Selected Planning and Zoning Decisions: 2010
May 2009-April 2010

Kurt H. Schindler, AICP, MSU Extension Regional Land Use Educator
schindl9@msu.edu; (231)779-9480x2.

This public policy brief summarizes the important state and federal court cases and Attorney General Opinions issued between May 1, 2009 and April 30, 2010.

Table of Contents

Published Cases. . . . 2
- Takings. . . . 2
- Due Process and Equal Protection. . . . 3
- Variances (use, non-use). . . . 4
- Nonconforming Uses. . . . 4
- Open Meetings Act, Freedom of Information Act. . . . 5
- Signs: Billboards, Freedom of Speech. . . . 6
- Public Water and Sewer. . . . 7
- Riparian, Littoral, Water's Edge, Great Lakes Shoreline, wetlands, water diversion. . . . 8
- Planning Commission, Plans. . . . 8
- Other Published Cases. . . . 9

Unpublished Cases. . . . 10
- Restrictions on Zoning Authority. . . . 10
- Takings. . . . 13
- Land Divisions & Condominiums. . . . 15
- Substantive Due Process. . . . 16
- Due Process and Equal Protection. . . . 19
- Variances (use, non-use). . . . 19
- Zoning Amendment: Voter Referendum. . . . 20
- Conditional Zoning Amendment. . . . 22
- Court, Ripeness for Court's Jurisdiction, Aggrieved Party. . . . 22
- Open Meetings Act, Freedom of Information Act. . . . 25
- Zoning Administrator/Inspector, Immunity, and Enforcement Issues. . . . 25
- Riparian, Littoral, Water's Edge, Great Lakes Shoreline, wetlands, water diversion. . . . 26
- Other Unpublished Cases. . . . 28

Glossary. . . . 29

Takings

Self-imposed Hardship Rule in Zoning Takings

Court: Michigan Supreme Court (483 Mich. 1023; 765 N.W.2d 343; 2009)

Case Name: *Wolverine Commerce, L.L.C. v. Pittsfield Charter Twp.*

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

(Note: This case was granted a motion to in part reconsider, November 29, 2009, and remanded to the Court of Appeals. (485 Mich. 969; 774 N.W.2d 690; 2009 Mich.))

In an order in lieu of granting leave to appeal, the Michigan Supreme Court reversed the judgment of the Court of Appeals (See page 18 of *Selected Planning and Zoning Decisions: 2009* (May 2008-April 2009)) and reinstated the trial court's judgment. The Supreme Court held the Court of Appeals erred in failing to give due weight to the trial court's findings (which were not clearly erroneous) and in precluding relief on the basis of the "self-imposed hardship" rule.

The plaintiff-Wolverine Commerce, L.L.C. sought to have the township's master plan and the zoning ordinance which changed the legal status of the plaintiff's property. Very little change was made to the physical property. The plan and zoning changes (to industrial) were the direct efforts of plaintiff and plaintiff's predecessor in title. Later the plaintiff contended the land was not suited for industrial land use. The township did not cause the property to become unsuitable for the uses for which it was zoned (industrial), that was done at the plaintiff's request.

The self-imposed hardship rule applies to preclude relief in taking claims asserted by a property owner who has physically altered or subdivided the land rendering it unfit for the uses for which it is zoned, not to cases where the legal status of the property has been altered. A "plaintiff who purchases property with knowledge of existing zoning regulations takes the property along with the seller's legal right to challenge those regulations." There was no legal precedent for extending the self-imposed hardship rule

"to prevent a plaintiff who personally sought to conform the property's zoning classification to the municipality's master plan in the first instance from later seeking, in good faith, to rezone the property to another classification to allow a different use."

VOTING TO GRANT LEAVE TO APPEAL - MARKMAN

Justice Markman would grant leave to appeal to consider the Court of Appeals' application of the "self-created hardship" doctrine. (Source: State Bar of Michigan *e-Journal* Number: 42919, June 8, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/supreme/2009/052909/42919.pdf

Takings Due to City Delay Implementing Pud Agreement

Court: Michigan Court of Appeals (___ Mich. App. ___; ___ N.W.2d ___; 2010 (Published No. 288920, April 27, 2010))

Case Name: *Chelsea Inv. Group, LLC v. City of Chelsea*

Concluding, *inter alia*, the trial court properly found the defendant-City of Chelsea breached the Planned Unit Development (PUD) Agreement by not timely providing the plaintiff-Chelsea Investment Group (CIG) (and Pulte Land Company) access to water for the development. The damages CIG requested were not too speculative, CIG was not entitled to damages as to the lost profits on Pulte purchase agreement phase three. The trial court erred by calculating interest at six-month intervals on July 1 and January 1, which was inconsistent with M.C.L. 600.6013(8), the trial court properly dismissed CIG's taking claims, and the trial court properly dismissed defendant-Michael Steklac (city manager) where his conduct was not grossly negligent and the claim against him was barred by governmental immunity. The Appeals Court affirmed in part, but vacated as to the trial court's calculation of interest, and remanded.

CIG acquired 157 acres of undeveloped real property by land contract located in Chelsea, for which it paid $5,000,000. CIG then filed a petition to rezone the property as a PUD, which the City approved contingent upon CIG meeting all provisions in two city resolutions. The development would contain 352 single-family condos. Under the PUD Agreement, *inter*

alia, the city was to provide CIG with access to water for the development in a timely fashion.

CIG made an agreement with Pulte for the construction of the residential units and it bought the home sites for $23,000 per lot. Pulte was to buy the lots and build the homes in three phases. Its purchase of the sites was conditioned on governmental approval for each phase.

Eventually, the process ran into a snag when the City decided there was not sufficient water capacity for the project and long delays ensued causing delays for the necessary governmental approvals permitting Pulte to proceed with the project. Pulte finally exercised its option, terminated its contract with CIG, and requested full refund of its $250,000 deposit.

Later, plaintiff-CIG sued the City and Steklac alleging breach of the PUD Agreement, the City's actions constituted an unlawful taking, and alleging Steklac was grossly negligent. After the bench trial, the trial court adopted CIG's findings of fact and conclusions of law, except as to the takings claim, held plaintiff had established a breach of the PUD Agreement, held its damages were limited to Pulte phase two, and awarded plaintiff costs, attorney fees, and interest. The court affirmed as to the various issues, but remanded for a recalculation of the interest on the CIG's damages. (Source: State Bar of Michigan *e-Journal* Number: 45643, April 29, 2010).

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2010/042710/45643.pdf

Due Process and Equal Protection

PUD approval by Township Board after Planning Commission Recommendation

Court: Michigan Court of Appeals 284 Mich. App. 50; 771 N.W.2d 453; 2009)

Case Name: *Hughes v. Township of Almena*

The court held the Zoning Board of Appeals' (ZBA) decision to deny approval of the Planned unit development (PUD) was supported by competent, material, and substantial evidence on the record and the trial court erred by, *inter alia*, reversing the respondent-township's ZBA's decision to uphold the township board's denial of petitioners' (the Hughes) preliminary site plan for a PUD, reversing the township board's decision to deny petitioners' preliminary site plan, and approving their preliminary site plan. The trial court erred in holding the ZBA's decision was not authorized by law or based on proper procedure because the zoning ordinance's provisions regarding review and approval of a PUD were in direct conflict with the Township Zoning Act's[1] review and approval process.

The Hughes submitted a preliminary site plan for a proposed PUD, which the township board unanimously denied. Article 14 of the township's zoning ordinance authorized PUDs and set forth the application procedures for a PUD. The court held the ordinance validly placed final responsibility for the review and approval of PUDs in the township board pursuant to MCL 125.286c, although preliminary steps took place before the zoning administrator and planning commission. The ordinance stated the township board

> "shall review the application and site plan . . . and shall approve, approve with conditions, deny, or table for future consideration, the application and site plan."

The ordinance further stated the planning commission only makes a "recommendation" to the township board, the entity which then takes "final action." There was no binding approval of a preliminary site plan until the township board provided it. Thus, while the planning commission conducts a public hearing, reviews the PUD application and its preliminary site plan and submits a report with recommendations to the township board, the township board has the ultimate authority to review and approve the PUD in accordance with MCL 125.286c.

Further, because the ordinance designated the township board as the final review body and decision maker, and the planning commission's report was merely a recommendation, the court held the township board must independently determine whether the proposed PUD meets the ordinance requirements. Consequently, the court held it was fair to imply the township board had the same authority as the planning commission to require additional evidence from the applicant to ensure the PUD met all pertinent legal requirements. The court also concluded the ordinance validly granted authority to the planning commission to review the proposed PUD and make recommendations on it to the township board.

[1]This case concerns and quotes the old Township Zoning Act (M.C.L. 125.271 *et seq.* repealed July 1, 2006 but applicable here for this court case.

Liberally construing the statute in favor of the township, the court held the ordinance's designation of the planning commission to review proposed PUDs and make recommendations to the township board to aid it in making its final decision was a fair implication of the statute. The trial court's order was vacated and the case was remanded for entry of an order affirming the decision of the ZBA. (Source: State Bar of Michigan *e-Journal* Number: 42809, May 28, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/052609/42809.pdf

Variances (use, non-use)

Denial of a Non-Use Variance

Court: Michigan Court of Appeals (284 Mich. App. 453; 773 N.W.2d 730; 2009)

Case Name: *Risko v. Grand Haven Charter Twp. Zoning Bd. of Appeals*

Concluding the phrase "substantial property right" as used in the respondent-township's ordinance encompasses the right to build a garage on property regulated for residential use, but does not encompass the right to build according to a preferred design, the court held the defendant-zoning board of appeals' (ZBA) decision to deny petitioners' application for the 9.5-foot setback variance on the ground the variance was not "necessary for the preservation and enjoyment of a substantial property right similar to that possessed by other properties in the same zoning district" comported with the law, was procedurally proper, was supported by the evidence, and was not irrational.

Petitioners sought to construct a single-family residence on a lot in the Township. The zoning ordinance at issue requires a 50-foot front setback. The lot was zoned R-1 residential and is 2.46 acres. However, it is located in a "critical dune zone," and only part of it is actually buildable. Petitioners designed architectural plans for which they were given the approval of the MDEQ. The plans included an attached two-stall garage, which would encroach onto the 50-foot setback area by 9.5 feet. They applied for a variance for the zoning setback. The application stated the encroachment was necessary because the critical dunes in the rear lot area forced part of the structure to be moved closer to the property line. The ZBA voted to deny petitioners' variance request.

They appealed to the trial court arguing changing the plans would require significant additional expense and delay. The trial court reversed the ZBA's decision concluding the ZBA had improperly considered other possibilities and locations, *inter alia*, and a redesign and resubmission to the MDEQ with the associated costs and delays imposed practical difficulties.

The appeals court noted the sole issue was whether the 9.5 setback "variance is necessary for the preservation and enjoyment of a substantial property right similar to that possessed by other properties in the same zoning district." The court concluded it would be possible for petitioners to build a MDEQ-approved home with a two-car garage, but resolution of the matter depended on whether a "substantial property right includes construction of a particular design." After the court's review of relevant case law, it held the phrase "substantial property right" does not encompass the right to build according to a preferred design. Thus, it was proper for the ZBA to consider whether petitioners had alternative designs available which negated the need for a variance. It was appropriate to consider whether petitioners' substantial property right in building a garage could be honored without granting the variance. Reversed. (Source: State Bar of Michigan *e-Journal* Number: 42981, June 18, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/061609/42981.pdf

Nonconforming Uses

Prohibition of Short-term Rentals

Court: Michigan Supreme Court Order (485 Mich. 933; 773 N.W.2d 903; 2009)

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

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

In an order in lieu of granting leave to appeal, the court reversed the judgment of the Court of Appeals (see *Selected Planning and Zoning Decisions: 2009 May 2008-April 2009*, page 25: http://web5.msue.msu.edu/lu/pamphlet/Blaw/SelectedPlan&ZoneDecisions2008-09.pdf found at web page http://web5.msue.msu.edu/lu/pamphlets.htm#Court2009) and reinstated the trial court's February 9, 2007 opinion and order and the February 28, 2007 judgment and final order for injunctive relief.

Under §200 of the 1979 Laketon Township Zoning

Ordinance, use of the dwelling, which were zoned Residential District A, was restricted to "single family dwellings." Single family dwellings were a subset of the 1979 ordinance's more expansive definition of "dwelling." Thus, the defendant's expansion of the rental use of the subject premises to include the main residence situated on the property, after purchasing it in 2003, constituted an impermissible expansion of an existing nonconforming use lawful under the 1979 ordinance.

The property at issue contained six structures - four cottages, a guesthouse, and the main house. From about 1948 until January 2003, the prior owners rented out the four cottages and occasionally the guesthouse on a short-term seasonal basis, but used the main house as their permanent residence. After defendant purchased the property, it began using the main house as a short-term rental. In 2004, plaintiff amended its zoning ordinance to clarify the definition of "dwelling." The 2004 amendment clearly prohibited short-term rentals, which were only allowed to continue if considered to be a nonconforming use. Following the bench trial, the trial court issued a February 9, 2007 opinion ruling that although the ordinance that was in effect when defendant purchased the property defined a dwelling "to include this *type* of use [short-term rentals]," the former owners only used the main house for their residence and renting it out now would expand the non-conforming use. (Source: State Bar of Michigan *e-Journal* Number: 44189, November 3, 2009.)

Full Text Order:
http://www.michbar.org/opinions/supreme/2009/102809/44189.pdf

Open Meetings Act, Freedom of Information Act

Content-neutral Rules for Speech at Public Meetings.

Court: U.S. Court of Appeals Sixth Circuit 586 F.3d 427; 2009 FED App. 0395P (6th Cir.))

Case Name: *Lowery v. Jefferson County Bd. of Educ.*

NOTE: This is a freedom of speech case involving a school board meeting, but the ruling establishes principles that can also apply to a planning commission or zoning board of appeals meeting. However do not rely on it as a valid statement of Michigan law as it was based on constitutional principles and not the Michigan Open Meeting Act. Actual procedure used in Michigan would need to comply with the Open Meeting Act.

Concluding a school board meeting was a "designated" and "limited" public forum, and the policy under which the defendant-school board denied the plaintiffs-parents' second request to speak at a meeting amounted to a content-neutral time, place, and manner restriction, the court affirmed the jury verdict for the defendants in this §1983 action alleging violation of plaintiffs' First and Fourteenth Amendment rights. However, the appeals court reversed the district court's grant of attorney's fees to the defendants.

The parents' sons used to play on a high school football team, but the coach dismissed them from the team for challenging his leadership. Board policy 1.404 allows individuals to apply to speak for 5 minutes at board meetings as long as their appearances are "not frivolous, repetitive, nor harassing." (Rather than "policy" this would be in a planning commission's bylaws, or a zoning board of appeals's rules of procedure.) Plaintiffs successfully obtained permission to speak at a November 2005 school board meeting. Dissatisfied with the results of the meeting, one of the plaintiffs requested a speaking spot at the December board meeting, but she was denied permission.

The issue was whether the denial of plaintiffs' second request to speak violated the First and Fourteenth Amendments. The court noted in a "limited" public forum, the government may regulate the time, place, and manner of speech as long as the regulation is "content-neutral," "narrowly tailored to serve a significant government interest," and leaves "open ample alternative channels for communication of the information." The court held the policy (bylaw, rules of procedure) at issue was content-neutral on its face, it served significant governmental interests, it was narrowly tailored because it only prohibited "repetitive," "harassing," or "frivolous" speech, and it allowed ample alternative channels of communication. The evidence supported a finding the defendants-school officials denied the second request on the basis the proposed speech was "repetitive." (In a planning commission or zoning board of appeals situation, the "evidence" would be the detailed minutes of the meeting and supporting record.) The jury had

> "ample bases for concluding that any potential viewpoint-based motives of the board did not affect the outcome. No violation occurs when the

same result would have occurred in the absence of any illegitimate motive . . . ."

The U.S. Appeals Court reversed the district court's decision to grant the defendants (school board) $87,216.49 in attorney's fees, however, because plaintiffs' claims were not frivolous. The case presented a legitimate question of fact and legitimate questions of law. The court did "not think the plaintiffs' motives in filing the action by themselves could warrant a fee award." (Source: State Bar of Michigan *e-Journal* Number: 44287, November 16, 2009.)

Full Text Order:
http://www.michbar.org/opinions/us_appeals/2009/111209/44287.pdf

Inspection of Minutes Pursuant to Open Meeting Act

Michigan Attorney General Opinion Number 7244, March 3, 2010:

In answer to the questions relating to a person's right of access to a public body's meeting minutes under the Open Meetings Act (OMA) (MCL 15.261 *et seq*.): Can a public body may require a person to make an appointment to inspect a public body's meeting minutes and supervise the inspection of the minutes? Can a public body provide copies of the minutes in lieu of allowing a person to personally inspect the "original" minutes on demand during normal business hours?

After receiving a request, a public body must make open meeting minutes available for inspection within the time periods specified in the Open Meetings Act. The public body may, under rules established and recorded by the public body, request advance notice for inspection of the minutes. Under rules established and recorded by the public body they can require supervision of any inspection of the public body's "record copy" of open meeting minutes to protect the record from "loss, unauthorized alteration, mutilation, or destruction." MCL 15.233(3). Generally if no rules are adopted on this topic, neither advance notice nor supervision should be required for the inspection of copies of open meeting minutes.

Copy of the opinion:
http://www.ag.state.mi.us/opinion/datafiles/2010s/op10321.htm

Signs: Billboards, Freedom of Speech

Adult Entertainment Content-Neutral Sign Regulations

Court: U.S. Court of Appeals Sixth Circuit 568 F.3d 609; 2009 FED App. 0210P (6th Cir.))

Case Name: *H.D.V.-Greektown, LLC v. City of Detroit*

Concluding, *inter alia*, the defendant-city's sign ordinances were content-neutral and thus, the *Thomas v. Chicago Park Dist.* standard applied, the court held the ordinances satisfied all four of the required factors and affirmed the district court's order holding the ordinances were not facially unconstitutional (although they were unconstitutional as applied to plaintiffs).

H.D.V.-Greektown-Plaintiffs alleged the city used its "adult-use" zoning and sign ordinances to prevent an adult cabaret from transferring its business to a new operator and from erecting signage desired by the present owner. The district court held the challenged zoning provisions were unconstitutional and ordered the city to revise them, but denied plaintiffs' requested injunctive and declaratory relief. It granted plaintiffs injunctive and declaratory relief as to the sign ordinances, but refused to generally enjoin the city from otherwise enforcing them. Plaintiffs appealed the denial of their requested injunctive and declaratory relief as to the zoning ordinances and the holding the sign ordinances were not facially unconstitutional.

Noting the city's claim the challenged zoning ordinances were constitutional was not properly before it due to the procedural posture of the case, the court reversed and remanded the district court's denial of plaintiffs' request it declare the present owner's operation of the cabaret lawful and enjoin the city from enforcing the adult-use provisions of the zoning ordinances. Assuming the ordinances were unconstitutional, the district court abused its discretion in refusing to enjoin the city from enforcing them.

The court rejected plaintiffs' argument the sign ordinances were content-based because they distinguished between types of signs ("advertising signs," "business signs," and "political signs"), concluding nothing indicated the distinctions reflected a meaningful preference for one type of speech over another.

Plaintiffs also argued in addition to the four criteria applied by the court, *Thomas* required content-neutral

licensing ordinances to (1) contain a brief, specified time limit and (2) require the decision maker to specify the grounds for denying an application. The court disagreed and held the district court correctly declined to apply those additional elements. While affirming the district court's order as to the facial constitutionality of the sign ordinances, the court modified the scope of injunctive relief it granted on plaintiffs' as-applied challenge. (Source: State Bar of Michigan *e-Journal* Number: 42976, June 16, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2009/061209/42976.pdf

See also *Lowery v. Jefferson County Bd. of Educ.*, on page 5.

First Amendment Retaliation

Court: U.S. Court of Appeals Sixth Circuit 592 F.3d 718; 2010 FED App. 0013P (6th Cir.))

Case Name: *Fritz v. Charter Twp. of Comstock*

Since the plaintiff's-Fritz's factual allegations were sufficient to raise more than a mere possibility of unlawful First Amendment retaliation by the defendants-township and its supervisor, the U.S. Court of Appeals, 6th Circuit, held the U.S. District Court erred in granting their motion to dismiss on the pleadings as to that part of the complaint. Thus, the court reversed the district court's order granting in part defendants' motion for summary judgment as to the First Amendment retaliation claim and remanded.

The plaintiff was an independent agent for Farm Bureau Insurance doing business as the Fritz Agency out of an office in her home in Comstock, Michigan. Plaintiff applied for and received a special use permit for a home office. While the application was pending, she attended several Comstock Planning Commission and Township Board of Trustees meetings related to the approval of her home office and some other meeting during which she noticed procedural irregularities. At one meeting the township supervisor, Tim Hudson, became irritated with her presence and in another meeting was frustrated with her monitoring of the meetings, allegedly in an attempt to intimidate her from attending future meetings. She learned the local zoning restrictions and ordinances restricted the way she could conduct her business as to signage and employees working in the home office, and applied for a zoning variance, which was denied. She was later issued a sign violation. She applied for a variance, which also was denied. Allegedly citizens and township officials made false statements about plaintiff and her home office. She complained to Hudson.

On three occasions, he spoke via telephone with her Farm Bureau supervisors about her activities and insinuated her conduct would create adverse consequences for her and Farm Bureau. In the third call, Hudson warned Farm Bureau's presence in the community was in jeopardy due to plaintiff's conduct because the community was "allegedly in an uproar about it." Farm Bureau terminated its relationship with plaintiff because of her "controversial community relations with [her] neighbors and with the local governmental unit."

Fritz sued alleging, *inter alia*, the defendants engaged in unlawful retaliation against her under 42 USC §1983 for exercising her First Amendment rights.

The court held plaintiff pleaded sufficient facts to support a claim of "adverse action" and should have prevailed on the motion to dismiss as to whether she stated a claim for unlawful retaliation because she sufficiently alleged these adverse actions were motivated, at least in part, by her protected conduct. . (Source: State Bar of Michigan *e-Journal* Number: 44912, February 1, 2010.)

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2010/012810/44912.pdf

Public Water and Sewer

City Selling Water to a Township/"contractual Costumers"/Cost of Service

Court: Michigan Supreme Court (485 Mich. 859; 771 N.W.2d 785; 2009)

Case Name: *Oneida Charter Twp. v. City of Grand Ledge*

In an order in lieu of granting leave to appeal, the court reversed the judgment of the Court of Appeals in a published opinion (see page 14 of "Selected Planning and Zoning Decisions: 2009", May 2008-April 2009 http://web5.msue.msu.edu/lu/pamphlet/Blaw/SelectedPlan&ZoneDecisions2008-09.pdf) and remanded to the trial court for reinstatement of the March 15, 2007 order dismissing the case with prejudice.

MCL 123.141(2) exempts water departments which are not contractual customers of another water department and serve less than 1 percent of the

population of the state, such as the City of Grand Ledge, from the cost-based requirement of subsection (2). Contrary to the Court of Appeals' ruling, subsection (2) does not indicate the second sentence of MCL 123.141(2) somehow modifies or limits application of the exemption appearing in the subsequent sentence by defining "contractual customers" as wholesale contractual customers. Further, MCL 123.141(3) prohibits only "contractual customers as provided in subsection (2)" from charging retail rates in excess of the actual cost of providing service. Grand Ledge is not a contractual customer as provided in subsection (2), so subsection (3) was not applicable. (Source: State Bar of Michigan *e-Journal* Number: 43717, September 17, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/supreme/2009/091109/43717.pdf

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

Riparian Rights Where Lots Abut a Roadway Contiguous to the Lakeshore in an Approved Plat

Court: Michigan Court of Appeals 284 Mich. App. 544; 773 N.W.2d 44; 2009)

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

Note: The Supreme Court of Michigan has granted leave to appeal this case (485 Mich. 1047; 777 N.W.2d 137; 2010). That court's action is still pending.

The court held the plaintiffs had no riparian rights based on the plat (subdivision) dedication because the language of the statutory dedication indicated an intent to grant to the public an unlimited use in fee of the alleys and roadways. Although the trial court's failure to specifically analyze the language of the dedication was error, it was harmless error, and the court affirmed the trial court's denial of the plaintiffs' motion for partial summary disposition.

Plaintiffs are owners of lots fronting Lake Charlevoix, but separated from the water by Beach Drive, a road dedicated in the approved plat to the use of the public running parallel and immediately adjacent to the lake. Plaintiffs claimed the dedication merely transferred a limited fee for the sole purpose of maintaining the road, and had no effect on their riparian rights because the dedicatory language limited the public's interest in the alleys and streets to maintaining those roadways.

The court disagreed and held a statutory dedication under the 1887 Plat Act vested a fee title interest in the public limited to the uses and purposes delineated by the plattors. After reviewing the language of the statutory dedication, the court concluded the plattors did not intend to vest any riparian rights in plaintiffs' properties. This inquiry required a two-tier analysis - first, whether a valid statutory dedication was created under the 1887 Plat Act and, second, if so, what type of fee interest was vested in the public. The latter inquiry required an interpretation of the plattors' intent. Conversely, had the dedication been one at common law, it would merely have created an easement in Beach Drive, and plaintiffs would retain riparian rights to Lake Charlevoix.

The court held the trial court's analysis concluded prematurely, holding the plat created a statutory dedication creating a fee interest cutting off plaintiffs' riparian rights, which will not always be the case. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 43065, June 25, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/062309/43065.pdf

Planning Commission, Plans

Can Take Oath Of Office, But Not Assume Office Until Appointment Ratified by Legislative Body

Michigan Attorney General Opinion 7236, November 3, 2009.

In answer to the question whether an individual appointed by a municipality's chief elected official as a member of the municipality's planning commission may assume the duties of that office immediately upon taking the oath of office or must wait to assume the duties of office until after his or her appointment is approved by a majority vote of the municipality's legislative body the Attorney General ruled:

Thus, construing the Michigan Planning Enabling Act, 2008 PA 33, M.C.L. 125.3801 et seq. (specifically M.C.L. 125.3815(1)) according to the common and approved usage of the language leads to the conclusion that the Legislature intended to require the approval of a majority of the members of the legislative body of the municipality before an appointment to a planning commission is complete and effective.

It is the Attorney General's opinion that, under

M.C.L. 125.3815(1), while a person appointed to a planning commission may take his or her oath of office before the appointment is approved by the legislative body of the municipality, he or she may not assume the duties of that office until after the appointment is approved by a majority vote of the members of the municipality's legislative body elected and serving.

Copy of the Opinion:
http://www.ag.state.mi.us/opinion/datafiles/2000s/op10313.htm

Other Published Cases

Federal versus State Court review.
Court: U.S. Court of Appeals Sixth Circuit (Nos. 08-2068/2069/2079/2082, August 17, 2009)
Case Name: *Saginaw Hous. Comm'n v. Bannum, Inc.*

Deciding an issue of first impression as to whether a federal court should abstain from a decision involving the interpretation of a local land use ordinance, the court held it should not, particularly where there was no evidence federal involvement would disrupt a coherent state policy. Thus, the district court erred in abstaining in this case.

Defendant-Bannum obtained a permit from the City of Saginaw to build a halfway house in the city. After it received its permit, the plaintiffs-Housing Commission and School District filed complaints seeking injunctions against construction of the halfway house. Bannum removed both cases to the district court. Both plaintiffs filed motions to return the case to state court.

The district court found the City was properly joined in the School District's complaint, defeating diversity jurisdiction and abstention was appropriate as to the Commission's action. The district court remanded both cases to state court.

The court held since the remand order as to the School District complaint was based on jurisdiction, the remand order was unreviewable. The court also held while land use policy is undoubtedly of substantial public concern, there was no evidence the state's interest in that policy has led to the type of coherent state policy warranting *Burford v. Sun Oil Co.* abstention. *Burford* abstention policy applies only to statewide policies and the appropriate focus for Burford abstention is state policy, rather than local policy. The court also held the zoning dispute in this case did not implicate the kind of coherent state policy warranting *Burford* abstention. The Housing Commission did not identify any evidence of coherent state policy or of how federal involvement would disrupt such a policy. Rather, the Commission's nuisance per se suit only challenged the permit Bannum received from the city. This dispute thus, turned solely on the City's interpretation of its own zoning ordinance - it did not implicate any policies in the Township Zoning Act or the Zoning Enabling Act. Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 43512, August 19, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2009/081709/43512.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* (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.) 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

Right to Farm Act: Papadelis V

Court: Michigan Court of Appeals (Unpublished No. 286136, December 15, 2009)

Case Name: *Papadelis v. City of Troy* (Michigan Farm Bureau, *Amicus Curiae*)

The trial court properly construed the provisions of the defendant-city's zoning ordinance and did not err in concluding they were inapplicable to the plaintiffs' greenhouses, cold frames, and pole barn. Thus, the Appeals Court affirmed the trial court's order denying defendants-City of Troy's motion for an order directing the plaintiffs-Papadelis to remove the buildings and the dismissal of defendants' counterclaim in this lengthy land use dispute.[2]

Papadelis (plaintiffs) own two adjacent parcels of land in the city, referred to as the north and south parcels. Both parcels are zoned "single-family residential" (R-1D) under the zoning ordinance. Thus, the parcels can be used for the purposes described in §§10.00.00 - 10.20.08 of the City of Troy zoning ordinance. Section 10.20.00 describes the "principal uses permitted" and provides no building or land shall be used and no building erected except for one or more of the specified uses. "Agriculture" is specified as a permitted principal use of property zoned R-1D. The ordinance defines "agriculture" as "[f]arms and general farming, including horticulture, floriculture . . . ."

The city did not contest the floriculture and horticulture occurring on plaintiffs' property were "agriculture" and thus, a principal permitted use of the property. Rather, defendants appeared to claim while the use was permitted, the two greenhouses, pole barn, and cold frames were not permitted because they were in violation of other zoning ordinance provisions. Defendants argued they were all "accessory buildings" or "accessory supplemental buildings" under the ordinance and thus, subject to certain regulations.

The Appeals Court disagreed, concluding the buildings did not meet either definition as set forth in the ordinance. Pursuant to the definition of "accessory building" in §04.20.01, if the greenhouses, pole barn, and cold frames were not a barn, a garage, or a storage building/shed as defined by the ordinance, they were not "accessory buildings." The buildings did not meet any of those definitions. Section 04.20.03 defined an "accessory supplemental building" in a manner contemplating a residential use as the main property use by its reference to a "'building used by the occupants of the principal building for recreation or pleasure . . . .'" There was no evidence the plaintiff-Papadelis' greenhouses and cold frames were used "'for recreation or pleasure.'" Rather, the evidence showed they were used in conjunction with their horticulture and floriculture commercial business located on the south

[2]The significant history of this matter has been set forth in previous opinions of the Appeals Court. See *Papadelis v City of Troy*, 478 Mich 934; 733 NW2d 397 (2007) (*Papadelis IV*) (including a Michigan Supreme Court Order of June 29, 2007); *Papadelis v Troy* (Unpublished No. 268920 (2006)) (*Papadelis III*); *City of Troy v Papadelis (On Remand)*, 226 Mich App 90, 95-96; 572 NW2d 246 (1997) (*Papadelis II*); *City of Troy v Papadelis*, unpublished opinion 172026 per curiam of the Court of Appeals, issued May 10, 1996 (Docket No. 172026) (*Papadelis I*), vacated 454 Mich 912 (1997). A single source to review a summary of all these cases is *Summary of Zoning and Right to Farm Act Court Cases* found at http://web5.msue.msu.edu/lu/pamphlets.htm#CourtRTFA.

parcel.

The court opinion read:

> "Next, defendants argue that allowing plaintiffs to maintain the contested agricultural buildings violates the intent of the ordinance which is to "provide for environmentally sound areas of predominantly low density single family detached dwellings." We disagree. The intention of providing low-density, single-family dwellings actually appears to be furthered by plaintiffs' agricultural use of their property. Preserving agricultural uses compatible with limited residential development, protecting the decreasing supply of agricultural land by allowing only limited residential development and/or maintaining some rural character to the community arguably provides 'for environmentally sound areas of predominately low density single family detached dwellings.'" In any case, this argument is without merit."

And

> "Defendants also argue that the trial court's interpretation and conclusion that defendants' ordinance contains no provisions that relate to agricultural buildings 'defies common sense' and leads to an absurdity. We disagree. The wisdom of an ordinance, like a statute, is for the determination of the legislative body and must be enforced as written. See *City of Lansing v Lansing Twp*, 356 Mich 641, 648; 97 NW2d 804 (1959). Agriculture is a principal use permitted, as are one-family dwellings, accessory buildings, and others. That defendants' ordinance provides detailed and specific regulations with respect to some principal uses and does not include agriculture within the ambit of those regulations is the prerogative of the legislative body and we may not second-guess such wisdom. Further, plaintiffs' expert witness, Leslie Meyers, testified that as a zoning administrator in every municipality she has worked where there has been farming, agricultural buildings have been exempt from such regulation."

The Supreme Court's June 29, 2007 order (*Papadelis v City of Troy*, 478 Mich 934; 733 NW2d 397 (2007) (*Papadelis IV*)) requires that farm buildings, such as plaintiff's structures, are subject to applicable building permit, size, height, bulk, floor area, construction, and location requirements, under local zoning. As to if City of Troy's ordinances apply to plaintiffs' greenhouses, pole barn, and cold frames was never reached or decided. Accordingly, the trial court's decision, that the particular structures do not violate any applicable zoning ordinance, does not conflict with our Supreme Court's order.

Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 44574, January 4, 2010.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/121709/44574.pdf

Mobile Homes Zoning and Manufactured Housing Commission Act

Court: Michigan Court of Appeals (Unpublished No. 288027, March 18, 2010)

Case Name: *Armstrong v. Iosco Twp*.

The trial court properly entered an order in favor of defendant-Township after a bench trial because the township's special use permit (SUP) requirement for mobile homes did not violate MCL 125.2307 of the Manufactured Housing Commission Act (MHCA) (MCL 125.3301 *et seq*.).

Plaintiff owns approximately 22 acres of property located in the Township. The land was vacant, except for an old farmhouse and some utility poles. It was not farmable because its surface consists mostly of sand and rock. At the time of this litigation, the property was zoned Agricultural-residential (A-R). Permitted principal uses on A-R zoned land include farms and farm buildings, single-family dwellings, public parks, and forest preservation areas. Certain special land uses not explicitly allowed on A-R zoned land can be permitted upon the issuance of a SUP. Among the special land uses permitted on A-R zoned land are a manufactured home community, or mobile home park.

Armstrong-plaintiff's SUP application was denied. He alleged, *inter alia*, the current zoning was exclusionary and failed to meet a legitimate purpose contrary to §§297a and 273 (MCL 125.297a and 125.273) of Township Zoning Act (TZA) (MCL 125.271 *et seq*.)[3]. At the pretrial hearing and in his supplemental briefing, plaintiff raised for the first time the argument his exclusionary zoning claim was also based on §7 of the MHCA, under which he would not

[3]This case concerns and quotes the old Township Zoning Act (M.C.L. 125.271 *et seq*. repealed July 1, 2006 [specifically 125.297a and 125273]) but applicable here for this court case. However the new Michigan Zoning Enabling Act contains essentially the same language at M.C.L. 125.3203 and 125.3207.

have to show a demand for manufactured housing existed. In plaintiff's view, MCL 125.2307 provided him with another avenue by which to pursue his exclusionary zoning claim. The court disagreed. The court noted plaintiff failed to specifically plead an exclusionary zoning claim based on MCL 125.2307 and did not file a motion for summary disposition under the MHCA.

The trial court addressed plaintiff's assertion by explaining the TZA, not the MHCA, controlled plaintiff's exclusionary zoning claim thus, it made no explicit summary disposition ruling on the MCL 125.2307 "claim." The court held the trial court did not err by determining the TZA controlled plaintiff's exclusionary zoning claim and not the MHCA. The provisions of the MHCA do not control over local zoning laws. The TZA enables townships to "regulate the development and proper use of land . . . ." The MHCA, on the other hand, "regulate[s] and provide[s] for minimum construction and safety standards with regard to mobile home businesses and parks."

Further, it was plainly obvious, given the purpose of the MHCA, the MHCA does not provide the legal basis for an exclusionary zoning claim. It does not seek to provide a plaintiff recourse if a township attempts to exclude a lawful land use. Rather, MCL 125.297a of the TZA does. The court also rejected plaintiff's claim the Township's ordinance totally excluded mobile home communities, noting the use is permitted if a landowner obtains a SUP, and the fact no manufactured housing community existed in the Township did not show manufactured housing was totally excluded. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 45358, March 25, 2010.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2010/031810/45358.pdf

Exclusionary Zoning

Court: Michigan Court of Appeals (Unpublished No. 288010, April 27, 2010)

Case Name: *Anspaugh v. Imlay Twp.*

The trial court did not clearly err in holding there were available indirect travel routes providing reasonably suitable access to the Graham Road Corridor thus, the Graham Road Corridor was not shown to be inappropriate for heavy industrial (I-2) development, and in entering judgment for defendants-Imlay Township. The defendants did not commit exclusionary zoning in violation of former MCL 125.297a.[4]

Under the statute, a zoning ordinance may not totally exclude a land use where (1) there is a demonstrated need for this land use in the township or surrounding area, (2) the use is appropriate for the location, and (3) the use is lawful. Although defendants-township challenged whether there was a "demonstrated need" for I-2 zoned property, this issue was beyond the scope of the Supreme Court's remand order to the trial court. (See Supreme Court order on page 5 of *Selected Planning and Zoning Decisions: 2008 May 2007-April 2008*
(http://web5.msue.msu.edu/lu/pamphlet/Blaw/SelectedPlan&ZoneDecisions2007-08.pdf) and see the first appeals court decision on page 2 of *Selected Planning and Zoning Decisions: 2007 May 2006 - April 2007*
(http://web5.msue.msu.edu/lu/pamphlet/Blaw/SelectedPlan&ZoneDecisions2006-07.pdf)) Rather, the pertinent issue was whether defendants' ordinance effectively excluded appropriate I-2 uses because the area zoned for this use, the Graham Road Corridor, was not suitable for such development.

Plaintiffs-Anspaugh contended the Graham Road Corridor was inappropriate for I-2 development because the road access is not particularly suitable for asphalt trucks, but this pertained only to plaintiffs' private interest in operating a particular type of industry, not to the public's need for general industrial uses, or to the appropriateness of the Graham Road Corridor for those uses. Likewise, the fact the road access was not particularly suitable for asphalt trucks did not refute the fact land in the Graham Road Corridor was currently being put to I-2 heavy industrial use, presumably by way of the same road access about which plaintiffs complained. The plaintiffs did not establish the Graham Road Corridor was inaccessible or unsuitable for I-2 development, or the site was selected as a subterfuge for excluding I-2 zoning. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 45649, May 4, 2010.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2010/042710/45649.pdf

[4]This case quotes the old Township Zoning Act section 27a (M.C.L. 125.297a) repealed July 1, 2006 but applicable here for this court case. However the new Michigan Zoning Enabling Act contains essentially the same language in section 207 (M.C.L. 125.3207).

Takings

Inverse Condemnation Taking of Property

Court: Michigan Court of Appeals (Unpublished, No. 282672, May 7, 2009)

Case Name: *Barrett Ellis Props., L.L.C. v. City of Ecorse*

The court reversed the trial court's order granting the defendant-City of Ecorse summary disposition of plaintiff's claim the city's actions constituted an unconstitutional taking of its property because there was a genuine issue of material fact concerning whether there was a temporary taking before the trial court ordered the city to allow plaintiff to renovate the property to a single-family residence.

The case concerned a house plaintiff owned in the city. Plaintiff argued the city's actions constituted a regulatory taking. When plaintiff purchased the property, it was zoned for single-family use but was inhabited by four tenants. Plaintiff argued the defendants initially prevented it from repairing the property to its original legal nonconforming use as a multi-family residence, then prevented it from renovating the property to a single-family use, and later told plaintiff it could not demolish the building and rebuild a single-family residence because the lot was "irregular."

On April 6, 2007, the trial court ordered the city to permit plaintiff to renovate the property to a single-family residence. The city contended plaintiff always could have obtained a permit to renovate the property, as reflected by the trial court's April 6, 2007 order. However, the city's building superintendent testified he posted notices on the house indicating it could not be renovated or rebuilt. Defendants also admitted in trial court filings the city's position was the building could not be renovated or rebuilt and had to be torn down. The court held there were outstanding questions of fact, which the trial court did not resolve, about when the zoning regulation for the property took effect and whether plaintiff ever abandoned its nonconforming use. Further, there was a genuine issue of material fact concerning the cost of repairs to the property.

The court affirmed the trial court's order granting the defendant-mayor summary disposition, concluding plaintiff did not proffer an applicable exception to governmental immunity or identify any specific conduct by the mayor in any way related to plaintiff's alleged deprivation of rights by the city. Affirmed in part, reversed in part, and remanded. (Source: State Bar of Michigan *e-Journal* Number: 42626, May 12, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/050709/42626.pdf

Categorical Taking

Court: Michigan Court of Appeals (Unpublished No. 289434, March 11, 2010)

Case Name: *Thomas v. Genoa Twp.*

The trial court properly granted the defendant-Township's motion for summary disposition of the plaintiff's "takings" claim where he failed to establish a genuine issue of material fact he was deprived of all beneficial or productive use of his land. Thus, plaintiff failed to establish a "categorical taking."

Plaintiff-Thomas owned a 1.6 acre triangular piece of real property located in the Township. The property was bordered by roads on all sides and was zoned Low Density Residential (LDR) under the Township's zoning ordinance. However, plaintiff was currently operating a drive-thru coffee and donut shop on the property under the terms of a consent judgment. He urged the court to completely ignore the consent judgment and decide the case based solely on the property's zoning classification of LDR. The court declined to do so.

Although the property was zoned as LDR, the consent judgment was still in effect, and the zoning requirements for the property were found within this document. The consent judgment modified the zoning classification of plaintiff's property and allowed him to use it in ways impermissible under the LDR classification. There was no legal reason, and it was contrary to common sense, to ignore this legal document and treat the property as strictly LDR.

Plaintiff argued defendant's conduct perpetrated an unconstitutional taking. He argued his property was zoned LDR and the property would be much less valuable were it utilized solely as residential. However, the court found in this situation, "as zoned" encompassed both the zoning classification of LDR, and the legal non-conforming use outlined in the modifications of the classification contained in the consent judgment. The manner in which the property is currently being used, and which it may continue to be

used under the consent judgment, allows plaintiff economically viable use of his property. He was able to generate revenue from the operation of the coffee shop on the property. Further, plaintiff's own market analysis indicated the land had some value when zoned residential and it would be even more valuable if used commercially. While the report concluded a gasoline station would provide "highest and best use" of the property, it noted any commercial use of the property would be more valuable than residential use.

Thus, while it was unclear exactly how much, if any, actual "profit" plaintiff was earning from his coffee shop at this location, the evidence established the property, as currently being utilized, had economic value. The court also held the trial court properly determined all three prongs of the *Penn Central* test favored defendant (*Penn Central Transportation Co v New York City,* 438 US 104,98 S Ct 2646, 57 L Ed 2d 631 (1978)). Affirmed.

Further Notes: To show a categorical taking, plaintiff must prove that the property is unsuitable for use as zoned or unmarketable as zoned. *Bevan v Brandon Twp,* (438 Mich 385, 403; 475 NW2d 37 (1991)). An ordinance effects a regulatory taking if it precludes the use of the land for **any** purposes to which it is reasonably adapted (*Troy Campus v City of Troy,* 132 Mich App 441, 450-451; 349 NW2d 177 (1984)).

The *Penn Central* test for a categorical taking consists of:

1. Character of the government's action: Did the governmental regulation single out a person's property to bear the burden for the public good and if the regulatory act being challenged is a comprehensive, broadly based regulatory scheme that burdens and benefits all citizens relatively equally (*K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 559, 705 NW2d 365 (2005)).

2. Economic effect of the regulation: The Taking Clause of the constitution does not guarantee property owners an economic profit from the use of their land (*Paragon Properties Co v City of Novi,* 452 Mich 568, 579 n 13; 550 NW2d 772 (1996)). A government is not required to zone property for its most profitable use *Dorman v Clinton Twp,* 269 Mich App 638, 645; 714 NW2d 350 (2006)). To establish a taking, a property owner must prove that the value of his land has been destroyed by the regulation or that he is precluded from using the land as zoned (*Bevan v Brandon Twp,* 438 Mich 385, 403; 475 NW2d 37 (1991)).

3. Investment-backed expectations: A "key factor" in determining whether a regulation has interfered with investment backed expectations "is notice of the applicable regulatory regime (*K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 559, 705 NW2d 365 (2005)).

(Source: State Bar of Michigan *e-Journal* Number: 45302, March 17, 2010.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2010/031110/45302.pdf

Inverse Condemnation Claim

Court: Michigan Court of Appeals (Unpublished No. 285691, March 18, 2010)

Case Name: *Chicago Area Council, Inc. v. Blue Lake Twp.*

The plaintiffs-Boy Scouts (Chicago Area Council, Inc.) were not entitled to judgment as a matter of law on their "inverse condemnation" claim because the defendant-Township did not effect a "categorical taking" by changing its zoning scheme to Forestry-Recreation: Institutional (FR-I), the new zoning classification did not violate the Boy Scouts' constitutional rights, and did not constitute inverse condemnation. Thus, the trial court properly granted summary disposition to the Township.

The case involved the Boy Scouts' challenge to a new zoning classification the Township adopted. The Boy Scout Camp property was rezoned from Forestry-Recreation (FR) to a new FR-I classification, to preserve the unique camp-like characteristics of the Township. The Boy Scouts claimed the Township's new zoning classification only allowed them to use their 4,748 acres located in Blue Lake Township for the single purpose of operating a youth camp. They contended this limitation on their use of the land improperly precluded them from using it in any economically viable way specifically, they objected to the zoning's exclusion of residential development. The Township claimed the zoning classification was consistent with the historical use of the land and promoted important community interests.

The trial court found there was no categorical taking. The trial court acknowledged there was a factual dispute regarding whether the property could generate a profit as a camp. The trial court found there was no dispute even under the FR-I zoning, where the land retained substantial economic value. The record did not

support the Boy Scouts' argument the Township had rendered their land economically idle by pressing their property into public service. Contrary to the Boy Scouts' contentions, the Township was not requiring the Boy Scouts keep their land substantially in a natural state. The zoning ordinance allowed them to pursue campground development on the land, although not necessarily the type of residential development the Boy Scouts preferred to pursue.

The categorical taking test also does not guarantee property owners a certain minimum economic profit from the use of their land. Nothing in the record suggested the Boy Scouts' property was unsuitable for continued camp use. Camp use was the historical established use of this land, and the evidence showed the land was suitable for continued camp use. The Boy Scouts were not prohibited from selling the land to another camp organization, including by breaking the land into smaller parcels for sale. While the restrictions FR-I placed on the land may have reduced its value, the restrictions did not render the land worthless or economically idle. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 45352, March 24, 2010.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2010/031810/45352.pdf

Land Divisions & Condominiums

Vacate the Public Dedication of a Subdivision Park

Court: Michigan Court of Appeals (Unpublished No. 280231, July 21, 2009)

Case Name: *Pleasant Cmty. Circle v. Township of Casco*

While the trial court did not err in concluding the defendant-township did not formally accept the public dedication of the subdivision park when it accepted the subdivision plat, the court held it erred in granting plaintiffs' summary disposition motion and vacating the public dedication because the evidence established a genuine issue of material fact whether there was "an informal acceptance by public user."

The subdivision was platted in 1925. The plat contained a dedication of the platted streets and a park to the public. The township accepted the plat in 1925. The plaintiffs, including an association of homeowners who resided in the subdivision, sued to vacate the public dedication of the park. On cross-motions for summary disposition on the issue of whether the township ever accepted the park dedication, the trial court concluded there was never any formal or informal acceptance of the park property and vacated the dedication of the park. The minutes of the relevant township meeting indicated the subdivision plat was presented for approval, a motion was made the township board accept the plat, and the motion was granted. The minutes did not contain any specific reference to acceptance of dedicated land. Thus, pursuant to *Marx v. Department of Commerce*, the trial court properly determined the township board did not formally accept the public dedication.

The township tried to distinguish this case from *Marx* by pointing out the township in *Marx* only "approved" the plat, while here the township "accepted" the plat. However, the court in *Marx* emphasized

> "in order to formally accept dedicated property, a public authority must accept it by a manifest act. The authority must make specific reference to accepting the dedicated property, not merely accepting or approving the plat that dedicates the property."

The township also argued it was entitled to rely on the statutory presumption of acceptance in §255b of the Land Division Act (LDA) (MCL 560.255b) (effective 12/22/78).

While the plaintiffs argued the public dedication was withdrawn because the lot owners used the park in a manner inconsistent with the notion of a public dedication, the court concluded "the evidence created an issue of fact whether there was a withdrawal of the dedication due to inconsistent use." Many of the cited activities by lot owners or the association before 1978 were not necessarily inconsistent with public ownership. "Continued and regular public use by the general public is all that is necessary for there to be acceptance by public use of a park," and there was evidence of regular public use. Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 43298, July 29, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/072109/43298.pdf

Decision to Approve the Plat

Court: Michigan Court of Appeals (Unpublished No. 287002, March 2, 2010)

Case Name: *Reid v. Lincoln Charter Twp.*

Holding direct review of the township board's decision to approve the plat was available to the plaintiff, the court concluded the trial court did not

abuse its discretion in denying her leave to file an amended complaint as to counts for, *inter alia*, superintending control, nuisance *per se*, and some due process violations because the proposed amendments were futile.

The plaintiff's trust (Reid) owned a long and narrow parcel of property, which had been split-zoned since 1947. The eastern three acres, abutting a highway, were zoned C-3 while the western four acres were zoned R-1. The only access to the property was from a highway. In 2000 the township board approved a plat submitted by defendant-Red Ridge Properties for the development of a subdivision, the eastern section of which bordered on the trust property. Pursuant to the plat, the only road in the subdivision would be a 1,200-foot cul-de-sac, which would not be stubbed to the trust property.

Plaintiff sued in 2005, asserting two claims for nuisance *per se* contending the subdivision road violated the township's Subdivision Control Ordinance (SCO) and the township violated the Land Division Act (LDA) because by approving the plat, the township board isolated the trust property. Plaintiff moved to file an amended complaint containing, *inter alia*, claims for deprivation of procedural and substantive due process, regulatory taking, and inverse condemnation. She asked the trial court to issue an order of superintending control requiring the township to comply with the stubbed road requirement in its SCO.

A complaint for superintending control is an original action and may not be filed if another adequate remedy is available. The court concluded plaintiff had an adequate remedy available – an appeal to the trial court for direct review of the township board's decision to approve the plat. Thus, she could not maintain a complaint for superintending control. Further, due process and nuisance *per se* claims arising from an agency's decision subject to direct appeal must be raised in a direct appeal of the decision. Plaintiff's due process and nuisance *per se* claims in the proposed amended complaint related to the township board's approval of the plat and thus, were required to have been raised in a timely direct appeal of the board's decision.

However, the court reversed the trial court's October 5, 2007 order to the extent it struck from plaintiff's second amended complaint all allegations referring to the board's approval of the plat, and reversed in part the May 30, 2008 order denying plaintiff's motion for leave to file a third amended complaint, concluding she asserted new due process claims. Affirmed in part, reversed in part, vacated in part, and remanded. (Source: State Bar of Michigan *e-Journal* Number: 45218, March 8 2010.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2010/030210/45218.pdf

Substantive Due Process

Denial of Rezoning Was Arbitrary, Capricious, and Unfounded Exclusion of Legitimate Land Use.

Court: Michigan Court of Appeals (Unpublished No. 278208, September 8, 2009)

Case Name: *Bedford Partners, LLC v. Bedford Twp*.

Concluding the trial court's factual findings showed it considered all the testimony and the composition of the area at issue, the court upheld the trial court's ruling the zoning violated plaintiff's substantive due process rights because while the defendant-township identified a reasonable governmental interest advanced by the zoning classification, the ordinance contained arbitrary, capricious, and unfounded exclusions of legitimate land use.

The case arose from plaintiff's purchase of farmland with the intent to build a residential development, which required the defendant to agree to rezone the property. However, the township denied the rezoning request. Plaintiff sued alleging a violation of substantive due process and a "taking" claim.

The defendant appealed the trial court's judgment for plaintiff on the substantive due process issue and plaintiff cross-appealed the trial court's dismissal of its taking claim.

The appeals court affirmed on both issues. The trial court concluded while there would be additional costs for schools and students, state money for an increase in the student body would follow. As to fire service, police service, sewers, and water, the trial court noted they were not free of charge - residents were charged for sewer and water use, and millages would generate extra revenue to offset fire and police service costs. The trial court also discounted defendant's evidence about the increase in traffic, noting, *inter alia*, plaintiff agreed to contribute to a road upgrade. The court noted the case was decided after a bench trial, not at the summary disposition stage, and it deferred to the trial court's factual findings. The court also rejected plaintiff's claims the trial court erred as to the taking claim by

ruling it did not have distinct investment backed expectations since it purchased the property with notice of the restrictions, the land was adaptable because it was possible to farm, the aggregation of the property with an adjacent parcel was appropriate to determine if a taking occurred, and the property was marketable and valuable as zoned. The court could not conclude the trial court's dismissal of the taking claim was clearly erroneous in light of its factual findings, which were supported by the evidence. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 43680, September 14, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/090809/43680.pdf

Denial of a Rezoning Application not a Substanative Due Process Violation

Court: Michigan Court of Appeals (Unpublished No. 284862, September 15, 2009)

Case Name: *Eureka Int'l L.L.C. v. City of Romulus*

Concluding the plaintiffs did not raise any genuine issue of material fact as to the propriety of the defendant-city's explanations for denying their rezoning application, the court held, *inter alia*, there was no genuine issue of material fact whether the denial was a violation of plaintiffs' substantive due process rights.

In 1998, plaintiffs purchased three contiguous parcels of property in the city totaling almost 90 acres. Almost all the property was zoned M-1 Light Industrial, and was between property zoned for residential use on one side and heavier industrial use on the other side. The land was undeveloped. Plaintiffs planned to develop it as an "intermodal warehouse/distribution facility."

In 2001, the city amended the restrictions related to the M-1 zoning classification, limiting the size of structures built on the land to a maximum of 40,000 square feet and the maximum number of truck bay doors to 13. Plaintiffs wanted to build about 1 million square feet of warehouse space. They unsuccessfully sought to have the zoning classification for the property changed to MT-2 Industrial Transportation District, which has no size or truck bay door restrictions.

The trial court granted the city summary disposition. On appeal, plaintiffs argued, *inter alia*, the trial court did not properly consider their argument it was the city's denial of rezoning, rather than the creation of the M-1 zoning classification in the first place, which constituted a substantive due process violation. The court noted "plaintiffs are making a distinction without a difference." Although most Michigan case precedent relating to substantive due process claims in the land use context frame the issue as a "challenge to a zoning ordinance," the "same standards are applied to cases in which a landowner challenges the denial of a rezoning request" and "there is no substantive difference between these kinds of claims." In either case, the landowner claims the existing zoning classification is unreasonable and unjustified, "whether the unreasonableness is manifested as the original creation of the classification or the subsequent affirmation of the classification by the municipality's denial of a rezoning request."

The court concluded plaintiffs did not produce evidence the city's partial reliance on its master plan was arbitrary and capricious, or countering the city's determination there was no evidence the property could not be developed as zoned. Plaintiffs' "regulatory taking" claim also failed. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 43733, September 22, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/091509/43733.pdf

"No Very Serious Consequences" Relative to Mining Permit

Court: Michigan Court of Appeals (Unpublished No. 283638 September 22, 2009)

Case Name: *Velting v. Cascade Charter Twp.*

The trial court did not clearly err in concluding the plaintiffs failed to make a strong showing "no very serious consequences would result from the rezoning" and thus, did not err in ruling their substantive due process rights were not violated by the defendant-township's denial of their application for rezoning their property as a Planned Unit Development (PUD) to permit the extraction of sand.

Plaintiffs own about 60 acres of land in the township, which was zoned R-1 residential and contained almost 2 million cubic tons of sand they wanted to excavate and sell as construction grade sand. Defendant's zoning ordinance did not expressly prohibit excavation of natural resources from land zoned R-1 residential, but required application for a PUD to rezone the prospective site if it met certain qualifications. Plaintiffs alleged, *inter alia*, defendant's denial of their application denied them substantive due process of law. After a prior remand by the court to conduct a *de novo* review of the substantive due process claim and to

clarify the status of plaintiffs' claim their federal (42 USC §1983) substantive due process rights were violated, the trial court held their substantive due process rights were not violated and their §1983 claim had been dismissed.

The court concluded the trial court did not clearly err in finding approval of the PUD would worsen an already dangerous traffic condition, have a negative impact on home values, and create dust and noise in the area. The record supported the finding sand of the same quality and comparable price was available for a highway project from multiple different existing mines in the area. In light of this evidence, the court did not have a definite and firm conviction the trial court erred in determining the public's interest in the excavation of plaintiffs' sand was low. Thus, they had to "make a very strong showing that 'no very serious consequences" [would] result from the extraction of the resources." Deferring to "the trial court's superior opportunity to observe and evaluate the evidence presented before it," the court concluded there was adequate evidence to support its finding serious traffic concerns would result in serious consequences if the PUD was approved. Testimony also supported the trial court's finding surrounding home values would decrease due to the mine, and there was evidence supporting its finding dust and noise would result from plaintiffs' mining operation. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 43805, September 30, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/092209/43805.pdf

See also *Kyser v. Kasson Twp.*, page 3, of *Summary of Planning and Zoning Court Decisions, 2009*, found at http://web5.msue.msu.edu/lu/pamphlets.htm#court

Engineering Standards Constitutionally Sound

Court: Michigan Court of Appeals (Unpublished No. 288625 and 290054, April 20, 2010)

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

In Docket No. 288625, the court held the plaintiff-township's zoning ordinance and engineering standards ordinance were constitutionally sound and the trial court erred in ruling against the township in regard to the access roads thus, reversal was mandated.

The case involved the improvement, extension, and construction of two access roads on farm property owned by defendant-Rondigo, for purposes of carrying out a composting operation, activities the township claimed were in violation of the law, including various township zoning ordinances. The appeals court held §4.12(A) of the zoning ordinance set forth constitutionally sufficient standards and criteria to guide a determination whether to approve a non-residential driveway. The strong presumption of constitutionality was not overcome as Rondigo did not meet its burden to show the ordinance was clearly unconstitutional. The ordinance language was reasonably precise given the subject matter. The ordinance mandated consideration be given to three factors and three factors alone - the effects on the surrounding property, the effects on pedestrian and vehicular traffic, and the effects on the movement of emergency vehicles. The township's planning commission, the county road commission, and, if applicable, the Department of Transportation were not at liberty to exercise unstructured, unlimited, and arbitrary discretion, where they were required to contemplate and weigh all three of the recited factors in making a decision. The court acknowledged §4.12(A) did not expressly specify how the three factors should be weighed relative to rendering a decision on an application, and did not detail the parameters of the factors. The court found, however, the factors were sufficiently descriptive an ordinarily intelligent person would keenly be aware of what facts were relevant in the decision-making process - minute detail was unnecessary. Given the wide array of logically pertinent facts potentially encompassed by the three factors and thus subject to consideration, it would make little sense for the ordinance's standards to be drawn in more narrow and detailed terms.

The court also held the trial court erred in ruling §IV-1(I)(2) of the township's engineering standards ordinance violated the Title Object Clause of the Michigan Constitution of 1963, article 4, §24 and disagreed with Rondigo's claim the ordinance was unconstitutionally vague.

Further, as to the trial courts ruling on costs, expenses, and attorney fees in Docket No. 290054, the court reversed and remanded in part, allowing the trial court an opportunity to exercise its discretion to make an award solely in connection with the litigation of the township's failed ordinance-based nuisance claims concerning composting activities on the property. Affirmed in part, reversed in part, and remanded.. (Source: State Bar of Michigan *e-Journal* Number: 45558, April 26, 2010.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2010/042010/45558.pdf

Due Process and Equal Protection

Properly Filed its Petition for Rezoning During the Moratorium

Court: Michigan Court of Appeals (Unpublished, No. 284238, June 25, 2009)

Case Name: *Dan & Jan Clark, LLC v. Charter Twp. of Orion*

The court held there were no procedural defects with the defendant-Township's petition for rezoning and the trial court properly granted summary disposition to the Township.

The case arose from a rezoning dispute for 6.64 acres (the Clark property). Plaintiff-Clark purchased the land in 1999, intending to develop it commercially pursuant to its then existing zoning classification of General Business (GB-2). Additional properties relevant to the appeal included:

1) the adjacent property to the south of the Clark property (Home Depot property),
2) the adjacent property to the north of the Clark property (Atchoo property), and
3) the property to the north of the Atchoo property (Bald Mountain property).

The Township determined permitting new development or expansion and rezoning in the area would be "counter-productive" and imposed a 120-day moratorium on June 20, 2005, which was later extended for an additional 180 days. Ultimately, the Township Board concurred with the recommendations and reasoning of the Township Planning Commission and rezoned the Bald Mountain property from Recreational 2 (Rec-2) to Suburban Estates (SE), rezoned the Clark property from GB-2 to Office and Professional (OP-1), and denied rezoning the Atchoo property, leaving it OP-1.

Plaintiff appealed the decision to rezone the Clark property and requested a variance to permit the uses allowed under a GB-2 zoning designation, but its appeal was dismissed for lack of jurisdiction.

Plaintiff sued alleging, *inter alia*, substantive due process violations, an unconstitutional "taking," and equal protection violations. On appeal, plaintiff claimed the Township improperly filed its petition for rezoning during the moratorium and its petition was defective because it sought to rezone multiple, nonadjacent properties in a single petition, contrary to MCL 125.284.[5] The 180-day extension to the initial moratorium ran until April 16, 2006. The petition requesting rezoning was not filed until April 21, 2006. Thus, the petition was not filed during the moratorium.

As to plaintiff's claim the Township's petition was defective because it sought to rezone multiple, nonadjacent properties, the court failed to see how MCL 125.284 supported plaintiff's position. Nothing in the statute related to how many properties, adjacent or otherwise, may be contained within a single petition for rezoning. It was simply a notice provision. The court also held, *inter alia*, the evidence showed there was clearly room for legitimate differences of opinion as to the zoning and use of the Clark property, and where there is room for a legitimate difference of opinion about an ordinance's reasonableness, there is no due process violation. Plaintiff also failed to prove an equal protection claim, and summary disposition was proper on its taking claims. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 43114, July 1, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/062509/43114.pdf

See also *Lubienski v. Scio Twp.* on page 25.

Variances (use, non-use)

ZBA's Decision Supported by Competent, Material, and Substantial Evidence on the Record

Court: Michigan Court of Appeals (Unpublished No. No. 281745, June 16, 2009)

Case Name: *Spruce Ridge Dev. v. Big Rapids Zoning Bd.*

Since the record supported the conclusion the respondent-Big Rapids Zoning Board of Appeals' (ZBA) decision represented the reasonable exercise of discretion granted by law to the ZBA, the decision was supported by competent, material, and substantial evidence on the record, and in affirming the ZBA's decision the trial court applied correct legal principles and did not misapprehend or grossly misapply the substantial evidence test, the court affirmed the denial

[5]This case concerns and quotes the old Township Zoning Act (M.C.L. 125.284 repealed July 1, 2006) but applicable here for this court case. However the new Michigan Zoning Enabling Act contains essentially the same notice requirements: M.C.L. 125.3306 with cross reference to M.C.L. 125.3202, and 125.3401(2) with cross M.C.L. 125.3202.

of the petitioners' variance requests.

The property at issue was zoned as R-1 residential district and consisted of 35 acres of unimproved land. Petitioners-Spruce Ridge Dev. argued at the ZBA hearings on the northwest part of the property they wanted to mix duplexes with single-family structures. They did not specify how many structures would be single-family and how many would be duplexes and did not indicate how the mixed structure area would be designed. They also asserted an assisted living center might be built in the southwest corner of the property, which would be adjacent to apartment complexes to the south. They also indicated the east half of the property would contain single-family structures with no variances, and eight acres of the property on the east half would not be developed. In order to facilitate this planned development, petitioners requested two non-use variances to allow the parcel size for the single-family homes to be reduced from 11,250 square feet to 7,500 square feet and the maximum parcel coverage to be increased to 30 percent from 25 percent.

The ZBA denied the requested variances. Petitioners' primary claim was no market existed in a price range where they could make a profit on the sale of lots developed according to the R-1 zoning because of the high infrastructure costs, but §13.5:1 of the zoning ordinance provides the "possibility of increased financial return shall not of itself be deemed sufficient to warrant a variance."

Petitioners did not present, *inter alia*, a drawing of the purported project, or specific figures to show how the infrastructure costs would be reduced or how those decreased costs would impact a reasonable rate of return. Also, the ZBA noted the estimated infrastructure costs were based on all of the property being developed and did not exclude the eight acres, which were not going to be developed. The ZBA found petitioners' inability to get a greater rate of return was primarily due to them paying too much for the property. In addition to these concerns, the ZBA made several findings, applied them to the standards for variances, and concluded the request should not be granted. (Source: State Bar of Michigan *e-Journal* Number: 42988, June 23, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/061609/42988.pdf

Standing to Challenge Variance

Court: Michigan Court of Appeals (Unpublished No. 282799, February 23, 2010)

Case Name: *Blue Lake Fine Arts Camp v. Blue Lake Twp. Zoning Bd. of Appeals*

Concluding the plaintiff failed to prove the "harm" it alleged for the purpose of establishing it had standing, the court held the trial court properly ruled plaintiff-Blue Lake Fine Arts Camp lacked standing to challenge the defendant-Blue Lake Township Zoning Board of Appeals' (ZBA) grant of use variances to the Harris-defendants.

The dispute arose over the Harris parties' intent to construct homes on four non-contiguous lots around a lake, near the plaintiff's property. The parcels were zoned Forest Recreational-Institutional (FR-I), which prohibited residential uses unrelated to operation of a camp. The ZBA had previously granted the Harris parties variances several times, but each time the court reversed and remanded. This appeal arose from the ZBA again granting the variances after a second remand.

The court noted standing in this case required "plaintiff to prove, not merely allege, harm." Standing was challenged and a hearing was held. Plaintiff did not present any evidence beyond, at most, an unsigned letter from an unknown source, which was given to the ZBA. There was no indication "plaintiff was denied a meaningful opportunity to present actual evidence, whether in the form of sworn testimony, an affidavit, or anything else." Plaintiff simply failed to do so. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 451508, February 26, 2010.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2010/022310/45150.pdf

Zoning Amendment: Voter Referendum

Contract/zoning Pud Agreement Never Became Effective: Voter Referendum

Court: Michigan Court of Appeals (Unpublished No. 287485, November 17, 2009)

Case Name: *MPBC Dev., LLC v. Charter Twp. of Oakland*

The trial court properly granted summary disposition to the defendant-Township holding the Planned Unit Development (PUD) Agreement never became effective because the defeated ordinances never went into effect.

In 2004, plaintiff-MPC purchased property, which

plaintiff-MPCB Development, LLC, sought to develop on behalf of MPC into a residential/commercial community (Harvest Corners). In June 2005, MPCB submitted a rezoning petition to have the property rezoned from Medium Residential District (MRD), Low Residential District (LRD), and Very Low Residential District (VLRD) to Residentiaol Multiple District (R-M-1), Local Business District (B-1), and Planned Unit Development (PUD). The Township adopted three ordinances related to the property. MPCB Dev. and the Township entered into a development agreement (the PUD Agreement). Ordinances A(1) and A(2), which were designed to rezone the property, were defeated in a voter referendum and thus, never became effective.

MPCB Dev. argued the trial court erred in granting defendant's motion for summary disposition when it concluded the PUD Agreement never became effective because the defeated ordinances never went into effect. The PUD Agreement had two different paragraphs related to its effective date. The first was recital J. The final paragraph of the agreement provided the PUD Agreement "shall take effect on the effective date of the Township's amended Ordinance Granting the Harvest Corners Planned Unit Development rezoning." The court agreed with plaintiffs these paragraphs appeared to conflict. Under recital J, the PUD Agreement takes effect on the later of, September 12, 2006 (the date the PUD Agreement was executed), October 2, 2006 (the effective date of the PUD Ordinance), or never (the effective date of the defeated ordinances). Looking just at this paragraph, the trial court properly concluded the PUD Agreement never took effect, as "never" was the latest of the three alternate dates. Under the final paragraph, however, the PUD Agreement would have become effective on October 2, 2006, when the PUD Ordinance became effective.

The court concluded, however, even if the PUD Agreement was operative, defendant was still entitled to summary disposition because without the underlying B-1/Planned Residential Rezoning Overlay (PRRO) and R-M/PRRO zoning, aspects of plaintiffs' proposed development were inconsistent with the underlying zoning and thus, their proposal was not in compliance with all Township ordinances as required by the PUD Agreement. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 44334, November 24, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/111709/44334.pdf

Petition for Voter Referendum: Open Meetings Act

Court: Michigan Court of Appeals (Unpublished No. 287425, November 24, 2009)

Case Name: *Larrin v. Interior Twp. Bd.*

The trial court, *inter alia*, properly granted summary disposition to defendants and intervening defendants on counts I through VII of plaintiffs' second amended complaint.

In March 2006, the defendant-Interior Township board added Article 5A to the township's zoning ordinance. The article created a lake-residential zoning classification for the purpose of allowing land surrounding Bond Lake (or Bond Falls Flowage) to be used for residential use. It also permitted seasonal docks to be built on the lake. In August 2006, the board adopted Amendment 083106, which rezoned property near Bond Lake from a forestry-recreation district to the lake-residential district.

In September 2006, plaintiff-Larrin, a township resident and registered elector, provided notice of her intent to file a petition as to Amendment 083106. During the next three weeks, the second plaintiff-Rein and another person circulated the petition and gathered the required number of signatures. In October 2006, Rein hand delivered the petition to the defendant-township clerk (DeWitt). In December 2006, the clerk declared the petition inadequate because (1) the person who filed it was not the person who filed the notice of intent and (2) the petition addressed both Amendment 083106 and Article 5A.

Plaintiffs Larrin and Rein sued alleging various violations of the Open Meetings Act (OMA) (MCL 15.261 et seq.), Michigan Zoning Enabling Act (MZEA) (MCL 125.3101 *et seq.*), and Michigan election law. Plaintiffs requested in part, the "ordinance provisions" establishing the lake-residential zoning classification be declared invalid.

Defendant-Interior Township filed a motion to dismiss counts I-V and VII of the complaint. The trial court ordered the motion was granted unless plaintiffs filed an amended complaint within 21days. In ruling on township-defendants' motion to dismiss, the trial court ordered "any relief requested for the alleged OMA violations shall not include invalidation of Article 5 or Amendment 083106." Plaintiffs filed a second amended complaint in which they asserted violations of the OMA, MZEA, and the The Township Zoning Act

(TZA) (MCL 125.271 *et seq.*)[6].

Plaintiffs' counsel announced at oral argument, the only relief they sought on counts I-VII was the invalidation of Article 5A and Amendment 083106, although this specific relief was not requested in the second amended complaint.

However, even if it was established defendants violated the OMA as to specific meetings, plaintiffs were unable to obtain the desired relief based on the alleged OMA violations. The Appeals Court also held plaintiffs failed to establish a genuine issue of material fact existed as to the alleged violations of the TZA and MZEA and affirmed the trial court's order which granted summary disposition on counts I-VII.[7]

Finally, the court held the township clerk, DeWitt, erred in declaring the petition inadequate on the basis it sought to repeal both Article 5 and Amendment 083106 and the trial court erred in affirming DeWitt's declaration the petition was inadequate. Affirmed in part, reversed in part, and remanded. (Source: State Bar of Michigan *e-Journal* Number: 44427, December 15, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/112409/44427.pdf

Conditional Zoning Amendment

See *DF Land Dev., L.L.C. v. Ann Arbor Charter Twp.* on page 23.

Court, Ripeness for Court's Jurisdiction, Aggrieved Party

Not Ripe for Court Review

Court: Michigan Court of Appeals (Unpublished No. 283666, June 23, 2009)

Case Name: *Atchoo v. Charter Twp. of Orion*

The court held the plaintiff's challenges to the defendant-Township's moratorium, ordinance, and zoning decisions were not ripe for review and affirmed the trial court's grant of the Township's motion for summary disposition.

Plaintiff filed suit in the trial court challenging numerous Township decisions involving trust property in the Township. Relevant to this appeal, plaintiff alleged the circumstances surrounding a 10-month moratorium imposed to defer applications for development and rezoning in the area and the Township's post-moratorium denial of her request to rezone the trust property from Office and Professional 1 (OP-1) to General Business 2 (GB-2) denied the trust property's substantive due process, use, and equal protection rights under the United States and Michigan Constitutions.

The court held plaintiff's "as applied" challenges were precluded by the "rule of finality," as she only requested a variance from the Township Zoning Board of Appeals, which refused it because it lacked jurisdiction. The possibility still existed the Township Board would have granted a variance during the moratorium or afterward, in the alternative to her application to apply for rezoning and her subsequent rezoning request. Thus, the court held plaintiff's "as applied" substantive due process, takings, and equal protection challenges regarding the moratorium and rezoning request was not ripe for review. Because plaintiff's underlying federal claims were not ripe for review, her corresponding federal claims for relief under 42 USC § 1983 also failed. The court concluded even if the issues were ripe for review, it would affirm the trial court's order for the reasons expressed in the trial court's written opinion. (Source: State Bar of Michigan *e-Journal* Number: 43072, June 29, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/062309/43072.pdf

Did Not Exhaust Local Administrative Remedies

Court: Michigan Court of Appeals (Unpublished No. 285723, June 25, 2009)

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

Concluding the proper avenue for plaintiff-Daley's appeal was to the defendant-township's zoning board of appeals (ZBA), not the construction board of appeals and he failed to exhaust all available administrative remedies by not appealing to the township's ZBA, the court held the trial court properly granted the township-defendants' motion for summary disposition.

[6]The old Township Zoning Act (M.C.L. 125.271 *et seq.*) was repealed July 1, 2006, but applicable here for this court case.

[7]Counts I-III and VII: The trial court's order regarding counts I-III and VII was given for "the reasons stated on the record," but plaintiffs have not filed a transcript of the January 9, 2008 hearing with the Appeals Court, thus abandoning the issue.

Counts IV and V: planning commission, violated the TZA (MCL 125.281), because the minutes "did not reflect the public comments made during the meeting[s]."

Plaintiff sought to build a 910 square-foot garage with two 16-foot-long garage doors to house 4 cars. In 2004, he applied to the ZBA for a variance, which was denied. He failed to appeal the decision and instead filed a complaint in the trial court alleging the ordinance provision was unconstitutionally vague. The trial court dismissed the complaint and the Appeals Court affirmed.

In 2007, plaintiff submitted a revised plan with space for 3 cars and a 100 foot craft room and calling for two 16-foot doors. The township denied the plans as not complying with the ordinance. Plaintiff argued the township was obligated to approve the plans because he complied with the ordinance. Plaintiff requested an appeal to the township's construction board of appeals. Defendant-township argued the decision was not a construction code dispute, but a zoning ordinance dispute.

Plaintiff then filed this court case seeking approval of his revised plans without appealing to the township ZBA or applying for a variance. Thus, the ZBA had not already made a final decision on the issue against plaintiff. The court noted the 2007 plans were revised to include the craft room, which could rebut the presumption decided in the first ZBA decision "that two 16-foot garage doors means a four-car garage."

The court held the crux of the 2004 and 2007 plans was not exactly the same pursuant to MCL 125.3603(1), and an appeal as to the 2007 revised plans must be taken to the ZBA. Although plaintiff contended an appeal to the ZBA would be futile, the court held the futility exception to the exhaustion of administrative remedies does not apply when a plaintiff maintains the zoning board is biased against him when bias is impossible to determine because the plaintiff has failed to obtain a final decision from the board. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 43125, July 2, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/062509/43125.pdf

Not a Person Aggrieved

Court: Michigan Court of Appeals (Unpublished No. 287400, September 15, 2009)

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

An existing cell tower owner-plaintiff did not show it was entitled to appellate relief where it failed to address the trial court's holding it could not establish standing as a "person aggrieved," and it could not contend the "colocation" ordinance created a vested right. Thus, the court affirmed the trial court's orders denying DF Land Dev., L.L.C.-plaintiff's zoning appeal and granting the defendants-township, zoning official, trustees, planning commission, and zoning board of appeals partial summary disposition.

Plaintiff filed a complaint and statutory claim of appeal arising from the defendants' involvement in the placement and construction of a cell tower community (the AT&T Tower). Plaintiff asserted it was the owner of properties near the AT&T Tower, including real property "already improved by a designed and otherwise suitable cell tower." It alleged the township-defendants approved the site, construction, and use of the AT&T Tower contrary to controlling ordinances, policies, and procedures. Plaintiff contended defendants violated their own ordinances requiring them to investigate the possibility of colocation, which refers to the situation where multiple cell carriers occupy the same tower, and they allowed the AT&T Tower without investigation or study because they received revenue from the lease of their property.

While plaintiff alleged the trial court erred in concluding laches barred its claim, the trial court's ruling was also based on, *inter alia*, its determination plaintiff could not show standing as a person aggrieved, and plaintiff did not address this holding.

"In light of the failure to address this aspect of the trial court's ruling, plaintiff did not demonstrate entitlement to appellate relief." Noting there "is no vested right to the continuation of an existing law by precluding the amendment or repeal of the law," the court also held the trial court did not err in granting defendants' motion for partial summary disposition on plaintiff's claim of "vested rights." Plaintiff essentially contended the colocation ordinance must be followed and it had a vested right in the ordinance. However, defendants' zoning laws also contained exceptions and exemptions, "and an otherwise prohibited use may be altered through the authority to grant conditional use permits." Defendants leased the premises for the AT&T Tower through a conditional use permit. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 43742, September 21, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/091509/43742.pdf

Lack of Standing

Court: Michigan Court of Appeals (Unpublished No. 286730, February 9, 2010)

Case Name: *Miller Apple Ltd. P'ship v. Emmet County*

Concluding the plaintiff's interest in preventing competition from a nearby restaurant business, even if the prospective competition constitutes an "actual" and not a merely "conjectural" or "hypothetical" injury, is not a "legally protected interest" sufficient to establish standing, the court held the trial court properly dismissed for lack of standing plaintiff's appeal of the decision by the defendant-Emmet County Board of Commissioners approving an amendment to a planned unit development (PUD) agreement to allow the operation of a new restaurant on a vacant lot near plaintiff's existing restaurant.

The dispute concerned the proposed development of a vacant parcel currently designated for office and professional use, to house a restaurant. Plaintiff operates an Applebee's on a leased lot in the Plaza across the street from the vacant parcel. The intervening defendants have various interests in the vacant parcel and plaintiff's leased lot. The original PUD Agreement permitted up to two restaurants in the Plaza. The Board later approved an amendment to permit the construction of a third restaurant. Plaintiff filed a claim of appeal, intervening defendants moved to dismiss the appeal on the ground plaintiff lacked standing, and the trial court granted the motion.

To have appellate standing, the party filing the appeal must be "aggrieved." In the zoning context, a party is "aggrieved" only if he alleges and proves "that he has suffered special damages related to the beneficial use and enjoyment of his own land that are not common to other similarly situated property owners." Proof of increased traffic and general economic or aesthetic losses are not sufficient to show special damages. Also,

> "a party's financial interest in stifling competition posed by the development of neighboring properties is not a 'legally protected interest' sufficient to grant standing to seek appellate review."

In more detail the court said:

> Moreover, "to have appellate standing, the party filing an appeal must be 'aggrieved.'" *Manuel v Gill*, 481 Mich 637, 643; 753 NW2d 48 (2008), citing *People v Hopson*, 480 Mich 1061; 743 NW2d 926 (2008), and *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291; 715 NW2d 846 (2006). To establish aggrieved status,
>
> > " . . . one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency." An aggrieved party is not one who is merely disappointed over a certain result. Rather, to have standing on appeal, a litigant must have suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court's power. The only difference is a litigant on appeal must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case. [*Federated*, 475 Mich at 291-292, quoting *In re Trankla Estate*, 321 Mich 478, 482; 32 NW2d 715 (1948) (citations omitted).]
>
> In the zoning context, a party is "aggrieved" only if he alleges and proves that he has suffered special damages related to the beneficial use and enjoyment of his own land that are not common to other similarly situated property owners. *Village of Franklin v Southfield*, 101 Mich App 554, 557; 300 NW2d 634 (1980), citing *Western Mich Univ Bd of Trustees v Brink*, 81 Mich App 99, 103 n 1; 265 NW2d 56 (1978), and *Unger v Forest Home Twp*, 65 Mich App 614; 237 NW2d 582 (1975).1 Proof of increased traffic and of general economic or aesthetic losses is not sufficient to show special damages. *Unger*, 65 Mich App at 617, citing *Joseph v Grand Blanc Twp*, 5 Mich App 566; 147 NW2d 458 (1967). Moreover, a party's financial interest in stifling competition posed by the development of neighboring properties is not a "legally protected interest" sufficient to grant standing to seek appellate review. *Brink*, 81 Mich App at 105.2 As this Court stated in *Brink*, a plaintiff's "financial interest in throttling the development of neighboring properties is not the kind of legally protectable property right or privilege, the threatened interference with which grants standing to seek review." *Id.*
>
> We conclude that plaintiff's interest in thwarting competition from a nearby restaurant business, even assuming that such prospective competition constitutes an "actual" and not

merely "conjectural" or "hypothetical" injury, is not a "legally protected interest" sufficient to establish standing. *Michigan Citizens for Water Conservation*, 479 Mich at 294-295; *Brink*, 81 Mich App at 105.

Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 45031, February 17, 2010)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2010/020910/45031.pdf

Conditional Use Permit and Site Plan Approval are Administrative Decisions

Court: Michigan Court of Appeals (Unpublished No. 288727, March 23, 2010)

Case Name: *Lubienski v. Scio Twp.*

The court held, *inter alia*, the trial court's order dated September 26, 2008 finding the denial of the Lubienski-plaintiffs' requests for a conditional use permit and site plan approval by the township-defendants complied with the law; was supported by competent, material, and substantial evidence on the record; reflected the proper exercise of discretion; and so affirmed the order and also affirmed the trial court's order denying the plaintiffs' motion for reconsideration.

Plaintiffs own adjoining pieces of property, totaling about 120 acres in Scio Township. They sought to develop an "open space residential neighborhood" known as "Oakridge Estates," with 64 lots and a community wastewater treatment system on the property. Plaintiffs alleged in 1997, they divided the main parcel into 6 approximately 20-acre parcels and after the division there were 9 parcels. In 1999, they applied for and were granted approval to divide a 25-acre parcel. They also received a variance to improve a street located on the property as a private road.

Plaintiffs continued discussions with the township as to the proposed development and believed the density permitted on the property was 64 units. Plaintiffs applied for a conditional use permit and site plan approval from the township, the request was denied because the density they proposed "grossly exceed[ed] that permitted by the [t]ownship's zoning ordinance," according to the township attorney in a letter to plaintiffs. After several meetings with the township, and plaintiffs' petition for the conditional use permit and site plan approval was denied.

Plaintiffs filed suit against the township. The trial court found the denial complied with the law, was a proper exercise of discretion, and denied their request for reconsideration. On appeal, plaintiffs argued Count I of their complaint challenging the township's denial of their request for a conditional use permit and site plan approval invoked the original rather than appellate jurisdiction of the trial court and the trial court applied the wrong standard of review. The Appeals Court disagreed and held Count I specifically dealt with the township's denial of their request for the conditional use permit, invoking the appellate jurisdiction of the trial court. Thus, the trial court properly concluded Count I was a claim of appeal of an administrative decision, subject to review under Const. 1963, art. 6, § 28. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 45388, March 30, 2010.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2010/032310/45388.pdf

Open Meetings Act, Freedom of Information Act

See *Larrin v. Interior Twp. Bd.*, page 21.

Zoning Administrator/Inspector, Immunity, and Enforcement Issues

Enforcement: Unfinished Structure Is Blight

Court: Michigan Court of Appeals (Unpublished No. 289059, October 22, 2009)

Case Name: *City of Mackinac v. Webster*

The Appeals Court affirmed the trial court's order granting the plaintiff-city's motion to abate a nuisance (an unfinished single-family home) on the defendants' property and requiring them to abate the nuisance in accordance with the city's requested relief, rejecting their arguments the specific abatement ordered by the trial court was a "drastic and punitive measure" and the trial court failed to consider alternative remedies before issuing its order for specific abatement.

Defendants purchased a vacant lot in 1993, intending to construct a single-family home. They obtained the required building and zoning permits in 1999, and began construction. By 2001, they had excavated and poured a concrete foundation with walls extending 3 to 4 feet above grade, and installed a septic pit. They had an eight-foot fence constructed in 2003, at the city's insistence, to enclose the foundation work.

However, primarily due to financial problems, defendants were unable to complete any more construction on the property and the home remained unfinished.

While they argued on appeal the trial court erred in ruling the unfinished home constituted blight and a nuisance, the Appeals Court declined to address the merits of their argument because they conceded this point in the trial court. They also argued the abatement ordered by the trial court required the complete destruction of the unfinished house and the trial court abused its discretion in failing to consider and impose an alternative form of abatement. The court concluded other than "defendants' own self-serving statement, they failed to present any evidence that the court-ordered remedy would completely destroy the unfinished basement structure." Further, "partial removal and filling in of an unfinished structure, which had been in an unfinished state for nine years and in violation of plaintiff's zoning ordinances for most of that time, was not too drastic a remedy where defendants were repeatedly given opportunities to obtain financing" to remedy the blight, but did failed to do so.

The court concluded the record showed the trial court addressed the reasonableness of defendants' alternative proposal, and their proposed remedy would not provide the city with sufficient relief "because the structure, after defendants' proposed remedial measures were completed, would still violate plaintiff's ordinances." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 44151, November 2, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/102209/44151.pdf

Wrongful termination: Whistleblowers' Protection Act

Court: Michigan Court of Appeals (Unpublished No. 286775, February 23, 2010)

Case Name: *Vandyke v. Leelanau County*

The court held, *inter alia*, the trial court did not abuse its discretion in setting aside the default, there were questions of material fact as to whether G (the plaintiff's boss) was aware of the warrant disposition requests involving the electrical contractor, and whether Vandyke-plaintiff's reports were causally connected to the decision to fire him. The court also held his verbal reports to G were "protected activity," but his suspension of the certificates of occupancy was not, there was also a material question of fact as to whether his termination was causally related to his protected conduct, and further held the trial court properly granted summary disposition on the claim related to the alleged mechanical code violations, and the Whistleblowers' Protection Act (WPA) (MCL 15.361 *et seq.*) venue provision applied to keep his WPA claim in the county where he resided.

Plaintiff was the building inspector for the defendant-Leelanau County and G was the county administrator. Defendants fired plaintiff asserting he was ineffective in managing the building department. He claimed he was fired in violation of the WPA because he reported to G a condo project was wrongly approved because of numerous existing code violations, he had suspended the condo development's certificates of occupancy, and had submitted warrant disposition requests to the prosecutor's office as to a contractors use of unlicensed workers.

The trial court dismissed the case finding his activities were not protected by the WPA and there was no evidence supporting his claim his firing was causally connected to his activities.

The appeals court affirmed the trial court's grant of summary disposition on the motion to set aside the default, and affirmed its grant of summary disposition on plaintiff's third claim of protected activity as to mechanical code violations and its conclusion the revocation of the occupancy permits was not a report, but reversed as to the warrant request and plaintiff's reporting to G of the condo defects plaintiff thought required revocation of the occupancy permits, and held the trial court clearly erred in granting defendants' motion to change venue. The court affirmed in part, reversed in part, and remanded. (Source: State Bar of Michigan *e-Journal* Number: 44155, March 4, 2010.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2010/022310/45155.pdf

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

"Anti-funneling"/"Keyhole" Can Prohibited Riparian Owners from Allowing Non-riparian Lot Owners to Use the Lake Front

Court: Michigan Court of Appeals (Unpublished No.

286888, January 26, 2010)

Case Name: *Adkins v. Rutland Charter Twp. Zoning Bd. of Appeals*

Concluding under the plain and unambiguous language of the defendant-Rutland Charter Township's "anti-funneling"part of the zoning ordinance, multiple families could not use a single-family lot for access to the lake, the court held the defendant-Zoning Board of Appeals (ZBA) erred in failing to enforce the ordinance as written and the trial court erred by affirming the ZBA's erroneous interpretation. Thus, the court reversed the trial court's decision, vacated its order affirming the ZBA's interpretation, and remanded for entry of an order reversing the ZBA's decision.

The primary issue on appeal was whether the relevant township ordinance prohibited riparian lot owners from allowing non-riparian lot owners to use the riparian owners' property to access the lake for seasonal boating. The plaintiffs, owners of property abutting the lake, filed an application for interpretation and enforcement of the anti-funneling provision of the zoning ordinance after several non-riparian landowners began docking and mooring their boats on neighboring lakefront property lots with the permission of the owners of those lots.

After holding two public hearings and conducting a survey, the ZBA determined under the preamble to the anti-funneling provision in the zoning ordinance only applied to developers and not to residential property owners. Thus, the ZBA concluded the riparian owners could allow non-riparian owners to use the riparian lots for lake access. The trial court affirmed the ZBA's decision. However, the court held the ZBA's interpretation was contrary to law because the ordinance language was unambiguous and clearly limited the use of a given lakefront lot for lake access to the owners of a single-family home. Thus, the ordinance contemplated a riparian lot's access will be linked to a single-family home "and will include only the access incidental to use by the owners of that single-family home."

No language in the ordinance specifically limited its application to developers, and the court would not read this limitation into the ordinance. "The riparian owners' grant of semi-permanent access to non-riparian owners is not incidental to the use of the lots as a single-family home." Thus, the lakefront lot owners allowing the docking, mooring, or storage of boats by non-riparian lot owners were violating the anti-funneling provision of the zoning ordinance. (Source: State Bar of Michigan *e-Journal* Number: 44887, February 1, 2010.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2010/012610/44887.pdf

"Tree Protection" Ordinance Interpretation

Court: Michigan Court of Appeals (Unpublished No. 289734, March 2, 2010)

Case Name: *Huron Charter Twp. v. Fox*

Although the trial court erroneously interpreted the plaintiff-township's "tree protection" ordinance, it reached the correct outcome and properly granted the plaintiff summary disposition and injunctive relief.

The case concerned defendant's alleged violation of the ordinance. He owns an undeveloped parcel undisputedly larger than 10 acres and smaller than 25 acres. In 2007, plaintiff-Huron Charter Township received complaints from nearby residents defendant was cutting down trees. Defendant was ticketed for violating the ordinance. The misdemeanor charge was dismissed and plaintiff filed this civil suit, seeking damages and an injunction prohibiting further cutting.

Defendant argued the trial court's interpretation of the ordinance was contrary to the plain language of the ordinance. The court held both parties were correct to some extent. Defendant was correct in reading the plain language of §4.01 as requiring a tree removal permit only when a site plan was filed. "A mere intent or mental plan to develop property does not trigger the requirement of applying for a tree removal permit." However, plaintiff was also correct the ordinance should be read as a whole. Nothing in §4.01 identified it as being the only description of parcels to which the permit requirement applied. Reading it this way, as defendant would like, would render worthless or invalid not only the words "ten acres in size or greater" but also several of the exceptions identified in Article VI. No site plan would be on file for land being used for agriculture, conservation, or outdoor recreation, so exceptions would not be needed for those uses. It was "nonsensical" to argue the enactors intended to exempt those lands if they were being subdivided for development, because the developers would then have to submit a plat or plan, triggering the need for a tree removal permit, again rendering the exception unnecessary.

The only reasonable reading of the ordinance as a whole was it applied to all parcels of 10 or more acres

unless an exception applied, and to all parcels, regardless of size, for which a site plan or plat has been filed. Because there was no dispute defendant's property was over 10 acres, the ordinance applied and he was required to seek a permit before cutting the trees. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 45228, March 9, 2010.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2010/030210/45228.pdf

Other Unpublished Cases

Fence Dispute: Zoning Protection of Lake View
Court: Michigan Court of Appeals (Unpublished No. 287119, September 29, 2009)
Case Name: *Simon v. City of Norton Shores*

Since the trial court erred in finding the language of the ordinance at issue unambiguous, in construing the ordinance in a way reading the words "required minimum" out of the language, and decided the entire project was not valid, it did not address how much of the six-foot fence, if any, extended beyond the setback line and did not address plaintiffs' contention some of the new fence exceeded six feet tall, the court reversed and held a remand was necessary to address these issues.

The plaintiffs (Simon) live next to the Sipovics, and both have lake frontage. The Sipovics wanted to build a fence and applied for a building permit, submitting their plan to the Community Development Director (CDD) (who also serves as the building and zoning administrator) for the defendant-City of Norton Shores. Five sections of the city zoning ordinance were relevant to the case, but none of them defined "required minimum front yard." The CDD granted the permit and noted approval was premised on an amendment to the proposed site plan "12 feet of solid, six-foot fence instead of the proposed 24 feet of solid, six-foot fence."

Plaintiffs appealed the decision arguing the Sipovics put in four sections of solid, higher-than-four-feet fence instead of the two sections the permit allowed. The issue between the parties was whether §15.100(2) of the city zoning ordinance, which allows six-foot fences only up to the "minimum required front yard," means fences may extend to the setback line as defined in §4.102(1)(A) of the zoning ordinance or whether they cannot extend into the front yard at all, as defined in §2.281.

The trial court ruled, *inter alia*, the ordinance language was clear and unambiguous and provided a six-foot fence shall not extend from a side yard into a front yard, and voided the issuance of the permit. Thus, the issue became where the "front yard" begins for purposes of determining where the six-foot high fence must stop. The various ordinances do not define "required minimum front yard." The CDD considered several ordinances, particularly §4.102(1)(A), which provides the closest a principal structure can be to the water is the point where it meets "a straight line drawn from the front of each principal building" on adjoining parcels. Defendants marked this as the beginning of the "required minimum front yard."

The court opined this was a reasonable interpretation of the statutory language and chose to remand for the trial court to consider the issues it previously did not address in light of this interpretation. (Source: State Bar of Michigan *e-Journal* Number: 43896, October 6, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/092909/43896.pdf

Compel the Tax Assessor to Issue a Separate Tax Identification Number
Lot/parcel = Tax Parcel Number
Court: Michigan Court of Appeals (Unpublished No. 287626, November 19, 2009)
Case Name: *Arnold v. Torch Lake Twp. Tax Assessor*

NOTE: This case is included for purposes of its application for those few zoning ordinance that tie the definition of "lot" or "parcel" to the tax parcel number.

Rejecting the plaintiff's argument the relevant statutes, read as a whole, expressed the Legislature's intent each parcel of property must be assessed and identified separately unless the owner gives permission to combine them, the court held neither statute nor case law mandate each lot be given an individual tax ID number. Thus, the trial court correctly held plaintiff did not have a clear right to performance, defendant did not have a clear duty to perform, the requirements for mandamus were not met and granted defendant's motion for summary disposition.

Plaintiff owns Lot 27, Lot 26, and the adjacent half of Lot 25 in a subdivision. She obtained Lot 26 and her half of Lot 25 by one deed, and Lot 27 by a separate deed, although both were acquired in the same transaction, along with the execution of a single mortgage on all 3 parcels. The 3 parcels were deeded as

single unit since 1975 and according to defendant were given a single tax ID number in 1970 when a land contract vendee requested a unified tax number. A house was built on Lot 27 around 1960 and a garage was built on Lot 26 in 1977. For unknown reasons, plaintiff wanted Lot 27 to be assigned its own tax ID number so it could be assessed separately, and asked defendant to do so. Defendant refused, stating he was required to do so only if the property was unimproved.

Plaintiff sued for mandamus seeking to compel defendant to issue a separate tax ID number for Lot 27. The trial court held the relevant statutes only give the property owner the clear right to refuse a separate assessment, but not to demand it unless the lots are unimproved, and these were not. The parties did not dispute the exceptions in MCL 211.24 did not apply because the case did not concern contiguous or unimproved lots.

Contrary to plaintiff's claim, MCL 211.24(1) does not set out the only times parcels can be combined -- instead it identifies circumstances when parcels must be combined, and the "demand" referred to in the same sentence only applies to those circumstances. Also, M.C.L. 211.25(1)(e) did not help plaintiff where it only provides a permissive means of joining tax numbers and is silent on separating joined parcels and issuing separate numbers. Both MCL 211.25(1)(c) and MCL 211.25(1)(e) are permissive. The Appeals Court concluded plaintiff's claim there was a "clear mandate" in this section was incorrect. The only statutory mandate as to tax ID numbers was contiguous subdivisions within a section and contiguous undeveloped lots must be assigned one number unless a demand is made by the owner. In all other respects, the statutes are permissive or silent. Plaintiff had no clear right to the performance she sought under these statutes. (Source: State Bar of Michigan *e-Journal* Number: 44383, December 3, 2009.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2009/111909/44383.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

laches
n noun Law unreasonable delay in asserting a claim, which may result in its dismissal.
ORIGIN
Middle English (in the sense ‘negligence’): from Old French *laschesse*, from *lasche* ‘lax’, based on Latin *laxus*.

mandamus
n *noun Law* a judicial writ issued as a command to an inferior court or ordering a person to perform a public or statutory duty.
ORIGIN
C16: from Latin, literally ‘we command’.

mens rea
n *noun Law* the intention or knowledge of wrongdoing that constitutes part of a crime. Compare with **actus reus**.
ORIGIN
Latin, literally ‘guilty mind’.

obiter dictum
n *noun* (plural **obiter dicta**) *Law* a judge’s expression of opinion uttered in court or in a written judgement, but not essential to the decision and therefore not legally binding as a precedent.
ORIGIN
Latin obiter ‘in passing’ + dictum ‘something that is said’.

pecuniary
adjective formal relating to or consisting of money.

DERIVATIVES
pecuniarily adverb
ORIGIN
C16: from Latin pecuniarius, from pecunia 'money'.

per se
n adverb Law by or in itself or themselves.
ORIGIN:
Latin for 'by itself'.

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

scienter
n *noun Law* the fact of an act having been done knowingly, especially as grounds for civil damages.
ORIGIN
Latin, from *scire* 'know'.

stare decisis
n *noun Law* the legal principle of determining points in litigation according to precedent.
ORIGIN
Latin, literally 'stand by things decided'.

sua sponte
n *noun Law* to act spontaneously without prompting from another party. The term is usually applied to actions by a judge, taken without a prior motion or request from the parties.
ORIGIN
Latin for 'of one's own accord'.

writ
n *noun*
1 a form of written command in the name of a court or other legal authority to do or abstain from doing a specified act. (**one's writ**) one's power to enforce compliance or submission.
2 *archaic* a piece or body of writing.
ORIGIN
Old English, from the Germanic base of **write**.

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

[May 18, 2010 (3:15pm); C:\Documents and Settings\Kurt\My Documents\wp\LU Court Cases\SelectedPlan&ZoneDecisions2009-10.wpd]