abused its discretion in awarding the non-city defendants attorney fees because plaintiff-Little Red Barn's claim against those defendants "was neither frivolous nor unreasonable." While the court held "the offer by private citizens to fund the defense of an ordinance, and acceptance by a local governing body, does not necessarily establish a symbiotic relationship for purposes of a §1983 claim," when Little Red Barn filed suit, neither the court nor the Supreme Court had addressed whether private citizens' offer of funding to defend a subsequently enacted statute created a symbiotic relationship with the state. Affirmed in part and reversed in part. (Source: State Bar of Michigan *e-Journal* Number: 39407, May 22, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2008/052008/39407.pdf

Whether the variance was unconstitutional as applied to the defendant's circumstances; Whether defendant waived his right to challenge the variance as unconstitutional by failing to timely appeal an earlier decision of the city's Zoning Board of Appeals

Court: Michigan Supreme Court (482 Mich. 979; 755 N.W.2d 187; 2008 [Order No. SC: 136235], September 10, 2008)

Case Name: *People v. Stross*

Judge(s): Taylor, Weaver, Corrigan, Young, Jr., and Markman;

Voting to deny leave to appeal - Cavanagh and Kelly

In an order in lieu of granting leave to appeal, the court reversed the judgment of the Court of Appeals[2]. The Stross-defendant received a variance to paint an oversized sign from the City of Roseville's Zoning Board of Appeals (ZBA), under specified conditions on July 15, 1997. In 2005, a jury convicted him under a local ordinance for violating these conditions. The Court of Appeals erroneously concluded the condition prohibiting "lettering" was "an unconstitutional regulation of speech, infringing on defendant's First Amendment protections," and reversed the conviction.

However, at the time defendant's variance was granted, the then-current City and Village Zoning Act (M.C.L. 125.585(11)) required a party to challenge the constitutionality of the variance within 21 days. Defendant's painting of the word "LOVE" on the sign clearly violated the "lettering" condition of the variance.

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[2]See page 26-27 of *Summary of Planning and Zoning Court Decisions, 2008* (http://web5.msue.msu.edu/lu/pamphlet/Blaw/SelectedPlan&ZoneDecisions2007-08.pdf found at web site http://web5.msue.msu.edu/lu/pamphlets.htm#court).

Because this statute prescribed the relevant procedure for challenging the constitutionality of the conditions, defendant was obligated to challenge these conditions in accordance with this procedure. His failure to do so precluded him from raising his constitutional challenge eight years later as discussed in *Finlayson v. West Bloomfield Twp*. and *City of Troy v. Aslanian*.

Because the Court of Appeals did not address the remainder of defendant's issues on appeal, the court remanded to the Court of Appeals to consider his remaining arguments. (Source: State Bar of Michigan *e-Journal* Number: 40444, September 16, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/supreme/2008/091008/40444.pdf

Challenge to the constitutionality of a municipal ordinance establishing licensing requirements and regulations for sexually-oriented businesses

Court: U.S. Court of Appeals Sixth Circuit (555 F.3d 512; 2009 U.S. App., February 12, 2009)

Case Name: *Richland Bookmart, Inc. v. Knox County, TN*

Analyzing the case in the terms set forth in *City of Renton v. Playtime Theatres* and *City of Los Angeles v. Alameda Books*/or equivalently applying the *United States v. O'Brien* test, incorporating evidentiary standards articulated in *Renton* and its progeny, the court held, *inter alia*, plaintiffs did not meet their burden of casting direct doubt on the factual findings or rationale underlying the defendant-county's ordinance, the time, place, and manner regulations in the ordinance were narrowly tailored to serve the government's legitimate, content-neutral interests, plaintiffs-Richland Bookmart's overbreadth challenge failed, the ordinance was not an unconstitutional prior restraint, and it was consistent with and was not preempted by state law.

The plaintiffs, three sexually oriented businesses, sued to challenge the constitutionality of defendant's ordinance establishing licensing requirements and regulations for sexually oriented businesses. Plaintiffs attacked several provisions in the ordinance as unconstitutional as applied to them and on its face. The district court granted summary judgment for the defendant and ordered the severance of two crimes, racketeering and dealing in controlled substances, from the list of crimes triggering the ordinance's civil disability provision. Plaintiffs argued the ordinance infringed on First Amendment freedoms, which was not justified by adequate evidence local sexually oriented businesses produced adverse "secondary effects" or it was designed to remedy these effects, the definitions of the terms "nudity," "semi-nudity," and "adult motel," and prohibition of the sale and consumption of alcohol were not narrowly tailored and were unconstitutionally overbroad, the ordinance enacted a prior restraint, and the regulation of business hours was preempted by state law.

The defendant cross-appealed, arguing the district court erroneously severed two specified crimes from the civil disability provision. A regulation of sexually oriented businesses implicates at least two protected categories of speech – sexually explicit but non-obscene speech, like adult publications and adult videos, and "symbolic speech" or "expressive conduct," such as nude dancing. The Supreme Court has held a restriction on protected speech is

> sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Using this analysis, the court held the ordinance and its various regulations were constitutional. The court affirmed the district court's grant of summary judgment for defendant, but reversed the grant of partial summary judgment for plaintiffs on the severance issue. (Source: State Bar of Michigan *e-Journal* Number: 41829, February 19, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2009/021209/41829.pdf

Whether a provision of the village's traffic code was an unconstitutional restriction on commercial speech in violation of the First Amendment

Court: U.S. Court of Appeals Sixth Circuit (559 F.3d 477; 2009, March 16, 2009)

Case Name: *Pagan v. Village of Glendale, OH* (Pagan II)

In an opinion explaining its previous *en banc* opinion in this case[3] the court held it decided the merits of the plaintiff-Pagan's claim in *Pagan I* and invalidated the ordinance he challenged, thus the district court correctly entered a judgment in his favor.

The issue here was what "further proceedings" the court instructed the district court to hold when it reversed and remanded plaintiff's case for "further proceedings consistent with this opinion." The defendant-Glendale contended the court meant for the case to "proceed as if Glendale's motion for summary judgment had never been filed," and in refusing to allow Glendale to re-litigate the constitutionality of its statute, the district court misinterpreted the court's mandate.

The court held Glendale misread *Pagan I*. In July 2003, plaintiff, a resident of Glendale, decided to sell his 1970 vehicle, placed a "for sale" sign in its window, and parked it on a road. He received a notice from the Glendale police indicating his car violated the local traffic code making it illegal to park a car on a street "for the purpose of displaying it for sale." Later, he sued defendant alleging the law was unconstitutional because it infringed on his First Amendment right to engage in commercial speech. After the court's *en banc* decision, the district court entered a final judgment for plaintiff and awarded him $1 in nominal damages. The court noted its unequivocal language in *Pagan I* removed all reasonable doubt as to its holding or the nature of the remand where the court, "struck down section 76.06, so a remand that permitted Glendale to re-litigate the merits of Pagan's constitutional claim (or that of some future challenger) simply could not be 'consistent'" with the court's opinion. The district court correctly entered a judgment for plaintiff. (Source: State Bar of Michigan *e-Journal* Number: 42139, March 18, 2009.)

Full Text Opinion:

http://www.michbar.org/opinions/us_appeals/2009/031609/42139.pdf

[3] See p. 9 of Selected Planning and Zoning Decisions: 2008, May 2007-April 2008 (http://web5.msue.msu.edu/lu/pamphlet/Blaw/SelectedPlan&ZoneDecisions2007-08.pdf)

Restrictions on the operation of adult entertainment; Whether the township's regulations "unreasonably limit alternative avenues of communication"

Court: Michigan Court of Appeals (___ Mich. App. __; ___ N.W.2d ___; 2009 [Published No. 279475], March 31, 2009)

Case Name: *Truckor v. Erie Twp.*

In an issue of first impression, the court held "grandfathered" sites are included in the "reasonable alternative avenues of communication" analysis where the plaintiffs were already exercising their First Amendment rights through operation of the existing adult entertainment business at the grandfathered site in the defendant-Erie Township.

Plaintiffs, the landowner (Truckor) and the entity operating the business on the land (Alcatraz), appealed the trial court's order granting defendants summary disposition, denying plaintiffs' motions for summary disposition and declaratory judgment, and dismissing the case. The issues were whether the township's ordinance allowing for the operation of adult entertainment businesses only in the C-2 zoning district and then only if certain footage requirements were met "unreasonably limit alternative avenues of communication" or constituted a "prior restraint" on plaintiffs' speech. The court held the township had not suppressed plaintiffs' speech, the ordinance otherwise did not unreasonably limit alternative means of communication, and it did not constitute an unlawful prior restraint.

Truckor operated an adult entertainment business on the Telegraph Road site from 1992 and 2000, when he transferred his permits to operate the business to Alcatraz, which had since operated the business at the site. The township enacted an adult entertainment ordinance in 2003. Truckor purchased a parcel of property zoned C-2 on Victory Road in 2005, and Alcatraz planned to move the business to the Victory Road site, but the township would not allow plaintiffs to construct an adult entertainment business on the site because the property was not at least 1,200 feet from a residential area. In light of decisions in which courts have repeatedly rejected First Amendment claims in similar cases, where the new zoning ordinance does not reduce the number of adult businesses operating before the enactment of the ordinance, and the undisputed fact

plaintiffs were not prevented from operating their adult business in the township and were grandfathered in under the new ordinance, the court held they could not maintain a cause of action under the First Amendment. It was impossible to show the township unlawfully suppressed their speech while the business was still operating within the township's borders. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 42307, April 2, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/033109/42307.pdf

Public Water and Sewer

Whether MCL 123.141 (authorizing municipalities to contract for the sale of water outside their territorial limits) requires sale of water to extra-territorial customers be actual cost of service
Court: Michigan Court of Appeals (___ Mich. App. __; ___ N.W.2d ___; 2009 [Published No. 277093], February 12, 2009)
Case Name: *Oneida Charter Twp. v. Lee*

In an issue of first impression regarding whether M.C.L. 123.141, which authorizes municipalities to contract for the sale of water outside their territorial limits, mandates rates charged for the sale of water directly to extra-territorial individual inhabitants of a "contractual customer" to be equal to the actual cost of service, the court held a municipality selling water extraterritorially directly to individual inhabitants of a "contractual customer" must charge actual costs pursuant to M.C.L. 123.141(3), and the trial court erred by concluding the 1980 water agreement remained valid and enforceable.

The case arose from a dispute over the water rates the defendant-City of Grand Ledge charges residents of plaintiff-Oneida who reside outside the territorial limits of Grand Ledge. Under the 1980 agreement, Grand Ledge supplies potable water and sanitary sewer services to Oneida Township residents within a designated area, at a rate twice what Grand Ledge residents pay for the same service. Grand Ledge is a water system but is not a contractual customer - it is not under contract to buy water from another department. Grand Ledge also services less than 1% of the state - it services only its own residents and those extra-territorial users authorized for service. Because Grand Ledge qualifies under the M.C.L. 123.141(2) exemption, if viewed in isolation, the general actual cost provision of subsection (2) would not apply to the rates charged to Oneida residents. Thus, subsection (2), standing alone, would permit Grand Ledge to charge Oneida residents more than the actual cost of service.

Oneida is a contractual customer of Grand Ledge by virtue of the 1980 agreement and as stipulated to by the parties. However, the Oneida residents are the ultimate consumers of the water supplied by Grand Ledge. Thus, under subsection (3) Grand Ledge is required to charge the "actual cost of providing" water services. Grand Ledge directly charges its contractual customer's inhabitants more than the actual cost of service under the 1980 agreement. This arrangement violated the requirements of subsection (3).

The 1980 agreement, which requires township residents pay Grand Ledge for water services at a rate double what Grand Ledge residents pay for the same services, was in violation of M.C.L. 123.141(3). Because the language of subsection (3) does not explicitly or implicitly incorporate the exemption language of subsection (2), but rather only incorporates the contractual relationship between the contracting parties, the court held subsection (3) requires the rate charged by a water department directly to "inhabitants" of a municipal corporation that is a contractual customer of the water department not exceed actual costs. Thus, the court held a municipality selling water extraterritorially directly to individual inhabitants of a contractual customer must charge those inhabitants actual costs pursuant to M.C.L. 123.141(3), regardless of whether the municipality is exempt from the provisions of M.C.L. 123.141(2). Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 41831, February 17, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/021209/41831.pdf

Riparian, Littoral, Water's Edge, Great Lakes Shoreline, wetlands, water diversion

See *Crystal Lake Prop. Rights Ass' v. Benzie County* on page 6.

Unpublished Cases

(Generally unpublished means there was not any new case law established, but presented here as reminders of some legal principles. Unpublished opinions are not precedentially binding under the rules of *stare decisis*.[4] They are included here because they state current law well, or as a reminder of what current law is.)

Restrictions on Zoning Authority

Whether the trial court properly granted summary disposition to defendant-Allison and determined his property qualified for protection under the Michigan Right to Farm Act

Court: Michigan Court of Appeals (Unpublished No. 275315, May 20, 2008)

Case Name: *Woodland Hills Homeowners Ass'n of Thetford Twp. v. Thetford Twp.*

Since defendant-Allison's facility qualified as a commercial farming operation in compliance with Generally accepted agricultural and management practices (GAAMPS) and was afforded protections by the Michigan Right to Farm Act (RTFA)(MCL 286.471) (specifically no nuisance case could be maintained against the property) preempting the local zoning ordinance, the trial court properly granted Allison summary disposition because there was no genuine issue of material fact.

The local zoning ordinance at issue stated no farm may operate unless the farm is at least 20 acres in size. Allison's property did not meet the size threshold. Plaintiff-Woodland contended the defendant-township should be forced to apply the zoning ordinance to prevent Allison from using his property for farming purposes. The court held in *Charter Twp. of Shelby v. Papesh* where a zoning ordinance prevents an individual from operating a farm on a parcel of land because of the small size of the parcel, the ordinance is preempted by the RTFA where the RTFA would otherwise protect the operation.

The court held Allison's farm was protected by the RTFA because it conformed to GAAMPS and the operation was commercial in nature. Thus, no nuisance cause of action could be maintained against the property. The court also held plaintiff did not have standing to bring the action where it failed to provide evidence demonstrating a resident of the subdivision had been injured by Allison's conduct or operation and did not have specific allegations regarding aspects of his farm creating a nuisance. Plaintiff failed to distinguish its residents from members of the general public who did not belong to the association. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 39418, May 29, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/052008/39418.pdf

See also *JGA Dev. L.L.C. v. Charter Twp. of Fenton* on page 26.

Whether the trial court correctly ruled the total exclusion of a manufactured housing community (MHC) in the township was unlawful zoning in violation of MCL 125.297a and plaintiffs' rights to substantive due process and equal protection

Court: Michigan Court of Appeals (Unpublished No. 270594 and 275469, August 26, 2008)

Case Name: *Hendee v. Township of Putnam*

Based on the relevant case law, the court held the defendant-township effectively and totally prohibited manufactured housing community (MHC) land use because:

(1) there was no land presently designated for MHCs,
(2) the land designated in the master plan for a MHC was not actually suitable for a MHC (reflecting an intent to exclude any and all MHCs in the township),
(3) the township had a "problematic" history of designating land for MHCs in master plans and removing the land in later plans (reflecting an intent to exclude),
(4) there was no land allowing for a MHC based on a special use permit, and
(5) although the current ordinance scheme recognizes a

[4] *Stare decisis* (MCR 7.215(c)(1). See *Dyball v Lennox*, 260 Mich. App. 698; 705 n 1 (2003). Unplublished cases need not be followed by any other court, except in the court issuing that opinion. But, a court may find the unpublished case persuasive and dispositive, and adopt it or its analysis. Unpublished cases often recite stated law or common law. Readers are cautioned in using or referring to unpublished cases; and should discuss their relevance with legal counsel before use.

MHC classification zone as a permissible use for purposes of a rezoning request, it was evident the township will not grant any such rezoning requests for anyone and has effectively prohibited MHCs.

Smookler v. Wheatfield Twp. dictates "the township is engaged in exclusionary zoning because the classification has not been applied to any land in the township so as to allow for present day development."

This dispute was over a vacant 144-acre tract of land owned by the Hendee-plaintiffs located in the township. The property is zoned as an agricultural-open space district (AO), which allows, *inter alia*, farming, and single-family residential homes on at least 10-acre lots. Plaintiffs tried to have the property rezoned for single-family homes on one-acre lots, but on the township's recommendation later sought consideration of a 95-lot PUD, which was later denied as was a request for a variance. Plaintiffs later considered but did not request rezoning for a 498-unit MHC. The township never acted on the 498-unit MHC plan and plaintiffs sued.

The trial court ruled the AO zoning classification was unconstitutional as applied to plaintiffs' property, the total exclusion of MHCs constituted illegal exclusionary zoning and violated plaintiffs' substantive due process and equal protection rights, and development of a 498-unit MHC on plaintiffs' property was a reasonable use of the property, enjoined the township from enforcing the AO zoning and from interfering with plaintiffs' development of an MHC. Affirmed in part and reversed in part. (Source: State Bar of Michigan *e-Journal* Number: 40374, September 8, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/082608/40374.pdf

Denial of plaintiffs' request for a conditional use permit to sell and distribute pesticides and fertilizer as a secondary business to their farming operation; Whether the defendant-township's ordinance on sale and distribution of pesticides and fertilizer is preempted by the Natural Resources and Environmental Protection Act

Court: Michigan Court of Appeals (Unpublished No. 270242, October 7, 2008)

Case Name: *War-Ag Farms, LLC v. Franklin Twp.*

The trial court erred by denying the War-Ag Farms - plaintiffs' appeal of a decision of the defendant-township Zoning Board of Appeals denying plaintiffs' request for a conditional use permit to sell and distribute pesticides and fertilizer as a secondary business to their farming operation because defendants' ordinance §7.03(12) was preempted by the Natural Resources and Environmental Protection Act (NREPA) (M.C.L. 324.101 *et. seq.*).

The Appeals Court found an ordinance may not preempt state law. The Franklin Township zoning ordinance imposed various conditions that must be satisfied in order for a conditional permit involving the sale or transportation of agricultural commodities, including fertilizer and other accessories, to be issued. Plaintiffs' application for a conditional use permit was denied by the township planning commission on the basis their proposed usage was not incidental and secondary to the use of their farm for agricultural activities, but rather involved a sale and distribution business. Plaintiffs were previously issued licenses to sell pesticides and fertilizer at the location in question by the state Department of Agriculture. They argued the township's attempt to regulate their sale of pesticides and fertilizer under the zoning ordinance was invalid because the ordinance was preempted by the NREPA.

The Appeals Court agreed. M.C.L. 324.8328 and M.C.L. 324.8517 both allow some local regulation and thus, do not expressly preempt all local legislation. Instead, they allow for limited local regulation to the extent it does not conflict with or contradict any portion of parts 83 or 85 of the NREPA. Therefore, these portions of the NREPA do not completely occupy the field of regulation of farm chemicals to exclude local government intervention. Local regulation is permissible, except where it is specifically preempted by MCL 324.8328 or MCL 324.8517, or conflicts with the NREPA. The township's ordinance imposed additional conditions related to the sale and transportation of agricultural chemicals and required those activities to be conducted on an operating farm and incidental and secondary to the use of the farm for agricultural activities.

> "These requirements are not found in the NREPA and conflict with the Department of Agricultures decision to allow plaintiffs to sell and distribute pesticides and fertilizer from their farm. This is an area of regulation expressly reserved for the state under the NREPA."

The ordinance was not enforceable against plaintiffs, who were previously licensed by the Department of

Agriculture to sell and distribute pesticides and fertilizer on their farm. Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 40678, October 10, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/100708/40678.pdf

Takings

Claim of regulatory taking without just compensation, the "nonsegmentation principle"
Court: Michigan Court of Appeals (Unpublished No. 276311, June 10, 2008)
Case Name: *Grand Blanc Venture, L.L.C. v. Charter Twp. of Grand Blanc*

Concluding plaintiff failed to overcome the presumption of validity of the R&D zoning of its property or show the defendant-township's decision to enforce its zoning classification was a violation of substantive due process, and the claim there was a regulatory taking failed when analyzed under any of the three takings tests, the court affirmed the trial court's judgment of no cause of action in the township's favor.

The township's board denied plaintiff's petition to have its 129-acre R&D parcel rezoned to general commercial. Plaintiff argued, *inter alia*, the denial of its petition was a violation of substantive due process and a regulatory taking without just compensation. While plaintiff relied on *City of Essexville v. Carrollton Concrete Mix, Inc.* to support its substantive due process claim, it conceded it never argued the denial of its petition constituted spot zoning. This was why the stricter test discussed in *City of Essexville v. Carrollton Concrete Mix, Inc.* did not apply, and the more deferential test the court actually applied in *City of Essexville v. Carrollton Concrete Mix, Inc.* governed plaintiff's claim.

The trial court correctly found because this was not a spot zoning case, it must evaluate plaintiff's "substantive due process claim pursuant to the *Brae Burn, Inc. v. Bloomfield Hills* and *Kropf v. Sterling Heights* deferential 'general principles of reasonableness' test, including the presumption of validity, and not the *Penning v. Owens* and *Anderson v. Highland Twp.* 'arbitrariness of zoning ordinances' test." While plaintiff also argued even if there was no spot zoning, the case involved "a discrete, isolated zoning decision," so the stricter *Penning v. Owens* and *Anderson v. Highland Twp.* test should still apply, the appeals court disagreed. The denial of plaintiff's rezoning petition "was not a discrete, isolated, micro decision." It "represented a refusal to change a macro decision" about how the township will be developed. The fact plaintiff's property met some of the criteria for general commercial development was not grounds for finding a due process violation.

As to plaintiff's takings claim, the court held the "substantially advances test" is no longer valid in the context of evaluating a takings claim, the trial court did not clearly err in finding plaintiff failed to show the property was unsuitable for use as zoned, and none of the factors of the *Penn Cent. Transp. Co. v. New York City* balancing test tended to favor plaintiff's argument. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 39611, June 17, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/061008/39611.pdf

Whether the trial court misapplied the nonsegmentation principle in looking only to the single lot at issue here as the denominator parcel
Court: Michigan Court of Appeals (Unpublished No. 277420, July 15, 2008)
Case Name: *Dubuc v. Department of Envtl. Quality*

The trial court did not err in concluding there was a regulatory taking and properly granted partial summary disposition in favor of the plaintiffs. In 2002, plaintiffs applied for a permit under the Wetlands Protection Act (MCL 324.30301 *et seq.*) to fill wetlands on their property. The property is a 1.73-acre lot in a residential neighborhood. Plaintiffs intended to build a home on the lot. Defendant-DEQ denied the permit. Plaintiffs filed this action, seeking damages on a theory of a taking of real property.

Defendant argued the trial court misapplied the nonsegmentation principle in looking only to the single lot at issue here as the denominator parcel. Defendant contended the proper denominator parcel was the entire collection of 17 parcels plaintiffs previously owned in the vicinity. The court concluded defendant conveniently ignored the fact plaintiffs never owned all of these parcels at the same time. It was not the case plaintiffs once owned a larger tract of land and thereafter subdivided it into 17 parcels, with the subject parcel being the last to be developed. Were this the situation, it would certainly weigh heavily in defendant's favor - the entire point of the

nonsegmentation principle, as the Supreme Court in *K & K Constr., Inc. v. Department of Natural Res.* explained, was to prevent a developer from developing and selling off all but the affected portion of a larger parcel and then claim his (remaining) property had no economic value because of regulatory taking. But *K & K Constr., Inc. v. Department of Natural Res.* and *Ciampitti v. United States* also warn against looking at too broad a parcel as this may disguise the effects of a regulatory taking. None of the factors identified in *K & K Constr., Inc. v. Department of Natural Res.* and *Ciampitti v. United States* were present here with respect to the subject parcel. To accept defendant's argument, the court would have to create a rule the appropriate "denominator parcel" should include all parcels the landowner ever owned in the area even if not at the same time. Such a rule would create a disincentive to a developer ever revisiting an area they previously had developed lest they inadvertently create a larger "denominator parcel."

The trial court did not improperly overlook the appropriate application of the nonsegmentation principle. Rather, it had no applicability here. "Simply put, the appropriate denominator parcel is the single lot at issue here." Affirmed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 39941, July 18, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/071508/39941.pdf

Claim the application of defendant's zoning ordinance resulted in a "temporary" taking of plaintiff's property

Court: Michigan Court of Appeals (Unpublished No. 279998, October 16, 2008)
Case Name: *Doorenbos v. Alpine Twp.*

Applying the *Penn Cent. Transp. Co. v. New York City* balancing test, the court held the undisputed material facts entitled defendant to judgment as a matter of law because the trial court correctly concluded plaintiff failed to establish a constitutional taking of his property, whether temporary or permanent, where it was clear his "chief complaint regarding diminution of value is one of timing and fluctuating market values."

Plaintiff purchased 168 acres of farmland in the township in 1987 to hold as an investment. The property was zoned "AG" for agricultural uses and was actively farmed. In 2002, he sold a 45-acre parcel of the property to a development company, and joined in applying for rezoning of the 45-acre parcel to low-density residential. The township approved the request, but citizens successfully petitioned for a referendum vote on the amendment and it was defeated in the referendum election. The development company quitclaimed the property back to plaintiff.

After filing this suit in 2004, he applied for a new application to rezone the property, which defendant approved in 2006. No timely petition for a referendum was filed. The court concluded the Michigan Supreme Court's decision in *K & K Constr., Inc. v. Department of Natural Res.* arguably supported a regulatory "temporary" taking claim based on facts establishing something less than a "categorical" taking rendering property worthless, and the *Penn Cent. Transp. Co. v. New York City* balancing test applies to "temporary" regulatory taking claims.

Plaintiff was at all times allowed any use of the property permitted in an "AG" zone. It is well established government can exercise its police powers and adopt zoning laws regulating where certain uses are permitted or prohibited. The ordinance imposed traditional zoning as part of a comprehensive plan. Plaintiff was benefited and burdened like any similarly situated property owner. The submission of the proposed zoning amendment to a referendum was "part of the lawful political process one seeking an amendment may reasonably expect to endure." The trial court correctly held defendant did not unreasonably delay processing plaintiff's rezoning application. Further, the economic effect of the zoning classification did not support the conclusion there was a temporary taking. Since the property was zoned "AG" when plaintiff purchased it, he must have known rezoning would be needed before greater residential development was possible. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 407770, October 22, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/101608/40770.pdf

Finding the defendant's zoning of the property was arbitrary, capricious, not in furtherance of any reasonable governmental interest and an unconstitutional, confiscatory taking

Court: Michigan Court of Appeals (Unpublished, Nos. 278417, 282532, November 20, 2008)
Case Name: *Wolverine Commerce, LLC v. Pittsfield Charter Twp.*

Concluding the zoning ordinance was based on furtherance of a legitimate governmental interest, the evidence showed there was a legitimate difference of opinion about how the ordinance went about furthering this interest, and to the extent the property was not easily marketed as zoned, plaintiff-Wolverine Commerce, LLC was responsible for the situation, the court held the trial court clearly erred in finding the ordinance was a confiscatory taking.

Thus, the appeals court reversed the trial court's order enjoining interference with plaintiff's proposed housing project on the property on the basis of the trial court's finding defendant's-Pittsfield Charter Township zoning was arbitrary, capricious, not in furtherance of any reasonable governmental interest, and an unconstitutional, confiscatory taking. The court noted the "self-imposed hardship" rule had only been applied in Michigan where a landowner or a landowner's predecessor in title either altered the physical properties of the land in some way, or subdivided a contiguous parcel of land at some time after the zoning ordinance was enacted. However, the court concluded the principle applied with equal force here.

> 'The "self-imposed hardship" rule has so far only been applied in Michigan where a landowner or a landowner's predecessor in title either (1) altered the physical properties of the land in some way, or (2) subdivided a contiguous parcel of land at some time after the zoning ordinance at issue was enacted. We conclude, however, that the principle applies with equal force here. It is undisputed that plaintiff did not subdivide the property and only made *de minimus* changes to its physical condition. But the *legal* conditions imposed on the property – both the master plan and the zoning ordinance – were all brought about by the direct efforts of plaintiff and plaintiff's predecessor in title. The "self-imposed hardship" rule is a natural corollary of the principle that one has no cause of action for bringing an injury on one's self. . . . plaintiff is not suffering from a violation of constitutional rights by defendant, but rather from its own business decision.'

While it was undisputed plaintiff did not subdivide the property and only made *de minimus* changes to its physical condition, the legal conditions imposed on the property (both the master plan and the zoning ordinance) "were all brought about by the direct efforts of plaintiff and plaintiff's predecessor in title", that is had the land rezoned industrial. The township was correct it did not cause the property to become unsuitable for the uses for which it was zoned (industrial). However, plaintiff did cause the property to become zoned for uses to which it is unsuited (accepting plaintiff's factual assertions as true). "Either way, plaintiff was responsible for causing a mismatch between the property's zoning and the property's usability." Although plaintiff's self-imposed hardship did not cut off a claim the zoning ordinance was completely arbitrary, the fact the property might be better suited to residential uses did not make industrial zoning irrational. Reversed. (Source: State Bar of Michigan *e-Journal* Number: 41093, December 4, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/112008/41093.pdf

Whether the trial court properly applied the "nonsegmentation" principle and included all of plaintiff's property; Whether defendant's denial of the rezoning request denied plaintiff economically viable use of its property

Court: Michigan Court of Appeals (Unpublished No. 279225, November 25, 2008)

Case Name: *Jarvis Assoc. LLC v. Charter Twp. of Ypsilanti*

The trial court properly applied the general rule a person's property should be considered as a whole in determining whether there has been a regulatory taking and in including all of Jarvis Assoc. LLC-plaintiff's property as the denominator parcel in its takings analysis, and dismissed the plaintiff's regulatory takings claim.

Plaintiff sought to have its property rezoned from its light industrial zoning classification to a general business classification. Plaintiff argued, *inter alia*, the township's refusal to rezone the property constituted a compensable "regulatory" taking of its property. The case involved not a "categorical" taking, but a regulatory taking requiring application of the balancing test articulated in *Penn Cent. Transp. Co. v. New York City*. The first element in *Penn Central* is the character of the government's action. The nature of the government action in this case, which involved application of a zoning regulation and not a physical invasion by the government, mitigated against a finding of a compensable taking.

Regarding the second element of the *Penn Central* balancing test, the economic effect of the regulation on the property, the trial court correctly concluded although defendant's denial of plaintiff's rezoning request resulted in a significant diminution in value of the property, mere diminution in value did not constitute a taking. Regarding the third element in *Penn Central*, based on plaintiff's knowledge of the zoning of the property as light industrial, it was not reasonable for plaintiff to plan to use the property for commercial uses. Thus, the effect of Charter Township of Ypsilanti-defendant's denial of plaintiff's request for rezoning on its reasonable, investment-backed expectations weighed against the conclusion a compensable taking occurred.

The appeals court also held the trial court properly dismissed plaintiff's substantive due process claim. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 41155, December 10, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/112508/41155.pdf

Whether the defendant's actions conditioning issuance of a special land use permit (SLU) and delaying issuance of a building permit amounted to a governmental taking

Court: Michigan Court of Appeals (Unpublished No. 278916, January 8, 2009)

Case Name: *Time Out, L.L.C. v. New Buffalo Twp*.

While the trial court correctly ruled the plaintiffs-Time Out, L.L.C. failed to create a genuine issue of material fact the New Buffalo Township-defendant's zoning ordinance or application of the building code constituted a regulatory taking and granted the defendant summary disposition of plaintiffs' constitutional claims, it clearly erred as a matter of fact and law in determining defendant did not rezone the property from industrial to commercial.

The plaintiffs argued the township's actions conditioning issuance of a special land use permit on cleaning up an unrelated portion of their property and delaying issuance of a building permit for three and a half months while allegedly trying to impose this condition amounted to a governmental taking. There were several reasons why plaintiffs could not base a regulatory taking claim on the township planning commission's decision to recommend conditioning approval of a special land use permit to operate an outdoor business selling lawn and garden supplies, etc. on plaintiffs' clearing "all junk" from the entire property. The undisputed facts showed plaintiffs abandoned any claim about their special land use permit application by withdrawing it before the township board either approved or rejected it. They also did not present any meaningful argument why the proposed condition was unlawful. Further, the court concluded the undisputed facts did not establish a regulatory taking on the basis of the time period between plaintiffs' application for a building permit in August 2004 and defendant's issuing one in November 2004.

Plaintiffs' claims for a temporary regulatory taking also failed as a matter of law because (1) such claims do not apply to normal delay related to issuance of building permits, zoning changes, or similar administrative action, (2) the only basis for damages consisted of speculative claims for lost profits, and (3) analysis under the *Penn Cent. Transp. Co. v. New York City* test confirmed no regulatory taking requiring just compensation occurred. However, the trial court clearly erred in concluding the rear portion of plaintiffs' property was never knowingly and purposefully rezoned from industrial to commercial, and in requiring defendant to adopt an ordinance rezoning the property. Affirmed in part, reversed and vacated in part, and remanded. (Source: State Bar of Michigan *e-Journal* Number: 41468, January 13, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/010809/41468.pdf

Whether the actions of the defendant-building inspector constituted a waiver of the defendant-township's parking regulations as applied to plaintiff's commercial property developments

Court: Michigan Court of Appeals (Unpublished No. 281708, March 24, 2009)

Case Name: *Houston v. Township of Davison*

The court held plaintiff waived his claim the Davison Township-defendant's building inspector waived the application of the parking ordinance to Houston-plaintiff's properties, and the trial court properly granted Davison Township-defendant's motion for a directed verdict on this basis.

Plaintiff claimed because he ran against the incumbent for the office of Supervisor of Davison Township, defendants demanded he provide more parking spaces in his commercial development, Davison Business Center. Even though he had obtained site plan

approval, the building and planning administrator told plaintiff his parking lot did not violate township parking regulations, and he had no space to add more parking. Defendants asserted plaintiff painted and located the parking spaces in violation of township ordinances and, despite his earlier representations, he leased space in the development to retail tenants instead of office tenants, which raised the intensity of use for the development.

With regard to another development, Davison Crossings, plaintiff alleged the township unfairly recalculated the number of parking spaces he needed once it determined the actual use of space in the development would require additional parking under its ordinances. The case went to trial on plaintiff's claim the township waived its parking requirements for the Davison Business Center development and his claim the township's method of calculating the number of parking spaces constituted an unconstitutional regulatory taking. Plaintiff conceded on the record during cross-examination he was not pursuing a claim the township waived the application of its parking ordinance to his properties based on Davison Township building inspector 's actions. Together with plaintiff's admission at trial he was not asserting his waiver claim, the case did not present the "extraordinary circumstances" calling for an exception to the general rule a municipality is not estopped from enforcing its zoning regulations based on the actions of a municipal employee. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 42238, April 1, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/032409/42238.pdf

Land Divisions & Condominiums

Whether the condominium bylaws were ineffective because they were not recorded
Court: Michigan Court of Appeals (Unpublished No. 278514, September 18, 2008)
Case Name: *Orchard Estates of Troy Condo Ass'n, Inc. v. Dawood*

The trial court erred by granting partial summary disposition for the plaintiffs because the condominium bylaws were inoperative since they were not filed along with the master deed as required by the Act.

It appeared the plaintiffs-Komasaras may have intended to record the bylaws along with the master deed, but failed to do so. Although the master deed referred to the bylaws, they were not attached as an exhibit, contrary to the language in the master deed. Rather, the subdivision plan was the only attachment to the master deed, and the plan was recorded immediately after the master deed was recorded according to the liber and page numbers appearing on those documents. In accordance with M.C.L. 559.153, 559.103(9), and 559.108, the bylaws were inoperative because they were never recorded.

Thus, plaintiffs had no cause of action against defendants to enforce the bylaws. Further, the plain language of the restrictive covenants supported the defendants' argument the covenants were also not binding because they too were never recorded. The restrictions were not binding on defendants, and plaintiffs had no cause of action against them for violation of the covenants. Reversed and remanded for entry of judgment in favor of defendants. (Source: State Bar of Michigan *e-Journal* Number: 40545, September 30, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/091808/40545.pdf

Substantive Due Process

See also *Hendee v. Township of Putnam* on page 15.

See also *Wesley & Velting, LLC v. Village of Caledonia* on page 27.

Statutory interpretation of the zoning ordinance at issue
Court: Michigan Court of Appeals (Unpublished, No. 280628, February 17, 2009)
Case Name: *Cierra Bldg. Co. v. Charter Twp. of Harrison*

Since the plaintiff-Cierra Bldg. Co. failed to fulfill its evidentiary burden to show the zoning ordinance at issue was arbitrary and an unreasonable restriction on its use of the property, the trial court improperly granted a declaratory judgment in favor of plaintiff.

The defendant-Harrison Township's Planning Commission considered and denied the plaintiff's request to rezone nine lots from B-3 General Commercial to R-1-D Single Residential. Plaintiff then filed a complaint for declaratory relief alleging defendant's actions violated its procedural due process and equal protection rights. Before the bench trial began, plaintiff orally moved to amend its complaint

and requested the trial court interpret the zoning ordinance, which plaintiff argued was a "pyramid" where users in "lower" classifications were permitted in "higher" classifications. Under plaintiff's pyramid theory, it opined as a matter of right, it was entitled to build residential dwellings on its lots. Defendant alleged two sections of the ordinance directly conflicted and asked the trial court to decide which of the two sections was more specific.

The trial court granted plaintiff's motion for declaratory relief, ruled it could use its lots for single family residences in accordance with the R-1-D zoning district, accepted plaintiff's theory the ordinance was a pyramid and held §10.10(A)(5) of the zoning ordinance was the more specific section and §3.09 was more general. The court concluded the trial court correctly noted if the two ordinance sections conflicted, the right interpretation was for the specific provision to prevail over the general provision. However, the trial court erred in accepting the parties' assumption the ordinance could be read as a pyramid and in relying on a purported conflict between the two sections of the ordinance. Assuming the ordinance was valid, the court noted the trial court did not address the issue of whether the ordinance was an unreasonable restriction of plaintiff's use of its property. "A master plan adopted in compliance with statutory requirements by a responsible political body is of itself evidence of reasonableness." Plaintiff failed to prove otherwise. Reversed. (Source: State Bar of Michigan *e-Journal* Number: 41875, February 24, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/021709/41875.pdf

Due Process and Equal Protection

Whether defendant's refusal to rezone the property at issue violated plaintiffs' substantive due process rights

Court: Michigan Court of Appeals (Unpublished No. 280921, December 23, 2008)

Case Name: *Leduc, Inc. v. Charter Twp. of Lyon*

The Appeals Court held the plaintiffs failed to meet the burden required to establish a violation of due process, they did not sustain their burden to show a regulatory taking, no genuine issues of material fact remained, and the trial court properly granted summary disposition to the defendant-township.

Plaintiff-Leduc is a real estate developer and plaintiff-Windmill is the fee simple owner of a nearly 202 acre parcel located in the township, which is utilized as a golf course and is zoned R-1.0, allowing for low-density exurban housing developments and agricultural endeavors. Due to recent competition, Windmill sought an alternative use for the property and entered into an option contract with Leduc for the sale of the land contingent on rezoning to R-0.3, to permit single-family homes and other high-density uses, but not agricultural pursuits.

When suit was filed, none of the surrounding property had a similar classification. Plaintiffs began developing plans to build single-family homes on the property. Leduc filed an application to rezone to R-0.3, which the defendant subsequently denied for various reasons. The township Zoning Board of Appeals (ZBA) affirmed the decision. Plaintiffs filed a three-count complaint alleging they were entitled to rezoning as a matter of law and injunctive relief was appropriate, defendant's refusal to rezone deprived them of procedural and substantive due process, and the denial in conjunction with a tree ordinance and requirements for hooking into the sewer system constituted an unconstitutional regulatory taking.

Relying on *K & K Constr., Inc. v. Department of Envtl. Quality*, the trial court granted defendant summary disposition. Using the "balancing" test in *Dorman v. Clinton Twp.*, the court held the trial court's conclusion the township decision to adhere to its Master Plan was reasonably related to its stated interest was proper, plaintiffs failed to meet the burden required to establish a violation of due process, and did not show a regulatory taking. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 41400, January 7, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/122308/41400.pdf

Unclear zoning interpreted for free use of property; zoning lacking standards is unconstitutional and void Zoning ordinance governing yard setbacks

Court: Michigan Court of Appeals (Unpublished No. 283202, March 17, 2009)

Case Name: *Richie v. Gladwin County*

Presuming the defendant's zoning ordinance reproduced in the opinion was accurate, and also presuming plaintiffs'-Richie's lot lines were of equal or indistinguishable length, only one of them could be considered the "front yard," and in the absence of a

legitimate basis in the ordinance for resolving which one, the court resolved it in favor of the free use of property. Since the Gladwin County Zoning Board of Appeals' (ZBA) interpretation conflicted with the ordinance, the trial court erred in resolving any ambiguity in favor of the ZBA's interpretation and in granting defendants summary disposition.

The action was based on plaintiffs' removal of a barn on their property and construction of a quonset hut on the barn's foundations. Plaintiffs' property was the southwest corner lot at the intersection of Highwood and Hay Roads. Their residence faced Highwood Road to the north. The barn was, and the hut now is, accessed from Hay Road to the east. According to the parties, the barn/hut was located 42 feet from the Hay Road right-of-way. Plaintiffs asserted, and defendants did not dispute, plaintiffs' lot was square, meaning all four of its sides are of equal length.

At issue was whether the portion of plaintiffs' property on Hay Road was a "front yard" or a "side yard." Defendants contended plaintiffs' property had two front lot lines, one on Highwood Road and one on Hay Road, so the property was subject to a 50-foot setback on both sides. As a result, the hut was too close to the road right-of-way. Plaintiffs contended their property had only one front lot line, on Highwood Road, so the hut was in a side yard and more than the required 25 feet from Hay Road.

The trial court determined the ordinances were poorly worded and ambiguous, and resolved the dispute in favor of Gladwin County, primarily because county-defendants' interpretation had been adopted by the ZBA several years earlier. The court agreed with the trial court the zoning ordinance was poorly written. However, according to §3.04 of the zoning ordinance, a double frontage lot can be a corner lot or a through lot. According to §3.04(C), a *through* lot must comply with "front yard" setbacks on both sides fronting on roads. In contrast, §3.04(A) clearly provides *corner* lots will have only one "front yard" lot line, to be selected by the Zoning Administrator (ZA) if the two road-frontage property lines are of equal length.

Because the front yard setback for a corner lot is measured from the front lot line, the lot line designated as the front lot line by the ZA, there cannot be two front lot lines on a corner lot (based on how the Gladwin County zoning ordinance is written) and thus, one of the two sides fronting a road must necessarily be a side lot line. Further, the ordinance was unconstitutional under the circumstances where it granted the ZA the unfettered discretion to pick one lot line as the "front." A zoning ordinance lacking standards for its application must be held unconstitutional and void. Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 42171, March 23, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/031709/42171.pdf

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Variances (use, non-use)

Whether the trial court correctly held the Zoning Board of Appeals' decision was contrary to law

Court: Michigan Court of Appeals (Unpublished No. 262311, May 22, 2008)

Case Name: *City of Detroit Downtown Dev. Auth. v. US Outdoor Adver., Inc.*

The trial court correctly ruled respondent-US Outdoor Advertising failed to make a threshold showing under Detroit Zoning Ordinance §62.0403(a) the property "can reasonably be used for a purpose consistent with existing zoning, which depends on whether a reasonable return can be derived from the property as zoned."

US Outdoor appealed the trial court's order reversing the decision of respondent-City of Detroit Zoning Board of Appeals' (BZA) to grant a variance to US Outdoor to install a prominent advertising sign on a building in downtown Detroit. US Outdoor's issue on appeal was whether the trial court erred in finding the BZA's decision was contrary to law.

After the BZA granted US Outdoor a variance for its sign, the petitioner-DDA appealed to the trial court arguing the BZA's decision was not supported by competent, material, and substantial evidence on the whole record and was an abuse of discretion. The trial court agreed and reversed the decision finding the BZA did not make, and the evidence would not support, a finding of undue hardship on the property owner or an inability to make reasonable use of the property as zoned. The property owner's comment, "business is not that great" and his desire for the advertising revenue fell far short of establishing the building was not reasonably usable as currently zoned. The evidence did not show the owner could not derive a reasonable economic return for his use of the property as zoned. Rather, it was undisputed the bar had operated at the location for

about 25 years under the existing zoning scheme.

There was no evidence suggesting it could not continue to operate at the site into the reasonable future as zoned. Thus, the BZA's decision was not supported by competent, material, and substantial evidence on the record. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 39453, June 3, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/052208/39453.pdf

The trial court's reversal of the decision by the respondent-township's board of zoning appeals (BZA) to allow petitioners' neighbors to proceed with the construction of a large attached garage

Court: Michigan Court of Appeals (Unpublished)
Case Name: *Frankling v. Charter Twp. of Van Buren*

The court affirmed the trial court's order reversing the decision of the respondent-township's Board of Zoning Appeals (BZA) to allow Frankling-petitioners' neighbors to proceed with construction of a large attached garage, concluding, *inter alia*, the trial court did not abuse its discretion in denying respondent's request to join the garage owners as necessary parties and properly determined the BZA's decision related to the side setback, height, and roof pitch requirements in the ordinance was not supported by competent, material, and substantial evidence on the record.

Respondent contended the homeowners must be joined as parties to the litigation because demolition of their garage would deprive them of due process of law. However, the trial court simply reversed the BZA's decision and remanded for additional proceedings, including consideration of whether appropriate variances would be applied for and granted. Thus, the court concluded due process concerns were not yet implicated at this stage of the proceedings. While the trial court raised the possibility the garage might be razed, there was no indication this would take place before resolution of the remand and the application for variances. The court noted the BZA's decision did not contain any indication of the basis for its decision or an application of factual findings to the ordinance language, contrary to Reenders.

The BZA determined the building permit was properly issued and the permit holder was responsible for seeking any needed variances. The "BZA did not even advise the permit holder regarding the ordinance provision" requiring a variance. The court also rejected respondent's argument the trial court erred in ruling respondent waived its standing argument by not raising it before the BZA. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 39912, July 18, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/071508/39912.pdf

Whether the standards set forth in Michigan Zoning Enabling Act required reversal of respondent's denial of the petitioner's variance requests

Court: Michigan Court of Appeals (Unpublished No. 280972, January 27, 2009)
Case Name: *Lakewood Hills v. East Grand Rapids Bd. of Zoning Appeals*

The trial court properly denied the Lakewood Hills-petitioner's motion for reconsideration of an earlier order affirming the East Grand Rapids Board of Zoning Appeals-respondent's denial of petitioner's request for zoning variances because respondent's decision was not contrary to applicable law or proper procedure and was adequately supported by competent, substantial, and material evidence on the record.

Petitioner owns real property zoned "B-1 Apartment." The property is a lawful nonconforming use because the apartments on the property do not conform to ordinance requirements in terms of number, height, and square footage and pre-date those zoning requirements. In March 2006, petitioner filed a variance request with respondent seeking three non-use variances. If granted, the variances would add 21 units to the complex, for a total of 72 units. This would significantly exceed the 40 units permitted under the applicable ordinance. The variances would also reduce the existing apartment unit size and would permit the buildings to be 85 percent taller than the height currently allowed by the ordinance. Petitioner argued in part the variances were justified because they were consistent with the zoning requirements of an adjacent property zoned as a PUD, which allowed taller buildings and denser development.

The appeals court concluded compliance with the ordinance would not deprive petitioner of the use of its property and would not be unnecessarily burdensome. Petitioner can still use the property for the same purpose as it had before the variance was denied. Although the variance denial may be somewhat burdensome, petitioner was not unnecessarily burdened because the ordinance was in place to maintain the community's

aesthetic value and ensure its welfare, both of which are cognizable necessities. Further, the record reflected there were no special conditions or circumstances regarding the property not shared by other properties in the zoning district. At least one adjoining property had building height and lot area density requirements similar to those of petitioner's property, and the record supported the finding the PUD would have the same or similar impact on other property in the B-1 district. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 41666, February 5, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/012709/41666.pdf

Nonconforming Uses

See also *Lamar OCI N. Corp. v. City of Norton Shores* on page 31.

Whether short-term rentals were allowed under the ordinance in effect when the defendant began using the property in this manner

Court: Michigan Court of Appeals (Unpublished No. 276986, March 24, 2009)

Case Name: *Laketon Twp. v. Advanse, Inc.*

Since at the time defendant purchased and began renting out the main house in 2003, the 1979 ordinance was in effect and the 1979 ordinance's definition of "dwelling or residence" did not prohibit short-term rentals, defendant was entitled to continue using the main house for short-term rentals after the 2004 ordinance amendment. Thus, the court reversed the trial court's judgment and final order granting the plaintiff-township injunctive relief and prohibiting defendant's use of the main house for a short-term rental unit.

The property at issue contained six structures - four cottages, a guesthouse, and the main house. From about 1948 until January 2003, the prior owners rented out the four cottages and occasionally the guesthouse on a short-term seasonal basis, but used the main house as their permanent residence. After defendant purchased the property, it began using the main house as a short-term rental.

In 2004, plaintiff amended its zoning ordinance definition of "dwelling." The 2004 amendment clearly prohibited short-term rentals, which were only allowed to continue if considered to be a nonconforming use under the ordinance (MCL 125.3208(1)). The only relevant issue was whether short-term rentals were allowed under the 1979 ordinance in effect when defendant began using the property this way in 2003. Defendant-Advanse, Inc. argued the 1979 ordinance allowed short-term rentals, and after the 2004 amendment, short-term rentals of the main house became a legal non-conforming use. Plaintiff contended it did not rezone in 2004, but rather simply clarified the language concerning the prohibition of short-term rental use.

The court agreed with defendant, concluding nothing in the 1979 ordinance's definition of "dwelling or residence" prohibited short-term rentals. Since the court found defendant's short-term rental of the main house was permitted at the time of the 2004 ordinance amendment, it was not relevant to consider the manner in which the prior owners were using the main house when they owned the property and the trial court abused its discretion in issuing an injunction on this basis. Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 42228, March 31, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/032409/42228.pdf

Zoning Amendment: Voter Referendum

Rezoning application; Substantive due process; Equal protection; and Taking claim

Court: Michigan Court of Appeals (Unpublished No. 276574, July 15, 2008)

Case Name: *Fifty Eight Ltd. Liab. Co. v. Charter Twp. of Lyon*

Determining if reasonable minds could differ on the issue of if the Lyon Township Zoning Ordinance was an arbitrary and unreasonable restriction on the use of the property, the Appeals Court concluded Fifty Eight LLC and Touchstone Corporation-plaintiffs' evidence simply proved "there was room for legitimate differences of opinion." Thus the Appeals Court affirmed the trial court's order granting the defendants summary disposition in this rezoning application dispute.

Plaintiff-Touchstone applied to have the property rezoned from R-1 (residential-agricultural) to B-2 (community business). The defendant-township planning commission recommended the zoning amendment application be denied, and the Lyon Township Board of Trustees voted to deny the

application. Plaintiffs sued, alleging constitutional claims and a claim under §1983. Plaintiffs argued, *inter alia*, there was factual support for their substantive due process claims based on an "as applied" challenge to defendants' zoning action.

While the affidavits of plaintiffs' expert planners focused on trying to justify the proposed rezoning to a B-2 district, their opinions differed from the opinion expressed by the township's planner. The court concluded even discounting the township planner's affidavit, "the evidence on which plaintiffs base their claim shows a debatable question." The township's master plan documents did not unequivocally support plaintiffs' claim rezoning their property as commercial was the only reasonable outcome. The meeting minutes and recommendations of the planning commission related to plaintiffs' application (and the application of a nonparty) clearly showed reasonable minds could differ about the reasonable use of the property. Further, plaintiffs failed to show evidence regarding the master plan created a genuine issue of material fact. "Adherence to a master plan is only one factor in determining if a zoning ordinance is reasonable." The court also found no support for plaintiffs' contention the master plan could be construed as designating the property for a commercial use. Plaintiffs' equal protection, taking, and § 1983 claims also failed. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 39924, July 23, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/071508/39924.pdf

Planned Unit Development: Whether the township had authority to rezone the PUD

Court: Michigan Court of Appeals (Unpublished No. 277243, August 21, 2008)

Case Name: *JGA Dev. L.L.C. v. Charter Twp. of Fenton*

Since the court found nothing in the Township Zoning Act (TZA)[5] indicating the Legislature intended for a township's general authority to rezone property did not apply to a planned unit development (PUD), the Appeals Court held the trial court erred in finding the defendant-township did not have authority under the TZA and the township zoning ordinance to rezone plaintiff-JGA Dev. L.L.C.'s for a PUD.

In 2000, plaintiffs-JGA/Kingsway purchased a parcel in the defendant-township. JGA submitted an application to rezone the property from R-1A, single family residential, to a PUD. On November 12, 2001, the Township Board approved the PUD, which allowed for development up to a maximum density of 2.33 units per acre. JGA then proceeded to secure a water source for the site. After drilling test wells, it found the site did not have sufficient groundwater. In early 2004, JGA dug another test well but the water had too high a mineral content.

By 2004, JGA was unable to secure a water source for the PUD and had not submitted a preliminary site plan for approval. In December 2002, the township amended its land use plan, which changed the maximum permissible density to 1.5 units per acre. The township planning commission voted to rezone plaintiff's property to R-3.

JGA sued and the case was removed to federal court, which disposed of all but three of JGA's claims, and remanded. On remand, the parties stipulated to dismiss with prejudice two claims, leaving one claim - the alleged violation of the TZA to be decided by the trial court. JGA alleged the township acted beyond the scope of its authority in revoking the PUD because the TZA did not specifically authorize such action. The trial court agreed with the JGA and concluded the TZA did not authorize the township to revoke the PUD through rezoning.

The Appeals Court disagreed and held it was important to note this case involved rezoning, a legislative act, not the revocation of a variance or special land use permit, an administrative act. Thus, the specificity of the requirements for approval and denial of a PUD (essentially administrative acts) did not affect a township's general authority to rezone property. Here, the township changed the property's zoning classification. Reversed and remanded for entry of summary disposition in favor of the township. (Source: State Bar of Michigan *e-Journal* Number: 40284, August 29, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/082108/40284.pdf

See *Doorenbos v Alpine Township* on page 18.

[5] This case concerns and quotes the old Township Zoning Act (M.C.L. 125.271 *et seq.* repealed July 1, 2006 but applicable here for this court case. The new Michigan Zoning Enabling Act contains essentially the same language, M.C.L. 125.3503(1)-125.3503(10).

Conditional Zoning Amendment

Whether the amended zoning ordinance violated Michigan Zoning Enabling Act

Court: Michigan Court of Appeals (Unpublished No. 278264, October 2, 2008)

Case Name: *Wesley & Velting, LLC v. Village of Caledonia*

Because the amended zoning ordinance did not violate conditional rezoning provisions of the Michigan Zoning Enabling Act (M.C.L. 125.3405) and plaintiff's challenge to the original zoning ordinance was moot, the Appeals Court affirmed the trial court's order granting summary disposition to defendant.

Plaintiff's property was zoned agricultural. Seeking to construct a 136-unit single-family residential development on the property, plaintiff sought to have the property rezoned, first to an R-2 district and then to a PUD district. After defendant's village council and the zoning board of appeals (*sic.*) denied plaintiff's rezoning request, plaintiff filed a two-count complaint in September 2004.

The first count alleged defendant's zoning ordinance "as it applies" to plaintiff's property failed to advance any reasonable governmental interest. In November 2005, defendant amended its zoning ordinance by rezoning plaintiff's property to a Planned Unit Development (PUD) district, which allowed plaintiff to develop its property as a PUD subject to terms and conditions contained in the zoning ordinance. Defendant argued because a trial court is to apply the zoning ordinance in effect at the time of decision, plaintiff's challenge to the zoning ordinance was rendered moot when defendant amended the ordinance. Defendant claimed it did not rezone plaintiff's property to a PUD district in bad faith and with unjustified delay, a phrase equated with manufacturing a defense. Plaintiff claimed because defendant rezoned its property to a PUD district, subjecting it to terms and conditions contained in the zoning ordinance, the amended ordinance was invalid under MCL 125.3405.

MCL 125.3405, by its plain language, provides a mechanism for contractual (*sic.*) zoning, where an agreement may be formed between an owner of land and the local unit of government in which the landowner receives a desired rezoning in exchange for certain use and development conditions on the property. Once this agreement is formed, the local unit of government is prohibited from altering the conditions during the time in which the agreement is valid. In this case, as noted by the trial court, the original zoning ordinance was not the result of an agreement between plaintiff and defendant. Thus, MCL 125.3405 did not preclude defendant, after rezoning plaintiff's property to a PUD district, from subjecting the property to terms and conditions contained the ordinance. Affirmed.

(Source: State Bar of Michigan *e-Journal* Number: 40663, October 9, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/100208/40663.pdf

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Court, Ripeness for Court's Jurisdiction, Aggrieved Party

Whether a municipality has standing to assert legal claims on behalf of residents affected by a zoning decision; concept of standing; Zoning Board of Appeals

Court: Michigan Court of Appeals (Published No. 268753, May 13, 2008)

Case Name: *Township of Coldsprings v. Kalkaska County Zoning Bd. of Appeals*

In an issue of first impression, the court held a municipality lacks standing to sue on behalf of residents affected by a zoning decision and only has standing if it can show "it suffered a concrete, particular injury." Since the petitioner-township failed to assert a concrete, particular injury, the trial court properly dismissed for lack of standing its appeal of the respondent-Kalkaska County Zoning Board of Appeals' (ZBA) grant of zoning variances to the intervening appellees-homeowners, who owned lake-front property in the township.

A property owner filed a variance application with the ZBA to build a new home with an attached garage with a 25 foot setback from the lake and a second garage. The county zoning ordinance required a 60 foot setback and prohibited a second garage on less than 1,200 square feet of property. During a public hearing a letter was read from the township's supervisor, stating the variances should be denied because a new construction or remodel less than 60 feet from the lake would contribute to poor lake water quality due to erosion and "improper septic tanks and fields." The ZBA granted the variances, with a 30-foot setback.

The township contended, like a non-profit corporation, it had standing on behalf of its residents who possessed riparian rights to the lake. The court concluded the township's "'analogy of its representation of its citizens to a private organization's representation of its members misconceives'" the concept of associational standing. The court also cited decisions from other jurisdictions for the principle political subdivisions cannot sue as *parens patriae*[6]. Since the township could not sue as *parens patriae* on behalf of its residents with riparian rights, it had to show it, and not simply some of its residents, was detrimentally affected by the ZBA's approval of the variances "in a manner distinct from the interest of the general public." While the township broadly asserted it had an interest in the lake to protect the health, safety, and welfare of its citizens from pollution and its effects, those claimed harms were not distinct from those of the general public. The township produced no evidence it suffered any specific injury. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 39311, May 15, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/051308/39311.pdf

Whether the trial court properly granted summary disposition in favor of defendants where plaintiff claimed the defendant-planning commission's discretion was legally invalid as an unlawful delegation of legislative discretion

Court: Michigan Court of Appeals (Unpublished No. 276540, August 26, 2008)

Case Name: *ACO Dev., Inc. v. Superior Charter Twp.*

The trial court properly granted the defendants' motion for summary disposition. Plaintiff sought a conditional use permit to build a mini-storage facility on property zoned as commercial, but the defendant-township planning commission denied the permit. Plaintiff alleged the trial court erred in granting summary disposition in favor of township where the planning commission's discretion was legally invalid as an unlawful delegation of legislative discretion.

The Appeals Court disagreed. Contrary to the assertion of plaintiff, this issue was not preserved for appellate review. An issue is not properly preserved for appellate review when it has not been raised, addressed, and decided by the trial court. The trial court's opinion and order granting defendants' motion for summary disposition did not address and decide the question of an unlawful delegation of legislative authority. The court also concluded plaintiff failed to meet its burden of establishing a denial of equal protection where the planning commission complied with the local zoning ordinances and deference was to be accorded its decision. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 40336, September 3, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/082608/40336.pdf

Whether the trial court properly found plaintiff's "as applied" claim in count I was not ripe for review by applying a takings case finality test to its substantive due process claim

Court: Michigan Court of Appeals (Unpublished No. 275859, October 23, 2008)

Case Name: *DF Land Dev., L.L.C. v. Charter Twp. of Ann Arbor*

Since the plaintiff submitted a request for rezoning to the township zoning commission, as well as a request for a variance before the Zoning Board of Appeal (ZBA), its constitutional claim for exclusionary zoning was ripe for review by the courts. Thus, the trial court erred by finding plaintiff's exclusionary zoning claims were not ripe.

The case was about property located in Ann Arbor Charter Township currently zoned A-1 (agricultural). Plaintiff petitioned the township zoning commission to rezone the property to R-7 (low density, multiple family residential) and indicated it did not apply for a Planned unit development (PUD) because a PUD "lacked flexibility." The township board denied the rezoning application and the ZBA denied plaintiff's application for variances for lack of jurisdiction.

Plaintiff filed a complaint alleging claims of – unreasonable zoning, substantive due process, exclusionary zoning, denial of equal protection, and substantive due process – declaratory relief – ripeness and finality. The trial court relying on *Braun v. Ann Arbor Twp.* "rule of finality", found plaintiff was required to seek the minimum variance, and held count I was not ripe because PUD classification was a possibility, dismissed count II because it "is one of exclusionary zoning and as such is not merely a facial

[6] *Parens Patriae* means "parent of his country" (Latin). Used when the government acts on behalf of a child or mentally ill person. Refers to the "state" as the guardian of minors and incompetent people.

challenge," and dismissed the complaint.

The Appeals Court noted plaintiff filed a rezoning petition and applied for a use variance, and both were denied. Thus, its "as applied" claims were ripe for appellate review because it exhausted all administrative remedies available for the particular narrow injury alleged (the refusal to rezone the property to R-7), and defendant arrived at a definitive position on the particular issue. The trial court erred by finding plaintiff's as applied claim was not ripe. Also, while "finality" in the *Braun* context is not required to establish ripeness in exclusionary zoning claims, at a minimum, a plaintiff must submit a zoning request for consideration before the proper administrative body for a suitability and needs determination in that particular community for the claim to be ripe. Because plaintiff submitted its request for rezoning to the township zoning commission and a variance before the ZBA, its statutory claim was also ripe for review. Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 40842, October 30, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/102308/40842.pdf

Standing; Interpretation of provisions in the Stille-DeRossett-Hale Single State Construction Code Act: Whether petitioner was an "interested person"

Court: Michigan Court of Appeals (Unpublished No. 282007, March 17, 2009)

Case Name: *Forner v. Robinson Twp. Bldg. Dep't*

The court held petitioner was not an "interested person" under MCL 125.1514(1) or MCL 125.1516(1) (Stille-DeRossett-Hale Single State Construction Code Act (MCL 125.1501 et seq.)) because he did not demonstrate he had a substantial interest that would be detrimentally affected in a manner different from the interests of the public at large, thus he lacked standing.

In a prior appeal petitioner argued the true intent of the Michigan Residential Code (MRC) had been incorrectly interpreted and respondent's building official had not enforced the code regarding a property on Limberlost Lane. This case arose from an unrelated appeal submitted to the Robinson Township Construction Board of Appeals (CBA) on November 9, 2005, where petitioner asserted the building official improperly issued a certificate of occupancy permit to a resident on Van Lopik Avenue. He sought the court's interpretation of provisions of the State Construction Code Act as well as the MRC.

It was undisputed petitioner no longer worked for respondent on November 9, 2005, he never resided in Robinson Township, he never owned property in Robinson Township, and he never held a security interest in any property in Robinson Township, much less the subject property. The court held petitioner had no legally recognizable stake in this matter. He had no legal right invaded by respondent's action, and he had no interest, pecuniary or otherwise, directly or adversely affected by the original ruling – the issuance of the certificate of occupancy permit. The court affirmed the Construction Code Commission's decision ruling petitioner lacked standing to appeal the CBA's decision rejecting his appeal. (Source: State Bar of Michigan *e-Journal* Number: 42168, March 24, 2009.)

NOTE: Under the Michigan Zoning Enabling Act (M.C.L. 125.3101 *et seq.*) standing to appeal is that one is an "aggrieved" party (a more restrictive standard than "interested party"), or is an officer, department, board, or bureau of the State of Michigan or the respective local unit of government (M.C.L. 125.3604). A definition of "Aggrieved party" is found in the glossary of this document

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/031709/42168.pdf

Whether the trial court properly addressed the validity of the 1962 consent decree where the only matter before the trial court was whether the writ of mandamus should be issued to compel defendants to carry out their duty

Court: Michigan Court of Appeals (Unpublished No. 278471, April 30, 2009)

Case Name: *AEA Dev. L.L.C. v. Village of Franklin*

Concluding the trial court in this zoning dispute erred in addressing the validity of the 1962 decree because it lacked jurisdiction to do so and in declaring it invalid, the court vacated the trial court's rulings on the issue, affirmed the trial court's denial of plaintiff's request for mandamus, and held the ruling did not preclude plaintiff from resubmitting a site plan application including all the necessary information required by the defendant-Village's zoning ordinance.

Plaintiff owns three adjacent lots, two are located in the Village. In November 2006, plaintiff proposed to commercially develop a lot in the Village by building a

bank. It submitted a site plan application on which it stated the zoning district was a "consent judgment." In a letter, plaintiff said the proposed use was consistent with a consent judgment entered in 1962. The Village did not accept the site application because the proposed use did not conform to the single-family residential zoning of the property. It argued "subsequent zoning changes and developments supersede that decree."

In the consent decree the parties agreed the particular lot would be placed in Zone C-commercial. There was no dispute the lot was never developed and the commercial uses of 1962 ceased to exist. In January 2007, the plaintiff filed a complaint for a writ of mandamus to compel defendants to forward its site plan application to the Village's planning commission and asked the trial court to take judicial notice of the 1962 decree. Relying on *Schwartz v. City of Flint*, the trial court found the decree unlawful because it impermissibly rezoned the lot at issue in violation of the separation of powers doctrine and denied the request for mandamus.

On appeal, plaintiff challenged the necessity and authority of the trial court to address the validity of the consent decree and declare it invalid. The Appeals Court held, *inter alia*, the trial court failed to recognize the limitation on its jurisdiction. Any challenge to the 1962 decree could not be made collaterally. Thus, the trial court was bound to give effect to the decree, under which commercial use of the lot for a bank was permissible. Further, defendants did not need to attack the validity of the decree in order to defend against the mandamus case. The court also held since plaintiff's application lacked necessary information about various specifics of the proposed project, the trial court properly denied the writ of mandamus, but plaintiff should be allowed to resubmit a complete plan application. Affirmed in part and vacated in part. (Source: State Bar of Michigan *e-Journal* Number: 42565, May 6, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/043009/42565.pdf

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Conflict of Interest, Incompatible Office, Ethics

Whether the plaintiff was removed from the defendant-township's planning commission in a manner violating his constitutional and due process rights

Court: Michigan Court of Appeals (Unpublished No. 278985, September 25, 2008)

Case Name: *Vallely v. Bois Blanc Twp.*

The Appeals Court held 'The Michigan Zoning Enabling Act (MZEA) (M.C.L. 125.3101 *et seq.*) did not change the manner in which a planning commission member may be removed from the commission under" the [now former] Township Planning Act (TPA) (M.C.L. 125.321 *et seq.*),[7] and plaintiff was properly removed pursuant to the procedure set forth in M.C.L. 125.324(2), which did not require defendants to show he committed an act of misfeasance, malfeasance, or nonfeasance in office, the court affirmed the trial court's order granting defendants summary disposition.

Plaintiff argued he was removed from the planning commission in a manner violating his constitutional and due process rights after he and two other planning commission members filed a lawsuit against the defendant-township and the township board to place a referendum on a rezoning issue on the ballot. He asserted because the township board had transferred certain zoning powers to the planning commission, the removal provision of the MZEA applied. The MZEA removal provision requires the board to establish the member committed misfeasance, malfeasance, or nonfeasance in office upon written charges and after a public hearing. The defendants instead removed plaintiff at the direction of the township supervisor, after a hearing and a vote by the township board.

Defendants contended this was the correct procedure for removing a planning commission member under the applicable TPA provision, MCL 125.324(2). Apparently the removal from office took place after the adoption of the MZEA and prior to the effective date of

[7] This case concerns the old Township Planning Act (M.C.L. 125.321 *et seq.* repealed July 1, 2006 but applicable here for this court case.

the Michigan Planning Enabling Act.[8]

The court disagreed with plaintiff's reading of the MZEA. Although the Legislature contemplated "a planning commission shall perform the functions of a zoning commission for purposes of performing zoning duties and responsibilities," the court concluded the statute in no way transformed a planning commission into a zoning commission. Thus, MZEA subsection 9 (M.C.L. 125.3301(9)), which specifically applied to members of a "zoning commission," did not take precedence over the TPA, under which the township's planning commission was created. There was no indication the MZEA was intended to replace any laws relating to planning commissions - it simply stated planning commissions may decide zoning matters in the same manner a zoning commission would. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 40620, October 6, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/092508/40620.pdf

Signs: Billboards, Freedom of Speech

Whether the trial court correctly reversed the decision of the Norton Shores Zoning Board of Appeals (ZBA) and ordered the defendant-city to issue the plaintiff the requested building permit

Court: Michigan Court of Appeals (Unpublished No. 272583, May 1, 2008)

Case Name: *Lamar OCI N. Corp. v. City of Norton Shores*

The court held the plaintiff's (OCIN. Corp.'s) new free-standing sign was permitted under the second provision of §14.101(13) because it would be shorter than the existing billboard and it would be shorter than 20 feet in height, and plaintiff did not need a variance.

The case involved plaintiff's request to complete billboard repairs and alterations. Plaintiff acquired the billboard in 1998, but it had been in the same location since before defendant enacted its Zoning Ordinance in 1981. Plaintiff's billboard did not comply with the ordinance because free-standing, off-premises signs are not permitted in the zoning district where the billboard is located. It was undisputed the billboard constituted a valid nonconforming use. Plaintiff began to reduce the sign's size by over 21 percent. City police officers ordered the work stopped. Plaintiff applied for building permits for two years, but defendant did not respond. When plaintiff again applied, a city official informed plaintiff its request required a variance from the Zoning Board of Appeals (ZBA).

Plaintiff requested the variance, which was denied. Plaintiff appealed the ruling to the trial court pursuant to the former MCL 125.585[9]. The trial court remanded to the ZBA, which again denied plaintiff's request. The ruling was again appealed. The trial court reversed the ZBA's ruling and ordered defendant to issue the building permit. Defendant argued the proposed billboard would violate the second provision of §14.101(13) because it would exceed the height of the "maximum size permitted in the corresponding zoned district ...," and because free-standing signs containing advertising were not permitted in the district, "the maximum size permitted in the corresponding zoned district is zero," disallowing plaintiff's new sign. The court rejected the claim and noted although plaintiff's billboard is a type of sign not generally permitted in the C-2 district, the ordinance contains only a size limitation. The court would not read the ordinance to include the requirement defendant claimed because it was not included in the ordinance by the drafters. Since the second part of the ordinance is written in terms of size only, and because a C-2 district has no size restriction for free-standing signs containing advertising, the plaintiff was permitted to replace its existing billboard with a new proposed sign under the second provision of §14.101(13). Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 39213, May 7, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/050108/39213.pdf

[8]The Township Planning Act was replaced by the Michigan Planning Enabling Act (MPEA) on September 1, 2008. Under the MPEA, a township board member "may remove a member of the planning commission for misfeasance, malfeasance, or nonfeasance in office upon written charges and after a public hearing." MCL 125.3815. Thus, the Legislature redrafted the statute to resemble the MZEA's requirements for the removal of zoning commission members.

[9]This case concerns and quotes the old City and Village Zoning Act (M.C.L. 125.581 *et seq.* repealed July 1, 2006 (specifically 125.585 concerning Boards of Appeals)) but applicable here for this court case. The new Michigan Zoning Enabling Act contains essentially the same language, M.C.L. 125.3601-125.3607.

Whether the defendant "manufactured" an objection to the issuance of the entertainment and topless activity permits "based on a purported unspecified ordinance"

Court: Michigan Court of Appeals (Unpublished No. 278209, September 23, 2008)

Case Name: *Mesquite, Inc. v. City of Southgate*

The trial court properly dismissed the case following the denial of Mesquite, Inc.-plaintiffs' petition for a writ of mandamus and did not abuse its discretion in denying plaintiffs' request for an order directing defendant to approve their requests for a "topless activity" permit and an "entertainment with dressing rooms" permit.

Plaintiffs requested the trial court issue an order directing defendant to approve their requests for a "topless activity" permit and an "entertainment with dressing rooms" permit. They relied on M.C.L. 436.1916. However, nothing in the statutory text required defendant to grant plaintiffs the permits they sought. On the contrary, M.C.L. 436.1916(4) states "[t]he commission may issue to an on-premises licensee a combination dance-entertainment permit or topless activity-entertainment permit after application requesting a permit for both types of activities." Unlike the word "shall," which indicates a mandatory provision, the word "may" designates discretion. Plaintiffs asserted defendant "manufactured" an objection to the issuance of the entertainment and topless activity permits "based on a purported unspecified ordinance."

The minutes of the city council meeting revealed plaintiffs' permit request was denied on the basis of "noncompliance with zoning requirements." While the minutes did not specify any specific ordinance, they stated there was discussion regarding plaintiffs' permit request and "[i]t was stressed that rezoning or a variance would be necessary to allow this activity at the requested location." There was nothing in the record indicating defendant refused to disclose the citation of the pertinent ordinance to plaintiffs. Further, defendant stated as an affirmative defense plaintiffs" "proposed use of the subject property is contrary to the applicable zoning regulations of the City of Southgate, including, but not limited to Section 1298.06(f)."

To demonstrate entitlement to the extraordinary relief of a trial court order directing defendant to issue the permits, plaintiffs had the burden of showing §1298.06(f) of defendant's zoning ordinance was not applicable. Since plaintiffs failed to even address the provision in their brief, they did not show it was irrelevant to their permit request. Plaintiffs did not establish they had a clear legal right to issuance of the permits. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 40584, October 1, 2008.)

Full Text Opinion: http://www.michbar.org/opinions/appeals/2008/092308/40584.pdf

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Immunity and Enforcement Issues

Whether the defendant-city established there was no genuine issue of material fact the property's "permitted principal use" had changed

Court: Michigan Court of Appeals (Unpublished No. 276528, September 25, 2008)

Case Name: *Lancaster & York, L.L.C. v. City of Pontiac*

Concluding the record was incomplete and did not establish whether the property's "permitted principal use" had changed, the court reversed the trial court's order granting the defendant-city summary disposition and remanded the case.

Plaintiff-Landcaster & York, L.L.C. owned property zoned C-3 (fringe central business district and thoroughfare frontage business district), which allowed it to be used for warehousing, storage, distribution, retail business, and similar uses. The city placed cease and desist orders on the property, requiring plaintiff to obtain site plan approval for the building and install a sprinkler system before occupying it.

Plaintiff leased the property to Chemico Systems, Inc. from 1996 to 2002, for office use, warehousing, and distributing/manufacturing nonhazardous chemicals. In 1997, Chemico (unbeknownst to plaintiff) submitted an application for site plan review to the city, requesting to use the building for a paint-cleaning process requiring the installation of ovens. The city approved the request without obtaining plaintiff's consent, and allowed the property to be used as "light industrial." However, the "use variance never changed the zoning of the property." When Chemico vacated the premises, it took all of its paint-cleaning machinery with it. Plaintiff entered into negotiations with third-party defendant-McKenzie to lease the property for storage and warehousing. McKenzie occupied the property sometime in 2005 or 2006 and appeared to have used it for office furniture storage. He vacated the property on August 31, 2006.

Asserting the ordinance required site plan approval when a building is "converted to a different principal permitted use," plaintiff argued there was no change in the principal permitted use and it was not required to submit a new site plan, obtain a new certificate of occupancy, or comply with the most recently enacted building codes (requiring installation of a fire suppression system). The court held the city failed to establish as a matter of law "the property's principal use" had ever changed. A genuine issue of material fact existed on this question.

The court also reversed the $55,000 judgment against plaintiff, agreeing the trial court had no basis on which to find the property was unlawfully occupied for 555 days. Affirmed in part, reversed in part, and remanded. (Source: State Bar of Michigan *e-Journal* Number: 40608, October 3, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/092508/40608.pdf

Revocation of the plaintiff's zoning permits; Constitutional right to due process; Whether the plaintiff had a sufficient property interest to assert its constitutional claims

Court: Michigan Court of Appeals (Unpublished, No. 279188, December 18, 2008)

Case Name: *Devlon Props., Inc. v. City of Boyne City*

Deylon Props., Inc.-plaintiff failed to establish it had a vested property interest in the zoning permits where it did not perform substantial work in using the property in accordance with the permits. Thus, the trial court did not err in holding plaintiff lacked a sufficient property interest to assert its constitutional claims.

Plaintiff purchased property in the defendant-Boyne City for development of a condo, hotel, restaurant, and marina. It was issued a conditional land-use permit in May 2004 and a zoning permit for the land-based portion of the project, which expired on September 8, 2005. Defendants revoked plaintiff's permits on May 16, 2006. Plaintiff sued, alleging defendants' act of revoking its permits violated plaintiff's constitutional right to due process.

> "To obtain a vested property interest in the zoning permits, plaintiff had to obtain a building permit and begin activities of a substantial character toward construction before September 8, 2005."

However, plaintiff failed to produce sufficient evidence it satisfied either of those conditions. Plaintiff did not obtain a building permit to begin construction on its project at any time between September 8, 2004 and May 16, 2006. By plaintiff's own admission, it did not begin any activities the court in *City of Lansing v. Dawley* considered of "substantial character" toward the construction until November 5, 2005, almost two months after the zoning permits expired.

Plaintiff's argument strict compliance with *Dawley* was not required and mere reliance can create a property interest was misplaced. *Schubiner v. West Bloomfield Twp.*, on which plaintiff relied, made it clear the court was "willing to entertain a reliance argument only after a landowner had acquired a building permit." Plaintiff never acquired a building permit.

The appeals court also rejected plaintiff's claim defendants' decision to revoke its zoning permits was arbitrary and capricious and thus, violated its substantive due process rights, concluding plaintiff failed to cite any authority showing defendants' rationale for revoking the permits was either arbitrary and capricious or shocked the conscience. The trial court's order granting the defendants summary disposition was affirmed. (Source: State Bar of Michigan *e-Journal* Number: 41341, December 29, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/121808/41341.pdf

Action alleging the defendant failed to apply on a year-to-year basis for a new special use permit for a mobile home trailer on defendant's property zoned for agriculture and the trailer violated the plaintiff's ordinance

Court: Michigan Court of Appeals (Unpublished No. 281120, January 8, 2009)

Case Name: *Medina Twp. v. Davis*

Finding no evidence in the record to support the claim the plaintiff assessed taxes and fees on the defendant's trailer and like the trial court in *Charter Twp. of Shelby v. Papesh*, the trial court did not make any specific findings about how defendant was prejudiced, the Appeals Court reversed the trial court's order granting him summary disposition on the basis the doctrine of laches applied.

In 1984 defendant and his father appeared before the plaintiff's township board seeking a permit to place a trailer on their property, which was zoned for agriculture. Plaintiff's zoning ordinance provided one mobile home could be authorized on any farm

temporarily by special use permit, which was to be issued at the board's discretion for one year in cases of extreme hardship and unusual need to accommodate the family farm operation. The board stated in the 1984 board minutes it had no objection to the permit as long as Health Department requirements and regulations were met.

In 2006, plaintiff filed suit alleging defendant failed to apply on a year-to-year basis for a new special use permit for the trailer and thus, the trailer violated its ordinance. Defendant argued, *inter alia*, the affirmative defense of laches applied. The Appeals Court agreed with the trial court the evidence showed the township board was initially aware of the trailer. The trial court also appeared to find the plaintiff had notice in later years because it assessed taxes and fees on the trailer. Defendant's attorney stated during a hearing "if you look at the tax bills that are attached, it's being taxed as real property all the way through" and it was being assessed a ambulance fee each year, so "this township collected money over a long period of time and condoned the trailer use as it was in place without any complaints for some 21 years." However, the court found no evidence supporting the claim plaintiff had assessed fees and taxes on the trailer. The trial court also indicated the trailer could not be moved without disintegrating due to its age, but defendant did not argue moving the trailer would cause it to disintegrate and there was no evidence supporting this contention. While defendant's attorney stated there was "an extreme amount of prejudice because he would have to remove the trailer at a significant cost," no evidence was produced about this cost. Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 41474, January 13, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/010809/41474.pdf

Riparian, Littoral, Water's Edge, Great Lakes Shoreline, wetlands, water diversion

Whether the defendant-road commission was immune from an action based on acquiescence; Whether plaintiff had exclusive rights to control the disputed property because she has riparian rights in the beachfront

Court: Michigan Court of Appeals (Unpublished No. 274604, July 15, 2008)
Case Name: *Miller v. King*

The court held, *inter alia*, the doctrine of acquiescence was unavailable to the plaintiff because the beachfront property at issue abuts a county road and qualified as government property, thus the disputed property was a part of West Fish Lake Road's right-of-way, and plaintiff's acquiescence claim was without merit.

Plaintiff and the defendants-King own neighboring lots. Both properties abut West Fish Lake Road, a county road controlled by the defendant-road commission. Fish Lake is located immediately south of the road. Plaintiff and the Kings were embroiled in a dispute over the use of the lake shoreline. The road commission claimed it owns the shoreline because it is a part of the West Fish Lake Road right-of-way. The road commission had allowed property owners along the road to use the part of the shoreline encompassed by the natural extensions of their property lines. Plaintiff contended the natural extension of her property lines entitled her to use a portion of the beach directly in front of the Kings' property. The Kings argued plaintiff's property lines naturally extended due south, rather in the southeasterly direction plaintiff claimed. Plaintiff sued to quiet title asserting she owned the disputed portion of the beachfront by acquiescence, by virtue of her riparian rights, or by adverse possession.

The court held based on M.C.L. 600.5821, the road commission was immune from an acquiescence suit. The evidence clearly established West Fish Lake Road was a highway-by-user, which became a public road by dedication long before 2005 when plaintiff or her predecessors in interest obtained the lot. The trial court did not decide plaintiff's riparian rights issue. The court concluded an issue of fact existed as to whether plaintiff has riparian rights to use the beachfront and if so, which portion she may use. If riparian rights exist, she is entitled to erect and maintain a dock, anchor her boat, access the lake, and make reasonable use of the lake. However, riparian rights do not constitute ownership interests in the disputed property. Rather, a property owner with riparian rights is merely allowed the privilege of using the lake and the beach. Thus, plaintiff is not entitled to exclusively control the disputed property, even if the trial court decides on remand she has riparian rights. Affirmed in part, reverse in part, and remanded. (Source: State Bar of Michigan *e-Journal* Number:

39917, July 25, 2008.)
Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/071508/39917.pdf

Whether the plat dedication conferred a right to dock boats overnight; Whether the ordinance prohibiting overnight docking of boats violated the constitutional protections against the taking of property without due process and just compensation
Court: Michigan Court of Appeals (Unpublished No. 278469, July 31, 2008)
Case Name: *Magician Lake Homeowners Ass'n, Inc. v. Keeler Twp. Bd. of Trs.*

Concluding plaintiff failed to produce sufficient evidence establishing a question of fact the scope of the easement intended something more than lake access, the court held "the grant of land 'to the use of the public' did not confer riparian rights and thus did not include anything more than the right to temporarily moor boats" and the trial court properly entered judgment for the defendant.

Plaintiff was an association of homeowners who owned back lots in a subdivision, which included a platted park and walks terminating in small beaches at the water's edge. The plat dedication stated, "the streets, walks, courts, beaches and park in said plat are hereby dedicated to the use of the public. All lots in block 1 to 6, inclusive, and the land designated as park and beaches runs to the water's edge." A local ordinance prohibited overnight docking of boats. Plaintiff asserted the dedication conferred a right to dock boats overnight and the ordinance violated the constitutional protections against the taking of property without due process and just compensation.

While the plat dedication language was ambiguous and extrinsic evidence could be considered in determining its scope, the only evidence plaintiff offered was the affidavit of a local owner who stated when his father and grandfather purchased back lots, one of the original platters told them they could put a dock in the water and keep boats there. This was inadmissible hearsay and plaintiff failed to identify an exception under which it would be admissible. While the owner also stated at various times after his relatives purchased their lots, they built docks and kept their boats moored there, activities on the lake at some unspecified time after the plat dedication were insufficient to establish the disputed activities were properly within the scope of the dedication.

The language the land "runs to the water's edge" did not change the grant to one including riparian rights, and the court did not find the fact the dedication expressly included beaches and a park significant on the issue of riparian rights. Plaintiff's members' "right of access to the lake did not include the riparian right to dock boats overnight." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 40109, August 7, 2008.)
Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/073108/40109.pdf

Plaintiffs' claims related to dredging an area in front of their lakefront property; Whether the trial court properly applied the "substantial evidence" standard in reversing the defendant-township's denial of plaintiffs' dredging permit
Court: Michigan Court of Appeals (Unpublished No. 279793, December 23, 2008)
Case Name: *Hall v. Charter Twp. of W. Bloomfield*

Since the trial court misapplied the "substantial evidence" test to the defendant-township's factual findings, the defendant's decision to deny plaintiffs' application under the ordinance was supported by competent, material, and substantial evidence, and the trial court improperly substituted its own judgment for that of the defendant, the court reversed the trial court's decision and reinstated the defendant's denial of plaintiffs' application for a dredging permit.

Plaintiffs own adjacent lakefront property. According to the Michigan Department of Environmental Quality (MDEQ), the lake contains native lake whitefish, which are rare. A major concern with the dredging project was the need by whitefish for large shallow areas for spawning and which contain their main food source. The area of the lake in front of plaintiffs' properties is shallow, about two feet deep, and they claimed they have difficulty maneuvering and docking their boats. The MDEQ approved plaintiffs' revised dredging plan, but the township's Wetland Board of Review (WRB) denied their revised plan after defendant's environmental consultant indicated, *inter alia*, the dredging would have significant impact on the lake's overall acquatic habitat and would not improve the lake in any manner. The township board affirmed the finding there were reasonable alternatives available to plaintiffs.

The trial court reversed the decision. The court

agreed the trial court erred in reversing the township's denial of the permit by failing to apply the substantial evidence standard, substituted its judgment for the township's, and failed to give due deference to the township's discretionary decisions. The court reversed the trial court's decision and reinstated the township's decision denying plaintiffs' application for a dredging permit. (Source: State Bar of Michigan *e-Journal* Number: 41384, January 7, 2009.)

Full Text Opinion: http://www.michbar.org/opinions/appeals/2008/122308/41384.pdf

Solid Waste (Landfills, recycling, hazardous waste, Junk, etc.)

Blight Ordinance and its enforcement by civil infraction.

Court: Michigan Court of Appeals (Unpublished, No. 280973, January 15, 2009)

Case Name: *Elliott v. Downes*

The trial court properly granted the defendants (Downes, Easton Township, Ionia County, and others) summary disposition on plaintiff's-Elliott's claim of conspiracy to commit malicious prosecution based on governmental immunity and his failure to establish the "special injury" element of malicious prosecution, and the trial court correctly denied his motion to disqualify the trial court.

The case arose from plaintiff's alleged violation of the defendant-township's blight ordinance and defendants' attempts to enforce the ordinance prohibiting the storing of junk vehicles, etc. on his property without a landfill permit. Violations constitute a civil infraction and a civil infraction action may be commenced. The failure to answer a citation or notice to appear is a misdemeanor violation. Defendants allegedly initiated two criminal proceedings against plaintiff (which terminated in his favor). He sued them alleging, *inter alia*, they engaged in a conspiracy to commit malicious prosecution. He argued on appeal the trial court erred in granting defendants summary disposition.

The Appeals Court found the individual defendants were engaged in the exercise of a governmental function within the scope of their employment, and the township, county, the township attorney, board members, and sheriff were also entitled to governmental immunity. While the trial court erred in granting some of the defendants summary disposition based on MCR 2.116(C)(7), it properly awarded them summary disposition based on Michigan Court Rules (MCR) 2.116(C)(10) for failure to state a claim. In order to state a claim for conspiracy to commit malicious prosecution, plaintiff had to prove all the elements of malicious prosecution. He established the first two elements, but the trial court properly found defendants had probable cause to believe he violated the blight ordinance. Plaintiff also failed to prove he suffered any special injuries where he presented no evidence his injuries were any different than those suffered by others in similar situations. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 41564, January 23, 2009.)

Full Text Opinion: http://www.michbar.org/opinions/appeals/2009/011509/41564.pdf

Other Unpublished Cases

Whether the trial court correctly held the fence line was the best evidence to determine the location of the lost corner and a 1983 survey set the corner and was later affirmed by the county Remounmentation Committee

Court: Michigan Court of Appeals (Unpublished, No. 279109, March 10, 2009)

Case Name: *Greenview Assoc., LLC v. Pettis*

Since the only evidence no corner was set by the Government Land Office (GLO) was surveyor notes dating from 1871, and the trial court's decision a fence line was the best evidence to determine the location of the lost corner was supported by Michigan precedent, the Appeals Court held the trial court's determination was not clearly erroneous.

The parties own adjacent properties with a common border -- the northern boundary of plaintiff's property is the southern border of defendants' property. Since 1839 when the GLO surveyed the area to set boundaries, several other surveys have taken place. From the evidence it was unclear whether the original quarter corner by the GLO was ever witnessed or whether it was lost or obliterated. A 1983 survey set the corner and was later affirmed by the Manistee County Remounmentation Committee (RC). The trial court affirmed this location as the quarter corner.

Defendants argued the trial court erred by failing to find the quarter corner at issue was never established and relied on surveyor notes dating from 1871 in which

the surveyor opined the GLO never surveyed or monumented the section line common to Sections 2 and 3, on which the quarter corner at issue lies. Based on these notes, defendants argued the corner never existed and could not be treated as lost or obliterated and must be placed where the surveyor should have put it.

However, only the 1871 surveyor notes say no boundaries were set. The notes from a 1921 surveyor indicated he located a stake and "upgraded the monument" at the location. Thus, the evidence no GLO survey had ever been done was disputed and was a fact question for the trial court.

It has long been held there is a presumption government surveyors and their surveys are accurate. Here, the trial court concluded the fence line was the best evidence to determine the location of the lost corner. The trial court held it is presumed in the absence of evidence the government officials were not performing their duty, they were in fact performing their duty. Deeds were conveyed not only to the plaintiffs, but also to uninvolved persons whose property, if the corner in question was relocated, would be moved south. The descriptions of the properties relied on the quarter corner. Following *McMurtry v. Abbey*, the trial court could have found the corner was established because several other land descriptions were established based on the location of the corner at issue. Affirmed.

(Source: State Bar of Michigan *e-Journal* Number: 42084, March 13, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/031009/42084.pdf

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Glossary

aggrieved party
one whose legal right has been invaded by the act complained of, or whose pecuniary interest is directly and adversely affected by a decree or judgment. The interest involved is a substantial grievance, through the denial of some personal, pecuniary or property right or the imposition upon a party of a burden or obligation. It is one whose rights or interests are injuriously affected by a judgment. The party's interest must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment – that is affected in a manner different from the interests of the public at large.

aliquot
1 a portion of a larger whole, especially a sample taken for chemical analysis or other treatment.
2 (also **aliquot part** or **portion**) *Mathematics* a quantity which can be divided into another an integral number of times.
3 Used to describe a type of property description based on a quarter of a quarter of a public survey section.
n *verb* divide (a whole) into aliquots.
ORIGIN
from French *aliquote*, from Latin *aliquot* 'some, so many', from *alius* 'one of two' + *quot* 'how many'.

amicus (in full **amicus curiae**)
n noun (plural **amici**, **amici curiae**) an impartial adviser to a court of law in a particular case.
ORIGIN
modern Latin, literally 'friend (of the court).'

certiorari
n noun *Law* a writ by which a higher court reviews a case tried in a lower court.
ORIGIN
Middle English: from Law Latin, 'to be informed', a phrase originally occurring at the start of the writ, from *certiorare* 'inform', from *certior*, comparative of *certus* 'certain'.

corpus delicti
n *noun Law* the facts and circumstances constituting a crime.
ORIGIN
Latin, literally 'body of offence'.

curtilage
n *noun* An area of land attached to a house and forming one enclosure with it.

ORIGIN

Middle English: from Anglo-Norman French, variant of Old French *courtillage*, from *courtil* 'small court', from *cort* 'court'.

dispositive

n *adjective* relating to or bringing about the settlement of an issue or the disposition of property.

En banc

"By the full court" "in the bench" or "full bench." When all the members of an appellate court hear an argument, they are sitting *en banc*. Refers to court sessions with the entire membership of a court participating rather than the usual quorum. U.S. courts of appeals usually sit in panels of three judges, but may expand to a larger number in certain cases. They are then said to be sitting *en banc*.

ORIGIN

French.

estoppel

n *noun Law* the principle which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person or by a previous pertinent judicial determination.

ORIGIN

C16: from Old French *estouppail* 'bung', from *estopper*.

et seq. (also **et seqq.**)

n *adverb* and what follows (used in page references).

ORIGIN

from Latin *et sequens* 'and the following'.

hiatus

n (plural **hiatuses**) a pause or gap in continuity.

DERIVATIVES

hiatal adjective

ORIGIN

C16: from Latin, literally 'gaping'.

injunction

n *noun*

1 *Law* a judicial order restraining a person from an action, or compelling a person to carry out a certain act.

2 an authoritative warning.

inter alia

n adverb among other things.

ORIGIN

from Latin

laches

n noun Law unreasonable delay in asserting a claim, which may result in its dismissal.

ORIGIN

Middle English (in the sense 'negligence'): from Old French *laschesse*, from *lasche* 'lax', based on Latin *laxus*.

mandamus

n *noun Law* a judicial writ issued as a command to an inferior court or ordering a person to perform a public or statutory duty.

ORIGIN

C16: from Latin, literally 'we command'.

mens rea

n *noun Law* the intention or knowledge of wrongdoing that constitutes part of a crime. Compare with **actus reus**.

ORIGIN

Latin, literally 'guilty mind'.

obiter dictum

n *noun* (plural **obiter dicta**) *Law* a judge's expression of opinion uttered in court or in a written judgement, but not essential to the decision and therefore not legally binding as a precedent.

ORIGIN

Latin obiter 'in passing' + dictum 'something that is said'.

pecuniary

adjective formal relating to or consisting of money.

DERIVATIVES

pecuniarily adverb

ORIGIN

C16: from Latin pecuniarius, from pecunia 'money'.

per se

n *adverb Law* by or in itself or themselves.

ORIGIN:

Latin for 'by itself'.

res judicata

n *noun* (*plural* **res judicatae**) *Law* a matter that has been adjudicated by a competent court and may not be pursued further by the same parties.

ORIGIN

Latin, literally 'judged matter'.

scienter

n *noun Law* the fact of an act having been done knowingly, especially as grounds for civil damages.

ORIGIN

Latin, from *scire* 'know'.

stare decisis

n *noun Law* the legal principle of determining points in litigation according to precedent.

ORIGIN

Latin, literally 'stand by things decided'.

sua sponte

n *noun Law* to act spontaneously without prompting from another party. The term is usually applied to actions by a judge, taken without a prior motion or request from the parties.

ORIGIN

Latin for 'of one's own accord'.

writ

n *noun*

1 a form of written command in the name of a court or other legal authority to do or abstain from doing a specified act. (**one's writ**) one's power to enforce compliance or submission.

2 *archaic* a piece or body of writing.

ORIGIN

Old English, from the Germanic base of **write**.

For more information on legal terms, see *Handbook of Legal Terms* prepared by the produced by the Michigan Judicial Institute for Michigan Courts: http://courts.michigan.gov/mji/resources/holt/holt.htm.

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