MICHIGAN STATE UNIVERSITY EXTENSION
Bringing Knowledge to Life

Selected Planning and Zoning Decisions: 2005
May 2004-April 2005

Kurt H. Schindler, MSU Extension Land Use Team

This public policy brief summarizes the important state and federal court cases and Attorney General Opinions issued between May 1, 2004 and April 30, 2005.

In comparison to other years, this has been an average year for number of land use cases in the courts, and in terms of the significance of the cases. Most cases were not significant (did not create new law), but a couple are.

The significant court cases are *County of Wayne v. Hathcock* (471 Mich. 445: 684 N.W.2d 765: 2004 Mich.) ruling that use of eminent domain to condemn real property for economic development (private development) can not be done in Michigan.

The other significant case is *Rochon v. Chippewa Twp.* (Unpublished No. 247465) with re-states the Michigan rules for takings. The opinion states the principles very well. It does not create new law from what was established in *K & K Construction, Inc v Department of Natural Resources*, 456 Mich 570; 575 NW2d 531 (1998).

Restrictions on Zoning Authority

State Fairground exempt from local zoning

Court: Michigan Court of Appeals (262 Mich. App. 542; 686 N.W.2d 514; 2004)

Case Name: *City of Detroit v. State of Michigan*

Since the Legislature's intent in creating the Michigan Exposition and Fairgrounds Act (MEFA) was to grant the Michigan Department of Agriculture (MDA) exclusive control—exempt from local zoning ordinance—over the State Fairground and any other property acquired for the purpose of holding and conducting state fair exhibitions, the trial court erred in ruling the defendant-state is subject to the plaintiff-city's zoning ordinance. The state owns the State Fairgrounds where it holds the annual State Fair. Adjacent to the property is a parcel of land, which the state has also acquired. The state agreed to sell the adjoining parcel to State Fair Development Group, L.L.C. (SFDG). The purchase agreement provided after the sale, the property was subject to certain local ordinances and regulations, including zoning and taxation, which it had not been subject to while owned by the state. The state also agreed to lease the fairgrounds to SFDG for 30 years. The lease provided for development of a master plan, including construction of an auto racing facility and large open-air amphitheater. The city opposed construction of the racetrack because of anticipated nuisance, violation of a city ordinance, and violation of the EPA. The court analyzed the various statutes at issue and concluded the plain language of the MEFA indicated the Legislature's intent was that the jurisdiction over the fairgrounds be vested exclusively in the MDA—exempt from local ordinances. Reversed and remanded.

Full Text Opinion:
http://www.michbar.org/opinions/home.html?/opinions/appeals/2004/062204/23628.pdf

A corn maze, and a riding stable are covered by GAAMPS and thus not subject to zoning.

Court: Michigan Court of Appeals (Unpublished[1] No. 246596)

Case Name: *Village of Rothbury v. Double JJ Resort Ranch, Inc.*

[1]This is an unpublished opinion, as are others in this report. Unpublished opinions are not precedentially binding under the rules of stare decisis. They are included here because they state current law well, or as a reminder of what current law is.

The trial court erred in determining the use of the defendant's cornfield as a maze available to the public and its rental of horses for recreational riding were not protected by the Right to Farm Act (RTFA) and Generally Accepted Agricultural Practices (GAAMPs) and were subject to plaintiff's ordinance. Because the GAAMPs and RTFA specifically provide a riding stable is a farm operation and horse riding is a farm product, they are exempted from local zoning regulations by the RTFA. Since plaintiff's ordinance conflicted with the RTFA, it was unenforceable. Defendant's corn maze was also a farm product within the purview of the RTFA and exempt from plaintiff's zoning laws. A farm product is defined as 'an agriculturally produced field crop that is useful to human beings.' A corn maze is agriculturally produced. The definition of a farm product is not limited to edible agriculturally produced products. The definition also includes flowers, seeds, grasses, nursery stock, trees and tree products, and other similar products. Thus, the court concluded the corn maze was a farm product and where plaintiff conceded defendant produced the product according to GAAMPs, the maze fell within the protection of the RTFA and was also exempted from the zoning ordinance. Reversed.

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2004/081704/24220.pdf

Riparian Jurisdiction: can have anti-funneling and riparian regulations

Court: Michigan Court of Appeals (Published After Release[2] 264 Mich. App. 604; 692 N.W.2d 728; 2004)
Case Name: *Township of Yankee Springs v. Fox*

Since it is the location of the riparian land, not the location of the lake abutting it, that determined the plaintiff-township's authority and jurisdiction, and the riparian lot in question was located within the township, the court rejected defendant's contention the township's riparian ordinance did not apply because Gun Lake was not wholly located within the township's borders. Defendant, owner of an undivided one-eighth interest in a riparian lot on Gun Lake, appealed from the trial court's order permanently enjoining defendant and several other lot owners from using the lot to access Gun Lake in violation of the township's anti-funneling ordinance and riparian lot use regulations. The court concluded the township had authority to regulate defendant's riparian rights because the riparian lot was located within the township's boundaries and the township was authorized by the Township Rural Zoning Act to regulate riparian rights. The court also rejected defendant's arguments the township's riparian lot use regulations were void for vagueness and the ordinance was unconstitutional because it violated substantive due process. Affirmed.

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2004/122104/25604.pdf

Can use HUD standards for mobile homes

Court: Michigan Court of Appeals (Unpublished No. 249353)
Case Name: *Bunker Hill Twp. v. Allen*

The trial court did not err in granting the plaintiff-township a permanent injunction requiring defendants to remove a mobile home from a lot located in the township because it did not comply with the amendments made to federal Housing and Urban Development (HUD) construction and safety standards for mobile homes in 1994. Defendant-Bailey owned a mobile home manufactured in compliance with HUD standards in effect in 1984. The Baileys moved the home from one lot to another owned by defendant-Allen within the township. The move violated plaintiff's zoning ordinance requiring all mobile homes moved within the township to comply with current HUD standards. Since defendants failed to have the mobile home inspected and certified as meeting current HUD standards, they could not obtain building and occupancy permits as required by the ordinance. Plaintiff sought and was granted an injunction requiring defendants to remove the mobile home. The defendants argued federal and state statutes preempted the ordinance. However, the court disagreed, concluding the township's ordinance required nothing more than compliance with the minimum construction and safety standards of HUD and was not preempted. Defendants also argued the ordinance violated due process because it excluded older mobile homes from the township. The court held the ordinance had already overcome a due process challenge in Goodnoe, construction standards had improved since defendant's mobile home was built, the ordinance was rationally related

[2]This opinion was previously released as an unpublished opinion on 10/12/04.

to the plaintiff's police power, and exempted mobile homes already situated in the township. Affirmed.

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2004/110904/25171.pdf

Shooting Range: jurisdiction limited on sport shooting ranges only (has jurisdiction over law enforcement practice ranges), must grandfather existing ranges

Court: Michigan Court of Appeals (Unpublished No. 251155, No. 255286)

Case Name: *Smolarz v. Colon Twp.*

The defendant-township had the authority under the Township Rural Zoning Act (TRZA) to amend its zoning ordinance to require a special land use permit for firing range use in an agricultural district, but regardless of any failure to comply with the zoning ordinance, plaintiff was allowed under the Sport Shooting Range Act (SSRA) to continue to operate his sport shooting range. The township's amendment to the zoning ordinance and its authority to enact it implicated its power to regulate land use. Further, MCL 691.1542, part of the SSRA, was inapplicable to the township's nuisance per se action against plaintiff because the claim was based on plaintiff's alleged violation of the zoning ordinance, not a noise ordinance. However, plaintiff was permitted to continue to operate his sport shooting range on his property as long as he does so in compliance with generally accepted operation practices pursuant to MCL 691.1542a(2). Nonetheless, the statute contains no language that would allow plaintiff to continue to use his land for law enforcement personnel firearms training in the face of local zoning ordinances to the contrary. A sport shooting range is statutorily defined as an area designed or operated for sport shooting, not law enforcement firearms training, which is not a protected use under the SSRA and may be regulated through local zoning ordinances without affecting the property's use as a sport shooting range. Affirmed and remanded.

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2005/042105/27085.pdf

State law preemption of zoning

Court: Michigan Court of Appeals (Unpublished No. 248702)

Case Name: *Salamey v. Dexter Twp. Zoning Bd. of Appeals*

Based on the plain language of MCL 324.21109 and the ordinance, the court rejected plaintiff's argument the ordinance was preempted because it was in direct conflict with Natural Resources and Environmental Protection Act (NREPA), and the court further held NREPA did not preempt the ordinance by virtue of completely occupying the field the ordinance attempted to regulate. Plaintiff appealed from the trial court's order affirming the zoning board of appeals' (ZBA) decision denying plaintiff's request for a conditional use permit to operate a gas station in an area zoned a "General Commercial District." Plaintiff contended NREPA preempted local regulation of the installation and use of underground storage tanks (UST) systems, and the ZBA's decision was not supported by competent, material, and substantial evidence. The court concluded MCL 324.21109 neither expressly permits, nor prohibits, operation of a gas station in a general commercial district and the ordinance did not strictly regulate USTs – rather, it promulgated rules for the operation of automobile service stations. NREPA also did not preempt municipal regulation under the facts presented when the record showed various factors other than the installation of the UST system were legitimate reasons for denial of the permit. In addition, the court held the record demonstrated there was competent, material, and substantial evidence supporting the denial of the permit. Affirmed.

Quoting, on the issue of state law preemption:

> "State law preempts a municipal ordinance where "1) the statute completely occupies the field that ordinance attempts to regulate, or 2) the ordinance directly conflicts with a state statute." *Michigan Coalition for Responsible Gun Owners, supra,* 256 Mich App 408, quoting *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 257; 566 NW2d 514 (1997). Regarding the second method of preemption set forth above, our Supreme Court has held that "[a] direct conflict exists . . . when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits." *People v Llewellyn (City of East Detroit v Llewellyn),* 401 Mich 314, 322 n 4; 257 NW2d 902 (1977).
>
> "According to MCL 324.21109(3) of NREPA, a local unit of government "shall not enact or enforce a provision of an ordinance that requires a permit, . . . [or] approval . . . for the installation, use, closure, or removal of an underground storage tank system." The act

further provides that a local unit of government "shall not enact or enforce a provision of an ordinance that is inconsistent with this part or rules promulgated under this part." MCL 324.21109(2). Under the township zoning ordinance at issue in the instant case, Section 13.01(D)(5), Art XIII of the Dexter Township zoning ordinance requires a special approval use permit in order for the ZBA to permit an "automobile service station" in a general commercial district.

"Plaintiff contends that, because the township zoning ordinance requires plaintiff to obtain a special approval use permit in order to operate a gas station, i.e., a facility with an underground storage tank system, NREPA preempts that section of the zoning ordinance. This argument is not persuasive in light of the plain language of MCL 324.21109 [1] and the plain language of the ordinance. Clearly, MCL 324.21109 of NREPA neither expressly permits nor prohibits the operation of a gas station in a general commercial district. And, Section 13.01(D)(5), Art XIII of the Dexter Township zoning ordinance does not strictly regulate underground storage tanks, but rather promulgates rules for the operation of an automobile service station.

....

"Our Supreme Court set forth four guidelines to aid courts in determining whether a statute occupies the field of regulation:

> First, where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is pre-empted.
>
> Second, preemption of a field of regulation may be implied upon an examination of legislative history.
>
> Third, the pervasiveness of the state regulatory scheme may support a finding of preemption. While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer preemption, it is a factor which should be considered as evidence of preemption.
>
> Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest." [*Llewellyn, supra*, 401 Mich 323-324 (citations omitted).]

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2004/120204/25398.pdf

Federal Telecommunications Act

Court: U.S. Court of Appeals Sixth Circuit (398 F.3d 825; 2005 U.S. App)

Case Name: *State of Tenn. ex rel. Wireless Income Properties, LLC v. City of Chattanooga*

In an amended opinion, the court rejected the defendant-city's ripeness claim and held the city's actions constituted an informal denial of plaintiff's applications to build and manage telecommunications towers within the city and this informal decision-making process violated the mandates of the federal Telecommunications Act (TCA) requiring a written denial to be provided to the permit applicant and "supported by substantial evidence contained in a written record." After plaintiff filed its applications for permits to construct the telecommunications towers, the city called for a moratorium to consider amendments to the pertinent zoning ordinances. After the moratorium was lifted, plaintiff's applications did not comply with the newly amended zoning ordinances. The city's only communication with plaintiff regarding the now-inadequate applications was a telephone call by a city employee informing plaintiff the applications could not be approved absent a "special exceptions permit" and they were "on hold." The court held the city's actions in the nine months after the moratorium was lifted constituted a functional informal denial of plaintiff's applications. This procedure directly contravened the substantive and procedural requirements of the TCA. Also, the city provided no written support for its denial of the applications. The court held the remedy was injunctive relief compelling the city to grant the permits. The court reversed the district court's 60-day order and remanded for issuance of injunctive relief ordering the city to grant the permits, and affirmed the district court's denial of plaintiff's § 1983 claim.

Commentary:

The result of this case 'TCA requiring a written denial to be provided to the permit applicant and "supported by substantial evidence contained in a written record"' is even more so in Michigan. The Michigan 1963 Constitution requires administrative bodies (planning commission, zoning

board, appeals board, zoning administrator) to create a written record showing ". . . . the result was based upon competent material and substantial evidence on the record as a whole." (Article VI, §28 of the 1963 Michigan Constitution).

Another aspect of this case which raises an issue for Michigan is that of the moratorium. While it is clear federal courts have upheld the use of moratoriums, Michigan does **not** have any specific statutory authority granting the option for local governments to use moratoriums. I regularly hear municipal attorneys suggest local government in Michigan cannot place moratoriums on development, and other attorneys suggest to their municipal clients they can do so. Suffice it to say, the authority of moratoriums by Michigan municipalities is debatable.

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2005/040705/26902.pdf

---

Takings

A takings refresher

Court: Michigan Court of Appeals (Unpublished No. 247465)

Case Name: *Rochon v. Chippewa Twp.*

In relying on Troy Campus and concluding the relevant question was whether the zoning classification had precluded any use of the land for which it was reasonably adapted, the trial court applied an outdated and incorrect standard to determine whether the zoning ordinance at issue was a taking. The relevant case law was summarized in *K & K Construction, Inc v Department of Natural Resources*, 456 Mich 570; 575 NW2d 531 (1998) (*K&K*). Plaintiffs sought a variance for two parcels they owned totaling 2.24 acres, which were subject to a zoning ordinance requiring a minimum of 5 acres to build a house. The trial court should have examined the circumstances surrounding plaintiffs' ownership of surrounding property, totaling 12.31 acres, rather than simply the 2.24 acres at issue. In determining whether the zoning regulation as to the 2.24-acre parcels constituted a taking, plaintiffs' ownership of surrounding parcels, presently or in the past, might be relevant. Even assuming plaintiffs no longer owned the surrounding parcels, it was not clear when they were sold, particularly in relation to when the ordinance became effective. The parties' stipulated facts were insufficient to address the kind of fact question that had to be considered in deciding the taking issue in this case. The court reversed the trial court's order finding plaintiffs' property had been taken under the Fifth Amendment and remanded the case.

Opinion, in part, reads:

> "The relevant law here was recently summarized by our Supreme Court in *K & K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570; 575 NW2d 531 (1998), a unanimous decision. The Court stated that a land use regulation effectuates a taking "where the regulation denies an owner economically viable use of his land." *I*d. at 576. [1] Such a denial can be either (a) "a 'categorical' taking, where the owner is deprived of 'all economically beneficial or productive use of land'" or (b) "a taking recognized on the basis of the application of the traditional 'balancing test'" wherein the reviewing court must engage in an ad hoc analysis "centering on three factors: (1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations." *I*d. at 576-577 (citations omitted). This recitation of the applicable law has more recently been reiterated with approval in *Adams Outdoor Advertising v East Lansing (After Remand)*, 463 Mich 17, 23-24; 614 NW2d 634 (2000).
>
> (A taking can also occur where a regulation does not substantially advance a legitimate state interest, *i*d., but plaintiffs do not argue that the regulation at issue here fails to do so. Accordingly, there is nothing to defendant's argument that the trial court improperly failed to presume the ordinance validly advanced a legitimate state interest as it would have been required to do had this been the issue raised. *Bevan v Brandon Tw*p, 438 Mich 385, 398; 475 NW2d 37 (1991).)
>
> The *K & K* Court further made it clear that, for a categorical taking to exist, there must be a denial of *all* economically beneficial or productive use of the land at issue. *K &* K, *supra* at 586."

Full Text Opinion:

http://www.michbar.org/opinions/appeals/2004/090704/24399.pdf

Power of Eminent Domain

Condemnation of land through eminent domain can only be for a public use

Court: Michigan Supreme Court (471 Mich. 445; 684 N.W.2d 765; 2004 Mich.)

Case Name: *County of Wayne v. Hathcock*

Although the condemnation of defendants' properties was consistent with M.C.L. 213.23, the court held the proposed condemnations did not advance a "public use" as required by Const.1963, art. 10, § 2. Section 2 permits the exercise of the power of eminent domain only for a "public use." Wayne County attempted to use the power of eminent domain to condemn defendants' real properties for the construction of a 1,300-acre business and technology park to reinvigorate the struggling economy of southeastern Michigan. However, the court concluded Wayne County's intent to transfer the condemned properties to private parties in this manner was inconsistent with the common understanding of "public use" at the time the Michigan Constitution was ratified. The court held the *Poletown Neighborhood Council v. Detroit* (410 Mich 616; 304 NW2d 455 (1981)) analysis provided no legitimate support for these proposed condemnations, and was overruled. Further, the decision to overrule *Poletown* was given retroactive effect to apply to all pending cases in which a challenge to *Poletown* was raised and preserved. The judgment of the Court of Appeals was reversed and the case was remanded for entry of an order of summary disposition in defendants' favor.

Justice Weaver concurred with the majority's result and decision to overrule *Poletown*, but did so for her own reasons. She dissented from the majority's reliance on its recently created rule of constitutional interpretation that gives constitutional terms the meaning that those "versed" and "sophisticated in the law" would have given it at the time of the Constitution's ratification, and its application of the new rule to the facts of this case.

Justices Cavanagh and Kelly wrote separately because they believed the analysis offered by Justice Ryan in his dissent in *Poletown* offered the best rationale to explain why *Poletown* should be overruled. Further, they dissented from the majority's conclusion the decision should be applied retroactively and would have applied the decision prospectively only.

Full Text Opinion:
http://www.michbar.org/opinions/supreme/2004/073004/24048.pdf

Land Divisions & Condominiums

Parent parcel is as it existed on March 31, 1997 even if subsequently reconfigured

Court: Michigan Supreme Court (470 Mich. 95; 680 N.W.2d 381; 2004 Mich.)

Case Name: *Sotelo v. Township of Grant*

Since the division of the Sotelo's (plaintiffs') reconfigured parcel resulted in a number of divisions to the "parent" parcel exceeding the number of divisions allowed under Land Division Act §108, plaintiffs were required to comply with the Land Division Act's plating provisions and Grant Township (the defendant) was properly granted summary disposition in plaintiffs' suit to compel approval of the land divisions.

The Sotelos owned a 2.35-acre parcel adjacent to a 7.63-acre parcel owned by Filut. On July 15, 1999, Filut conveyed 3.25 acres of his parcel to the Sotelos, making their parcel 5.6 acres and the Filut parcel 4.38 acres. No division rights were transferred with the conveyance. By deeds dated the same day, the 4.38-acre Filut parcel was divided into four parcels. In deeds dated August 10, 1999, the 5.6-acre Sotelo parcel was also divided into four parcels. The reconfigured Sotelo parcel could not be divided into four parcels because it included a portion of the original Filut "parent" parcel, which had already reached its maximum potential divisions. No portion of the Filut "parent" parcel could be divided again until at least 10 years expired, without complying with the requirement to create a subdivision. The trial court properly considered the Filut and Sotelo "parent" parcels as they existed on March 31, 1997 (the effective date of the relevant statutory amendment). The Court of Appeals erred in reversing summary disposition for defendant. Reversed and the judgment of the trial court was reinstated.

Justices Cavanagh and Kelly would not have decided

the case by a per curiam opinion and would have instead granted leave to appeal.

Full Text Opinion:
http://www.michbar.org/opinions/home.html?/opinions/supreme/2004/060304/23302.pdf

Condominium development subject to local subdivision ordinance that requires compliance with a clear incorporation of zoning requirements

Court: Michigan Court of Appeals (Unpublished No. 245168)

Case Name: *Stanley Bldg. Co. v. City of St. Clair Shores*

The court upheld the judgment for defendant-city, rejecting plaintiffs' claims the trial court erred in affirming the city council's decision to deny approval of plaintiffs' condominium development project because the city lacked authority, there were no applicable ordinances, the existing ordinance was vague, and the site plan substantially conformed to any applicable standards. Giving due deference to the city council's expertise, the court declined to disturb the city's conclusion an increase in housing density constitutes a change in use triggering site plan review. The city planning consultant's report, stating site plan approval was required because the increased housing density on the two existing lots constituted a change in the nature or character of use, was competent, material, and substantial, and supported the city council's decision. Both Ahearn and Osius, on which plaintiffs relied, were distinguishable. The court could not read into the MCA's plain language a prohibition against the application of subdivision ordinances to condominium subdivisions. The court also concluded the zoning ordinance, as incorporated by the subdivision regulations, was not vague, and did not lack reasonable and objective standards. Affirmed.

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2004/072704/23992.pdf

Due Process, Equal Protection

Must grant permit when requirements of laws in effect on the application date (not subsequent laws) are met

Court: U.S. District Court Eastern District of Michigan (328 F. Supp. 2d 725; 2004 U.S. Dist.)

Case Name: *Lamar Adver. Co. v. Township of Elmira*

Since plaintiff satisfied all the requirements of the applicable laws in place when it applied for permission to erect the billboard at issue, defendant-township's refusal to permit plaintiff to go forward with construction of the billboard along a state highway on the basis of the township's subsequently enacted ordinance constituted an unlawful prior restraint of commercial speech. Plaintiff, as part of its outdoor advertising business, builds billboards on locations it leases or owns and then charges advertisers a fee for displaying commercial and noncommercial messages on its billboards. When plaintiff applied for permits to construct the billboard, only the Michigan Department of Transportation had jurisdiction to regulate the area where the billboard was to be located – the township had not yet enacted an ordinance under the Michigan Highway Advertising Act (MHAA). The court concluded it was plain from the undisputed facts plaintiff's application should have been granted under the rules in effect as of its application date and the township deprived plaintiff of its First Amendment rights by denying plaintiff a permit based on an improper interpretation of the zoning ordinance. The law in effect when plaintiff filed its applications did not disallow construction of a billboard at the location in question. Plaintiff was granted summary judgment.

Full Text Opinion:
http://www.michbar.org/opinions/district/2004/072604/24114.pdf

Without adopted rules/guidelines, can not enforce

Court: Michigan Supreme Court (471 Mich. 904; 688 N.W.2d 77; 2004 Mich.)

Case Name: *Castle Inv. Co. v. City of Detroit*

The court concluded[3] an examination of the ordinance in question led inescapably to the conclusion the certificate-of-approval provisions of ordinance 124-H, as amended, could not lawfully be enforced because the city council never approved the inspection guidelines. Therefore, there were no guidelines and without those guidelines, the defendant-city was unable to issue a certificate of approval. Consequently, the trial court erred in not enjoining enforcement of the certificate-of-approval provisions of the ordinance. While the trial court and the Court of Appeals

[3]In an order, the court granted reconsideration of its prior June 11, 2004 order in this case, reversed the judgment of the Court of Appeals (see e-Journal # 14345 in the 3/25/02 edition), and remanded the case to the Court of Appeals for further proceedings.

concluded defendant was entitled to summary disposition on the basis of laches, the court rejected this analysis, finding defendant did not meet the standard for summary disposition on this ground.

Full text opinion:
http://www.michbar.org/opinions/supreme/2004/102804/25058.pdf. (Overturned Appeals court opinion: http://www.michbar.org/opinions/appeals/2002/031902/14345.pdf).

Must exhaust administrative remedies before going to court
Court: Michigan Court of Appeals (Published After Release: 262 Mich. App. 379; 686 N.W.2d 16; 2004 Mich. App.)
Case Name: *Conlin v. Scio Twp*.

The trial court properly granted defendant's motion for summary disposition, holding plaintiffs' "as applied" challenge was **not ripe for judicial review because plaintiffs failed to exhaust their administrative remedies**. Plaintiffs commenced the action alleging the township's zoning ordinances, particularly the density restrictions, were unreasonable and arbitrary, contrary to the intent of the Land Division Act, and effectively resulted in condominiums being prohibited in the A-1 district in violation of the Condominium Act. Although plaintiffs apparently participated in an informal preapplication conference, as required of all major projects, it was undisputed a formal site plan was never submitted for preliminary or final approval. Plaintiffs also never applied for conditional land use approval of a Rural Open Space Development, or for a dimensional variance from the challenged density requirements, or for rezoning of their land to a classification that would allow developments at the density they desired. While the trial court erred in dismissing plaintiffs' facial challenge and the claim the ordinance was ultra vires on the basis of the finality requirement, since it was apparent these claims could not succeed, defendant was entitled to summary disposition. Affirmed.

Full Text Opinion:
http://www.michbar.org/opinions/home.html?/opinions/appeals/2004/061004/23403.pdf

Must exhaust administrative remedies before going to court II
Court: Michigan Court of Appeals (Unpublished No. 247228)
Case Name: *Wolters Realty, Ltd. v. Saugatuck Twp.*

The trial court erred in holding defendant-township's ordinance, as applied to plaintiff's parcel, was unreasonable and the trial court's order enjoining defendants from interfering with the development of a travel plaza plaintiff planned to build on property it owned within the township was reversed. Plaintiff failed to establish that a final decision was made regarding the rezoning of the particular parcel, and as such, the issue was not ripe for adjudication. Defendants argued the trial court did not have subject matter jurisdiction to hear plaintiff's "as applied" challenge to the township's zoning ordinance, and in addition to appealing the denial of the special use application, plaintiff was also required to seek a variance from the township zoning board of appeals (ZBA) to satisfy the requirements of finality. It was undisputed plaintiff never sought a variance from defendants. Further, plaintiff's appeal of the planning commission's decision to the ZBA related only to the planning commission's decision to deny the special use application regarding the gas station/convenience store proposed use. Reversed.

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2004/080304/24063.pdf

Due process and equal protection claims can go to court before all administrative remedies are exhausted
Court: U.S. District Court Eastern District of Michigan (356 F. Supp. 2d 770; 2005 U.S. Dist.)
Case Name: *Neuenfeldt v. Williams Twp.*

The court denied the defendant-township's motion to dismiss and ordered plaintiff to amend his complaint, concluding plaintiff's claims were not for regulatory taking and unripe, but arose under the Due Process and Equal Protection Clauses and were ripe for adjudication. Plaintiff alleged the defendant's officials treated him unfairly when they rejected his proposed plat plan for a subdivision development and instead required the inclusion of two "stub streets" as a condition of approval. He contended defendant's requirements for his proposed development were more exacting than those for other, similarly situated developers, including the township engineer and a planning

commission member's brother. Not all claims against local governments relating to land use are treated as takings claims. Some claims become ripe upon the occurrence of the offending event without the requirement the injured landowner seek redress in state administrative or judicial proceedings. The essence of plaintiff's claim was he was subjected to unequal treatment when defendant advanced the commercial interests of other, private individuals at his expense. He sought a variance, received "half-a-loaf," and sued for damages because he believed he was the victim of unequal treatment and arbitrary application of the stub street ordinance.

Full Text Opinion:
http://www.michbar.org/opinions/district/2005/020905/26178.pdf

Any person affected by a zoning ordinance may appeal to court, not just a person affected by a zoning board of appeal decision

Court: Michigan Court of Appeals (265 Mich. App. 88; 693 N.W.2d 170; 2005 Mich. App.)
Case Name: *Polkton Charter Twp. v. Pellegrom*

Holding the judicial appeal provision of the Township Zoning Act (TZA) allows for circuit court appeal from a zoning board of appeals (ZBA) denial of a special land use permit, the court upheld the circuit court order reversing the decision by the plaintiff-township's ZBA and requiring the ZBA to issue defendant a special land use permit to create an outdoor pond. The township argued the ZBA's decision was not reviewable under M.C.L. 125.293a because it was not derived from an appeal or a variance request as described in "section 23," M.C.L. 125.293. The township contended since M.C.L. 125.293a specifically referenced M.C.L. 125.293 and M.C.L. 125.293 only governs appeals to a ZBA and decisions on variances, M.C.L. 125.293a only confers a right of appeal to the circuit court from decisions by a ZBA on appeal or on certain variance applications. The court disagreed, concluding plaintiff's argument was contrary to the statute's plain language. The use of the word "however" in the second sentence of M.C.L. 125.293a supported that "in spite of" the limiting language of the first sentence, a person affected by a zoning ordinance may appeal a ZBA decision to the circuit court, not just a person affected by a decision made by a ZBA pursuant to section 23. The circuit court had jurisdiction under MCL 125.293a to review defendant's appeal from the adverse ZBA decision because he had an interest affected by the zoning ordinance. Affirmed.

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2005/020305/26042.pdf

Doctrine of claim preclusion

Court: U.S. District Court Eastern District of Michigan (Case Number 03-CV-10047-BC; 2004 U.S. Dist.)
Case Name: *Hendrix v. Roscommon Twp*.

The court found plaintiffs' action was barred by the doctrine of claim preclusion, and granted defendants' motion for summary judgment. Plaintiffs filed suit in federal court pursuant to § 1983 alleging defendants' actions in seeking to enforce a local ordinance to ban the operation of their automobile salvage yard violated their rights under the Equal Protection and Due Process Clauses. Defendants previously sued plaintiffs in state court contending they were operating a business in violation of an ordinance regulating the operation of junk and automobile salvage yards. Plaintiffs filed a counterclaim in state court and obtained permission to add the theories they raised here, but they failed to file an amended pleading after the state court granted them leave. The state court action proceeded to judgment, which defendants now contend operates as a bar in this case. Plaintiffs' claims in this court were nearly identical to those they sought to bring in their state court second-amended answer, counterclaims, and cross-claims. Defendants asserted MCR 2.203 applied because plaintiffs' motion to amend their counterclaim to state their federal constitutional claims were not denied – they failed to comply with state procedure by timely amending their pleadings The court held claim preclusion and the operation of the state court judgment applied here barring plaintiffs' claims.

Full Text Opinion:
http://www.michbar.org/opinions/home.html?/opinions/district/2004/051804/23292.pdf

Cannot have zoning referendum on zoning change resulting from a consent judgement

Court: Michigan Court of Appeals (Unpublished No. 246641, No. 248203, No. 248801)
Case Name: *Petoskey Inv. Group, LLC v. Bear Creek Twp.*

The trial court erred by denying the motion to enforce the consent judgment and allowing a referendum to proceed

regarding the zoning of the parcel addressed in the consent judgment. These consolidated cases arose from a dispute between the terms of a consent judgment altering the zoning of a parcel of property to allow for mixed-use development, and citizen action to preclude any change in zoning. The *Green Oak Twp v Munzel* (255 Mich. App. 235; 661 N.W.2d 243 (2003)) court concluded MCL 125.282 provides for a right of referendum as applied to a zoning ordinance, and a consent judgment does not comport with the requirements of a zoning ordinance or amendment as contemplated by the statute. A new zoning ordinance was not at issue. The court noted the consent judgment provided (1) the agreement was approved in accordance with applicable law, (2) the PUD development was deemed approved, (3) the terms and limitations on the type of development authorized, and (4) where there was any conflict in zoning, it would be resolved in favor of the consent judgment. Consequently, the attempt to distinguish the case from *Green Oak* was without merit. Additionally, the court agreed with the *Green Oak* panel the terms of the consent judgment could readily be construed as a variance. Reversed.

Full text of opinion:
http://www.michbar.org/opinions/appeals/2004/120204/25395.pdf

AND

Court: Michigan Court of Appeals (Unpublished No. 248311)

Case Name: *LJS P'ship v. Fenton Charter Twp.*

The trial court erred by granting intervening defendant-FTRA's motion to set aside the consent judgment between defendant-Fenton Township and plaintiff. Plaintiff requested the township rezone property owned by plaintiff from AG (agricultural) to RMH (residential manufactured housing). After plaintiff's rezoning request and request for a use variance were denied, plaintiff challenged the constitutionality of the AG zoning classification as applied to its property. The parties ultimately reached an agreement on the terms of a consent judgment, which was subsequently entered. The township later approved petitions for referendum seeking a vote as to whether the township should proceed with the consent judgment or continue with the litigation. Plaintiff filed a motion to enforce the consent judgment and to enjoin the referendum, asserting *Green Oak Twp v Munzel* (255 Mich. App. 235; 661 N.W.2d 243 (2003)) held a consent judgment in a zoning dispute is not subject to a referendum under M.C.L. 125.282. The facts in *Green Oak* were similar to those in this case. The holding in *Green Oak* was not premised on the presence or absence of any particular language in the consent judgment, but rather on the fact a consent judgment does not meet the particularized definition of, and requirements for, a zoning ordinance as provided by the Legislature in the Township Rural Zoning Act (TRZA). The trial court erred in finding the consent judgment constituted a rezoning of the parcel under the TRZA and thereby invoked the right of referendum, and by setting aside the consent judgment. Reversed.

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2004/122804/25655.pdf

---

Conflict of Interest, Incompatable Office, Ethics

<u>Membership, at the same time, on a township and county planning commission is okay</u>

Attorney General Opinion #7161 (canceling out A.G. #6837 (February 23, 1995))

A September 25, 2004 Michigan Attorney General opinion has now canceled out former opinions and now says that a member of a county planning commission and a township planning commission can be a member of both at the same time, without violating the Incomparable Offices Act.

The change is a result of the coordinated planning amendments to the three planning enabling acts which (1) changed the county planning review of township plans from "approval required" to "advisory" and coordination and

Parts of the A.G. opinion reads:

> "Because the county planning commission now has only an advisory role in reviewing township plans, there is no longer a supervisory/subordinate relationship present."

For a copy of the opinion:
http://www.ag.state.mi.us/opinion/datafiles/2000s/op10237.htm.

Signs: Billboards, Freedom of Speech

Two sign limit on political signs not likely a valid regulation of time, place, or manner; rather it is a content-based regulation

Court: U.S. District Court Eastern District of Michigan (341 F. Supp. 2d 727; 2004 U.S. Dist.)

Case Name: *Fehribach v. City of Troy*

Concluding the defendant-city's political yard sign ordinance limiting the number of such signs to two was not a valid time, place, or manner restriction, the court granted plaintiff a preliminary injunction enjoining defendant, its officers, agents, etc. from enforcing the ordinance until further notice. The court determined plaintiff had a strong likelihood of success on the merits because the two-sign ordinance did not meet the requirements of a valid time, place, or manner restriction. Plaintiff was likely to succeed in establishing the ordinance was content-based since it applied only to political signs. Whether plaintiff could display a third sign depended on whether the content of the third sign was political. While the ordinance was viewpoint-neutral, it was not content-neutral. It was also likely the court would find the ordinance did not leave open alternative means for communicating the desired message. Further, it was unlikely the ordinance would pass strict scrutiny and held to be a valid content-based speech restriction. The court also held plaintiff would suffer irreparable injury without the preliminary injunction, the preliminary injunction would not cause substantial harm to others, and the public interest would be served by issuing the preliminary injunction.

Full text opinion:
http://www.michbar.org/opinions/district/2004/101804/24928.pdf

Sign size regulations are valid; and may not need justify the size regulation

Court: U.S. Court of Appeals Sixth Circuit (398 F.3d 814; 2005 U.S. App.)

Case Name: *Prime Media, Inc. v. City of Brentwood*

Concluding the defendant-city's ordinance restricting the height and size of billboards was a content-neutral restriction on the time, place, and manner of speech and the city had satisfied the intermediate scrutiny applicable to such regulations, the court reversed the district court's ruling invalidating the ordinance. The court found the city's height and size restrictions satisfied the tailoring requirements for a content-neutral regulation of time, place, and manner of speech and the fit between the city's means and ends was a reasonable one. The question was not whether a municipality can "explain" why a 120-square-foot limitation detracts more from the city's aesthetics than signs with smaller sign faces – it is whether the regulation is substantially broader than necessary to protect the city's interest in eliminating visual clutter and advancing traffic safety. The city satisfied this test. To ask a city to justify a size restriction of 120-square feet over, for example, 200-square feet or 300-square feet would impose great costs on local governments and do little to improve the court's ability to review the law. Reversed and remanded.

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2005/022405/26363.pdf

Sign size limitations are valid, even if different for multi-tenant buildings

Court: Michigan Court of Appeals (263 Mich. App. 194; 687 N.W.2d 861; 2004 Mich. App.)

Case Name: *Norman Corp. v. City of E. Tawas*

The trial court erred by reversing the East Tawas Zoning Board of Appeals' (ZBA) decision denying plaintiffs a sign variance, holding defendant's sign ordinance unconstitutional and authorizing plaintiffs to erect the sign for which the variance was requested. The court held the defendant-city's ordinance was constitutional and its sign-size limitation was valid. Defendant's planning commission denied plaintiffs' sign-permit request because it found the proposed signs would exceed the number and size permitted under the city's sign ordinance. The ZBA denied the variance, holding plaintiffs' problem was self-created. The court further held Art Van to be an incorrect statement of law and reversed its holding in lieu of Muskegon Area Rental Ass'n. Like Art Van, this case presented a legislative maximum sign limitation that effectively distinguished between single- and multi-tenant buildings and the businesses they house. The fact plaintiffs were treated differently then other businesses was not a predicate for finding the ordinance unconstitutional. This was a legitimate government interest. Limiting the size of signs to dissipate visual clutter was reasonably related to protecting the general welfare because visual clutter

detracts from the community's aesthetic value and may create dangerous distractions to passers-by. Reversed in part and affirmed in part.

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2004/080304/24055.pdf

Context-based sign regulation not upheld

Court: Michigan Court of Appeals (262 Mich. App. 716; 686 N.W.2d 815; 2004 Mich. App.)

Case Name: *Outdoor Sys., Inc. v. City of Clawson*

Because it advanced no government interest, City of Clawson's ordinance's prohibition of readily changeable signs violated plaintiff's First Amendment right to free speech. Plaintiff argued defendant's prohibition of billboards, meaning readily changeable signs unrelated to the principal use of the premises where they are located, was an unconstitutional violation of plaintiff's freedom of speech. Plaintiff, who engages in outdoor advertising, sought a preliminary injunction, alleging defendant's total prohibition of the billboards violated free speech. The court held to the extent the ordinance otherwise allows large outdoor signs, within certain size and height limitations, billboard advertisers like plaintiff must be allowed to procure, build, and lease locations even though their signage is readily changeable. Summary disposition for defendant was reversed and the case was remanded.

Full Text Opinion:
http://www.michbar.org/opinions/home.html?/opinions/appeals/2004/070604/23803.pdf

Adult book store regulation: cannot severely limit sites to locate, broadly define

Court: U.S. Court of Appeals Sixth Circuit (391 F.3d 783; 2004 U.S. App.)

Case Name: *Executive Arts Studio, Inc. v. City of Grand Rapids*

Concluding the Younger abstention doctrine, the Rooker-Feldman doctrine, and claim preclusion did not prevent the district court from taking jurisdiction over the case, the court held the district court properly granted summary judgment to plaintiff, an adult bookshop, because defendant-city's ordinances 77-31 and 01-07 failed to narrowly tailor the definition of adult bookstore, leading to the unconstitutional restriction of plaintiff to disseminate its First Amendment protected material. Plaintiff applied for a variance from the city's zoning ordinance regulating adult businesses. City Ordinance 77-31 added section 5.284(2) defining what constituted an adult bookstore. These stores, and other regulated businesses such as pool halls and pawn shops, were prohibited from establishing themselves within 1,000 feet of any two other regulated uses or within 500 feet of any area zoned for residential use. Subsequently, the city adopted Ordinance 01-07, which amended the definition of adult bookstore to include the sale, rental, trade, exchange or display of books, magazines, video tapes, video discs, and other more recent additions to the adult entertainment industry's stock in trade. The city's ZBA denied plaintiff's variance request. The court held Ordinance 77-31 was not narrowly tailored when its language swept up mainstream bookstores such as Walden's and Borders, and it was evident the ordinance controlled the dissemination of objectionable reading material, rather than the effects on a neighborhood from businesses disseminating and specializing in such material. Further, the court held the ordinance was fatally flawed and did not pass constitutional scrutiny when applied where it severely limited the number of sites where plaintiff could carry on its First Amendment protected activities in the city. Affirmed.

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2004/121004/25458.pdf

---

Immunity

Building inspector

Court: Michigan Supreme Court (SC: 126901, March 7, 2005; _ Mich. _; _ N.W.2d _; 2005 Mich)

Case Name: *Van Nguyen v. Professional Code Inspections of Mich., Inc.*

In an order in lieu of granting leave to appeal, the court reversed the portion of the Court of Appeals opinion remanding the matter for trial as to defendant-Johnson. The court held no reasonable juror could conclude Johnson's conduct amounted to reckless conduct showing a substantial lack of concern whether damage or injury would result and thus, plaintiff failed to demonstrate Johnson's conduct constituted gross negligence under M.C.L. 691.1407(2)(c). The court concluded Johnson's actions in issuing a stop work order were based on his duty as an

assistant city manager to enforce a presumptively valid city ordinance and an approved variance to the ordinance. The fact it was subsequently determined the language of the approved minutes of the Zoning Board of Appeals meeting at which the variance was approved was erroneous did not strip Johnson of immunity. Further, his conduct did not meet the test of being the proximate cause for plaintiff's alleged damages. In all other respects, leave to appeal was denied.

The entire opinion:

> "On order of the Court, the application for leave to appeal the July 15, 2004 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we REVERSE that portion of the Court of Appeals opinion remanding this matter for trial as to defendant Dan Johnson. No reasonable juror could conclude that defendant's conduct amounted to reckless conduct showing a substantial lack of concern whether damage or injury would result. *Stanton v City of Battle Creek*, 466 Mich 611, 620-621 (2002); *Jackson v Saginaw Co*, 458 Mich 141, 146 (1998). Thus, plaintiff has failed to demonstrate that defendant's conduct constitutes gross negligence under MCL 691.1407(2)(c). Defendant's actions in issuing a stop work order were based on his duty as an assistant city manager to enforce a presumptively valid city ordinance and an approved variance to that ordinance. That it was later determined that the language of the approved minutes of the Zoning Board of Appeals meeting at which the variance was approved was erroneous does not strip defendant of immunity. Moreover defendant's conduct does not meet the test of being the proximate cause for plaintiff's alleged damages. See *Robinson v Detroit*, 462 Mich 439 (2000). In all other respects, leave to appeal is DENIED."

Full Text Opinion:

http://www.michbar.org/opinions/supreme/2005/040705/26931.pdf

Intergovernmental Cooperation

Can financially help neighboring government in a lawsuit

Court: Michigan Court of Appeals (No. 248974, March 31, 2005; _ Mich. App. _; _ N.W.2d _; 2005 Mich. App.)
Case Name: *Hess v. Cannon Twp*.

The trial court did not err in granting the defendants-townships' motion for summary disposition because the money Cannon Township gave to Grattan Township was lawful based on MCL 41.2(1)(b) as a contract necessary and convenient for the exercise of Cannon Township's corporate powers. The case concerned whether Cannon Township may disperse or contribute funds to help defray or otherwise share the legal costs incurred by Grattan Township, a neighboring township, in a land use controversy over a manufactured housing community both townships opposed. The plaintiffs-taxpayers residing in Cannon Township claimed the expenditure of township funds was unlawful. Cannon Township's board adopted formal resolutions regarding the adverse impacts the mobile home park would have on both townships and the townships executed an agreement providing for Cannon Township to contribute $90,000 to Grattan Township to assist with legal fees incurred in defending the mobile home park developer's lawsuits. The court concluded the liberally construed, implied powers provided to the townships by the Michigan Constitution and the statutory authority of townships "to make contracts necessary and convenient for the exercise of their corporate powers" validated the agreement between the townships. Cannon Township's determination to help defray legal expenses incurred by Grattan Township caused by the land use issue on their township border opposed by both units of government was a proper disbursement of township funds by Cannon Township. Further, the registered electors of Cannon Township did not have the right to vote on the disbursement. Affirmed.

To quote from the court's decision:

> "In essence, plaintiffs argue that the powers of a township are sparse, able to fit in a snacksize Ziploc bag. Plaintiffs are incorrect. "Townships generally have the power to buy, hold, and sell property; to levy and collect taxes; to borrow money; to make contracts; to exercise police power; to condemn private property for public

purposes; to receive gifts of real and personal property for public purposes; to use funds from government grants to promote local business; and to sue and be sued." Michigan Civil Jurisprudence, Townships, § 84, pp 355-356. Townships are granted the power to adopt ordinances and regulations under MCL 41.181 regarding the public health, safety, and general welfare of its persons and property. Further, MCL 41.806 gives townships broad powers to establish and maintain police and fire departments, including the power to contract with the legislative bodies of neighboring municipalities to give or receive police and fire services."

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2005/033105/26854.pdf

---

Other Unpublished Cases

(generally unpublished means there was not any new case law established, but presented here as reminders of some legal principles)

If ordinance is not enforced in the past

Court: Michigan Court of Appeals (Unpublished: No. 244858, No. 244960; 2004 Mich. App.)

Case Name: *Sanilac County Parks Comm'n v. Lexington Twp.*

The trial court erred by barring defendant from enforcing a zoning ordinance on the grounds of laches and equitable estoppel. Plaintiff did not establish the requisite elements for equitable estoppel or show extraordinary circumstances justified preventing defendant from enforcing its zoning ordinances. Plaintiff claimed that because defendant failed to enforce its ordinance in the past, specifically, when plaintiff unlawfully established camping at the park since at least 1993, plaintiff was justified in assuming camping was permissible. However, when a plaintiff engages in acts that are unauthorized and in express contravention of ordinance provisions, the plaintiff acquires no vested right to use property for a purpose forbidden by law. The evidence showed defendant's ordinances have always prohibited the operation of a campground in Lexington Park. As to plaintiff's laches argument, defendant's delay in enforcing its ordinance inured to the benefit of plaintiff. Reversed and remanded.

Full Text Opinion:
http://www.michbar.org/opinions/home.html?/opinions/appeals/2004/062904/23737.pdf

Importance of fact-finding

Court: Michigan Court of Appeals (Unpublished No. 248702)

Case Name: *Salamey v. Dexter Twp. Zoning Bd. of Appeals*

Based on the plain language of M.C.L. 324.21109 and the ordinance, the court rejected plaintiff's argument the ordinance was preempted because it was in direct conflict with Natural Resources and Environmental Protection Act (NREPA), and the court further held NREPA did not preempt the ordinance by virtue of completely occupying the field the ordinance attempted to regulate. Plaintiff appealed from the trial court's order affirming the zoning board of appeals' (ZBA) decision denying plaintiff's request for a conditional use permit to operate a gas station in an area zoned a "General Commercial District." Plaintiff contended NREPA preempted local regulation of the installation and use of underground storage tanks (UST) systems, and the ZBA's decision was not supported by competent, material, and substantial evidence. The court concluded M.C.L. 324.21109 neither expressly permits nor prohibits operation of a gas station in a general commercial district and the ordinance did not strictly regulate USTs – rather, it promulgated rules for the operation of automobile service stations. NREPA also did not preempt municipal regulation under the facts presented when the record showed various factors other than the installation of the UST system were legitimate reasons for denial of the permit. In addition, the court held the record demonstrated there was competent, material, and substantial evidence supporting the denial of the permit. Affirmed.

Quoting; on issue of sufficient finding of facts to support a decision:

> "However, the decision of a zoning board of appeals should be affirmed unless it is contrary to law, based on improper procedure, not supported by competent, material and substantial evidence on the record, or an abuse of discretion. *Reenders v Parke*r, 217 Mich App 373, 378; 551 NW2d 474 (1996).
>
> "Our careful review of the record reveals

that there was competent, material and substantial evidence presented that supports defendant's decision to deny the permit. Plaintiff's environmental consultant, Strata Environmental Services, as well as an environmental consulting firm that the planning commission hired, J & L Consulting, issued reports explaining the fragile environment, its permeable soil, its character as a groundwater recharge area close to the Huron River and wetlands, all resulted in a risk that fuel spills and leaks could contaminate the groundwater It is also undisputed that several local residents obtain their drinking water from the groundwater through private wells Gary Dannemiller, a certified storage tank professional, a certified stormwater manager, and a geologist, explained to the planning commission that, if there is a release at the proposed site, the impacted groundwater migrates directly to the Hudson River or it could enter a number of wells in the area. There was also evidence presented regarding the possibility of MTBE, a highly soluble fuel additive known for causing groundwater contamination, entering the fuel supply system and contaminating the soil and groundwater.

"There was also a great deal of evidence presented regarding the inefficacy of the proposed Bentomat liner that is contrary to plaintiff's assertion on appeal that it is undisputed that a fuel spill or leak would remain contained for a period of two years. Further, there is evidence in the record regarding concerns about the effectiveness of monitors used to detect contamination. In sum, there were a number of questions regarding costs, containment of potential spills and leaks, and the effectiveness of the Bentomat liner under a gas station that all contributed to the decision to deny the permit.

"Further, a traffic impact study that plaintiff obtained showed that the project would increase noise and road congestion. It also showed that the automobile service center would create nuisance vehicle headlight glare on abutting residential properties during both morning and evening hours.

"Under section 6.05(O)(1) of the township zoning ordinance requires the applicant to demonstrate that:

'[R]easonable precautions will be made to prevent hazardous materials from entering the environment including:

'1. Sites at which hazardous substances are stored, used or generated shall be designed to prevent spills and discharges to the air, the surface of the ground, ground water, lakes, streams, rivers or wetlands.' [Dexter Township Zoning Ordinance, section 6.05(O)(1).]

"According to defendant, plaintiff did not submit "clear evidence that waste . . . will be confined, purified, and treated . . . to prevent pollution of air, water and soil resources." Thus, plaintiff did not provide the necessary reassurance to convince the ZBA that spills would be contained, as required under the ordinance. Because defendant's decision to deny the conditional use permit was based on competent, material and substantial evidence on the record, we must affirm the ZBA's decision."

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2004/120204/25398.pdf

<u>Deadline to file appeal is 21 days from when minutes that report the decision are approved</u>

Court: Michigan Court of Appeals (Unpublished No 247284)

Case Name: *Eckler v. Howard Twp. Bd. of Trustees*

The trial court erred in finding plaintiffs did not file their appeal of right within the 21-day filing period set forth in MCR 7.101(B)(1). The trial court held plaintiffs did not file their appeal within 21 days of the zoning administrator's reduction to writing of defendant township board's approval of the conditional use permit and therefore, it lacked jurisdiction. The trial court distinguished this case from Davenport on the basis there was no other writing that could constitute an order in that case, and here the zoning administrator's notification letter to defendant-Moose Lake LLC served as the entry of an order. However, the trial court's interpretation was not supported by law. Notice of a successful outcome to an applicant and the entry of the township board's decision into the public record are two different events, and it is the latter that triggers the appeal period. The court held the date of the township board's certified meeting minutes constituted the date of entry of the order and plaintiffs' claim of appeal was timely. Reversed

and remanded.

Full Text Opinion:
http://www.michbar.org/opinions/home.html?/opinions/appeals/2004/071504/23878.pdf

Do what the court tells you to do

Court: Michigan Court of Appeals (Unpublished No. 246393)

Case Name: *Elmwood Citizens For Sensible Growth v. Charter Twp. of Elmwood*

The trial court properly granted plaintiffs $16,701.77 in sanctions to be paid by defendant-Charter Township of Elmwood in connection with lawsuits filed against the township, its Board of Trustees, and its Zoning Board of Trustees over application of the township's zoning ordinance. Defendants argued because the trial court declined to hold defendants in contempt, plaintiffs were not the prevailing party "on the entire record" as required by MCL 600.2591. Furthermore, defendants contended because they never filed an answer or argued plaintiffs' first claim, the trial court could not have found their defense frivolous as also required by MCL 600.2591. While the trial court awarded the sanctions pursuant to MCL 600.2591, it also invoked the doctrine of inherent power as an alternative basis for the award. The court held it did not need to address whether plaintiffs were the "prevailing party on the entire record" or the merits of defendants' legal position, since it was clear from the record defendant willfully disregarded the court's order to apply the zoning ordinance as written or undertake the statutory amendment process. The court found no abuse of discretion in the trial court's exercise of its inherent power here. Affirmed.

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2004/091604/24507.pdf

Home Occupations, what is an "employee"

Court: Michigan Court of Appeals (Unpublished No. 249688)

Case Name: *Windsor Charter Twp. v. Remsing*

The court affirmed in part and reversed in part the trial court's grant of summary disposition in favor of plaintiff. The trial court found defendant violated plaintiff's zoning ordinance by allowing nonoccupant sales agents to work from his home-based real estate company. Defendant argued the real estate agents were not employees, they were independent contractors, and the wording of the ordinance showed the township recognized this distinction. The ordinance permitted employees as long as they also occupy the dwelling. For purposes of enforcing the township's ordinance, the court concluded the only reasonable way to interpret and apply the term "employee" was to deem any person who was a non-occupant working out of a home in the area as a "employee" within the meaning of the ordinance regardless of his "legally" defined position of employee or independent contractor. That defendant employed a non-occupant of his dwelling who worked in his dwelling was all the township needed to prove, and the worker fell into that category.

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2004/102804/25041.pdf

---

MSU Extension Land Use Team Contacts:

Pat Norris, MSU Ag Economics (norrisp@msu.edu; (517)353-7856)
Kurt H. Schindler, MSU Extension, Wexford (schindl9@msu.edu; (231)779-9480)

---

institution.

[June 1, 2006 (3:47pm); C:\Documents and Settings\Kurt\My Documents\wp\LU Court Cases\SelectedPlan&ZoneDecisions2004-05.wpd]