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Selected Planning and Zoning Decisions: 2015
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Kurt H. Schindler, AICP, MSU Extension Senior Educator, Land Use
Greening Michigan Institute, Government & Public Policy Team

This public policy brief summarizes the important state and federal court cases and Attorney General Opinions issued between May 1, 2014 and April 30, 2015.

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Restrictions on Zoning Authority

Cell tower requirement: "in writing" requirement of Federal Telecommunications Act

Court: United States Supreme Court
Case name: *T-Mobile South LLC v. City of Roswell, Georgia* (135 S. Ct. 808; 190 L. Ed. 2d 679; 2015 U.S. LEXIS 612(2015)).

The United States Supreme Court issued a January 14, 2015 opinion on the "in writing" requirement of the Federal Telecommunications Act of 1996 (FTA) (Pub. L.A. No. 104-104, 110 Stat. 56 (1996); U.S.C. 151). In short:

1. Local government must provide written reasons for denying a cell tower application.
2. The denial and written reasons don't need to be in the same document; i.e., separate detailed minutes satisfy this requirement.
3. If they are in separate documents, however, they must be issued "essentially contemporaneously" (at the same time).

Point number three may require a change in practice for many local governments.

In more detail, T-Mobile South submitted an application to build a 108-foot cell tower on a vacant lot in a residential neighborhood in the city of Roswell, Georgia. The company proposed a tower designed to look like a pine tree, branches and all, though this one would have stood at least twenty feet taller than surrounding trees. The city's zoning department found that the application met the requirements of the relevant portions of the city code, and recommended approval of the application subject to several conditions. The city council then held a public hearing at which a T-Mobile South representative and members of the public spoke. Five of the six members of the city council then made statements, with four expressing concerns and one of those four formally moving to deny the application. That motion passed unanimously. Two days later, the city sent T-Mobile South a letter stating that its application had been denied. The letter did not provide reasons for the denial, but did explain how to obtain the minutes from the hearing. At that time, only "brief minutes" were available; the city council did not approve detailed minutes recounting the council members' statements until its next meeting, twenty-six days later.

T-Mobile filed suit, alleging that the council's decision violated the "in writing" requirement of the FTA that says that a denial of an application for a wireless facility "shall be in writing and supported by substantial evidence contained in a written record." The U.S. District Court agreed with T-Mobile. On appeal the Eleventh Circuit reversed. Noting that T-Mobile had received a denial letter and possessed a transcript of the hearing that it arranged to have recorded, the Eleventh Circuit found that this was sufficient to satisfy the "in writing" requirement.

The US Supreme Court first determined that "supported by substantial evidence contained in a written record" imposes upon local governments a requirement to provide reasons when they deny applications to build cell towers. It would be extremely difficult for a reviewing court to carry out its review of a local decision if localities were not obligated to state their reasons in writing. The Court went on to stress, however, "that these reasons need not be elaborate or even sophisticated, but rather…simply clear enough to enable judicial review." In this regard, it is clear that Congress meant to use the phrase "substantial evidence" simply as an administrative "term of art" that describes how an administrative record is to be judged by a reviewing court. It is not meant to create a substantive standard that must be proved before denying applications.

Local governments are not required to provide their reasons in the denial notice itself, but may state those reasons with sufficient clarity in some other written record such as in detailed minutes. At the same time, the Court agreed with the Solicitor General's brief that

> the local government may be better served by including a separate statement containing its reasons . . . . If the locality writes a short statement providing its reasons, the locality can likely avoid prolonging the litigation – and adding expense to the taxpayer, the companies, and the legal system – while the parties argue about exactly what the sometimes voluminous record means.

The Court further determined, however, that

because the FTA requires the recipient of a denial to seek judicial review within 30 days from the date of the denial, the denial and written reasons, if contained in separate documents, must be issued "essentially contemporaneously."

Because an entity may not be able to make a considered decision whether to seek judicial re-view without knowing the reasons for the denial of its application, and because a court cannot review the denial without knowing the locality's reasons, the locality must provide or make available its written reasons at essentially the same time as it communicates its denial.

The Court observed that this rule ought not to unduly burden localities given the range of ways in which localities can provide their reasons. Noting that the FCC "shot clock" declaratory ruling allows localities 90 days to act on applications to place new antennas on existing towers and 150 days to act on other siting applications, the Court suggested that

> if a locality is not in a position to provide its reasons promptly, the locality can delay the issuance of its denial within this 90- or 150-day window, and instead release it along with its reasons once those reasons are ready to be provided. Only once the denial is issued would the 30-day commencement-of-suit clock begin.

The Court concluded that it was acceptable for City of Roswell to provide its denial and written reasoning (in the form of detailed minutes) in separate documents, but did not issue these documents "essentially contemporaneously." As such, the city did not comply with the statutory obligations of the FTA. The Court remanded the case to the Eleventh Circuit to address the question of the appropriate remedies.

(Source: *The Midwest Planning BLUZ*, Gary Taylor, Esq., Iowa State University Extension, January 14, 2015, http://blogs.extension.iastate.edu/planningBLUZ/2015/01/14/us-supreme-court-issues-opinion-on-in-writing-requirement-of-federal-telecommunications-act/)

Full Text Opinion:
http://www.supremecourt.gov/opinions/14pdf/13-975_8n6a.pdf

PSC has precedent over zoning for electric line a certificate of public convenience and necessity

Court: Michigan Court of Appeals (No.317872, 317893 unpublished November 18, 2014; approved for publication January 13, 2015: 2014 Mich. App. LEXIS 2641)

Case Name: *Har Co., LLC v. Michigan Elec. Transmission Co.*

In Docket No. 317872 the appeals court rejected the appellants' (collectively, the Landowners) claim that the appellee- Michigan Public Service Commission (PSC) did not follow the requirements of the Electric Transmission Line Certification Act (Act 30) (MCL 460.568(5)) (particularly MCL 460.568) in granting petitioner-Michigan Electric Transmission Company's (METC) application for a certificate of public convenience and necessity (CPCN) for construction of an overhead transmission line. The court held that they did not show that the PSC erred or abused its discretion in granting the application. In Docket No. 317893, the court held that under the "plain language of MCL 460.570(1)," the CPCN took precedence over the appellant-Township's conflicting ordinance that required a portion of the transmission line be constructed underground.

Thus, the court affirmed in both cases and lifted the stay imposed pending the appeal.

While the Landowners argued that METC did not prove that the proposed transmission line was needed, "MCL 460.568(5) does not specifically state that an applicant for a proposed transmission line must prove that the line is needed." However, "the PSC found that METC's proposed transmission line was needed to address a reliability issue." Further, the PSC was correct

> that METC was not required to do a cost/benefit analysis of the Weeds Lake project, even though that project was estimated to cost $32 million more than the fourth transformer project. No statute required the METC to perform a cost/benefit analysis, and the PSC was not required to make its judgment based solely on cost. The reliability issue was the primary reason for METC seeking a CPCN to install a transformation line, and the evidence showed that the fourth transformer project would not solve the reliability issue.

The PSC also

> correctly found that METC's proposed route for the transmission line was feasible and reasonable, in spite of the fact that METC's proposed route did not get the highest score using METC's own scoring methods. MCL 460.568(5)(b) required only that the PSC find that METC's proposed route was feasible and reasonable, not that it was more feasible and more reasonable than any other route proposed by any party.

The court also rejected the Landowners' claim that

the PSC's approval of the application allowed METC to violate municipal zoning ordinances and to take private property without due process. Further, it concluded that the arguments that Act 30 preempted the Township's ordinance and was unconstitutional ignored "the clear language of constitutional provisions, MCL 460.570(1), and binding precedent." (Source: State Bar of Michigan *e-Journal* Number: 59040, January 15, 2015.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2015/011315/59040.pdf

Open Meetings Act, Freedom of Information Act

Not entitled to court costs, attorney fees if not succeed in obtaining injunctive relief

Court: Michigan Supreme Court (No. 148617, December 22, 2014;497 Mich. 125; 860 N.W.2d 51; 2014 Mich. LEXIS 2400)

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

Judge(s): VIVIANO, YOUNG, JR., MARKMAN, KELLY, ZAHRA, AND MCCORMACK;

In an issue of first impression for the court, it held that a person cannot recover court costs and actual attorney fees under The Open Meetings Act (OMA) (MCL 15.261 *et seq.*) (specifically MCL 15.271(4)) unless he or she succeeds in obtaining injunctive relief in the action. As a result, the court overruled *Ridenour v. Dearborn Bd. of Educ.* and its progeny to the extent that those cases allowed for the recovery of attorney fees and costs under the statute "when injunctive relief was not obtained, equivalent or otherwise."

The Supreme Court reversed the Court of Appeals opinion and order granting the plaintiff these costs and fees based on his entitlement to declaratory relief under the OMA. It reinstated the portion of a prior Court of Appeals decision on the issue of court costs and actual attorney fees. The Court of Appeals noted that it reached the decision awarding the costs and actual attorney fees "only because it was compelled to do so" by Court of Appeals precedent, and that if not for this binding precedent, it would have denied plaintiff's request on the basis that "the plain language of MCL 15.271(4) does not permit such an award unless the plaintiff obtains injunctive relief."

The Supreme Court agreed with the Court of Appeals "that prior decisions of that court have strayed from the plain language of MCL 15.271(4)." It agreed with the defendants "that court costs and actual attorney fees under MCL 15.271 may only be awarded when a plaintiff seeks and obtains injunctive relief." The court noted that the

> first statutory condition, "[i]f a public body is not complying with this act," contemplates an ongoing violation, precisely the circumstances in which injunctive relief is appropriate. The second condition, i.e., commencement of "a civil action against the public body for injunctive relief to compel compliance or enjoin further noncompliance with the act," directly refers to and obviously requires that a party seek injunctive relief. And the third condition, i.e., a requirement that a party who files an action seeking such relief "succeeds in obtaining relief in the action," cannot be divorced from the phrases that precede it.

Viewing the provision as a whole "MCL 15.271 only speaks in terms of an injunctive relief and contemplates no other form of relief." While the Court of Appeals determined that plaintiff was

> entitled to declaratory relief for defendants' notice violation, he is not entitled to receive court costs and actual attorney fees because he did not succeed in obtaining injunctive relief in the action, as MCL 15.271(4) requires.

Dissent: CAVANAGH

The dissent noted that for the past 33 years, the Court of Appeals has reiterated its holding in *Ridenour v. Dearborn Bd. of Educ.*

> in numerous published opinions, solidifying the role of declaratory relief as it relates to costs and attorney fees under MCL 15.271(4). Despite this long line of precedent, at no time has the Legislature taken steps to amend MCL 15.271(4) in response.

The dissent believed that "these cases properly interpreted and effectuated the Legislature's intent . . . ." The dissent would hold that plaintiff was entitled to costs and attorney fees because declaratory relief is sufficient to trigger attorney fees and costs under MCL 15.271(4).

(Source: State Bar of Michigan *e-Journal* Number:58960, December 23, 2014.)

Full Text Opinion:
http://www.michbar.org/opinions/supreme/2014/122214/58960.pdf

Regulation of donation box, like signs, must be content neutral

Court: U.S. Court of Appeals Sixth Circuit (No. 14-1680, April 6, 2015; 782 F.3d 318; 2015 U.S. App. LEXIS 5474) [This appeal was from the WD-MI.]
Case Name: *Planet Aid v. City of St. Johns, MI*

The court affirmed the district court's preliminary injunction, which enjoined the implementation of the defendant-City's ordinance banning "outdoor, unattended charitable donation bins." The court held that the ordinance was "a content-based regulation of protected speech," and that plaintiff-Planet Aid, a nonprofit charitable organization, "demonstrated a strong likelihood of success on the merits of its constitutional claim."

Ordinance #618 prohibited the placement and use of donation boxes, but "grandfathered" previously existing boxes. Planet Aid sued, alleging a First Amendment violation and requesting a preliminary injunction because the ordinance "infringed on Planet Aid's protected speech of charitable solicitation and giving." The district court granted the injunction, and the court affirmed, holding that the ordinance was a "content-based restriction on speech" that was not "narrowly tailored to promote" compelling government interests.

The Supreme Court has yet to address "the status of unattended donation bins," but the Appeals Court agreed with the Fifth Circuit in *National Fed'n of the Blind of TX, Inc. v. Abbott* (5th Cir.), which held that "'public receptacles are not mere collection points for unwanted items, but are rather silent solicitors and advocates for particular charitable causes.'"

The court concluded that the City's ordinance was content-based because it did "not ban or regulate all unattended, outdoor receptacles[,]" but only banned "those unattended, outdoor receptacles with an expressive message on a particular topic - charitable solicitation and giving." The court rejected the City's argument that the bin ordinance was "analogous to billboards and advertising signs" ordinances, which have been deemed "content-neutral," because Ordinance #618 "bans altogether an entire subclass of physical, outdoor objects - those with an expressive message protected by the First Amendment."

The court then applied a "strict scrutiny" analysis and determined that the ordinance was not "'narrowly tailored to promote a compelling Government interest.'" Thus, because the plaintiff was likely to succeed on the merits of its claim, the court affirmed the district court's order granting the preliminary injunction. (Source: State Bar of Michigan *e-Journal* Number: 59659, April 9, 2015.)

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2015/040615/59659.pdf

Unpublished Cases

(Generally unpublished means there was not any new case law established, but presented here as reminders of some legal principles. They are included here because they state current law well, or as a reminder of what current law is.) A case is "unpublished" because there was not any new principal of law established (nothing new/different to report), or the ruling is viewed as "obvious." An unpublished case may be a good restatement or summary of existing case law. Unpublished opinions are not precedentially binding under the rules of *stare decisis*.[1] 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

Zoning preempts police power ordinances, including county zoning preempting township police power ordinances (township zoning preempts county zoning).

Court: Michigan Court of Appeals (Unpublished, No. 319134, December 4, 2014)

Case Name: *Forest Hill Energy-Fowler Farms, L.L.C. v. Township of Bengal*

The court held that there was no genuine issue of material fact that the defendants-townships' ordinances substantively qualified as zoning regulations and the township ordinances regulated the same subject matter as Clinton County's zoning ordinance. As the county adopted its ordinance under the Michigan Zoning Enabling Act (MZEA) (MCL 125.3101 *et seq.*) and defendants-townships did not adopt their ordinances under the MZEA, thus the county's zoning ordinance controlled and established the only standards for regulating the use of property for wind energy systems in the county.

Thus, the court affirmed the trial court's ruling that the plaintiff-Forest Hill Energy-Fowler Farms, L.L.C. was entitled to judgment in its favor. The court case is a declaratory judgment action requesting a declaration that defendants'-township's ordinances, which imposed more restrictive requirements for wind energy systems than the county ordinance, were invalid and unenforceable.

The appeals court first rejected defendants'-township's argument that plaintiff's claims were not ripe for review, concluding that plaintiff

> sufficiently showed an actual controversy, and not merely a hypothetical injury, given that defendants were attempting to subject plaintiff to additional licensing requirements for a special land use for which the county had already issued a permit.

> Further, the court agreed with the trial court that defendants' ordinances were in substance zoning regulations that conflicted with the county's ordinance and that because the county enacted its ordinance under the MZEA and defendants' ordinances were not enacted pursuant to that act, the county's ordinance was controlling.

MCL 125.3210 "reflects a codification of the doctrine of 'field preemption.'" If defendants' ordinances qualified as zoning ordinances, then MCL 125.3210 established that the county's zoning ordinance "will be deemed controlling to the extent of any inconsistencies between defendants' ordinances and the county's ordinance."

Defendants argued that their ordinances were valid because they addressed "activities" (related to producing wind energy) within their respective borders. However, it was clear

> that the ordinances regulate the "use" of land in defendants' townships and the construction of structures. The construction of an infrastructure of wind turbines as part of a wind energy system is not merely an activity on land, but rather relates to a permanent land use. MCL 125.3201 also supports the trial court's determination that defendants' ordinances should be treated as zoning regulations.

While

> MCL 41.181 clearly permits defendants to adopt laws for the protection of the public health, safety, and welfare of their citizens, a zoning

[1] *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.

regulation must be enacted pursuant to the MZEA.

(Source: State Bar of Michigan *e-Journal* Number:58776, January 14, 2015.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2014/120414/58776.pdf

Zoning has jurisdiction in summer resort corporations

Court: Michigan Court of Appeals (Unpublished No. 315293, June 10, 2014)

Case Name: *Prose v. Clough*

The court held that pursuant to the Michigan Zoning Enabling Act (MZEA) (MCL 125.3101 *et seq.*), the defendant-township may exercise its zoning authority over the territory incorporated by defendant-Glennbrook Beach Association, because it is not an incorporated city or village, and it is within the township's legal boundaries. Thus, the trial court did not err by granting summary disposition to defendants and dismissing plaintiff's complaint.

Glennbrook is a homeowners association, founded and incorporated under the The Summer Resort Owners Corporation Act (SROCA) (MCL 455.201 *et seq.*), and is located in the township.

Plaintiff owns residential property that is within the territory of Glennbrook. In 2000, he sought permission from the township to demolish the existing cottage on the property and construct a new one. The township denied his request in 2006.

He appealed to the trial court, but the case was closed in 2007. Plaintiff asserted that he did not receive notice of this action until 2012. He filed this action against defendants in trial court seeking declaratory relief to determine

which governmental entity had zoning powers over his land, a writ of prohibition to prevent defendants from continuing to exceed the bounds of their offices,

a writ of mandamus against defendants-Clough and the Kellys

to cease their efforts to prevent plaintiff's exercise of his property rights, and an order for superintending control over the township's zoning board of appeals to prevent it from asserting jurisdiction over plaintiff's property.

On appeal, plaintiff argued that the trial court erred by determining that the township could exercise zoning powers over territory incorporated by Glennbrook. He was correct that the MZEA did not affect any pending litigation or appeal that existed before June 30, 200, but he incorrectly argued that because he submitted his application to the zoning board before that date, the former Township Rural Zoning Act (TRZA) (MCL 127.271 *et seq.*) applied. There was no evidence that plaintiff had pending litigation that existed before June 30, 2006. Although he "filed an application in 2000 to make improvements to his property, that application was denied by the township" in May 2006. Plaintiff appealed to the trial court on June 20, 2006, but after remanding to make a record, the appeal was closed in 2007, and he did not take any further action.

Thus, the MZEA applied. By the plain language of the statute, "a township may exercise zoning powers over the areas within its legal boundaries, except over incorporated cities and villages." Thus, the question was whether a summer resort owners association is an incorporated city or village under the MZEA. The court held that it was not. Affirmed. (Source: State Bar of Michigan *e-Journal* Number:57329, July 7, 2014.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2014/061014/57329.pdf

Due Process and Equal Protection

See also *Hoffman v. Porter Twp.*, page 8.

Neighbor's constitutionally protected property rights on adjacent land as to enforcement of zoning ordinance

Court: Michigan Court of Appeals (Unpublished Nos. 315397, 316024, August 19, 2014)

Case Name: *Pamela B. Johnson Trust v. Anderson*

Noting the absence of Michigan cases addressing whether a neighbor has constitutionally protected property rights in the enforcement of zoning ordinances on adjacent property he does not own or use, the appeals court held that the plaintiff-trust could not establish a property interest for purposes of its due process claims against the defendant-City of Charlevoix (and Anderson). Further, the trial court properly found that laches barred its claims as to the 2010 amendment of the City's zoning ordinance. Collateral estoppel barred its claims as to the residential use of the Anderson defendants' boathouse and the alleged side yard and setback violations. It failed to state a claim on which relief could be granted as to its private nuisance allegations, and the *Penn Cent.*

Transp. Co. v. New York factors weighed heavily against finding a regulatory taking.

Thus, the appeals court affirmed the trial court's orders in these consolidated appeals granting summary disposition to the defendants. It also upheld the trial court's orders granting the defendants attorney fees and costs as case evaluation sanctions.

This zoning dispute began in 2007 with the issuance of a zoning permit to the Anderson-defendants authorizing construction of a single-family residence and an attached boathouse. Among its arguments on appeal, plaintiff-Johnson asserted that the trial court erred in determining that plaintiff lacked a protected property interest for purposes of its substantive and procedural due process allegations against the City. Plaintiff contended that, as an adjacent property owner, it had a constitutionally protected interest in the City's enforcement of the zoning ordinance to the Anderson-defendants' property.

The court disagreed. "Even accepting plaintiff's characterization of the boathouse as a 'special use,'" the court rejected the assertion that the Michigan Zoning Enabling Act's (MZEA) (MCL 125.3101 *et seq.*) requirements

> give rise to a property right because the authority exercised by officials in regard to the granting of a request for a special use is wholly discretionary, and thus plaintiff lacks a legitimate claim of entitlement or a justifiable expectation in the outcome.

Further, accepting its claim that the procedures for granting a variance were required to be followed, plaintiff again

> failed to establish that it had a legitimate claim of entitlement or a justifiable expectation in the outcome because the ZBA's [Zoning Board of Appeals] authority in relation to this issue of a variance was discretionary.

(Brackets added)

As to case evaluation sanctions, while plaintiff argued that the trial court should have applied The "interest of justice" exception (MCR 2.403(O)(11)), "the trial court determined that the case did not present unusual circumstances in which it would be appropriate to deny case evaluation sanctions," and the court found that it did not abuse its discretion. (Source: State Bar of Michigan *e-Journal* Number:57878, September 17, 2014.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2014/081914/57878.pdf

Variances (use, non-use)

See also *International Outdoor Inc. v. City of Roseville*, page 12.

ZBA can interpret, review administrative decisions, but cannot decide what something is zoned or rezoned

Court: Michigan Court of Appeals (Unpublished No. 319409, April 21, 2015)

Case Name: *Hoffman v. Porter Twp.*

The court held that the trial court had subject matter jurisdiction over the plaintiff's (Hoffman's) appeal of the zoning board of appeals' (ZBA) denial of his variance request, and over his due process and equal protection claims. Thus, the court vacated in part and reversed in part the trial court order's affirming the denial of plaintiff's variance request and dismissing his constitutional claims, and remanded for further proceedings.

Plaintiff owns a small island on a lake in the defendant-Porter Township. He wished to build a home on the island and sought to determine how the township's zoning ordinance applied to his property. The township deputy zoning administrator determined that the island was "not zoned." However, the township planning commission chairman appealed that determination to the ZBA, which voted to reverse the deputy zoning administrator's decision and interpreted the zoning map to determine that the property was zoned "agricultural." The ZBA later voted to deny plaintiff's request for a variance.

The plantiff appealed that decision to the trial court, and filed a four-count complaint asserting due process and equal protection violations, among other things. The court noted that plaintiff timely appealed the ZBA's decision. Further, the trial court erred in dismissing his constitutional claims under MCR 2.116(C)(4). Plaintiff argued that the ZBA's 2011 decision was "unreasonable because most of the surrounding property is zoned 'lake residential' and there is no 'agricultural' property on the lake." As to his equal protection claim, he argued that "the zoning of his property as 'agricultural' and the ZBA's denial of a variance was a result of him being 'singled out' as a 'class of one.'"

The Appeals Court noted that the available evidence from the 2011 ZBA meeting suggested "that plaintiff's island had never before been zoned," as

determined by the deputy zoning administrator. Further, the "Michigan Zoning Enabling Act (MZEA) does not authorize a ZBA to make zoning determinations," and thus, a ZBA "is not empowered to decide in what zoning district a particular piece of property should be placed in the first instance, or whether a property should be rezoned." Decisions about "zoning and rezoning are legislative, rather than administrative, in nature." The court could not determine from the record

> whether the ZBA's decision was in fact an 'interpretation' of the map, as the phrasing of the meeting minutes suggest, or whether the ZBA in fact made an initial zoning decision (or a rezoning decision)

as to the property, "in excess of the authority granted to it under the ordinance and the MZEA." (Source: State Bar of Michigan *e-Journal* Number:559758, April 30, 2015.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2015/042115/59758.pdf

Nonconforming Uses

See *Township of Macomb v. Svinte*, page 13.

Zoning Amendment, Voter Referendum, Repeal

Citizens in home rule city cannot employ a voter initiative to rezone property

Court: Michigan Court of Appeals (Unpublished No. 315177, July 1, 2014)

Case Name: *Melching Inc. v. City of Muskegon*

The court held that *Korash v. Livonia* is controlling case law and demanded it affirm the trial court's order granting summary disposition in favor of plaintiffs-Melching and Callow, ruling that a voter-enacted rezoning initiative (Proposal 4) did not constitute a valid rezoning of the property.

Plaintiffs sued defendant-the city, alleging that Proposal 4 constituted an invalid means of amending the city zoning map and ordinance, given the proposal effectively rezoned property absent compliance with the procedural hurdles set forth in The Michigan Zoning Enabling Act (MZEA) (MCL 125.3101 *et seq.*). They sought declaratory relief, as well as an injunction, to prevent the city from enforcing the rezoning accomplished by Proposal 4. After granting the intervenors' motion to intervene, the trial court granted summary disposition in favor of plaintiffs. It found that the Supreme Court's decision in *Korash* dictates that "the citizens of a home rule city could not, absent compliance with the MZEA, employ a voter initiative to rezone property." It was undisputed that there was a lack of compliance with the MZEA before Proposal 4 was approved.

"The crux of the dispute" was whether,

> despite the The Home Rule City Act's (HRCA) (MCL 117.1 *et seq.*) grant of authority allowing the inclusion of charter provisions giving the citizens of a home rule city the power of initiative in regard to matters generally held within the scope of a city's authority, including the power to zone, an ordinance can be amended through the power of initiative when such a mechanism fails to comply with the procedural steps and safeguards outlined in the MZEA.

The Appeals Court held that *Korash* "is directly on point, it remains controlling, and there is no basis or authority for us to limit the applicability of *Korash* or to find that it has been superceded." It also declined intervenors'

> invitation to uphold the election with the caveat that the results, while not construed as accomplishing a rezoning of the property, should be used to force consideration of the rezoning issue by the city's planning or zoning commission, at which time full compliance with the MZEA can be met.

This would entail the court "effectively rewriting the city's charter, twisting the law regarding the true impact of an initiative, and subverting the election process." (Source: State Bar of Michigan *e-Journal* Number:57571, August 8, 2014.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2014/070114/57571.pdf

To repeal zoning ordinance, must be done by adoption of an ordinance

Court: Michigan Court of Appeals (Unpublished No. 319235, April 28, 2015)

Case Name: *Lorencz v. Township of Brookfield*

The court held that the trial court erred by granting summary disposition for the defendants-township and county in the plaintiff's declaratory action because defendants could not repeal a zoning ordinance by resolution.

The township's board of trustees adopted an ordinance that would have repealed a then-current

zoning ordinance with intent to come under Huron County's zoning ordinance because the township could not populate its planning commission and zoning board of appeals. But its electors later rejected the repealing ordinance by referendum with a 119 to 118 vote. The board then adopted a resolution repealing the zoning ordinance.

Plaintiff sought a declaratory judgment, arguing that the ordinance could not be repealed by a resolution. The trial court held that because the statute was silent as to the procedure to be followed when repealing a zoning ordinance, it was properly repealed by the resolution.

On appeal, the Appeals Court agreed with plaintiff that a resolution is not of equal dignity to an ordinance and thus, cannot serve as a proper method for repealing the zoning ordinance in issue.

> [A]n ordinance may only be repealed by an act of equal dignity, which requires the township to repeal by ordinance and not resolution. The 2013 resolution purporting to repeal the
>
> (Brackets added)

zoning ordinance was "void and the zoning ordinance remains in effect." Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 59820, May 7, 2015.)

Full Text Opinion:
www.michbar.org/opinions/appeals/2015/042815/59820.pdf

Conditional Zoning Amendment

Conditional rezoning automatically reverts back upon abandonment of development

Court: Michigan Court of Appeals (Unpublished No. 317199, December 18, 2014)

Case Name: *Chestnut Dev. LLC v. Township of Genoa*

The court held that the trial court abused its discretion by granting the plaintiff-developer a writ of mandamus compelling the defendants-township and zoning administrator to issue a land use permit. While the court rejected defendants' claim that the zoning classification matter was not ripe, the issue whether plaintiff was entitled to a land use permit to construct a single family home and to enlarge an existing pond on its property was not ripe for adjudication. Thus, it affirmed in part, vacated in part, and remanded. Plaintiff sought a writ of mandamus compelling defendants to issue a land use permit allowing it to construct a single family home.

Defendants claimed the matter was not ripe for adjudication and that plaintiff had to comply with its zoning ordinance as a consequence of the property's prior Planned Unit Development (PUD) zoning. They also claimed plaintiff actually sought to mine sand from its property to sell, which is only permitted in industrial districts with special land use approval. After several hearings, the trial court eventually granted plaintiff's request for a writ of mandamus and ordered defendants to issue the land use permit.

As to defendants' argument that the matter of zoning classification was not ripe, the Appeals Court found that the conditional zoning agreement entered into between defendants and the prior property owner became void when the prior owner abandoned the development project and the property.

> Therefore, the conditional rezoning of the property from [Agricultural zoning] AG to PUD was automatically revoked and, at some time before plaintiff purchased the property, the property reverted back to its original zoning classification, AG, by operation of

defendants' ordinance and MCL 125.3405(2) (statute providing that when conditions for rezoning are not satisfied "the land shall revert to its former zoning classification"). Further,

> [a]ll of the information necessary to resolve the issue of zoning classification was available and its resolution was not dependent on any determination by the [zoning board of appeals] ZBA.
>
> (Brackets added)

However, the issue of whether plaintiff was entitled to a land use permit to construct a home and to enlarge the pond on its property that is zoned AG was not ripe "because the municipality did not render a final determination regarding the requested use considering the property's AG zoning classification . . . ." Thus, the claim "'rests upon contingent future events that may not occur as anticipated, or may not occur at all.'" (Source: State Bar of Michigan e-Journal Number:58918 January 26, 2015.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2014/121814/58918.pdf

Court, Ripeness for Court's Jurisdiction, Aggrieved Party

See also *Schall v. City of Williamston*, page 16.
See also *Chestnut Dev. LLC v. Township of Genoa*, page 10.

Court can hear appeal of site plan review.

Court: Michigan Court of Appeals (Unpublished No.

317606, October 30, 2014)

Case Name: *Visser Trust v. City of Wyoming*

Holding that the trial court erred in finding that it did not have jurisdiction to hear the plaintiff-trust's challenge to the site plan approval, but in all other respects did not err in granting summary disposition for the defendants-city and developers, the court affirmed in part, reversed in part, and remanded.

Plaintiff sued defendants challenging both the rezoning of the property at issue, and the site plan approval. It also alleged a Freedom of Information Act (FOIA) (MCL 15.231 *et seq.*) violation and claimed the rezoned property was subject to negative restrictive covenants. The trial court granted defendants' motions for summary disposition and dismissed the case.

On appeal, the court agreed with plaintiff that the trial court erred in holding that it lacked jurisdiction to hear its challenge to the site plan approval, finding that there is

> no statutory provision requiring plaintiff to challenge the Planning Commission's approval of the site plan in a particular manner as opposed to filing a general civil suit for declaratory and injunctive relief.

However, the court rejected plaintiff's argument that the

> rezoning was invalid because: (1) it failed to comply with the Michigan Zoning Enabling Act (MZEA) (MCL 125.3101 *et seq.*) and (2) the rezoning was illegal contract zoning.

It held that "there was no issue of fact to support that the rezoning violated the MZEA." Further,

> despite attaching numerous exhibits to its brief on appeal, other than the letter, which, standing alone is insufficient to create an issue of fact, plaintiff does not cite any deposition testimony or other documentary evidence to support that [the city] engaged in illegal contract zoning.

The court also rejected plaintiff's argument that the trial court improperly dismissed its FOIA claim for lack of standing, holding that plaintiff

> neither submitted the FOIA request nor was the request submitted on behalf of plaintiff. After commencing the lawsuit, plaintiff could have submitted an additional FOIA request on its own behalf, but it failed to do so.

Finally, the court rejected plaintiff's argument that a reciprocal negative easement existed, finding no documentary evidence to support this claim. (Source: State Bar of Michigan *e-Journal* Number:58500 December 8, 2014.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2014/103014/58500.pdf

Open Meetings Act, Freedom of Information Act

See also *Visser Trust v. City of Wyoming* , page 11.

Minutes must show rescinded motions

Court: Michigan Court of Appeals (Unpublished No. 312209, April 29, 2014)

Case Name: *Speicher v. Columbia Twp. Bd. of Election Comm'rs*

Holding that there was insufficient evidence to establish a question of material fact as to whether the defendants engaged in "deliberations" or made "decisions" outside of a public meeting, the appeals court affirmed the trial court's order granting them summary disposition on the claims that they violated MCL 15.263(2) and (3) of the Open Meetings Act (OMA) (MCL 15.261 *et seq.*). However, it reversed the order granting the defendant-Township Board summary disposition on the basis of substantial compliance as to the alleged violation of MCL 15.269, and concluded that the Board violated the OMA by failing to record two roll call votes in the approved minutes of the October 15, 2011 meeting.

The October 15, 2011 meeting was scheduled to appoint election inspectors for the upcoming election. Plaintiff and another individual (K) submitted applications to be considered as election inspectors.

> The Township-defendants did not consider these applications at the meeting and voted to appoint three other individuals whose applications had been signed in 2010.

Plaintiff told the Board that the law permitted citizens to be trained as election inspectors after they were appointed and required election inspector applications to be signed during the current calendar year. Defendants then voted to rescind their prior vote and rescheduled the meeting.

The Board later approved the October 14, 2011 meeting minutes. Those minutes failed to include reference to the two roll call votes. On October 18, 2011, the Board held its next meeting, and the individual defendants voted to appoint three other individuals, two of whom were appointed (and had their appointments rescinded) at the October 15, 2011 meeting.

As to the alleged violations of MCL 15.263(2) and

(3), the court concluded that because neither plaintiff nor K "was qualified to serve as an election inspector at the time" of the October 15, 2011 meeting, "there were no 'options' to be 'carefully' considered by defendants. Thus, any conversations that took place" about their qualifications "did not constitute deliberations within the meaning of the OMA."

As to MCL 15.269, the court held that contrary to the trial court's ruling, "the OMA only recognizes the defense of substantial compliance where a party seeks invalidation of a public body's decision." The defense did not apply here, where the record was clear that plaintiff did not request invalidation of the Board's actions. The Board argued that because the first roll call vote was rescinded by the second one, the votes never actually occurred and, thus, were not required to be reflected in the minutes. The court rejected this argument as without merit, concluding that the statute "provides no exception for roll call votes that were rescinded." Affirmed in part, reversed in part, and remanded. (Source: State Bar of Michigan *e-Journal* Number:57034, June 5, 2014.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2014/042914/57034.pdf

Signs: Billboards, Freedom of Speech

Variance for Billboard not unbridled ZBA discretion

Court: Michigan Court of Appeals (Unpublished No. 313153, May 1, 2014)

Case Name: *International Outdoor Inc. v. City of Roseville*

> Holding that the defendant-City's sign ordinance did not place unbridled discretion in the hands of the ZBA [Zoning Board of Appeals], but rather, provided a standard from which the ZBA reviews variance applications,
>
> (Brackets added)

the appeals court concluded that the trial court did not err in ruling that the ordinance, on its face, was constitutional. Further, the ZBA applied the standard set forth in the ordinance in reviewing plaintiff's application for variances, and its findings were "supported by competent, material, and substantial evidence."

Thus, the trial court properly granted the City summary disposition in this case challenging the constitutionality of its ordinances regulating billboards (the sign ordinance and the zoning ordinance) and the ZBA's application of the ordinances in granting or denying variances. Plaintiff argued that the City's ordinances, as applied, constituted an unconstitutional prior restraint because the City had not consistently applied the stated objective standards for permitting billboards.

The court concluded that the language of both the Michigan Zoning Enabling Act MCL 125.3604(7) and the sign ordinance "allow the ZBA discretion in determining whether to grant or deny a variance based upon a finding that a practical difficulty or unnecessary hardship exists." Thus, the court found that the ordinance was enacted in compliance with MCL 125.3604(7). Plaintiff conceded that the ordinance set forth "a narrow, objective, and definite standard for permitting off-premises signs in a particular location." Because plaintiff could not meet the strict application of the ordinance, "it was required to present evidence that a practical difficulty or unnecessary hardship existed." The court concluded that while the ZBA had discretion under the ordinance,

> contrary to defendant's conclusory assertions, the ordinance did not place unbridled discretion in the hands of the ZBA. Rather, the ordinance as stated and as applied stands for the proposition that if the petitioner does not meet the strict application of the ordinance, the ZBA reviews the variance request and considers whether a practical difficulty or unnecessary hardship exists based upon the evidence presented in that specific case.

This standard "has repeatedly been upheld" as valid. Based on the record evidence, specifically the ZBA's minutes, the court concluded that the City applied the standard. Further, the record suggested that the variances granted or denied were directly related to the stated purpose of the sign ordinance - "to protect the health, safety and welfare of" the City's citizens,

> including but not limited to defining and regulating signs in order to promote aesthetics, to avoid danger from sign collapse and to regulate sign materials, avoid traffic hazards from sign locations and size, avoid visual blight and provide for the reasonable and orderly use of signs.

Affirmed. (Source: State Bar of Michigan *e-Journal* Number:57049, June 4, 2014.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2014/050114/57049.pdf

Zoning Administrator/Inspector, Immunity, and Enforcement Issues

See also *Stoll v. Luce Mackinac Alger Schoolcraft Dist. Health Dep't Bd. of Health*, page 18.

Patented land still subject to Wetland Protection Act

Court: Michigan Court of Appeals (Unpublished No. 318380, January 29, 2015)

Case Name: *Groninger v. Department of Envtl. Quality*

Holding that plaintiffs-Dunn and Thompson lacked standing, that the Wetlands Protection Act (WPA) (MCL 324.30301 *et seq.*) applied to plaintiffs-Groningers' land, and that there was no violation of the Contract Clause, the court affirmed the trial court's order granting the defendant-Department of Environmental Quality (DEQ) summary disposition in this action for declaratory relief seeking to prevent the DEQ from entering the property to inspect for wetlands.

The Groningers' chain of title goes back to a federal patent granted in 1855.

When the DEQ was prevented from entering the property, "apparently to inspect a driveway that was being built, it sought a warrant to conduct a wetlands inspection." Plaintiffs filed this suit seeking declaratory relief that the DEQ did not have authority to enter their private land. The court noted that while Dunn and Thompson alleged they have an oral lease to hunt on the Groninger property, they "made no showing that their hunting interest would be affected" by the DEQ entering the property to determine its wetland status. Further, they did not plead facts establishing that the construction of a driveway in any way affected their hunting interest. "Their injury, as presented to the trial court and on appeal, is merely hypothetical and they have not established an actual controversy." Thus, the trial court correctly ruled that they lacked standing.

The Groningers argued that the federal patent removed the property from the DEQ's authority, and that any regulation of their land impairs their patent, which violates the U.S. and Michigan Constitutions. The court noted that the definition of a "wetland" in the WPA "makes clear that the statute applies to any 'land' bearing certain characteristics of water or aquatic life. There is no limitation on the types of land affected by the WPA, nor is there any distinction made between private, public, or federal lands." The court concluded that the broad definitions in the WPA evidence

> the intent for the WPA to apply to any land under the authority of the executive department, which would be any land in Michigan, whether it is federal, state, public, or private land.

Further, there was no unconstitutional impairment of contract. "Foremost, any impairment by the WPA is minimal." The Groningers

> hold their land in fee simple and the permit requirement that may be necessary does not divest plaintiffs of any ownership interest in their land - they still hold title against all comers.

If a permit were required for driveway construction, they

> could show a particularized injury sufficient to confer standing, but the permitting process is not a "substantial impairment" of plaintiffs' ownership interest, which is the foundational contractual relationship.

(Source: State Bar of Michigan *e-Journal* Number: 59202, February 27, 2015.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2015/012915/59202.pdf

Commercial use in Agricultural district not allowed: was not a nonconforming use

Court: Michigan Court of Appeals (Unpublished No. 318064, December 18, 2014)

Case Name: *Township of Macomb v. Svinte*

The court held that the trial court did not err by granting summary disposition for the plaintiff-township and enjoining the defendants-land owners from using their property for commercial purposes or for storing commercial property.

Plaintiff sought to enjoin defendants from using their property in this manner, claiming it violated a zoning ordinance, was not a prior nonconforming use because the commercial use of the property was never legal, and, even if there was a prior nonconforming use, they had inappropriately expanded that use. The trial court granted summary disposition for plaintiff.

On appeal, the court rejected defendants' argument that summary disposition was inappropriate because there was a prior nonconforming use. It noted that the only evidence they presented in support of this argument was that the prior owners of the land had used the property for commercial purposes before they purchased it.

> However, defendants are required to show a legal use occurring before the 1973 agricultural zoning ordinance took place. Defendants provide absolutely no evidence of this, which they were

required to do to survive summary disposition.

As to their remaining arguments, the court noted that they were either unpreserved, undeveloped, or meritless. Affirmed. (Source: State Bar of Michigan *e-Journal* Number:58933, February 2, 2015.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2014/121814/58933.pdf

Can enforce a site plan as part of zoning variance adopted by reference in motion granting variance

Court: Michigan Court of Appeals (Unpublished No. 317908, December 18, 2014)

Case Name: *Pleasanton Twp. v. Parramore*

The appeals court held that the plaintiff-Pleasanton Township was improperly denied summary disposition on its claim that the defendant-property owner's (Parramore) building constituted a nuisance *per se* because the building violated a zoning ordinance - it did not satisfy the height restriction imposed as a condition for the variance from the side-yard setback requirement.

The appeals court first determined that the circuit court had jurisdiction because Parramore did not collaterally challenge the Zoning Board's decision - the Township sued him, alleging claims of nuisance *per se* and fraud, and asking for injunctive relief. The circuit court has jurisdiction to hear nuisance and fraud claims and to grant injunctive relief.

The variance at issue was granted during a Zoning Board of Appeals (ZBA) public meeting and was included in the meeting's minutes. This reference reflected that the ZBA "voted to grant the variance 'based on' Parramore's application[,]" which contained representations that the building would be eight feet tall. The land use permit was also based on the application. Therefore, his claim that the Zoning Board did not impose a height restriction in its variance was without merit, and the Township should have been granted summary disposition. The Township could not be "estopped" from enforcing the zoning ordinance or its condition based on "the Zoning Administrator's alleged verbal statements or the land use permit issued by the Zoning Administrator . . . ." A "municipality cannot be estopped from enforcing its zoning ordinances by 'the ultra vires acts of its zoning officials.'"

The appeals court instead concluded that because Parramore "accepted the advantages of the variance by building his structure, but did not comply with the condition on the grant of the variance," he was "estopped from challenging the propriety of the condition" and it was binding on him.

However, the Township failed to establish its claim that he was also estopped under a fraud theory because it failed to cite any evidence that he "made the representations regarding his building plans in bad faith without the present intention to perform." It also failed to successfully state its claim based on judicial estoppel.

Parramore did not prevail on his counterclaim based on a violation of his equal protection rights because he did not show that "he was treated differently from another similarly situated applicant." Additionally, "the right to build according to a preferred design is not a substantial property right."

Affirmed in part, reversed in part, and remanded for entry of summary disposition for the Township on its nuisance *per se* claim and on Parramore's equal protection counterclaim. (Source: State Bar of Michigan *e-Journal* Number:58931, January 27, 2015.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2014/121814/58931.pdf

Can have more than one zoning permit for a parcel of land

Court: Michigan Court of Appeals (Unpublished No. 306066, June 12, 2014)

Case Name: *Camp v. City of Charlevoix*

Holding that the trial court erred in concluding that the defendants-Andersons' request for relief had been rendered moot, the court reversed the trial court and remanded for entry of an order in their favor.

The case involved zoning permit 2850 issued by the defendant-City's Zoning Administrator to the Anderson defendants, authorizing construction of a single-family home and an attached boathouse. The neighbors opposed the project and filed this action.

The trial court issued an order for superintending control requiring the City's Zoning Board of Appeals (ZBA) to review the zoning permit. The ZBA revoked the permit because certain features of the boathouse violated the City's Zoning Ordinance. In a prior appeal, the court reversed, concluding that the ZBA's decision to revoke the permit must be vacated.

This appeal followed remand to the trial court. The Andersens argued that the trial court failed to comply on remand with the court's prior opinion, and violated the law of the case doctrine. However, the trial court's actions on remand were not inconsistent with the court's opinion and did not violate the law of the case.

In the court's prior decision it did not consider the legal effect of the issuance of the new zoning permit, 3071, or whether, by obtaining it, the Andersons rendered relief relating to permit 2850 moot. It did not discuss permit 3071 or consider the question of mootness in any way.

The Appeals Court concluded that the dispositive question on appeal involved consideration of whether the trial court properly determined the mootness of the relief sought by the Andersons. They argued on appeal that the trial court erred in finding relief related to permit 2850 was rendered moot by the issuance of permit 3071. The court agreed. The trial court opined that the Andersons' decision to obtain permit 3071 rendered their request for the reinstatement of permit 2850 moot because - "(1) they could not hold two permits for the same property, and (2) they had demonstrated an intention of abandoning permit 2850." However, the court knew

> of no authority, either generally or specific within the Ordinance at issue in this case, to suggest that a property owner may not legally hold two zoning permits in relation to his or her property.

Given that nothing prevented the Andersons from holding both permits, the court held that "the trial court erred in concluding on this basis that the issuance of permit 3071 left permit 2850 without legal effect" and thus, moot. Similarly, the trial court erred in concluding that they abandoned permit 2850. (Source: State Bar of Michigan *e-Journal* Number:57348, June 14, 2014.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2014/061214/57348.pdf

Township cannot enforce deed restrictions

Court: Michigan Court of Appeals (Unpublished No. 316507, October 16, 2014)

Case Name: *Town Ctr. Flats, LLC v. Shelby Twp.*

Holding that the defendant-township was not authorized by law to adjudicate the alleged dispute between the plaintiff and another property owner, and was not required or authorized by law to enforce any alleged deed restrictions, the court affirmed the trial court's order dismissing the case.

Plaintiff-Town Center Flats sought injunctive relief and damages, alleging that defendant-township refused to enforce a deed restriction pertaining to property for which its owner sought to construct a planned unit development. "Plaintiff alleged that defendant's failure to act constituted a discriminatory application of the law and resulted in the inverse condemnation of plaintiff's adjacent property."

The trial court dismissed the case after concluding that plaintiff failed to establish that defendant was a proper party because, contrary to plaintiff's claims, defendant did not have legal authority to enforce the alleged deed restrictions at issue. The court noted that townships "have no inherent powers, but only possess the limited powers conferred on them by our constitution or by the Legislature through enabling statutes."

On appeal, plaintiff failed to

> set forth any legal support for its claims that defendant had legal authority to enforce the purported deed restrictions and, thus, should be held liable for failing to exercise such authority.

Plaintiff did not cite to a statute or constitutional provision vesting a township "with authority to adjudicate a dispute between property owners involving the use of land, including the alleged violation of deed restrictions." Plaintiff also did not cite to any case holding that "a municipality is empowered to, and required to, enforce deed restrictions." (Source: State Bar of Michigan *e-Journal* Number:58306 November 10, 2014.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2014/101614/58306.pdf

Enforcement official can use professional judgment, specialized knowledge, experience, and discretion

Court: Michigan Court of Appeals (Unpublished, No. 315941, October 14, 2014)

Case Name: *McNabb v. Dan's Excavating, Inc.*

Holding that the exercise of discretion and judgment by the defendant-Township's building official was clearly involved, the court upheld the trial court's grant of summary disposition to the Township on the plaintiffs' claim for mandamus relief. Further, while the plaintiffs had standing to seek mandatory injunctive relief against defendant-Dan's Excavating, they had an adequate legal remedy and the condition at issue (overfilling that caused surface water run-off onto their property) was not irreparable or of a permanent or continuous nature.

Thus, the appeals court also affirmed the trial court's dismissal of plaintiffs' claim for injunctive relief against Dan's Excavating.

The case arose from the filling and restoration operations of a sand mining pit that was adjacent to plaintiffs' residential property. In seeking mandamus relief, plaintiff requested that the trial court order the Township to enforce the then current grade to an

elevation of 1,060 feet and to restore the site by grading and seeding. The court noted that neither the Ordinance 99 (ordinance) nor the permit issued under it

> imposed a specific grading requirement or a specific elevation limitation during the filling and restoration operation, or that the filling and restoration operation be completed by a certain date.

The ordinance and the permit "only required the site to be restored progressively in accordance with the approved site plan. There was no mandatory timetable or progressive standard for this process."

The Township presented evidence that its building official investigated plaintiffs' complaints and exercised

> discretion and judgment in determining that the current elevation was not in violation of the ordinance or the permit because the filling and restoration operation was not yet complete, but was ongoing and in progress.

Whether the site was in compliance with the filling and restoration requirements of the ordinance involved consideration of specific matters, and the building official also was required to

> interpret whether the current requirements of the ordinance and the permit issued thereunder were being met in accordance with the approved site plan. These matters were not ministerial in nature but required professional judgment, specialized knowledge and experience, and discretion.

(Source: State Bar of Michigan *e-Journal* Number:58274 November 5, 2014.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2014/101414/58274.pdf

Landscape buffer requirement upheld, violation is a nuisance *per se*

Court: Michigan Court of Appeals (Unpublished, No. 317731, December 4, 2014)

Case Name: *Schall v. City of Williamston*

The appeals court held that the trial court did not err by finding no material disputed fact that defendants' landscape buffer failed to comply with the zoning ordinance (and special use permit) and thus, was an abatable nuisance *per se*. It also held that the trial court had subject-matter jurisdiction of plaintiffs' claim for equitable relief from the alleged zoning violation. Plaintiffs had standing, no non-futile administrative remedy was available, and their claim was ripe for adjudication.

Thus, it affirmed the trial court's grant of city-plaintiffs' motion for summary disposition and denied defendants' motion for summary disposition. Plaintiffs sought injunctive relief to compel their new neighbors, defendants-D&G Equipment, Inc. and its owners the Gustafsons to comply with the defendant-City's zoning ordinance that

> allows the outdoor display of farm implements for sale only by special use permit, which in turn requires a green buffer zone to shield plaintiffs' property from the outdoor sales displays on D&G's property.

The appeals court held that the zoning ordinance was clear and unambiguous. Defendants could not "operate their outdoor sales and storage operation of large farm equipment without a special use permit" and could not obtain a special use permit "without complying with the pertinent landscape buffer requirements of the zoning ordinance." The minimum standards of the ordinance applied except to the extent they were satisfied by the existing vegetation. It was undisputed that at the time the case was initiated the landscape buffer did not meet the minimum standard of "closely spaced evergreens" that "form a complete visual barrier at least six feet in height."

The issue was whether within three years of installation such a visual barrier could reasonably be expected to form. Plaintiffs presented two affidavits of a competent, qualified landscape architect that 30 more evergreens, 10 to 12 feet tall, would need to be planted. Defendants' reliance on affidavits by an individual serving as zoning administrator (S) to create a disputed question of fact whether the landscape buffer complied with the ordinance was misplaced for several reasons. Also, their claim that S's affidavits positioned the case as a battle of experts at trial was without merit. Defendants did not establish S's qualifications as an expert, "his opinion was not shown to be based on facts," and his affidavits "presented mere conclusory statements insufficient to withstand a supported motion for summary disposition."

The court held that the trial court properly granted relief on the basis that plaintiffs "established, on the basis of undisputed evidence, that defendants' use of their property was in violation of the landscape screening requirements of the zoning ordinance."

(Source: State Bar of Michigan *e-Journal* Number:58774 January 12, 2015.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2014/120414/58774.pdf

Have to tear home down: got permit and site plan approval but did not follow site plan.

Court: Michigan Court of Appeals (Unpublished No. 321440, December 16, 2014)

Case Name: *Oray v. City of Farmington Hills*

The defendant-City did not violate the plaintiff's procedural due-process rights when it issued seven valid citations relating to the construction of plaintiff-Oray's home addition because each citation resulted in a hearing in which the plaintiff participated. The issue was not

> whether the various decisions regarding the citations and zoning requirements were correct but whether plaintiff was afforded due process in regard to the citations and zoning violations.

The trial court ordered the plaintiff to remove the addition because it did not comply with the City's zoning ordinance. The plaintiff sued the City under several theories. The trial court rejected his due-process claim, and declined to apply ; *Pittsfield Twp. v. Malcolm* to find "exceptional circumstances" that would "equitably estop" the City from enforcing the zoning restrictions. The plaintiff

> submitted a set of plans that were approved, and then proceeded to build a structure that did not match his plans. The plans submitted with the permit also failed to accurately depict the property lines. As soon as the discrepancy was discovered, defendant-city issued a stop work order; however, plaintiff continued to work on the project.

He also "failed to comply with the applicable building codes."

His claims under the Michigan Zoning Enabling Act (MZEA) were not fully developed.

He was not entitled to relief on his *Penn Cent. Transp. Co. v. New York* takings claim because he did not show that the zoning ordinance was

> not equally applicable to all similarly situated property owners, nor did he produce evidence demonstrating that he was unaware of the zoning ordinance or could not have reasonably known of the ordinance at the time he purchased his property.

Further, it was clear that the zoning ordinance allowed plaintiff "to make valuable use of his land." There was no evidence to support a *de facto* "taking."

His claim for a violation of the Open Meetings Act was not addressed because he did not raise it in the lower court.

His substantive due-process claim was unsuccessful because none of the City's actions, including seeking an order requiring the addition be removed, were "'so arbitrary and capricious as to shock the conscience.'"

The Appeals Court affirmed the trial court's dismissal of plaintiff's complaint. (Source: State Bar of Michigan *e-Journal* Number: 58897, January 22, 2015.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2014/121614/58897.pdf

Other Unpublished Cases

Building inspection can act on use of entire building rather than piecemeal and impose remedies against only certain portions of the building

Court: Michigan Court of Appeals (Unpublished No. 313020, June 26, 2014)

Case Name: *RJMC Corp. v. Green Oak Charter Twp.*

Holding that nothing in

> the plain language of Housing Law of Michigan (125.401 *et seq.*) (specifically MCL 125.541) required either the hearing officer or the Township Board to take the type of piecemeal action suggested by plaintiff and impose remedies against only certain portions of the building

(the Barnstormer [a bar, restaurant, banquet center, nightclub with several additions done without permits]), the court concluded the remedy of enjoining plaintiff's use of the entire facility was warranted.

Thus, in Docket No. 313020, the appeals court affirmed the trial court's grant of summary disposition to the defendant-Township on plaintiff's complaint and defendant's counter-complaint. As to attorney fees, in Docket No. 313483, the court affirmed in part, vacated in part, and remanded. It concluded that while defendant was not entitled to attorney fees under MCL 125.541(7) or on the basis of "plaintiff's unlawful conduct," it was impossible to ascertain whether the trial court clearly erred in denying defendant's motion for sanctions. In Docket No. 313020, plaintiff contended that summary disposition was inappropriate because, as part of its order, the trial court "enjoined plaintiff from occupying any part of the Barnstormer, including the first floor and adjacent tent structure."

Without citing any supporting authority, plaintiff asserted that the trial court erred because there was no evidence before the hearing officer, the Township Board, or the trial court that the first floor or the tent structure were dangerous. Essentially, plaintiff

challenged the authority of the Township Board and the trial court to enjoin the occupancy of the entire Barnstormer.

The court noted that plaintiff stipulated that portions of the Barnstormer were in a condition that constituted a "dangerous building" under MCL 125.538. "As set forth in MCL 125.539, the entire building does not need to have safety violations in order for the building to be considered a 'dangerous building.'" The court concluded that "MCL 125.541(2) gives a hearing officer discretion in the remedy to impose on the dangerous building, and nothing in the plain language of the statute requires that a hearing officer restrict her orders to only those parts of the building that are considered dangerous." Further, the Township Board

> is afforded the same wide breadth in determining the appropriate remedy. MCL 125.541(4) permits a "legislative body," - in this case, the Township Board - to "either approve, disapprove, or modify the order" entered by the hearing officer. The legislative body then has authority to "take all necessary action to enforce the order."

Thus, the court held that "the plain language of MCL 125.541 authorized the hearing officer and the Township Board to take action affecting 'the building,' not portions thereof." The court also noted that plaintiff's argument was "factually flawed," as the record belied its "claim that the first floor and tent structure were safe and not in need of repairs." (Source: State Bar of Michigan *e-Journal* Number:57514, August 4, 2014.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2014/062614/57514.pdf

Board of health entitled to absolute immunity on plaintiff's concerning regulation of septic waste treatment

Court: Michigan Court of Appeals (Unpublished No. 316287, October 21, 2014)

Case Name: *Stoll v. Luce Mackinac Alger Schoolcraft Dist. Health Dep't Bd. of Health*

The court held that the defendant-board of health was entitled to absolute immunity on the plaintiff's claims arising from the regulation of septic waste treatment. Further, defendant-Derusha was immune from tort liability as the board's highest appointed executive official, and defendant-Hubble (a board employee) was entitled to governmental immunity. The court also held that plaintiff's due process and equal protection claims lacked merit and were properly dismissed.

As a licensed "designer and installer of aerobic treatment units as an alternative to conventional septic units" plaintiff applies for septic permits. The court noted that the board

> is an agency established under MCL 333.2415 and was engaged it its statutory function of protecting the public health by, among other duties, regulating septic waste treatment.

Thus, any tort claims alleged directly against the board were barred by governmental immunity.

Plaintiff did not plead any facts showing that Derusha was acting outside the scope of his executive authority.

> The particular actions asserted in the complaint are delegated by statute. MCL 333.2433(1). To the degree that any duty would be delegated to a lower-ranking employee, the duty would still remain within Derusha's authority.

He was also protected by MCL 691.1407(5) against liability for plaintiff's claim that he defamed plaintiff at a board meeting, pursuant to MCL 333.2465. All of Hubble's

> actions were discretionary and done in the course of her employment as a sanitarian.
>
> While plaintiff concluded that she acted with malice, he offered no facts to support his conclusions.

He complained that Hubble wrote to his clients in 2008 and 2009 about maintenance contracts that she needed to approve. He also alleged that in 2009 she sent a list of maintenance providers for plaintiff's products and he did not approve of the list, which did not include some of his subcontractors. However, nothing in the complaint alleged "these actions were not discretionary actions done during her employment as sanitarian for a multiple county health board." He also offered "no facts to show that Hubble acted willfully or wantonly under MCL 333.2465."

As to his constitutional claims, while plaintiff asserted that aerobic treatment systems were treated differently from mound systems, he never alleged that he was treated differently from other aerobic treatment providers. "The board has rational and legitimate reasons to treat different treatment systems differently due to different risks and concerns."

The court affirmed the dismissal of the complaint in its entirety. (Source: State Bar of Michigan *e-Journal* Number: 58356, November 17, 2014.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2014/102114/58356.pdf

Glossary

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

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

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

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

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

curtilage
n *noun* An area of land attached to a house and forming one enclosure with it.
ORIGIN
Middle English: from Anglo-Norman French, variant of Old French *courtillage*, from *courtil* 'small court', from *cort* 'court'.

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

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

estoppel
n *noun Law* the principle which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person or by a previous pertinent judicial determination.
ORIGIN
C16: from Old French *estouppail* 'bung', from *estopper*.

et seq. (also **et seqq.**)
n *adverb* and what follows (used in page references).
ORIGIN
from Latin *et sequens* 'and the following'.

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

hiatal adjective
ORIGIN
C16: from Latin, literally 'gaping'.

in camera

Refers to a hearing or inspection of documents that takes places 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.*

in limine

To pass a motion before the trial begins. Usually requested in order to remove any evidence which has been procured by illegal means or those that are objectionable by jury or which may make the jury bias.
ORIGIN
Lat. *At the threshold* or *at the outset*

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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