MICHIGAN STATE UNIVERSITY | Extension

Selected Planning and Zoning Decisions: 2011
May 2010-April 2011

Kurt H. Schindler, AICP, MSU Extension Regional Land Use Educator

This public policy brief summarizes the important state and federal court cases and Attorney General Opinions issued between May 1, 2010 and April 30, 2011.

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Restrictions on Zoning Authority

"No very serious consequences" rule related to extracting natural resources

Court: Michigan Supreme Court (488 Mich. 860; 788 N.W.2d 9; 2010 Mich. LEXIS 1898, September 14, 2010 [278 Mich. App. 743, 755 N.W.2d 190, 2008 Mich. App. (2008) July 15, 2010])

Case Name: *Kyser v. Kasson Twp.*

Judge(s): MARKMAN, CORRIGAN, YOUNG, JR., AND HATHAWAY; Not participating - WEAVER

Holding the *Silva v. Ada Twp.* "no very serious consequences" rule is not a constitutional requirement, it violates the constitutional separation of powers, and was superseded by the exclusionary zoning provision (MCL 125.297a) of the Township Zoning Act (TZA),[1] the Michigan Supreme Court reversed the Court of Appeals[2] judgment affirming the trial court's ruling enjoining enforcement of the defendant-township's zoning ordinance and remanded the case to the trial court.

Over 50% of Kasson Township (Leelanau County) is either mostly or moderately suited for gravel mining. There were seven gravel mines operating in the township in 1988, and over the next six years there were seven rezoning applications submitted to allow for more gravel mining. The township established a gravel mining district in accordance with the Michigan Zoning Enabling Act (ZEA), encompassing 6 of its 37 square miles. Plaintiff-Kyser owned a 236-acre parcel adjacent to the gravel mining district, and 115.6 acres of her property contained a large deposit of the most commercially valuable type of gravel. She applied to rezone her property to permit gravel mining, but the township denied the application, asserting to do otherwise would undermine its comprehensive zoning plan and prompt more rezoning applications from similarly situated property owners.

Plaintiff-Kyser sued, arguing her due process rights were violated by the township's decision because gravel mining would cause "no very serious consequences" in accordance with *Silva*. Although the trial court determined the public interest in plaintiff's gravel was not high, it applied the rule and concluded a mining operation on her property would result in no very serious consequences.

The Michigan Supreme Court concluded the "no very serious consequences" rule was not a "species" of the "reasonableness" test used to assess the constitutionality of zoning regulations and thus, not a requirement of the Due Process Clause. **Further, adoption of the "no very serious consequences" rule violated the separation of powers** where the Constitution directs the Legislature, not the judiciary, to provide for the protection and management of the state's natural resources and by "preferring the extraction of natural resources to competing public policies," the rule "usurps the responsibilities belonging to both the Legislature and to self-governing local communities."

The Supreme Court also concluded by enacting the ZEA, the Legislature superseded the rule.

> The constitution only requires that a zoning ordinance be reasonable, regardless of whether the ordinance does or does not regulate the extraction of natural resources.

An ordinance is presumed reasonable and the burden is on the party challenging it to overcome this presumption by showing there is no reasonable governmental interest being advanced. Because both the Court of Appeals and the trial court analyzed the zoning ordinance at issue "through the prism of the 'no very serious consequences' rule, rather than the 'reasonableness' test," the Supreme Court reversed and remanded the case to the trial court.

Dissent - KELLY AND CAVANAGH.

The dissent concluded the "very serious consequences" test derived from constitutional due process considerations, did not violate the separation of powers, and was not superseded by the exclusionary

[1]The Township Zoning Act was repealed in 2006, replaced by essentially the same language now found in MCL 125.3207 of the Michigan Zoning Enabling Act (ZEA).

[2]The Appeals Court decision is summarized on pages 3-4 in *Selected Planning and Zoning Decisions: 2009 (May 2008-April 2009)*: http://web5.msue.msu.edu/lu/pamphlet/Blaw/SelectedPlan&ZoneDecisions2008-09.pdf found at web page http://web5.msue.msu.edu/lu/pamphlets.htm#court.

zoning statute. The dissenting justices stated the majority opinion dismissed "over 80 years of precedent holding that minerals on property implicate unique due process concerns," and did not adequately consider whether *stare decisis* warranted overruling the constitutional underpinnings of *Silva*. Because the dissenting justices believed the very serious consequences test derived from constitutional due process, it followed the separation of powers principle was not violated. They also did not believe the test was superseded by the ZEA, noting, *inter alia*, both the TZA and ZEA were silent about the test. The dissenting justices would affirm the Court of Appeals judgment. (Source: State Bar of Michigan *e-Journal* Number: 46329, July 19, 2010).

Note: On September 14, 2010 the Michigan Supreme Court denied a motion to re-hear this case.

Full Text Opinion:
http://www.michbar.org/opinions/supreme/2010/071510/46329.pdf

Power of Eminent Domain

Pedestrian pathways

Michigan Attorney General Opinion Number 7251, October 21, 2010

A path for use by pedestrians and bicyclists is a proper use of an easement granted for highway purposes. Because it is a proper use within the scope of an easement granted for highway purposes, a county road commission need not obtain the consent of property owners abutting the easement before establishing a pedestrian and bicycle pathway within the right-of-way. A pedestrian and bicycle pathway may be established within the right-of-way of a county road built on an easement granted for highway purposes.

Full Text Opinion:
http://www.ag.state.mi.us/opinion/datafiles/2010s/op10328.htm

Civil Rights

Low income discrimination

Court: U.S. Court of Appeals Sixth Circuit (606 F.3d 842; 2010 U.S. App. LEXIS 11362; 2010 FED App. 0158P (6th Cir.), June 4, 2010)

Case Name: *White Oak Prop. Dev., LLC v. Washington Twp., OH*

Holding, *inter alia*, plaintiff's reliance on the general definitions in Article III of the "Zoning Resolution" (ZR) as authorization to build multiple family dwellings was misplaced because the more specific and relevant "Permitted Uses" in Article V, §2(A)(1) unambiguously restricted dwellings in a residential district to "Single Family Dwelling[s]," the Fair Housing Act (FHA) (42 USC § 3601 *et seq.*) does not prevent discrimination based on "low income," and plaintiff's claim the ZR's blanket prohibition on multi-family housing violated the Equal Protection Clause of the Fourteenth Amendment failed, the court affirmed the district court's order granting the defendant-township summary judgment.

Plaintiff's development plan proposed a residential condo development on the property at issue, to include 280 to 300 units with prices starting in the low $200,000 range. Plaintiff argued, *inter alia*, the ZR allowed it to build multiple family dwellings on the property and, alternatively, the applicable provisions of the ZR were vague. The court disagreed, noting multiple dwellings were clearly prohibited because §2(B) of Article V expressly stated it "prohibit[s] . . . [a]ny other use not specifically permitted in this section."

Plaintiff's claim the ZR regulations were vague because they allegedly allowed construction of only one single family dwelling in a residential district was also unavailing. The court concluded plaintiff's interpretation would produce an absurd result, but when the "Permitted Uses" limitation was read in conjunction with the "Intensity of Use"/"Lot Size" requirements, "a harmonious construction devoid of vagueness is achieved."

As to the alleged FHA violation, the court noted plaintiff's lack of evidence and "implausible argument" condo units starting in the low $200,000 range qualified as low-income housing. Even if the development later transitioned to low-income or subsidized housing, the FHA's plain language does not prevent discrimination based on low income and plaintiff cited no authority saying otherwise. While plaintiff tried to recast its argument as a race-based allegation, relying on *United States v. City of Parma*, the court concluded there was no evidence suggesting an unlawful discriminatory intent or impact based on race. Further, plaintiff's reliance on *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.* and *Dews v. Town of Sunnyvale (ND TX)* to support its equal protection claim was misplaced. Neither case held a prohibition against multi-family housing was a *per se* equal protection violation and both addressed "as applied" challenges, rather than a facial challenge. The cases held a racially discriminatory intent is required to support an equal

protection claim, but plaintiff "wholly failed" to show the ZR's prohibition against multiple-family dwellings, on its face, discriminated based on race and produced no evidence defendant's as-applied rejection of its proposed multi-family development was motivated by a racially discriminatory purpose. (Source: State Bar of Michigan *e-Journal* Number: 45999, June 10, 2010).

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2010/060410/45999.pdf

Due Process and Equal Protection

Zoning must specifically list special land uses

Court: Michigan Court of Appeals (288 Mich. App. 672; 2010 Mich. App. LEXIS 1042, June 10, 2010)
Case Name: *Whitman v. Galien Twp.*

Because the zoning ordinance at issue did not comply with the Michigan Zoning Enabling Act (MZEA) (M.C.L. 125.3101 *et seq.*), the defendant-Board of Appeal's decision to grant a special use permit did not comport with the law, and the Appeals Court held the trial court erred in affirming the Board of Appeal's decision. Thus, the trial court's order affirming the Appeals Board was reversed and the special use permit was vacated.

The Board of Appeals granted the applicants' application for a special use permit to allow the operation of a snowmobile (watercross), dirt bike, and an ATV racetrack during the summer months in the defendant-township's agricultural zoning district "without making any findings of fact or conclusions of law on the record." Because the Appeals Board failed to create a proper record for review the hearing was done over again. Upon re-hearing and review of a site plan the Board concluded the proposal was a possible special use, and approved it with restrictions. The appellants (Whitman and the Piccolis–neighboring land owners) claimed the Board's decision did not comport with the law because the zoning ordinance did not comply with the MZEA. Appellants contended the zoning ordinance failed to "specify" the land uses and activities eligible for special use permits because the ordinance generalized any establishment for commercial or industrial activities was eligible for special use status.

(The Court of Appeals did not rule on the problem of the Board of Appeals hearing and ruling on a special use permit [normally an administrative function] and by statute can not be acted upon by the Appeals Board [M.C.L. 125.3502]. This is because the issue was not raised in an earlier court proceeding on this case, thus not on the table to be appealed.)

The issue ruled on was if the zoning ordinance complied with the Michigan Zoning Enabling Act because the ordinance did not "specify" possible special uses (M.C.L. 125.3502 [with substantively identical language in repealed M.C.L. 125.286b]).

Applying the interpretation of the language in the MZEA to the zoning ordinance at issue, the court held the zoning ordinance did not comply with the enabling legislation. The court said:

> Section 2.4B(2) of the zoning ordinance provides that "[e]stablishments for the conducting of commercial or industrial activities" are eligible for special use permits within the agricultural zoning district, subject to Board approval and compliance with the requirements set forth in Section 3.13 of the ordinance. Appellants contend that the zoning ordinance fails to "specify" the land uses and activities that are eligible for special use permits because the ordinance generalizes that any establishment for commercial or industrial activities is eligible for special use status.

The court also said:

> As stated above, the language from the MZEA at issue provides that a zoning ordinance "shall specify . . . the special land uses and activities eligible for approval . . . ." When used in a statute, the term "shall" is considered to require mandatory conduct. *Hughes*, 284 Mich App at 62. Because the terms at issue are not defined in the statute, see MCL 125.3102, consultation of dictionary definitions is appropriate. *Risko*, 284 Mich App at 460. *Random House Webster's College Dictionary* (1997) defines "specify" as "to mention or name specifically or definitely; state in detail" and as "to give a specific character to." It defines "specific" as "having a special application, bearing, or reference; explicit or definite," and as "specified, precise, or particular." *Id.* It defines "use" as "an instance or way of using something," as "a way of being used; a purpose for which something is used," as "continued, habitual, or customary employment or practice, custom," and as "the enjoyment of property, as by occupation or enjoyment of it." *Id.* It defines "activity" as "a specific deed, action, function, or sphere of action." *Id.* When these definitions are considered together, the statute can be read to mandate that a zoning ordinance must set forth in explicit,

> precise, definite and detailed language both the customary uses and the specific actions and functions that are eligible for special use permits. The legal definition of "special use permit" supports this reading of the statute. *Black's Law Dictionary (9th ed)* defines a "special-use permit" as "[a] zoning board's authorization to use property in a way that is identified as a special exception in a zoning ordinance." Accordingly, the MZEA's specificity requirement ensures that property uses and activities eligible for special use status are identified in the language of the zoning ordinance.

Considering the definitions of "commercial" and "industrial," the Appeals Court held the **language in the zoning ordinance swept too broadly** and made all actions or functions (activities) pertaining to commerce, business, trade, manufacture, or industry in general, eligible for special use status within the agricultural zoning district.

Section 2.4B(2) of the zoning ordinance did not comply with M.C.L. 125.3502(1) because it did not **specify** the special land uses and activities eligible for approval, but rather identified general categories of uses or activities. Section 3.13 of the ordinance did not change the court's conclusion. Also, defendants' reliance on *Reilly v. Marion Twp.* was unpersuasive. The quintessential issue in *Reilly* involved the interpretation of a zoning ordinance, while the central issue in this case concerned whether the zoning ordinance complied with the MZEA.

Comment: This is not new law. In fact teaching that listing of possible special uses must be "specific" has long been the case in programs such as those done by Michigan Association of Planning, MSUE, and Citizen Planner. Here the court said "commercial" and "industrial" are too broad "and makes all actions or functions (i.e., activities) pertaining to commerce, business, trade, manufacture, or industry in general, eligible for special use status. . . ." "The statute requires a zoning ordinance to specifically enumerate land use activities that are eligable for special land use status. . . ." This is in part to insure that there are limits placed on discretionary zoning decisions which are not legislative changes (zoning amendments). So terms like "commercial", "industrial", "...and similar uses" are probably not "specific" as required by statute. However "gas station", "racetrack", "cell phone tower", "Wind Energy System" or making direct reference to a third party specifically defined listing (such as the North American Industry Classification System [NAICS]) should do the trick.

(Source: State Bar of Michigan *e-Journal* Number: 46034, June 14, 2010).

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2010/061010/46034.pdf

Parochial school not discriminated against, zoning was facially neutral

Court: Michigan Supreme Court (486 Mich. 311; 783 N.W.2d 695; 2010 Mich. LEXIS 1123, June 18, 2010)

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

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

(Note: The motion to re-hear the case was denied.)

The court held the municipal-defendants' denial of the plaintiff-Catholic school's variance request to operate a primary school in an area zoned as Office Park (OP) by the township did not violate equal protection principles because plaintiff-school did not meet the threshold burden of proof for its equal protection challenge. To do so the school would need to show disparate treatment of similarly situated entities, and did not demonstrate the variance was denied because of religious animus. Thus, the Michigan Supreme Court reversed the Court of Appeals judgment for plaintiff and reinstated the trial court's order granting defendants' motion for summary disposition. (Previous Appeals Court case is found at *Public Policy Brief: Selected Planning and Zoning Decisions, 2004* page 11; http://web5.msue.msu.edu/lu/pamphlet/Blaw/LUCourtCaseAnnualSum2004.pdf and a previous Michigan Supreme Court order is found at *Selected Planning and Zoning Decisions: 2008* p. 3. Both found at web page http://web5.msue.msu.edu/lu/pamphlets.htm#court.)

The case arose from a zoning dispute where the property at issue was zoned OP and located within the Domino's Farms office complex. Among the uses permitted in the OP zoning district were daycare facilities for use by children of OP employees. RR, a former tenant of the office complex, operated a 100-child capacity secular preschool daycare in the OP limited to children of OP employees. It was later granted a variance to allow children whose parents were not OP employees to attend. In 1998, plaintiff opened a Catholic preschool daycare facility in the same office park. The facility was also granted a variance to allow children whose parents were not OP employees to attend. In 2000, RR moved out of the OP, and plaintiff proposed to move into the vacated space and operate a K-3 primary school program. The township's

zoning administrator denied the proposal explaining the operation of a primary school was not a permitted use within an OP district.

Plaintiff filed a petition with the zoning board of appeals (ZBA) seeking either reversal of the decision, a use variance, or a "substituted use" of the prior "nonconforming" RR daycare program. The ZBA held a hearing and during the hearing, plaintiff's attorney asserted plaintiff should receive special consideration because its primary school would have a religious component which was a use favored by the Constitution. Only one ZBA member questioned plaintiff's attorney about the assertion. The ZBA unanimously agreed with the administrator's decision and denied the request because a primary school was not permitted within an OP district by the relevant ordinance. The ZBA also held plaintiff's proposed nonconforming primary school use could not be substituted for RR's use of the property because the daycare was a permitted use but a school was not. The ZBA also voted deny the variance request because plaintiff did not prove without the variance, there was no other viable use of the property.

The Supreme Court noted operating a daycare facility was not the same as operating a primary school in an OP district. Plaintiff requested something no entity had ever requested before. Plaintiff was not seeking similar treatment –rather, plaintiff asserted religion in an effort to obtain preferential treatment. However, the Equal Protection Clause does not require the plaintiff get better treatment than a secular entity. It only requires "equal" treatment, which was exactly what plaintiff received. Finally, the court addressed plaintiff's assertion defendants discriminatorily applied the facially neutral zoning ordinance against it because of its religious affiliation and treated it differently. The court held it found no evidence of discriminatory animus. The ordinance generally prohibits all schools in the OP zoning district, which is a valid exercise of defendants' police power. (Source: State Bar of Michigan *e-Journal* Number: 46124, June 22, 2010).

Full Text Opinion:
http://www.michbar.org/opinions/supreme/2010/061810/46124.pdf

Lack of notices is a due process violation

Court: U.S. Court of Appeals Sixth Circuit (610 F.3d 340; 2010 U.S. App. LEXIS 13140; 2010 FED App. 0186P (6th Cir.), June 28, 2010)

Case Name: *Wedgewood Ltd.P'ship v. Township of Liberty, Ohio*

(Note: Motion to rehear the case was denied, the appeal to the United States Supreme Court was denied.)

The U.S. 6th Circuit Appeals Court held the defendant-Liberty Township violated plaintiff-Wedgewood's procedural due process rights when it adopted zoning instructions which, in effect, amended the Wedgewood Commerce PUD without providing Wedgewood with notice and an opportunity to be heard. Thus, the court affirmed the order of the U.S. District Court granting a permanent injunction.

In 1991, the township trustees legislatively approved the Wedgewood Commerce Center (WCC), a Planned Unit Development (PUD). Before the vote, the requirements for the WCC's land use were negotiated between the trustees and one of the applicants seeking approval for PUD re-zoning. A trustee asked if the Wedgewood Commerce Center Development Plan (WCCDP) would be "incorporated into a document for the Township records," and was told it would be.

A document was filed with the township zoning commission (*sic.*) entitled WCC Development Standards and contained (1) individual development criteria and zoning information for each subdivision, (2) a map labeled WCC Land Use Plan, and (3) Addendum A titled WCC summary of Site Data. According to this document only subareas 3, 8, and 9 were zoned for commercial development. Wedgewood owns lot 2069, designated as subarea 3, which is 32.36 acres of land in the WCC and the subject of the parties' protracted litigation.

At a public trustees' meeting a resident voiced her concern "about rumors that a Wal-Mart or Lowes' was moving into the WCC, asserting the development was becoming too commercial." The resident asked "can we do anything about it?" The trustee replied "those hearing[s] were . . . years ago, and the public had their shot then, and basically [the WCCDP] was approved."

Wedgewood submitted an application to the commission requesting an amendment to the WCCDP, six zoning variances to develop a Wal-Mart fueling station within subarea 3. A public hearing addressing the request was held with many residents voicing their objections to the proposal. The commission denied Wedgewood's application. Public opposition intensified and the trustees held two public meetings. A petition drive was also coordinated and gathered signatures from anti-Wal-Mart residents. The trustees issued a *Public Statement and Instructions to Zoning Department Regarding Future Administration of Wedgewood*

Commerce Center Development Plan (Instructions), which formed the crux of Wedgewood's constitutional claims. Later, Wedgewood submitted an application for a zoning permit to build a smaller Wal-Mart fueling station in subarea 3. It was also denied as it was not in conformance with the newly adopted Instructions.

To establish a procedural due process violation under §1983, Wedgewood had to demonstrate three elements:

1. it had a life, liberty, or property interest protected by the Due Process Clause of the Fourteenth Amendment,
2. it was deprived of the protected interest within the meaning of the Due Process Clause, and
3. the state did not afford it adequate procedural rights before depriving it of its protected interest.

The court held the district court did not err in ruling the Instructions constituted an amendment to the WCCDP triggering a state requirement of advance notice and a public hearing and properly granted summary judgment to Wedgewood on its procedural due process claim and the scope of the district court's injunction did not constitute an abuse of discretion. (Source: State Bar of Michigan *e-Journal* Number: 46192, July 1, 2010).

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2010/062810/46192.pdf

Due process, equal protection, retaliation

Court: U.S. District Court, Michigan Eastern Division (705 F. Supp. 2d 753; 2010 U.S. Dist. LEXIS 34978 April 9, 2010 [705 Fed Supp 2d 753 (ED Mich, 2010).])
Case Name: *Paeth v. Worth Twp.*

(Note: Motion for new trial was denied.)

In a case with very substantial damage awarded against the township the Federal Court found in favor of plaintiff-Paeth[3] finding the township sought to retaliate and violated due process rights in a lengthy zoning dispute, but did not find violation of equal treatment or substantive due process violations. The Judgement included Worth Township paying over $800,000, including costs to the Paeths.

Plantiffs sought to make improvements to their cottage located in defendant-Worth Township. Applied for and received a permit from the township. Then the township later revoked the permits. Township resisted and denied various request for permits along with creating various roadblocks for further requests for permits. The matter went to court at several levels.

When seeking a zoning permit for remodeling the cottage Paeths received a zoning permit in June 1999. The township lost that permit, and a second one was issued. Those permits were issued even through the existing cottage was less than the required side parcel line. Other permits were obtained (county building code permit) and construction started. Paeths then received a well permit, but before the well was drilled the township revoked all their permits as it had started the process to create a municipal water system. Paeths applied for a tap-in permit which was granted. This set of circumstances delayed construction and completion of the cottage remodeling.

In 2002 the township then created its own building department, with the zoning administrator also being the building inspector.[4] The township decided the county building permit was expired. Paeths disagreed because work on the cottage had not stopped for more than six months, but purchased a township building permit rather than dispute the issue.

Paeths complained about a neighbor's fence. The neighbor with the fence happened to be a relative of the township supervisor. The township building administrator notified Paeths they would need a variance for the side yard setback. A change in the zoning increased side yard setbacks for the area up to eight feet. At the 2005 hearing for reconsideration the room has a standing room crowd. The ZBA does not enter into the record a number of letters from neighbors supporting granting the variance. At this meeting the township treasurer is overheard telling another township board member that the issue is taken care of and the variance will be denied. At the Zoning Board of Appeals (ZBA) meeting Paeths produced a second survey of the land showing the first survey was in error and the cottage was four feet from the side parcel line. Paeths document having a vested interest, having acted on the zoning permit with construction well underway. The ZBA ruled the original permit was issued in error because the first survey was not correct and ordered the structure within the setback area removed.

Paeths appealed to the Circuit Court. That court found the ZBA applied the wrong standard for a non-use variance and ordered the ZBA to reconsider. No

[3]George Paeth's profession is as a nation-wide expert in building codes, working for architect firms to troubleshoot projects through the plan review and inspection process.

[4]The township building inspector is paid a percent of the fee paid for each permit issued.

notices for the second hearing are sent out including notice to Paeths. The ZBA holds the April 2006 hearing at which Paeths are not present. The ZBA denied the variance again.

The court again ordered the ZBA to reconsider. Upon reconsideration in November 2006 the ZBA denied the variance a third time. The court, in June 2007, ordered the ZBA to grant the variance. Worth Township appealed to the Michigan Court of Appeals which denied the request to hear the appeal. The township then asked for a re-hearing of the case.[5] But in October 2007 the township indicated it would not appeal further, that construction on the cottage could continue with cleaning up construction debris from the property that accumulated during the appeals.

About a month later the township building inspector placed a stop work order on Paeths's property because during the appeals no work was done for six months, thus permits expired. There was not any notice or hearing as required by statute. Paeth challenges the stop work order before the state construction board which rules there are not any valid reasons to issue a stop work order. In March 2008 the township reversed its position, but sent the resume work notice to the wrong address, and did not remove stop-work order until litigation started in October 2008 – but still required more information.[6] At this point the township decides to disband its building inspections department. A new zoning administrator starts work with the township. The township attorney (that works for the township's liability insurance carrier) agrees to stipulate to take down the stop work order. The township supervisor takes the order down from the Paeth property and shreds the document. Then all permits were issued or extended and work was able to commence.

In October 2008 Paeths sued in Federal District Court. During depositions notes by the then-zoning administrator are disclosed that indicate the township clerk ordered the zoning administrator to post the stop work order because the ZBA said to do so, or the administrator would loose their job. (The ZBA had never held a meeting in this time period.)

The federal court case is filed on the basis that (1) first amendment rights were violated due to township retaliation, (2) selective enforcement resulted in violation of equal protections, (3) substantive due process violation for issuing stop work orders without proper notice, and (4) mandamus and superintending control. Worth Township argued qualified immunity of the building administrator and the municipality generally. The court ruled that qualified immunity defense is relevant only to protect public officials from personal suits. In this case the building administrator was not sued in their individual capacity. The actions of the township's officials, building administrator, ZBA denials are actions of official capacity is the municipality perusing policy and actions that was the force behind deprivation of someone's rights. The court ruled there is municipal liability in this case.

The court ruled in Paeths' favor in the retaliation claim. Paeths have the right to disagree with the township's rulings and to appeal those ZBA rulings. The township's actions were designed to prevent practice of that right.

> There can be no doubt that the freedom to express disagreement with state action, without fear of reprisal based on the expression, is unequivocally among the protections provided by the First Amendment. [Posting stop work order after the ZBA ruling was] a ham-handed method of overriding the adverse judicial decision and punishing the plaintiffs for their successful resort to the courts. As noted above, the township clerk and board member stopped further work on the plaintiffs' property because she did not 'like a decision [and went] to great lengths to get her way.'

The court found the Paeths were not treated differently from others in a similar situation (similar setback variances for others had also been denied), thus selective enforcement did not take place, and there was not a lack of equal protection.

The court agreed that issuing a stop work order without notice, hearing, or redress was a violation of due process. Issuing a building permit creates a valid property right –even for a nonconformity. Permits might expire or lapse if no activity takes place, but not when the delay is due to bringing a case to the ZBA or other litigation. The Michigan Zoning Enabling Act an appeal to the ZBA stays any action while that matter is being considered (M.C.L. 125.3604(3)). The substantive due process claim was not upheld by the federal court. The ZBA had the proper discretion to continue to deny the variance (as long as not an action

[5] At this point the township has a different attorney.

[6] The building administrator – not the same person that was inspector at the beginning of this case – plead guilty to an unrelated felony in another township.

that is not justifiable by any government interest) up until the state Circuit Court ordered the variance granted.

The court remanded the case back to a jury trial. That trial (737 F. Supp. 2d 740; 2010 U.S. Dist. LEXIS 88136 August 2011) decided two counts for Paeths: $275,000 for retaliation, $325,000 for violation of procedural and due process rights, and attorney fees and costs (about $200-$300 in taxes per home). Worth Township is seeking appeal to the 6th Circuit Federal Court of Appeals where the case is pending.

In the meantime the township clerk as been recalled, and petitions started to recall two other township board members who resigned first. This left the township board without a quorum with which to appoint replacements to the township board – leaving the governor to appoint someone for purposes of holding a meeting to make appointments. (Source: Daniel P. Dallton, DALTON, TOMICH & PENSLER, PLC, presentation at the Michigan Association of Planning Spring Institute; and Marc Daneman, DANEMAN & ASSOCIATES; *Planning & Zoning News*; January 2011; pp. 2-3)

Court, Ripeness for Court's Jurisdiction, Aggrieved Party

No rezoning request, no variance request: not ready for court

Court: Michigan Supreme Court (486 Mich. 556; 786 N.W.2d 521; 2010 Mich. LEXIS 1453, July 15, 2010)

Case Name: *Hendee v. Putnam Twp.*

Judge(s): WEAVER AND HATHAWAY; Concurrence - CAVANAGH AND KELLY; Separate Concurrence – CORRIGAN, YOUNG, JR., AND MARKMAN

The lead opinion of the Michigan Supreme Court held the trial court and the Court of Appeals erred by reaching the question whether the defendant-Putnam Township's zoning ordinance was unconstitutional and thus, also erred by holding the plaintiffs-Hendee were entitled to an order enjoining the township from interfering with plaintiffs' development of a 498-unit manufactured housing community (MHC). Because plaintiffs never submitted an application for rezoning or a variance to construct an MHC, their claim was not ripe for judicial review. Thus, the trial court had no basis to enjoin the township from enforcing its zoning ordinance, nor should the trial court have awarded plaintiffs their costs and expert witness fees.

Plaintiffs-the Hendees own a 144-acre tract of land, formerly used as a dairy farm, in the township. They filed an application with the township Planning Commission to rezone their land from Agricultural/Open Space (A-O) to R-1-B (not found in the current zoning ordinance). They later unsuccessfully applied for approval of a 95-unit Planned Unit Development (PUD) and rezoning to R-1-B. At some point during the application process concerning the 95-unit PUD, the Plantifs-Hendees filed a new application to rezone the property to permit MHC development. However, they withdrew this application after the township informed them it would not process a new application for an MHC while the PUD application was still pending.

The Hendees, and the proposed buyer/developer, plaintiff-Village Pointe, sued the township, alleging the refusal to rezone the property from A-O zoning to allow MHC development deprived them of equal protection and substantive due process, constituted an unconstitutional taking, and the township's zoning was exclusionary, in violation of former MCL 125.297a,[7] because it excluded MHC zoning. Plaintiffs' exclusionary zoning claim was based on the notion because the township's zoning map classified no appropriate land for MHC use and the township's master plan designated only unsuitable property for this use, the township's ordinance was facially invalid.

Citing the United States Supreme Court's opinion in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, as well as the court's express adoption of *Williamson* in *Electro-Tech, Inc. v. H F Campbell Co.*, the Michigan Supreme Court observed in *Paragon Props. Co. v. City of Novi* the importance of requiring finality in land-use-regulation disputes. Consistent with *Williamson*, the court held in *Paragon* judicial review in zoning cases is not available until the zoning authority has rendered a final decision. Here, the trial court and the Court of Appeals majority erred (1) to the extent they held the township zoning ordinance was facially invalid because it unconstitutionally excluded a lawful use (MHC) and (2) by holding the futility exception excused compliance with the finality rule and the appropriate remedy was to enjoin the township from interfering with plaintiffs' development of a 498-unit

[7] MCL 125.297a was part of the former Township Zoning Act. 2006 PA 110 repealed that act and other zoning statutes and replaced them with the Michigan Zoning Enabling Act, MCL 125.3101 *et seq.*, effective July 1, 2006. MCL 125.3702(1). The Township Zoning Act, however, applies to this case. MCL 125.3702(2).

MHC.

> An ordinance is not facially invalid merely because it does not authorize every conceivable lawful use, nor does a zoning authority's denial of an application for residential rezoning at a proposed lower-density level automatically establish that it would be futile for the property owner to apply for a higher-density use, such as MHC rezoning or a variance allowing MHC use.

Because plaintiffs never submitted an application to the township for MHC rezoning or for a use variance permitting construction of an MHC, their claim was not ripe for judicial review. The Court of Appeals judgment was reversed and remanded for entry of a dismissal order.

CONCURRENCE:

Justices CAVANAGH AND KELLY disagreed with the lead opinion's analysis, which would extend and exacerbate the errors in *Electro-Tech* and *Paragon*, but ultimately agreed with its conclusion plaintiffs had not presented any exclusionary zoning claims ripe for review. Thus, they concurred with the decision to reverse the Court of Appeals judgment and remand the case for entry of a dismissal order consistent with the court's decision..

SEPARATE CONCURRENCE:

Justices CORRIGAN, YOUNG, JR., AND MARKMAN concluded plaintiffs exclusionary zoning claim was not ripe for adjudication because plaintiffs neither sought nor obtained a decision concerning their contemplated development of a 498-unit MHC before filing suit. They would hold plaintiffs' as applied challenge to the validity of defendant's zoning ordinance was subject to the threshold doctrine of ripeness and the interrelated rule of finality. Because plaintiffs could not cross this threshold and because the futility exception to the rule of finality was inapplicable in this case, the justices concurred in the result of the lead opinion reversing the Court of Appeals judgment. (Source: State Bar of Michigan *e-Journal* Number: 46328, July 19, 2010).

Full Text Opinion:
http://www.michbar.org/opinions/supreme/2010/071510/46328.pdf

Local final decision not made yet: not ready for court

Court: U.S. Court of Appeals Sixth Circuit (629 F.3d 533; 2010 U.S. App. LEXIS 25908, December 21, 2010)

Case Name: *Miles Christi Religious Order v. Township of Northville*

(Note: Motion for a rehearing was denied.)

Holding that the plaintiffs-religious order and two of its members did not satisfy either of the requirements under *Warshak v. United States* for bringing their constitutional and The Religious Land Use & Institutionalized Persons Act (RLUIPA) claims now, the court agreed with the district court that the case was unripe and affirmed the district court's order dismissing the case without prejudice.

Plaintiffs sued the defendants-township and officials based on a dispute over the application of several township zoning ordinances to a house owned by the order. Plaintiffs invoked the free-exercise protections of the First and Fourteenth Amendments, the RLUIPA, and the Michigan Constitution. State-court proceedings arising from an ordinance violation ticket were stayed pending the outcome of the federal case. Defendants successfully moved to dismiss this case, arguing that the religious order had not received a "final decision" about the application of the zoning ordinances to its property, making its claims unripe.

To decide whether a dispute is ripe for judicial resolution, the court asks - (1) is the dispute "fit" for a court decision in that it arises in "a concrete factual context" and involves "a dispute that is likely to come to pass" and (2) "what are the risks to the claimant if the federal courts stay their hand?" In the land-use context, the requirements of a concrete factual context and a dispute that is likely to come to pass

> converge in an insistence on 'finality,' an insistence that the relevant administrative agency resolve the appropriate application of the zoning ordinance to the property in dispute.

The court held that the religious order did not show that the government entity charged with implementing the regulations had reached a final decision as to the application of the regulations to the property, and did not show that it would suffer any hardship by delaying a federal court decision until the zoning board of appeals (ZBA) acts. The religious order conceded that it had not gone to the ZBA to determine whether the ordinances required it to submit a site plan and, if so, which regulations imposed this obligation and why. The religious order also did not deny that the administrative process allows residents to seek a variance. Instead, the order argued that defendant-Frey's (the township's community development director) request that it provide a site plan amounted to the kind of final decision necessary to overcome ripeness concerns. However, the court

concluded that this position did not square with the relevant regulations. An administrative appeal to the ZBA would resolve at least three questions about the religious order's obligations or whether it has any obligations at all. The court held that finality required the ZBA's input on those unresolved questions. Further, an appeal to the ZBA may help the religious order because the ZBA may grant it a variance or provide a different intensive-use determination. Both forms of relief would considerably narrow the grounds of dispute between the parties, if not end the dispute. (Source: State Bar of Michigan e-Journal Number: 47657,December 27, 2010).

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2010/122110/47657.pdf

Signs: Billboards, Freedom of Speech

Unconstitutional a city ordinance, county ordinance jurisdiction

Court: U.S. Court of Appeals Sixth Circuit (633 F.3d 459; 2011 U.S. App. LEXIS 3626; 2011 FED App. 0059P (6th Cir.), February 24, 2011)

Case Name: *East Brooks Books, Inc. v. City of Memphis*

(Note: appeal to the United States Supreme Court was denied.)

Holding that the plaintiffs failed to show that either the equities or intervening changes in the law favored relief from the consent judgment at issue, the court affirmed the district court's decision denying their motion for relief from judgment pursuant to Rules 60(b)(5) and (6).

The judgment was a 1996 consent judgment declaring unconstitutional a City ordinance intended to regulate sexually-oriented businesses in the defendant-City of Memphis. Plaintiffs operated adult businesses that would be regulated under the ordinance. As a result of the consent judgment, while the City ordinance was never repealed, it was never enforced and no adult entertainment establishment was ever required to apply for a permit. However, in 2007 the county adopted an adult-oriented establishment registration act via the promulgation of a county ordinance. Enforcement of the county ordinance in the City was only limited by the act's preemption clause, which did not apply since the City did not choose to enforce its own regulatory scheme.

In moving for relief from judgment, plaintiffs argued that due to intervening changes in statutory and case law, the City ordinance no longer suffered from the constitutional defects that caused the court to invalidate it and thus, the parties should be relieved of the judgment. The district court found that while intervening changes in the law effectively cured the unconstitutionality of the City ordinance's appeals procedure, this did not justify relief from judgment because the ordinance was still unconstitutional for three other distinct reasons. Further, the district court found that although two of those three provisions were severable, the third (the overly broad "shareholder disclosure" provision) could not be severed. The district court also found that the equities did not favor relief from judgment as the plaintiffs did not show that the judgment created any inequity, only that they would prefer to be regulated under the City ordinance rather than the more restrictive county ordinance.

The court held that the district court reasonably concluded that the City ordinance, on its face, did not indicate that the shareholder disclosure provision could be severed. Further, plaintiffs failed to show that applying the judgment prospectively was no longer equitable. To prevail under this prong of the Rule 60(b) requirement, they had to convince the court

> "that the City's decision to leave adult businesses alone to operate as they please, free from a restrictive licensing scheme, is somehow unfair or unjust to those businesses. This position is difficult to countenance straight-faced."

Also, it was not reasonable for plaintiffs to suggest that it was inequitable that they "should be regulated under the fully constitutional, democratically promulgated County Ordinance." (Source: State Bar of Michigan e-Journal Number: 48232 March 1, 2011).

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2011/022411/48232.pdf

Restrictions on the location of adult businesses are constitutional

Court: U.S. Court of Appeals Sixth Circuit (2011 U.S. App. LEXIS 7551; 2011 FED App. 0091P (6th Cir.), April 13, 2011)

Case Name: *Big Dipper Entm't, L.L.C. v. City of Warren*

The court held that the defendant-city's restrictions on the location of adult businesses were constitutional, and the district court properly granted the city's motion for summary judgment.

Plaintiffs (collectively, Big Dipper Entm't) brought this §1983 action against the city of Warren, challenging certain ordinances that regulate the licensing and location of sexually oriented businesses. They claimed that the 10/05 and 3/06 amendments to the City of

Warren's zoning ordinance, §14.01(s), violated the First Amendment and that the city's untimely (by 4 days) rejection of the application acted as a prior restraint on protected expression.

Plaintiffs claimed that §14.01(s), as amended, was an unconstitutional restriction on speech. The court noted that "the speech at issue here was that conveyed by a topless bar" and it is common sense to say that in a democracy "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate[.]"

The first issue was whether §14.01(s) was aimed at the secondary effects of adult businesses. Plaintiffs claimed it was not, arguing that the real reason the city amended §14.01(s) was not to limit secondary effects, but to prevent new adult businesses from opening there. The court noted that this was a difficult claim on which to prevail. A city need only show that its "predominate concerns were with the secondary effects" of adult businesses in order to defeat a claim of illicit motive.

The court held that the city made that showing here. The city council received 49 studies and reports about the secondary effects of adult businesses before enacting the 10/05 amendments to its ordinance. Those reports remained valid for purposes of the 3/06 amendment. The city council's minutes of its 2/14/06 meeting contained discussion about limiting secondary effects and avoiding blight and deterioration in the city. The council passed a resolution stating that the 3/06 amendment was intended to "halt[] property value deterioration," "eliminate the causes of deterioration" and "eliminate blight." Thus, the appropriate inquiry here, as in *City of Renton v. Playtime Theatres, Inc.*, was whether the "ordinance is designed to serve a substantial government interest and allows for reasonable alternative avenues of communication." The district court applied this same test and held that the ordinance passed it.

Plaintiffs' argument was that various aspects of its expert's (M) analysis showed that §14.01(s), as amended, restricted plaintiffs to less than 10 potential sites, rather than 39. Plaintiffs claimed the district court disregarded these aspects of M's analysis in granting summary judgment to the city. The court concluded that the problem with this argument was that, in the district court, plaintiffs did not discuss these aspects of M's analysis any more than the district court did. Nowhere in plaintiffs' briefs in support of their motion for summary judgment and in opposition to the city's motion did plaintiffs argue that the number of sites available should be reduced from 39 based on M's analysis. "It was Big Dipper's job, not the district court's, to present argument as to how" M's report created genuine issues of material fact as to the number of sites available to Big Dipper's business. Plaintiffs did not make those arguments in the district court, and could not make them now. Thus, plaintiffs' arguments as to how M's report supported a sites-available number of less than 39 were waived. For purposes of its analysis, the court reduced the number of sites from 39 to 27. It was undisputed that two applications for adult businesses were filed in the city in the five years leading up to this case. "A supply of sites more than 13 times greater" than the 5-year demand was "more than ample for constitutional purposes." (Source: State Bar of Michigan e-Journal Number: 48553 April 18, 2011).

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2011/041311/48553.pdf

Zoning Administrator/Inspector, Immunity, and Enforcement Issues

Threatening legal action is not a violation of one's rights (qualified immunity)

Court: U.S. Court of Appeals Sixth Circuit (617 F.3d 828; 2010 U.S. App. LEXIS 17364; 2010 FED App. 0255P (6th Cir.), August 20, 2010)

Case Name: *Hussein v. City of Perrysburg* (Ohio)

Since the city inspector defendant-Klag only threatened litigation rather than removing the asphalt on the plaintiffs' (Fadhil Hussein and Raya Ahmed) driveway, the court held that the plaintiffs' rights were not violated and Klag and his direct superior defendant-Thielen were entitled to qualified immunity.

The plaintiffs endured a lengthy dispute with local zoning authorities after their builder failed to adhere to a number of zoning ordinances in the course of building their house. In June 2006, the zoning authorities issued a "stop work" order, but as winter approached, Hussein sought to have a temporary layer of asphalt installed on top of his gravel driveway. He alleged the zoning authorities gave oral permission for this installation. While the subcontractor was installing the asphalt layer, Klag arrived with two policemen and threatened to take the subcontractor to court unless it ceased the asphalt installation and removed the asphalt already laid down. The Husseins alleged this action violated their substantive and procedural due process rights. Apparently as the subcontractor began putting down

the asphalt on the gravel driveway, a neighbor of the Husseins called Thielen, Klag's direct supervisor, about the paving work. Thielen asked Klag if any driveway work had been authorized and when Klag answered in the negative, Thielen asked Klag to investigate the situation. Klag went to the Husseins' home along with two police officers. Baird, the subcontractor doing the paving work, testified Klag told him there was a stop work order on the job and he had to stop work and remove the asphalt, and he was told if he did not do as requested, he would be required to go to court and get fined and would be under litigation. He called Hussein and told him the inspector said there was no permit, and Hussein told him to do as he was instructed. Baird removed the asphalt he had installed.

The Husseins filed suit. The district court held that they had produced sufficient evidence to show they had a protected property interest in the asphalt that was laid down on their driveway, the defendants deprived them of that interest by ordering it removed, the deprivation was arbitrary and capricious, without notice and an opportunity for the Husseins to be heard, and denied Klag and Thielen's request for qualified immunity.

The U.S. Court of Appeals for the Sixth Circuit held that defendant-inspectors were entitled to qualified immunity because state officials are permitted under the Constitution to inform citizens of the officials' view that they are violating state or local law. State officials are also permitted to threaten litigation or prosecution if citizens do not agree to conform their actions to state or local law. These actions are the provision of notice and do not constitute deprivation of the citizen's interest without notice and an opportunity to be heard. The court held that no deprivation without due process occurred where the asphalt driveway incident did not implicate specific constitutional guarantees, denial of a driveway does not shock the conscience, and an asphalt driveway is not an interest so rooted in the traditions and conscience of our people as to be fundamental. Reversed. (Source: State Bar of Michigan *e-Journal* Number: 46645, August 25, 2010).

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2010/082010/46645.pdf

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

Still have littoral rights when public road is between lakeshore and property

Court: Michigan Supreme Court (488 Mich. 136; 793 N.W.2d 633; 2010 Mich. LEXIS 2590, December 29, 2010)

Case Name: *2000 Baum Family Trust v. Babel*

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

The court held that based on the authority of the relevant case law, and since the imperatives of *stare decisis* are particularly strong in the area of property law, the plaintiffs (front lot owners whose property abuts a public road running parallel to the lakeshore) have riparian[8] rights in the lake, as similarly situated persons have always had in Michigan.

The road at issue along the lake was dedicated under the 1887 Plat Act. Decisions of the court going back over 100 years provide that when the public road was dedicated to the county, it did not receive title in the nature of private ownership but took title to the extent it could preclude questions which might arise as to the public uses, other than those of mere passage. The Court of Appeals has held that a statutory "base fee" does not divest front-lot owners of their riparian rights. The plaintiffs own front lots in a platted subdivision on the north shore of the lake. Their lots do not touch the shoreline. Rather a public road runs parallel to the lake and separates their lots from it. Thus, their lots extend to the edge of the road and not to the water's edge. The defendants were the Charlevoix County Road Commission (CCRC), Charlevoix Township, and back-lot owners. The county board of supervisors accepted the plat and the dedication of the streets in 1911. The CCRC maintains the road, which is now paved.

Over time, plaintiffs have used the lake in front of their lots and built seasonal docks extending into the lake to moor boats and other equipment. It was

[8] Strictly speaking, land which includes or abuts a river is defined as "riparian," while land which includes or abuts a lake is defined as "littoral." *Thies v Howland*, 424 Mich 282, 288 n 2; 380 NW2d 463 (1985). However, "the term 'riparian' is often used to describe both types of land," *id.*, and will be used in such a manner in this opinion.

undisputed that there was neither a reservation nor a grant of riparian rights in plaintiffs' deeds and their lots are taxed as "water view" rather than "waterfront" properties. Allegedly, the back-lot owners began using the waterfront in front of plaintiffs' homes to maintain docks and store boats. Plaintiffs sued defendants alleging claims of trespass and nuisance and seeking injunctive and equitable relief. The CCRC counterclaimed, alleging that plaintiffs had trespassed on the public road by maintaining encroachments on the drive, including docks. The back-lot owners also counterclaimed.

The trial court ruled that the effect of the dedication was to "vest fee title" in the local governmental unit and because plaintiffs did not hold fee title to the waterfront land in front of their properties, they did not possess riparian rights. The Court of Appeals affirmed. A "dedication" of land is an "appropriation of land to some public use, accepted for such use by or in behalf of the public."

The Michigan Supreme Court concluded that Michigan's jurisprudence governing the riparian rights of front-lot owners provides several constant and governing principles. First, front-lot owners whose property is separated by a public road running parallel to the water are deemed to have riparian rights. Second,

> [t]he ownership of the walks and alleys and the scope of the dedication of these lands are interrelated, but distinct inquiries.

All cases involving the public dedication of land "must be considered with reference to the use for which they are made . . . ." The court found it clear that a statutory "base fee" is not the type of "fee title" capable of "destroy[ing] riparian rights." The court held that contrary to the lower courts' rulings, the CCRC could not exercise riparian rights to the road because such uses were incompatible with the underlying dedication. The court concluded that every Michigan decision addressing the exact issue before the court has held that riparian rights vest with the front-lot owners. Thus, the court reversed and remanded.

DISSENT - DAVIS, CAVANAGH, AND HATHAWAY

The dissenting justices concluded that long-settled precedent establishes that a "statutory base fee" is a fee ownership title capable of cutting off riparian rights and no precedent of the court has established a contrary rule. Riparian rights attach to land that actually touches the water, but "interposition of a fee title between upland and water destroys riparian rights, or rather transfers them to the interposing owner." Because a base fee is a fee title, interposition of it between the property owner's lot and the edge of the water will cut off the lot owner's riparian rights. The justices concluded that the majority "misread" the court's precedent. (Source: State Bar of Michigan *e-Journal* Number: 47782, January 5, 2011).

Full Text Opinion:
http://www.michbar.org/opinions/supreme/2010/122910/47782.pdf

Planning Commission, Plans

Must follow process for adoption of [U.S. Forest Service] plan, and must be fact-based

Court: U.S. Court of Appeals Sixth Circuit (623 F.3d 363; 2010 U.S. App. LEXIS 20079; 2010 FED App. 0318P (6th Cir.), September 29, 2010)

Case Name: *Meister v. U.S. Dep't of Agric.*

(Note: motion to reopen the case was denied.)

Agreeing for the most part with the plaintiff that the defendant-Forest Service failed to comply with several of its own regulations and a federal statute in developing its 2006 management plan for the Huron-Manistee National Forests, the court reversed in part the district court's judgment for the Service and remanded the case so that the Service may comply with those requirements.

The court held that, *inter alia*, the Service's estimates of snowmobile and cross-country visitors to the Forests were arbitrary. Thus, the Service did not comply with § 219.21(a)(2)'s requirement of a demand-supply analysis. The court determined that there were "two serious problems with the Service's estimates of snowmobile and cross-country visitors. The first is that there is scarcely any basis for the snowmobile estimate." As far as the court could tell, three sentences were "the entire basis of the Service's adjustment of the snowmobile estimate from zero to 120,000." Further, those sentences contained a hypothetical, not an estimate. The second problem was "the disparate treatment of the cross-country estimate." Most, if not all, of the Service's rationales for boosting the snowmobile numbers generally also applied to cross-country visitors. Plaintiff "quite reasonably asks why snowmobile visits received an upward adjustment, but cross-country visits did not." The Service also failed to comply with the requirement that it coordinate its recreational planning with that of the State of Michigan with the goal (to the extent feasible) of "'reducing duplication in meeting recreational demands'" as to gun hunting and snowmobiling, pursuant to § 219.21(e). The court also held that the Service's reasons for keeping

pre-designation and club trails open to snowmobile use were arbitrary and thus, the Service did not comply with "§ 219.21(g)'s mandate to minimize conflicts between off-road vehicle use and other uses and interests of the Forests." Further, the Service violated the National Environmental Policy Act by failing to consider whether to close Primitive and Semiprimitive Nonmotorized areas to gun hunting and snowmobile use, as plaintiff proposed in his comments on the plan during its development.

The court held that each of these failures was material to the plan's development and to that extent, the plan's approval "was arbitrary or without observance of procedures required by law." In light of this holding, the court had authority to "set aside" the plan. However, it elected not to exercise that authority, but rather granted the Service 90 days to adopt a plan that complies with the law. (Source: State Bar of Michigan *e-Journal* Number: 46959, October 4, 2010).

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2010/092910/46959.pdf

Other Published Cases

DEQ cannot require a township to install a sanitary sewer

Court: Michigan Court of Appeals (2010 Mich. App. LEXIS 1572 [this opinion is uncorrected and subject to revision before publication in the Michigan Court of Appeals reports], August 17, 2010)

Case Name: *Department of Envtl. Quality v. Township of Worth*

(Note: The Michigan Supreme Court will hear an appeal of this case.)

The court held that the Water Resources Protection part (part 31) of the Natural Resources and Environmental Protection Act (NREPA)(MCL 324.101 *et seq.*), specifically MCL 324.3109(2) does not impose blanket responsibility upon a municipality for any sewer discharge that occurs within its jurisdiction without regard to cause and a corresponding obligation to remedy such discharges. Rather, it merely creates the presumption that the discharge originated with the municipality. However, where, as here, the municipality (defendant-township) could not be the cause of the discharge, it has no responsibility for the discharge. Thus, there was no basis to impose upon defendant-township the obligation to pursue a remedy desired by the plaintiffs-Department of Environmental Quality (DEQ) (now Department of Natural Resources and Environment), the installation of a public sanitary sewer system.

Defendant is a common law township along the shores of Lake Huron. It does not operate a public sanitary sewer system. All of the residences and businesses within the township rely on private septic systems for waste disposal. A problem arose with a number of the private septic systems located on a strip of land about five miles long located between highway M-25 and the lake. Some of these septic systems are failing resulting in effluent being discharged into the lake. Recently, the DEQ and the county health department have been pushing for defendant to install a public sanitary sewer system. Defendant declined to do so, because the project was not financially feasible.

Defendant's refusal to pursue the sanitary sewer project resulted in this case to force it to do so. The trial court granted the DEQ's motion for summary disposition resulting in an order establishing a time frame for defendant to design, begin construction on and begin operating a sewer project, imposing a $60,000 fine, and awarding attorney fees. Resolution of the case turned on the interpretation and application of NREPA §3109(2) establishing responsibility for the discharge and NREPA §3115 for the remedy. The court held that it was not persuaded NREPA §3109(2) imposed the responsibility on defendant that plaintiffs suggested. The court's analysis of the meaning of "prima facie evidence," which the statute does not define, made it clear that prima facie evidence is rebuttable. Thus, the statute does not automatically make a municipality conclusively responsible for discharge of raw sewage.

Rather, the statute merely creates a presumption that the municipality is responsible until and unless it is able to establish that it did not violate Part 31 of the NREPA. Defendant advanced a "particularly compelling" argument that it was not the source of the violation - it does not operate any sanitary sewer system that could be the source of the discharge. The DEQ argued any discharge of raw sewage within a municipality constitutes *prima facie* evidence of a violation by the municipality even if it was not the source of the discharge. But, after analyzing the phrase "by the municipality," the Appeals Court disagreed.

The Appeals Court held that the language of the statute imposes responsibility on the municipality where it is the actions of the municipality that leads to the discharge. Defendant-township overcame the presumption of responsibility and was not subject to the statutory remedies for a discharge. The court

reversed the trial court's order granting the DEQ summary disposition and remanded for entry of an order of summary disposition in favor of defendant. (Source: State Bar of Michigan *e-Journal* Number: 46611, August 19, 2010).

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2010/081710/46611.pdf

Unpublished Cases

(Generally unpublished means there was not any new case law established, but presented here as reminders of some legal principles. They are included here because they state current law well, or as a reminder of what current law is.) A case is "unpublished" because there was not any new principal of law established (nothing new/different to report), or the ruling is viewed as "obvious." An unpublished case may be a good restatement or summary of existing case law. Unpublished opinions are not precedentially binding under the rules of *stare decisis*.[9] Unpublished cases might be cited, but only for their persuasive authority, not precedential authority. One might review an unpublished case to find and useful citations of published cases found in the unpublished case.)

Restrictions on Zoning Authority

See also *DF Land Dev., LLC v. Charter Twp. of Ann Arbor* on page 21.

Compel a developer to improve an off-site roadway

Court: Michigan Court of Appeals (Unpublished No. 292948, November 18, 2010)

Case Name: *City/Village of Douglas v. Von Der Heide*

The trial court properly upheld the plaintiff-city's grant of a planned unit development (PUD) application contingent on Von Der Heide-defendants' constructing a roadway, part of which fronted the PUD.

Defendants submitted a proposal to the city to construct two, two-unit condos on a parcel of property fronting Park Drive. At the time, Park Drive was an unimproved dirt road public right of way and there were no other finished residences fronting it. The city council approved defendants' PUD proposal in June 2002, on the condition that defendants improve Park Drive by constructing an asphalt road in accordance with the county road commission's standards. Defendants built one of the two-unit condos and constructed a gravel road on the Park Drive right of way that did not conform to road commission standards.

In 2008, the city filed this case to compel defendants to complete the asphalt roadway. Defendants contended, *inter alia*, that the city had no authority to compel a single developer to improve an off-site roadway according to *Arrowhead Dev. Co. v. Livingston County Rd. Comm'n*. The Appeals Court disagreed that *Arrowhead* was controlling in this case. Instead, the proper inquiry here involved determining whether the city acted within its authority under the Michigan Zoning Enabling Act (MZEA) and the local zoning ordinance. Defendants argued that the city did not have authority under the MZEA to require the Park Drive roadwork. At the time defendants submitted their PUD application, Park Drive was a dirt two-track road located in an isolated part of the platted subdivision. There were no other completed developments nearby at the time. Defendants proposed a two-phase project with plans to construct two, two-unit condos for a total of four residences. Although defendants did not complete the second phase, the city approved the PUD based on the understanding that there would eventually be four residences on the property.

> An improved road was necessary to ensure that the residents would have appropriate access to the property and to accommodate the wear and tear caused by vehicle traffic associated with four residences.

Further, the required improvement to Park Drive was

[9] *Stare decisis* (MCR 7.215(c)(1). See *Dyball v Lennox*, 260 Mich. App. 698; 705 n 1 (2003). Unpublished 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.

also necessary to ensure the city could access the development to provide essential public services such as fire and police protection, emergency medical services, garbage removal, and snow plowing. The improved road was also necessary to prevent other negative externalities such as dust. The road commission provided standards to ensure proper water runoff, the placement of culverts, and the appropriate surface and subsurface materials.

The court also noted that defendants were not required to pave a substantial distance (415 feet), and the cost was not unreasonable given the total cost of the project. In sum, the court agreed with the trial court that the city's requirement regarding the road construction was "reasonable." The court also concluded the reasonable conditions the city imposed for approval of the PUD related to - (1) the protection of natural resources, health, safety, and welfare, and the social and economic well-being of those who use the land, the neighboring landowners and residents, and the community as a whole, (2) the valid exercise of the police powers and purposes which are affected by the proposed use, and (3) the necessity to meet the intent and purpose of the zoning requirements and insuring compliance with the standards established in the zoning ordinance. Further, the court found that the city did not exceed its authority under its zoning ordinance. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 47395, December 2, 2010).

Full Text Opinion
http://www.michbar.org/opinions/appeals/2010/111810/47395.pdf

RLUIPA

Court: Michigan Court of Appeals (Unpublished No. 296370, April 28, 2011)

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

The court held that the trial court properly granted the defendants' motion for summary disposition of plaintiff's claims under the RLUIPA and denied its motion for reconsideration.

> Plaintiff-Great Lakes Society (GLS)
> is a Michigan ecclesiastical corporation and an IRS-recognized religious organization . . . and describes itself as ministering to persons having varying degrees of chemical sensitivities to common environmental pollutants.

It sought to

> construct a two-story building, about 9,700 square feet in size, for worship services and supporting ministries, on a six-acre parcel of property owned by GLS pastor John Cheetham . . ., located in defendant Georgetown Charter Township . . . .

The property was "zoned low-density residential . . . ." The township's zoning ordinance permit construction of churches in a residential district with a special use permit (SUP). Plaintiff filed applications for a SUP, which the defendant-township' zoning board of appeals (ZBA) denied. The issue was before the ZBA concerning if the applicant was a church or not. While the SUP application was pending the township board approved an amendment of § 20.4(E) of the ordinance relating to the street frontage requirements for churches built in residential districts. Plaintiff's property did not meet the amended street-frontage requirements and it applied for a variance, which was also denied. Plaintiff appealed the township's denial of a SUP and request for variance to the trial court "by way of two separate complaints," which also asserted claims under the Religious Land Use & Institutionalized Persons Act (RLUIPA) (43 USC § 2000cc(b)) and constitutional claims.

The trial court ruled, *inter alia*, that the decision of the ZBA that the proposed building was not a church for zoning purposes "was supported by competent, material, and substantial evidence on the record . . . ." The trial court's opinion did not address the RLUIPA issues or constitutional claims and stated they would be tried later. The parties filed cross-motions for summary disposition. The trial court granted defendants' motion.

Plaintiff appealed the trial court's opinion and order affirming the ZBA's denial of its request for a SUP and variance and defendants appealed the trial court's opinion and order granting plaintiff partial summary disposition on its RLUIPA and constitutional claims. The Appeals Court in a published opinion affirmed in part, held that defendant did not violate the RLUIPA, and rejected the constitutional claims. The court also reversed in part and remanded.

Plaintiff now appealed the trial court's order granting defendants summary disposition on the RLUIPA claims and the trial court's denial of plaintiff's motion for reconsideration. The court held that the trial properly granted summary disposition of plaintiff's RLUIPA claims under § 2000cc(b)(1), (2), and (3), and since plaintiff's motion for reconsideration was not timely, the trial court did not abuse its discretion in denying the motion. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 48719, May 31, 2011)

Full text opinion:

Takings

See also *City/Village of Douglas v. Von Der Heide* on page 16.

Delays in a development project from voter referendum is not a taking

Court: Michigan Court of Appeals (Unpublished Nos. 292811 & 294122, November 18, 2010)

Case Name: *Petoskey Inv. Group, LLC v. Bear Creek Twp.*

Whether under a theory of breach of consent judgment, violation of procedural or substantive due process, violation of equal protection, or an unconstitutional taking, the court held that plaintiffs had no sustainable claim related to and based on the referendum arising from a consent judgment rezoning. The court found no basis in the record or in law to place liability for damages on the defendant-township for any delay in the development attributable to the referendum process, because the necessary element of causation was lacking as a matter of law, regardless of the cause of action.

The case arose from the development of Petoskey Investment Group-plaintiffs' property for mixed retail, commercial, and residential purposes. Plaintiffs' suit was primarily fueled by Bear Creek Township-defendants' conduct as to the referendum and the sanitary sewer connection, which plaintiffs claimed delayed the development of their property and gave rise to civil liability on the defendants' part. Plaintiffs were ultimately able to complete the development project. Their claims were based on the underlying theory that they were entitled to *timely* completion of the project and this did not occur due to delays caused by the referendum and by sewer connection problems attributable to defendants.

A township resident, an attorney, sought publication of the consent-judgment rezoning in order to be able to initiate the referendum process. The resident threatened a mandamus action against the township if publication did not occur. Plaintiffs' counsel vigorously voiced his opposition to any publication and referendum. The township informed plaintiffs' counsel that, after review of the law, it thought it appropriate to publish the notice as demanded by the citizen, just as if the zoning change had been accomplished through the normal zoning process and not via a consent judgment.

During the referendum process, plaintiff-Petoskey Investment went to the trial court to challenge the referendum and to enforce the consent judgment, claiming the referendum was unlawful. The township did not take any position in the trial court. The trial court ruled that the consent judgment constituted rezoning and was subject to a referendum under the former Township Zoning Act (MCL 125.282).[10] The township took a position in favor of the referendum on the appeal to the court, but did not file the application for leave to appeal in the Supreme Court. The application was pursued by the intervening township citizen.

The Michigan Supreme Court found that the appeal was rendered moot due to a settlement agreement embodied in a separate federal consent judgment. The court concluded that even had the township refused to publish the notice of the consent-judgment rezoning and argued against the referendum in the trial court, the court, and the Supreme Court, the events would still have transpired much like they did and thus, a delay in the development would have occurred regardless of the township's conduct. The citizen who demanded publication was set to file a mandamus action had the township failed to publish notice of the consent-judgment rezoning, and the trial court agreed that publication was necessary and that the referendum process could go forward. Even absent the township's voluntary decision to publish, the matter would have come to the trial court's attention, a notice would have been published by court order, and the referendum would have occurred.

It was illogical to believe that the trial court would have ruled differently had the township argued against the referendum instead of taking no position. Also, under MCL 125.282, once the petition process seeking a referendum was underway, the statute did not provide any mechanism for the township to unilaterally halt the process, although the township clerk did have to make a finding that the petition was sufficient.

> The issue of petition sufficiency had nothing to do with whether a referendum was lawful under the circumstances, and any attempt to stall or halt the process by the township would have been

[10] M.C.L. 125.282 was part of the former Township Zoning Act. 2006 PA 110 repealed that act and other zoning statutes and replaced them with the Michigan Zoning Enabling Act, M.C.L. 125.3101 *et seq.*, effective July 1, 2006. MCL 125.3702(1). The Township Zoning Act, however, applies to this case. Similar language exists in the Michigan Zoning Enabling Act at M.C.L. 125.3403.

greeted unfavorably by
the trial court, given the trial court's position. Further, any delays in developing the property caused by the appellate process as to the referendum question were not the township's fault. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 47392, December 1, 2010).

Full Text Opinion
http://www.michbar.org/opinions/appeals/2010/111810/47392.pdf

Land Divisions & Condominiums

Verbal approval by elected official carries no weight: still need written permit/approval

Court: Michigan Court of Appeals (Unpublished No. 289141, May 27, 2010)

Case Name: *Estate of Buchanan v. Deerfield Twp.*

The trial court properly granted summary disposition in the defendant-township's favor in this zoning dispute because there was no genuine issue of fact exceptional circumstances were not present and the defendant should not be estopped from enforcing its zoning ordinance.

The case arose after a prior lawsuit between plaintiff and neighboring landowners, the Hs, related to a three acre parcel of real property (Parcel B) the two parties owned jointly after plaintiff's brother sold his interest in the parcel and the neighboring one (Parcel C) to the Hs in 1989. Parcel B is contiguous with Parcel C and plaintiff's remaining three-acre parcel (Parcel A). After the Hs sued plaintiff to enjoin his mining/excavation activities, plaintiff and the Hs entered into a settlement and agreed to equally divide parcel B. The parties agreed the Hs' portion of Parcel B was to be combined with their adjoining parcel. The parties' initial settlement was contingent on plaintiff's portion of Parcel B remaining a separate piece of property, retaining its original tax identification number and "having been determined to be a buildable lot." Plaintiff obtained the signature of defendant's then-supervisor on a document entitled "consent order," which summarized those terms.

When plaintiff-Estate of Buchanan tried to execute this agreement, the township's tax assessor noted there was a problem with the tax identification numbers referenced in the request, and indicated her belief each one and one half-acre parcel should be joined with each party's existing parcel. Plaintiff later filed this case against defendant requesting his part of Parcel B be deemed a separate and buildable lot.

In granting defendant's summary disposition motion, the trial court noted plaintiff could not have reasonably relied on the supervisor's "approval" when he had notice the proposed lot split was contrary to local ordinances and the Land Division Act (LDA). Plaintiff argued defendant should be estopped from enforcing its zoning ordinance, given the exceptional circumstances presented in the case.

The appeals court disagreed. The court did not dispute plaintiff's statement there was no indication of collusion between himself and township officials, and recognized lack of collusion was one factor the court considered in *Pittsfield Twp. v. Malcolm.* However, plaintiff lacked the additional factors present in *Malcolm.* Perhaps most striking was the fact plaintiff received notice well before he applied for an address or zoning approval to construct the storage building, the division of Parcel B could only be accomplished if each one and one half-acre section were added to the respective adjoining parcels. Also, while plaintiff may have expended a significant amount of money to build the pole barn on the property, the building remained useful even if a residence was not constructed, especially given this portion of the lot was adjacent to his current residence. The court also rejected plaintiff's argument defendant should be bound by its supervisor's "agreement" to the proposed land division. Defendant's land division ordinance required prior review and written approval of the township assessor before land can be divided. Thus, plaintiff was charged with the knowledge the supervisor lacked the authority to approve a lot split. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 45954, June 9, 2010).

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2010/052710/45954.pdf

Substantive Due Process

Rezoning, zoning ordinance constitutionality

Court: Michigan Court of Appeals (Unpublished No. 294696, April 28, 2011)

Case Name: *Whitmore Lake 23/LLC v. Ann Arbor Charter Twp.*

The court held, *inter alia*, that under the *Kyser v. Kasson Twp.* standard the trial court properly dismissed the plaintiffs' constitutional claims in this zoning dispute. The court also held that plaintiffs' appeal of the trial court's decision affirming the ZBA decision was untimely and dismissed that part of their appeal for lack of jurisdiction.

The six individual plaintiffs purchased the property at issue (166 acres in the township). Part of the

property was zoned A-1 and the other part was zoned R-2. Plaintiffs entered into an agreement with plaintiff-Whitmore Lake granting it an option to purchase the property. The option was amended several times, finally expiring during the trial court proceedings. Plaintiffs and Whitmore Lake wished to develop the property by building single-family residences on ½ acre lots.

Whitmore Lake filed an application with the township's planning commission seeking to rezone the property to accommodate their plans. The township board denied the request. Plaintiffs sued asserting claims of violation of substantive due process, exclusionary zoning, denial of equal protection, inverse condemnation, and an appeal of the Zoning Board of Appeal's (ZBA) denial of their requests for variances.

The trial court entered an order affirming the ZBA's denial of the variance requests. The case proceeded to trial and later the trial court dismissed plaintiffs' remaining claims that the zoning ordinance violated their substantive due process and equal protection rights, holding that defendant's zoning scheme was rationally related to legitimate government interests and plaintiffs' evidence did not overcome the presumption the ordinance was constitutional.

The Appeals Court held that the plaintiffs' evidence regarding the zoning ordinance fell far short of overcoming the presumption of validity. As applied to plaintiffs' property, township-defendant's zoning ordinance was rationally related to advancing several legitimate governmental interests. Plaintiffs' evidence related to the wisdom of the zoning, but the wisdom of defendant's zoning choices did not affect the constitutionality of the ordinance. The rational basis test applied in a substantive due process claim, not involving a heightened scrutiny applicable to a suspect classification, as stated in *Muskegon Area Rental Ass'n v. Muskegon*, was derived from *Crego v. Coleman*. The court noted that *Scots Ventures, Inc. v. Hayes Twp.* was factually distinguishable from this case. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 48713, May 27, 2011)

Full text opinion:
http://www.michbar.org/opinions/appeals/2011/042811/48713.pdf

Due Process and Equal Protection

No breach of contract action out of an implied covenant of good faith and fair dealing

Court: Michigan Court of Appeals (Unpublished No. 292279, October 21, 2010)

Case Name: *United Inv., Inc. v. City of Mount Pleasant*

Since the court found no clear error in the trial court's findings of fact or in its legal conclusions that plaintiff failed to prove any of its claims at trial and thus, had no cause of action against the defendant-city, the court affirmed the trial court's order ruling that plaintiff-United Inv., Inc. had no cause of action for either breach of contract or constitutional violations arising from plaintiff's effort to modify a Planned Residential Development (PRD) agreement that defendant entered into with plaintiff's predecessor in interest.

In 2005, plaintiff requested the RPD agreement, which permitted construction of M-1 apartments (no more than 2 unrelated persons per dwelling), be amended to allow instead for construction of M-2 apartments (more than 2 unrelated persons per dwelling). Plaintiff sought the modification because changes in the state building code made constructing M-1 buildings much more expensive and because of "significant modifications" in the market. The court concluded that nothing defendant did precluded plaintiff from developing the property at issue in accordance with the original PRD agreement. While the agreement contemplated that the developer might seek to amend the agreement the future, it also provided that a request to make substantial changes in the agreement would return the parties to their positions before adopting agreement. The amended agreement would need approval as if it was a new agreement. It could not be seriously argued that plaintiff's proposal to shift from building M-1 units to building M-2 units as part of an open space community overlay project was not a substantial change in the approved PRD plans.

Thus, plaintiff's request to amend the PRD agreement returned the parties to the negotiation stage of forming a new contract, and mutual assent was required to form a new contract. The relevant contract and ordinance provisions were consistent with general contract law. Whether the parties could agree on a new contract was not controlled by the PRD agreement, but rather by plaintiff's compliance or not with city-defendant's zoning ordinance, and in particular, the M-2 density requirements of §154.052A. Plaintiff conceded no part of the PRD agreement controlled the interpretation of §154.052A. Defendant was enforcing its ordinance in accordance with its understanding of the intent expressed in §154.052A. When the pertinent density provisions in §154.052A were discovered to be ambiguous, defendant adopted an ordinance to clarify the intent consistent with defendant's preexisting

understanding. Nothing in the PRD agreement controlled the meaning of defendant's ordinance, so clarifying ambiguous terms in the ordinance could not possibly breach the agreement.

"Further, what the parties were doing was not enforcing or performing the PRD agreement, they were negotiating a new contract." The court also held that plaintiff could not create a breach of contract action out of an implied covenant of good faith and fair dealing. By seeking to modify the PRD agreement, plaintiff was negotiating with defendant to form a new contract that would permit construction of M-2 dwelling units. Also, "'Michigan does not recognize a claim for breach of an implied covenant of good faith and fair dealing . . . .'" Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 47159, November 10, 2010).

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2010/102110/47159.pdf

Court, Ripeness for Court's Jurisdiction, Aggrieved Party

Not exclusionary zoning with adequate commercial/retail land use and no demonstrated need

Court: Michigan Court of Appeals (Unpublished No. 291362, July 13, 2010)

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

The court held the DF Land Dev., LLC-plaintiff's facial exclusionary zoning issue was ripe for judicial review and the trial court properly granted summary disposition in favor of the defendant-township finding there was no total exclusion of commercial/retail land use and the plaintiff failed to satisfy its burden of showing a demonstrated need for commercial/retail land use in the township.

The case arose from the plaintiff's ownership of a parcel of real property located within the township's borders. The property is zoned a combination of R2 (single-family suburban residential) and RD (research and development), but plaintiff wanted to develop it for commercial/retail uses, which would require it to be zoned C1. However, C1 zoning for the property would be inconsistent the *General Development Plan*, which defendant has a policy of following. Further, the *Plan* stated the township had no need for commercial services or commercial centers.

Plaintiff contended there was no C1 zoning anywhere within the township, although it appeared to the court the Township Zoning Map upon which plaintiff relied did include two small areas zoned C1, in areas completely surrounded by the City of Ann Arbor. The court held plaintiff made out a facial challenge to defendant's zoning ordinance. Plaintiff alleged defendant's zoning scheme had the effect of totally prohibiting commercial/retail uses anywhere in the township, there was a demonstrated need for commercial/retail land uses in the township, and commercial/retail uses were appropriate for plaintiff's property.

It was undisputed plaintiff's proposed use was lawful. Defendant complained plaintiff discussed facts specific to plaintiff's property, but this was expected, given plaintiff's need to demonstrate that commercial/retail uses would be appropriate on its particular property. Defendant was not given the opportunity to decide whether to consider permitting plaintiff's proposed land use. However, the record as a whole suggested absolutely no indication defendant would have granted one here. Further, the fact that a plaintiff could seek a variance or a special permit does not necessarily cure a facially defective zoning ordinance. The record indicated that any attempt by plaintiff to seek an administrative remedy from defendant would have been futile. However, the real inquiry as to the total-prohibition requirement "is not technicalities, but whether the *practical effect* of a township's zoning ordinance results in the functional unavailability of a land use." The evidence supported the trial court's conclusion there was "ample commercial/retail land use 'within close geographical proximity' of everywhere within the township by virtue of the township's unusual shape wrapped around the City of Ann Arbor." For similar reasons, the court also agreed with the trial court that plaintiff failed to show a "demonstrated need." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 46303, July 23, 2010).

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2010/071310/46303.pdf

Superintending control exceeded trial court authority

Court: Michigan Court of Appeals (Unpublished No. 291473, October 26, 2010)

Case Name: *Camp and others v. City of Charlevoix and Anderson*

The trial court erred in issuing an order of superintending control where it appeared that the order allowed an appeal to the defendant-City of Charlevoix's zoning board of appeals (ZBA) that was time barred by the applicable ordinance and the ZBA did not fail to

perform a clear legal duty.

The appeal related to a zoning permit issued by the City's zoning administrator on March 26, 2007 to the Anderson-defendants authorizing construction of a single-family home with an attached boathouse. On May 14, 2007, plaintiff-Johnson, a neighbor of the Andersons, filed an application to appeal the issuance of the zoning permit with the ZBA and also requested the interpretation of several provisions of the City zoning ordinance relevant to the issuance of the permit. The ZBA held a hearing on July 18, 2007 and determined that the appeal could not be addressed because it was brought more than 30 days after the zoning administrator's initial decision was made and thus, was beyond the jurisdictional deadline in the zoning ordinance.

Johnson unsuccessfully appealed. Meanwhile, the other plaintiffs, also neighbors of the Andersons, filed the complaint in this case. This case was removed to federal district court, which issued an opinion staying Camp-plaintiffs' federal claims and remanding the case to the state trial court.

The Charlevoix Circuit Court issued an order for superintending control, requiring the ZBA to review the issuance of the zoning permit. The ZBA held a hearing and found that the majority of plaintiffs' arguments as to zoning ordinance violations lacked merit, but revoked the permit because some features of the boathouse violated the ordinance.

On appeal, the Andersons argued that the trial court exceeded its authority in remanding the case to the ZBA under the power of superintending control. The Michigan Supreme Court noted in *Public Health Dep't v. Rivergate Manor* that the remedy of superintending control is not available "as a substitute for an appeal or to evade a statutory prohibition of an appeal." The ordinance specifically precluded the ZBA from hearing an appeal related to the issuance of a zoning permit after more than 30 days had passed. The ZBA's decision after remand from the trial court showed that the ZBA only considered plaintiffs' claims that the permit was erroneously issued because it would result in several zoning violations. "These claims were the same claims previously considered time barred by the Ordinance." Also, superintending control will not lie unless there is a showing of a failure to perform a clear legal duty and the absence of an adequate legal remedy. The parties agreed that when there is no variance necessary on the face of a permit, no notice as to the zoning permit is required. The zoning permit at issue did not reference any required variances. Further, the plaintiffs failed to show that their right to appeal within 30 days was an inadequate remedy. Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 47190, November 16, 2010).

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2010/102610/47190.pdf

Open Meetings Act, Freedom of Information Act

Exempt from disclosure under FOIA

Court: Michigan Court of Appeals (Unpublished No. 290437, June 29, 2010)

Case Name: *Beaty v. Ganges Twp.*

The trial court erred in granting the defendants' summary disposition motion on the basis the information plaintiff-Keag requested was exempt from disclosure pursuant to Michigan Freedom of Information Act (MCL 15.243(1)(v))[11] where the requested materials were not from the actual record generated by his dealings with the defendant-planning commission or his appeal of the denial of his PUD application and it was likely portions of the information he sought had no bearing on his underlying case.

After the planning commission denied their PUD application, Keag and plaintiff-Beaty sued the township and the planning commission seeking an order of superintending control compelling the defendants to approve the site plan and asserting a claim of appeal from an administrative agency. Keag initially filed four requests for information under the Freedom of Information Act (FOIA), including, *inter alia*, certain tape recordings, copies of proposed zoning and PUD ordinance changes, and correspondence and e-mails exchanged by planning commission members related to the changes. He later filed three more requests, including for a copy of a site plan submitted by a non-party and approved by the planning commission, information related to another non-party's special use permit application, and all communications between the planning commission and a company dealing with reports and ordinance changes, dating back to when the company was retained.

The trial court concluded the materials, which it did not examine in camera before ruling, "related" to the

[11] M.C.L. 15.243(1)(v) reads: "(1) A public body may exempt from disclosure as a public record under this act any of the following: . . . (v) Records or information relating to a civil action in which the requesting party and the public body are parties."

underlying case because Keag might be able to use them in some way for comparison purposes in pursuing his appeal of the planning commission's decision.

However, the Appeals Court concluded notwithstanding this possibility, the trial court erred in making a general conclusion all the information Keag requested was exempt from disclosure. He requested various types of information - e-mails, tape recordings, drafts and final copies of ordinances, applications and plans submitted by other persons, etc. - "and the trial court simply made a blanket determination that all the information was exempt under MCL 15.243(1)(v)." The court held the "trial court was required to sort through the requests and make a particularized determination regarding each piece of information sought under the requests." Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 46216, July 9, 2010).

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2010/062910/46216.pdf

Interview of Building Inspector and Zoning Administrator job candidates under OMA

Court: Michigan Court of Appeals (Unpublished No. 291025, November 9, 2010)

Case Name: *Brown v. Plainfield Twp.*

The trial court properly granted defendants' motion for summary disposition on the basis that there was no delegation of authority from the defendant-township's Board to the defendant-township Supervisor to interview candidates for the Zoning Administrator position in this action for alleged violations of the Open Meetings Act (OMA) (MCL 15.261 *et seq.*).

The Supervisor determined that the position of Township Building Inspector and Zoning Administrator should be divided into two part-time positions. The Board voted to allow the Supervisor to advertise for a part-time Zoning Administrator. *H* (who held the position), *O*, and one other candidate applied for the position. After interviewing the three candidates, the Supervisor recommended to the Board that *O* be hired. At a special meeting, the Board voted three to two to do so. Plaintiffs voted against *O*'s hiring.

Plaintiffs, trustees on the Board, alleged that the three individual defendants met before the special meeting and conducted interviews for the Zoning Administrator position. Plaintiffs contended that this gathering of a quorum constituted a meeting of a "committee" that was subject to the provisions of the OMA, and that because the meeting was not noticed and was not conducted in a meeting open to the public, it constituted a violation of MCL 15.263(1), (2), and (3) and MCL 15.265(1). Plaintiffs contended that the Supervisor appointed himself a "committee of one" and he thus, constituted a "public body" subject to the OMA.

However, "an individual acting in his official capacity is not a 'public body' for the purposes of the OMA." Like the plaintiff in *Herald Co. v. Bay City*, plaintiffs in this case cited *Booth Newspapers, Inc. v. University of MI Bd. of Regents* for the proposition that the Supervisor individually constituted a public body. Although the Supreme Court in *Booth Newspapers* rejected the defendant's assertion that a "one-man committee" could not be considered a "public body," in *Herald* the Supreme Court held that the decision in that case was distinguishable because it "precluded an attempt by a public body to evade the OMA (and thus circumvent legislative intent)" by improperly delegating its authority to the committee chairman and to subquorum groups that had no independent authority to select a president. As opposed to the circumstances of *Booth Newspapers* where

> [t]he board effectively sought to delegate its authority as a body subject to the OMA to various bodies of its own creation that it believed were not subject to the OMA, for the express purpose of avoiding the requirements of the OMA,

in this case, there was no delegation of authority or evasive effort by the Board.

The evidence submitted by defendants established that the Supervisor, of his own volition and without assistance, interviewed the three candidates for the part-time Zoning Administrator position. The affidavits of the three individual defendants, as well as the Township's personnel manual, showed that the Supervisor acted pursuant to the apparently long-standing internal policy that the Building Inspector and Zoning Administrator positions were employees within the Supervisor's Department, and that he had the authority to hire and direct those employees. Although plaintiffs argued that the Supervisor had no actual authority under statute or otherwise to hire a Zoning Administrator, this did not change the fact that there was no delegation of authority by the Board, whose members apparently believed that the Supervisor did have such authority. Further, regardless whether the Supervisor actually had authority to make a hiring decision or to convey a recommendation to the Board, the fact remained that

the Board itself hired *O*. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 47295, November 18, 2010).

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2010/110910/47295.pdf

Zoning Administrator/Inspector, Immunity, and Enforcement Issues

See also *Brown v. Plainfield Twp.*, page 23; *Charter Twp. of Chesterfield v. Burton*, page 26.

Enforce a zoning ordinance, if a municipality can be estopped from enforcing a zoning ordinance

Court: Michigan Court of Appeals (Unpublished No. 290639, June 22, 2010)

Case Name: *Kawkawlin Twp. v. Sallmen*

Since there were questions of fact whether the defendants-Sallmens acted in good faith in erecting the addition to their home precluding application of the doctrine of equitable estoppel, the court held the trial court erred in granting their motion for summary disposition and reversed and remanded for further proceedings.

The Sallmens hired a builder to construct a two-story addition to their home. The builder prepared an application for a building permit and submitted it to the plaintiff-Township. The drawing submitted indicated the new addition would be located seven feet from the line of a fence between the Sallmens' house and the intervening plaintiffs' (Kuschs) house and also showed the addition would occupy the same space as an existing 12-foot by 12-foot deck. The drawing did not show whether the fence was on the property line and did not show where it was. Under the applicable zoning ordinance, the township required at least 10 feet of clearance between the side property lines and any structures on the property. The township accepted payment from the builder for the permit application and later apparently approved the application. After the builder started working on the addition, the Kuschs became concerned the addition violated the setback requirements and filed a formal complaint with the township.

(Jeff Kusch averred previously the Sallmens approached him about building the deck, he told them of the 10-fo0t setback requirement, and helped them measure the distance so the deck would conform to the requirement. The Sallmens did not approach him about the new addition, which he said had a larger "footprint" than the deck and encroached on the setback by more than two feet.)

Later Sallmen requested a variance to the setback requirement. The township zoning board (*sic.*) denied the request after a hearing. The township sued the Sallmens alleging the addition violated the setback under its zoning ordinance, asked the court to determine the addition violated the ordinance and was a nuisance *per se*, and asked the trial court to order the Sallmens to abate the nuisance by removing the encroachment. The trial court stayed the suit and asked the township to hold a new hearing on the issue with a sufficient record for it to review. The zoning board again denied the Sallmens' request for a variance.

Later, Sallmens moved for a permanent injunction claiming they relied on the township's approval of their building permit application, building inspections, and discussions with township personnel who did not tell them the project violated the side setback ordinance, and no one ordered them to stop the project, which cost $35,000. They argued the township should be estopped from enforcing the ordinance. The Kuschs intervened, the trial court granted the Sallmens summary disposition based on estoppel based on "exceptional circumstances," and dismissed the Kusch's complaint with prejudice.

The Appeals Court held viewing the evidence in the light most favorable to the Sallmens, a reasonable fact-finder could conclude they knew the proposed addition violated the zoning ordinance and proceeded in defiance of it. If the facts supported a fact-finder's conclusion, it would militate strongly against the use of equitable estoppel to insulate the Sallmens from the enforcement of the setback. (Source: State Bar of Michigan *e-Journal* Number: 46157, June 29, 2010).

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2010/062210/46157.pdf

Governmental immunity

Court: Michigan Court of Appeals (Unpublished No. 293084, November 30, 2010)

Case Name: *Gordon v. Jim Lippens Constr., Inc.*

Since defendant-Gaul's (township building inspector) conduct was not "the" proximate cause of plaintiffs' injuries, he was entitled to governmental immunity and the trial court erred by denying his motion for summary disposition. Thus, the court reversed and remanded for entry of an order granting summary disposition in defendant's favor.

Plaintiffs contracted to have a single-family residence built. Defendant inspected the framing of

plaintiffs' home as it was being built, and approved the framing in early 2004. He issued a certificate of occupancy for the home in January 2005. In early 2006, plaintiffs noticed a deflection in the slope of their roof. They retained consultants, who advised that the home, particularly the framing and structure of the roof, had not been built in accordance with the architectural plans or the applicable building code, and was not constructed in a workmanlike manner.

Defendant contended that he was entitled to governmental immunity pursuant to MCL 691.1407(2) because he was not "the" proximate cause of plaintiffs' injuries. Similar to *Rakowski v. Sarb*, plaintiffs' claim of injury was the faulty construction of their home, which arose directly and most substantially from the work done by the construction company. The risk of harm was created by the construction company. The allegation against defendant was essentially that he failed to find the defects and deficiencies after they already existed. The damages were the result of the poor construction, not the result of the failure to discover the poor construction.

Had defendant discovered the alleged roof defects upon inspection, the defects would have needed to be corrected upon discovery rather than at a later point in time. In any event, the roof would have needed additional work performed regardless of the defendant's findings. At most, his actions may have contributed to an increased cost of repair. Further, if the faulty workmanship had not been in existence, due to the actions of the construction company, there would have been no tort to which defendant could have contributed. Thus, "the one most immediate, efficient, and direct cause" of the damages was the poor workmanship of the construction company. Although defendant's conduct may have been a proximate cause, it was not the proximate cause of plaintiffs' injuries. (Source: State Bar of Michigan *e-Journal* Number: 47473, December 6, 2010).

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2010/113010/47473.pdf

Ownership

Court: Michigan Court of Appeals (Unpublished No. 297530, April 28, 2011)

Case Name: *City of Saugatuck v. Breen*

The court held that the trial court properly ruled that, when viewed in a light most favorable to the defendants, there was no genuine issue of material fact as to whether defendant-John Breen either owned or had a controlling interest in defendant-San Marino Holding, Inc. such that he could be held responsible for the violation of the zoning ordinance. Thus, the court affirmed the trial court's grant of summary disposition in favor of the plaintiff-City in this zoning enforcement case arising from a zoning violation.

The case involved property and a residence located on P Street. The gist of plaintiff's complaint was that the property, which was zoned for single family use, was being used as a multifamily dwelling by defendants. The complaint alleged that John was an owner or has an ownership interest in the property and that San Marino Holding was a company that owns or has an ownership interest in the property. The complaint alleged that defendants rented out the upper levels of the home on the property to persons who are not family of Margaret Breen (who is John's mother), while Margaret occupied the lower level of the home. The complaint alleged that defendant-Lakeshore Lodging was the rental agency that facilitated the rental of the home. Plaintiff's complaint sought, in relevant part, a declaration that defendants' maintenance and use of the single family dwelling for more than one family was in violation of the zoning ordinance and that violation of the zoning ordinance constituted a nuisance *per se*.

John argued that the trial court erred by finding that there was no genuine issue of material fact as to whether he owned or controlled the property. Plaintiff presented an abundance of documentary evidence to support its allegation that John either owned or controlled San Marino Holdings, and thus, that he controlled the property in question. The only evidence presented by John was his own affidavit stating that he "does not have an operating or controlling interest in any entity or organization that does [have an operating or controlling interest]" and that "He has never dealt with Lakeshore Lodging, as a representative of San Marino, Inc. nor in a personal capacity in his own behalf."

Aside from the documentary evidence suggesting otherwise, counsel for both John and San Marino Holding acknowledged at the hearing on the motion for summary disposition that counsel was the authorized agent for San Marino Holding, Inc., that he had no idea "who this San Marino Holding Company consists of," that John indicated to him that he was not a part of it, but that John was the only person he ever had contact with in regard to San Marino Holding. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 48721, May 19, 2011).

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2011/042811/48721.pdf

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

Prohibiting improperly stored junk or rubbish

Court: Michigan Court of Appeals (Unpublished No. 290927, May 6, 2010)

Case Name: *Village of Montgomery v. Robey*

The trial court did not err in continuing with the case despite defendant's jurisdictional objections and properly required him to "remove all junk and rubbish" from his property in the plaintiff-village, and "either make all necessary repairs . . . to bring it into compliance with Plaintiff's ordinance and with all other applicable building codes or . . . demolish the residence and remove all debris . . . ."

Defendant challenged the trial court's subject-matter jurisdiction to decide the case, and argued it should have assisted his litigation efforts through "curative notations" and opportunities to file additional or alternative pleadings or motions. The trial court appeared to show some willingness to treat defendant's motion to abate the complaint as a motion to set aside the default, but concluded his submission was "unintelligible," "legal mumbo jumbo," and failed to "make any legal sense whatsoever." Defendant on appeal attacked the ordinances under which plaintiff proceeded on procedural grounds, and also plaintiff's status as a municipality entitled to promulgate and enforce ordinances. However, those attacks went not to subject-matter jurisdiction, but rather to whether there was an underlying legal basis for the trial court's exercise of jurisdiction. "In casting his challenges under the rubric of jurisdiction," defendant seemed to have been misled by the "loose practice . . . of saying that a court had no 'jurisdiction' to take certain legal action when what is actually meant is that the court had no legal 'right' to take the action, that it was in error."

The trial court's right as the Hillsdale Circuit Court to adjudicate a claim for equitable relief in connection with a parcel of real property in Hillsdale County was hardly in dispute. "Defendant's attack on the validity of the ordinances under which plaintiff acted on procedural grounds is an attack on those textual authorities. His attack on plaintiff's status as a municipality entitled to create and enforce ordinances is an attack on plaintiff's standing." Those attacks were not properly characterized as an attack on the trial court's jurisdiction in the matter. Rather, those challenges were attacks on the propriety of the trial court's deciding in plaintiff's favor. Because defendant defaulted by failing to answer, and failed to show the trial court lacked subject-matter jurisdiction over the controversy, he forfeited all other defenses as to the merits of plaintiff's cause of action but for contesting the question of remedies. When invited to do so, however, defendant merely referred the trial court to his motion to abate the complaint, which the trial court had concluded was "unintelligible . . . mumbo jumbo." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 45735, May , 2010).

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2010/050610/45735.pdf

Statute of limitations relative to enforcement of blight ordinance and setbacks

Court: Michigan Court of Appeals (Unpublished No. 293795, December 7, 2010)

Case Name: *Charter Twp. of Chesterfield v. Burton*

The trial court had jurisdiction over the plaintiff-Township's claims, properly denied the defendants-Burton and Kent's motion for judgment *non obstante veredicto* or, in the alternative, a new trial, and entered an order granting the Township's request for injunctive relief in this dispute concerning a shed located on defendants' property.

The Township filed a three-count complaint in May 2008. Counts I and II essentially claimed that defendants owned property on which the shed was located and that the shed violated the Township Zoning Code in several ways. Count III asserted that defendants used their property for the outdoor storage of unregistered vehicles, junk cars, old fuel tanks, an old tractor, and tarps. The Township noted that it had issued a citation for blight, yet they still failed to remove the blight. The Township asserted that their use of the property constituted blight and was a nuisance *per se* pursuant to MCL 125.3601. The Township argued it had no adequate remedy at law to require defendants to remove the blight and thus, only an injunctive order could cause the abatement of the nuisance *per se*.

In May 2009, the trial court entered an order granting the Township's request for injunctive relief. Defendants argued, *inter alia*, that the trial court lacked jurisdiction over the Township's claims. They argued that the Township could have moved in the trial court to transfer the case to the proper jurisdiction if it believed that its allegations constituted a nuisance *per se*, but it chose not to. They also contended that the

Township could have appealed Burton's prior district court misdemeanor conviction and $100 fine but again, chose not to. Further, they asserted that the district court adjudicated the Township's causes of action in a prior case that was closed in 2005, but otherwise the district court retained jurisdiction. They also argued that pursuant to ordinance violation provisions of the General Law Village Act (MCL 66.6), an action alleging a code violation must be filed in district court and must be commenced not more than two years after the commission of the offense and thus, the Township's claims in the trial court were untimely. In 2005, the district court convicted Burton of a misdemeanor for constructing a shed that violated the Township Zoning Code. However, the district court did not issue an injunction, and defendants' shed remained standing, in violation of the ordinance. Rather than issue a citation for every day that they were in violation of the ordinance, however, the Township chose to seek abatement of the nuisance and filed a case in trial court in order to obtain injunctive relief. Although the sections for violations section of the Township Ordinances Act (MCL 41.183(6)) and District Court section of the Revised Judicature Act (MCL 600.8311) required that the Township institute its action for violation of the township zoning code in the district court, its suit for injunctive relief in the trial court was proper, and the trial court had jurisdiction. Pursuant to the nuisance abatment circuit court injunction section of the Revised Judicature Act (MCL 600.2940(1)), all claims based on or to abate nuisances may be brought in the circuit court, which may grant injunctions to stay and prevent nuisance. Defendants further contended that the Township's claims violated the statute of limitations and were not properly before the trial court. The six-year period of limitations in other personal actions section of the Revised Judicature Act (MCL 600.5813) governed the Township's claim seeking injunctive relief to abate a public nuisance.

It was undisputed that defendants' shed was still standing on May 30, 2008 – the date the Township filed its complaint. Thus, there was no violation of the statute of limitations, and the issue was properly before the trial court. The court also held that the trial court did not clearly err in finding that the defendants violated the blight ordinance and the front yard setback ordinance. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 47545, December 14 , 2010).

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2010/120710/47545.pdf

NR&EPA does not preempt local recycling ordinance

Court: Michigan Court of Appeals (Unpublished No. 292611, December 16, 2010)

Case Name: *Rondigo, LLC v. Township of Casco*

The court held that Part 115 (Solid Waste Management) of the Natural Resources & Environmental Protection Act (NREPA) (MCL 324.11521) does not expressly preempt local ordinances, and the legislative history indicated that the Legislature did not intend to preempt local regulations concerning recycling operations. Further, the court found nothing in the pervasiveness of the statutory scheme or in the nature of the subject matter being regulated (the composting of yard clippings) that warranted a finding of preemption.

Thus, the court affirmed the trial court's order denying the Rondigo, LLC-plaintiff's request for a declaratory judgment that MCL 324.11521 preempted the parts of the defendant-township's zoning ordinance regulating composting operations.

Plaintiff purchased a 42-acre parcel in the township in 2003. The parcel was zoned industrial and plaintiff intended to use it for commercial composting operations. Defendant enacted new zoning ordinance provisions in December 2004 regulating commercial composting operations in the township. Defendant's zoning ordinance allows for yard waste composting activities in industrial zones, but only under a special use permit subject to a series of locally-imposed requirements. The Legislature amended part 115 of the NREPA in 2007 to add regulations related to composting operations. Plaintiff asserted that it took the necessary steps to become a "registered composting facility" under MCL 324.11521 and thus, it was entitled to begin composting activities on the property without further approvals or restrictions imposed by defendant. After defendant rejected plaintiff's site plans for a composting facility on the property, plaintiff filed this case.

On appeal, plaintiff argued that the trial court erred in holding that the parts of the zoning ordinance addressing composting were not preempted by MCL 324.11521. The appeals court disagreed. While defendant's ordinance addressed concerns similar to those addressed by the statute as to the location and manner of composting, and the maintenance of appropriate site drainage, the ordinance also contained several additional requirements not present in the statute. The court concluded that

> the plain language of the statute does not indicate that the Legislature intended the statutory requirements to be the only requirements for establishing and operating a composting facility of the nature intended by plaintiff.

Rather,

> the statute establishes the minimum requirements for such facilities, and thus, defendant is permitted to impose additional, non-conflicting requirements upon the construction and operation of such facilities.

Since there was no indication that MCL 324.11521 and the local ordinance provisions regulating composting operations could not coexist, the court held that there was no direct conflict between the ordinance and the statute. (Source: State Bar of Michigan *e-Journal* Number: 47618, January 12, 2011).

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2010/121610/47618.pdf

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

Judgment *non obstante veredicto*
also called **judgment notwithstanding the verdict**, or **JNOV.**
A decision by a trial judge to rule in favor of a losing party even though the jury's verdict was in favor of the other side. Usually done when the facts or law do not support the jury's verdict.

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*.

littoral
n *noun* Land which includes or abuts a lake or Great Lake is "littoral." When an inland lake it includes rights to access, use of the water, and certain bottomland rights. When a Great Lake it includes rights to access and use of the water. See "riparian."

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'.

riparian
n *noun* Land which includes or abuts a river is riparian, and includes rights to access, use of the water, and certain bottomland rights. *Thies v Howland*, 424 Mich 282, 288 n 2; 380 NW2d 463 (1985). (Land which includes or abuts a lake is defined as "littoral." However, "the term 'riparian' is often used to describe both types of land," *id.*) See "littoral."

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.

Contacts

For help and assistance with land use training and understanding more about these court cases contact your local MSU Extension land use educator. For a list of who they are, territory covered by each and contact information see: http://www.msue.msu.edu/portal/module_detach.cfm?module_column_map_id=553147&portal_id=25643 .

To find other expertise in MSU Extension see: http://people.msue.msu.edu/ .

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