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Selected Planning and Zoning Decisions: 2017
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This public policy brief summarizes the important state and federal court cases and Attorney General Opinions issued between May 1, 2016 and April 30, 2017.

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Restrictions on Zoning Authority

RLUIPA question on maximizing tax revenue for a religious school the same as other schools is a factual, not legal, question

Case: *Tree of Life Christian Schools. v. City of Upper Arlington*
Court: U.S. Court of Appeals Sixth Circuit (Published Opinion No. 14-3469 (823 F.3d 365, 2016 U.S. App. LEXIS 9048 (6th Cir.) (6th Cir. Ohio, 2016), May 18, 2016)

The court concluded that the question whether the defendant-Upper Arlington city treats nonreligious assemblies or institutions that would fail to maximize income-tax revenue in the same way it has treated the proposed religious school was a factual, not a legal, question, and the district court erred by deciding the issue on summary judgment.

Plaintiff-Tree of Life Christian Schs sought to rezone its property to operate a religious school, but the city refused to rezone it from office use to residential, claiming that the change would lower tax revenue, contrary to the city's Master Plan.

Tree of Life Christian Schools challenged the ruling, claiming it violated Religious Land Use & Institutionalized Persons Act's (RLUIPA) (42 USC §§ 2000cc–2000cc-5) Equal Terms Provision, which stipulates that

> "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." The court reviewed the Provision interpretations of several circuits but concluded that it need not reach the issue because summary judgment was inappropriate "'in a proceeding for equitable relief . . . where genuine issues of material fact exist.'"

The court found that Tree of Life Christian School's allegations created a genuine issue of fact as to whether the city treated "more favorably assemblies or institutions similarly situated with respect to maximizing revenue, unless the government can demonstrate that no assemblies or institutions could be similarly situated." Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 62761; June 14, 2016.)

Full Text Opinion:
http://www.michbar.org/file/opinions/us_appeals/2016/051816/62761.pdf

County has no power over zoning to site land uses, just principal buildings and their accessory uses

Case: *Coloma Charter Twp. v. Berrien County*.
Court: Michigan Court of Appeals (Published Opinion No. 325226 317 Mich. App. 127; 2016 Mich. App. LEXIS 1651, September 6, 2016)

In both of these consolidated appeals, the Appeals Court reversed the trial court's orders granting summary disposition to the defendant-county, modified a permanent injunction to the extent it ruled that the county could operate the shooting range under the authority of the County Commissioners Act (CCA) (MCL 46.1 *et seq.*) and remanded for entry of summary disposition in favor of plaintiffs-township. For these same reasons, it reversed the trial court's modification of the injunction, and vacated and remanded on the issue of attorney fees in light of its conclusion that the county acted in violation of *Herman* and MCL 46.11(b) and (d). It affirmed the trial court's ruling on criminal contempt.

Despite the fact that the county constructed a new building since the issuance of *Herman*, the appeal was still controlled by *Herman*. The CCA provides the county with no power to site land uses or activities, only county buildings. The problem with the building being constructed in front of the existing shooting range was that it was ancillary to the use of the shooting range, as opposed to the shooting range being ancillary to the normal use of the building. It existed long before the building, and was utilized (until the courts stopped its use) without the existence of the building. The evidence showed the range was and is the main feature of this activity, making the building subordinate to, or ancillary to, the range. Stated differently, the county used an after the fact building in an attempt to statutorily shield its non-conforming land use, something the *Herman* Court stated was impermissible under the CCA. No matter the intentions of the county in seeking to comply with *Herman*, the facts revealed a belated attempt to protect a land use by

siting an adjacent building. This it could not do. Further, the *Herman* Court concluded that "Berrien County's outdoor shooting ranges do not have priority over the township ordinances that plaintiffs rely on because they are land uses that are not indispensable to the normal use of the county building."

Thus, the

> Supreme Court has spoken: shooting ranges are not a normal or indispensable use of a county building. This decision makes sense on a number of different levels. The purpose of the CCA is to allow counties priority over the TZA [now former township zoning act] to build buildings and ancillary items to those buildings such as parking lots, shrubs, and lighting, which are specifically adapted to support the use of the building. (Brackets added)

The court found no support in the CCA that the Legislature contemplated shooting ranges as normal uses of county buildings. (Source: State Bar of Michigan *e-Journal* Number: 63497; September 8, 2016.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2016/090616/63497.pdf

Nonconforming Uses

Without laches and estoppel defenses, enforcement of zoning could proceed after years of not doing so

Case: *Charter Twp. of Lyon v. Petty*
Court: Michigan Court of Appeals (Published Opinion No. 327685 (317 Mich. App. 482; 2016 Mich. App. LEXIS 1877, October 13, 2016)

Holding that the defendants in these consolidated cases did not present adequate proof of prejudice to support their laches and estoppel defenses, the court affirmed the trial court's grant of summary disposition to the plaintiff-township, ruling that the township could enforce its zoning ordinance and order an end to defendants' commercial uses of their properties, which were always prohibited on their agricultural/residential-zoned land.

The Hoskins-defendants have a home on their land, and a pole barn used to store equipment and material for their landscaping business. The Petty-defendants own a neighboring lot, on which they operate a truck storage facility and store materials. The both defendants had operated their businesses without township interference for decades although their uses were never permitted under the zoning ordinance.

However, the character of the neighborhood has changed and neighbors began complaining about early morning activity and noise at the businesses. Defendants conceded "that their commercial activities have never conformed to the uses approved for their properties' zoning classification." They relied on laches and estoppel defenses.

The court noted that prejudice is a mandatory element for both defenses. The Petty defendants did not allege or present evidence of "any expenditure or action to adapt or improve their property to suit their business." Thus, they created no question of fact on the prejudice element and their claim failed as a matter of law. The Hoskins family presented building permits for their original pole barn construction and 2 additions, which recited $10,300 in improvements. However, the original permit application only indicated the barn would be used for storage. Township officials "had no reason to believe the pole barn would be used for commercial purposes."

The defendants did not allege that their land could not be used for other purposes that are allowed under the zoning ordinance . The Hoskins family did not present evidence that they expended the $10,300 due to the township's inaction. Further, "as a matter of law, $7,000 worth of additions to a storage barn fall short of the 'substantial change in position' or 'extensive obligations and expenses' necessary for equity to overcome a township's zoning authority."(Source: State Bar of Michigan *e-Journal* Number: 63733; October 17, 2016.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2016/101316/63733.pdf

Court, Ripeness for Court's Jurisdiction, Aggrieved Party

Need to apply for permit to have standing to sue: futility of doing so requires decision makers demonstrating adamant opposition and decision discretion

Case: *Miller v. City of Wickliffe, OH*
Court: U.S. Court of Appeals Sixth Circuit (Published Opinion No. 16-3052/3053 (2017 U.S. App. LEXIS 5131; 2017 FED App. 0065P (6th Cir.), March 23, 2017)

Where the plaintiffs never applied for a permit under the defendant-City of Wickliffe's new nightclub permit ordinance, they lacked constitutional standing to challenge the ordinance.

"[T]he failure to apply for a permit bars any

as-applied claims plaintiffs could make regarding the constitutionality of the Ordinance." Plaintiffs maintained that their failure to apply for a permit should be excused under the "futility doctrine" because it was "clear—from the history of the Ordinance's passage and from the language of the law itself—Wickliffe would have denied their application to open a nightclub, and thus, it would have been pointless for them to waste the time doing so."

The court disagreed, noting that "Wickliffe never indicated that it would not permit plaintiffs to open their nightclub[,]" and offered the plaintiffs the opportunity to "submit a conditional-use permit with revised parking plans. Plaintiffs never did so." Also, it was not clear from the ordinance itself that the plaintiffs would have been denied a permit. This case was distinguishable from *Bannum v. City of Louisville* and *G&V Lounge v. Michigan Liquor Control Comm'n*, "where the decisionmakers had demonstrated 'adamant opposition' to those plaintiffs' proposals, and had unbridled discretion in rendering decisions."

Plaintiffs' facial challenge to the ordinance was also unsuccessful where they could not show that "the threat of enforcement against them was credible." In the end, their as-applied and their facial challenges to the ordinance failed for the same reason—they could not "demonstrate that the City made a decision sufficiently final, or a threat sufficiently credible, to establish a concrete and particularized injury."

The court affirmed the district court's dismissal of their claims. (Source: State Bar of Michigan *e-Journal* Number: 64857; April 3, 2017.)

Full Text Opinion:
http://www.michbar.org/file/opinions/us_appeals/2017/032317/64857.pdf

Other Published Cases

Must be patient or primary caregiver to use MMMA defense, and cannot provide medical marihuana to another caregiver or his/her patients

Case: *People v. Bylsma*

Court: Michigan Court of Appeals (Published Opinion No. 317904 (315 Mich. App. 363; 889 N.W.2d 729; 2016 Mich. App. LEXIS 994, May 17, 2016)

The court held that the defendants-Bylsma and Overholt were not entitled to an affirmative defense under §8 of the Michigan Medical Marihuana Act (MMMA) (MCL 333.26421 *et seq.*) because neither of them served as a "primary caregiver" or "patient" when they operated the cooperative growing operation and medical marijuana dispensary that resulted in the charges against them.

Thus, it affirmed the trial court's orders denying their motions to dismiss and preventing them from raising the defense. The trial court found Bylsma "failed to establish that he was entitled to immunity under §4 [of MMMA,] and because his entitlement to an affirmative defense under §8 was dependent on whether he fulfilled the requirements of §4, he also was not entitled to raise an affirmative defense under §8."

In a prior appeal, the court affirmed. The Supreme Court agreed that he was not entitled to immunity under §4, but held that he was not required to establish the elements of §4 in order to avail himself of the §8 affirmative defense. Thus, it remanded. On remand, the trial court denied his motion to dismiss and found he was precluded from raising an affirmative defense under §8 at trial.

The trial court in Overholt's case concluded that a §8 defense was "irrelevant." He then accepted a settlement. The court denied his appeal, but the Supreme Court remanded.

Addressing both cases, the Appeals Court held that "a defendant who possessed, cultivated, manufactured, sold, transferred, or delivered marijuana to someone with whom he was not formally connected through the MMMA registration process may be entitled to raise an affirmative defense under §8." However, "in order for such a defendant to be entitled to raise a defense under §8, he must qualify as a 'patient' or 'primary caregiver' *as those terms are defined and limited under the MMMA*." It then noted that "[t]he plain language of the MMMA indicates that a patient can only have one 'primary caregiver,' and an individual may only serve as a 'primary caregiver' for no more than five patients." Further,

> the affirmative defense available under §8 is necessarily restricted by the fact that no provision under the MMMA permits an individual to provide marijuana to one or more patients of another caregiver—or cultivate, manufacture, or otherwise possess marijuana on behalf of one or more patients of another caregiver—and therefore qualify as a 'primary caregiver' for purposes of §8.

(Source: State Bar of Michigan *e-Journal* Number: 62721; May 17, 2016.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2016/051716/62721.pdf

Marijuana immunity exists when person possesses a valid MMMA; complies with the volume limitations, stored enclosed, locked facility, engaged in medical use

Case: *People v. Manuel*

Court: Michigan Court of Appeals (Published Opinion No. 331408 (2017 Mich. App. LEXIS 616, April 18, 2017)

Holding that the trial court properly concluded that the defendant was entitled to § 4 immunity and thus, did not abuse its discretion by dismissing the charges against him, the court affirmed the dismissal.

He was charged with delivering or manufacturing 20 or more, but less than 200 marijuana plants, possessing marijuana with intent to deliver, maintaining a drug house, and felony-firearm. The trial court dismissed the charges, holding he was entitled to Michigan Medical Marihuana Act (MMMA) (MCL 333.26421 *et seq.*); § 4 on immunity. The trial court found that he possessed a valid registry identification card; complied with the volume limitations of § 4 possessing only 71 marijuana plants (and that the marijuana he had in tins was unusable); stored the marijuana in an enclosed, locked facility; and was engaged in the medical use of marijuana.

On appeal, the Appeals Court first noted that the prosecution conceded that defendant was issued and possessed a valid registry identification card. It next found that he complied with the volume limitations because he was allowed to possess up to 72 marijuana plants, but only possessed 71, and the marijuana he kept in tins was "'drying' not 'dried'" and thus, was not usable under the statutory definition. It further noted that, as to the third element of immunity, "[f]ar from flouting the law, the[] facts demonstrate[d] that defendant went to excessive measures to comply with the statutory requirements" and the trial court did not err in finding that he "kept his 71 marijuana plants in an enclosed, locked facility." Finally, the Appeals Court held that defendant was engaged in the medical use of marijuana, finding no evidence that he "did not intend to use the marijuana he acquired . . . 'to treat or alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition.'" (Source: State Bar of Michigan *e-Journal* Number: 65002; April 20, 2017.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2017/041817/65002.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

See also *Charter Twp. of White Lake v. Ciurlik Enters.*, page 13.

MMMA and RTFA zoning jurisdiction and enforcement: Moot

Case: *Armada Twp. v. Hampson*

Court: Michigan Court of Appeals (Unpublished Opinion No. 325135, August 23, 2016)

Holding that the issues raised on appeal were rendered moot by the fact the defendants had ceased their medical marijuana growing operation and that their greenhouses were no longer in violation of the plaintiff-township's ordinances, the court dismissed the township's appeal as moot.

The township contended that defendants' operation was in violation of its building and zoning ordinances and was a nuisance *per se.*

On cross-motions for summary disposition, the trial court held that the township's ordinance confining the growing of marijuana to accessory structures was preempted by MCL 333.26423(d), part of the Michigan Medical Marihuana Act (MMMA) (MCL 333.26421 *et seq.*). While the trial court also ruled that the greenhouses' construction without permits was a nuisance *per se*, it gave the defendants additional time to apply for the permits and comply with the township's building code.

On appeal, the township asked the court to conclude that the MMMA did not preempt its zoning ordinance; that a proper abatement of the nuisance *per se* was to order the removal of the greenhouses; and that the trial court erred in not definitively ruling whether the Right to Farm Act (RTFA) (MCL 286.471 *et seq.*) was a valid affirmative defense. However, these issues were now moot. (Source: State Bar of Michigan *e-Journal* Number: 63436; August 30, 2016.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2016/082316/63436.pdf

Substantive Due Process

Denial of Accessory Structure without a Principal Use on a Parcel is reasonable regulation

Case: *Village of Pentwater v. Bates*

Court: Michigan Court of Appeals (Unpublished Opinion No. 328528, March 28, 2017)

Holding that the defendants failed to satisfy the burden necessary to invalidate the zoning ordinance on the basis of substantive due process, the court affirmed the trial court's order granting the plaintiff-Village summary disposition.

Defendants own a wooded parcel of land in the Village. They constructed a 12-foot-by-12-foot shed on their property in violation of "Zoning Ordinance §3.08B, which provides, in relevant part, that accessory buildings are only allowed on a lot 'which contains a principal use or main building.'" Plaintiff-village sued defendants for the violation of the ordinance. An "accessory building" is defined as "[a] building or portion of a building supplementary and/or subordinate to a main building on the same lot occupied by or devoted exclusively to an accessory use."

Defendants did not argue that their shed did not violate the ordinance. They argued only that the

[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.

ordinance constituted "an unconstitutional delegation of police power because it prohibits activities that pose no significant harm to the community."

However, the question was not whether their accessory building posed a threat of harm to the community. Rather, the relevant inquiry was whether they could overcome the presumption that the ordinance was reasonable. They failed to establish that there was "no reasonable governmental interest advanced by the ordinance." Plaintiff asserted that the ordinance was enacted to achieve the "goal of preserving the residential character of its neighborhoods. MCL 125.3201(1) specifically provides that local governments can enact zoning ordinances in order to provide places of residence for citizens, 'to ensure that use of the land is situated in appropriate locations and relationships,' and 'to promote public health, safety, and welfare.' It is reasonable that in order to preserve the residential nature of neighborhoods and to ensure that land zoned as residential is used for residential purposes plaintiff would limit the use of accessory buildings, such as storage buildings, on parcels without a principal building." Defendants also failed to prove that the ordinance was "an arbitrary restriction on their property interests." They bore the burden "to show that there was no relationship between plaintiff's goals and its means of attaining them." They did not meet this burden.

The court ruled restriction on accessory buildings did "not represent a total prohibition on defendants' opportunity to build an accessory building on the property," and it applied uniformly to all parcels. (Source: State Bar of Michigan *e-Journal* Number: 64885; April 12, 2016.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2017/032817/64885.pdf

Due Process and Equal Protection

Failing to make Findings of Fact: denial of due process

Case: *International Outdoor, Inc. v. City of Harper Woods* I
Court: Michigan Court of Appeals (Unpublished Opinion, No. 325469, April 26, 2016)

In an order, the Appeals Court remanded the trial court's denial of the plaintiff-billboard company's application for a special permit to the defendant-city of Harper Woods Board of Zoning Appeals (BZA) "to develop the record related to its factual findings and reasoning" for its decision.

Defendant denied plaintiff's request for special permits to erect billboards that did not meet its standard requirements. The trial court found defendant's sign ordinance was constitutional and that "the BZA's failure to state findings of fact and reasoning on the record was not error requiring reversal where the record provided by the BZA fully supported the reasoning behind the BZA's decision."

On appeal, the court rejected plaintiff's argument that defendant's sign ordinance is an unconstitutional prior restraint on free speech, noting there was "nothing in the record to suggest that if plaintiff's proposed billboards had been compliant with" the ordinance "that plaintiff would have even had to seek a variance, let alone be granted one by defendant." It held that "[b]ecause the Court in *Thomas v. Chicago Park Dist* (freedom of speech) held that even implied rules within the governmental body's discretion were enough to survive First Amendment review," it was compelled to conclude the same.

However, the court agreed with plaintiff that it was denied due process because the BZA failed to make a proper record. It noted that "defendant's BZA did not make a single factual finding on the record, nor did it provide any reasoning for why plaintiff's special permits were denied." It "simply announced its position that the special permits were denied. Pursuant to the binding decision in *Reenders v. Parker*(competent, material, & substantial evidence on the record), that action by the BZA is not permitted." It concluded that "[w]ithout a factual and logical record provided by the BZA, plaintiff is left without any manner of proving that" the ordinance "is being applied with favoritism based on the content of speech." Affirmed in part, reversed in part, and remanded.[2] (Source: State Bar of Michigan *e-Journal* Number: 62604; May 26, 2016.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2016/042616/62604.pdf

On remand to develop record of findings of fact and reasoning, not a rehearing and notices not needed

Case: *International Outdoor, Inc. v. City of Harper Woods* II
Court: Michigan Court of Appeals (Unpublished Opinion No. 325469, August 16, 2016)

[2] See *International Outdoor, Inc. v. City of Harper Woods* II, page 8.

After remand[3] to the Board of Zoning Appeals' (BZA) to develop the record related to its factual findings and reasoning for its decision to deny plaintiff's applications for special permits, the court held that the BZA properly articulated the factual findings and reasoning supporting its decision, and affirmed.

Plaintiff contended that the BZA's decision was based on improper procedure. The court disagreed. Plaintiff asserted that it was not notified of the June 8, 2016 BZA meeting, during which the BZA adopted its findings of fact and conclusions of law. Plaintiff further argued that it did not have the opportunity to be heard.

Assuming that it was not notified of the meeting, the lack of notice did not deprive it of its right to due process. The meeting was a regular BZA meeting, and plaintiff did not contend that there was no public notice of the meeting. Instead, it contended that it was not directly notified of the June meeting. However, plaintiff had notice of the March 12, 2014 meeting, and its representatives argued and presented evidence during that meeting. The remand order provided that the BZA must "develop the record related to its factual findings and reasoning for its decision to deny plaintiff's application for a special permit under defendant's sign ordinance." Thus, the proceedings on remand to the BZA were limited to articulating the factual findings and conclusions supporting the decision to deny the special permits. The court did not direct the BZA to take additional evidence or to reconsider its decision. "Even if plaintiff appeared at the meeting, it would not have been able to make any additional arguments or present any additional evidence. Instead, the BZA merely stated the basis for its earlier decision." Assuming plaintiff did not receive direct notice of the subsequent BZA meeting, the lack of notice or an opportunity to be heard did not deny plaintiff its right to due process because it already received notice and the opportunity to be heard during the March 2014 meeting, and the BZA had already reached its decision in the case.

While plaintiff relied on *Polkton Charter Twp. v. Pellegrom*, this case was distinguishable because the issue of due process was not raised in *Polkton*, and the court did not discuss whether the ZBA in that case employed proper procedures. Plaintiff also cited *Sitz v. General Motors Corp*, but this case differed "because the BZA held a public meeting, during which it adopted the findings of fact and conclusions of law, and the contemporaneous meeting minutes" reflected the actions taken at the meeting. (Source: State Bar of Michigan *e-Journal* Number: 63391; May 26, 2016.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2016/081616/63391.pdf

[3] See *International Outdoor, Inc. v. City of Harper Woods* I, page 7.

Appeals, Variances (use, non-use)

Variance not needing to be the same as neighbor's, can treat each unique parcel differently

Case: *Deling v. Township of Girard*
Court: Michigan Court of Appeals (Unpublished Opinion No. 329767, November 15, 2016)

Concluding that the fact the Zoning Board of Appeals (ZBA) might have made slightly different decisions as to nearby properties did not render its decision as to the variance it granted to the plaintiff discriminatory (much less an unreasonable exercise of discretion), the court affirmed the circuit court's ruling upholding the ZBA's decision.

Plaintiff sought a variance to build a garage on his property. The zoning ordinance limited the garage height to 16 feet. He sought a variance for a height of 26 feet. The ZBA granted him a 23.5 foot variance. With the assistance of *Macenas v. Village of Michiana*, the court read MCL 125.3606(1):

> to require that any factual findings of the ZBA are to be reviewed under the competent, material and substantial evidence standard, while the decision itself of the ZBA based upon any factual conclusions is to be reviewed to determine if it is a reasonable exercise of discretion.

While plaintiff asserted that the decision was not supported by competent, material and substantial evidence on the record, he pointed to "no specific factual determination made by the ZBA that was not supported by the record." Instead, he argued that the decision itself was unsupported by such evidence, and this "twists the standard to be applied."

His second argument was closer to addressing the real issue – "whether the ZBA's decision was unreasonable because it discriminated against plaintiff because similarly situated neighbors were granted the same variance" he was denied.

However, the ZBA simply reduced his variance "so that only 16 feet show on the lower side" of the structure. It tried to

> craft a solution that granted as much of plaintiff's requested variance as it could, while keeping with the spirit of the ordinance in terms of how much of the structure would be showing in light of the contour of the land and its location in the neighborhood.

His argument that nearby properties were granted the variance he sought overlooked

> the fact that ultimately each parcel of land is unique and, even with closely situated properties, the effect of a particular variance granted to one property might nevertheless have a different effect when granted to a nearby property.

(Source: State Bar of Michigan *e-Journal* Number: 63989; November 23, 2016.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2016/111516/63989.pdf

ZBA can hear more than one variance request from property owner

Case: *Engel v. Monitor Twp. Zoning Bd. of Appeals*
Court: Michigan Court of Appeals (Unpublished Opinion No. 327701, September 13, 2016)

The court held that the trial court did not err by affirming the appellee's (township zoning board) decision to grant a nonuse variance to the appellants' neighbors allowing them to construct an indoor horse training arena near their property line.

Appellee granted the neighbors' second application for a variance on the basis that the arena was not a structure in which animals were fed, bathed, or resided overnight, and because there were many difficulties in locating the arena elsewhere on the property. The trial court affirmed zoning board of appeals' decision.

On appeal, the court rejected appellants' argument that appellee did not have authority to consider the neighbors' second application because it was essentially a rehearing of their first application, noting that appellee did not grant a rehearing, but instead considered a new application with a new proposed location for the arena. The court next held that appellee applied the proper ordinance when considering the variance, and supported its decision with "competent, material, and substantial evidence." Finally, the court found that appellee's building inspector's participation in the proceedings was appropriate because he was not related to or compensated by the neighbors, and did not improperly pressure appellee in its decision. Affirmed.
(Source: State Bar of Michigan *e-Journal* Number: 63535; September 22, 2016.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2016/091316/63535.pdf

Appeal of ZBA action is void if filed after deadline

Case: *Reynolds v. Huron Charter Twp.*
Court: Michigan Court of Appeals (Unpublished Opinion No. 326532, July 12, 2016)

The court held that the circuit court lacked jurisdiction over the Reynolds-plaintiff's filing an appeal too late, and that the circuit court erred in finding that the defendant-township was estopped from claiming the appeal was untimely. Thus, it reversed the circuit court's order reversing the Zoning Board of Appeals' (ZBA) decision that rejected plaintiff's challenge to the planning commission's decision to permit a church to erect an outdoor electronic sign.

The parties did not dispute that the ZBA meeting took place on March 10, 2014, and that the meeting minutes were approved on May 12, 2014. The ZBA record contained no decision in writing signed by the chairperson or the ZBA's members. Thus, plaintiff was required to file her claim of appeal within 21 days after the ZBA approved the meeting minutes (MCL 125.3606(3)). She filed a claim of appeal in the circuit court on August 20, 2014, well after the 21 days expired. As a result, she did not timely file her claim of appeal in violation of MCL 125.3606(3).

She argued that the defendant-township "deliberately delayed the release of the certified meeting minutes" until August 12, 2014. "However, the statute does not require that a plaintiff be provided with a copy of the official meeting minutes in order to file a claim of appeal. Instead, the period to file a claim of appeal begins to run when the ZBA approves the minutes of its decision, regardless of whether the plaintiff has a copy of the minutes." Further, MCR 7.122(C)(4) simply requires an appellant to attach a copy of the meeting minutes to the claim of appeal – it does not require the copy to be certified or signed. There was no dispute that plaintiff had an unofficial copy of the meeting minutes before the time to file a claim of appeal expired. While she also asserted that she had the ability to file a late application for leave to appeal under MCR 7.105(G), the court concluded that the "applicable statute does not authorize an appeal by leave granted or a late appeal." (Source: State Bar of Michigan *e-Journal* Number: 63137; August 1, 2016.)

Full Text Opinion:

http://www.michbar.org/file/opinions/appeals/2016/071216/63137.pdf

ZBA Interpretation of the land use "clubs and lodges" was appropriate

Case: *Epicurean Devs., LLC v. Summit Twp.*

Court: Michigan Court of Appeals (Unpublished Opinion Nos. 329060, 334355, February 28, 2017)

The court held that the defendant-township's Zoning Board of Appeals (ZBA) did not err in determining that the plaintiffs' proposed land use was not consistent with the "clubs and lodges" allowed in C-2 zoning districts under the township's zoning ordinance. The court also rejected plaintiffs' claims that their procedural and substantive due process rights were violated by the decision and that it constituted a content-based speech restriction that violated the First Amendment.

The court gave deference to "the ZBA's determination of the particular land use proposed by plaintiffs, which it characterized as a 'swinger's club.'" Given that "clubs and lodges" were grouped together in the zoning ordinance, it was "reasonable to conclude that a definition of 'club' similar in nature to the definition of 'lodge' applies for purposes" of the relevant provision. Likewise, reading the ordinance as a whole showed that the only reasonable interpretation was "to read the term 'clubs and lodges' as not including every conceivable kind of club." The "lodge" definitions

> similar in nature to viable definitions of "club" include the meeting place of an organization, or the branch of an organization. Likewise, similar definitions of "club" include the meeting place of an association or group coming together for, or identified by, a particular characteristic, purpose, or plan.

Further, it appeared

> that a "night club" is not the type of "club" intended by §150.145(38), given the fact that eating and drinking establishments, as well as establishments offering nightly entertainment, are included under separate zoning categories.

As the ZBA found, "plaintiffs' proposed use included, among several other things, a 'dance club.'" This factual finding was supported by documentary evidence. Reviewing the evidence confirmed that their

> proposed land use constituted much more than "a private membership club," or a meeting or gathering place for an organization or group united by a common purpose or interest. Rather, it constituted, in effect, a "nightclub" with various amenities.

It was clear that,

> simply based on the anticipated spaces inside the building and the projected activities and amenities, that plaintiffs' proposed use did not constitute a "club" as the term is used under §150.145 of the [zoning ordinance], regardless of the sexual preferences of the patrons.

Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 64698; March 9, 2017.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2017/022817/64698.pdf

Court, Ripeness for Court's Jurisdiction, Aggrieved Party

Case not ripe for court without seeking variance first

Case: *AM Rodriguez Assoc. Inc. v. City Council of the Vill. of Douglas*

Court: Michigan Court of Appeals (Unpublished Opinion No. 325862, July 21, 2016)

The court held that in light of *Paragon Props. Co. v. Novi* and *Hendee v. Putnam Twp.*, the trial court did not err in granting the defendants-municipalities summary disposition as to the plaintiff's inverse condemnation claim.

Plaintiff, in accordance with a planned unit development (PUD), sought to build 44 (originally 52) condo units on its property. That number appeared to have been well within the number of units permitted by the R-5 zoning. "However, defendants [Village of Douglas] rejected plaintiff's PUD in part because the private road that serviced plaintiff's property was already servicing more residential units than was permitted under defendants' ordinances" [brackets added].

Plaintiff could have sought a variance from the Zoning Board of Appeals (ZBA) under Douglas Zoning Ordinance that would have permitted it to go forward with a development. However, there was no indication in plaintiff's 2009 complaint that plaintiff pursued a variance from the ZBA that would have allowed its development plan to go forward in some form. Thus, the case was similar to *Paragon*, in which the Michigan Supreme Court held that the rule of finality barred the plaintiff's claim because, despite the fact that the plaintiff received a decision from the defendant-city as to its rezoning request, the plaintiff never requested a

variance from the ZBA. Because plaintiff did not request a variance from the ZBA here, the court was left to conclude, just as the Michigan Supreme Court did in *Paragon*, that, "absent a request for a variance, there is no information regarding the potential uses of the property that might have been permitted, nor, therefore, is there information regarding the extent of the injury" plaintiff suffered here.

Plaintiff argued in its reply brief that any attempt on its part to request a variance from the ZBA would "arguably" have been futile. But, "[a] mere expectation that an administrative agency will act a certain way is insufficient to satisfy the futility exception." Further, in *Hendee*, five Michigan Supreme Court Justices held that "for the futility exception to the rule of finality to be available to a plaintiff raising an inverse condemnation claim, the plaintiff must have made at least one 'meaningful application' for a variance from the challenged regulations." In this case, plaintiff did not apply for a variance from the ZBA. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 63233; August 11, 2016.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2016/072116/63233.pdf

Case not ripe for court without seeking variance, ZBA has option to issue variance

Case: *Heritage Sustainable Energy, LLC v. County of Schoolcraft*

Court: Michigan Court of Appeals (Unpublished Opinion No. 331279, October 20, 2016)

Holding that the trial court properly granted the defendant-county summary disposition on the plaintiffs' inverse condemnation claim based on their failure to satisfy the rule of finality, the court affirmed.

Plaintiffs-Heritage Sustainable Energy acquired wind energy leases in order to build wind turbine generators for providing electricity to the utility grid. After they obtained a variance to install a test tower, the Schoolcraft County Zoning Ordinance §508(D) was amended to list 25 different conditions required for a variance for a utility grid wind energy system. None of the sites plaintiffs leased could meet those conditions.

Plaintiffs alleged that the amended §508(D) "prohibited them from constructing utility grid wind energy systems on their leases" and thus, "deprived them of all economically beneficial use" of their property interests. The trial court granted the county summary disposition under MCR 2.116(C)(4) for lack of subject matter jurisdiction.

On appeal, the court concluded that "issues such as ripeness and finality are more appropriately addressed under MCR 2.116(C)(8)" but found that any error as to the specific sub-rule used was not dispositive here. It was undisputed that plaintiffs had not sought a variance to build utility grid wind energy systems. They argued they were excused from complying with the rule of finality because the Zoning Board of Appeals (ZBA) had no discretion to grant a variance unless the 25 requirements were met. However, Schoolcraft County Zoning Ordinance §905

> states that when "a literal enforcement of the use provisions of this Ordinance would involve practical difficulties or cause unnecessary hardships . . . the Board shall have power . . . to authorize such variation . . . so that public safety and welfare be secured and substantial justice done."

The Appeals Court concluded that while zoning ordinance §508(D) used mandatory language, this did not "preclude § 905 from providing an exception to that mandatory language. The presence of the exception does not render the mandatory language surplusage or nugatory." Section 905 gives the ZBA "the discretion to grant plaintiff a variance to build its utility grid wind energy systems, even if the 25 specific requirements under the amended § 508(D) were not met." Thus, it would "not have been futile for plaintiffs to have sought such a variance." (Source: State Bar of Michigan *e-Journal* Number: 63854; November 7, 2016.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2016/102016/63854.pdf

Open Meetings Act, Freedom of Information Act

Quorum emailing each other is violation of OMA

Case: *Markel v. Mackley*

Court: Michigan Court of Appeals (Unpublished Opinion No. 327617, November 1, 2016)

While the issue of whether "a quorum is present for the purpose of deliberating toward a decision" when only some commissioners in the e-mail chain respond to a message is often a question of fact, the court held here that the evidence clearly showed an Open Meetings Act (OMA) (MCL 15.261 *et seq.*) violation by the defendants.

The issues involved the activities of the Oakland Township Parks & Recreation Commission (PRC). Specifically at issue were e-mails sent between

defendants as to certain PRC matters that plaintiffs alleged violated the OMA. Plaintiffs alleged that defendants used e-mail communications "to discuss and decide how to address PRC matters, and would then carry out those decisions at the public PRC meetings as a united front."

The Appeals Court found that defendants attempted to overextend the *Ryant v. Cleveland Twp.* decision, which was distinguishable. As to the alleged meeting about a township board's attempt to seize control of a land preservation fund from the PRC, the court concluded that because there was a quorum present and deliberation occurred on a matter of public policy, "there was a meeting pursuant to MCL 15.262(b)." Further, because the meeting was held privately via e-mail, "the four defendants violated MCL 15.263(3), which required such deliberations to be open to the public."

For this reason alone, the Appeals Court reversed the trial court's decision granting the defendants summary disposition and remanded for entry of an order granting the plaintiffs summary disposition, considering that they only sought declaratory relief, an injunction on further violations of the OMA, and fees and costs.

While the court found other OMA violations also occurred, it concluded that there was no violation involving discussions relating to procedure guidelines at future PRC meetings because this clearly fell "under the exception provided in *Davis v. Detroit Fin. Review Team*, wherein the subcommittee was not a public body." [Note this says "subcommitee", not "committee," but not settled law on this point.]Thus, there was no violation of the OMA, even though the meeting was held privately, and summary disposition was proper for defendants on this issue. Affirmed in part, reversed in part, and remanded. (Source: State Bar of Michigan *e-Journal* Number: 63899; November 10, 2016.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2016/110116/63899.pdf

Signs: Billboards, Freedom of Speech

See also *International Outdoor, Inc. v. City of Harper Woods* I, page 7, and *International Outdoor, Inc. v. City of Harper Woods* II, page 8.
See also *Reynolds v. Huron Charter Twp.*, page 9.

Can prohibit construction of new off-premises billboards, as long as it is not a total ban

Case: *International Outdoor, Inc. v. City of Livonia*
Court: Michigan Court of Appeals (Unpublished Opinion No. 325243 , June 14, 2016)

Holding that the trial court did not err in granting the defendant-city summary disposition on the plaintiff-billboard advertising company's common law exclusionary zoning, equal protection, and Michigan Zoning Enabling Act (MZEA) (MCL 125.3101 *et seq.*) exclusionary zoning claims, the court affirmed.

The city denied plaintiff's permit application to erect a new billboard within the city limits, and its zoning board of appeals denied plaintiff's request for a variance from city's zoning ordinance provisions banning new billboards. The zoning ordinance has prohibited the installation of off-premises billboards within the city since 1952. Existing billboards were permitted to remain, but the last one was eliminated in 1986.

The court noted that plaintiff's reliance on MCL 252.303 (The Highway Advertising Act (HAA) (MCL 252.301 *et seq.*)) to show that the city's zoning ordinance impermissibly prohibited a commercial activity allowed and endorsed by the state was "undercut by § 4 of the HAA, which recognizes that ordinances that were already in existence in 1972 are not invalidated by" the enactment of the HAA.

Plaintiff also failed to show that the zoning ordinance actually zoned out a legal business contrary to Michigan case law. The ban on new billboard installation did not prevent advertisers using billboards from soliciting and serving clients in the city or performing their day-to-day business operations in the city. It simply bars the construction of new billboards in the city. The court found this zoning ordinance analogous to the one in City of Holland (*Adams Outdoor Adver., Inc. v. City of Holland*), as it did not constitute a total ban on billboards on its face.

As to plaintiff's equal protection claim, the primary rationales for the restrictions in the zoning ordinance "were promoting aesthetic features, including the prevention of visual blight, and reducing traffic hazards for motorists. Each of these factors constitutes a legitimate governmental interest in regulating billboards."

Finally, the court rejected plaintiff's argument that the zoning ordinance violated MCL 125.3207 of the MZEA. "Assuming, without deciding, that billboards

qualify as a land use under MCL 125.3207," plaintiff did not show that the zoning ordinance was invalid under the statute. It failed to show "that there is a public need for billboards within defendant's boundaries." (Source: State Bar of Michigan *e-Journal* Number: 62914; June 30, 2016.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2016/061416/62914.pdf

Zoning Administrator/Inspector, Immunity, and Enforcement Issues

Liability Insurance coverage for township exists because procedure of enforcing of zoning was not cause of restricting property/takings

Case: *Michigan Twp. Participation Plan v. Charter Twp. of Harrison*
Court: Michigan Court of Appeals (Unpublished Opinion No. 331109, April 13, 2017)

Giving the policy language its plain and ordinary meaning, the court held that the defendant-township building official's (Mr. Parakh) actions did not fall within the definition of "Regulatory Taking of Private Property" under the liability policy issued to the defendant-Township.

Thus, the trial court properly granted the defendants summary disposition. They were entitled to a judgment as a matter of law as to the applicable policy limit. Plaintiff's, Participation Plan's claim related to an underlying federal court case "in which a jury found that the Township and Parakh had violated the substantive due process rights of the Nazar-defendants, who were the plaintiffs in that case." The trial court here rejected plaintiff's claim that the wrongful conduct found to have occurred in the federal case fell within the policy's definition of a "Regulatory Taking of Private Property." The policy limited liability for a "Regulatory Taking of Private Property" to $1 million; otherwise, the liability limit was $5 million. Plaintiff argued that "the wrongful acts in question fit within the Policy's definition of 'Regulatory Taking of Private Property' because the Township's enforcement of its zoning codes unconstitutionally (through denying the Nazars' substantive due process rights) and temporally (for 11 months) restricted the Nazars' use of their private property."

The Appeals Court disagreed. The policy defined "Regulatory Taking of Private Property" to mean "the enactment or enforcement" of a regulation or ordinance "that offends in the manner described." It did not define the terms "enactment" and "enforcement." Consulting dictionary definitions, the court found that the action that delayed the Nazars' "ability to open the addition to their business was not the Township's legal and authoritative establishment of any unconstitutional laws or ordinances, or Parakh's actions in giving force to or compelling obedience to such laws or ordinances. Rather, it was Parakh's failure to perform his duties under the relevant ordinances that required him to issue a certificate of occupancy within five days of application, or to deny it and state the reasons." Any restriction on the Nazars' use of their property was not caused "by any enforcement of a building code." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 64988; April 24, 2016.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2017/041317/64988.pdf

Composting not a farm operation under RTFA, can be excluded from agricultural zoning district

Case: *Charter Twp. of White Lake v. Ciurlik Enters.*
Court: Michigan Court of Appeals (Unpublished Opinion No. 326514, May 12, 2016)

The court held, among other things, that because the defendant's large scale commercial composting operation was not a "farm" under the zoning ordinance, it was not a permitted use of AG-zoned land.

The MDEQ visited defendant's property after receiving complaints from surrounding property owners about the noxious odor emanating from the facility and discovered two violations of the Natural Resources and Environmental Protection Act (NREPA) (MCL 324.101 *et seq.*) . Plaintiff-township later notified defendant-Kiurlik Enterprises to conform to the zoning ordinance "by stopping the commercial composting operation and removing the material causing the noxious odors." Defendant failed to do so, and plaintiff filed this action.

Defendant argued that there was no zoning violation because its commercial composting operation fit the definition of a "farm" under the AG district in the zoning ordinance, as well as the definition of farm in the Right to Farm Act (RTFA). "Defendant also argued that the composting operation was entitled to immunity under the RTFA because, pursuant to MCL 286.473(1), a farming operation cannot be considered a nuisance." Further even if a commercial composting

facility was not a permitted use of AG-zoned land there cannot be exclusionary zoning (MCL 125.3207) totally prohibiting the land use with a demonstrated need.

The trail court found the land use was not a farm, it was a commercial composting facility; "no issue of material fact existed that" defendant's noxious odors violated the zoning ordinance; "no issue of material fact existed that" defendant violated NREPA; that this was not a case of exclusionary zoning (composting as part of a farm operation is permitted).

On appeal, the parties disagreed on the process the court should use to define "farming" for purposes of the zoning ordinance (dictionary definition or past practice of application of the zoning ordinance). However, the same result was reached either way. Defendant "operates a commercial composting facility that does not produce plants or animals." Rather, it "accepts yard waste from offsite sources, completes the composting procedure, and sells the finished product." Its operation

> does not even closely relate to any of the listed examples of permissible activities provided by the [zoning] ordinance. Finally, the operation of a commercial composting business is not within the intent of the agricultural district: "to protect land needed for agricultural pursuits from encroachment by untimely and unplanned . . . commercial . . . development." – Brackets added

The "composting operation is commercial in nature,"

However, defendant argued that plaintiff's application of the zoning ordinance as to AG-zoned property required that its commercial composting facility be allowed. There was "no record evidence of an official decision by any zoning board regarding application of" the zoning ordinance to AG-zoned land. Defendant relied "primarily on allegations that plaintiff contracted with a commercial composting facility that was situated on AG-zoned property for the disposal of yard waste produced by its own citizens." The court found this argument was not persuasive, partly because defendant "misconstrued the record evidence."

The case is not exclusionary zoning because composting is a possible land use in light industrial zoning district, and as part of a farm operation.

The large scale composting operation is not protected under RTFA.

> The RTFA, MCL 286.471 *et seq.*, "was intended to 'protect farmers from the threat of extinction caused by nuisance suits arising out of alleged violations of local zoning ordinances and other local land use regulations as well as from the threat of private nuisance suits.'" *Lima Twp v Bateson*, 302 Mich App 483, 495; 838 NW2d 898 (2013), quoting *Northville Twp v Coyne*, 170 Mich App 446, 449; 429 NW2d 185 (1988). This Court previously held that "a party relying on the RTFA as a defense to a nuisance action has the burden to prove that the challenged conduct is protected under the RTFA." *Lima Twp*, 302 Mich App at 496.

To prove the conduct is protected under the RTFA one must show it is a "farm," "farm operation," producing "farm products" as defined in the RTFA. To be a farm is must be used in commercial production of farm products – which the commercial compost is. But the compost humus is not a "farm product" which is "limited to those plants and animals useful to human beings" (MCL 286.472(c)). Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 62709; June 13, 2016.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2016/051216/62709.pdf

Barn used for events can be commercial, not accessory to single family home

Case: *Webster Twp. v. Waitz*

Court: Michigan Court of Appeals (Unpublished Opinion No. 325008, June 7, 2016)

The court held that the trial court properly determined that there was no question of fact as to whether the defendants-Waitzes' use of a barn was as an accessory use, and the building permits did not lead them to acquire a vested right in the commercial operation of the barn. Further, the case did not present an exceptional or compelling circumstance to prevent the plaintiff-township from enforcing the ordinance, and the trial court did not plainly err by failing to apply the doctrine of laches.

The case involved the intensity of the use of a barn on the Waitzes' property. The trial court permanently enjoined them from operating a commercial event barn. They contended that the trial court improperly determined that their use of the barn was a commercial use under the township's ordinances. The barn's use was not "subordinate to" the property's use as a single-family dwelling.

> Setting aside the questions of fact that did exist—including whether the home was occupied—the property's actual use as an events venue far outstripped its use as a single-family dwelling. While families occasionally host weddings and gatherings in their backyards and

> outbuildings, the Waitzes provide no evidence that such gatherings are a year-round weekly occurrence at single-family homes.

In 2013, Waitzes began constructing a parking lot. "Single family homes have driveways, not parking lots." There was "no question that the property's character as a commercial events venue overtook its character as a single-family dwelling." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 62890; June 26, 2016.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2016/060716/62890.pdf

Ordinance is not vague concerning short term rentals, resort

Case: *Christians v. Township of Clark*
Court: Michigan Court of Appeals (Unpublished Opinion No. 327519, October 20, 2016)

Concluding that the circuit court properly upheld the constitutionality of the defendant-Clark Township's Zoning Ordinance, the court affirmed the circuit court's decision rejecting the plaintiffs-property owners' as applied challenge related to the denial of their application for a special land use permit.

The property owners own a single lot containing "two residential structures, only one of which is insulated for year-round habitation." They occasionally offered one or both structures on the lot for short-term rentals. The township determined "that renting both structures simultaneously constituted a resort use" only allowed with a permit. The township's zoning board of appeals interpreted the zoning ordinance "as allowing special use permits for resort activities only for purposes of expanding existing resorts, and denied plaintiffs' application on the ground that their operations had no existing recognition as a resort."

Plaintiffs appealed to the circuit court.

The Appeals Court concluded that "the circuit court correctly recognized that the unambiguous provisions" of the zoning ordinance covered the issue presented here. They recognized that their guesthouse came under the definition of an "accessory building" under the zoning ordinance. They asserted that "they were set up to fail when advised to seek" a permit for a resort operation, "because a resort is defined as a group of dwellings, and their lot consists of just one dwelling plus one accessory building."

However, that they "did not obtain satisfaction from the permitting process" was not due to "any ambiguity in the definition of 'dwelling,' 'accessory building,' or 'resort.' Defendant objected to rentals to multiple families, which it characterized as resort operations," in a single-family residential district. Its objection "was to the simultaneous rentals to two families, not to plaintiffs' guesthouse's failure to satisfy the definition of 'dwelling unit' and thus the combination's failure to satisfy the definition of 'resort.' Whether plaintiffs should have recognized that their attempt to obtain the permit was futile from the start, given that their lot consisted of a dwelling and an accessory building, not any combination of dwellings, and thus, as before, their rentals did not qualify for recognition as resort operations, is beside the point." (Source: State Bar of Michigan *e-Journal* Number: 63833; June 26, 2016.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2016/102016/63833.pdf

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

Inland lake road end determined by intent of dedicator

Case: *Colthurst v. Bryan*
Court: Michigan Court of Appeals (Unpublished Opinion No. 323539, June 14, 2016)

The appeals court upheld the trial court's conclusion that Elm Court was a public road end because the evidence confirmed that it was a public road open for use by the public. Also, the trial court did not err in granting the plaintiff summary disposition on the prescriptive easement issue. Further, the nongovernmental defendants did not make a persuasive showing that the Act was applied retroactively, or that their rights to use Elm Court and the adjoining water were vested rights.

The case arose from a dispute as to the nongovernmental defendants' activities involving Elm Court and the adjacent lake. "Elm Court is a 20 foot wide by 50 foot long right of way located on" the lake shore. Plaintiff owns a cottage on the lake shore. The nongovernmental defendants argued that the trial court erred in concluding that Elm Court was a public road end and in granting summary disposition on this issue.

The court has recognized that

> (1) the determination of the dedicators' intent is a fact-specific inquiry, (2) the burden is on those seeking to establish the parameters of access to water at a public road end to "establish that anything other than mere access to the lake was

intended," and (3) evidence of historical uses of public road ends after the dedication of a plat are not useful in the determination of the dedicators' intent.

The court held that the trial court's legal conclusion on the issue of Elm Court being a public road end was correct, where the evidence showed that (1) it was a public road open for use by the public and (2) that it ended at an inland lake. Similarly, the trial court's conclusion also met the revised requirements of the Inland Lakes and Streams part of the Natural Resources and Environmental Protection Act (MCL 324.30111b), effective June 12, 2016, which defines a public road end as "the terminus at an inland lake or stream of a road that is lawfully open for use by the public." Perhaps the most important evidence confirming that it was a public road open for use of the public that ended at an inland lake was the plat, which clearly provided that Elm Court is "hereby dedicated to the use of the public." Also, the Elm Court Rules and Regulations clearly contemplated members of the public using Elm Court. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 62910; June 28, 2016.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2016/061416/62910.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'.

pari materia
The general principle of in pari materia, a rule of statutory interpretation, says that laws of the same matter and on the same subject must be construed with reference to each other. The intent behind applying this principle is to promote uniformity and predictability in the law.

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'.

quo warranto
Latin for "by what warrant (or authority)?" A writ *quo warranto* is used to challenge a person's right to hold a public or corporate office. A state may also use a *quo warranto* action to revoke a corporation's charter.

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

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

[May 18, 2017 (4:19pm); C:\Users\Kurt\Documents\wp\LU Court Cases\SelectedPlan&ZoneDecisions2016-17.wpd]