

Selected Planning and Zoning Decisions: 2013 May 2012-April 2013

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This public policy brief summarizes the important state and federal court cases and Attorney General Opinions issued between May 1, 2012 and April 30, 2013.

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Published Cases

(New law)

Restrictions on Zoning Authority

Fireworks Regulation

Attorney General Opinion 7266 (June 12, 2012)

Michigan Fireworks Safety Act (2011 PA 256, MCL 28.451 *et seq.*) does not preempt a generally applicable local ordinance regulating all use of temporary vending facilities because the ordinance has only an incidental effect on the sale, display, and distribution of fireworks, and where both the Act and the ordinance can be enforced. Therefore, so long as the local ordinance does not prohibit fireworks vendors from undertaking their commercial operations in any way that other vendors may undertake their operations, the ordinance is not preempted by the Act.

The A.G.'s opinion explained his reasoning further by examination and application of the preemption doctrine.

A state statute preempts regulation by a local government unit when the statute completely occupies the regulatory field, or when the local regulation directly conflicts with the state statute. (*USA Cash #1, Inc v City of Saginaw* (285 Mich App 262, 267; 776 NW2d 346 (2009), citing *McNeil v Charlevoix County* (275 Mich App 686, 697; 741 NW2d 27 (2007), citing *Rental Prop Owners Ass'n of Kent County v Grand Rapids* (455 Mich 246, 257; 566 NW2d 514 (1997))). And in *People v Llewellyn* (401 Mich 314, 322; 257 NW2d 902 (1977), the Michigan Supreme Court observed that “where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is preempted.” (*Id.* at 323 (emphasis added)). This express preemption analysis is most relevant here, in light of the Act's preemption section quoted above, MCL 28.457(1).

The distinction being made is that the Fireworks Safety Act includes the phrase “shall not . . . enforce an ordinance [about fireworks which is] . . . regulated under this act.” The A.G. opinion uses an example of the state barring any local enforcement of ownership, transfer, sale, etc. of pistols or firearms “except as otherwise provided by federal law or a law of this state.” (MCL 123.1102). But the Fireworks Safety Act leaves open the door to limited regulation so long as that regulation

does contravene the state law and the local ordinance is incidental because it applies its regulations to any and all retail operations, and fireworks sales are not treated any differently than all other retail enterprises.

Thus, the township ordinance does not regulate the sale of consumer fireworks and it does not run afoul of the Act on that basis. Had the Legislature intended to prohibit a local unit of government from enforcing or enacting any peddling or temporary structure ordinances, or other generally applicable zoning, health, fraud, and public safety ordinances against fireworks vendors, it could easily have done so.

It is my opinion, therefore, that the Michigan Fireworks Safety Act, 2011 PA 256, MCL 28.451 *et seq.*, does not preempt a generally applicable local ordinance regulating all use of temporary vending facilities because the ordinance has only an incidental effect on the sale, display, and distribution of fireworks, and where both the Act and the ordinance can be enforced. Therefore, so long as the local ordinance does not prohibit fireworks vendors from undertaking their commercial operations in any way that other vendors may undertake their operations, the ordinance is not preempted by the Act.

The A.G. opinion also indicated sellers of consumer grade fireworks subject to the Michigan Fireworks Safety Act must comply with all provisions of the 2009 edition of National Fire Protection Association 101 and the 2006 edition of National Fire Protection Association 1124, including section 7.5.1.2, to the extent the provisions do not conflict with the Act. MCL 28.455(1)(a).

Copy of Attorney General Opinion:

<http://www.ag.state.mi.us/opinion/datafiles/2010s/op10345.htm>

Medical Marijuana

Court: Michigan Court of Appeals (297 Mich. App. 446; 823 N.W.2d 864; 2012 Mich. App. LEXIS 1510, July 31, 2012)

Case Name: *Ter Beek v. City of Wyoming*

NOTE: This case will go on to the Michigan Supreme Court to hear issues on the question of if (1) the Medical Marijuana Act (MMA) preempts local ordinances and (2) if the MMA is preempted

by federal law.

The court held that the defendant-City’s ordinance is void and unenforceable “to the extent that it purports to sanction the medical use of marijuana in conformity with the MMMA” (Michigan Medical Marihuana Act (MCL 333.26421 *et seq.*)) because the ordinance directly conflicted with the MMMA. The court also held that the federal Controlled Substances Act (CSA) (21 USC § 801 *et seq.*) does not preempt MCL 333.26424(a) because the limited grant of immunity from a “penalty in any manner” relates only to state action and does not purport to interfere with federal enforcement of the CSA.

Thus, the court reversed the trial court’s order granting summary disposition in favor of the City and remanded for entry of summary disposition in favor of plaintiff.

The City amended its city code and enacted a zoning ordinance (Ordinance § 90-66) that provides -

Uses not expressly permitted under this article are prohibited in all districts. Uses that are contrary to federal law, state law, or local ordinance are prohibited.

Violations of Wyoming’s city code including zoning violations are punishable by “civil sanctions, including, without limitation, fines, damages, expenses and costs . . . ,” and zoning violations are further subject to injunctive relief pursuant to the M.C.L. 125.3407 of the Michigan Zoning Enabling Act (MZEA) (MCL 125.3101 *et seq.*). Plaintiff, who is a qualified medical marijuana patient, lives within the city limits, where he grows and uses medical marijuana in his home (presumably in compliance with the MMMA). He was not charged with violating the ordinance and he has not been subjected to any penalties, fines, or injunctions.

Plaintiff argued on appeal that the ordinance was invalid because it conflicts with the MMMA. The City specifically acknowledged that the purpose of the ordinance “is to regulate the growth, cultivation and distribution of medical marihuana in the City of Wyoming by reference to the federal prohibitions regarding manufacturing and distribution of marijuana.” The City relied on the provision of the CSA that makes it

unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . .

Further, under CSA § 812(c)(10), marijuana is a Schedule I controlled substance. Thus, manufacturing or possessing marijuana is generally prohibited under federal law. The court concluded that:

these provisions of the CSA when read together with defendant’s zoning ordinance, which makes any violation of federal law an unpermitted use of one’s property, cause any medical use of marijuana pursuant to the MMMA on any property within the city of Wyoming to be a violation of defendant’s zoning ordinance.

While plaintiff has not been punished for violating the ordinance, the municipal code permits “civil sanctions, including, without limitation, fines, damages, expenses and costs . . .” for violations of the code. Also, it could not be disputed that if found in violation of Ordinance § 90-66, plaintiff would be subject to injunctive relief that would restrict the use of his property for purposes that would otherwise be permitted under the MMMA.

Under these circumstances, the issue presented as to conflict preemption between the MMMA and the ordinance was whether the possibility of plaintiff being subject to the civil sanctions of the City’s zoning ordinance if found in violation of the ordinance for engaging in activity otherwise permitted by the MMMA constituted a “penalty in any manner” prohibited by MMMA MCL 333.26424(a).

The Appeals Court held that applying the plain meaning of the words used in the immunity provision of the MMMA to the ordinance,

there can be no doubt that enforcement of the ordinance could result in the imposition of sanctions that the immunity provision of the MMMA does not permit. Specifically, the provisions directly conflict because the ordinance expressly prohibits uses contrary to federal law” and thus, “provides for punishment of qualified and registered medical marijuana users in the form of fines and injunctive relief, which constitute penalties that the MMMA expressly prohibits.

(Source: State Bar of Michigan e-Journal Number: 52313, August 3, 2012)

Full Text Opinion:
<http://www.michbar.org/opinions/appeals/2012/073112/52313.pdf>

Cell Towers

Court: U.S. Court of Appeals Sixth Circuit (691 F.3d 794; 2012 U.S. App. LEXIS 17534, August 21, 2012)

Case Name: *T-Mobile Cent., LLC v. Charter Twp. of W. Bloomfield*

In an issue of first impression, the court adopted the *MetroPCS, Inc. v. City & Cnty. of San Francisco* (9th Cir.) standard and held that the denial of a single application can constitute a violation of Telecommunications Act (47 USC § 332 *et seq.*) § 332(c)(7)(B)(i)(II). Further, the court concluded that the defendant-Township's decisions had "the effect of prohibiting the provision of personal wireless services" and thus, violated the statute. The court also held that the district court properly granted partial summary judgment for plaintiff because the township's grounds for denying plaintiff's zoning application were not supported by substantial evidence, and there was no feasible alternative location for plaintiff's cell tower.

Thus, the U.S. Court of Appeals, Sixth Circuit, affirmed the district court's grant of partial summary judgment for plaintiff.

Plaintiff-T-Mobile Cent., LLC sued township after defendant denied its application to put up a cell tower to address a gap in coverage. On appeal, the court rejected defendant's arguments that its denial of plaintiff's application was supported by substantial evidence. First, it held that its aesthetics objections were not based on substantial evidence, noting that general concerns from a few residents that the tower would be ugly or that a resident would not want it in his backyard are not sufficient. It also found that defendant's height objections were not based on substantial evidence, noting that there was no evidence in the record to support its position that a 70-foot tower would have been suitable to satisfy the zoning ordinance's requirement that 2 wireless providers, engaged in reasonable communication, could be collocated at this particular site. The court next concluded that defendant's sufficient need objections were not supported by substantial evidence, noting that, based on the terms of defendant's own zoning ordinance, plaintiff introduced "voluminous amounts of evidence to support its position that there was a sufficient need for the tower." The court also rejected defendant's argument that plaintiff failed to establish a significant coverage gap.

Instead, the court agreed with plaintiff that the relevant evidence showed that the gap was "significant" because the "gap area includes both a major commuter highway and fully developed residential areas." The court found that both of these assertions were amply supported by plaintiff's engineer's affidavit. Finally, as to whether there were other feasible locations for

plaintiff's tower, the court found that plaintiff made numerous good-faith efforts to identify and investigate alternative sites that may have been less intrusive on the "values that the denial sought to serve,"

but that none were feasible, and defendant offered no other alternatives. (Source: State Bar of Michigan e-Journal Number: 52498, September 19, 2012)

Full Text Opinion:

http://www.michbar.org/opinions/us_appeals/2012/082112/52498.pdf

Nonferrous metallic mineral mining & mining generally zoning authority

Michigan Attorney General Opinion 7269, September 27, 2012.

The attorney General held, in response to the first of two questions, in his formal opinion that part 632 of the Natural Resources and Environmental Protection Act, MCL 324.63201 *et seq.* (NREPA), preempts any local ordinance, regulation, or resolution that regulates, controls, or requires permits for nonferrous metallic mineral mining¹ or reclamation activities regulated under Part 632, except ordinances, regulations, or resolutions that reasonably regulate the hours at which mining may take place and routes used by vehicles in connection with mining operations. A local unit of government may enact, maintain, and enforce ordinances, regulations, and resolutions of general applicability that incidentally affect mining operations if the ordinances, regulations, or resolutions do not duplicate, contradict, or conflict with Part 632 of NREPA. The attorney general said:

. . . section 63203 of Part 632, MCL 324.63203, expressly preempts local government regulation of nonferrous metallic mineral mines, subject to certain limited exceptions

"(3) Subject to subsections (4) and (5), a local unit of government shall not regulate or control mining or reclamation activities that are subject to this part, including construction, operation, closure, postclosure monitoring, reclamation, and remediation activities, and does not have jurisdiction concerning the issuance of permits for those activities.

¹In enacting Part 632, the Legislature found, among other things, that nonferrous metallic sulfide deposits are different from the iron ore deposits already being mined in Michigan and present special environmental concerns that warrant additional regulatory measures beyond those applied to iron mines.

"(4) A local unit of government may enact, maintain, and enforce ordinances, regulations, or resolutions affecting mining operations if the ordinances, regulations, or resolutions do not duplicate, contradict, or conflict with this part. In addition, a local unit of government may enact, maintain, and enforce ordinances, regulations, or resolutions regulating the hours at which mining operations may take place and routes used by vehicles in connection with mining operations. However, such ordinances, regulations, or resolutions shall be reasonable in accommodating customary nonferrous metallic mineral mining operations.

"(5) Subsections (3) and (4) do not prohibit a local unit of government from conducting water quality monitoring. [Emphasis added.]"

The second question concerned what effect 2011 PA 113 (amending the Michigan Zoning Enabling Act) (MCL 125.3205 (3-6)) had on the regulation of nonferrous metallic mineral mines. 2011 PA 113 became effective on July 20, 2011, and amended section 205 of the MZEA, by adding mining-related provisions, which provide, in part, that a zoning

... ordinance shall not prevent the extraction, by mining, of valuable natural resources from any property unless very serious consequences would result from the extraction of those natural resources.

In answer to the second question the Attorney General ruled, that 2011 PA 113, by its own terms, does not affect the preemption of local government regulation of nonferrous metallic mineral mines under Part 632, nor does it expand the limited scope of local government regulation authorized by Part 632. of MREPA.

Copy of full opinion:

<http://www.ag.state.mi.us/opinion/datafiles/2010s/op10348.htm>

Ambassador Bridge not a Federal Instrumentality

Court: U.S. Court of Appeals Sixth Circuit (695 F.3d 518; 2012 U.S. App. LEXIS 19961, September 24, 2012)

Case Name: *Commodities Exp. Co. v. Detroit Int'l Bridge*

The court held that the district court properly found that the defendant-Detroit International Bridge

(Bridge Company) was not a federal instrumentality.

Plaintiff, a property owner near the Ambassador Bridge, sued the defendants-City of Detroit and the United States alleging that the Bridge Company unilaterally condemned roads around its property, cutting off the land and effecting a regulatory taking. The United States cross-claimed against the Bridge Company, alleging that it had misappropriated the title of "federal instrumentality." The district court granted summary judgment for the United States, and dismissed plaintiff's claims.

On appeal, the court first found that the district court had an independent jurisdictional basis to hear the cross-claim, noting that there was a legitimate case or controversy, and clear subject matter jurisdiction. The court next concluded that the Michigan Supreme Court's decision, *City of Detroit v. Ambassador Bridge Co.*, was at most non-binding, persuasive authority, which the court was free to follow or to reject, depending on its interpretation of federal law. (See page 2 of *Selected Planning and Zoning Decisions: 2009*: <http://lu.msue.msu.edu/pamphlet/Blaw/SelectedPlan&ZoneDecisions2008-09.pdf>. In that case, the Michigan Supreme Court's finding it was a federal instrumentality meant the Bridge Company was not subject to Detroit's zoning.)

The U.S. Appeals Court also held that the Bridge Company is not a federal instrumentality. It found that the Bridge Company "is a for-profit corporation that makes its money by facilitating international commerce, an activity that has some relationship to the United States' legitimate governmental powers." However, the court said, it is not "so closely related to governmental activity as to become ... [an] instrumentality." Finally, the court found that the district court did not abuse its discretion in allowing plaintiff to dismiss its claims voluntarily without also vacating its earlier summary judgment decision for the United States. The court concluded that the resolution of the cross-claim was not dependent on the resolution of plaintiff's claim. Affirmed. (Source: State Bar of Michigan e-Journal Number: 52770, October 31, 2012)

Full Text Opinion:

http://www.michbar.org/opinions/us_appeals/2012/092412/52770.pdf

Substantive Due Process

See: *EJS Props, LLC v. City of Toledo* on page 6.

Due Process and Equal Protection

Substantive and procedural due process, equal protection

Court: U.S. Court of Appeals Sixth Circuit (698 F.3d 845; 2012 U.S. App. LEXIS 18624, September 5, 2012)

Case Name: *EJS Props, LLC v. City of Toledo*

The court held that the district court properly granted the defendants-City and McCloskey (a City councilman) summary judgment on plaintiff-EJS Props, LLC's (EJS) claims alleging violation of its rights to substantive and procedural due process, equal protection, and to petition under the First Amendment.

EJS wanted to build a charter school at a commercial site on the City's east side. However, the site first needed to be rezoned. After initially supporting the rezoning, McCloskey changed his mind and the City Council voted against rezoning the site. EJS alleged that McCloskey's sudden reversal occurred only after EJS refused to acquiesce to his demand that it donate \$100,000 to a local retirement fund, a demand McCloskey did not deny that he made.

City voters later passed a school levy mandating the building of two new middle schools on the east side. The school district (TPS) won an eminent domain suit for the site, successfully applied to rezone it to use the entire site as a campus, and a middle school is now on the property.

In considering whether EJS had a property interest in its expectation of rezoning, the court held that EJS could not show that the City Council lacked discretion to deny EJS use of the land due to the "categorically discretionary nature of the zoning procedures used by" the City. The court also held that defendants' actions could not be said to have deprived EJS of its interest in its early-start authorization permit. Further, the cases EJS cited did

not stand for the proposition that the right to enter into contracts free from interference includes the right to be free from government interference with the occurrence of a wholly discretionary condition precedent to such contracts.

The court also

found no support for the proposition that a citizen has a fundamental right or liberty interest in having the government make discretionary decisions free from corruption independently from whether the citizen has a separate property

or liberty interest at stake.

EJS argued that corrupt zoning decisions that "shock the conscience" violate substantive due process even if there is no property or liberty interest at stake. The district court held that even in such instances, the plaintiff must show as a predicate the deprivation of a liberty or property interest.

The U.S. Court of Appeals, Sixth Circuit, concluded that there was "ample support" for the district court's ruling in the case law. Further, even if a protectable interest was not required, the court noted that "the behavior against EJS in this case does not 'shock the conscience.'" As to its right to petition claim, while EJS's argument equated "meaningful access with meaningful process after complete access has been achieved," the court found "no support for the proposition that the right to meaningful access is the same as the right to meaningful process."

The court also held that the district court correctly ruled "that EJS and TPS were not similarly situated, the first element of an equal-protection claim." TPS's rezoning application was filed over 18 months after EJS's application, TPS owned the property and was allowed under the eminent domain seizure to only use it as a school, TPS sought to use the entire land (not just part of it), and TPS "was more financially stable than a new charter school proposal that relied on both a purchase contract with the actual property owner and a lease with the school provider." (Source: State Bar of Michigan e-Journal Number: 52584, September 18, 2012)

Full text opinion:

http://www.michbar.org/opinions/us_appeals/2012/090512/52584.pdf

Equal protection for retail size limitation

Court: U.S. Court of Appeals Sixth Circuit (692 F.3d 452; 2012 U.S. App. LEXIS 17441, August 20, 2012)

Case Name: *Loesel v. City of Frankenmuth*

The U.S. Court of Appeals, Sixth Circuit, held that there was a genuine dispute of material fact as to whether the properties were similarly situated and whether the defendant-City of Frankenmuth's size limitation ordinance lacked a rational basis under a "no-conceivable basis" theory. However, the appeals court concluded that the district court should have granted the City's motion for judgment as a matter of law on the animus theory of liability, and the error required that the court vacate the judgment for the plaintiffs and remand for a new trial.

Thus, the court reversed the district court's judgment and remanded the matter for further

proceedings.

Plaintiffs sued the City claiming its ordinance violated their rights under the Equal Protection Clause because it restricted the size of buildings on their property and caused Wal-Mart to terminate its agreement to purchase the land. A jury awarded plaintiffs \$3.6 million in damages.

On appeal, defendant-city argued that it was entitled to judgment as a matter of law because plaintiffs failed to show that:

- (1) their property was similarly situated to other properties that were treated differently under the zoning ordinance;
- (2) the ordinance lacked a rational basis; or
- (3) the ordinance was passed because of any animosity against plaintiffs.

The appeals court rejected the first two arguments, but agreed with defendant on the third. It held that the fact that defendant was not cognizant of or proactively seeking plaintiffs' opinions was "a far cry from harboring animus or ill will." The court further held that although plaintiffs presented "abundant evidence" showing that certain officials, such as the city manager, strongly opposed having a Wal-Mart supercenter in Frankenmuth, the animus was not directed at plaintiffs. Since nothing on the verdict form indicated which theory formed the basis of the jury's decision, the issue became whether the court could presume that the jury found for plaintiffs under the factually sufficient no-conceivable-basis theory.

The court concluded that it was bound by Virtual Maintenance to vacate the verdict and remand for a new trial. Finally, the court instructed the district court on damages, noting that, if the case is tried again, the jury should be instructed that the proper damages award is the amount plaintiffs would have received from Wal-Mart had the ordinance never been enacted, minus the property's value unencumbered by the zoning ordinance. (Source: State Bar of Michigan e-Journal Number: 52491, September 18, 2012)

Full text opinion:
<http://www.michbar.org/e-journal/091812.cfm/#52>

14th Amendment rights

Court: U.S. Court of Appeals Sixth Circuit (707 F.3d 699; 2013 U.S. App. LEXIS 3614, February 21, 2013)

Case Name: *Nimer v. Litchfield Twp. Bd. of Trs.*

The court held that the district court erred in dismissing Nimer-plaintiffs' claim and should have stayed the case because plaintiffs sought legal, not

equitable or discretionary, relief.

Thus, the court remanded the case with instructions that the district court stay the proceedings.

Plaintiffs sued the defendant-township under 42 USC § 1983, alleging that defendant violated their rights under the Fourteenth Amendment of the U.S. Constitution. Plaintiffs operate a business that produces meat snacks, and they began constructing buildings on their land to expand the business to include the butchering of cattle and pigs. The land was zoned for residential use and plaintiffs did not get zoning certificates before constructing and improving the buildings on their property.

The township sued them in state court, and obtained injunctive relief. Plaintiffs appealed in Ohio state court and then filed this federal case days later. The U.S. district court abstained and dismissed the case with prejudice. On appeal, the U.S. Court of Appeals found that although the district court properly applied the *Younger v. Harris* doctrine to abstain from adjudicating plaintiffs' claim, it was required to stay the case instead of exercising its discretion in deciding to dismiss the case because they only sought legal relief. The court found that plaintiffs' complaint sounded in damages and held that the district court "was not able to exercise its discretion at all in dismissing the case." It explained that "the district court should have stayed the case - instead of deciding to dismiss it without prejudice - after finding that the *Younger* doctrine applied." (Source: State Bar of Michigan e-Journal Number: 54006, April 3, 2013.)

Full text opinion:
http://www.michbar.org/opinions/us_appeals/2013/022113/54006.pdf

Open Meetings Act, Freedom of Information Act

Financial review team (Emergency Financial Manager Act) is not a "public body"

Court: Michigan Court of Appeals (Published No. 309218; 309250, May 21, 2012)

Case Name: *Davis v. City of Detroit Fin. Review Team*

The court held that a financial review team (FRT) appointed by the Governor under § 12(3) of the Local Government & School District Fiscal Accountability Act (the Emergency Financial Manager Act - EFMA) (MCL 141.1501 *et seq.*) (and thus, the defendant-defendant-Detroit Financial Review Team (DFRT)) was not a "public body" under the Open

Meetings Act (OMA) (MCL 15.261 *et seq.*) because it was not a “governing body” as the OMA uses that term. The court also held that the defendant-State Treasurer, whether acting in his executive capacity or as a “one-man” committee of the DFRT, was not a “public body.” Further, the court concluded that the trial court abused its discretion by granting injunctive relief to the plaintiffs in these consolidated cases.

In Docket No. 309218, the court reversed and vacated in their entirety the trial court’s orders granting declaratory and injunctive relief to plaintiff-Davis and remanded the case to the trial court for entry of judgment for the defendants as to the merits of the case. In *McNeil*, the court reversed and vacated in its entirety the trial court’s order granting the plaintiff a show cause hearing as to his claim under the OMA and remanded for entry of judgment for the defendants.

However, in Docket No. 309250, the court remanded for further proceedings as to Davis’s motion for civil contempt. Plaintiffs claimed that the State Treasurer and the DFRT were “public bodies” subject to the OMA and that they violated the OMA. The court concluded that while complex, this was “a narrow question.” In light of *Herald Co. v. Bay City*, the court held that “the State Treasurer when acting in his executive capacity with authority either generally derived from the Constitution or specifically derived from statute is not a ‘public body’ subject to” the OMA. The issue of whether the State Treasurer acted as a “one-man” committee of the DFRT when he allegedly met with Detroit officials and leaders and negotiated part or all of the consent agreement/financial stability agreement, turned on whether the DFRT was a “public body” under the OMA. The court noted that the definition of a “public body” in the OMA contains two requirements:

- (1) “the entity at issue must be a ‘state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council’”, and
- (2) “the entity must be ‘empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function[.]’”

The court concluded that it was clear that the DFRT was not a “legislative body” because the EFMA did not give a FRT “the power to make or enact law, to bring something into or out of existence by making law, or to attempt to bring about or control by legislation.”

Thus, a FRT “cannot legislate and it has no legislative functions.” Further, the court concluded that a FRT’s authority and functions under § 13 of the EFMA “do not empower a financial review team to independently ‘govern’ through decision-making that effectuates or formulates public policy.” A FRT “cannot act ‘upon’ its recommendations” - “it can only make such recommendations.” Thus, the court concluded that the DFRT was not a “governing body” and not a “public body” within the meaning of the OMA. Since the DFRT was not a public body, *Booth Newspapers, Inc. v. University of MI Bd. of Regents* did not apply and the State Treasurer, even if acting as a “one-man” committee, could not be a “public body” exercising governmental authority.

(Source: State Bar of Michigan e-Journal Number: 51719, May 23, 2012)

Full Text Opinion:

<http://www.michbar.org/opinions/appeals/2012/052112/51719.pdf>

See also *Muma v City of Flint FRT*, page 23.

Public Water and Sewer

Municipality can be held responsible for discharge of sewage by a private party

Court: Michigan Supreme Court (491 Mich. 227; 814 N.W.2d 646; 2012 Mich. LEXIS 630, May 17, 2012)

Case Name: *Department of Env'tl. Quality v. Worth Twp.*

JUDGE(S): HATHAWAY, CAVANAGH, M. KELLY, MARKMAN, M.B. KELLY, AND ZAHRA:

The Supreme Court held that under MCL 324.3109(2) of the Natural Resources and Environmental Protection Act (NREPA) (MCL 324.3101 *et seq.*), “a municipality can be held responsible for, and required to prevent, a discharge of raw sewage that originates within its borders, even when the raw sewage is discharged by a private party and not directly discharged by the municipality itself.” The court also held that a township, as a municipality, can be held responsible for such a discharge.

Thus, the court reversed the judgment of the Court of Appeals because it interpreted MCL 324.3109(2) in a manner that precludes a municipality from being held responsible for such discharge. Further, the court remanded the case to the Court of Appeals to address the defendant-Township’s remaining arguments on appeal.

The case arose from the contamination of surface waters within and surrounding the Township. The parties agreed that the contamination came from septic

systems on privately owned properties located within Township. After the first survey was performed by the plaintiff-The Department of Environmental Quality (DEQ), the Township and the DEQ attempted to remedy the problem. In April 2004, they entered into a district compliance agreement, where the Township agreed to construct a municipal sewerage system by June 1, 2008. However, the Township did not construct such a system, citing a lack of funds. As a result, the DEQ filed this case seeking injunctive relief under part 31 of the NREPA, to compel the township to prevent the discharge of raw sewage into the waters of the state. The Township moved for summary disposition, arguing that neither the courts nor the DEQ has the authority to hold a township liable for the discharge of raw sewage from private residences into state waters. The court held that

when MCL 324.3109(2) is read in conjunction with the surrounding subsections and in the historical context of statutes governing raw-sewage disposal, it was clear that the Legislature intended to create a presumption that the municipality is in violation of NREPA when a discharge originates within its boundaries, irrespective of who actually caused the discharge. The historical obligation of a municipality to oversee the proper disposal of sewage within its boundaries is reflected in former MCL 323.1 *et seq.*

Former MCL 323.1 *et seq.* was repealed by 1994 PA 451. In its place, 1994 PA 451 enacted NREPA, which includes MCL 324.3109. The court held that,

when read as a whole, MCL 324.3109 continues the historical obligations of MCL 323.6 that allow local units of government to be held responsible for the discharge of raw sewage that originates within their borders into state waters, even when the raw sewage is discharged by a private party and not directly discharged by the local unit itself.

The Supreme Court disagreed with the Court of Appeals reasoning that it would be incorrect to assume that the Legislature intended to allow the state to shift its own responsibility to a municipality such as a township by seeking to enforce an injunction against a township under MCL 324.3109(2) and MCL 324.3115. The court also disagreed with the Court of Appeals' conclusion because it overrides the intent of the Legislature by concluding that no municipalities can be held responsible simply because several municipalities are responsible under MCL 324.3109(2). The court

further held that there was no reason why a township, as a "municipality," cannot be deemed a responsible entity under the language of MCL 324.3109(2) when a discharge occurs within its borders.

DISSENT - JUDGE YOUNG, JR.:

Justice Young, Jr., dissenting from the majority's interpretation of MCL 324.3109(2) believed that the majority's decision imposed strict liability on a municipality for every injurious or potentially injurious discharge of raw human sewage that originates within its borders, even if the municipality can conclusively establish that some other entity caused the pollutant discharge. The Justice would have concluded that the statutory presumption contained in MCL 324.3109(2) may be rebutted when a municipality shows either that the discharge of raw human sewage did not violate part 31 of the NREPA or that it was not in fact the discharging party. Because the DEQ's documentary evidence indicated that the Township was not the actual source of the environmental contamination, and the DEQ conceded that defendant would prevail if permitted to rebut causation, the Justice believed that defendant was entitled to summary disposition of the claim brought under MCL 324.3109(2). The Justice would reverse the Court of Appeals' decision on part 31 and remand the case to the circuit court to determine whether there was a basis to impose liability under the DEQ's alternative theory of liability pursuant to MCL 324.3112. (Source: State Bar of Michigan e-Journal Number: 51690, May 21, 2012)

Full Text Opinion:

<http://www.michbar.org/opinions/supreme/2012/051712/51690.pdf>

This case was referred to in an unrelated case involving the same township. See *Paeth v. Worth Twp.*, page 7 of *Selected Planning and Zoning Decisions: 2011*: <http://lu.msue.msu.edu/pamphlet/Blaw/SelectedPlan&ZoneDecisions2010-11.pdf>

NREPA part on septage waste servicers does not pre-empt further local regulation

Court: Michigan Court of Appeals (2013 Mich. App. LEXIS 319, February 19, 2013)

Case Name: *Gmoser's Septic Serv., LLC v. Charter Twp. of E. Bay*

Since the defendant-East Bay Township's ordinance imposed stricter requirements on the disposal of septage taken from within the Township than Part 117 of the Natural Resources & Environmental Protection Act (NREPA) (MCL 324.110701 *et seq.*), the court held that the trial court correctly ruled that Part 117 did not

preempt the Township's ordinance.

The intervening plaintiff-Michigan Septic Tank Association (MSTA) argued that Part 117 preempted the Township's ordinance requiring septage service providers to deliver all septic tank waste collected from within the Township for treatment at the septage treatment facility operated by the defendant-County through the defendant-County Board of Public Works. The trial court concluded that the ordinance was specifically authorized under MCL 324.11715(1) and thus, not preempted under Part 117.

The court noted that the Township's Septage Control Ordinance directly conflicted with the Legislature's statutory scheme in several respects and as such, "courts would typically infer that the Legislature intended to preempt the Township's ordinance." However, this was "not a typical case." While the Legislature

enacted a comprehensive and statewide scheme for the regulation of septage servicers and the disposal of septage, it also specifically limited the preemptive effect of its statutory scheme.

In MCL 324.11715(1), the Legislature provided that Part 117 does "not preempt an ordinance of a governmental unit that prohibits the application of septage waste to land within that governmental unit or otherwise imposes stricter requirements than this part."

Thus, it expressed a clear policy choice -

if a local government adopts an ordinance that conflicts with the Legislature's statutory scheme, that ordinance will not be preempted if it is a qualified ban on land application or if it imposes stricter requirements on septage disposal than that stated under the statutory scheme.

Under the Township's ordinance, "the servicer's duty to dispose of septage at a receiving facility is triggered whenever the servicer takes septage from any location within the Township," and the servicer can only satisfy its duty by hauling the septage to a specific receiving facility - the one operated by the County. The ordinance did not lessen the duty imposed by the state regulatory scheme. Rather, it

requires servicers to always use a receiving facility and to use the specific receiving facility designated by the Township. These requirements are plainly stricter than that imposed by the Legislature in Part 117 - the requirements have a stricter trigger for the duty to use a receiving facility and a stricter method for complying with

that duty.

Thus, the requirements were not preempted by Part 117. The court affirmed the trial court's order granting the defendants summary disposition on the MSTA's preemption claim. (Source: State Bar of Michigan e-Journal Number: 53974, February 21, 2013)

Full Text Opinion:

<http://www.michbar.org/opinions/appeals/2013/021913/53974.pdf>

Other Published Cases

Physician's statement required to be made after Medical Marihuana Act enacted, and before Marihuana use

Court: Michigan Supreme Court (491 Mich. 382; 817 N.W.2d 528; 2012 Mich. LEXIS 765 [No. 142695, No. 142712, No. 142850]; May 31, 2012)

Case Name: *People v. Kolanek* (and *People v. King*)

JUDGES: M.B. KELLY, YOUNG, JR., CAVANAGH, M. KELLY, MARKMAN, HATHAWAY, AND ZAHRA

In light of the plain language of the statute, the court held that a defendant asserting the § 8 affirmative defense under the the Michigan Medical Marihuana Act (MMMA) (MCL 333.26421 *et seq.*) is not required to establish the requirements of § 4. The court also held that to establish the defense under § 8, a defendant must show under § 8(a)(1) that the physician's statement was made after the MMMA was enacted but before the charged offense was committed. Further, if the trial court denies a defendant's motion to dismiss under § 8 and there are no material questions of fact, the defendant may not reassert the defense at trial - the appropriate remedy is to apply for interlocutory leave to appeal

In these cases consolidated on appeal, defendant-King was charged with one count of manufacturing marijuana. Six marijuana plants were found in a padlocked chain-link dog kennel in his backyard and six more were found in his home in a closet that did not have a lock. Defendant-Kolanek was arrested on April 6, 2009 for possession of eight marijuana cigarettes. He did not have a registry identification card. He was charged with marijuana possession. Six days later, he requested that his doctor (B) authorize his medical use of marijuana to treat chronic severe pain and nausea caused by Lyme disease. B complied, and Kolanek applied for and was issued a registry identification card.

Under the Court of Appeals' construction, the phrase "in accordance with the provisions of this act" in

§ 7(a) requires a defendant to satisfy all the requirements of § 4 in order to establish the § 8 affirmative defense. However, principles of statutory construction did not support this conclusion.

Nowhere does § 8 state that a defendant must also establish the requirements of § 4 in order to present a valid affirmative defense under § 8. Precisely because such a requirement is lacking, assertion of the § 8 defense without establishment of the § 4 requirements is “in accordance with the provisions of [the MMMA].” . . . Any defendant, regardless of registration status, who possesses more than 2.5 ounces of usable marijuana or 12 plants not kept in an enclosed, locked facility may satisfy the affirmative defense under § 8. As long as the defendant can establish the elements of the § 8 defense and none of the circumstances in § 7(b) exists, that defendant is entitled to the dismissal of criminal charges.

The Supreme Court also concluded that the MMMA did not apply retroactively and a doctor’s statements made before its enactment cannot satisfy § 8(a)(1). Further, when subsections (1) through (3) were read together, it was “clear that the physician’s statement must necessarily have occurred before the commission of the offense if it is to be used as the basis for a § 8 defense.” While Kolanek was entitled to raise the § 8 defense in a motion for an evidentiary hearing, he failed to show the requirements of the defense at that hearing. “Because no reasonable jury could have concluded that Kolanek is entitled to the defense as a matter of law, he is precluded from presenting evidence of this defense at trial.”

The Supreme Court reversed the Court of Appeals’ judgment in *King* and remanded for an evidentiary hearing so that King may raise the § 8 affirmative defense. The court affirmed the Court of Appeals’ judgment in *Kolanek*, except for the portion directing the trial court to allow Kolanek to reassert the § 8 affirmative defense at trial. (Source: State Bar of Michigan e-Journal Number: 51811, June 4, 2012)

Full Text Opinion:

<http://www.michbar.org/opinions/supreme/2012/053112/51811.pdf>

Appropriate Medical Marihuana use allowed if have registry identification card – may be arrested if card not produced

Court: Michigan Court of Appeals (297 Mich. App. 191; 2012 Mich. App. LEXIS 1266, June 26, 2012)

Case Name: *People v. Nicholson*

The court held that the defendant was not immune from arrest because his application paperwork for a registry identification card under the The Michigan Medical Marihuana Act (MMMA) (MCL 333.26421 *et seq.*) was “not reasonably accessible at the location of his arrest.” However, the court further held that because he possessed a registry identification card that had been issued before his arrest when being prosecuted, he was immune from prosecution unless there is evidence showing that his possession of marijuana at the time was not in accordance with “medical use” as defined in the MMMA or otherwise not in accordance with the MMMA.

Thus, the Appeals Court reversed the circuit court order denying his application for leave to appeal the district court’s denial of his motion to dismiss his marijuana possession charge on the basis of immunity under MMMA § 4(a), and remanded the case.

Defendant-Nicholson was arrested for possession of marijuana while he was a passenger in a parked vehicle near a water treatment plant. He had approximately one ounce of marijuana in his possession, and verbally informed the officer that he was a medical marijuana patient. He indicated that he was approved for medical marijuana, but had not yet received his registry identification card. He claimed to have paperwork showing his approval for use of marijuana for medical purposes, but it was in his own car which was parked at his home. The officer arrested him and he was charged with marijuana possession. The court concluded that

a person can fail to qualify for immunity from arrest pursuant to § 4(a), but still be entitled to immunity from prosecution or penalty. Therefore, courts must inquire whether a person “possesses a registry identification card” at the time of arrest, prosecution, or penalty separately.

The court noted that the word “or” used in § 4(a) is disjunctive and thus, indicates a choice between alternatives. As to the “possesses” requirement,

the statute uses the term “possesses” in the present tense. Thus, the language of the statute requires a defendant to presently possess his or her registry identification card in order to qualify for § 4(a) immunity from arrest.

Under the circumstances, the court concluded that defendant’s paperwork showing that he was issued the equivalent of a registry identification card at the time the officer found him in possession of marijuana was not reasonably accessible at the location where he was

requested to produce it because he was in possession of marijuana in another individual's vehicle away from his home where the paperwork for his card was located. Thus, he was not a person who "possesses a registry identification card," and was not entitled to immunity from arrest. However, if his registry identification card was reasonably accessible at the location of his prosecution, he would meet the "possesses" requirement for immunity pursuant to § 4(a) despite the fact that he was not entitled to immunity from arrest.

Defendant's production of his registry identification card in the district court was sufficient. The court noted that its conclusion that he satisfied the "possesses" requirement in § 4(a) at the time of his prosecution did not conclusively resolve the issue of whether he was entitled to immunity from prosecution. He also must "establish that at the time of his arrest he was engaged in the medical use of marijuana in accordance with the MMMA." Since this issue was not properly before the court and the factual record was insufficient to resolve it, the court remanded for consideration of this issue. (Source: State Bar of Michigan e-Journal Number: 52026, June 28, 2012)

Full Text Opinion:

<http://www.michbar.org/opinions/appeals/2012/062612/52026.pdf>

Uncompensated transfer, delivery of marijuana between registered patients constitutes "medical use"

Court: Michigan Court of Appeals (2013 Mich. App. LEXIS 184, January 29, 2013)

Case Name: *People v. Green*

The court held that the trial court did not err by granting defendant's motion to dismiss the charged crime because the uncompensated transfer and delivery of marijuana between registered patients constitutes "medical use" that is protected by § 4(a) of the Michigan Medical Marihuana Act (MMMA) (MCL 333.26421 *et seq.*). Thus, the Appeals Court affirmed the trial court's order finding defendant, a registered medical marijuana patient, immune from prosecution under § 4(a), for his transfer of marijuana to another registered medical marijuana patient.

Defendant gave T marijuana. On the date of the transfer, defendant possessed a patient registry card, and T had submitted a valid application for a registry identification card more than 20 days before the transfer thus, under MCL 333.26429(b), his application was the equivalent of a registry identification card. The

amount of marijuana transferred was less than the 2.5 ounces that a registered qualifying patient is permitted to possess under § 4(a). Authorities did not arrest T in connection with his receipt of marijuana from defendant however, defendant was arrested after authorities learned that he gave T marijuana. Having found defendant was engaged in the "medical use" of marijuana, the trial court granted his motion to dismiss.

On appeal, the prosecution argued that the trial court erred by dismissing the charges against defendant because the MMMA does not grant immunity for patient-to-patient transfers of marijuana. Thus, the issue was whether the immunity granted by § 4(a) extends to uncompensated patient-to-patient transfers of marijuana. The court held that unlike the sale of medical marijuana, the delivery or transfer of marijuana, absent the exchange of compensation, is specifically included in the MMMA's definition of "medical use." Thus, the circumstances present in this case were distinguishable from the circumstances in *Michigan v. McQueen*. Nevertheless, the prosecution argued that the statute's inclusion of "transfer" in the definition of "medical use" only refers to the transfer of marijuana between caregivers and patients, and that the transfer of marijuana between patients is not medical use. The prosecution supported this argument by reading § 4 as limiting patients to only two options - either grow their own marijuana or name a primary caregiver to provide them with marijuana.

However, adoption of the prosecution's position would require the court to read limitations into the MMMA that the plain language of the statute does not express because the MMMA does not explicitly limit patients in the fashion the prosecution urged. Further, the MMMA does not place any restrictions on the transfer or delivery of marijuana between adult patients, and the court declined to read any such restriction into the MMMA. (Source: State Bar of Michigan e-Journal Number: 53805, January 31, 2013)

Full Text Opinion:

<http://www.michbar.org/opinions/appeals/2013/012913/53805.pdf>

Patient-to-patient sales of Medical Marihuana not allowed

Court: Michigan Supreme Court (493 Mich. 135; 828 N.W.2d 644; 2013 Mich. LEXIS 147, February 8, 2013)

Case Name: *State v. McQueen*

JUDGE(S): YOUNG, JR., MARKMAN, KELLY, AND ZAHRA;
NOT PARTICIPATING: MCCORMACK

The Supreme Court held that although the Court of

Appeals erred by excluding sales from the definition of “medical use,” it properly found that the Michigan Medical Marihuana Act (MMMA) (MCL 333.26421 *et seq.*) does not contemplate patient-to-patient sales of marijuana for medical use and that, by facilitating such sales, defendants’ business constituted a public nuisance.

Thus, the Supreme Court affirmed the Court of Appeals’ decision on alternative grounds. Defendants-McQueen and others, owners and operators of a medical marijuana dispensary, allowed patient-to-patient sales of marijuana at their facility. Plaintiff, the Isabella County Prosecuting Attorney, sought a temporary restraining order (TRO), a preliminary injunction, and a permanent injunction, alleging that defendants’ business constituted a public nuisance because it did not comply with the MMMA. The trial court denied plaintiff’s request, finding that

the patient-to-patient transfers and deliveries of marijuana between registered qualifying patients fall soundly within medical use of marijuana as defined by the MMMA.

The Court of Appeals reversed, finding that the MMMA does not allow patient-to-patient sales. In so finding, it concluded that the definition of “medical use” does not encompass the sale of marijuana.

The Supreme Court first held that the Court of Appeals erred by excluding sales from the definition of “medical use.” It found that a transfer is

[a]ny mode of disposing of or parting with an asset or an interest in an asset, including a gift, the payment of money, release, lease, or creation of a lien or other encumbrance,

and a sale is “[t]he transfer of property or title for a price.” It concluded that, given these definitions, “to state that a transfer does not encompass a sale is to ignore what a transfer encompasses.” However, the court next found that the Court of Appeals properly held that the MMMA does not contemplate patient-to-patient sales. It first noted that such transfers do not qualify for MMMA §4 immunity because “the transferor is not engaging in conduct related to marijuana for the purpose of relieving the transferor’s own condition or symptoms.” Similarly, it added,

§4 immunity does not extend to a registered primary caregiver who transfers marijuana for any purpose other than to alleviate the condition or symptoms of a specific patient with whom the caregiver is connected through the MDCH’s

registration process.

The court further held that defendants were not protected by §4(i), noting that while they were assisting one registered qualifying patient with acquiring marijuana and another registered qualifying patient with transferring marijuana, they were not assisting anyone with using or administering marijuana

as contemplated by the statute. Finally, the court held that defendants were not entitled to protection under §8 because that section contemplates criminal prosecutions and thus, did not provide defendants with a basis to assert that their actions are in accordance with the MMMA.

DISSENTING JUDGE: CAVANAGH;

The dissent disagreed with the majority’s interpretation of §4(d)(2), arguing that its interpretation “erroneously precludes a qualified patient who transfers marijuana to another qualified patient from asserting §4 immunity.” Rather, the dissent would hold that “both qualified patients involved in a patient-to-patient transfer of marijuana have the right to assert immunity and are entitled to immunity if they meet the specific requirements of §4.”

(Source: State Bar of Michigan e-Journal Number: 53912, February 11, 2013)

Full Text Opinion:

<http://www.michbar.org/opinions/supreme/2013/020813/53912.pdf>

Washitaw Moor land claims are fictional

Court: Michigan Court of Appeals (Published 2013 Mich. App. LEXIS 427; No. 306880, March 7, 2013)

Case Name: *People v. Johnson-El*

After a bench trial the trial court convicted the defendant of forgery, uttering and publishing, and encumbering real property without a lawful cause based on an "Affidavit of Allodial Title" that he authored, signed, and recorded with the County Register of Deeds for a parcel of real property for which he had no ownership or other interest. The court held that the prosecution presented sufficient evidence to establish that the affidavit was false and forged and that defendant was aware of its falsity when he authored and recorded it.

On July 21, 2010, defendant-Johnson-El recorded the affidavit with the County Register of Deeds claiming an interest in real property. The affidavit stated that he owned the property, that its value was secured by a \$100 billion bond, and that defendant was a secured party. Defendant claimed allodial title because he is a

"Washitaw Moor" as indicated in his tribe-endorsed birth certificate provided to the trial court.² While the United States Sixth Circuit has called the Nation of Washitaw fictional, the Washitaw Moors apparently believe that all land in this country outside the 13 colonies and Texas belongs to its members.

Allodial title denotes "absolute ownership" of property over which no one can bring a superior claim.

"Defendant's actions clouded the property's title." The property's true owner, MR, was unable to redeem the property, which was the subject of a bank foreclosure, by trying to sell it to an interested buyer to secure the funds necessary to satisfy the secured debt. When MR's real estate agent contacted defendant, he asserted his "property rights" and warned the agent not to close the sale or "I got their ass."

On appeal, defendant contended that the prosecutor failed to prove beyond a reasonable doubt that the affidavit was false or forged or that he filed the affidavit to harass or intimidate anyone. The court held, *inter alia*, that the prosecutor presented sufficient evidence that defendant uttered and published and unlawfully encumbered when he recorded the affidavit with the County Register of Deeds - where he swore to the truth of the statements in the affidavit before a notary public, knowing that his statements were not true. As a result of the recorded false document, others were led to believe that MR's title to the property was clouded. Further, one "need not know the victim of his harassment, fraud, or forgery." Also, the defendant exhibited his intent to harass or intimidate MR personally when he threatened his real estate agent. Affirmed. (Source: State Bar of Michigan e-Journal Number: 54104, March 7, 2013)

Full Text Opinion:
<http://www.michbar.org/opinions/appeals/2013/030713/54104.pdf#page=1&zoom=auto,0,792>

²The Washitaw Moors claim a mixture of Native American and African heritage and assert that they are a sovereign nation within the U.S.

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*.³ Unpublished cases might be cited, but only for their persuasive authority, not precedential authority. One might review an unpublished case to find and useful citations of published cases found in the unpublished case.)

Restrictions on Zoning Authority

See *Oberly v. Dundee Twp.*, page 20.

See *Township of Richmond v. Rondigo, LLC*, page 27.

Food processing, packaging, warehousing subject to zoning, does not have RTFA protection

Court: Michigan Court of Appeals (Unpublished No. 301952, August 16, 2012)

Case Name: *County of Mason v. Indian Summer Coop., Inc.*

This abatement-of-a-nuisance action concerned whether a county zoning ordinance and state law required an agricultural cooperative to obtain special land-use zoning permit and construction code permit before beginning construction on both a warehouse that is to be used to store packaged processed-fruit products and an addition to a processing plant to store a snowplow and a boiler. The Appeals Court held, *inter alia*, that the ordinance required the defendant-cooperative to obtain special land-use permits to construct the warehouse and the addition.

Thus, the Appeals Court reversed the trial court’s order granting summary disposition in favor of the cooperative.

Mr. H, the cooperative’s president, approached the county as to the possible construction of a new warehouse on the parcel that was needed for a “labeling line” and “more warehouse space” to accommodate the storage of its “finished” product in plastic packaging containers in response to its customers’ needs. Although H had plans for the building construction, he tried to obtain a construction code building permit

without going through “the special land use process.” R, the county’s zoning and building director and zoning administrator, informed H that no permit would be issued without further documentation required by the county zoning ordinance. H insisted that he did not have to comply with the special land-use permit process.

R contacted the MDA to determine whether the cooperative was exempt from local zoning ordinances under the Michigan Right to Farm Act (RTFA) (MCL 286.471 *et seq.*). The Michigan Department of Agriculture (MDA) informed R that the cooperative was not exempt. The county filed a nuisance complaint against the cooperative, alleging that the cooperative’s “actions in erecting a structure on the real property without securing the requisite zoning approval” and the “offending structure” that was “created on [the cooperative’s] premises by the construction” were nuisances.

After the cooperative submitted an application “under protest” for special land-use approval, the Planning Commission held a public hearing, and the cooperative’s site plan and special land-use application were approved. The county’s employees “observed the cooperative constructing a new addition to the east side of its main processing plant,” an activity not part of the approved site plan. Thus, the county issued another stop-work order and eventually a citation for violating the stop-work order.

The Appeals Court held that it could not conclude that the county improperly classified the use of the parcel as “agribusiness.” Contrary to the cooperative’s argument on appeal, the use of the parcel could not be classified as farming under the ordinance. The evidence showed that crops were not being grown on the parcel.

³*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.

Instead, the parcel “was used for processing and, with the new construction of the warehouse, for the purposes of labeling and storage of the cooperative’s finished product before distribution to customers.” Under the zoning ordinance, “commercial storage, processing, distribution, marketing, or shipping operations shall not be considered part of the farming operation.” Also, the cooperative’s use of the parcel fell within the ordinance’s definition of “agribusiness.”

The Appeals court held that given that the ordinance’s definition of “agribusiness” included and was not limited to “the processing of farm products,” the “cooperative’s processing of fruit and its storage of processed farm products” - “finished” apple products - on the parcel fell within the ordinance’s definition of agribusiness. Reversed. (Source: State Bar of Michigan e-Journal Number: 52464, ,August 30, 2012)

Full Text Opinion:

<http://www.michbar.org/opinions/appeals/2012/081612/52464.pdf>

RTFA Preemption does not apply to non-commercial farm-like land uses

Court: Michigan Court of Appeals (Unpublished No. 304979, August 23, 2012)

Case Name: *Brown v. Summerfield Twp.*

The Appeals Court held that the trial court properly granted summary disposition on the plaintiff’s Right to Farm Act (RTFA) (MCL 286.471 *et seq.*) claim because she offered no evidence that she was engaged in a commercial operation. The trial court also did not err in granting summary disposition on her substantial due process claim because the ordinance was not unreasonable, and the trial court did not err in granting summary disposition on her equal protection claim because she provided no evidence that the defendant-township treated any other person differently.

She claimed on appeal that the RTFA preempts a township ordinance that prohibited her from keeping horses on property less than 1½ acres. The trial court granted defendant’s motion based on its finding that plaintiff was not engaged in a commercial farming operation. The RTFA preempts ordinances only to the extent that they impose restrictions on commercial farming operations. Thus,

any township ordinance, including a zoning ordinance, is unenforceable to the extent that it would prohibit conduct protected by

the RTFA, which includes ordinances requiring minimum lot sizes, which the Generally Accepted

Agricultural and Management Practices (GAAMPs) do not address (*Shelby Twp v Papesh*, 267 Mich App 92, 107; 704 NW2d 92 (2005)). In other words, the RTFA does not apply to property owners who are not engaged in a commercial operation for profit.

MCL 286.472(b) defines farm operation as activity conducted “in connection with the commercial production, harvesting, and storage of farm products.” Plaintiff cited to the reference in this statute, MCL286.472(b)(vii), to “the care of farm animals.” However, this subsection is part of a list of possible farm activities that might be conducted in connection with commercial production, harvesting, and storage. It does not create an exception to the commercial requirement.

Plaintiff offered no evidence that she kept horses for profit, either through breeding, boarding, or horse riding. Affirmed. (Source: State Bar of Michigan e-Journal Number: 52540, ,September 6, 2012)

Full Text Opinion:

<http://www.michbar.org/opinions/appeals/2012/082312/52540.pdf>

Takings

See also *Kalkman v. City of the Vill. of Douglas*, page 25.

Buying land with knowledge of land use regulations does not result in regulatory taking

Court: Michigan Court of Appeals (Unpublished No. 303744, June 26, 2012)

Case Name: *Orco Inv., Inc. v. City of Romulus*

The Appeals Court held, *inter alia*, that the trial court did not err in granting the defendant’s motion for summary disposition on the regulatory taking claim because plaintiff purchased the property with knowledge of the regulatory scheme and because plaintiff could (and can) make valuable use of the property, and compensation is not required under *Penn Cent. Transp. Co. v. New York City*.

The case arose from plaintiff’s intent to develop 18 single-family condos on a vacant 7.35-acre property located in Romulus. In September 2003, plaintiff submitted a preliminary site plan for its project to the defendant-Planning Commission. The property was zoned RI-B for single family residences so plaintiff’s plans were proper under the applicable zoning ordinances. Plaintiff did not yet own the property, but intended to buy it.

At a city council meeting on December 2003, many

persons living near the property, including the mayor, voiced their concern and dissatisfaction with the development plan. The Council passed a six-month moratorium on issuing building permits for the area, which included the land plaintiff planned to develop. Later, at the Planning Commission's meeting, the commission tabled approval of the site plan and asked plaintiff to work with the City to address some of the citizens' concerns. Plaintiff met with the City's engineers and adapted its plans.

The plan was brought up again at the February 2004 meeting when four members voted to approve plaintiff's preliminary site plan and four members voted to deny it (the ninth member was not present). This was interpreted as a denial. In March 2004, plaintiff filed an action in the trial court and asked that court to order the City to approve its preliminary site plan. The trial court ordered the Board of Zoning Appeals (BZA) to include the issue on its agenda. The BZA approved the preliminary site plan.

Plaintiff purchased the property in July 2004. Before this, the City adopted the Rural Characters Overlay District (RCOD), which included the property plaintiff sought to develop. The RCOD increased the required lot size and reduced the number of condo units. Plaintiff requested that the trial court relieve it of the requirements of RCOD. The trial court ordered plaintiff to appeal to the BZA for a use variance, but the BZA denied the request. Plaintiff moved for summary disposition and argued the RCOD should not apply to its site plan because the City acted in bad faith and with unreasonable delay when it initially denied its site plan. The trial court agreed and granted plaintiff a writ of mandamus in a prior case. Plaintiff proceeded with its plans but alleged that the City continued to purposely delay approval of various permits and greatly hindered its progress.

Plaintiff then filed this case. The trial court dismissed plaintiff's due process and equal protection claims because those that were not barred by the statute of limitations were meritless. Affirmed. (Source: State Bar of Michigan e-Journal Number: 52052, July 19, 2012)

Full Text Opinion:

<http://www.michbar.org/opinions/appeals/2012/062612/52052.pdf>

Zoning not destroying value of land or precluded use, not a takings

Court: Michigan Court of Appeals (Unpublished, No. 304087)

Case Name: *Pittsfield Investors, LLC v. Pittsfield Charter Twp.*

Concluding that the Pittsfield Investors, LLC-plaintiffs did not demonstrate that the zoning ordinance destroyed the value of the land or precluded them from using it, the court held that the trial court properly granted the defendant-Township's motion for summary disposition.

The property consists of about 194 acres in the Township. Bloch, the president of plaintiff-J. A. Bloch & Company, purchased the property in 1973. It is zoned for agricultural use. In the Township, property that is zoned for agricultural use may have no more than 1 house per 2.5 acres. Bloch testified that he previously developed part of the property into 2.5 acre lots, but that it took him 19 years to sell them.

In 2002, the Township updated its Comprehensive Plan.

In 2006, Bloch sold 100 acres of the property to plaintiff-Pittsfield Investors and entered into an agreement to turn the combined properties into a subdivision. In November 2006, plaintiffs petitioned the Township to rezone 131 acres of the property as suburban residential, and 63 acres as moderate-density multi-family residential. They argued that the rezoning would create a transitional zone between the Township's agricultural district and a research complex in another township.

They argued on appeal that the land has no value as farm property because the property taxes exceed its value as farm property. But the property has been farmed since 1973. Further, they may develop the property residentially in two ways - (1) if there is no more than 1 house per 2.5 acres, or (2) according to the Township's open-space development option. B, plaintiffs' planning expert, determined that they could develop 42 lots under either of the Township's available options.

As shown by the zoning map, "rural" and "large-lot" residential homes surround the property on three sides. Thus, the court held that plaintiffs did not create an issue of material fact whether the ordinance completely prohibits them from using their land as it is zoned. Nor did they show that the ordinance completely destroys the value of the land. They argued that it is not "economically feasible" to develop the property because they would operate at an expected financial loss to do so. The court reiterated that

"an owner is not guaranteed an economic profit from the use of his or her land. When the land has some financial value under a zoning ordinance - even if that is a small fraction of the

value the land could have if developed - the ordinance is not a categorical regulatory taking.”

Plaintiffs admitted at the June 7, 2007 planning meeting that the property was not valueless. B testified that the property has a negative net present value, but that this means that “the developer would not have any economic incentive to invest in the raw land.” B’s testimony did not show that the land was valueless. S, the Township’s real estate appraiser, testified that land in the Township that had a potential to be developed is typically valued between \$3,500 and \$15,000 an acre. Thus, plaintiffs did not create an issue of material fact whether the ordinance completely destroyed the value of the land. (Source: State Bar of Michigan e-Journal Number: 54223, April 4, 2013)

Full Text Opinion:

<http://www.michbar.org/opinions/appeals/2013/032113/54223.pdf>

Substantive Due Process

See also *Charter Twp. of W. Bloomfield v. Jacob*, page 27.

Ordinance related to proper government interest is not unconstitutional

Court: Michigan Court of Appeals (Unpublished No. 302860, June 26, 2012)

Case Name: *Grucz v. City of New Baltimore*

The Court of Appeals held, *inter alia*, that the plaintiff failed to show that the ordinance was arbitrary and unreasonable. Thus, the ordinance was rationally related to legitimate government interests and was not unconstitutional under substantive due process.

The court affirmed the trial court’s grant of summary disposition to the defendant-City of New Baltimore in this constitutional challenge to a municipal zoning ordinance. The case arose from Grucz’s-plaintiff’s attempt to erect a fence on the lake side of her waterfront property. Defendant prevented her from doing so on the basis of an ordinance prohibiting fences within 30 feet of the water. Plaintiff applied to the ZBA for a variance, explaining that the fence was necessary to protect herself and her dog and to give her dog adequate exercise. She also provided a signed statement from her neighbors stating that they did not object to her proposed fence. The ZBA denied the variance.

Plaintiff then filed this action in the trial court, directly challenging the constitutionality of the ordinance. Plaintiff argued, *inter alia*, that the ordinance

violated her substantive due process rights. The City advanced two interests to justify the ordinance - community aesthetics and public safety. The Appeals Court held that both were sufficient to justify the constitutionality of the ordinance. Plaintiff disputed that aesthetic concerns are a legitimate government interest, but the court has held otherwise. In *Adams Outdoor Adver., Inc. v. City of Holland*, the plaintiff tried to argue that the city’s ordinance prohibiting billboards and advertisements was not justified through aesthetic concerns. The Appeals Court reversed the decision of the trial court and held that this interest, even standing alone, is enough to justify an ordinance.

Plaintiff also disputed that public safety is a legitimate government interest, at least under the circumstances at bar. Specifically, the City contended that a fence could hinder emergency personnel from rendering assistance to swimmers and boaters in the lake. Plaintiff argued that the City did not explain how the fence could do so. “However, the ability of emergency personnel to reach a lakefront in an emergency is itself a legitimate government interest.” The court noted that it is a matter of common knowledge that one function of fences is to impede access, so the court found that it was rational for the City to conclude that a fence could, indeed, at least slow down emergency personnel from accessing the lake in an emergency. Plaintiff’s concerns about the wisdom of this rationale were misplaced - the court “does not adjudicate the wisdom of zoning ordinances beyond evaluating them for a rational basis.” Also, the Michigan Supreme Court has found that “an ordinance restricting multiple residences on lakefront property survived rational basis review because the ordinance was rationally related to the legitimate government purpose of ensuring access for emergency personnel.”

The court also rejected plaintiff’s other constitutional claims (regulatory taking, equal protection): “Zoning ordinances ““come[] to us clothed with every presumption of validity.”” *Adams*, 234 Mich App at 692 (internal citations omitted). Plaintiff has failed to overcome that presumption.” (Source: State Bar of Michigan e-Journal Number: 52045, July 17, 2012)

Full Text Opinion:

<http://www.michbar.org/opinions/appeals/2012/062612/52045.pdf>

Due Process and Equal Protection

Site plan denial needs competent, material, substantial evidence on the record founded on zoning provisions

Court: Michigan Court of Appeals (Unpublished No. 302536, May 3, 2012)

Case Name: *Common Ground v. City of Pontiac*

In this case where the court affirmed the trial court's final order of January 31, 2011 granting summary disposition to the plaintiff-Common Ground, the Appeals Court held that the trial court properly held that the defendant-Pontiac City Planning Commission's (PC) ultimate determination to deny approval of the plaintiff's site plan was not supported by the language of the zoning ordinance or by competent, material, and substantial evidence on the record presented, and that the trial court had previously concluded that the plaintiff's facility was a permitted principal use and that the issue of Pontiac City Zoning Ordinance § 4.47 could not be revisited on remand.

The defendants (City of Pontiac, its PC, and its City Council (CC)) appealed the trial court's final order entered after the trial court granted summary disposition to the plaintiff and remanded to the PC for further proceedings. Plaintiff sought to develop a parcel of land in the City for use as administrative offices and to provide mental health services for "children, youth, and families in crisis." The proposed 48,000 square foot building would consist of administrative and counseling offices. The original plan provided for a short-term residential care component. That plan was later modified to eliminate any provision for residential or overnight care of patients. The mental health services provided would consist of psychiatric screening, referrals, and outpatient counseling.

Plaintiff's land was zoned C-2, Central Business District. Section 7.47 of Pontiac's zoning ordinance lists various relevant permitted uses under C-2 zoning. Plaintiff submitted its application for site plan approval to the PC, which considered the plan and tabled the request. Later the PC met with an attorney at a closed meeting and eventually voted against the request without explanation. Later, a letter authored by a non-PC person explained the denial.

Plaintiff appealed the denial to the CC, which affirmed the PC's decision. Plaintiff appealed to the trial court, which found that there was no genuine issue of material fact that the PC's decision was procedurally

defective and had to be vacated, and also found that there was no genuine issue of material fact that plaintiff's proposed uses of the property "clearly and unambiguously fall within 'permitted principal uses' under the City's Ordinance," so denial on that basis was improper. The trial court remanded the case back to the PC to address whether plaintiff's site met the remaining requirements for approval. The trial court noted that under MCL 125.3501(4), a decision rejecting a site plan must be based upon the requirements and standards contained in the zoning ordinance, and under MCL 125.3606, the trial court reviewed the denial of the site plan review to ensure that the decision was based on proper procedure and supported under the "substantial evidence" standard. The trial court also found that the PC did not make findings of fact and articulate its reasons for its decision based on § 5.11 of the zoning ordinance. Instead, the purported reasons were provided 6 days later in a letter from a person who was not a member of the PC. Thus, the PC's decision was ineffective because it never articulated its reasons for the denial of plaintiff's request. And the CC's review affirming the denial was procedurally defective. The trial court found that under the substantial evidence test reasonable minds could not differ in concluding that the facts of the case described a situation where the proposed functions and services offered by plaintiff fell within and otherwise constituted "permissible principal uses" under the ordinance despite the label attributed to the proposed uses. The trial court rejected defendant's claim that plaintiff's use was a "crisis center" and the area was oversaturated with similar uses, and remanded.

The Appeals Court noted that since the proposed uses clearly and unambiguously fell within the principal permitted uses of § 7.47, the issue was not to be revisited on remand. (Source: State Bar of Michigan e-Journal Number: 51549, May 3, 2012)

Full Text Opinion:

<http://www.michbar.org/opinions/appeals/2012/050312/51549.pdf>

Major PUD site plan changes is violation of legislative action

Court: Michigan Court of Appeals (Unpublished No. 303520, May 8, 2012)

Case Name: *VMG, Inc. v. Byron Twp.*

Concluding that the complaint raised constitutional issues that, in light of the facts as presented in the complaint, were based on a legislative decision made by the defendants, the court held that the trial court erred

by dismissing plaintiff-VMG's constitutional claims under MCR 2.116(C)(8).

The trial court based its dismissal of counts II-IV entirely on *Krohn v. City of Saginaw*. The court concluded that while it would seem that *Krohn* was on point, "there is a limitation to the application of *Krohn*. Where the challenged action is legislative in nature, no appeal right exists and collateral challenges invoking the trial court's original jurisdiction are permitted." On the other hand, "administrative decisions are required to be raised on appeal from a decision of the planning commission, and collateral challenges are not permitted." Thus, the court had to first resolve the issue of whether, based on the facts as alleged in the complaint, defendants' action in "amending the PUD [planned unit development] to allow for a storm water basin to be located in the commercial section of the PUD constituted an administrative or a legislative decision." VMG contended that this was a major change that constituted a legislative decision because the effect of the decision was to remove the storm water basin from its property and relocate it to another property. VMG relied on *Sun Cmty. v. Leroy Twp.* to support its position.

The court noted that § 15.14 of the defendant-Township's zoning ordinance provided some guidance as to which types of changes to a PUD constitute major, and which constitute minor, changes. The court concluded that the specific language of § 15.14 provided that "minor changes are only allowed for matters that were not part of the preliminary development plan. Because the location of the storm water basin was a part of the PUD, this change is contrary to the ordinance's express language."

The court held that defendants' removal of the storm water basin from VMG's property to a location across the street, and the removal of an entire building to accommodate the change, was

more similar to the types of changes considered 'major' by § 15.14 (increase in density or number of dwelling units, increase in land area or building size), than those considered 'minor' (moving the location of structures, roads, parking areas, signs, lighting, and driveways in the same general location as approved in the preliminary site development plan).

The storm water basin was "no longer in the 'same general location as approved in the preliminary site development plan.'" While the defendant-planning commission did not call this action a rezoning and

characterized it as "a minor regrading," it appeared from the complaint that changing the PUD so that VMG's property, "which was to be a pond with residences surrounding it, to a plot of useless swampy ground is a major change." Reversed and remanded. (Source: State Bar of Michigan e-Journal Number: 51574, May 21, 2012)

Full Text Opinion:
<http://www.michbar.org/opinions/appeals/2012/050812/51574.pdf>

Prohibiting commercial activity in Agr. District is not disparate treatment Commission-based auction does not fall under RTFA protection

Court: Michigan Court of Appeals (Unpublished No. 304122, September 20, 2012)

Case Name: *Oberly v. Dundee Twp.*

The court held, *inter alia*, that the plaintiffs did not make a sufficient showing of disparate treatment or enforcement by the defendant-Township as to similarly situated individuals. Weighing against plaintiffs' claim of disparate treatment was the indication that the Township received complaints about the conduct of plaintiffs' auctions, but did not receive any such complaints as to the other businesses cited by plaintiffs and alleged to be similarly situated.

The case involved the propriety of ongoing auctions conducted by plaintiffs on their agriculturally zoned property allegedly in violation of the Township's ordinances. The auctions conducted on the property were primarily through Dundee Auction Services and involved the sale of personal property on a commission basis. Plaintiffs acknowledged that the property at issue is zoned for agricultural use and that they have regularly conducted auctions on the property, averaging two auctions occurring every month with about 100 to 150 people attending each event.

In 2001, the Township notified plaintiffs of an intent to preclude the ongoing conduct of auctions on their property. Plaintiffs retained counsel to negotiate with the Township on their behalf. No particular enforcement action was taken by the Township and plaintiffs' auctions continued unimpeded until 2007. The Township sent plaintiffs a letter indicating that it had received complaints as to the commercial use of the property zoned agricultural. The Township sued plaintiffs but the case was voluntarily dismissed. The plaintiffs initiated a second suit, and the defendants filed a motion for summary disposition, which the trial court granted as to all claims except the plaintiffs' claim of a violation of their rights to equal protection. The

trial court later dismissed that claim also.

On appeal plaintiffs alleged, *inter alia*, that the trial court erred in dismissing their claim that defendants violated their equal protection rights and relied on an improper affidavit. Plaintiffs asserted that the Township treated them differently than it treated other individuals conducting business or commercial operations on their properties. The court disagreed where the plaintiffs failed to make the requisite showing of identical non-complying usage, rendering their constitutional argument of violation of their right to equal protection without a basis in the record.

Plaintiffs also challenged the grant of summary disposition in favor of defendants premised on the trial court's failure to apply the Michigan Right to Farm Act (RTFA), M.C.L. 286.471 *et seq.*, and the Michigan Department of Agriculture's Generally Accepted Agricultural Management Principles (GAAMPs). The court reviewed the applicability of the RTFA ("farm", "farm operation", "farm product", "commercial") and GAAMPs. There appeared to be no dispute that various agricultural activities have continued unimpeded by defendants.

Rather, the conflict centers on whether plaintiffs' conduct of auctions on their agriculturally zoned property falls under the protections proffered by the RTFA. . . . Plaintiffs' routine conduct of commission-based auctions is not the type of activity that the RTFA was intended or designed to protect. Clearly, the statutory intent is to protect farms and farmers from facing nuisance litigation premised on activities inherent in a farming operation, which are statutorily defined as including "the operation and management of a farm or a condition or activity that occurs at any time as necessary on a farm in connection with the commercial production, harvesting, and storage of farm products." MCL 286.473(1)(b).

The Township did not threaten plaintiffs' right to farm their land. But plaintiffs argued to "extend the protections of the RTFA to any activity, including auctions, conducted on agricultural property as long as some portion or percentage of the items sold at the auction constitute a good or service produced by the farm." The plaintiffs argued auctions fall within the meaning of a "farm market", as defined in the Farm Market GAAMP. The court found that a commission-based auction would not include 50% or more are produced on and by the affiliated farm.

In addition, plaintiffs ignore additional language

within GAAMPs' definition of a farm market recognizing that such markets "may include marketing activities and services to attract and entertain customers and facilitate retail trade business transactions" but only "when allowed by applicable local, state and federal regulations." Such language is contrary to plaintiffs' assertion that the Township ordinances serving to restrict the conduct of auctions on their farm property are preempted by the RTFA.

Affirmed. (Source: State Bar of Michigan e-Journal Number: 52741, October 5, 2012)

Full Text Opinion:
<http://www.michbar.org/opinions/appeals/2012/092012/52741.pdf>

Nonconforming Uses

Requiring continuity for nonconformity not allowed

Court: Michigan Court of Appeals (Unpublished No. 301757, June 12, 2012)

Case Name: *Soechtig v. Greenbush Twp.*

The court held that the defendant-Greenbush Township Zoning Board of Appeals' (ZBA) requirement that the plaintiff prove the continuity required by the "ordinance" in order to establish a prior nonconforming use was contrary to Michigan law. Thus, the court reversed the trial court's order affirming the decision of the ZBA, denying the plaintiff's request for a zoning variance, and remanded to the ZBA for further proceedings consistent with Michigan law.

Soechtig's-plaintiff's family has owned lakefront property since 1956. She maintained that the cottage on the property has either been rented or available for rent every summer since 1957. In 1984, the property was rezoned as "R-1" or single-family residential, which prohibited weekly rentals. In 2010, the township informed plaintiff that the property could not be rented pursuant to the zoning ordinance. Plaintiff explained that the cottage had been available for rent since 1957. The township requested that plaintiff provide rental receipts "prior to 1984 and each consecutive year, through 2009. This would easily validate your claim of continuous rentals and would settle the issue." Plaintiff responded by letter that she could not provide receipts because her deceased grandmother and mother had previously been responsible for the cottage and rented it to friends and neighbors. Plaintiff included a signed affidavit in which she attested that "[t]he cottage . . . which has been owned by my family since 1956 was

either rented or offered continuously for rent since 1957.” The township formally denied plaintiff’s request for summer rentals.

Plaintiff appealed the decision to the ZBA. The ZBA voted unanimously to deny plaintiff’s request for a variance. Relying on the “ordinance,” the ZBA found that “plaintiff had not established a prior nonconforming use by demonstrating continuous use as rental property ‘every year’ since 1984.”

Plaintiff appealed to the trial court. The trial court affirmed the ZBA’s decision, finding that plaintiff did not “even come close” to establishing a prior nonconforming use.

In granting leave to appeal, the Appeals Court directed the parties to address the principles of abandonment of a prior nonconforming use as articulated in *Livonia Hotel, LLC v. City of Livonia* and the cases cited therein - *Dusdal v. City of Warren* and *Rudnik v. Mayers*. The nonconforming use at issue was the summer rental of the cottage owned by plaintiff’s family. The ordinance that prohibited the rental of the cottage was enacted in 1984. Thus, the 1984 enactment date “is the critical point in determining” whether plaintiff had a vested nonconforming use.

Importantly, while plaintiff’s use of the cottage after the 1984 enactment date would be relevant to determine whether plaintiff abandoned a prior nonconforming use or expanded the scope of such use, it is irrelevant to the initial determination of whether plaintiff established a vested right in the nonconforming use of the cottage for summer rentals.

When determining whether she established a prior nonconforming use, the ZBA relied on the “ordinance” and required her to show continuous use of the cottage as rental property “every year” since 1984 - that the rental of the cottage had not been discontinued for 365 days since the 1984 enactment date. “The ‘ordinance’ relied upon by the ZBA addresses abandonment of a prior nonconforming use - not establishment of a prior nonconforming use.”

Without addressing the legality of the ZBA “ordinance” under *Livonia Hotel*, the Appeals Court held that the ZBA’s reliance on the “ordinance” for purposes of determining whether plaintiff established a prior nonconforming use was contrary to law. “In order to establish a prior nonconforming use, plaintiff did not have to prove the continuity required by the ‘ordinance.’” (Source: State Bar of Michigan e-Journal Number: 51861, June 26, 2012)

Court, Ripeness for Court’s Jurisdiction, Aggrieved Party

Aggrieved Party

Court: Michigan Court of Appeals (Unpublished No. 296504, June 12, 2012)

Case Name: *Tobin v. City of Frankfort*

The court held that the trial court correctly concluded that the intervener-Friends of Betsie Bay, Inc. (FOBB) lacked standing to intervene and object to the consent judgment between plaintiff-Tobin and the defendant-City. The FOBB failed to establish that its members would suffer special damages adequate to support its status as an aggrieved party under either The City and Village Zoning Act (CVZA) MCL 125.585 or MCL 125.590, or that it had a “special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large,” as contemplated in *Lansing Sch. Educ. Ass’n v. Lansing Bd. of Educ.*

The appeal involved a condo project planned by plaintiff on property that he owns in the City. The FOBB consists of owners of residential property near plaintiff’s proposed development who oppose the project. FOBB appealed an order revoking its standing and right to intervene in two lawsuits that plaintiff filed against the City, and an order entering a consent judgment between plaintiff and the City.

The court considered whether the FOBB had standing to participate in the underlying litigations. “A landowner’s interest in the zoning of neighboring property derives solely from statutory authority.” When the City considered plaintiff’s conditional zoning request in 2005, the CVZA governed the proceedings.⁴ Several decisions of the court have interpreted the extent to which a landowner must be aggrieved by a zoning decision to invest the landowner with standing to challenge a zoning board of appeals decision. The court has consistently held that to have standing to challenge a zoning board of appeals decision a party must be (1) “aggrieved” and (2) have “suffered some

⁴The CVZA was repealed in 2006, replaced by essentially the same principle concerning an “aggrieved party” now found in M.C.L. 125.3604(1), M.C.L. 125.3605, M.C.L. 125.3606(1), and M.C.L. 125.3607 of the Michigan Zoning Enabling Act (MZEA).

special damages not common to other property owners similarly situated.” Thus,

a neighboring landowner merely alleging a likely increase in traffic volume, or a loss of aesthetic value, or a general claim of economic loss, has not alleged special damages sufficiently to become an aggrieved party.

The FOBB argued that it established through its members’ affidavits that it had standing to intervene and pursue its members’ claims. The declarations by FOBB members in their September 2000 affidavits primarily dealt with concerns about increases in population, traffic, noise, lights, air pollution and property taxes, decreases in home values, aesthetics of the neighborhood, and environmental values caused by tree and vegetation removal because of the project, and the potential presence of commercial establishments. The court concluded that the listed concerns did not suffice to show special damages different in kind from those suffered by others in the community, so as to qualify FOBB as an aggrieved party.

The affidavit of the one neighbor did allege a specific injury unique to their parcel of property - the filling of wetlands on both sides of their property. This may have been the case at the time of their affidavit in September 2000. But plaintiff’s 2000 proposal changed before the 2006 litigation began and again shortly after that time when plaintiff and the City reached their consent agreement.

The end result was that the allegations in the various affidavits were stale. The FOBB never submitted affidavits with updated allegations of harm or an explanation of how the project embodied in the consent agreement would cause its members to suffer special damages. The court held that the generalized averments of damages by FOBB members were common to other property owners. Affirmed. (Source: State Bar of Michigan e-Journal Number: 51853, June 18, 2012.)

Full Text Opinion:

<http://www.michbar.org/opinions/appeals/2012/061212/51853.pdf>

Open Meetings Act, Freedom of Information Act

Financial Review Team not subject to Open Meeting Act

Court: Michigan Court of Appeals (Unpublished No. 309260, May 21, 2012)

Case Name: *Muma v. City of Flint Fin. Review Team*

Based on *Davis v. City of Detroit Fin. Review Team* (page 7), the court held that the defendant-City of Flint Financial Review Team, as a review team for a municipal government created under the EFMA, is not a “public body” subject to the OMA. Thus, the court held that the trial court erred when it determined otherwise and when it concluded that the Team violated the OMA. The court reversed the trial court’s order granting declaratory judgment and permanent injunctive relief to plaintiff-Muma, and remanded for entry of judgment in favor of defendants.

Because of the City of Flint’s financial condition, the Governor appointed the Team. It held five meetings that were not open to the public. The Team filed a report with the Governor. In the report, the Team concluded that a local government financial emergency existed in Flint and that no satisfactory plan existed to resolve the emergency. The Team further recommended the appointment of an emergency financial manager to resolve the emergency.

The Governor appointed B to serve as the emergency manager.

Muma alleged that the Team was a public body subject to the Open Meetings Act (OMA) (MCL 15.261 *et seq.*) and that it had held meetings and taken actions in violation of the OMA. Muma asked the trial court to invalidate all decisions made in violation of the OMA and to enjoin future noncompliance. Defendants argued that the trial court erred when it determined that they were “public bodies” subject to the OMA. The trial court granted permanent injunctive relief barring all defendants, including the Governor, State Treasurer, and B, from further noncompliance with the OMA.

As the court discussed in *Davis*, the Governor and the State Treasurer in their individual executive capacities are not public bodies under the OMA and thus, were also not subject to the OMA in the context of this case. B was also not subject to the OMA. Muma argued that, in assuming what had been duties of the Flint City Council - which is clearly a public body under the OMA - B must also be subject to the OMA in carrying out those duties. The court rejected that position on the basis of *Craig v. Detroit Pub. Schs. Chief Executive Officer*. In that case, the court held that the CEO of the Detroit Public Schools was not required to comply with the OMA. Like B acting in place of the Flint City Council here, the CEO in *Craig* operated under a statutory scheme in which he “essentially

[stood] in the shoes of the former school board." But the court rejected the argument in *Craig* that the CEO had to comply with the OMA because he stepped into the shoes of the school board. Rather, the court held that, in light of *Herald Co. v. Bay City*, the CEO was not a "public body" under the OMA because he was an individual acting in his official capacity.

Reading the OMA and the other relevant statute in *Craig* together, the court concluded that the CEO was required "to perform all the duties and obligations of the former school board, but because [the Chief Executive Officer] is an individual and not a 'public body' within the meaning of the [Open Meetings Act], he is simply not able or required to carry out these functions at open meetings." The court rejected Muma's effort to distinguish *Craig* on the ground that the CEO was carrying out his executive duties, not the duties of the school board. Instead, *Craig* made clear that, when a single executive, such as the CEO in *Craig* or B here, assumed the duties of a public body pursuant to a statute that sets out that executive's duties, that single executive was not a public body subject to the OMA. It necessarily followed that defendants were not public bodies subject to the OMA and thus, that the trial court erred in granting declaratory and injunctive relief in favor of Muma and in awarding Muma attorney fees and costs. (Source: State Bar of Michigan e-Journal Number: 51750, June 13, 2012)

Full Text Opinion:

<http://www.michbar.org/opinions/appeals/2012/052112/51750.pdf>

Open Meeting Act posting violation with no evidence of public harm: no relief ordered

Court: Michigan Court of Appeals (Unpublished No. 306684, January 22, 2013)

Case Name: *Speicher v. Columbia Twp. Bd. of Trs.*

Because defendants plainly violated the Open Meeting Act (OMA) (MCL 15.261 *et seq.*) by failing to post notice of changes to "the schedule of regular meetings of a public body . . . within 3 days after the meeting at which the change is made," the Appeals Court held that the trial court erred in failing to grant declaratory relief to plaintiff. The court further concluded that plaintiff-Speicher failed to show his entitlement to injunctive relief and that, as a matter of law, the trial court correctly granted summary disposition in favor of defendants-Columbia Township as to this request for relief.

In March 2010, the defendant-Township Board established that the regular meetings for both the Board

and the defendant-Columbia Township Planning Commission would take place every month. However, at a October 18, 2010, Commission meeting, the Planning Commission discussed and decided to hold quarterly rather than monthly meetings beginning in 2011. MCL 15.265(3) of the OMA requires that changes to "the schedule of regular meetings of a public body be posted within 3 days after the meeting at which the change is made." However, it was clear from the record that defendants did not post notice of this change on or before October 21, 2011 - within 3 days of the October 18, 2011, meeting at which the Commission changed its regular meeting schedule. Thus, plaintiff was entitled to summary disposition and declaratory relief on this particular issue.

Finally, the trial court correctly denied plaintiff's request for injunctive relief. (Plaintiff argued he was injured because he was unable to present various issues to the Commission at the February and March 2011 meetings that no longer took place.) While the Commission's failure to timely post its new meeting schedule was a technical violation of the OMA, there was no evidence that the Commission had a history of OMA violations, there was no evidence that this violation was done willfully, and there was no evidence that the public was harmed in any manner by this OMA violation.

Affirmed in part, reversed in part, and remanded.

(Source: State Bar of Michigan e-Journal Number: 53749, February 8, 2013.)

Full Text Opinion:

<http://www.michbar.org/opinions/appeals/2013/012213/53749.pdf>

Zoning Administrator/Inspector, Immunity, and Enforcement Issues

See *Soechtig v. Greenbush Twp.* on page 21.

Enforcement of consent judgment

Court: Michigan Court of Appeals (Unpublished No. 301596, May 17, 2012)

Case Name: *Green Oaks MHC v. Township of Green Oak*

The court held that the trial court did not abuse its discretion by refusing to hold the plaintiffs in contempt where they contended that any violation of the consent judgment was unintentional and based on differing understandings of the terms in the consent judgment because the trial court's ruling was within the range of principled outcomes. However, the trial court erred in

defining the term “new” in the consent judgment § 2.2(c) in terms of previous occupancy.

Section 2.2(c) required that “all manufactured homes in the development . . . will be new, or a maximum of two years old . . .” The trial court initially defined “new” as meaning “manufactured homes that have not been previously titled.” However, defendant moved for reconsideration. According to the trial court’s order addressing that motion, defendant argued that

since this Court’s June 24, 2010 ruling, plaintiffs have obtained permits to install a 2007 manufactured home which has never been titled but which was used for residential purposes for almost two years.

The trial court then revised its definition, and defined “new” as a manufactured home “not previously occupied for any purpose.” Although the trial court changed the definition in response to that particular argument, it did not accept defendant’s previously stated argument that “new” should be measured by the model year of the mobile home and that the model year should be the same as the year in which it is installed in the park. Defendant argued on appeal that the last definition articulated by the trial court “leaves open a loophole for older previously unoccupied units to be characterized as ‘new.’” Defendant also argued that the trial court’s definition failed to give any consideration of the parties’ intent as that intent was revealed by looking at the terms of the consent judgment as a whole.

The court agreed that without considering the language of the consent judgment itself, defining a home as “new” in terms of whether it was ever occupied may seem reasonable at first glance, but so does defining it in terms of when it was titled or what the model year was. “However, the question is not which definition is reasonable” - “it is which one reflects the intent of the parties as determined from the language of the consent judgment.” Consent judgments are construed the same as contracts. The trial court came to its definition without any reference to the language of the consent judgment. The trial court’s definition was at odds with the findings it made when it ruled on the meaning of “2 years old.” Defining “new” in terms of model year was consistent with the expressed intent of full occupancy within five years together and with the rolling two-year age restriction. The court affirmed in part, reversed in part, and remanded. (Source: State Bar of Michigan e-Journal Number: 51697, May 29, 2012)

Full Text Opinion:
<http://www.michbar.org/opinions/appeals/2012/051712/51697.pdf>

Vested Rights from zoning permit issued in error, Attempt to stop work after permit issued is temporary taking

Court: Michigan Court of Appeals (Unpublished No. 306051, September 10, 2012)

Case Name: *Kalkman v. City of the Vill. of Douglas*

The Appeals Court held that the trial court did not err in ruling that the defendant-City of the Village of Douglas temporarily took the plaintiff’s property, but clearly erred in calculating the damages after a bench trial. While the trial court did not err in determining the proper elements of just compensation due to plaintiff, it clearly erred in determining the date on which the taking ended. Thus, the court affirmed in part, reversed in part, and remanded for a recalculation of damages on the basis of the revised takings period.

In July 2007, the City ordered plaintiff-Kalkman to stop building a home on his property because he allegedly violated the city’s zoning ordinance front yard setbacks. Plaintiff had obtained zoning approval for the proposed setback from the zoning administrator. Before the City ordered him to stop building, he had spent \$65,000 on the construction. While he did not request a variance from the City’s zoning board of appeals (ZBA), the ZBA held a hearing in August 2007 and determined that he needed a variance under the zoning ordinance and then denied the variance.

In June 2008, plaintiff sued the City for improperly ordering him to halt construction. He alleged that he had a vested right to build under the permit issued before the stop work order and that the City’s order amounted to a regulatory taking. On cross-motions for summary disposition, the trial court held that, under the undisputed facts, plaintiff was entitled to judgment. The trial court concluded that the zoning administrator properly approved the zoning permit and that, after plaintiff spent considerable money in reliance on it, he obtained a vested right to build the house pursuant to the zoning permit. Thus, the City’s decision to order him to stop construction amounted to a temporary taking.

While the trial court entered an order enjoining any further enforcement of the stop work order on May 19, 2009, it determined that there was a question of fact on the amount of compensation due to plaintiff for the temporary taking. The trial court held a bench trial on damages and found that the City owed plaintiff

\$178,903.91 in compensation.

The Appeals Court concluded that the trial court did not err in determining that plaintiff was not required to seek a variance in order to finalize his claim. Considering the zoning ordinance in light of the City's past practice, he did not need a variance. Further, even if the trial court were to conclude that he had to seek a variance in order to exhaust his administrative remedies, the Appeals Court determined that he was excused from doing so because the attempt would have been futile given the ZBA's actions. The court also agreed with the trial court that the City was equitably estopped from interfering with plaintiff's construction. It issued him a facially valid zoning permit, and relying on its validity, he invested approximately \$65,000 in construction costs. By issuing him a building permit, the City induced him to believe that he was permitted to construct the proposed home, and he changed his position in reliance on that permit to the extent that he would be prejudiced if the City were allowed to revoke it.

The Appeals Court also agreed that there was no genuine issue of material fact that the City's actions in issuing the stop work order and preventing plaintiff from completing construction constituted a temporary taking under the balancing test set forth in *Penn Cent. Transp. Co. v. New York City*. However, the trial court's finding that the temporary taking ended 21 days after the trial court issued its final judgment was clearly erroneous. The taking ended when the trial court granted plaintiff partial summary disposition on May 19, 2009 and enjoined the City from enforcing its stop work order. (Source: State Bar of Michigan e-Journal Number: 52760, October 2, 2012)

Full Text Opinion:
<http://www.michbar.org/opinions/appeals/2012/092012/52760.pdf>

Zoning Enforcement: Accessory use without principal use

Court: Michigan Court of Appeals (Unpublished No. 307682, November 15, 2012)

Case Name: *Milton Twp. v. Kaminsky*

The court held, *inter alia*, that the trial court did not clearly err in determining that defendants' use of the property for riding off-road vehicles on a defined track constructed for that purpose failed to constitute a permissible use of the property under the plaintiff-township's zoning ordinance. The riding activities were the predominant, and not a factually subordinate or ancillary, use of the property. Thus,

those activities could not constitute a permissible "accessory" use of the property. The trial court also properly held that defendants' use of the property violated the township's zoning ordinance and that it constituted a nuisance *per se* under MCL 125.3407. Thus, the trial court did not abuse its discretion in ordering defendants to abate the nuisance as mandated by that statutory provision.

The only buildings on the property are a barn/out building and smaller shed-type structure. There is no residence on the property. Defendant-Kaminsky purchased the property in 2007, and he and his family used it for recreational purposes, consisting primarily of the riding of off-road motorcycles and other vehicles on a track that he defined and improved for that purpose. After receiving numerous complaints about this use of the property, particularly about the noise and dust, plaintiff-Milton Township notified defendants that this use of the property violated the township's zoning and nuisance abatement ordinances. Defendants continued using the property for riding off-road vehicles.

The township sued seeking injunctive relief prohibiting them from this use of the property. The trial court concluded that their use of the property violated the zoning ordinance, and constituted a nuisance as defined by its nuisance abatement ordinance. The trial court ordered defendants to cease the offending use of the property and return it to its historical condition.

The issue was whether the riding activities constituted an "accessory use" within the meaning of the township's zoning ordinances. The evidence established that

the only use of the property made by defendants was recreational use, dominated by the riding of off-road vehicles on the defined course or track established for that purpose.

Defendants made no residential use of the property. Thus, their use of the property for riding activities was not factually subordinate, ancillary, or auxiliary to any residential use, but instead was the predominate, primary use of the property within the context of the zoning ordinance. It could not be said that their use of the property enhanced or furthered the use of the property as a residence. Thus, the trial court did not err by concluding defendants' use of the property did not constitute a permissible "accessory use" under the township's zoning ordinance. Affirmed. (Source: State Bar of Michigan e-Journal Number: 53217, December 6, 2012)

Full Text Opinion:
<http://www.michbar.org/opinions/appeals/2012/111512/53217.pdf>

Parking regulations qualify as substantive due process

Court: Michigan Court of Appeals (Unpublished No. 305598, February 21, 2013)

Case Name: *Charter Twp. of W. Bloomfield v. Jacob*

The court held, *inter alia*, that the trial court correctly interpreted the clear and unambiguous ordinance language. Also, defendant repeatedly conceded in his brief on appeal that he regularly parked vehicles on dirt or grass at the back of his residential lot. Given the undisputed nature of his rear-yard parking on dirt or grass, in violation of the plain language of zoning ordinance §26-29, the court further held that the trial court correctly granted plaintiff summary disposition on its claim that defendant violated §26-29.

Plaintiff alleged that defendant's residential property qualified as a nuisance *per se* on the basis of several township ordinance violations. Defendant argued that the trial court misinterpreted §26-29.

"The language of §26-29 plainly states that in all township zoning districts, including residential areas, a homeowner shall supply 'automobile off-street parking,' and all residential parking spaces shall exist off street in the form of 'a parking strip, driveway, garage or combination thereof.'"

The trial court summarized the language in § 26-29 and agreed with plaintiff that "vehicles openly parked and/or stored upon unimproved and/or lawn area of the property violate" the ordinance. The trial court read §26- 29(2) "as mandating residential parking only on a driveway or parking strip, inside a garage or in some combination of these options."

Defendant challenged §26-29 as unconstitutional and argued that it furthered no conceivable governmental objective. His claim that §26-29 had no rational relationship to any governmental objective constituted a substantive due process challenge to plaintiff's enactment of the off-street parking ordinance.

Plaintiff submitted an affidavit of R, a Senior Planner for plaintiff. R explained that she was familiar with plaintiff's "ordinances regulating the use of residential land and property within the Township." R attested that plaintiff's outdoor storage, off street parking and blight ordinances were enacted to preserve the general health, safety and welfare, and listed seven purposes.

Although the trial court did not analyze at length

the legislative objectives served by §26-29, the Appeals Court held that "the ordinance reasonably relates to multiple permissible legislative objectives" articulated by R. By requiring off-street residential parking and clearing the roadways of parked vehicles, the ordinance arguably "reduce[s] congestion and overcrowding of residential land," and

"minimizes hazards to children posed by crowded streets that reasonably would tend to impair driver sight lines, thus enhancing public safety. By precluding the parking of vehicles on bare grass or dirt, the ordinance also arguably reduces the potential for environmental contamination by fluids leaking from vehicles or necessary for automotive maintenance."

The ordinance also arguably enhances "the aesthetics of residential neighborhoods," and "a community's desire to enhance the scenic beauty of its neighborhoods through a very specific enactment is clearly a legitimate feature of the public welfare and is enforceable through the exercise of police power." Defendant did not satisfy his burden of overcoming the presumption of constitutionality. Affirmed. (Source: State Bar of Michigan e-Journal Number: 54015, March 12, 2013)

Full Text Opinion:

<http://www.michbar.org/opinions/appeals/2013/022113/54015.pdf>

Composting/nutrient management plan not subject to local regulation, roads for the same are

Court: Michigan Court of Appeals (Unpublished No. 307520, February 21, 2013)

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

Based on the "law of the case" doctrine, the court held that the trial court correctly granted summary disposition to the plaintiff-Richmond Township.

This appeal arises out of Richmond's attempt to enjoin and abate Rondigo's construction, expansion, and use of two access roads on its property at 26775 32 Mile Road in Richmond Township. Among other claims, this issue was addressed in a prior opinion issued by this Court in *Twp of Richmond v Rondigo, LLC*, unpublished opinion *per curiam* of the Court of Appeals, issued April 20, 2010 (Docket Nos. 288625, 290054). This Court explained the facts as follows:

Rondigo owns farm property, and it intended to implement a nutrient management plan, which included

extensive on-site composting, as part of an effort to naturally fertilize the farmland. Rondigo engaged in the improvement, extension, and construction of two access roads on the property to facilitate the hauling of leaves, grass, and yard waste for composting purposes. The township disapproved of and challenged Rondigo's roadwork activities, arguing that Rondigo never obtained proper township approval. In two separate complaints, the township alleged, in pertinent part, that the roadwork construction projects violated various provisions of the township zoning ordinance and violated the township's engineering standards ordinance, thus constituting nuisances per se that required abatement. The township also contended that Rondigo's composting operation violated township ordinances and constituted a nuisance. [Id., slip op p 2.]

The trial court consolidated Richmond's complaints, and ruled that Rondigo's ability to conduct a composting operation on the property is protected by the Right to Farm Act (RTFA) (MCL 286.471 *et seq.*) and the Michigan Department of Agriculture's generally accepted agricultural management practices, and that these preempt any conflicting local ordinance with regard to Rondigo's composting activities.

This was the second case arising from the parties' dispute. The trial court ruled that, in the court's opinion in the first case, the court held that Rondigo was required to comply with Richmond's zoning and engineering ordinances and that Rondigo violated the ordinances when it constructed the roads without Richmond's approval.

Because the issue was resolved in the prior case, the trial court held that Richmond was entitled to have Rondigo's use of the roads abated on remand from the court. In its prior opinion, the court observed that construction on the east access road "began after the trial court enjoined work on the west-side roadway." Further, the court unequivocally ruled that Richmond's ordinances applied to Rondigo's construction, expansion and use of both access roads and that Rondigo violated the ordinances by failing to comply with them. These legal rulings were binding on the trial court and on the Appeals Court. Also, the law of the

case doctrine precluded Rondigo from claiming that Richmond had to move on remand to stop Rondigo's use of the west access road or that the ordinances did not apply to the east access road because a driveway existed on the east side of the property when Rondigo purchased the land. The doctrine also precluded the court from deciding the merits of those claims because it already ruled that Rondigo violated Richmond's ordinances by constructing, expanding, and using both access roads.

The court gave Rondigo the opportunity to raise its claims as to the west access road and Rondigo declined. Further, to the extent Rondigo's "existing driveway" theory for the east access road was addressed in the prior case, that record was before the court and it ruled that the ordinances applied to both access roads, that Rondigo was required to comply with the ordinances, and that it violated the ordinances by failing to do so. While Richmond could have sought abatement on remand, the court's ruling

made clear that it was incumbent upon Rondigo to comply with the ordinances by seeking township review and approval before it used, improved, or expanded the access roads. Rondigo disregarded this, and resumed activities on the roads without any effort to comply with the ordinances.

After warning Rondigo to cease its use of the roads because of its noncompliance, Richmond filed this action to enjoin Rondigo's further activities. This was both necessary and logical in light of the court's prior decision and Rondigo's continuing conduct. Further, the trial court correctly ruled the uses were nuisances per se under MCL 125.3407, and the trial court was obligated under the statute to abate the nuisances. (Source: State Bar of Michigan e-Journal Number: 54030, March 14, 2013)

Full Text Opinion:
<http://www.michbar.org/opinions/appeals/2013/022113/54030.pdf>

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

Solid waste management plan disposal cap enforceable

Court: Michigan Court of Appeals (Unpublished No. 302163, November 1, 2012)

Case Name: *County of Ionia v. Pitsch Recycling & Disposal, Inc.*

The Appeals Court held that defendant-Ionia

County's solid waste management plan, including its disposal cap, was enforceable by law pursuant to Part 115, Solid Waste Management part of the Natural Resources and Environmental Protection Act (MCL 324.11501 *et seq.*) (Part 115), the disposal cap in the County's plan did not unconstitutionally burden interstate commerce, and plaintiffs-Pitsch did not demonstrate that their substantive due process were violated.

The primary issue was whether Part 115 permitted Ionia County to impose an annual limit on the amount of solid waste accepted for disposal by Pitsch, the only operating landfill in the county. The Appeals Court found no provision within Part 115, individually or as a whole, equally susceptible to more than one meaning or irreconcilably conflicting with any other provision, so Part 115 was not ambiguous. The Appeals Court further concluded that Ionia County's disposal cap was authorized. In Part 115, the Legislature directed the second defendant-Michigan Department of Environmental Quality (DEQ) to

assist in developing and encouraging methods for the disposal of solid waste that are environmentally sound, that maximize the utilization of valuable resources, and that encourage resource conservation

Each solid waste management plan is required to include an enforceable program and process to assure that the nonhazardous solid waste generated or to be generated in the planning area for a period of 10 years or more is collected and recovered, processed, or disposed of at disposal areas that comply with state law and rules promulgated by the department governing location, design, and operation of the disposal areas.

A solid waste disposal area cannot be operated contrary to the provisions of a solid waste management plan. The court held that operating a solid waste disposal area in compliance with a solid waste management plan is a minimum requirement of Part 115. "Solid waste management plans must 'contain enforceable mechanisms for implementing the plan.'"

Insofar as the court could determine, Ionia County's plan did not explicitly reference any enforcement mechanism, at least in so many words.

However, nothing in Part 115 requires a plan to identify an enforceable mechanism. "The state solid waste management plan shall consist of the state solid waste plan and all county plans

approved or prepared by the department." Thus, a county's disposal plan, once approved by the DEQ, becomes a part of Michigan's statewide solid waste management plan - it is itself enforceable as state law. The court noted that the DEQ explained in a letter that a county's plan "may contain other provisions that are neither required nor expressly authorized for inclusion in a solid waste management plan" and its approval of any such plan "does not extend to any such provisions." However, the court held that

the disposal cap here is absolutely necessary to Ionia County's plan, so it could not possibly be a provision "neither required nor expressly authorized."

The court affirmed the trial court's order granting dismissal in favor of the County and the DEQ. (Source: State Bar of Michigan e-Journal Number: 53141, November 26, 2012)

Full Text Opinion:
<http://www.michbar.org/opinions/appeals/2012/110112/53141.pdf>

Other Unpublished Cases

Can require Medical Marihuana be kept in enclosed, locked facility

Court: Michigan Court of Appeals (Unpublished No. 304022, May 10, 2012)

Case Name: *People v. Keller*

The court held, *inter alia*, that the challenged statutory language is not vague, and that the evidence in this case could not be interpreted as indicating that the defendant's plants were in an enclosed, locked facility.

The case arose from the discovery by police of 15 marihuana plants on the defendant's property. The police found the plants on or near defendant's premises, with approximately half being near some metal fencing material that had not been erected into a proper fence, and the rest not being secured at all. Defendant asserted that he had a medical marihuana card. At trial, he invoked the defense in the Michigan Medical Marihuana Act (MMMA) (MCL 333.26421 *et seq.*) , characterized his plants as "medicine," and offered into evidence his medical marihuana card. On cross-examination, defendant stated that he understood that he was limited to 12 plants to avoid prosecution, but that he did not know that the plants had to be secured. The court noted that several plants described as "partially enclosed" were described that way only because there was fencing material nearby.

Those plants joined all the others as being readily

accessible to a member of defendant's family, or any passerby his dogs did not decide to treat as a foe. The statute's requirement that the facility be enclosed and locked indicates that access to them is to be secured by something more than the grower's withholding of permission to unauthorized persons to access them. Because defendant grew more than 12 plants and failed to keep them in a secure, enclosed facility, the MMMA afforded him no defense to that general prohibition.

Affirmed. (Source: State Bar of Michigan e-Journal Number: 51617, May 25, 2012)

Full Text Opinion:

<http://www.michbar.org/opinions/appeals/2012/051012/51617.pdf>

Land Patent does not exempt property from taxation

Court: Michigan Court of Appeals (Unpublished No. 308783, January 8, 2013)

Case Name: *Barry Cnty. Treasurer v. Klinge*

The court held, *inter alia*, that the trial court in this property tax dispute did not err in finding that the property at issue was not exempt from taxation.

Defendant-Klinge owned real property in the Barry County, on which he did not pay property taxes for the 2009 tax year. On March 1, 2011, multiple parcels of property, including the defendant's property, were forfeited to plaintiff, the county Treasurer, under MCL 211.78g of the The General Property Tax Act (MCL 211.1 *et seq.*) (GPTA) for nonpayment of taxes during the 2009 tax year. On May 2, 2011, plaintiff-county filed a petition seeking a judgment of foreclosure on the forfeited properties pursuant to the GPTA, for unpaid taxes. Later, the trial court scheduled a hearing on plaintiff's petition. Defendant-Klinge attended the hearing and objected to the foreclosure of his property. The next day, the trial court entered an order granting plaintiff's foreclosure petition as to the properties listed

in the petition, including defendant's property. The order extinguished all liens and interests in each parcel, except those specifically listed in MCL 211.78k(5). The trial court later denied defendant's motion for reconsideration.

Defendant-Klinge appealed the trial court's order of foreclosure and its order denying his motion for reconsideration. He argued, *inter alia*, that his property was exempt from taxation by virtue of a federally granted land patent and thus, the trial court erred by ordering foreclosure for unpaid taxes. The court noted that "[A]ll property, real and personal, within the jurisdiction of this state . . . shall be subject to taxation." "For the purpose of taxation, real property includes . . . [a]ll land within this state, all buildings and fixtures on the land, and all appurtenances to the land . . ." It was uncontroverted that defendant did not pay taxes on the property during the 2009 tax year. He claimed that President Martin Van Buren issued a land patent on the property and that such a land patent exempted the property from taxation. In 1992, defendant filed a declaration of land patent with the County Register of Deeds. "A land patent is [a]n instrument by which the government conveys a grant of public land to a private person." Defendant failed to recognize, however, that "where federal land is sold to a private person, it becomes part of the general mass of property in the state and is subject to ad valorem property taxation."

The court did not decide whether defendant actually possessed a federal land grant on the property, because even if the court accepted his contention, the property, upon transfer to defendant, a private party, would have become "part of the general mass of property in the state," and would have been subject to property taxation. Affirmed.. (Source: State Bar of Michigan e-Journal Number: 53654, January 31, 2013)

Full Text Opinion:

<http://www.michbar.org/opinions/appeals/2013/010813/53654.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

Cl6: 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'.

in camera

Refers to a hearing or inspection of documents that takes place in private, often in a judge's chambers. Depending on the circumstances, these can be either on or off the record, though they're usually recorded.

In camera hearings often take place concerning delicate evidentiary matters, to shield a jury from bias caused by certain matters, or to protect the privacy of the people involved and are common in cases of guardianships, adoptions and custody disputes alleging child abuse.

ORIGIN

Lat. *in chambers*.

injunction

n *noun*

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

2 an authoritative warning.

inter alia

n *adverb* among other things.

ORIGIN

from Latin

Judgment *non obstante veredicto*

also called **judgment notwithstanding the verdict**, or JNOV.

A decision by a trial judge to rule in favor of a losing party even though the jury's verdict was in favor of the other side. Usually done when the facts or law do not support the jury's verdict.

laches

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

ORIGIN

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

littoral

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

mandamus

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

ORIGIN

C16: from Latin, literally 'we command'.

mens rea

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

ORIGIN

Latin, literally 'guilty mind'.

obiter dictum

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

ORIGIN

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

pecuniary

adjective formal relating to or consisting of money.

DERIVATIVES

pecuniarily *adverb*

ORIGIN

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

per se

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

ORIGIN:

Latin for 'by itself'.

res judicata

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

ORIGIN

Latin, literally 'judged matter'.

riparian

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

both types of land,” *id.*) See “littoral.”

scienter

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

ORIGIN

Latin, from *scire* ‘know’.

stare decisis

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

ORIGIN

Latin, literally ‘stand by things decided’.

sua sponte

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

request from the parties.

ORIGIN

Latin for ‘of one’s own accord’.

writ

n *noun*

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

2 *archaic* a piece or body of writing.

ORIGIN

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

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

Contacts

For help and assistance with land use training and understanding more about these court cases contact your local MSU Extension land use educator. For a list of who they are, territory covered by each and contact information see: http://msue.anr.msu.edu/program/info/land_use_education_services

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