Selected Planning and Zoning Decisions: 2006
May 2005-April 2006

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This public policy brief summarizes the important state and federal court cases and Attorney General Opinions issued between May 1, 2005 and April 30, 2006.

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(new law)

Restrictions on Zoning Authority

Right to Farm Act, Whether defendants' poultry operations constituted a "farm" and preempted a zoning ordinance

Court: Michigan Court of Appeals (267 Mich. App. 92; 704 N.W.2d 92; 2005 Mich. App., June 23, 2005)

Case Name: *Charter Twp. of Shelby v. Papesh*

The trial court erred in granting the plaintiff-township summary disposition because genuine issues of material fact existed regarding whether the defendants' poultry operations were commercial in nature or in compliance with the applicable Generally Accepted Agricultural Management Practices (GAAMPs), and the Right to Farm Act (RTFA) preempts enforcement of zoning ordinances conflicting with it. Defendants bought 1.074 acres of property in the township in 1995. The property had a farmhouse and two chicken coops on it. Defendants bought and began raising a flock of chickens using the preexisting chicken coops. Following development in the area, neighbors began to complain about defendants' poultry operation. The court held according to the plain language of the RTFA, a farm or farming operation cannot be found to be a nuisance if it is commercial in nature and conforms to GAAMPs. It was clear the poultry raised on defendants' property were "farm products" since they were useful to human beings and produced by agriculture. The raising of poultry on defendants' property constituted a "farm operation" since it involved the "harvesting of farm products." Defendants' evidence could support a finding the poultry operation was at least partially commercial in nature. If defendants' farm is commercial in nature and in compliance with the GAAMPs, it is a farm operation protected by the RTFA. Plaintiff's ordinance conflicted with the RTFA to the extent it permitted plaintiff to preclude a protected farm operation by limiting the size of a farm. Reversed in part, affirmed in part, and remanded. (Source: State Bar of Michigan *e-Journal* Number: 27804.)

Full Text Opinion:

http://www.michbar.org/opinions/appeals/2005/062305/27804.pdf

Commentary:

Here is my (Pat Norris') read of the chicken coop case, officially the *Charter Township of Shelby v. Papesh* case.

It is significant because it is the first recent Right to Farm decision that has actually been published, which makes it legally binding.

It is problematic in that it was essentially decided on procedural grounds, rather than anything about Right to Farm. It now goes back to the lower court for them to address the RTFA issue -- is the chicken operation a commercial one? Essentially, the court of appeals concluded that it should have been addressed.

This decision does a couple of things:

1) It raises the bar for claiming RTFA protection by taking up the "commercial production" issue. So owners of horses (2 or 3) simply for riding pleasure would presumably not be afforded right to farm protection against local zoning.
2) It confirms an apparent view by the court of appeals that it has stated previously but only in unpublished (and hence not precedent setting) decisions: "Any township ordinance, including a zoning ordinance, is unenforceable to the extent that it would prohibit conduct protected by the RTFA." My concern has been, and continues to be, the issue of farming in residential zones. The Court addressed this issue more directly:

> "Although plaintiff [township] argues that application of the RTFA under these circumstances will prevent local municipalities from 'getting their arms around' farms operating in existing or developing residential areas, the fact that the statute appears to be unwise or unfair to plaintiff is insufficient to permit judicial construction. The wisdom of a statute is for the determination of the legislature and the law must be enforced as written."

If I operated a commercial farm on my 2 acre lot in downtown East Lansing (e.g. growing and selling eggs, fruit, mushrooms, whatever), it appears that the City would not be able to stop me. (I don't actually have a 2 acre lot., but

size doesn't appear to be an issue according to this decision.)

Note that the Court referred to the exception in the RTFA that says local governments can propose ordinances that would be stricter than RTF in the interest of environmental or public health, but such an ordinance must be approved by the Ag. Commission. – Patricia E. Norris

Natural Resource Economist
Department of Agricultural Economics
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I (Gary Taylor) agree with your assessment. Shelby township should have moved against this operation from the outset, since it didn't meet minimum lot size requirements and therefore violated their code. Now apparently they are stuck. This decision, in fact, legalizes a previously illegal use for Shelby Township.

It points out two of the many holes in RTFA:

(1) Smaller operations (less than 50 animal units) are protected by RTFA but not regulated by GAAMPs. They get a free pass.

(2) We now know that communities cannot regulate minimum parcel sizes of a farming operation; i.e., regulation of parcel size has been construed to conflict with GAAMPs.

Thus, a pig in the parlor (or on Main Street) is, in fact, appropriate in Michigan.

– Gary D. Taylor
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Religious Land Use and InstitutionalizedPersons Act, operation of a school constitutes the exercise of religion

Court: U.S. District Court Western District of Michigan (File No. 5:04-CV-06, 384 F. Supp. 2d 1123; 2005 U.S. Dist., August 23, 2005)

Case Name: *Living Water Church of God v. Charter Twp. of Meridian*

e-Journal Number: 28515

The court concluded the defendant-township's denial of the plaintiff-church's application for an special use permit (SUP) to construct a building in excess of 25,000 square feet violated the Religious Land Use and Institutionalized Persons Act (RLUIPA) (42 USC § 2000cc et seq.) because it "imposed a substantial burden on plaintiff's religious exercise, was not in furtherance of a compelling government interest, and was not the least restrictive means of furthering a compelling government interest," the court granted plaintiff a declaratory judgment to this effect and an injunction enjoining the township from preventing plaintiff from proceeding with construction of a church and school building on its property in conformity with its 2003 SUP request. There was no question the denial of the SUP involved implementation of a land use regulation, under statutory basis for jurisdiction (§ 2000cc(a)(2)(C)). While the township asserted plaintiff's operation of a school did not constitute the exercise of religion protected by the RLUIPA, the court disagreed. The court further concluded the township's denial of the SUP based on the size of the building was an individualized assessment of the proposed use of the property. The court noted it could not view the 2003 SUP application in isolation in light of the plaintiff's long history with the township. The court found plaintiff's 2003 proposal went further in addressing the township's concerns than the previously approved 2000 plan, yet **the township denied the 2003 proposal on arbitrary grounds not contained in its ordinance**. (Source: State Bar of Michigan *e-Journal* Number: 28515.)

Full Text Opinion:
http://www.michbar.org/opinions/district/2005/082305/28515.pdf

Religious Land Use and InstitutionalizedPersons Act; zoning decision substantially burdened plaintiff's exercise of its religious beliefs and was the least restrictive means of furthering such interest

Court: Michigan Court of Appeals (268 Mich. App. 673; 708 N.W.2d 756; 2005 Mich. App., November 10, 2005)

Case Name: *The Greater Bible Way Temple of Jackson v. City of Jackson*

(NOTE: On May 4, 2006 the Michigan Supreme Court (SC:130196) considered an application for leave to appeal and it was granted.)

The trial court properly entered a judgment in favor of plaintiff (The Greater Bible Way Temple of Jackson) and awarded it attorney fees and costs in this case involving the Religious Land Use and Institutionalized Persons Act (RLUIPA) (42 USC § 2000cc *et seq.*). Plaintiff purchased property for the purpose of constructing an assisted living center for elderly and disabled people, and sought rezoning of the land from single-family residential to multiple-family

residential. The defendant (City of Jackson) denied the rezoning request. In *Shepherd Montessori Center Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 324; 675 NW2d 271 (2004), the court explained the RLUIPA prohibits a governmental entity from imposing on a person, or on a religious institution or assembly, a land use regulation that substantially burdens the free exercise of religion.

> "A plaintiff must meet at least one of the following three jurisdictional tests in order to receive protection under the RLUIPA:
>
> > "(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
> >
> > "(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or
> >
> > "(C) **the substantial burden is imposed in the implementation of a land use regulation, or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved**.
>
> "We conclude that the trial court did not err in concluding that defendants' denial of the request for rezoning constituted an individualized assessment within the meaning of the RLUIPA. Indeed, section 28-183 of the Jackson zoning ordinance provides an extensive procedure for a proposed zoning change; it includes such requirements as a written application, a hearing, and consideration by the city council. Moreover, it was clear that defendants followed the formal procedures of the zoning ordinance. Under the circumstances, the RLUIPA was applicable. See, e.g., *Shepherd Montessori, supra* at 328 (township's evaluation and denial of the plaintiff's request for a use variance under the local zoning ordinance constituted an individualized assessment under 42 USC § 2000cc [a][2][C]).
>
> [*Shepherd Montessori, supra* at 327, quoting 42 USC § 2000cc (a)(2) (**emphasis** added).]

Under the circumstances, RLUIPA was applicable. The trial court concluded there was no genuine factual dispute the defendants' conduct constituted an individualized assessment under RLUIPA, and regardless of the law on which the trial court relied, *Shepherd* Montessori is binding precedent and supported the trial court's decision. It was clear the government had in place formal or informal procedures or practices permitting the government to make individualized assessments of the proposed uses for the property involved, and the government followed those procedures in violation of RLUIPA.

Second:

> "To show that a governmental regulation imposes a substantial burden on a plaintiff's exercise of religion under the RLUIPA, the plaintiff must show that the regulation 'must compel action or inaction with respect to [a] sincerely held belief.' *Id.* at 330. Inconvenience to the church falls short of a substantial burden. *Id*. The RLUIPA defines 'religious exercise' as including 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.' 42 USC § 2000cc-5(7)(A). Additionally, '[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.' 42 USC § 2000cc-5(7)(B)."

Third was the contention the trial court erred in finding the city had not shown a compelling governmental interest for denying plaintiff's request for rezoning and the denial was not the least restrictive means of furthering such an interest. Defendants-city identified three potential compelling governmental interests in the context of this case: safety through traffic regulation, blight prevention, and urban sprawl prevention (or, phrased another way, promoting single family neighborhoods). The court found:

"With regard to traffic concerns, the record, at best, shows that rezoning would increase traffic but that congestion would occur only on special occasions, two or three times a year. Under these circumstances, we conclude that defendants have failed to show that the traffic control interest is compelling.

> "Nor does the record support a finding of impending blight. At best, blight is a theoretical possibility. Defendants' own witness, Charles

Reisdorf, testified that there is no evidence that rezoning the property to R-3 will cause blight to the area. . . .

"In light of the testimony, defendants have not demonstrated that blight prevention is a compelling governmental interest here. Even if blight prevention *were* a compelling governmental interest here, denial of rezoning was not the least restrictive means of furthering that interest.

"The control of urban sprawl is closely related to blight prevention as a governmental interest. Indeed, defendants' argument does not clearly differentiate between the two. The record does not portray the control of urban sprawl as a compelling governmental interest in this case. . . . Further, and significantly, even if defendants *had* established a compelling governmental interest in controlling urban sprawl, a less restrictive means of furthering that interest was available, as described above. The trial court did not commit clear error in finding no compelling governmental interest present in this situation."

Last, defendants contend that the RLUIPA provisions at issue here exceed Congress's power under § 5 of the Fourteenth Amendment of the United States Constitution[1] because they essentially create new constitutional rights to which the court ruled the argument does not withstand analysis. The court said:

"Moreover, and significantly, the United States Supreme Court has issued an opinion regarding the constitutionality of the RLUIPA. In *Cutter v Wilkinson*, ___ US ___; 125 S Ct 2113; 161 L Ed 2d 1020 (2005), the Court ruled that section 3[2] of the RLUIPA does not violate the Establishment Clause. The Court stated that section 3 does not violate the Establishment Clause "because it alleviates exceptional government-created burdens on private religious exercise." *Id.*, 125 S Ct at 2121. The Court further indicated that it had "no cause to believe that [the] RLUIPA would not be applied in an appropriately balanced way," and the Court emphasized that the RLUIPA "does not differentiate among bona fide faiths." *Id.*, 125 S Ct at 2123."

Affirmed both cases. (Derived from: State Bar of Michigan *e-Journal* Number 29378, November 15, 2005.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2005/111005/29378.pdf

Scope of Sport Shooting Ranges Act: does not preempt all township regulation of sport shooting ranges

Court: Michigan Court of Appeals (Published No. 258601, ___ Mich. App. ___; ___ N.W.2d ___; 2006 Mich. App., March 16, 2006)

Case Name: *Fraser Twp. v. Linwood-Bay Sportsmans Club*

Deciding an issue of first impression as to whether the Sport Shooting Ranges Act (M.C.L. 691.1541 *et seq.*) (Act) exempts shooting ranges from all local zoning ordinances, the court held the Act does not completely exempt sport shooting ranges from all local zoning ordinances and defendant-Linwood-Bay's construction of the new shooting range was not permitted by the Act without a variance from the plaintiff-township. The Act expressly provides for local regulation of certain aspects of sport shooting ranges except "as otherwise provided in this act." Thus, the Act does not completely occupy the field of regulation and exclude local government regulation. Rather, the Act leaves local government regulation of sport shooting ranges intact, except where such regulation is specifically limited by another section of the Act. Linwood-Bay, owner of the land used for a sport shooting range, appealed from a judgment permanently enjoining it from "building, continuing construction and/or using its proposed outdoor pistol and/or rifle range," entered by the trial court. The township filed suit for the injunction to prevent Linwood-Bay from operating an outdoor pistol or rifle range. Plaintiff-Maple Leaf Golf Course was permitted to intervene because a stray bullet had struck a golfer and other golfers complained bullets whizzed past them. The trial court did not clearly err in finding the range subject to the injunction was a new facility not in existence when the Act was passed. The trial court also did not err in

[1]Section 5 states: "The congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[2]Section 3 of the RLUIPA states, in part, that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden furthers "a compelling governmental interest" and does so by "the least restrictive means." See 42 USC § 2000cc-1(a)(1)-(2).

concluding the Act "does NOT mean that a sport shooting range may build an entirely new structure, building and/or facility on its property," even if the defendant claimed it needed the new range to "expand and/or increase membership" or expand "events and activities." Affirmed. (Source: State Bar of Michigan *e-Journal* March 20, 2006, Number: 30926.)

Full text opinion:
http://www.michbar.org/opinions/appeals/2006/031606/30926.pdf

See also: *Township of Homer v. Billboards By Johnson, Inc.* on page 20.

See also "Michigan Attorney General Opinion No. 7185, Date: 01/13/2006" on page 20.

See also "Michigan Attorney General Opinion No. 7188, Date: 02/17/2006" on page 20.

Takings

Takings Clause of the Fifth Amendment does not require compensation where implementation of a valid land use regulation negatively impacts a private citizen's property rights

Court: Michigan Court of Appeals (267 Mich. App. 523; 705 N.W.2d 365; 2005 Mich. App., July 26, 2005)
Case Name: *K&K Constr., Inc. v. Department of Envtl. Quality*

The court held plaintiffs failed to establish the Michigan Department of Environmental Quality's (DEQ) regulatory action, under the Wetland Protection Act (MCL 324.30323(3)), constituted a compensable regulatory taking of their property. Because the challenged land-use regulation, like traditional zoning, was comprehensive and universal so the plaintiffs were relatively equally benefited and burdened by the challenged regulation as other similarly situated property owners, plaintiffs purchased with knowledge of the regulatory scheme, and plaintiffs have made and can make valuable use of their land despite the application of the regulation, the court concluded compensation was not required under Penn Cent. Plaintiffs claimed the DEQ's denial of a permit to fill in the wetland on their property constituted a regulatory taking. The case involved four contiguous parcels of land amounting to about 82 acres. Plaintiffs began work on a restaurant in 1988, which was to occupy 42 acres on parcel 1, and would consist of the restaurant and a sports complex. The local township issued a cease-and-desist letter stating part of parcel 1 contained wetland and plaintiffs needed to get a DEQ permit. The DEQ denied the application. After the trial court and the Court of Appeals held a regulatory taking had occurred, the Supreme Court remanded to the trial court with instructions, inter alia, to apply the balancing test in Penn Cent. to determine whether plaintiffs proved their regulatory takings claim. On remand, the trial court did not comply with the remand order regarding the Penn Cent. analysis. Following its analysis of the Penn Cent. factors, the court reversed the trial court's judgment in favor of plaintiffs and entered a judgment in favor of the DEQ. (Source: State Bar of Michigan *e-Journal*.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2005/072605/28135.pdf

Rezoning from "Light Industrial" to "Residential Multiple" is not a takings

Court: Michigan Court of Appeals (269 Mich. App. 638; 2006 Mich. App., February 7, 2006)
Case Name: *Dorman v. Township of Clinton*

The trial court properly granted the defendant-township's motion for summary disposition in this dispute regarding the rezoning of the plaintiff's property and dismissed his inverse condemnation action, in which he alleged the township's actions amounted to a regulatory taking and violated his right to substantive due process. According to the township's Master Plan, plaintiff's property was originally zoned "Residential Multiple." In 1993, the township rezoned the property to "Light Industrial" with a special use permit (*sic.*), but never amended its Master Plan to reflect the change. Plaintiff anticipated beginning a public storage business on the site. Plaintiff admitted he did not review the Master Plan or question the seemingly out-of-place zoning classification before closing on the sale of the property. Plaintiff argued the township deliberately and improperly interfered with his proposed development by rezoning the property to "Residential Multiple" following the submission of his proposed site plan. By limiting the potential use of this property, the plaintiff claimed the township greatly reduced its value, effectively confiscating his property. Plaintiff

alleged, without providing any supporting evidence, his proposed storage facility would be worth approximately $700,000. He asserted the township, by rezoning his property to residential use, effectively reduced the property's assessed value to $148,000. Yet, his own real estate appraisal expert stated the plaintiff could divide the property into eight residential lots priced at $45,000 each and sell the lots for a net profit of $11,200 after deducting costs. Nothing in the record suggested the plaintiff's property was unsuitable for residential development. Plaintiff could not establish the township's rezoning of his property interfered with legally recognized "distinct, investment-backed expectations" under *Penn Central Transp. Co. v. New York; Zoning*. Plaintiff had made no changes to the land itself and had yet to begin construction on the two additional buildings proposed in his site plan. The plaintiff did not create a question of fact he had suffered an economic hardship amounting to a taking, regulatory or otherwise. Affirmed. (Source: State Bar of Michigan *e-Journal* number 30439, February 9, 2006)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/020706/30439.pdf

See *Grabow v. Macomb Twp* concerning use variances and townships on page 18.

Construction delay is not a taking

Court: Michigan Court of Appeals, unpublished March 23, 2006 No. 263123, approved for publication ___ Mich. App. ___; ___ N.W.2d ___; 2006 Mich. App., May 16, 2006.

Case Name: *Board of County Rd. Comm'rs of Oakland County v. J.B.D. Rochester, L.L.C.*

[This opinion was previously released as an unpublished opinion on 3/23/06.]

The trial court erred by denying road commission-plaintiff's motion *in limine* to exclude appraisals of defendants' property taking into consideration a post-taking road construction delay caused by congressional funding problems because the claimed severance damages were not caused by the taking. J.B.D. Rochester, L.L.C.-Defendants contended the evidence was relevant to a determination of its cost to cure severance damages. Plaintiff contended the appraisals at issue should have been excluded because they considered post-taking factors and defendants were only entitled to recover the fair market value of their property at the time of the taking. The delay in funding and not the taking itself caused the alleged severance damages. No market actor could have possibly known problems in congressional funding would halt the road project. Defendants' development project commenced and continued. Only later did defendants learn of their predicament. The road project would not be completed when expected, and commercial tenants would soon arrive once defendants' buildings were constructed. The strip of land plaintiff now owned sat as sort of a buffer obscuring the presence of the commercial development, which would rely on the business of passing motorists. Buildings slated for demolition continued to stand on the strip. Powerless to obtain federal funding, defendants paid for the demolition and road pavement to secure their investment from wholesale failure. The court concluded defendants placed unwarranted reliance on the expectation the road project would be completed, and they could not "impose their own construction timetable on the road commission under the banner of just compensation." They made a business decision to secure their investment as soon as possible. "They got that for which they paid and cannot now impose the price of their business decision on plaintiff as a matter of just compensation." Reversed and remanded. (Source: State Bar of Michigan *e-Journal* number 31775, May 18, 2006)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/051606/31775.pdf

Power of Eminent Domain

Condemnation of land through *eminent domain*, in Michigan, can only be for a public use

Court: United States Supreme Court (125 S. Ct. 2655; 162 L. Ed. 2d 439; 2005 U.S., June 23, 2005)

Case Name: *Kelo v. City of New London* [Conn.]

Commentary:

The United States Supreme Court ruled that a municipality may use condemnation of private property to help a developer's project/economic development.

A few details of this case to keep in mind: Economic development is a common activity of local government, and thus appropriate for government to use its *eminent domain* power to secure land. But if done, such activity must be well documented through planning **before** an individual developer is chosen or identified. This case did not address (and thus did not change the rules for) a development that

is a municipal-owned industrial park (instead of private). This case did not address (and thus did not change the rules for) use of *eminent domain* to address blight.

Full Text Opinion:
http://a257.g.akamaitech.net/7/257/2422/23jun20051201/www.supremecourtus.gov/opinions/04pdf/04-108.pdf

But in the mean time there is another big word of caution: **This court case does not change the effect of the Michigan Supreme Court ruling saying use of eminent domain for private economic development cannot be done in Michigan** (*County of Wayne v. Hathcock* (471 Mich. 445; 684 N.W.2d 765; 2004 Mich.)).

The exercise of the power of *eminent domain* is neither authorized by statute nor permitted under article 10 of the 1963 Michigan Constitution, which requires that any condemnation of private property advance a "public use," if it does not, then it does not pass muster under art. 10, § 2 of the Michigan 1963 Constitution.

The Michigan Supreme Court wrote:

> 'Art 10, § 2 of Michigan's 1963 Constitution provides that "[p]rivate property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law." Plaintiffs contend that the proposed condemnations are not "for public use," and therefore are not within constitutional bounds. . . . we [the court] hold[s] that the proposed condemnations do not advance a "public use" as required by art 10, § 2 of our 1963 Constitution.'

For a refresher, here is the Michigan court case from last year:

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

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

Case Name: *County of Wayne v. Hathcock*

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

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

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

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

Use of *eminent domain* for a road, used mainly by a private entity but available for public use, can be done

Court: Michigan Supreme Court (473 Mich. 242; 701 N.W.2d 144; 2005 Mich., July 20, 2005)

Case Name: *City of Novi v. Robert Adell Children's Funded Trust*

Where a municipality seeks to take private property to construct a road, the public use requirement is met when the proposed road will be available for public use even if it will be primarily used by a private entity contributing money to the project, and a municipality does not abuse its discretion under Uniform Condemnation Procedures Act (UCPA) (MCL 213.56) in determining a public necessity exists for the condemnation without considering alternatives. The plaintiff-city sought to condemn defendants' property for the purpose of constructing a spur road. While the single fact a project is a road does not per se make it a public road, under the *Rogren v. Corwin* analysis, the spur road was a public use. Plaintiff initiated the project in response to increasing traffic problems, and it would retain control, maintenance, and ownership. While the private entity might be the primary user of the spur road, the public would be free to occupy and use it. The fact the private entity was expected to contribute to funding the road was not

dispositive. As to defendants' challenge to plaintiff's determination there was a public necessity, plaintiff was not required to show its plan was the best or only alternative, simply that it was a reasonable one. Neither fraud, error of law, nor abuse of discretion was shown. The proposed condemnation did not violate art. 10, § 2 of the Michigan Constitution, and plaintiff's determination defendants' property was necessary to complete the road project did not violate the Uniform Condemnation Procedures Act. The decisions of the trial court and Court of Appeals were reversed, and the case remanded to the trial court for further proceedings.

The concurrence agreed with the majority opinion the proposed road was a public use and private property could be condemned for construction of the road, and with the majority opinion plaintiff did not commit fraud, an error of law, or abuse its discretion in declaring the condemnation of the property was necessary under M.C.L. 213.56. While also agreeing the case was not moot, the justice did not join the majority's "purported review of the basic principles of mootness law…."

The dissent concluded the matter was moot, the court was without authority to decide it, and plaintiff's appeal should be dismissed. As to the majority's substantive analysis, the dissent found the majority erroneously decided a matter properly first addressed by the trial court. Further, the majority improperly diminished the degree of inquiry that should be made into plaintiff's condemnation action and erroneously held the taking met the standard for public necessity. (Source: State Bar of Michigan *e-Journal*.)

Full Text Opinion:
http://www.michbar.org/opinions/supreme/2005/072005/28106.pdf

Rezoning land after government condemnation of land cannot be used in calculation of the value of a taking

Court: Michigan Supreme Court (473 Mich. 124; 700 N.W.2d 380; 2005 Mich., July 15, 2005)

Case Name: *Michigan Dep't of Transp. v. Haggerty Corridor Partners Ltd. P'ship*

The trial court abused its discretion in allowing defendants to present in support of their proffered calculation of just compensation, evidence their property had been rezoned from residential to commercial after the taking because the evidence of the post-taking rezoning was irrelevant to the issue of the condemned property's fair market value at the time of the taking. A post-taking zoning change does not make the fact of consequence (information regarding the reasonable possibility of a zoning change may have impacted the market value of property on the date of the taking) more probable or less probable. Because information concerning events occurring after the condemnation could not possibly have influenced the conduct of a willing buyer on the date of the taking, it can never be logically, and thus legally, relevant in determining the price the willing buyer and seller would have agreed upon on the date of the taking. The trial court's error in admitting the evidence was not harmless. The trial court further compounded the error by refusing to allow plaintiff to establish, as contemplated by the Michigan Uniform Condemnation Procedures Act (UCPA), that the zoning change was effectuated by the fact of the condemnation itself. The court affirmed the judgment of the Court of Appeals, which reversed the jury's verdict and remanded the case.

Justice Kelly would also hold the evidence of the post-taking rezoning was inadmissible and agreed with the decision of the Court of Appeals to set aside the jury verdict, holding plaintiff was entitled to a new trial without the admission of evidence of the post-taking zoning change and to remand the case to the trial court.

The dissent disagreed with the majority's conclusion evidence of a post-taking rezoning was inadmissible. The dissent would have concluded the trial court did not abuse its discretion in admitting the evidence, vacated the Court of Appeals decision, and remanded for a new trial.

Justice Markman did not believe the trial court abused its discretion in admitting evidence of a post-taking rezoning but did believe the trial court abused its discretion in prohibiting plaintiff from introducing evidence the post-taking rezoning was caused by the taking. Justice Markman would have vacated the decision of the Court of Appeals and remanded the case for a new trial, in which defendants would be allowed to introduce the evidence. (Source: State Bar of Michigan *e-Journal*.)

Full Text Opinion:
http://www.michbar.org/opinions/supreme/2005/071505/28059.pdf

Civil Rights

Zoning inspections of the exterior of a house within the "curtilage" is not a "search" within the meaning of the Fourth Amendment.

Property tax inspections of the exterior of a house within the "curtilage" is not a "search" within the meaning of the Fourth Amendment.

Court: U.S. Court of Appeals Sixth Circuit (No. 04-2189, 429 F.3d 575; 2005 U.S. App., November 17, 2005)
Case Name: *Widgren v. Maple Grove Twp.*

(NOTE: A petition for rehearing was referred to the original court, which further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original case. Thus a rehearing was denied.)

Balancing a number of factors regarding the plaintiffs' reasonable expectation of privacy, the court held the three intrusions on their property by the defendants-township officials were not Fourth Amendment searches. Plaintiff-Kenneth Widgren, Sr. owns 20 acres of undeveloped land in the township. In May or June 2002, he began construction of a house. The next spring, he cleared the area immediately surrounding the house, routinely mowed, and a clear line marked the perimeter of the mowed area. The area contained a fire pit, pruned trees, and a picnic table. Over 1,000 feet of driveway connected the house to a road, the sole public access to the property. At the end of the driveway was a metal gate displaying multiple "No Trespassing" signs, including signs directed at government and local officials. The other plaintiff stored various personal belongings in the house, which could be seen only from an adjoining parcel and from the air. Plaintiffs did not obtain a building permit for construction of the house. In the spring of 2003, defendants-Lenz, a township zoning official, and Beldo, the township tax assessor, entered the property three times to confirm the zoning violation, to post a civil infraction on the front door, and to conduct a tax assessment through observation of the exterior of the house. The court held the first inspection by the zoning official, while perhaps a trespass, was not a search under the Fourth Amendment, and neither was his second visit to post the civil infraction. Although the intrusion by the tax assessor presented a more difficult question, the court held it was significant the intrusion was administrative, not criminal, and held the assessor did not conduct a Fourth Amendment search by entering the curtilage for the tax purpose of naked-eye observations of the exterior of the house, without touching, entering, or looking into the house. Summary judgment for defendants was affirmed. (Source: State Bar of Michigan *e-Journal* Number: 29449; November 21, 2005)

Full Text Opinion:

http://www.michbar.org/opinions/us_appeals/2005/111705/29449.pdf

Land Divisions & Condominiums

Condominium development within a subdivision does not require vacating the subdivision

Court: Michigan Court of Appeals [This opinion was previously released as an unpublished opinion, No. 26336, December 13, 2005] (approved for publication February 14, 2006, 9:00 a.m.), ___ Mich. App. ___; ___ N.W.2d ___; 2005 Mich. App. (2005 Mich. App. LEXIS 3315).
Case Name: *Williams v. City of Troy*

Since the Land Division Act (LDA) (M.C.L. 560.101 *et seq.*) did not apply to the proposed condominium development at issue and the development clearly fell within the boundaries of the existing subdivision, the trial court properly determined defendant-Freund (the developer) was not required to institute an action to vacate the existing plat pursuant to the LDA before seeking the defendant-City's approval. Freund purchased three parcels of vacant land in subdivision Lots 21 and 22 for a proposed "site condominium" development under the The Condominium Act (CA) (M.C.L. 559.101 *et seq.*). He planned to combine the parcels into a single "condominium project" consisting of six detached "condominium units." The gross density of the proposed development would be 1.48 homes per acre, and a private road would provide access. Once constructed, the development would physically resemble a traditional planned subdivision with freestanding residences. However, the homes would be owned as condominiums and homeowners would share an interest in designated common areas. The city council approved the proposed development. Plaintiffs argued Freund was required under the LDA to file a court action to vacate the existing plant and submit a "replat" excluding the proposed condominium development. The CA specifically provides the LDA "shall

not control divisions made for made for any condominium project." The administrative rules promulgated pursuant to the CA recognize a proposed condominium development may overlap with a previously platted subdivision. Neither the statutes nor the regulations required the plat to be vacated pursuant to the LDA before a condominium project could be developed. Summary disposition for defendants was affirmed. (Source: State Bar of Michigan *e-Journal* Number: 29820; December 20, 2005)

Full Text Unpublished Opinion:
http://www.michbar.org/opinions/appeals/2005/121305/29820.pdf

Full Text Published Opinion:
http://www.michbar.org/opinions/appeals/2006/021406/30517.pdf

Due Process and Equal Protection

Township's 22 year old zoning valid, even when not properly adopted

Township's zoning is not repealed by just asking county to assume zoning duties

Court: Michigan Court of Appeals (266 Mich. App. 612; 703 N.W.2d 122; 2005 Mich. App., June 2, 2005)

Case Name: *Bengston v. Delta County*

(Note: motion to appeal this case to the Michigan Supreme Court was denied.)

Holding the township ordinance zoning the property in question for commercial use controlled rather than the defendant-county's ordinance zoning the property for residential use, the court reversed the trial court's determination of the zoning classification as R-1, residential, and remanded for entry of a declaratory judgment investing the property with a C-1, commercial, zoning classification. While it was undisputed the township planning commission was invalidly created in 1980, this did not affect the validity of the township zoning ordinance adopted in 1983. The zoning authority granted to a township board by M.C.L. 125.271[3] was not contingent on the existence of a validly created planning commission. **The township board could – and did – adopt a zoning ordinance even in the absence of a validly created township planning commission**.[4] It was uncontested the **township board never formally repealed the zoning ordinance**, and the court concluded passage of the motion to request a transfer of planning commission activities and the act of sending a corresponding letter to the county could not reasonably be considered to have repealed the township zoning ordinance. The trial court's public policy rationale also did not provide an appropriate basis for failing to apply the township zoning ordinance as required by state law. Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 27578.)

Quoting the court:

> "In 1976, Delta County adopted a county zoning ordinance. It is undisputed that the property at issue was zoned for residential use under this county zoning ordinance. In 1980, the Wells Township Board sought to create a township planning commission, but the township government failed to notify township residents of their right to pursue a referendum on whether to have such a planning commission under MCL 125.323(2). On September 28, 1983, the Wells Township Board adopted a township zoning ordinance and an official zoning map. Under that township zoning ordinance, the property at issue was zoned for commercial use. In accordance with the township zoning ordinance, a building permit was issued, a gas station constructed, and commercial use was established on the property in 1984.
>
> In 1986, the Wells Township Board recognized that the township planning commission was improperly created and passed a new resolution to create a planning commission with appropriate notice to township residents. The township held a referendum, and the electorate voted against the resolution calling for a township planning commission. As a result of the election, the township board requested that Wells Township be included in Delta County planning and zoning as of the date of request. The township board neither repealed their 1983 township zoning ordinance, nor did it decertify its official zoning map. On September 9, 1986,

[3] P.A. 184 of 1943, as amended, (being the Township Zoning Act, M.C.L. 125.271 *et seq.*). This act is repealed July 1, 2006 and replaced by P.A. 110 of 2006, as amended, (being the Michigan Zoning Enabling Act, M.C.L. 125.3101 *et seq.*). The language in the new act could result in possible different outcome for this court case.

[4] The time period can be as little as four years. See *Village of Lincoln v. Viking Energy of Lincoln, Inc.*, page 20.

the Delta County Board of Commissioners resolved, "that the County undertake zoning responsibilities with regard to Wells Township only from and after this date and that any prior decisions or actions taken under color of law with regard to zoning in Wells Township shall be the sole responsibility of Wells Township and not Delta County." Delta County used the township zoning map for a short while into 1987, and thereafter, utilized the county zoning map.

. . . .

Defendants' main argument attacking the validity of the Wells Township zoning ordinance adopted in 1983 center on the undisputed fact that the Wells Township Planning Commission was invalidly created in 1980. Regardless, a township is not statutorily required to establish a planning commission. *Sabo v Monroe Twp*, 394 Mich 531, 540; 232 NW2d 584 (1975), overruled in part on other grounds *Kirk v Tyrone Twp*, 398 Mich 429 (1976).

Accordingly, the zoning authority granted to a township board by MCL 125.271 is not contingent on the existence of a validly created planning commission. See *Sabo, supra*, 394 Mich at 538-541 (discussing existence of township zoning authority even in absence of a master plan developed by a township planning commission). By application, any invalidity in the creation of the Wells Township Planning Commission in 1980 does not affect the validity of the Wells Township zoning ordinance. Rather, the township board could – and did – adopt a zoning ordinance under the plain language of MCL 125.271, even in the absence of a validly created township planning commission. The establishment of a planning commission is a permissive act, "The township board of any township may create, by resolution, a township planning commission…". MCL 125.323(1). It is only the permissive act of creating a planning commission that is subject to notice and referendum, and not, the enactment of a zoning ordinance pursuant to MCL 125.271 as argued by defendants. Defendants fail to establish a record basis to question the validity of the adoption of the township zoning ordinance in 1983.

. . . .

It is uncontested that the Wells Township Board never formally repealed the zoning ordinance it enacted in 1983. Indeed, defendants do not argue that the township zoning ordinance was ever repealed, only that it was not validly adopted (or alternatively, as discussed below, that it should be disregarded for public policy reasons). Nevertheless, Wells Township sent a letter to Delta County "requesting that Wells Township be included in the Delta County Planning and Zoning as of this date." The township board's intent was to discontinue active involvement in zoning by the township government in Wells Township and to leave zoning administration to the county.[5] While defendants argue that the township letter requesting county zoning involvement be considered to have included intent to discontinue application of the township zoning ordinance, the motion adopted by the township trustees at their meeting of August 13,1986, was to "accept the letter to transfer the planning commission to the County.

The passage of the motion to request a transfer of planning commission activities and the act of sending the corresponding letter to Delta County cannot reasonably be considered to have repealed the Wells Township zoning ordinance. Those steps did not constitute a legislative act by the township board to repeal the zoning ordinance, but rather merely constituted a request by the board to the county to take certain action, namely, transferring administration of the township's zoning ordinance to the county. See MCL 42.18. Only subsequent legislative acts by a township board could either expressly or implicitly repeal a prior ordinance. See *Donajkowski v Alpena Power Co*, 460 Mich 243, 253; 596 NW2d 574 (1999)

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[5]Pursuant to MCL 42.18, governmental entities can make agreements between and amongst themselves for the operation of government including zoning. *Nicholas v Clinton Co Bd of Comm'rs*, 43 Mich App 527; 204 NW2d 351 (1972). MCL 42.18 provides: Each charter township may join with any governmental unit or agency, or with any number or combination thereof, by contract or otherwise as may be permitted by law, to perform jointly, or by one or more, for or on behalf of the other or others, any power or duty which is permitted to be so performed by law or which is possessed or imposed upon each such governmental unit or agency.

(repeal of a statute may be inferred where a subsequent legislative act "conflicts with a prior act" or "is intended to occupy the entire field covered by a prior enactment"). Clearly, the Wells Township Board did not undertake a legislative act such as passing an ordinance or resolution in making the transfer request."

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2005/060205/27578.pdf

Due Process denied when city blocks drive without hearing

Court: U.S. Court of Appeals Sixth Circuit
Case Name: *Warren v. City of Athens, Ohio* (411 F.3d 697; 2005 U.S. App., June 15, 2005)

The court affirmed the district court's grant of a permanent injunction, although only on the basis of the defendant-city's violation of plaintiffs' procedural due process rights. Plaintiffs alleged the city violated their constitutional rights by installing barricades restricting access to their Dairy Queen. The court held the city clearly deprived plaintiffs of a property interest by erecting barricades across one of the two means of access to their Dairy Queen. Further, whether seen as an attack on an established state procedure or as an attack on a "random and unauthorized" act, plaintiffs' claim was not subject to the *Parratt v. Taylor* rule. It clearly would not have been "impossible" for the city to grant a predeprivation hearing to plaintiffs. Moreover, even if the *Parratt* rule did apply, it was not clear any state remedies were available to plaintiffs. Thus, if the city's action was a "random and unauthorized act," then plaintiffs' claim prevailed. If, alternatively, the city's action was the result of an established state procedure, then the question would be whether that procedure violated due process rights. Plaintiffs demonstrated the state procedure in this case violated their rights. The facts of *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, where the city (acting in accordance with state procedure) singled out a landowner for regulation detrimental to the landowner's property interest, were directly analogous to plaintiffs' case. The same reasoning applied here, yielding the conclusion the city violated plaintiffs' procedural due process rights. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 27698.)

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2005/061505/27698.pdf

One public hearing to amend DDA boundaries

Court: Michigan Court of Appeals (267 Mich. App. 461; 705 N.W.2d 532; 2005 Mich. App., July 26, 2005)
Case Name: *Village of Holly v. Holly Twp.*

(Note: motion to appeal this case to the Michigan Supreme Court was denied.)

In an issue of first impression regarding whether, despite the use of the indefinite article "a" preceding "public hearing," the Legislature intended to refer to those public hearings necessary to create a downtown development authority (DDA) or to amend the boundaries of an existing authority, the court held the Legislature intended to refer only to the public hearings specified in M.C.L. 125.1653. The dispute arose after the village passed a resolution giving notice of its intent to expand the boundaries of its DDA and noticed a public hearing for July 11, 2000. The trial court held The Downtown Development Authority Act (the Act) (M.C.L. 125.1651 et seq.) requires two public hearings - the first to create a DDA or designate its boundaries and the second to adopt a Tax increment financing (TIF) plan. The court agreed with defendants and *amici curiae* that M.C.L. 125.1653(3) was not ambiguous. Read as a whole, § 3 of the Act establishes the procedure for creating a DDA or amending the boundaries of an existing DDA. The court held the Legislature intended "a public hearing held after February 15, 1994" in subsection 3 of § 3, M.C.L. 125.1653(3) to mean only a public hearing specified in § 3 of the Act, i.e., either a public hearing to create a DDA authority or a public hearing to amend the boundaries of an existing DDA. Moreover, 1993 PA 323, which added subsection 3 of § 3, did not amend § 18 of the Act. Reversed and remanded. (Source: State Bar of Michigan *e-Journal*.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2005/072605/28137.pdf

Failure to treat one equally not possible when it is only case of its kind

Minutes and excellent record keeping help avoid a substantive due process claim

Court: U.S. District Court Western District of Michigan (October 13, 2005, Case No. 4:04-CV-00095 RAE, ___ F. Supp. 2d ____; 2005 U.S. Dist.)
Case Name: *The Manistee Salt Works Dev. Corp. v.*

City of Manistee

Defendants were granted summary judgment on plaintiff's equal protection and substantive due process claims arising from the City of Manistee's (defendant[6]) denial of Manistee Salt Works Dev. Corp.'s (plaintiff) zoning application for a special use permit to develop a coal-fired power plant. Because plaintiff could not show it was treated differently from others similarly situated and the permit denial was completely rational. Under the city ordinance, the planning commission had discretion to either deny or grant a special use permit. There was both support and opposition to plaintiff's project voiced in public hearings on the matter. When the city learned plaintiff's power plant might obtain tax-exempt status, it sought a "community service fee" from plaintiff to essentially compensate it for lost tax revenue. Negotiations stalled and plaintiff refused to pay the fee. The permit was eventually denied. With regard to plaintiff's equal protection claim, its suggestion all special use applicants were similarly situated did not suffice, and it failed to produce any evidence an application similar to its own was ever approved by the city. The city could not be said to have treated plaintiff differently than others when it never considered an application of this type before. As to the substantive due process claim, since the city had discretion to deny or grant the permit, plaintiff's alleged retaliatory reason for the denial was unavailing. Further, even if plaintiff had a property right, the city provided four rational reasons for its denial. (Source: State Bar of Michigan *e-Journal*, October 18, 2005, Number: 29039.)

Full Text Opinion:
http://www.michbar.org/opinions/district/2005/101305/29039.pdf

Commentary:

This has been a well-publicized zoning court case in Northwest Michigan. Hearings on the issue attracted about 500 people, which resulted in the hearing being extended to four evenings lasting a total of 16 hours and 22 minutes. Deliberations on the issue occupied the city's planning commission for another 11 meetings and 7 work sessions totaling 25 hours and 43 minutes. Then a decision was made. The court said:

> "In April 2004, the Commission resolved to deny Plaintiff's permit application. By an April 15, 2004 Resolution, the Commission found that the permit did not comply with height standards, was not compatible with adjacent land use, is not in the best interests of the community's health, safety, and welfare, and will strain Defendant City's resources.[7]"

Excellent record keeping helped the city with the substantive due process claim. The court explained under Michigan law, with special use permits, a city has discretion to deny or grant the permit. In this case the plaintiff's alleged retaliatory reason for the denial (the company not paying a community service fee) was found by the court to be unavailing. Further the court said the city provided four rational reasons for its denial – documented in the record with findings of fact, reasons, and conclusions:

> " . . . . By an April 15, 2004 Resolution, Defendant City resolved that Plaintiff's proposed uses do not comply with height standards; the use is not compatible with adjacent land uses; the use is not reasonable to protect the health, safety, and welfare of the community; and the use is not designed to insure that public services and facilities are capable of accommodating increased loads caused by the land use or activity. The Resolution draws on four out of the six provisos in Ordinance § 8609. Puzzling to the Court is how this decision could ever be found to be devoid of a rational basis. The Resolution made specific findings of fact and supported its conclusion with the factors in Ordinance § 8609. Defendant City needed but one rational reason to pass constitutional muster, and it provided four. *See Curto v. City of Harper Woods*, 954 F.2d 1237, 1243 (6th Cir. 1992)."

Part of the court case against the city was that the city had created reasons for denial after determining community service fee would not be paid– an argument the court did not buy based on its review of a complete record (minutes, supporting documents, findings of fact, reasons, and so on occupying eight binders, 2,788 pages). City staff had received training on record keeping from MSU Extension, and a number of members of the Commission had obtained

[6]Defendants also include intervening parties Little River Band of Ottawa Indians and Manistee Citizens for Responsible Development, Inc.

[7]In a light most favorable to Plaintiff, *iff*, the Court will assume that also among the Commission's rationale for permit denial, though not included in the formal Resolution, was Plaintiff's refusal to pay the Community Service Fee. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

their Citizen Planner certificate.

Another aspect of this case, the claim that the company did not receive equal protection, the court ruled it is not enough to say all special use applicants were similarly situated:

> "With regard to zoning, the Sixth Circuit Court of Appeals requires that equal protection claimants prove that they are similarly situated to other approved zoning applicants. *Silver v. Franklin Twp. Bd. of Zoning Appeals*, 966 F.2d 1031, 1036-37 (6th Cir. 1992); *see also Baskin v. Bath Twp. Bd. of Zoning Appeals*, 101 F.3d 702 (6th Cir. 1996). Plaintiff's suggestion that all special use applicants are a similarly situated does not suffice.
>
> "First, Plaintiff has not submitted any evidence that an application similar to its own was ever approved by Defendant City during similar time periods. *McDonald's Corp. v. City of Norton Shores*, 102 F. Supp. 2d 431, 438 (W.D. Mich. 2000); *see also Purze v. Village of Winthrop Harbor*, 286 F.3d 452 (7th Cir. 2002); *Barstad v. Murray County*, 420 F.3d 880 (8th Cir. 2005). Next, Plaintiff has not demonstrated that any other applicant has been reviewed under the special use permit factors, Ordinance § 8609, that its application was considered under. *McDonald's*, 102 F. Supp. 2d at 438. Lastly, and most damning to Plaintiff's equal protection claim, Plaintiff cannot point to any applicant that has secured approval for a similar use, with the kind of community-wide effect proposed by Plaintiff did not suffice, and it failed to produce any evidence an application similar to its own was ever approved by the city. The city could not be said to have treated plaintiff differently than others when it never considered an application of this type before. . . . .
>
> "Stated another way, Plaintiff needed to show that Defendant City permitted another special use applicant to strain its resources, increase pollution, enrage its citizens, blemish its skyline, and generate no tax revenue when it denied Plaintiff's permit. This Plaintiff has not done so and Defendant City can hardly be said to have treated Plaintiff differently than others when it has never considered an application of Plaintiff's sort before. *Accord McGuire v. City of Moraine*, 178 F. Supp. 2d 882, 898 (S.D. Ohio 2001) (city did not treat applicant differently when it was the only applicant it ever reviewed)."
>
> (Finally, an interesting side note:
> "Defendant City adopted the Commission's decision on April 20, 2004. Plaintiff sued Defendant City in this Court on July 13, 2004. Intervening-Defendants were admitted into the fracas on January 25, 2005."

Manistee City uses a system where the planning commission approves special use permits. But City Council has the ability to review those decisions within 14 days. If council does nothing the decision stands. If council finds the commission made an error in its ruling on one of the zoning ordinance standards for the special use, then council can act to overrule the commission. In this case council acted within the 14 days to endorse the commission's decision. This process was set up as a compromise between wanting an administrative decision made by an administrative body –the planning commission– and council –the legislative body– not wanting to entirely give up its review. This approach is troubling to some attorneys, with advice not to use this procedural process. The court knew of the process, reviewed the procedure in light of due process challenges, accepted it at face value and did not comment on its propriety.)

Due Process: Voter Referendum

Consent Judgements which amend zoning are not subject to referendum

Lack of a referendum is not a substantive due process violation

Court: U.S. District Court Western District of Michigan (Case No. 5:03-CV-14, July 27, 2005, ___ F. Supp. 2d ____; 2005 U.S. Dist.)

Case Name: *Petoskey Inv. Group, LLC v. Bear Creek Twp.*

The defendant-township was granted summary judgment on plaintiff's substantive due process and fraud claims, and the court dismissed plaintiff's regulatory takings claim, related to a state court consent judgment previously entered into by the parties in connection with the zoning of property plaintiff owned in the township. Regarding the substantive due process claim, the court concluded plaintiff failed to show defendant's conduct "shocks the

conscience," and there was no evidence to support a finding defendant's conduct was arbitrary, capricious, or irrational. As in City of *Cuyahoga Falls, OH v. Buckeye Cmty. Hope Found*, the state appellate court ruled the consent judgment was not subject to a right of referendum, but the fact the Michigan Court of Appeals held the consent judgment was not subject to a right of referendum did not establish a substantive due process violation. The court found the regulatory takings claim was not ripe for federal court adjudication since Michigan's inverse condemnation procedure provided plaintiff with an adequate remedy and plaintiff had not tried to use the procedure. Plaintiff also sought to hold defendant liable for fraud based on conduct and events occurring almost two years after entry of the consent judgment. The court concluded to the extent defendant's conduct related to the zoning referendum might establish a fraud claim under the bad faith exception (which it did not), the claim failed as a matter of law because the conduct was too remote in time from the entry of the consent judgment. Plaintiff's remaining claims were dismissed based on principles of comity and federalism. (Source: State Bar of Michigan *e-Journal*.)

Full Text Opinion:
http://www.michbar.org/opinions/district/2005/072705/28171.pdf

Court review of zoning referendum: Is zoning approved by referendum unreasonable

Court: Michigan Supreme Court (264 Mich. App. 215; 690 N.W.2d 466; 2004 Mich. App., November 2, 2005)
Case Name: *Newman Equities v. Charter Twp. of Meridian*

In an order, the court vacated the judgment of the Court of Appeals in a published opinion (see below) but affirmed the result on different grounds. The court held, contrary to the view expressed by the Court of Appeals majority, the court may not consider whether there is a "legitimate difference of opinion" concerning the reasonableness of two zoning schemes. Rather, the court must determine whether the zoning approved by the referendum is unreasonable. (Source: State Bar of Michigan *e-Journal* Number: 29312; November 8, 2005)

Full Text Opinion:
http://www.michbar.org/opinions/supreme/2005/110205/29312.pdf

See also: *Kropf v SterlingHeights*, 391 Mich 139, 156-157 (1974). The following is the summary of the original case:

Court: Michigan Court of Appeals (Published No. 248722, October 21, 2004))
Case Name: *Newman Equities v. Charter Twp. of Meridian*

The trial court erred in reversing the voters' decision the parcels at issue should revert to their previous residential zoning designations because there was a least a legitimate difference of opinion whether residential zoning of the parcels was appropriate, meaning that the voters' decision was not unreasonable, arbitrary, or capricious. Plaintiff owned various properties in the area around the Meridian Mall, a large regional shopping center serving residents of the defendant-township and persons traveling to the complex for shopping, service, and entertainment purposes from the general area. In the mid 1980's, a traffic study recommended a collector road be built to ease the traffic problem in the area. The township accepted donations of property from plaintiff and the other adjacent owners for the road. Plaintiff's cost in donated land and assessments for the road was $700,000. Plaintiff's parcels were originally designated as multifamily residential and single family residential uses. Plaintiff's request to have them rezoned as commercial was approved by the township. The voters of the township then passed a referendum reversing that decision and the zoning reverted to the previous residential designations. Plaintiff argued the referendum zoning decision was unconstitutional because it was unreasonable, arbitrary, and capricious. The court concluded there was a legitimate difference of opinion as to the best zoning designation for the parcels. The voters through the referendum resolved the issue and the court had to defer to their judgment. Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 24898, October 25, 2004)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2004/102104/24898.pdf

Ripeness for Court's Jurisdiction

Must pursue inverse condemnation in state courts before case is ripe for federal court

Court: U.S. District Court Western District of Michigan (Case No. 1:03-cv-378, November 2, 2005, ___ F. Supp. 2d ____; 2005 U.S. Dist.)
Case Name: *Petoskey Inv. Group LLC v. Springvale-Bear Creek Sewage Disposal Auth.*

In a memorandum opinion, the court held plaintiff's Fifth Amendment takings claim, as well as its ancillary due process claims were dismissed for lack of jurisdiction on ripeness grounds. Plaintiff, a developer of 91 acres of land in Bear Creek Township, Michigan, brought this action against defendant arising from defendant's alleged refusal to permit plaintiff to connect to defendant's sanitary sewer system. Plaintiff asserted a claim under the Takings Clause of the Fifth Amendment, as well as substantive and procedural due process claims and claims under the

Constitution and statutes of the State of Michigan. The record clearly demonstrated plaintiff did not pursue an inverse condemnation in the state courts, as contemplated by the *Seguin v. City of Sterling Heights* decision. Under the holding of *Peters v. Fair*, the court would exceed its jurisdiction by reaching the merits of plaintiff's claims. The court granted plaintiff's motion for a voluntary dismissal of all federal claims without prejudice and declined to exercise pendent jurisdiction over any remaining state claims, thereby allowing plaintiff to pursue all its claims in the state courts. Defendant's motion for summary judgment on the merits was dismissed as moot. (Source: State Bar of Michigan *e-Journal* Number 29308, November 9, 2005.)

Full Text Opinion:
http://www.michbar.org/opinions/district/2005/110205/29308.pdf

Regulation such as 1,000 setback is proper when related to public health, safety, or welfare
Regulation which is not shown to be related to the same purposes is not

Court: Michigan Supreme Court, order in lieu of granting leave to appeal: 474 Mich. 1017; 708 N.W.2d 378; 2006 Mich., January 27, 2006

Case Name: *Village of Lincoln v. Viking Energy of Lincoln, Inc.*

Case court case involves a energy generating facility which proposed to burn solid waste and old tires. Local zoning included a 1,000 foot setback for the facility as well as other requirements, such as regulations concerning storage of fuel (including solid waste and tires). The storage of fuel regulations and 1,000 foot setback were upheld in the Michigan Court of Appeals decision concerning this case. It is the burden of the individual challenging a zoning ordinance to show the regulation is not related to public health, safety, or welfare. The energy company did not show such evidence, thus the appeals court ruled sections 3, 4, and 5 of the village zoning ordinance 96-2 is constitutional (reversing the trial court's ruling). These issues of the case was not part of the appeal to the Michigan Supreme Court.

The Alcona Circuit Court (LC No. 00-010619-CE) ruled that section six of the zoning ordinance violates the energy company's right to substantive due process. The appeals court upheld this ruling:

> "Plaintiff's [Village of Lincoln] argument that section six is rationally related to the government interest in protecting citizens from dust and odors is unpersuasive. Defendant [Viking Energy of Lincoln, Inc.] presented unrefuted evidence that burning more tire derived fuel (TDF) *decreases* the total amount of solid waste fuel used by defendant's facility by 69.8 tons per day and 24,885 tons per year. Defendant also showed that increasing TDF reduces the amount of particle board and pentachlorophenol-treated wood burned in defendant's facility, without increasing emissions over permissible levels. Furthermore, defendant presented evidence from the MDEQ [Michigan Department of Environmental Quality] indicating that burning TDF significantly *decreases* 'the vast majority of emissions, including particulate and most heavy metals' and *reduces* the emission of fine particulate matter by thirty tons per year. Therefore, we conclude that, as applied to this defendant, section six of plaintiff's ordinance is not reasonably related to a legitimate government interest because it restricts the burning of alternative fuels to levels that require burning a *larger* total amount of solid waste and producing *more* emissions, without any showing by plaintiff that the levels prescribed by section six are in some way related to the public welfare.
>
> "For these reasons, we agree with the trial court that, because of the unique circumstances regarding the amount and content of what this defendant was burning, defendant successfully rebutted the presumed reasonableness of section six.
>
> . . . . "MCL 324.5542 [Natural Resources and Environmental Protection Act (NREPA)] expressly disclaims preemption of any local air pollution control ordinance "having requirements equal to or greater than the minimum applicable requirements of this part." While the NREPA may not preempt plaintiff's ordinance, it does not prove its reasonableness either, particularly where the ordinance does not purport to regulate pollution, but only the type and amount of material burned. Thus, the trial court did not err in holding that section six violates defendant's substantive due process rights.
>
> . . . . "Next, plaintiff claims the trial court erred in holding that public policy did not bar a challenge to plaintiff's enactment of the zoning ordinance. We agree. In *Jackson v Thompson-*

McCully Co, LLC, 239 Mich App 482; 608 NW2d 531 (2000), this Court dismissed a challenge to the procedures used to enact a zoning ordinance brought nearly ten years after enactment of the ordinance, stating, 'Where a zoning ordinance is not challenged until several years after its enactment, a challenge on the ground that the ordinance was improperly enacted is precluded on public policy grounds.' *Id*. at 493, citing *Richmond Twp v Erbes*, 195 Mich App 210, 217; 489 NW2d 504 (1992), overruled on other grounds, *Bechtold v Morris*, 443 Mich 105, 108-109; 503 NW2d 654 (1993); *Northville Area Non-Profit Housing Corp, supra* at 434-435."[8]

In lieu of granting leave to appeal, the Supreme Court VACATED that portion of the judgment of the Court of Appeals that addressed the claim that the trial court erred in holding that public policy did not bar a challenge to plaintiff's enactment of the zoning ordinance (MCR 7.302(G)(1)). Because the Court of Appeals affirmed the trial court's ruling that section 6 of zoning ordinance 96-2 was unconstitutional as applied to defendant under the circumstances, the ostensible public policy bar to the challenge was rendered moot, and the discussion of it by the Court of Appeals was dicta.

The Michigan Court of Appeals has previously held that a lapse of four years after the enactment of a zoning ordinance bars a procedural challenge to a zoning ordinance. The Supreme Court added "However, this public policy [that one cannot challenge a zoning ordinance that has been enacted for four or more years] applies only to challenges based on *procedural irregularities* in the enactment of the ordinance; it does not bar defendant's *constitutional* challenges to plaintiff's ordinance."

Supreme Court Justice Corrigan concurred in the court's order to vacate the specified portion of the Court of Appeals judgment, but wrote separately to note she questioned the Court of Appeals' conclusion in *Jackson* and to state in an appropriate case, the court "should squarely review the continuing validity of the so-called 'public policy' doctrine." Citing *Castle*, she added even after the passage of many years, a challenge alleging a zoning ordinance was improperly enacted may proceed.

(Source: State Bar of Michigan *e-Journal* Number 30414, February 7, 2006; State Bar of Michigan *e-Journal* Number 24305, August 30, 2004; and the respective court opinions.)

Full Text Supreme Court Order:
http://www.michbar.org/opinions/supreme/2006/012706/30414.pdf

Full Text of appeals court Opinion:
http://www.michbar.org/opinions/appeals/2004/082404/24305.pdf)

Townships can grant use variances
(Until July 1, 2006, then new statute controls)

Court: Michigan Court of Appeals (Published No. 256517, ___ Mich. App. ___; ___ N.W.2d ___; 2006 Mich. App., March 9, 2006)

Case Name: *Grabow v. Macomb Twp*.

[NOTE: Adoption Michigan Zoning Enabling Act (M.C.L. 125.3101 *et seq.*), effective July 1, 2006, makes this court case's finding on use variance moot.[9]]

Holding the plaintiff-Mark Grabow had a clear legal right to file an application for the use variance, the Macomb defendant-Township Zoning Board of Appeals (ZBA) had a clear legal duty to hear and decide the application, and the clerk's duties were ministerial and it was not acting within its duties when it rejected plaintiffs' application for a use variance, the court reversed and remanded the trial court's decision denying plaintiffs' motion for mandamus to compel defendant's clerk to submit their application for a use variance to the defendant's zoning board of appeals.

[8] *Village of Lincoln v. Viking Energy of Lincoln, Inc.* Michigan Court of Appeals Unpublished No. 246319; http://www.michbar.org/opinions/appeals/2004/082404/24305.pdf . Brackets added for clarity.

[9] Adoption of HB 4398, now Public Act 110 of 2006, as amended, (Michigan Zoning Enabling Act, M.C.L. 125.3101 *et seq.*) (effective July 1, 2006) makes this court case's finding on use variance moot. The new state law supercedes the ruling in this court case. The authority to grant use variances are now limited to:

1. cities and villages;
2. townships and counties that, as of February 15, 2006, had a zoning ordinance provision that expressly authorized granting use variances (e.g., uses the phrase "use variance" or "variances from uses of land"); or
3. townships and counties that actually granted a use variance(s) before February 15, 2006.

Any local unit of government (including cities and villages) may choose to not issue use variances. If a government is going to issue use variances it must follow the new notification procedures required in P.A. 110 of 2006 and there shall be a concurring vote of **b** of the members of the appeals board. The zoning ordinance shall specify if, and when use variances can be granted (§604(7), M.C.L. 125.3604(7)). (§604(8)-604(9), M.C.L. 125.3604(8)-125.3604(9)).

Plaintiffs own adjacent properties zoned for agricultural use. Mark Grabow operates a limousine service from his property and a pole barn located on his mother's adjacent property. The defendant-township's clerk returned Mark Grabow's application for a use variance because the township attorney's opinion what that a township could not issue a use variance.

Plaintiffs sued seeking, *inter alia*, a writ of *mandamus* to compel defendant's ZBA to accept Mark Grabow's application. The trial court denied plaintiffs' request to rezone the property to commercial, but rezoned the property to residential use. The trial court denied plaintiffs' motion for the township to show cause why a writ of *mandamus* should not be granted to compel the ZBA to accept and decide Mark Grabow's application for a use variance. The court held the trial court abused its discretion in not granting plaintiffs' motion for a writ of *mandamus* **because state law and the township ordinance authorize use variances**, (citing statute which reads the ZBA "shall hear and decide questions that arise in the administration of the zoning ordinance" (M.C.L. 125.290 and also made reference to M.C.L. 125.290(1) and M.C.L. 125.290(2) [these statutes are repealed as of July 1, 2006]) and township clerk had a clear legal duty to accept and submit to defendant's zoning board of appeals Mark Grabow's application. Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number 30841, March 13, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/030906/30841.pdf

Signs: Billboards, Freedom of Speech

Adult Entertainment in accordance with the First and Fourteenth Amendments

Court: U.S. Court of Appeals Sixth Circuit (411 F.3d 777; 2005 U.S. App.; 2005 FED App. 0270P (6th Cir.), June 21, 2005)

Case Name: *Déjà Vu of Cincinnati, L.L.C. v. The Union Twp. Bd. of Trs.*

(An appeal to the U.S. Supreme Court was denied.)

After granting rehearing *en banc* to reconsider whether the defendant-township's resolution regulating the licensing of cabaret-style nightclubs featuring adult entertainment violated the First and Fourteenth Amendments, the court held the resolution provided for prompt judicial review and in providing for temporary permits to be issued to allow businesses to continue to operate while appeals from adverse licensing decisions are pending, the resolution effectively preserved the status quo. Further, the resolution's hours-of-operation provision, permitting plaintiff to be open for 12 hours a day, 6 days a week passed constitutional muster. Plaintiff's nightclub featuring performances by clothed, semi-nude, and nude dancers, began operations in the township. The township then enacted a resolution to regulate such businesses. Plaintiff alleged in its complaint various provisions of the resolution were unconstitutional and requested a preliminary injunction. The district court enjoined the defendant from enforcing sections of the resolution pertaining to warrantless health and safety inspections of the premises, and the disclosure of personal information concerning all partners and shareholders of the business. The defendant amended the resolution eliminating those provisions the district court held were likely unconstitutional, and modified the personal-disclosure and civil-disability provision in the former resolution. The court affirmed the district court's decision to deny in part the preliminary injunction, expressed no opinion on the district court's decision to grant in part the preliminary injunction in light of the township's subsequent modification of the resolution, and remanded the case. (Source: State Bar of Michigan *e-Journal* Number: 27745.)

Full Text Opinion:

http://www.michbar.org/opinions/us_appeals/2005/062105/27745.pdf

Adult Entertainment regulation as unconstitutional prior restraint of protected expression

Court: U.S. Court of Appeals Sixth Circuit (421 F.3d 386; 2005 U.S. App., August 26, 2005)

Case Name: *Odle v. Decatur County, Tenn.*

The court held while the Tennessee Adult-Oriented Establishment Registration Act did not constitute an unconstitutional prior restraint on protected expression where it provided on its face for prompt judicial review of an adverse decision and the status quo was adequately maintained by the Act's 120-day grace period, the county ordinance related to the Act was unconstitutionally overbroad. The ordinance made no attempt to regulate only

those expressive activities associated with harmful secondary effects and included no limiting provisions. Rather, it swept within its ambit expressive conduct not generally associated with the kinds of harmful secondary effects it was designed to prevent. Thus, the ordinance reached a substantial number of impermissible applications. Plaintiff operated a business where nude and semi-nude dancing was presented for entertainment and beer was sold. It was located in a rural area of the defendant-county. The other plaintiffs were dancers employed by the business. Plaintiff never obtained the license required by the Act. The court noted the county ordinance defined "public place" so broadly it was effectively all-encompassing, exempting only places where performances needing the protection of the First Amendment do not often occur. The court affirmed the district court's grant of summary judgment to defendants on the prior restraint claim, reversed the grant of summary judgment to them on the overbreadth claim, and remanded for entry of a judgment for plaintiffs on the overbreadth claim and an injunction permanently enjoining enforcement of the ordinance. (Source: State Bar of Michigan *e-Journal* Number: 28521.)

Full Text Opinion:

http://www.michbar.org/opinions/us_appeals/2005/082605/28521.pdf

The definition of public place, which was found to be too broad reads:

> [A]ny location frequented by the public, or where the public is present or likely to be present, or where a person may reasonably be expected to be observed by members of the public. "Public places" includes, but is not limited to, streets, sidewalks, parks, business and commercial establishments (whether for profit or not-for-profit and whether open to the public at large or where entrance is limited by a cover charge or membership requirement and/or both), bottle clubs, hotels, motels, restaurants, night clubs, country clubs, cabarets and meeting facilities utilized by any religious, social, fraternal or similar organizations. Premises used solely as a private residence, whether permanent or temporary in nature are not deemed to be a public place. "Public places" does not include enclosed single sex public restrooms, enclosed single sex functional showers, locker and/or dressing room facilities, enclosed motel rooms and hotel rooms designed and intended for sleeping accommodations, doctors' offices, portions of hospitals and similar places in which nudity or exposure is necessarily or customarily expected outside of the home and the sphere of privacy constitutionally protected therein; nor does it include a person appearing in a state of nudity in a modeling class operated by a proprietary school, licensed by the state of Tennessee, a college, junior college, or university supported entirely or partly by taxation, or a private college or university where such private college or university maintains and operates educational programs in which credits are transferable to a college, junior college, or university supported entirely or partly by taxation or an accredited private college. "Public place" does not include a private facility which has been formed as a family-oriented clothing optional facility, properly licensed by the state.

Ordinance that does not regulate lighting, size, nor spacing of billboards is not preempted by Michigan Highways Advertising Act

Court: Michigan Court of Appeals (268 Mich. App. 500; 708 N.W.2d 737; 2005 Mich. App., October 27, 2005)

Case Name: *Township of Homer v. Billboards By Johnson, Inc.*

Holding the ordinances at issue, prohibiting cross-reader signs and new off-premises billboards, fell outside the scope of the intended preemption of the Michigan Highways Advertising Act (MHAA) (MCL 252.301 *et seq.*) and did not conflict with the MHAA's regulatory scheme, the court affirmed the trial court's ruling the MHAA did not preempt the ordinance. The plaintiff-township sought an injunction requiring removal of the second face defendant added to an existing billboard and its associated structural components. Plaintiff also challenged defendant's standing to challenge the ordinances. The court concluded neither ordinance facially regulated lighting, size, nor spacing of billboards in adjacent areas. The MHAA's prohibition against ordinances permitting signs "otherwise prohibited" constituted a prohibition against expanding uses. Therefore, it followed the MHAA established minimum requirements a township cannot fall below, but a township is free to exceed. The township could enact ordinances more restrictive than required by the MHAA. Consequently, the ordinances at issue were both outside the scope of the MHAA's regulatory scheme and would in any event be allowed under an explicit exception. Further, plaintiff's ban on new billboards was not a total ban and thus, was permissible. The trial court's finding defendant had standing to challenge the cross-reader ban was reversed, but its finding defendant had standing to challenge the revised ordinance was affirmed. Remanded for further proceedings. (Source: State Bar of Michigan *e-Journal* Number: 29220, Monday October 31, 2005)

Full Text Opinion:

http://www.michbar.org/opinions/appeals/2005/102705/29220.pdf

Political sign regulation

Michigan Attorney General Opinion No. 7185, Date: 01/13/2006 (Requested by Honorable Wayne Kuipers State Senator)

Headnote: Authority of municipalities to regulate placement of political signs on private property.

The first question was whether local governments may require a permit and impose a fee for the placement of political signs on private property.

Attorney General Mike Cox's opinion is that municipalities may not, consistent with the First Amendment to the federal constitution, impose a permit and fee requirement with respect to political signs posted on private property.

The second question requested clarification regarding size limitations that may be applied to political signs.

Attorney General Mike Cox's opinion is that a municipality may impose reasonable size restrictions with respect to all signs, including political signs, on private, residential property provided that the regulation preserves the effective exercise of First Amendment rights. (Source: State of Michigan, Department of Attorney General.)

Full Text Opinion:

http://www.ag.state.mi.us/opinion/datafiles/2000s/op10261.htm

County cannot regulate size, lighting, and spacing of signs in adjacent area to highway

County can regulate signs outside adjacent area of a highway

County can regulate signs in adjacent area to highway that is not about size, lighting, and spacing.

Michigan Attorney General Opinion No. 7188, Date: 02/17/2006 (Requested by Honorable Tim Moore State Representative)

The Highway Advertising Act preempts counties from regulating the size, lighting, and spacing of signs and sign structures that are located within an "adjacent area" as defined by MCL 252.302(*o*). Within the limitations of the County Zoning Act, a county may otherwise regulate signs and sign structures. Other points made in the opinion include:

- A county has only those powers that have been granted to it by the Constitution or the state Legislature. *Alan v Wayne County,* 388 Mich 210, 245; 200 NW2d 628 (1972).[10]
- A county's statutorily granted authority should be liberally construed in its favor and includes those powers "fairly implied and not prohibited by the constitution." Const 1963, art 7, § 34. *Saginaw County v John Sexton Corp,* 232 Mich App 202, 221; 591 NW2d 52 (1998).
- Section 1(1) of the County Zoning Act, MCL 125.201(1), provides limited authorization to a county board of commissioners to adopt zoning ordinances.
- Zoning regulations adopted by a county board of commissioners "designating or limiting the location, size of, and the specific uses for which a . . . structure may be erected or altered" may extend to signs, subject to the limitations expressed in M.C.L. 125.201(1) and MCL 125.239 and so long as that power is not otherwise limited.
- The Highway Advertising Act of 1972 (M.C.L. 252.301 *et seq*,) Section 4 (M.C.L. 252.304) preempts local regulation of the size, lighting, and spacing of signs and their structures, in adjacent areas, except that a city, village, township, or charter township may adopt identical or more restrictive regulations.
- The Highway Advertising Act of 1972 does not extend that exception to counties. Section 25 of the Act recognizes that fact, providing that a study should be conducted to determine whether counties should be given the authority to regulate outdoor advertising in adjacent areas.
- As long as signs in question are not within an "adjacent area" of a state highway, Highway Advertising Act does not preempt the authority of a county – or any other local unit of government – to regulate them.
- As long as the county regulation does not address the "size, lighting, and spacing of signs and sign structures," within the adjacent area of a state highway regulation by a county is not preempted. *Homer Twp v Billboards by Johnson, Inc*, 268 Mich. App. 500; 708 N.W.2d

[10] See OAG, 2001-2002, No 7117, pp 115, 116 (September 11, 2002), for examples of powers that counties lack because of the absence of affirmative authority.

737; 2005 Mich. App., October 27, 2005[11].

(Source: State of Michigan, Department of Attorney General.)

Full text Opinion:

http://www.ag.state.mi.us/opinion/datafiles/2000s/op10264.htm

Immunity

Building inspector does not owe duty of care in common law negligence

Court: Michigan Court of Appeals (269 Mich. App. 619; 2006 Mich. App., February 7, 2006)

Case Name: *Rakowski v. Sarb*

Deciding an issue of first impression, the court applied the factors historically used to determine whether a common law duty existed. The court concluded the defendant (a municipal building inspector) did not owe the plaintiff a duty. Since plaintiff failed to establish the building inspector owed her a duty, the trial court should have granted him summary disposition. Plaintiff was injured when the railing gave way on a handicap ramp at her parents' home. The record indicated plaintiff's father applied for a building permit for the ramp from the city and the city issued a permit. The father hired Cytacki to build the ramp. However, before completing the handrail, Cytacki was fired or left the job. Cytacki claimed he told someone at the house the railing was incomplete and was told someone else would finish it. The inspector conducted a visual final inspection of the ramp about six months later and wrote, "okay" on the form. Visual inspections are to determine whether structures meet local building code requirements. Plaintiff alleged the inspector negligently conducted the inspection of the ramp, or was grossly negligent in doing so. The court held a municipal building inspector does not owe a duty of care in common law negligence to protect a homeowner's invitee from personal injury sustained by the invitee because of an allegedly defective structure inspected and approved by the building inspector. Neither state statute nor the building code adopted by the city imposes such a duty on a building inspector. Reasonable minds could not differ regarding whether the inspector was a qualified governmental actor under Michigan's governmental immunity statute, whether his conduct amounted to gross negligence, or whether his conduct was the proximate cause of the plaintiff's injuries. The trial court's denial of the inspector's motion for summary disposition was reversed. (Source: State Bar of Michigan *e-Journal* Number: 30440, Thursday February 9, 2006)

Full Text Opinion:

http://www.michbar.org/opinions/appeals/2006/020706/30440.pdf

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

Public right to walk along shores of the Great Lakes

Court: Michigan Supreme Court (473 Mich. 667; 703 N.W.2d 1; 2005 Mich., July 29, 2005)

Case Name: *Joan M. Glass, v. Richard A. Goeckel and Kathleen D. Goeckel*

(Note: A motion for rehearing of this case was denied by the Michigan Supreme Court.)

Plaintiff, as a member of the public, may walk the shores of the Great Lakes below the ordinary high water mark. Under longstanding common law principles, defendants-property owners hold private title to their littoral property according to the terms of their deed and subject to the public trust. Despite the competing legal theory offered by Justice Markman, the court unanimously agreed the plaintiff does not interfere with defendants' property rights when she walks within the area of the public trust. The dispute was the scope of the area within the public trust. The defendants claimed their property went to the water's edge and plaintiff trespassed on their private land when she walked the shoreline. The court held defendants could not prevent plaintiff from enjoying the rights preserved by the "public trust" doctrine. Because walking along the lakeshore is inherent in the exercise of a traditionally protected public rights of fishing, hunting, and navigation, our public trust doctrine permits pedestrian use of our Great Lakes, up to and including the land below the ordinary high water mark. Therefore, plaintiff, like any member of the public, enjoys the right to walk along the shore of Lake

[11] In so ruling, the Court in *Homer Twp* followed *Central Advertising Co v St. Joseph Twp*, 125 Mich App 548, 552; 337 NW2d 15 (1983): "[P]re-emption extends only to the area of regulation, which is, size, lighting and spacing in adjacent areas. . . . [T]he Highway Advertising Act does not pre-empt local governments from regulating areas unrelated to the spacing, lighting and size of signs in adjacent areas." Accord, *Oshtemo Charter Twp v Central Advertising Co*, 125 Mich App 538, 542; 336 NW2d 823 (1983).

Huron on land lakeward of the ordinary high water mark. The court reversed the judgment of the Court of Appeals and remanded the case to the trial court.

Justice Young, Jr. believed Justice Markman's opinion was more firmly anchored than that of the majority in the admittedly obscure property law of the Great Lakes. He concurred with the majority that The Great Lakes Submerged Lands Act (GLALA)/now part of the Natural Resources and Environmental Protection Act (MCL 324.101 *et seq*.) does not create a right to walk the shores of the Great Lakes, but joined Justice Markman's opinion regarding the other issues presented by the appeal. The justice would hold a pedestrian walking along the shoreline may only walk in the wet area where the lake is presently ebbing and flowing. Justice Young, Jr. concurred in part II (A) of the majority opinion, but joined parts I-III and V of Justice Markman's dissent.

Justice Markman disagreed with the majority's conclusion the "public trust" doctrine permits members of the public to use unsubmerged lakefront property up to the "ordinary high water mark," and would not alter the longstanding status quo in the state concerning the competing rights of the public and lakefront property owners. The result of the majority opinion will be to lead to an escalation in the number of disputes between members of the public and property owners along the Great Lakes. (Source: State Bar of Michigan *e-Journal*.)

Full Text Opinion:
http://www.michbar.org/opinions/supreme/2005/072905/28199.pdf (119 pages long)

Nestlé Waters groundwater removal

Court: Michigan Court of Appeals (269 Mich. App. 25; 709 N.W.2d 174; 2005 Mich. App., November 29, 2005)
Case Name: *Michigan Citizens for Water Conservation v. Nestlé Waters N. Am. Inc.*

While the trial court improperly applied the wrong law to plaintiffs' groundwater claim, it correctly determined defendant's water withdrawal from the Sanctuary Springs (at a combined maximum permitted pump rate of 400 gallons per minute-gpm) violated plaintiffs' riparian rights in the Dead Stream. The court affirmed the trial court's holding to that effect. However, the court remanded the issue to determine what level of water extraction from Sanctuary Springs will provide defendant with a fair participation in the common water supply while maintaining an adequate supply for plaintiffs' water uses. After making its determination, the trial court shall modify its original injunction. The trial court improperly relied on defendant's alleged violation of The Inland Lakes and Streams Act (ILSA) and The Wetlands Protection Act (WPA) to establish a *prima facie* violation of The Michigan Environmental Protection Act (MEPA) (MCL 324.1701 *et seq*.). The court also remanded on this issue. The trial court did not err in concluding the Dead Stream was not subject to the public trust doctrine and in dismissing plaintiffs' claim on the issue. The trial court abused its discretion in awarding expert costs to plaintiffs, which were not authorized by court rule or statute. However, since plaintiffs were still a prevailing party, the award of costs was appropriate. The court reversed the award of costs to plaintiffs and remanded for recalculation of costs. Finally, the prior stay issued by the court shall remain in force unless modified by the trial court. The stay shall be modified to permit defendant to pump not more than a weekly average of 200 gpm. Affirmed in part, reversed in part, and remanded. (Source: State Bar of Michigan *e-Journal* 29597; Thursday, December 1, 2005)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2005/112905/29597.pdf

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

Solid Waste Management Plan impact fee

Court: U.S. District Court Western District of Michigan (386 F. Supp. 2d 938; 2005 U.S. Dist., September 8, 2005)
Case Name: *Pitsch Recycling & Disposal, Inc. v. County of Ionia*

Since plaintiffs failed to allege the defendant's Impact Fee Resolution or any other relevant state law precluded a breach of contract action in state court, it failed to state a claim under the Contracts Clause implicating the federal question jurisdiction of the court. Plaintiffs sought a declaration defendant's amendment to its Solid Waste Management Plan increasing the impact fee on solid waste violated the Contract Clauses of the federal and state constitutions. In 1998 the parties entered into a contract in which plaintiffs agreed to pay an impact fee of $0.60 per

ton on all solid waste disposed of in its land fill. The agreement term was 15 years, but could be amended at any time. In June 2004, the defendant raised its fee to $1 per ton. The distinction between an unconstitutional impairment of a contract and a breach of contract is whether the non-breaching party has an available remedy. Plaintiff argued the increased fee impaired the 1998 contract because it both breached the contract and provided the defendant with a complete defense to a breach of contract suit where it would be unable to recover damages in a breach of contract suit because defendant could assert its authority under the Solid Waste Management Act (SWMA) (MCL 324.11501 *et seq.*) as an affirmative defense. The court disagreed. Although Michigan authorized counties to assess impact fees on solid waste via the SWMA, plaintiff did not show this authorization included an ability to avoid contractual obligations entered into prior to the adoption of a new impact fee. The SWMA does not preclude plaintiff from obtaining a remedy for the potential breach. Plaintiff clearly has an available remedy. The court granted defendant's motion for lack of subject matter jurisdiction. (Source: State Bar of Michigan *e-Journal*.)

Full Text Opinion:
http://www.michbar.org/opinions/district/2005/090805/28627.pdf

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Other Published Cases

Highway by user

Court: Michigan Court of Appeals (268 Mich. App. 287; 706 N.W.2d 897; 2005 Mich. App. July 19, 2006 (Published After Release No. 255955: unpublished July 19, 2005; Approved for publication September 27, 2005 9:10 a.m.))

Case Name: *Villadsen v. Mason County Drain Comm'n*

The trial court did not err in ruling the one-mile portion of the disputed road at issue was a public road under the highway by user statute. Four elements are required to establish a public highway pursuant to the statute—(1) a defined line, (2) the road was used and worked on by public authorities, (3) public travel and use for 10 consecutive years without interruption, and (4) open, notorious, and exclusive public use. While plaintiffs contended the existence of two wet areas on the disputed portion of the road precluded a finding there was a defined line, the trial court did not clearly err in finding a defined line existed here. Further, the roadway followed a "definite or established route" despite the detours. Regarding the second element, the trial court also did not err in considering work performed by defendants on portions of the road outside of the disputed portion, and the court held the disputed portion was reasonably passable. The record also supported the trial court's finding the last two elements were also present. In light of the character of the road and the circumstances of the surrounding population, there was sufficient public use of the disputed roadway to satisfy the public use element. The court rejected plaintiffs' argument the existence of "road closed," "dead end," and "no outlet" signs negated this element. Affirmed. . (Source: State Bar of Michigan *e-Journal* Number: 28815, September 29, 2005.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2005/092705/28815.pdf

Unpublished Cases

(Generally unpublished means there was not any new case law established, but presented here as reminders of some legal principles. Unpublished opinions are not precedentially binding under the rules of *stare decisis*. They are included here because they state current law well, or as a reminder of what current law is.)

Restrictions on Zoning Authority

City's building maintenance code not expressly preempted by the Construction Act

Court: Michigan Court of Appeals (Unpublished[12] No. 260438, September 22, 2005.)

Case Name: *Azzar v. City of Grand Rapids*

After considering the Llewellyn guidelines, the court concluded the Construction Act, as amended by 1999 PA 245, was not intended to occupy the field of property maintenance to the exclusion of any local regulation. Rather, the Legislature addressed which construction regulations were repealed and rendered invalid in MCL 125.1524, a provision left unchanged by 1999 PA 245. The court limited its review to the specific argument raised by plaintiffs regarding the validity of the building maintenance code (BMC) in its entirety, and found no basis for disturbing the trial court's decision denying plaintiffs' motion for partial summary disposition or entry of the stipulated judgment in favor of the defendant-city. The court concluded plaintiffs did not establish the BMC, as enacted in 1987, was expressly preempted by the Stille-DeRossett-Hale Single State Construction Code (formerly the State Construction Code Act) and rejected plaintiffs' claim MCL §§ 1504 and 1508 expressly preempted or prohibited defendant from enacting property maintenance ordinances. Affirmed. (Source: State Bar of Michigan *e-Journal* Wednesday, September 28, 2005, Number: 28794.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2005/092205/28794.pdf

See also: *Township of Homer v. Billboards By Johnson, Inc.* on page 20

See also "Michigan Attorney General Opinion No. 7185, Date: 01/13/2006" on page 20.

See also "Michigan Attorney General Opinion No. 7188, Date: 02/17/2006" on page 20.

Takings

Takings concerning gravel pit & "very serious consequences" test

Court: Michigan Court of Appeals (Unpublished No. 250946, May 5, 2005)

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

The trial court improperly applied a deferential standard to the township board's decision to deny the planned unit development (PUD), because plaintiffs were no longer appealing the board's denial but rather were seeking compensation for the board's regulatory taking and violation of their constitutional rights. Plaintiffs were speculators who purchased a parcel of property with an eye toward mining out its construction-grade sand. The planning commission recommended denying the PUD application, and the township board denied it. As in *Arthur*,[13] the case was a constitutional challenge to the township board's legislative action in failing to rezone a parcel of property. Such actions must receive *de novo* review when challenged in court. Plaintiffs asserted the mining of sand would not create "very serious consequences" under the test in *Silva*,[14] so the township's refusal to rezone the property and allow the mining operation to go forward was unreasonable. Under *Silva*, such an unreasonable zoning restriction violates the property owner's substantive due process rights. The trial court granted the township board

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

[13]*Arthur Land Co, LLC v Otsego Co*, 249 Mich App 650, 661-662; 645 NW2d 50 (2002).

[14]*Silva vAda Twp*, 416 Mich 153, 157-158; 330 NW2d 663 (1982).

substantial deference when it reviewed whether plaintiffs proved no "very serious consequences" would result from the mine. Because plaintiffs' strongest substantive due process claims hinged on this question, the trial court erred when it reviewed the claims as an appellate court rather than a court of first instance. The court held it was impossible to tell how much the trial court's deference to the township board tainted its factual findings. The trial court's finding of no cause of action on plaintiffs' taking claim and other constitutional claims was vacated in part and remanded for *de novo* review of plaintiffs' substantive due process claims based on the full trial record. (Source: State Bar of Michigan *e-Journal* Number: 27218.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2005/050505/27218.pdf

Road width regulation is legitimate; Road frontage requirements

Court: Michigan Court of Appeals (Unpublished, No. 256482, January 17, 2006)

Case Name: *Rathka v. City of Troy*

The trial court properly granted summary disposition to defendant-city and dismissed plaintiff's claim the city's zoning ordinance, as applied, effected an unconstitutional taking of his property. The city's zoning ordinance required residential dwellings be built only on public streets that have been accepted for maintenance by the city. Although plaintiff's southern parcel fronted Canham Street, the city had not accepted Canham for maintenance because it was not wide enough to provide adequate drainage, whether by open ditches or storm sewers. Plaintiff alleged both types of regulatory taking – the city's ordinance did not substantially advance a legitimate government interest, and the regulation deprived him of economically viable use of his land. Contrary to plaintiff's first argument, the Michigan Supreme Court has held a regulation requiring roads to be of a certain width substantially advances a legitimate government interest in ensuring emergency equipment has adequate access to residential dwellings. Here, apart from ensuring access for emergency equipment, the city additionally showed its ordinance was intended to ensure streets have adequate drainage. Concerning the second type of taking, plaintiff focused his analysis on the landlocked southern parcel. However, the Michigan Supreme Court has clearly held where a regulatory taking is alleged, the "nonsegmentation" principle applies. Plaintiff failed to show the city's ordinance effected a categorical taking. While plaintiff showed his southern parcel was unusable as zoned, the conclusion was inescapable he brought the problem on himself. Using the balancing test, plaintiff failed to create a question of material fact concerning whether the city's ordinance requiring frontage on a public street, as applied, effected an unconstitutional taking of his property without just compensation. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 30195, January 24, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/011706/30195.pdf

Not providing public funding for development is not a taking.

Court: Michigan Court of Appeals (Unpublished, No. 264903, February 16, 2006)

Case Name: *Hazel Park Dev., LLC v. City of Hazel Park*

Since the state of plaintiff's property was the same before defendant's decision not to provide public funding for plaintiff's development project as it was after, defendant's actions did not cause plaintiff to sacrifice any economically beneficial use it already had. Plaintiff contended the defendant's refusal to provide public funding for its development precluded any economically viable use of the property. In this type of regulatory taking, a property owner may recover if a regulation forces an owner to "sacrifice all economical beneficial uses [of his land] in the name of the common good…." Assuming it is true the property has no economically viable use, the evidence clearly demonstrated defendant's actions did not cause any change in the economic use of plaintiff's property. Further, defendant's actions did not preclude plaintiff's development of the property because defendant only precluded plaintiff from developing the property with public funds. Thus, the trial court did not err in dismissing this claim. The trial court also did not err in dismissing plaintiff's equal protection claim. The evidence clearly demonstrated defendant had a rational cost-effective basis for declining to provide $1 million in tax increment financing to plaintiff's private development project. Defendant's enforcement of its weed control ordinance and code requirements also had a rational basis in preventing weed overgrowth and protecting the public from unsafe structures. Summary disposition for defendant was affirmed. (Source: State Bar of Michigan *e-Journal* Number: 30600, February 24, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/021606/30600.pdf

Sand Dune Protection and Management Act denying all economic use of land is a taking

Court: Michigan Court of Appeals (Unpublished No. 257941, April 18, 2006)

Case Name: *Heaphy v. Michigan Department of Environmental Quality*

The trial court properly entered judgment in plaintiffs' (Heaphy) favor in the amount of $1,740,000 after finding the defendant (Michigan Department of Environmental Quality's (MDEQ)) application of the provisions of the Sand Dune Protection and Management Act (M.C.L. 324.35301 *et seq.*) denied plaintiffs all economically beneficial use of the parcels in Ottawa County and constituted a compensable regulatory taking. Plaintiffs filed an application for a special exception permit, which the MDEQ denied on the basis the proposed building site violated several provisions of the Sand Dune Act. Plaintiffs appealed the decision before an MDEQ hearing referee, who affirmed the MDEQ's decision to deny plaintiffs a special exception permit. Plaintiffs then appealed to the trial court, and sought damages for a regulatory taking in the Court of Claims. The trial court was assigned to sit as the Court of Claims. MDEQ argued the trial court improperly considered plaintiffs' regulatory takings claim before the MDEQ made a final decision regarding whether other possible building locations existed on any of plaintiffs' property. However, the court concluded the MDEQ reached a final decision in the matter. Further, when the MDEQ hearing referee reviewed the department's decision to deny the application for a special exception, he noted the opinion and order constituted the final agency decision of the MDEQ. As the ruling of the referee was the department's final, definitive decision regarding the question whether the special exception application should have been denied, the trial court had proper jurisdiction over the case. The court further held the trial court did not clearly err in finding the value of the three parcels was $11,600 per front foot, or $1,740,000 total. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 31427, April 26, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/041806/31427.pdf

Power of Eminent Domain

City selling a parking lot with prescriptive easement to another is not a taking.

Court: Michigan Court of Appeals (Unpublished, No. 263765, February 21, 2006)

Case Name: *Olive Branch Masonic Temple Ass'n v. City of Dearborn*

Since M.C.L. 600.5821(2) barred plaintiff's claim of an easement by prescription, the trial court properly granted the defendant-City summary disposition. Plaintiff claimed it acquired a prescriptive easement over a parking lot owned by the City. The record reflected on June 4, 1975, the City bought the parking lot for $75,000 from Penn Central Transportation Company. Plaintiff bought its nearby building from the Odd Fellows in 1984. Though plaintiff claimed to have used the parking lot for many years, the City recently rezoned the lot for a condominium development and agreed to sell the property to a developer. Plaintiff filed suit seeking to prevent the City from selling the parking lot and asserted, *inter alia*, the rezoning of the lot would amount to an unconstitutional taking and a violation of the public trust. According to M.C.L. 600.5821(1), a party may not assert an adverse possession claim against the state because the state is not subject to the period of limitations, and is not required to take action within 15 years to prevent the party taking title by adverse possession under M.C.L. 600.5801(4). Section M.C.L. 600.5812(2) provides a similar rule for municipal corporations. Further, Michigan law, in one form or another, has exempted municipalities from adverse possession claims since 1907. The trial court properly granted the City summary disposition. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 30638; February 28, 2006)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/022106/30638.pdf

Land Divisions & Condominiums

Land Division Act does not preempt Township Zoning regulation of density

Court: Michigan Court of Appeals (Unpublished No. 260197, May 26, 2005)

Case Name: *Camburn v. Macon Twp.*

Since § 109(6) of the Land Division Act (M.C.L.

560.109(6)) plainly contemplates the resulting parcels in a land division must comply with other ordinances and regulations, and the subject matter of defendant's zoning ordinance,[15] namely, density for particular land uses, was not addressed by the Land Division Act, the court held the defendant-township's zoning ordinance **was not preempted** by the Land Division Act. Plaintiffs own substantial areas of undeveloped land in a zoned agricultural district. Defendant's zoning ordinance permits a limited number of lots for single-family dwellings in an agricultural district. Plaintiffs filed suit challenging the validity of certain regulations in defendant's zoning ordinance, on the ground they conflicted with the Land Division Act and should be held invalid. The trial court held the matter was not ripe for judicial review, and concluded on the merits, the defendant's zoning ordinance was valid. The court agreed because the Land Division Act is not concerned with the particular land use established by a municipality through its zoning powers. Defendant's zoning ordinance linked its density restrictions to the land use, which here involved the number of single-family dwellings permitted in an agricultural district. Unlike statewide regulations, zoning ordinances address the unique residential, commercial, and agricultural needs of each township. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 27537.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2005/052605/27537.pdf

Can split a lot in a subdivision when deed restriction only prohibits more than one dwelling per parcel

Court: Michigan Court of Appeals (Unpublished No. 261823, August 16, 2005)

Case Name: *Doyle Living Trust v. Krupp*

The trial court did not err in granting defendants' motion for summary disposition in this declaratory judgment action to preclude defendants from building a home on a subdivision parcel split from an adjoining parcel. Plaintiff argued defendants should be enjoined from building a second house on what was once a portion of Lot 4. The court held the trial court did not err in holding the deed restriction and did not bar defendants' actions. The deed restrictions permit only one house per lot, but did not contain specific language prohibiting the division of a lot. Plaintiff did not challenge the township's ability to change lot lines or to divide Lot 4 pursuant to M.C.L. 560.263. Therefore, the court found no basis for a conclusion the deed restrictions barred defendants' proposed development. In addition, the court noted plaintiff will not be subject to greater housing density than what was initially proposed due to the fact the existing home lies on two lots. Any intent of the developer to restrict housing density was not frustrated by the township's actions of essentially moving a lot line. Moreover, plaintiff's parcel did not abut the newly created parcel. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 28426.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2005/081605/28426.pdf

Dividing lots in a subdivision is subject to maximum number of divisions allowed by Land Division Act

Court: Michigan Court of Appeals (Unpublished No. 262386 August 16, 2005)

Case Name: *Orion Homes, Inc. v. City of Royal Oak*

The trial court properly denied plaintiff's motion for summary disposition and dismissed the case. Plaintiff bought two adjoining tracts, Lots 44 and 45, in a platted subdivision, sought and received approval from defendant to split the property into a total of five parcels (A-E), and then sought to divide parcel A into two more parcels. Defendant denied this request on the basis such a division would exceed the 4-division per less than 10-acre limitation permitted by M.C.L. 560.108(2)(a). Plaintiff cited *Sotelo v. Grant Twp.*, in which the Supreme Court held a division does not include a property transfer between two or more adjacent parcels. However, contrary to plaintiff's assertion, *Sotelo* does not mandate a conclusion the requested division of parcel A into two more parcels was permissible. The *Sotelo* Court held that under The Land Division Act (LDA) (M.C.L. 560.101 *et seq.*), a parent parcel (i.e., an original parcel, as it existed on March 31, 1997) could be divided into no more than four parcels. Here, Lots 44 and 45 were reconfigured and split into 5 separate parcels. Various provisions of the LDA allow a parcel in a recorded plat to be split into no more than four separate parcels. The property owned by plaintiff had been split to the extent

[15] This opinion was written concerning P.A. 184 of 1943, as amended, (being the Township Zoning Act, M.C.L. 125.271 *et seq.*). This act is repealed July 1, 2006 and replaced by P.A. 110 of 2006, as amended, (being the Michigan Zoning Enabling Act, M.C.L. 125.3101 *et seq.*). The language at issue in both acts is similar, and the opinion may remain valid.

allowed by M.C.L. 560.108(2)(a) and M.C.L. 560.263. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 28428.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2005/081605/28428.pdf

Denial of divisions due to township-requireddriveway permit is proper

Court: Michigan Court of Appeals (Unpublished No. 256797, November 22, 2005)

Case Name: *Hilts v. Sylvan Twp.*

The trial court erred by reversing defendant-township's zoning board of appeals (ZBA) and directing the township to issue plaintiff's land division application. Plaintiff filed a land division application with the township, seeking to divide a 22.92-acre parcel into 2 equally sized parcels for distribution to 2 trust beneficiaries. The resulting parcels would both front an adjacent county road, but neither parcel would comply with the sight distance standards for new driveway locations set by the county road commission, which denied driveway permits for the two parcels. Since plaintiff could not obtain driveway permits for the two proposed parcels, the township denied the land division application for failure to comply with § 2(C) of its ordinance adopted pursuant to the The Land Division Act (M.C.L. 560.101 *et seq.*). Because the trial court failed to recognize the coexistent requirements for accessibility contained in the township's land division ordinance as contemplated in The Driveway Act (M.C.L. 247.321 *et seq*.) M.C.L. 247.322, the court vacated the trial court's order and reinstated the ZBA decision. Irrespective of whether plaintiff's proposed parcels would have qualified as strictly accessible in the absence of the township's land division ordinance, plaintiff's failure to comply with the additional requirement of the township's valid driveway ordinance should have been dispositive of the case. The township was entitled to enforce its valid ordinance, and to reject plaintiff's noncompliant application. Reversed. (Source: State Bar of Michigan *e-Journal* Number: 29558; December 1, 2005)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2005/112205/29558.pdf

Denial to alter a site plan for a condominium project is proper

Court: Michigan Court of Appeals (Unpublished, No. 263693, December 1, 2005)

Case Name: *Woodcliff on the Lake Condo. Ass'n v. Charter Twp. of W. Bloomfield*

The trial court did not err in giving deference to the defendant-township board's final denial of plaintiff's request to amend its condominium's site plan, correctly finding the Township Zoning Act on site plans (MCL 125.286e(3)) granted the board discretion to refuse to agree to an alteration of the original site plan, and did not err in concluding the board's decision was supported by competent, material, and substantial evidence. The removal of the gate would not have been consistent with the original site plan approved by the board since the site plan, including its maps, clearly reflected the existence of a barrier between the roadway sections. The developer emphasized in its 1990 address to the board the sections would stay separate, as the board required for the site plan's original approval. Since removal of the gate ran contrary to the site plan, it required township approval, which necessarily gave the board a measure of discretion. While plaintiff contended the board had no choice but to adopt its proposed amendment because it satisfied the general statutory requirements of M.C.L. 125.286e(5), the court disagreed. For post-construction changes, M.C.L. 125.286e(3) more specifically applied. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 29686; December 9, 2005)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2005/120105/29686.pdf

Can not build second home on a lot with deed restriction prohibiting it.

Court: Michigan Court of Appeals (Unpublished No. 257394, February 9, 2006)

Case Name: *Rachmaninoff v. SVM Dev. Corp.*

Looking solely to the obligations created by the 1957 John Hammond deed, the court held the use of the word "lot" was clear and plaintiffs were not entitled to build a second residence on lot 21 or any combination of lot 21 and the northern half of lot 20. The case involved the validity of deed restrictions for lots 20 and 21 in a residential subdivision in the city of Bloomfield Hills. The 1957 John Hammond deed conveyed lots 19, 20, and 21 to Fulton. The deed included building and use restrictions, but unlike the 1949 Frederick Hammond deed, only permitted one single private residence on lots 20 and 21. In 1967 plaintiffs obtained title to lot 21 and the northern half of lot 20. In 1985 the city approved a lot split of the

property into two parcels. Plaintiffs had a home on the front parcel. Their residential structure was situated on both lot 21 and the northern half of lot 20. In 1986, plaintiffs conveyed the front parcel to defendants-Zambricki, and plaintiffs retained the rear parcel. Plaintiffs filed this action to determine if the deed restrictions for lots 20 and 21 precluded construction of a residence on their back parcel. The trial court granted summary disposition to defendants, concluding the "one single private residence" restriction for lots 20 and 21 in the 1957 John Hammond deed was valid and precluded the construction of a second residence on the parcel. The court agreed, and also held plaintiffs did not demonstrate any ambiguity in the use of the word "lot" in the 1957 John Hammond deed so as to preclude summary disposition in favor of defendants as to whether the construction of a residence on their retained property would violate the "one single private residence" restriction. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 30488; February 16, 2006)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/020906/30488.pdf

Existing driveway that fails clear-sight distance standard can still be used, unless expansion/modification increases magnitude of failing to met a standard

Court: Michigan Court of Appeals (Unpublished No. 258315, April 11, 2006)

Case Name: *Merry v. Livingston County Rd. Comm'n*

The court reversed the trial court's order granting summary disposition on Count II, regarding whether the defendant-road commission had jurisdiction over the shared driveway based on relevant sight-distance requirements and the regulatory requirements of M.C.L. 247.327, because it was premature where there had been no opportunity for discovery and no factual record. The case arose from plaintiffs' application to Tyrone Township for approval to split their 10-acre parcel into two parcels, with the existing driveway serving both parcels. The township conditioned its approval on plaintiffs obtaining a shared driveway permit from defendant Livingston County Road Commission. The Road Commission denied the permit because the hill near the driveway prevented it from meeting its sight-distance requirements. The driveway also fell short of defendant's requirements for a single residence driveway, but plaintiffs were not required to comply because the driveway was exempt where it was built before August 2, 1969. The court agreed with plaintiffs the mere fact of regulatory noncompliance does not itself establish a safety hazard within the meaning of § 327. In order for the driveway to be subject to defendant's jurisdiction under §327, it must also show the safety hazard is caused by the proposed expansion or modification of the use of the land shared by the driveway. Defendant argued the safety hazard will be aggravated because the standard is higher for a shared driveway, thus creating a wider gap between the sight-distance at the driveway and the regulatory standard. Further discovery may lead to information from defendant on matters such as traffic patterns, volumes, or accidents in the county, which could be relevant to determining whether a shared driveway at plaintiffs' location would be a safety hazard. Affirmed in part, reversed in part, and remanded.

(Source: State Bar of Michigan *e-Journal* Number: 31305; April 20, 2006)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/041106/31305.pdf

Due Process and Equal Protection

Preserve rural character, focus development near infrastructure is rational public purpose for zoning regulation (substantive due process)

Court: Michigan Court of Appeals (Unpublished No. 253434, July 12, 2005)

Case Name: *Landon Holdings, Inc. v. Thornapple Twp.*

Concluding the record established at least two rational bases – the preservation of the area's rural character and the channeling of high density developments close to public services – for the defendant-township's zoning ordinance, the court held the trial court properly rejected plaintiffs' constitutional challenges to the ordinance. The parcels in question were presently zoned "agricultural/residential" (AR) and manufactured homes were not allowed in an agricultural district. Plaintiff-Landon unsuccessfully sought to rezone the parcels to residential so it could build a 650-home manufactured home community. Placing a large manufactured home development in a rural area would increase the cost of providing public services, utilities, and fire protection. Directing high density development to areas where the infrastructure was already equipped to handle them reduced the impact to adjacent landowners in what

was essentially an agricultural community. The court concluded there was an obvious relationship between the goals of preserving the area's rural character and channeling high density development to more urban areas on the one hand, and the AR zoning ordinance on the other, and the current zoning and the denial of rezoning of the property were reasonably related to these goals. Affirmed. (Source: State Bar of Michigan *e-Journal*.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2005/071205/27983.pdf

Failure to receive notice sent by government does not violate due process

Court: Michigan Court of Appeals (Unpublished No. 249689, August 23, 2005)

Case Name: *Sterling Bank & Trust, F.S.B. v. City of Pontiac*

The trial court properly granted defendant's motion for summary disposition. Following plaintiff's failure to appear at hearings regarding a building owned by plaintiff, the Pontiac City Council determined the building should be demolished and the structure was subsequently demolished. Plaintiff brought this action alleging an unconstitutional taking of its property. Plaintiff's assertion there was an unconstitutional taking primarily rested on the fact it did not receive actual notice of the pending demolition of the building despite its status as the owner of the property with a recorded interest. Plaintiff also contended defendant's failure to provide it with actual notice before the building was demolished was a violation of procedural due process. The court held the defendant indisputably complied with M.C.L. 125.540(5) by sending notice to the address of the interested parties last on file with the township of the pending hearing to determine whether the home at issue could be lawfully demolished as a "dangerous building." **The fact plaintiff did not receive actual notice was insufficient by itself to demonstrate the statutory procedures for providing notice were inadequate or constitutionally insufficient**, and plaintiff made no other showing why the notice provided under the statute violated its due process rights. The court rejected plaintiff's effort to have the court impose on defendant "the obligation to undertake an investigation to see if a new address for the [plaintiff] could be located," before acting to demolish a structure under the statute. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 28482.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2005/082305/28482.pdf

Not rezoning to commercial is unreasonable whenland around site is predominantly commercial in character, even when the plan's goal is to phase out existing commercial, and infrastructure does not exist and is not needed

Court: Michigan Court of Appeals (Unpublished No. 247228, October 25, 2005)

Case Name: *Wolters Realty, Ltd. v. Saugatuck Twp*.

On remand from the Supreme Court, after the Supreme Court the Appeals Court to reconsider the original opinion in light of a misstatement in the opinion in which the Appeals Court asserted that plaintiff never sought a zoning variance. *Wolters Realty, Ltd v Saugatuck Twp*, 472 Mich 908; 696 NW2d 711 (2005). In this case the court upheld the trial court's ruling the defendant-township's zoning ordinance was unreasonable as applied to the property in question and affirmed the order enjoining defendants from interfering with plaintiff's development of a travel plaza on the property. Both plaintiff and the defendants presented expert testimony concerning the uses of the surrounding property. A map of the area indicated there were residential areas near the property, but also showed the property immediately adjacent to the location of the proposed travel plaza was zoned commercial and being used for commercial purposes. Considering the trial court's superior ability to judge the witnesses' credibility, the court declined to interfere with the trial court's finding the land surrounding plaintiff's property was predominately commercial in character. While defendants asserted they had a legitimate and reasonable interest in prohibiting the development because there was no city sewer or water service to serve plaintiff's land, the existing commercial uses and residences were adequately served by non-public sewer and water. The court further concluded the trial court properly balanced defendants' interest in carrying out its comprehensive plan with plaintiff's proposed use, and plaintiff satisfied its burden to demonstrate application of the zoning ordinance was unreasonable as applied to its property. Affirmed. (Source: State Bar of Michigan *e-Journal* number 29167, October 31, 2005)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2005/102505/29167.pdf

The original Appeals Court case (*Wolters Realty, Ltd.*

v. Saugatuck Twp. (Michigan Court of Appeals Unpublished No. 247228)) is reported in *Selected Planning and Zoning Decisions: 2005 May 2004-April 2005*, page 8, by Kurt H. Schindler, at http://web1.msue.msu.edu/wexford/pamphlet/SelectedPlan&ZoneDecisions2004-05.pdf.

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

Appeals Board ZBA's decision was arbitrary and capricious, and an abuse of discretion

Court: Michigan Court of Appeals (Unpublished No. 247262, March 23, 2006)

Case Name: *Young v. Township of Grosse Ile*

The trial court properly reversed the Zoning Board of Appeals' (ZBA) decision denying the petitioner's request to place fill material on his property. Petitioner owns property adjacent to a creek. From time to time, he experienced flooding in his back yard preventing him from using the rear part of the yard and his boat dock. He conceived a plan to regrade his property by dredging a portion of the creek placing the dredge spoils and clean fill in his yard, and installing a French drain. The U.S. Army Corps of Engineers approved the plan, as did the Michigan Department of Environmental Quality. Respondent's engineer approved the plan on the condition petitioner construct a retaining wall along part of his lot line and install three French drains. Respondent's planning commission approved the request to dredge the creek, but denied the application to place fill on and grade the property. Petitioner appealed to the ZBA, which upheld the decision. Petitioner appealed to the trial court, which reversed the decision. The ZBA appealed and declined to change its decision. On remand, the trial court held petitioner's issue was moot because he had dredged, filled, and constructed the French drains and the retaining wall. The court held the trial court erred in finding the issue moot, but concluded it properly reversed the ZBA's decision.

> Initially, we conclude that the circuit court erred in determining that respondent's appeal of the ZBA's decision was moot in light of the fact that petitioner had completed the dredge and fill project on his property. An issue is moot and ordinarily should not be considered if a court cannot fashion a remedy. *Detroit Edison Co v Public Service Comm*, 264 Mich App 462, 474; 691 NW2d 61 (2004). A party cannot moot an appeal simply by proceeding with a project sought to be enjoined on appeal. See *MGM Grand Detroit, LLC v Community Coalition for Empowerment, Inc*, 465 Mich 303, 307-308; 633 NW2d 357 (2001).

The ZBA agreed petitioner had a problem on his property, but denied his request to put the spoils on his property partly because of the inclusion of the retaining wall petitioner added in order to gain the approval of the township engineer. The trial court correctly held this aspect of the ZBA's decision was arbitrary and capricious, and an abuse of discretion.

> The ZBA's decision placed petitioner in the untenable position of complying with the direction of the Township Engineer in order to gain approval of his plan, only to have the plan rejected by the ZBA based in part on the inclusion of a feature deemed necessary by the Township Engineer. The circuit court correctly found that this aspect of the ZBA's decision was arbitrary and capricious, and an abuse of discretion. *Polkton, supra*; *Dignan, supra*.

The trial court also correctly held the ZBA's finding the French drains might not function correctly was not supported by the requisite evidence.

> In addition, the ZBA based its decision to deny petitioner's request to fill his property on concerns that the French drains would not function properly if the creek rose above the ordinary high water mark. Evidence showed that such an event had occurred in the vicinity of petitioner's property only twice in the past 24 years. Moreover, evidence showed that the Township utilized French drains on its airport property, which was located directly across the creek from petitioner's property. The circuit court correctly found that the ZBA's finding that the French drains might not function correctly was not supported by the requisite evidence. *Polkton, supra*.

Affirmed. (Source: State Bar of Michigan *e-Journal* number 31066, March 29, 2006)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/032306/31066.pdf

Ripeness for Court's Jurisdiction

Must seek variance from zoning before case is ripe for court review

Court: Michigan Court of Appeals (Unpublished, January 17, 2006, No. 256137)

Case Name: *Grand Blanc Golf & Country Club v. City of Grand Blanc*

The defendant was entitled to summary disposition based on plaintiff's failure to exhaust its administrative remedies by seeking a variance from the zoning regulation at issue. A court cannot determine the constitutionality of a land-use regulation until the plaintiff has met the finality requirement. Because plaintiff did not seek a variance from the zoning regulation, it did not meet the finality requirement. Affirmed. (Source: State Bar of Michigan *e-Journal* Number 30190, January 23, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/011706/30190.pdf

Effect of failure of filing a timely appeal

Court: Michigan Court of Appeals (Unpublished No. 258840, April 25, 2006)

Case Name: *Cramer v. Vitale*

The trial court properly granted summary disposition in favor of all the defendants based on lack of jurisdiction. The Detroit Board of Zoning Appeals granted defendants-Vitale and Yorkshire Food Market a variance for a parking lot sign. Plaintiff, whose building is located adjacent to the parking lot, opposed the variance request, arguing at a public hearing the sign was too large, did not conform to city ordinances, and was too close to a mural painted on the side of his store. Plaintiff failed to timely appeal the Board of Zoning Appeals' decision to the trial court. Instead, seven months later, he filed this case alleging various claims, which was removed to federal court. The federal court later remanded plaintiff's gross negligence and nuisance per se claims to state court, and the trial court granted defendants summary disposition on the basis of plaintiff's failure to timely appeal the variance decision. Plaintiff argued he had a right to file an "original" cause of action related to that decision. The court disagreed. The only claims properly before the trial court on remand from the federal court were for gross negligence and nuisance per se. The allegations supporting those claims were directly related to the actions of, or method used by, the Board of Zoning Appeals in granting the variance and the result of the grant of the variance. It was clear plaintiff was impermissibly attempting to collaterally attack the decision to grant the variance without properly following the appeal procedure. The proper forum to attack the Board of Zoning Appeals' decision was in the trial court on direct review. Affirmed. (Source: State Bar of Michigan *e-Journal* Number 31568, May 12, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/042506/31568.pdf

Conflict of Interest, Incompatible Office, Ethics

A County Commissioner can not be the county zoning administrator

Court: Michigan Court of Appeals (Unpublished, August 9, 2005, No. 252206)

Case Name: *Boyce v. Williams*

The County Boards of Commissioners Act (CBCA) (MCL 46.1 *et seq.*) § 30a, prohibits the eligibility of a serving county commissioner for appointment or employment as a county department head except as specifically provided for in the act, and zoning administrator was not one of the exceptions. The exception to The Incompatible Public Offices Act (IPOA) (MCL 15.181 *et seq.*) §183(4)(c), for counties having a population of less than 25,000 persons does not vitiate the responsibilities provided in the CBCA. The immunity provided in the The Governmental Tort Liability Act (GTLA) (MCL 691.1401 *et seq.*) is not available to county commissioners who violate § 30a. The liability for recoupment of salaries paid is a separate cause of action created by the Legislature and the CBCA. Since the defendants acted in good faith and to their detriment, relied on the prosecutor's and deputy Attorney General's representations the defendants' conduct was legal, the prosecution of the action was unfair. Thus, the doctrine of entrapment by estoppel applied in this action and relieved the defendants from liability imposed by application of the CBCA, §§ 30a (2), (3), and (4). Because the Board violated § 30a by appointing Williams as Zoning Administrator while he was a member of the Board, the court affirmed the circuit court in part, and because the Board acted in reasonable and good faith reliance on the

opinion of the Attorney General's office, the court applied the doctrine of entrapment by estoppel, reversed the circuit court's order affirming the district court's judgment, and vacated the $23,042.73 judgment. (Source: State Bar of Michigan *e-Journal*.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2005/080905/28296.pdf

Removal of city planning board member from office

Court: Michigan Court of Appeals (Unpublished No. 258905, April 13, 2006)

Case Name: *Kulak v. City of Birmingham*

The trial court correctly dismissed plaintiff's claims he was denied his rights to due process and to fair and just treatment under Const. 1963, art. 1, § 17 in connection with his removal from the defendant-city's planning board. The Michigan Constitution of 1963, art 1, § 17 provides:

> No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

The court found the plaintiff's life or liberty was not at stake, and a federal district court determined in his prior § 1983 action he had no property interest in his position on the planning board. Since the determination a public officer does not have a property interest in his position is the same under Michigan law as federal law, plaintiff was collaterally estopped from relitigating whether he had a property interest in his position. The court further held in any event, plaintiff was given notice of the complaints against him, the nature of the proceedings, and an opportunity to be heard. He received the original complaints on November 25, 2003, the additional complaints on January 6, 2004, and his response was due on January 21, 2004. Further, he had an opportunity to address all complaints at the January 26, 2004 public hearing. Even if he had a property interest, he received the due process to which he was entitled. While plaintiff also argued the trial court erred in determining he did not have a right to appeal his removal under Const. 1963, art. 6, § 28, the court disagreed. It was undisputed this case did not involve a license, and plaintiff was barred from relitigating whether he had a private right to his position. Summary disposition for the defendants was affirmed. (Source: State Bar of Michigan *e-Journal* Number 31383, April 19, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/041306/31383.pdf

Immunity

Building inspector does not owe duty of care in common law negligence

Court: Michigan Court of Appeals (269 Mich. App. 619; 2006 Mich. App., February 7, 2006)

Case Name: *Rakowski v. Sarb*

Deciding an issue of first impression, the court applied the factors historically used to determine whether a common law duty existed. The court concluded the defendant (a municipal building inspector) did not owe the plaintiff a duty. Since plaintiff failed to establish the building inspector owed her a duty, the trial court should have granted him summary disposition. Plaintiff was injured when the railing gave way on a handicap ramp at her parents' home. The record indicated plaintiff's father applied for a building permit for the ramp from the city and the city issued a permit. The father hired Cytacki to build the ramp. However, before completing the handrail, Cytacki was fired or left the job. Cytacki claimed he told someone at the house the railing was incomplete and was told someone else would finish it. The inspector conducted a visual final inspection of the ramp about six months later and wrote, "okay" on the form. Visual inspections are to determine whether structures meet local building code requirements. Plaintiff alleged the inspector negligently conducted the inspection of the ramp, or was grossly negligent in doing so. The court held a municipal building inspector does not owe a duty of care in common law negligence to protect a homeowner's invitee from personal injury sustained by the invitee because of an allegedly defective structure inspected and approved by the building inspector. Neither state statute nor the building code adopted by the city imposes such a duty on a building inspector. Reasonable minds could not differ regarding whether the inspector was a qualified governmental actor under Michigan's governmental immunity statute, whether his conduct amounted to gross negligence, or whether his conduct was the proximate cause of the plaintiff's injuries. The trial

court's denial of the inspector's motion for summary disposition was reversed. (Source: State Bar of Michigan *e-Journal* Number: 30440, Thursday February 9, 2006)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/020706/30440.pdf

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

Road ends at inland lake shores

Court: Michigan Court of Appeals (Unpublished Numbers 262494, 262533, and 262717; October 20, 2005)

Case Name: *Higgins Lake Prop. Owners Ass'n v. Gerrish Twp.*

In these consolidated appeals, the trial court properly granted summary disposition for plaintiff (Higgins Lake Property Owners Association (HLPOA)). The action involved HLPOA's most recent attempt to restrict public use of areas where publicly dedicated roads terminate at the shore of Higgins Lake. In Docket No. 262494 the Geach defendants argued *Higgins Lake* was wrongly decided and violated Michigan's Constitution. They argued Const. 1963, art. 7, § 29, reserves control of the roads to local governments, and the court's decision in *Higgins Lake* ignored this principle by imposing the burden of proof on those claiming the plat dedications provide more than mere access to Higgins Lake. However, adopting this argument would require the court to ignore or overrule its own precedent, which would violate the law of the case doctrine (MCR 7.215(J)). Further, MCR 7.215(J) requires the court to follow its original decision. The court also would not declare a conflict, because defendants failed to persuade the panel *Higgins Lake* was wrongly decided. The court also rejected the defendant-county road commission's contention the trial court lacked authority to allow HLPOA to post signs at the road ends to inform the public of the use restrictions, concluding allowing HLPOA to post the signs was a proper order to effectuate the trial court's judgment. Affirmed. (Source: State Bar of Michigan *e-Journal* 29146; Wednesday, October 26, 2005)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2005/102005/29146.pdf

Subdivision outlot along inland lake shore

Court: Michigan Court of Appeals (Unpublished, No. 263616, January 19, 2006)

Case Name: *Ward v. Barron Precision Instruments, L.L.C.*

Questions of fact existed regarding whether plaintiffs possess an independent interest in a reserved strip along Warwick Lake, whether the strip was intended as a private dedication, and whether the scope of plaintiffs' easement to use and enjoy Outlot A extends to the edge of the lake. Thus, the court remanded the case to the trial court to consider these issues. The case arose from a dispute between the parties concerning their rights to a strip of property lying between a row of platted lots and the lake and their respective rights and interests in Outlot A, which runs between lots 8 and 9 to the reserved strip along the lake. The appeal primarily concerned plaintiffs' Count IV, in which they claimed an express easement in Outlot A, and Count V, in which they sought a declaratory judgment the platters intended for their lots to extend to the edge of the lake. The trial court granted summary disposition to plaintiffs on both counts and dismissed Counts I, II, and III, and Count VI. The court concluded the trial court erred in holding the scope of plaintiffs' easement in Outlot A extended to the lake and held an easement providing access to the lake does not provide full riparian right. Reversed and remanded. (Source: State Bar of Michigan *e-Journal* 30259; Monday, January 30, 2005)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/011906/30259.pdf

Township regulation of road ends at inland lake shores

Court: Michigan Court of Appeals (Unpublished No. 265152, April 11, 2006))

Case Name: *Lyon Twp. v. Higgins Lake Prop. Owners Ass'n*

Concluding only certain portions of the ordinance at issue were invalid, the court reversed the trial court's order granting the defendant summary disposition and invalidating the entire ordinance, and remanded for entry of an order severing the invalid regulations from the remainder. This action arose after the plaintiff-township adopted the ordinance, which purported to regulate certain activities at road ends abutting Higgins Lake. The ordinance permitted the road ends to be used for seasonal watercraft mooring

on boat hoists from May 1 through September 30 of each year. While the trial court erred in invalidating the whole ordinance, the court disagreed with plaintiff's contention the boat mooring regulations were valid. The dedication for the streets for public use "did not confer an absolute fee in the nature of private ownership on plaintiff." While plaintiff had the right to reasonable control over the activities associated with public access to the lake, the court determined in *Jacobs v. Lyon Twp*. public access does not include the installation of boat hoists and seasonal mooring. Thus, plaintiff was not empowered to authorize this activity and the provisions of the ordinance purporting to allow seasonal boat moorings were invalid. However, the remaining activities set forth in the Lyon Township ordinance's §§3(1)(b)(1) and (1)(b)(3) through (7) were consistent with activities already sanctioned by the court. Only §3(1)(b)(2) and portions of §3(3) were invalid and should be severed, leaving the valid provisions of the ordinance enforceable. Reversed and remanded. (Source: State Bar of Michigan *e-Journal* 31345; Tuesday, April 18, 2006)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/041106/31345.pdf

Other Unpublished Cases

Arbitrary and capricious zoning

Court: Michigan Court of Appeals (Unpublished No. 256013, June 7, 2005)

Case Name: *Grand/Sakwa Macomb Airport, L.L.C. v. Township of Macomb*

The trial court correctly held the zoning ordinance was arbitrary and capricious and its remedy to impose an injunction was proper under the circumstances. However, the trial court erred in concluding the ordinance constituted a confiscatory taking of plaintiffs' property in this case where the defendant-township denied plaintiffs' request for rezoning. Plaintiffs' property was owned by plaintiff-AIC. In a 1998 sale agreement AIC agreed to sell the property to plaintiff-Grand/Sakwa and an airport for a proposed price of $14 million. The agreement was contingent on plaintiffs' ability to have the property rezoned from its current industrial zoning classification to commercial and residential zoning. Plaintiffs submitted a request to the township planning commission to rezone three parcels, and the request was denied. The trial court approved plaintiffs' proposed residential and commercial uses for the property and enjoined defendant from interfering with plaintiffs' development pursuant to their requested zoning classifications. The court held the reasons asserted by defendant to support their claim the zoning ordinance was not arbitrary and capricious were not supported, and plaintiffs demonstrated the ordinance did not advance a legitimate governmental interest and was arbitrary and capricious. Affirmed in part, reversed in part, and remanded. (Source: State Bar of Michigan *e-Journal* Number: 27610.)

Quoting from the court's opinion:

> Defendant contends that the trial court erred in finding that the zoning ordinance in question is arbitrary and capricious. We disagree. Principally, defendant contends the zoning classifications are in accordance with its master plan, that the classifications advance a reasonable governmental interest to plan for future industrial development and employment, to separate incompatible land uses, to provide a tax base that created more revenue than residential development and to maintain the faith of its residents who made commitments on the basis of its current zoning. While these stated goals are certainly legitimate governmental interests, the record does not support defendant's contention that its defense of the ordinance in question was in support of these legitimate interests.
>
> Regarding defendant's master plan, the trial court found that the realignment of M-59 to Hall Road from 21-1/2 Mile Road had substantially changed what was the historical basis for the initial plan, and that defendant had not diligently updated the plan to reflect changes in economic and development trends. Moreover, the trial court found that defendant had demonstrated a significant willingness to modify or deviate from the master plan on an inconsistent basis, as most significantly demonstrated by the already existing incompatible land classifications adjacent to the subject property. The trial court did not clearly err in making these findings of fact.
>
> Even if defendant had demonstrated adherence to its master plan, such adherence is but one factor in determining the reasonableness of an ordinance. *Troy Campus v City of Troy,* 132 Mich App 441, 457; 349 NW2d 1777 (1984). In

order to be determined reasonable, the master plan must take into account existing circumstances, *Biske v Troy,* 381 Mich 611, 617-618; 166 NW2d 453 (1969); *Gust v Canton Twp*, 342 Mich 436, 440-442; 70 NW2d 772 (1955), and other pertinent factors, including, the stability of the master plan, the extent to which the goals of the master plan are advanced, and the extent to which the master plan constitutes a coherent development plan taking into account legitimate expectations. *Id*.; *Biske, supra* at 617-618. The trial court's findings of fact[16] that defendant's admissions, that industrial development as contemplated in the master plan is incompatible with the residential development that had already occurred and continued to occur in the areas around the subject site, that the agricultural zoning adjacent to the subject site would accommodate as a permitted use the development of single-family residential property on one acre lots, and that, inconsistent with it's master plan, defendant would initiate proceedings to rezone agricultural property to industrial to prevent such residential development, demonstrates that defendant's master plan neither takes into account existing circumstances nor exhibits a stability or coherence in the plan of development.

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2005/060705/27610.pdf

Emergency access road and gate

Court: Michigan Court of Appeals (Unpublished)
Case Name: *Fox Creek Assocs., LP v. Independence Twp*.

The trial court properly granted defendant-township's motion for involuntary dismissal because plaintiff failed to present competent evidence to show it was unreasonable for the township to provide unrestricted emergency access to the mobile home community for the public health, safety, and welfare. The case arose out of plaintiff's efforts to regulate use of an access road connecting the plaintiff's apartment complex to the defendant's mobile home park located on an adjoining parcel. Plaintiff claimed its proposal to install an emergency access gate, to prevent general traffic on the road, was reasonable and the trial court erred by entering an order granting the township's motion for an involuntary dismissal. Plaintiff's experts never stated it was unreasonable for the township to deny any gate in the interest of emergency response time. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 27874.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2005/062805/27874.pdf

Township can adopt zoning requiring property owner to comply with PUD

Court: Michigan Court of Appeals (Unpublished No. 260711, July 14, 2005)
Case Name: *Holwerda Builders, LLC v. Township of Grattan*

The trial court properly granted summary disposition to the defendants because the Township Zoning Act (M.C.L. 127.271 *et seq*.) (TZA) grants townships the authority to enact zoning ordinances including planned unit development (PUD) requirements, the township's PUD provisions required notice and public hearings before the approval of any PUD application, and the township PUD provisions were constitutional. Rox, LLC split an 80-acre parcel originally zoned for agricultural use into 10 sites (about 3 or 4 acres each) and one parcel in excess of 40 acres. Defendant-township approved the split. Rox sold four of the smaller sites to plaintiff, who purchased them intending to build four single-family homes on each lot. Rox submitted a plan to develop the remaining 40-acre site as a condominium site consisting of 12 individual sites. Plaintiff then requested building permits for its parcels. The township refused to grant the permits and stated plaintiff's lots had to comply with the PUD provisions of its zoning ordinance designed to regulate higher density developments due to Rox's plans to develop its remaining adjacent property with a 12-unit condominium. The court concluded plaintiff's argument the TZA does not grant townships the authority to enact a zoning ordinance requiring a property owner to comply with PUD requirements was without merit. According to the plain language of the TZA, the Legislature has granted townships the authority to enact zoning ordinances to regulate land use for a variety of purposes, including to prevent overcrowding and insure the appropriate use of natural and public resources. Further, the statute grants townships the authority to establish PUD requirements in a zoning ordinance. Affirmed. (Source: State Bar of Michigan *e-Journal*.)

[16]These findings are also not clearly erroneous.

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2005/071405/28048.pdf

PUD amendment as remedy to a court case

Court: Michigan Court of Appeals (Unpublished No. 255076, July 14, 2005)

Case Name: *Landon Holdings, Inc. v. Grattan Twp.*

Since the defendant-township amended its zoning ordinance to allow for a planned unit development (PUD) on administrative application to the defendant-zoning board of appeals (ZBA), and the trial court ruled such action was admissible in the pending litigation, the cases before the court were moot and the court affirmed the trial court orders at issue. The appeal arose from two separate cases regarding the same parties and parcel of property. Defendants appealed two trial court orders – one granting plaintiffs' motion to exclude evidence of the ZBA's September 25, 2003 resolution, and the second vacating and reversing that resolution. However, on July 1, 2004, the trial court denied plaintiffs' motion to exclude evidence of defendants' amendment to the zoning ordinance. Consequently, defendants were free to introduce at any upcoming trial evidence plaintiffs were allowed to develop 66 to 100 single-family homes on the property. By amending its ordinance and securing admission of the amendment at the upcoming trial, the township achieved its objective of being able to introduce evidence due to the availability of the PUD, the zoning of the property was not confiscatory and was otherwise consistent with due process and equal protection principles. Defendants' ability to defend the constitutional claims by relying on PUD usage potential was now established. Affirmed. (Source: State Bar of Michigan *e-Journal*.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2005/071405/28033.pdf

Rezoning for Mobile Home Park

Court: Michigan Court of Appeals (Unpublished No. 257416, November 17, 2005)

Case Name: *Brookside Acquisitions, LLC v. Charter Twp. of Lyon*

The trial court correctly granted the defendant-township summary disposition in this case where the township denied Brookside Acquisitions, LLC's (plaintiff) request to rezone their property for the purpose of developing a mobile home park. The property was zoned residential or agricultural use. Plaintiffs wanted the property rezoned to a mobile home district in order to develop a manufactured housing community with 709 units. The township's reasons for denying the rezoning were—it would interfere with the master plan, it would conflict with its future land use map, a high-density development was inconsistent with the present character of the area, it has a larger number of mobile home units than most of the surrounding areas and would not correct currently existing inequitable situations, and the development would burden the existing infrastructure. Zoning regulations are valid where there is a "rational relation to the public health, safety, welfare and prosperity of the community," and where the regulations are "not such an unreasonable exercise of [the police] power as to become arbitrary, destructive, or confiscatory." Use of surrounding areas, traffic patterns, and available water supply and sewage disposal systems are relevant considerations in the reasonableness of a particular exclusion. The trial court did not hold all zoning classifications are constitutional regardless of what evidence might be developed, but held "the zoning classifications" here were a rational and reasonable exercise of the township's police power and had a rational relationship to public health, safety, and welfare, by regulating the location and density of housing in the township. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 29499, November 28, 2005.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2005/111705/29499.pdf

Expansion of nonconforming use

Court: Michigan Court of Appeals (Unpublished, No. 256487, December 20, 2005)

Case Name: *Berrien Twp. v. Maxwell*

While the trial court did not err in determining defendant's operation constituted an unlawful expansion of the preexisting nonconforming use, defendant was correct the plaintiff-township's litter and debris ordinance did not provide for enforcement by filing a civil action. Defendant's predecessor owned and operated the property before 1980 as a salvage business and junkyard. The property was rezoned to agricultural/residential in 1980. The predecessor continued to operate as a preexisting nonconforming use. When defendant started operating the property, there were 3 structures and about 390,000 scrap tires, but no heavy machinery, trucks, or equipment. In October 2002, there

were an estimated 650,000 tires, and by October 2003, there were 6 balers, a loader, 2 forklifts, 2 shears, a rim buster, and 11 trucks. Defendant acknowledged erecting new buildings, adding heavy machinery, equipment, and a fleet of trucks, and to crushing automobiles and processing items for recycling. His testimony he was operating on four fewer acres than his predecessor "did not obviate his substantial expansion of the nature and character" of the operation. The court agreed with his argument, however, the litter and debris ordinance was a penal statute prescribing criminal enforcement and the trial court erred in permitting plaintiff to pursue civil enforcement of the ordinance, and in awarding plaintiff attorney fees attributable to that action. Affirmed in part and vacated in part. (Source: State Bar of Michigan *e-Journal* Number: 29898, January 3, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2005/122005/29898.pdf

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