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Selected Planning and Zoning Decisions: 2007
May 2006-April 2007

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This public policy brief summarizes the important state and federal court cases and Attorney General Opinions issued between May 1, 2006 and April 30, 2007.

Table of Contents

Restrictions on Zoning Authority

Exclusionary zoning

Court: Michigan Court of Appeals (273 Mich. App. 122; 729 N.W.2d 251 (2006), December 5, 2006)
Case Name: *Anspaugh v. Imlay Twp.*

Applying test in *Eveline Twp. v. H & D Trucking Co.*, the court held the I-2 (heavy industrial) zoning district provided for by defendant– Imlay Township's zoning ordinance was exclusionary because the ordinance effectively excluded lawful and otherwise appropriate I-2 uses for which there was a demonstrated need.

In 2000, Earl Anspaugh and Trinity of Michigan, LLC, (Plaintiffs) Applied to Rezone Property Located in the Township from R-1 Residential to I-2 Heavy Industrial. During meetings about rezoning the property township officials admitted I-2 land uses were permissible under the township's zoning ordinance in the I-2 zone, but no land was designated for such use under the township's land use plan. The township indicated the I-2 uses were appropriate for properties in its I-1 light industrial zoning district. Plaintiffs claimed based on this and other "direction" by the township, plaintiff-Trinity investigated and secured a second parcel of undeveloped land zoned I-1. Trinity then applied to rezone a portion of that property from I-1 to I-2. The township board denied both requests in 2001, as inconsistent with the township's land use plan.

Plaintiffs sued and argued the trial court erred in granting summary disposition to the township because its zoning ordinance was exclusionary.

> A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a township in the presence of a demonstrated need for that land use within either the township or surrounding area within the state, unless there is no location within the township where the use may be appropriately located, or the use is unlawful. [M.C.L. 125.297a.][1]

The appeals court agreed concluding a zoning ordinance creating a classification but not applying the classification to any land is exclusionary on its face. Thus, at the time plaintiffs sought rezoning of the parcels at issue, the township zoning scheme was clearly exclusionary. The fact the township later rectified this problem by amending its ordinance and use plan to expressly provide for I-2 uses did not defeat plaintiffs' claim of exclusionary zoning. Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 34106, December 7, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/120506/34106.pdf

Must a county comply with the township's zoning for ancillary improvements on a site?

Court: Michigan Court of Appeals (Published No. 273021 (2007 Mich. App. LEXIS 1132) ___ Mich. App. ___; ___ N.W.2d ___ (2007), April 26, 2007)
Case Name: *Herman v. County of Berrien*

The trial court properly held the building and shooting ranges were exempt from township ordinances because the statute grants the defendant-county the authority to choose the site for county buildings, and the "site" entailed the entire parcel, not just the area of land on which the building actually sits.

The Berrien County Commissioners chose a site to locate a new law enforcement training facility. The facility included an administrative building and, located behind the building, there will be four shooting ranges. Plaintiffs, all neighboring residents, challenged the county's ability to operate the shooting ranges, which presumably were in violation of several township

[1] This case concerns and quotes the old Township Zoning Act (M.C.L. 125.297a *et seq*. repealed 7/1/06 (specifically 125.286f)) but applicable here for this court case. However the new Michigan Zoning Enabling Act contains essentially the same language, M.C.L. 125.3207: "Sec. 207. A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a local unit of government in the presence of a demonstrated need for that land use within either that local unit of government or the surrounding area within the state, unless a location within the local unit of government does not exist where the use may be appropriately located or the use is unlawful."

ordinances.

The appeals court ruled:

> "Oftentimes there may also be physical improvement to the property outside of the physical structure of the building, but which are related to the buildings purpose. All such improvements are on the 'site' chosen by the county for the building, and consequently are immune from the township ordinances."

The shooting ranges located on the site were not subject to the township's zoning ordinances because they were located on the property chosen as the site for a county building. Since the statute contained no restrictions or limitations in this regard, the court held the township's ordinances (including noise ordinances) did not apply to the county's siting of the entire training facility. There was also nothing within the Township Zoning Statute (M.C.L. 125.271)[2] applying more specifically to the physical improvements on the property than M.C.L. 46.11(b) and (d). Thus, contrary to plaintiffs' position, the statutes could not be read to provide a legislative policy choice for townships to have the power to regulate any physical structures located on a site of a county building but to have no power to regulate the uses of the county building itself. The parties also did not cite any law regarding a local government's ability to regulate this type of shooting range. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 35761, April 30, 2007.)

There is a dissenting opinion to this court ruling by Judge Alton T. Davis, included in the full text opinion, below.

See also: *Pittsfield Charter Twp. v. Washtenaw County and City of Ann Arbor* 468 Mich 702, 664 N.W.2d 193 (2003), summarized on page five of *Selected Planning and Zoning Decisions: 2004* by Gary D. Taylor, J.D., State & Local Government Specialist (http://web1.msue.msu.edu/wexford/pamphlet/LUCourtCaseAnnualSum2004.pdf)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2007/042607/35761.pdf

[2]This case quotes the old Township Zoning Act (M.C.L. 125.271 *et seq.*) repealed July 1, 2006 but applicable here for this court case, and still applicable under the Michigan Zoning Enabling Act (M.C.L. 125.3101 *et seq.*).

Takings

Violations of the plaintiffs' rights under the Fourth, Fifth and Fourteenth Amendments of the United States Constitution.

Takings claims were ripe for federal judicial review.

Court: U.S. Court of Appeals Sixth Circuit (448 F.3d 853; (2006) U.S. App., May 22, 2006)

Case Name: *Coles v. Granville*

The district court properly dismissed the plaintiffs' claims for unconstitutional takings against defendant-public officials and railroad companies for actions taken relative to plaintiffs' real property, because the action was not yet ripe. Plaintiffs were landowners along the old Milan Canal. Defendant-Metroparks claimed to be the valid assignee of an infinite duration leasehold interest in the corridor and was interested in transforming the corridor into a recreational trail. A state court proceeding ultimately found Metroparks did possess a valid leasehold interest. Plaintiffs argued they were not seeking review of the state court decision adjudicating the validity and extent of Metroparks' leasehold interests, rather, they alleged defendants were misreading the state court decision to give them more property than the decision actually held was rightfully possessed by them. Defendants argued plaintiffs' action was an attempted end-run around the state leasehold decision and contended "The Rooker-Feldman doctrine" (*Rooker-Feldman*) barred their suit. Although the district court found *Rooker-Feldman* barred federal jurisdiction over some of plaintiffs' claims, the court held *Rooker-Feldman* was inapplicable. However, to the extent the district court decision may have improperly relied on *Rooker-Feldman* as a basis to dismiss plaintiffs' case, the court found the error harmless because plaintiffs' takings claims were not yet ripe for review. Plaintiffs alleged defendants were unconstitutionally taking plaintiffs' property by invading lands beyond the scope of Metroparks' leasehold interests. Before seeking relief in federal courts, plaintiffs alleging an unconstitutional taking by a local government entity must first seek compensation for the taking through state measures. Because plaintiffs had not done this, their case was not yet ripe for review. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 31851, May 24, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2006/052206/31851.pdf

Condemnation; Due Process, and Equal Protection

Court: U.S. Court of Appeals Sixth Circuit (456 F.3d 549; (2006) U.S. App., August 1, 2006)

Case Name: *Davet v. City of Cleveland*

The district court correctly granted the defendants' motion for summary judgment in this case where the plaintiff alleged the defendant-city's demolition of a building he owned violated the Takings, Due Process, and Equal Protection Clauses of the U.S. Constitution. A city building inspector examined plaintiff's building and found numerous housing code violations, including "deteriorated" roofing, walls, floors, and stairs and posted a condemnation notice on the building the same day, giving plaintiff one day to remedy the code violations or face the risk the city would demolish the building. Plaintiff filed an appeal, which triggered an automatic stay. The city asked the Board of Building Standards to lift the stay because the building posed an "immediate peril to life [and/or] property". The board lifted the stay finding the building posed an "immediate danger to the community." The city demolished part of the building and filed a counterclaim seeking reimbursement for the cost of the demolition. Plaintiff filed a complaint in state court seeking relief under § 1983 and claimed the city's actions amounted to a "taking without public purpose and without just compensation." The city removed the case to federal court. In granting the city's motion for summary judgment, the district court held the administrative hearings before the municipal board established the city had properly condemned the building and plaintiff's failure to appeal the conclusion rendered it an "established legal fact" entitled to "preclusive effect," and rejected his constitutional claims. The district court exercised supplemental jurisdiction over the counterclaim, and ruled in the city's favor. The court held because the validity of the condemnation order and the condition of the building were the crucial premises underlying the district court's conclusion and the district court did not err in giving the Board's decision on those issues preclusive effect, the district court properly granted summary judgment to the defendants on plaintiff's claims. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 32694, August 4, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2006/080106/32694.pdf

Inverse condemnation

Court: Michigan Court of Appeals (Published No. 271398 (2007 Mich. App. LEXIS 781) ___ Mich. App. ___; ___ N.W.2d ___ (2007), March 22, 2007)

Case Name: *Frenchtown Charter Twp. v. City of Monroe et al.*[3]

The trial court properly granted summary disposition to defendants-Frenchtown Township, Monroe County, and City of Monroe on the defendants-Cousinos' claims: defendants did not inversely condemned their property resulting in a regulatory taking.

The Cousinos own land in Frenchtown Charter Township in Monroe County. The property is a narrow strip of land abutting Custer Airport and runs parallel to the landing strip. The City of Monroe owns the airport located on city property. The Cousinos' property is zoned agricultural. They submitted a rezoning request to the township and asked for rezoning to single-family residential. The Frenchtown Township Planning Commission recommended approval, but the Monroe County Planning Commission recommended denial because the airport was next to the property, and the rezoning might be precluded by an airport approach plan approved by the Michigan Aeronautics Commission in 2002. The airport approach plan was approved under §3 of the The Airport Zoning Act (MCL 259.442, .434, and .447) and the Township Zoning Act (M.C.L. 125.273a)[4], which limits how land may be used or zoned around the airport. Under the plan most of the Cousinos' land is located in an "accident safety zone 5" and residential land is prohibited.

Once Frenchtown learned about the airport approach plan, it tabled the rezoning request and filed an action

[3] *Frenchtown Charter Twp. v. City of Monroe, County of Monroe, Department of Transporation and Aeronautics Commission, Cousino Trust, Cangiolosi Defendants/Counterplaintiffs/ Cross-Plaintiffs-Appellants, and Aiello, Defendant-Intervenor/Counter-Plaintiff.*

[4] Effective July 1, 2006, M.C.L. 125.273a of the Township Zoning Act (TZA) was repealed along with the rest of the TZA. See the Michigan Zoning Enabling Act (M.C.L. 125.3702). However, M.C.L. 12.3702(2) provides that "[t]his section shall not be construed to alter, limit, void, affect, or abate any pending litigation, administrative proceeding, or appeal that existed on the effective date of this act or any ordinance, order, permit, or decision that was based on the acts repealed by this section." Further, the new statute, M.C.L. 125.3203, provides similar language.

for declaratory judgment. The Cousinos later dismissed defendants-Michigan Department of Transportation and the Michigan Aeronautics Commission from their cross-claim. They filed a counterclaim against Frenchtown alleging they had to cancel two purchase agreements for $1.75 million and $2 million because their property was not rezoned. The trial court ruled that Frenchtown Township could not rezone the Cousinos' property because it is prohibited by state law from changing a zoning designation in a manner contrary to the airport approach plan. The trial court further ruled that defendants' actions did not amount to a regulatory taking or inverse condemnation.

The appeals court affirmed the trial court's ruling for a different reason, holding pursuant to state law neither Frenchtown, the City of Monroe, nor Monroe County could rezone their property. Local government units are obligated to comply with the requirements of the Michigan Legislature in the airport approach plan and the zoning regulations designated by the plan. The regulations the Cousinos objected to were not promulgated by the remaining defendants. Thus, they were not entitled to relief from them:

> In other words "a plaintiff must prove that the economic impact and the extent to which **the regulation** has interfered with distinct investment-backed expectations are the functional equivalent of a physical invasion by the government of the property in question." *K & K Const, Inc v Department of Environmental Quality*, 267 Mich App 523, 553; 705 NW2d 365 (2005) (emphasis added). The Cousinos cannot make such a showing when the regulations were not promulgated by any of the current defendants and, if defendants granted the Cousinos' rezoning request, it would run contrary to state law. Accordingly, the Cousinos are not entitled to any relief from these defendants.

The current defendants were the township, city or county, no longer Department of Transportation or the Aeronautics Commission.

The court also ruled:

> We further observe that, were we to conclude that it is appropriate to consider the Cousinos' claim that defendants violated their constitutional rights when Frenchtown Township failed to grant its rezoning request, the claim is clearly not ripe for review. Frenchtown Township **tabled** the Cousinos' rezoning request in order to file its declaratory judgment action to clarify its obligations under M.C.L. 125.273a, now 125.3203. In other words, Frenchtown Township did not officially deny the Cousinos' request. For this Court to evaluate a claim that a zoning ordinance constitutes a taking of property, the complaining party must satisfy the rule of finality. The rule requires the landowner to show that " 'the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.' " *Paragon Properties Co v City of Novi,* 452 Mich 568, 579; 550 NW2d 772 (1996), quoting *Williamson Co Regional Planning Comm v Hamilton Bank,* 473 US 172, 191; 105 S Ct 3108; 87 L Ed 2d 126 (1985).

Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 35347, March 26, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2007/032207/35347.pdf

Land Divisions & Condominiums

Reject residential subdivision plat

Court: Michigan Court of Appeals (271 Mich. App. 84; 720 N.W.2d 324 (2006), May 9, 2006)

Case Name: *Cole's Home & Land Co. v. City of Grand Rapids*

The defendant-city's amended reasons for rejecting plaintiffs' proposed residential subdivision plat, supported by the city's master plan, street classification policy, and street-calming program, did not fall within the reasons permitted by the Land Division Act (LDA) (M.C.L. 560.101 *et seq.*) and the city commission's decision was unauthorized by law. Defendants argued the master plan, street classification policy, and street-calming program constituted published rules of the municipality adopted to carry out the provisions of the LDA and thus, the rejection fell within M.C.L. 560.105(b). The court held none of the programs and policies defendants relied on were "a published county or municipal rule adopted to carry out the provisions of the LDA." According to "the ordinary meaning of 'rule' and the plain language of M.C.L. 560.105(b)," the court concluded "a published rule of a municipality or county adopted to carry out the provisions" of the LDA "must actually regulate or govern conduct for the purposes of carrying out the provisions of the LDA." A publication simply providing "objectives or guidance does not

constitute a rule" as the term is used in M.C.L. 560.105(b). Defendants could not rely on the guidelines of the master plan as a ground for rejecting plaintiffs' plat under M.C.L. 560.105(b). Likewise, neither the city's street classification policy (part of the master plan) nor the traffic-calming program (which was not adopted for any reason having anything to do with the LDA) were a published municipal or county rule adopted to carry out the provisions of the LDA. Summary disposition for the defendants was reversed. (Source: State Bar of Michigan *e-Journal* Number: 31698, May 11, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/050906/31698.pdf

Due Process and Equal Protection

Conditions imposed on a special use permit; Substantive due process claims; Equal protection rights; Statute of limitations

Court: U.S. District Court Eastern District of Michigan (No. 05-10093-BC (2006 U.S. Dist. LEXIS 51461) U.S. App., July 27, 2006)

Case Name: *Glenn v. Clement Twp.*

Plaintiffs' substantive due process claims were barred by the statute of limitations and a prior state court judgment, the defendant (Clement Township) was entitled to summary judgment on the merits of the claims because its decision to deny plaintiffs permission to install windows on the patio of their bar/restaurant was not arbitrary or capricious, and defendant was entitled to summary judgment on plaintiffs' equal protection claim because plaintiffs were unable to show they were treated differently than similarly situated businesses or such different treatment was arbitrary or capricious. Plaintiffs' bar/restaurant was a non-conforming use in a residential area in the township. Defendant granted them a special use permit to allow a summer "seasonal" patio. The permit specifically prohibited plaintiffs from enclosing the patio or installing windows on it. Plaintiffs installed windows and challenged the conditions imposed in the permit. The court concluded the applicable three-year statute of limitations began to run in 1997, when the "operative decision" giving rise to the objectionable consequences was made. Thus, the limitations period on the due process claims expired before plaintiffs filed this action in 2005. While their equal protection claim was not barred by the statute of limitations, the court concluded it was barred by *res judicata* (as were the due process claims) by a prior decision on the merits in state court litigation. The court granted the defendant summary judgment and dismissed the complaint. (Source: State Bar of Michigan *e-Journal* Number: 32721, September 5, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/district/2006/072706/32721.pdf

Dispute regarding letters of credit

Court: Michigan Court of Appeals (273 Mich. App. 69; 729 N.W.2d 242 (2006), November 28, 2006)

Case Name: *English Gardens Condo., LLC v. Howell Twp.*

While the court agreed with the trial court's result in denying English Gardens Condo-plaintiff's request for mandamus, the court also agreed with plaintiff: Defendant-Howell Township's zoning ordinance did not permit the preemptive seizure of a deposited security before work was completed.[5]

The township approved plaintiff's site plan for a condominium complex. Plaintiff provided letters of credit to the township as security for completion of the development. Defendant's, township zoning administrator, Ms Bering, stated in an affidavit she wrote a letter to plaintiff explaining what actions should be taken before the third letter of credit expired one month later. Plaintiff's managing member asserted in response most of these matters were maintenance concerns and the responsibility of the condominium association, not the developer. Ms Bering drew the full $60,000 available from the letter of credit on the basis plaintiff was refusing either to make repairs or renew the letter of credit. Plaintiff filed suit for return of those funds, also suing on a contract theory, styling the letter of credit as a contractual arrangement and claiming contract damages in the full amount. Entitlement to the money was a function of the parties' agreement. Plaintiff recognized this by pleading a contract claim and thus, had an adequate remedy at law—namely, contract damages. Moreover, the payment of contract damages was no mere ministerial task. Although English Gardens Condo presented a convincing claim the money was improperly taken, its argument fell short

[5]This case concerns the old Township Zoning Act (MCL 125.271 *et seq.* repealed 7/1/06 (specifically 125.286f)) but applicable here for this court case.

of establishing a clear, unequivocal right to the return of the funds in question. However, the court reversed the dismissal of plaintiff's declaratory judgment claim. Affirmed in part, reversed in part, and remanded. The trial court shall order defendants to return the deposited security to plaintiff. (Source: State Bar of Michigan *e-Journal* Number: 34031, November 30, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/112806/34031.pdf

See also: Michigan Attorney General Opinion concerning the Appeal Boards under the Michigan Zoning Enabling Act, page 7.

Variances (use, non-use)

Michigan Zoning Enabling Act

Michigan Attorney General Opinion number 7201, March 21, 2007:

This AG Opinion covers a number of issues about the changes brought about by the Michigan Zoning Enabling Act concerning zoning boards of appeals. A number of points made in the opinion are:

- The Zoning Enabling Act requires one member of the planning commission is on the zoning board of appeals. But there is not a requirement to kick off a member of the zoning boards of appeals to make an immediate transition.
- When the same case goes before the planning commission and the zoning board of appeals, the member of both boards should recuse themselves from the decision before one of the two boards.
- When a term of office on the zoning board of appeals ends, it should not take more than one month for the appointment of a new member, or reappointment of the same member, of a zoning board of appeals. Legislative bodies need to show a good faith effort to meet the one month time line. To prevent a *hiatus in government* the preceding member, if able and willing, continue to serve (a temporary reappointment) until a successor is found.
- The month to appoint a zoning board of appeals successor does not apply to mid-term vacancies.
- The 30-day deadline to file an appeal in circuit court of a zoning board of appeals decision is (1) from the date the appeals board certifies its decision, or (2) from the date the appeals board certifies (approves) its minutes, whichever comes first.
- Appeals to the Court of Appeals from decisions by a circuit court on review of a decision of the zoning board of appeals may only be taken by application for leave to appeal to that court in accordance with MCR 7.203 and not as a matter of right.
- Whenever state law and local ordinance conflict, the state law overrides. Thus regardless of procedure, dates, time lines found in a local zoning ordinance; those provisions found in the Michigan Zoning Enabling Act rule.
- The publication of notice of its adoption set forth in section 401(6) and (7) of the Michigan Zoning Enabling Act, M.C.L. 125.3401(6) and (7), will control over different requirements found in a city charter.
- It is acceptable for local government to advise neighbors of property involved in zoning decisions by addressing a letter to "occupant" when the person's name is not know. The letter needs to be mailed (U.S. Mail) or hand delivered.

Copy of Opinion 7201:
http://www.ag.state.mi.us/opinion/datafiles/2000s/op10277.htm

Ripeness for Court's Jurisdiction, Aggrieved Party

Do not need to exhaust administrative (local) remedies for a civil rights claim

Court: U.S. District Court Western District of Michigan (No. 4:05-CV-128 (2006 U.S. Dist. LEXIS 46909) ___ Mich. App. ___; ___ N.W.2d ___ (2006), July 11, 2006)

Case Name: *Little Mack Entm't II, Inc. v. Marengo Twp.*

The court denied the defendant's motion to dismiss for lack of standing and failure to exhaust state administrative remedies.

Plaintiff alleged the defendant's zoning ordinance, in whole or in part, was unconstitutional because it violated the First, Fifth, and Fourteenth Amendments of the United States Constitution, specifically with regard to adult businesses. In particular, plaintiff alleged the ordinance was unconstitutional because it required adult businesses to obtain conditional use permits and because it required that adult uses be located at least 750 feet from various land uses, including residential districts, churches, etc. Plaintiff also sought a

preliminary injunction and supported its motion with an affidavit by a witness, who concluded the 750 foot restriction effectively precluded adult businesses in the Township because no commercial sites were available for an adult business. Defendant responded with a motion to dismiss on the grounds plaintiff was not the real party in interest and did not exhaust its administrative remedies by submitting an application for a conditional use permit to defendant. Plaintiff provided evidence showing it was a sub-lessee of Relm Investments, which leased the property from Partello Investments. Plaintiff showed, and defendant no longer disputed, plaintiff was the real party in interest and had standing to maintain the action.

In addition to its real party in interest argument, defendant argued the complaint must be dismissed because plaintiff failed to exhaust its administrative remedies. This argument, however, was contrary to law, which provides a plaintiff need not exhaust state remedies prior to bringing a 42 U.S.C. §1983 (federal civil rights) claim in federal court. The court also denied defendant's motion to dismiss for mootness and plaintiff's motion for a preliminary injunction. (Source: State Bar of Michigan *e-Journal* Number: 32435, July 20, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/district/2006/071106/32435.pdf

Nearby property owner not permitted to intervene

Court: U.S. District Court Western District of Michigan (File No. 5:06-CV-115 (2007 U.S. Dist. LEXIS 2656) ___ F.3d ___; 2006 U.S. App., (2007), January 12, 2007)

Case Name: *New Par v. Lake Twp.*

The court denied the property owner's motion to intervene as a defendant because the motion was not timely filed, she did not have a substantial legal interest in the case – not an aggrieved party – , and she was adequately represented by the parties already before the court.

The property owner knew of her interest in the lawsuit at least two months before filing her motion to intervene and she filed the motion after the parties had reached a settlement agreement. Although the delay was not long, it was a decision the property owner made, not an accident or oversight. The court also held the potential decrease in the owner's property value due to the building of a wireless telecommunications tower nearby was not a sufficient legal interest. Denying the property owner's motion to intervene could not impair her ability to protect her legal interest because she did not have a substantial legal interest in the case. Moreover, the property owner's ultimate objective was the construction of a wireless tower conforming to the ordinances of Lake Township. The defendant, Lake Township, had the same objective, which was evidenced by its prior rejections of the wireless tower for failure to comply with township ordinances. The court ruled the property owner's motion to intervene was untimely, she did not have a substantial legal interest in the lawsuit and the defendant adequately represented her in the case. For these reasons, the property owner's motion to intervene was denied. (Source: State Bar of Michigan *e-Journal* Number: 34688, March 9, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/district/2007/011207/34688.pdf

See *Frenchtown Charter Twp. v. City of Monroe et al.* on page 4.

Open Meetings Act, Freedom of Information Act

Attorney fees and costs under the Freedom of Information Act

Court: Michigan Court of Appeals (Unpublished No. 264273 (2006 Mich. App. LEXIS 1666), May 16, 2006; Published after release June 22, 2006, 9:00 a.m., 271 Mich. App. 418; 722 N.W.2d 277; 2006.)

Case Name: *Detroit Free Press, Inc. v. State of Mich.*

The trial court erred in awarding the plaintiff-*Detroit Free Press* attorney fees and costs because while attorney fees are available under §10 of the Freedom of Information Act (FOIA) (M.C.L. 15.240(6)), plaintiff did not bring this action under §10 and the plain language of the statute compelled the conclusion the *Free Press* prevailed, in part, under §4 (M.C.L. 15.234), not §10. The newspaper requested documents from the defendant-Michigan Attorney General's office referring to direct wine shipments into Michigan. The Attorney General, granting the request for any existing nonexempt documents and denying it for exempt documents, informed plaintiff it would charge $20 per hour for three hours of labor to search, review, and separate the documents, plus $0.25 a page to copy about 541 pages, and mailing costs. The *Free*

Press alleged defendant violated the FOIA by constructively denying its request through the imposition of labor charges and excessive copying charges. The trial court concluded Attorney General did not show failure to charge the labor fee would result in an unreasonably high cost to its office. The per-page charge was upheld. The defendant did not "deny" plaintiff's information request and the trial court did not order the production of documents, as contemplated under §10. Plaintiff prevailed in part under §4, which does not contain any provision for the award of fees and costs. Reversed. (Source: State Bar of Michigan *e-Journal* Number: 31799, May 24, 2006; 32207, June 26, 2006.)

Full Text Unpublished Opinion:
http://www.michbar.org/opinions/appeals/2006/051606/31799.pdf

Full Text published Opinion:
http://www.michbar.org/opinions/appeals/2006/062206/32207.pdf

Attorney fee under the Open Meetings Act

Court: Michigan Court of Appeals (271 Mich. App. 552; 722 N.W.2d 691 (2006), July 13, 2006)

Case Name: *Omdahl v. West Iron County Bd. of Educ.*

Deciding an issue of first impression, the court held where the litigant who represents him/herself in a proceeding under the Open Meetings Act (OMA) (MCL 15.261 *et seq.*) is an attorney and prevails he/she is entitled to an award of an attorney fee. The statute provides: "If a public body is not complying with this act, and a person commences a civil action against the public body for injunctive relief to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining relief in the action, the person shall recover court costs and actual attorney fees for the action." The court concluded, under the plain meaning of MCL 15.271(4), plaintiff was entitled to recover attorney fees. He is a person who commenced a civil action to enforce the OMA and he prevailed. Accordingly, the statute directs he "shall recover court costs and actual attorney fees for the action." The amount of the actual attorney fees is the value of the professional time plaintiff invested in the case—the actual number of billing hours times his actual billing rate. The trial court also erred in not awarding plaintiff court costs. The statute plainly provides the prevailing person is entitled to an award of court costs incurred during the course of the litigation. Even if the court were to agree with defendants and the trial court that no attorney fees were awardable because there was no actual attorney fee incurred, clearly court costs were still incurred and there was no reason not to award them. The statute is mandatory on this issue. Reversed and remanded and plaintiff may tax costs. (Source: State Bar of Michigan *e-Journal* Number: 32448, July 17, 2006.)

This case has been appealed to the Michigan Supreme Court.

Full Text Unpublished Opinion:
http://www.michbar.org/opinions/appeals/2006/071306/32448.pdf

Claim related to the Freedom of Information Act; the "frank communication exception" to disclosure required

Court: Michigan Supreme Court (475 Mich. 463; 719 N.W.2d 19 (2006), July 19, 2006)

Case Name: *Herald Co. v. Eastern MI Univ. Bd. of Regents*

Judge(s): Young, Jr., Taylor, Corrigan, and Markman; Concurring in part, Dissenting in part – Weaver; Concurring in part, Dissenting in part – Kelly; Dissent – Cavanagh, Weaver, and Kelly

The trial court did not abuse its discretion in concluding the public interest in frank communication clearly outweighed the public interest in disclosure, and in holding the particular letter at issue was exempt as a frank communication under the Freedom of Information Act (FOIA) (MCL 15.231 *et seq*.). The Doyle letter was written by the Eastern Michigan University (EMU) Vice President of Finance to a member of the EMU board of regents, Brandon, at her request as part of defendant's investigation of allegations the then-president of EMU had run the construction of a new president's house over budget. In this "particular instance" defendant had a strong interest in preserving candid internal investigatory communications. Although Doyle may have retired soon after writing the letter, defendant maintained its interest in preventing the ripple effect of chilled communications during this or later investigations. The public interest in disclosure is favored initially in the weighted balancing test. However, the trial court found the defendant's release of financial data mitigated that interest. Thus, the trial court did not abuse its discretion. The appropriate standard of review of discretionary determinations in FOIA cases is for clear error where the parties challenge the factual findings of the trial court. Where the parties do not dispute the underlying facts, but challenge the trial court's exercise of discretion, the appellate court must review the decision for an abuse of discretion.

Pursuant to M.C.L. 15.244, the public body must "to the extent practicable, facilitate a separation of exempt from nonexempt information" and "make the nonexempt material available for examination and copying." The court affirmed the summary disposition for defendant and remanded to the trial court to separate the materials according to M.C.L. 15.244.

Justice Weaver concurring in part and dissenting in part, agreed with the majority's standard of review in FOIA cases, but joined with the dissent and signed all put part II of the dissent.

Justice Kelly concurring in part and dissenting in part, signed all but part II of the dissent, because the defendant did not carry its burden of proving the letter was exempt. The justice concurred with the majority's clarification of the standard if review in FOIA cases.

The dissent opined the majority decision was an example of a court properly articulating the law, yet failing to apply it correctly and would hold the trial court abused its discretion in finding the defendant met its burden under the FOIA. Justice Cavanagh also disagreed with the majority regarding the standard of review and would hold the standard articulated in Federal Publications was correct. The effect of the majority opinion was to effectively abolish the "frank communication" exemption. The defendant did not meet its burden of showing the public interest in nondisclosure to encourage frank communications clearly outweighed the public interest in disclosure in this particular instance. (Source: State Bar of Michigan *e-Journal* Number: 32499, July 20, 2006.)

Full Text Unpublished Opinion:
http://www.michbar.org/opinions/supreme/2006/071906/32499.pdf

Freedom of Information Act request for site plans etc. on real property involved in a settlement agreement between the municipality and a third party

Court: Michigan Supreme Court (475 Mich. 558; 719 N.W.2d 73 (2006), July 19, 2006)

Case Name: *Coblentz v. City of Novi*

Judge(s): Kelly, Taylor, Weaver, Young, Jr., and Markman; Concurring in part, Dissenting in part – Cavanagh; Separate Concurring in part, Dissenting in part – Corrigan

In a case regarding Freedom of Information Act (FOIA) (M.C.L. 15.231 *et seq*.) requests for documents connected to a settlement agreement between the defendant-city and a third party concerning real property, the court held the requested settlement agreement exhibits were not exempt from disclosure and were sufficiently identified in the request, the requested "side agreements" to the settlement agreement were not exempt because defendant failed to comply with M.C.L. 15.243(1)(f)(iii), and it was not appropriate for defendant to charge plaintiffs fees for the work its attorney did in retrieving and separating documents plaintiffs requested. Defendant claimed only the final settlement agreement was discoverable and the requested exhibits (which were intentionally deleted) were not part of it. The court ruled since the FOIA request sufficiently identified the documents, M.C.L. 15.233(1) required defendant to produce them regardless of whether they were part of the final agreement. Defendant pointed to no applicable exemption. The court further held the trial court abused its discretion in finding defendant recorded a description of the "side agreements" within a reasonable time where there was a four to five month interval between when defendant received the letters and when it recorded a description of them, rejecting the argument defendant's negotiations with the third party to secure public release of the letters made the delay reasonable. The court also held the lower courts erred in allowing defendant to charge plaintiffs fees for its attorney's work in examining and separating the side letters because the attorney was an independent contractor, not defendant's employee. M.C.L. 15.234(3) allows recovery only for the costs associated with employees. The court affirmed the part of the Court of Appeals decision holding defendant was not required under the FOIA to produce documents regarding site plans and "global readings." Affirmed in part, reversed in part, and remanded for entry of a judgment compelling disclosure.

Justice Cavanagh concurred in all parts of the majority opinion except for parts II and VI. Although he agreed with the result in part VI – plaintiffs should not have to pay defendant the requested fees – he believed the reason was the failure to charge a fee for searching, examining, and reviewing the side agreements would not result in an unreasonably high cost to defendant.

Justice Corrigan concurred with the majority in all respects except she dissented from the holding the Court of Appeals erred in affirming summary disposition for defendant on plaintiffs' request for the side agreements – she believed the side letters were properly ruled

exempt from disclosure under M.C.L. 15.243(f)(1). She concluded the trial court did not abuse its discretion in ruling defendant recorded a description of the side letters within a reasonable time after they were submitted and defendant satisfied the remaining requirements of the exemption.. (Source: State Bar of Michigan *e-Journal* Number: 32500, July 20, 2006.)

Full Text Unpublished Opinion:
http://www.michbar.org/opinions/supreme/2006/071906/32500.pdf

Did defendant violated the plaintiff's First and Fourteenth Amendment rights during public comment segments of a meeting

Court: U.S. District Court Western District of Michigan (No. 5:05-CV-127 and 5:06-CV-7 (2006 U.S. Dist. LEXIS 48699), July 18, 2006)

Case Name: *Timmon v. Wood* (*Timmon v. Wood and Allen* and *Timmon v. Leeman and Dunbar*)

The court held the Lansing City Council meetings are a limited forum, Rule 19 (adopted as part of the rules of procedure by the Lansing City Council concerning decorum for meetings) was content neutral and was not applied to plaintiff in a discriminatory manner, and there were no violations of the plaintiff's First and Fourteenth Amendment rights. The court granted the defendants' motions for summary judgment on all claims and denied plaintiff's motions for summary judgment in both cases.

Plaintiff sued various members of the Lansing City Council based on events occurring during the September 12, 2005 and the January 5, 2006 meetings. Plaintiff alleged defendants were liable under § 1983 for violating her First and Fourteenth Amendment rights by invoking City Council Rule 19, alleged a state law claim for violation of the Open Meetings Act, and alleged defendants-Wood and Allen violated §§ 241 and 242. Plaintiff, an African-American, is a resident of the City of Lansing, frequently attends meetings of the City Council, and speaks during the meetings, including the public comment segment. The City has adopted rules governing the procedures and conduct of City Council meetings. Rule 19 covers decorum for meetings and rules for speakers, including rules the City will not permit personally abusive attacks upon any person during debate or public discussion, or statements which disrupt or impede the orderly conduct of the meeting. The court was provided with videotapes of both council meetings at issue. The court held defendants did not invoke Rule 19 in a manner violating plaintiff's First Amendment rights where the prohibition against personally abusive attacks in Rule 19 furthers the City's interest in running efficient meetings without disruption by ensuring speakers focus only on the issues and do not air their personal disputes with others. Defendants properly applied Rule 19 during both City Council meetings to restrain plaintiff from continuing her personal attacks. (Source: State Bar of Michigan *e-Journal* Number: 32513, September 8, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/district/2006/071806/32513.pdf

Analysis of the relevant parts of the Open Meetings Act; Intentional violation; Did reenactment cure the alleged intentional violation

Court: Michigan Court of Appeals (273 Mich. App. 691 (2007), January 23, 2007)

Case Name: *Leemreis v. Sherman Twp.*

The trial court did not err in proceeding to trial on the plaintiffs-Leemreises' claim against defendants-Chupp and Laws (Sherman Township) for intentional violation of the Open Meetings Act (OMA) (M.C.L. 15.273) because the claim was a separate cause of action based on § 273 and was not affected by the reenactment.

The plaintiffs own real property in the defendant-Sherman Township. They applied to the township planning commission (*sic.*) for approval of a 4-foot side-yard and 10-foot setback variance. The variance was issued and plaintiffs proceeded with construction.

After a neighborly dispute, plaintiffs applied for and received approval for 6-foot side-yard variance. Later, the neighbor filed an appeal of the decision to the Zoning Board of Appeals (ZBA). The ZBA held a meeting, which was attended by 35 or 40 members of the public voicing strong opinions about the decision. After public input, the ZBA chairman-Chupp stated either the meeting was closed for public comment or was closed to the public, and the public was cleared from the room. The ZBA decided to "go with the 6-foot side yard set back and the 10-foot set back from the right of way. Also building not to exceed 20-feet in height to comply with [Township Ordinance] 13.1-2." The township sued plaintiffs seeking to enforce the township's zoning and building code ordinances. The ZBA reenacted its prior decision, affirmed the variance,

and denied the neighbor's appeal.

The case went to trial on the issues of whether the township violated the OMA and whether Chupp and Laws intentionally violated the OMA. The court held the reenactment by a public body does not affect the personal liability of a public official who intentionally violates the OMA. The court also held there was no basis for the trial court to award costs and attorney fees based on § 273, and it properly did not. The court affirmed the trial court's order denying the township's motion for summary disposition as to the claims against Chupp and Laws, reversed in part, and vacated the trial court's order awarding plaintiffs costs and attorney fees related to another issue. (Source: State Bar of Michigan *e-Journal* Number: 34596, January 25, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2007/012307/34596.pdf

Signs: Billboards, Freedom of Speech

Did ordinance unconstitutionally infringe on First Amendment right to display a vehicle for-sale sign in the public street; Commercial speech

Court: U.S. Court of Appeals Sixth Circuit (453 F.3d 784 (2006) , May 19, 2006)

Case Name: *Pagan v. Fruchey and Village of Glendale, Ohio*

The entry of summary judgment by the district court dismissing Christopher Pegan's (plaintiff's) action against the defendants-Village and police chief was affirmed because the ordinance was a constitutional exercise of the Village's regulatory power. Plaintiff's claims arose out of a Village ordinance proscribing a resident's ability to display a for-sale sign on a vehicle parked on a public street. Plaintiff contended the Village ordinance unconstitutionally infringed on his First Amendment right to display a vehicle for-sale sign in the public street and the district court improperly excused the Village from setting forth any evidence to demonstrate the ordinance actually furthered a significant governmental interest. The Village asserted two substantial interests in regulating the placement of for-sale signs in automobiles parked in public streets – **traffic safety and aesthetics – both of which the court has previously held constituted valid substantial interests**. The court also concluded the Village demonstrated the restriction on commercial speech directly and materially advanced its asserted governmental interests. The court found it worth noting because the ordinance was designed to regulate potential safety hazards – persons occupying the roadway and distracted motorists – the ordinance had only an incidental impact on speech. "Perhaps more importantly, several alternative channels of speech remain available to plaintiff." The ordinance impacted only public streets – not driveways or other private property. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 31842, May 23, 2006.)

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

Did court properly severed the licensing provisions from the remainder of the defendant's adult entertainment ordinance

Court: U.S. Court of Appeals Sixth Circuit (460 F.3d 717 (2006), August 18, 2006)

Case Name: *Cam I, Inc. v. Louisville/Jefferson County Metro Gov't*

The district court did not err in severing the construction and zoning provisions of defendant's adult entertainment ordinance from the licensing provision, and the court affirmed the district court's decision to deny the plaintiffs' motion to amend, alter, or vacate its July 18, 2003 order.

The district court properly severed the licensing provision from the remainder of the adult entertainment ordinance because the zoning and construction provisions complied with the three requirements of Booker. The district court previously held the licensing provisions were probably unconstitutional. Plaintiffs conceded for the purpose of this appeal the zoning and construction provisions are constitutional. The zoning and construction provisions also operate independently from the licensing provision. There is no reason plaintiffs cannot operate their businesses in the proper part of town and in the proper building without an adult entertainment license. Further, allowing the zoning and construction provisions to stand, despite the invalidity of the licensing provisions, was consistent with the objectives of the council in adopting the ordinance. The council aimed to limit the secondary effects of the adult entertainment industry in the area when it enacted the ordinance. The zoning provisions do that by limiting the effects of the adult entertainment to limited areas. The construction provisions of the ordinance limit the secondary effects by limiting opportunities for illegal

prostitution. Most importantly, the amended ordinance contains a severability provision, indicating the council intended each provision remain in force despite the invalidity of another provision. Affirmed and the court denied plaintiffs' motion to strike defendant's brief as moot. (Source: State Bar of Michigan *e-Journal* Number: 32931, August 22, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2006/081806/32931.pdf

Ordinance imposing time, place, and manner restrictions on sexually oriented businesses

Court: U.S. District Court Western District of Michigan (No. 1:06-CV-300 and 4:06-CV-60 (2006 U.S. Dist. LEXIS 60934), August 28, 2006)

Case Name: *Sensations, Inc. v. City of Grand Rapids* (consolidated Cases *Sensations, Inc. et al., v City of Grand Rapids*, and *Little Red Barn Adult Theatre & Bookstore, Inc., v City of Grand Rapids, et al.*)

The court denied the plaintiffs' motion for continuation of stay of enforcement, which it construed as a motion for preliminary injunction, finding plaintiffs had failed to demonstrate a substantial likelihood of success on the merits of their challenge to the defendant-City of Grand Rapid's Ordinance 2006-23. The ordinance purported to be a zoning ordinance imposing time, place, and manner restrictions on sexually oriented businesses, as defined in the statute, expressly for the purpose of controlling the secondary effects of such businesses. The ordinance had four principal restrictive components and a 180-day grace period for existing businesses to modify and comply, as well as a scienter requirement for any violation. The parties initially stipulated to a temporary restraining order, which was extended by stipulation. Plaintiffs moved for continuation of the stay of enforcement for the entire period in which the action was pending. The court noted no challenge was raised to the manner in which the ordinance was promulgated. The ordinance was adopted in accordance with customary practices and procedures and the court would not lightly impede enforcement of the city's legislative enactment. The city expressly relied on decisions of the Supreme Court and Sixth Circuit upholding each of the various restrictions in the ordinance, finding both sufficient evidence of secondary effects supporting the substantial governmental interest and the relevant ordinances were narrowly tailored to meet this interest. Assuming for purposes of the decision plaintiffs were permitted to challenge evidence previously found by the Sixth Circuit and Supreme Court to be narrowly tailored to address a substantial governmental interest, plaintiffs were unable to demonstrate a substantial likelihood of success in doing so. They demonstrated no more than a mere possibility of success on the merits. (Source: State Bar of Michigan *e-Journal* Number: 33013, September 12, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/district/2006/082806/33013.pdf

Dissolution of a permanent injunction enjoining the enforcement of the defendant's ordinance regulating sexually oriented businesses

Court: U.S. Court of Appeals Sixth Circuit (466 F.3d 391, 2006 U.S. App., October 12, 2006.)

Case Name: *Deja Vu of Nashville, Inc. v. Metropolitan Gov't of Nashville & Davidson County* (*Deja Vu II*)

Agreeing in an amended opinion with the district court the constitutional infirmities previously determined to exist in defendant's ordinance regulating sexually oriented businesses had been cured, the court affirmed the district court's decision dissolving the permanent injunction enjoining enforcement of the ordinance and dismissing the case.

The case had been before the court several times, *Deja vu of Nashville, Inc. v. Metropolitan Gov't of Nashville & Davidson County* (*Deja Vu I*). The district court permanently enjoined enforcement of defendant's (Nashville & Davidson County, Ohio) ordinance in 1999. Defendant-county amended the ordinance and appealed. In *Deja Vu I*, the court affirmed, finding the judicial review provision in the ordinance was inadequate and the definition of "sexually oriented" was overbroad. Additional amendments were then made narrowing the definition of "sexually oriented." The state also altered its common law writ of *certiorari* to require prompt judicial review in First Amendment cases. The district court concluded the ordinance was now constitutional under *City of Littleton, CO v. Z.J. Gift's D-4, L.L.C.* and complied with *Deja Vu I*. The court agreed the constitutional problems with the ordinance had been rectified. Following *Z.J. Gifts*, the judicial review statute clearly complied with the U.S. Consitution First Amendment's requirement of a prompt judicial review. Defendant took its cue from *Deja Vu I* by narrowing its definition of "sexually oriented" to mean only those activities regularly

depicting specified sexual activities or anatomical areas and occurring on the premises of a sexually oriented business will be regulated. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 33398, October 16, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2006/101206/33398.pdf

Standing to challenge the city's sign ordinance; Did court properly dismissed plaintiff-Prime Media's suit because it lacked Article III standing under the "overbreadth doctrine" where it did not suffer an injury in fact?

Court: U.S. Court of Appeals Sixth Circuit (No. 05-6343 (2007 U.S. App. LEXIS 10862; 2007 FED App. 0164A (6th Cir.)), ___ F.3d ___; 2007 U.S. App., May 8, 2007)

Case Name: *Prime Media, Inc. v. City of Brentwood*

The court vacated its prior opinion[6] and replaced it with this amended opinion, which is why, even through this came out after April 30, 2007, it is included here.

Plaintiff, Prime Media, Inc, argued the district court erred by ruling it had suffered no injury in fact and contended it actually did have Article III standing. Plaintiff's actual injury was the rejection of its six proposed billboards for failure to meet, *inter alia*, the size and height requirements of the defendant-city's sign ordinance. Based on the decision of a prior panel, however, those requirements were found to be sufficiently tailored to pass constitutional scrutiny. Thus, despite establishing standing on this specific challenge to the height and size provisions, plaintiff simply lost on the merits, due to the constitutionality of the requirements as they applied to plaintiff. The remaining question was whether plaintiff still had standing to litigate its remaining claims — numerous other provisions of the ordinance were also facially invalid under the First Amendment, and its equal protection and due process claims — even though none of these challenges were supported by an independent injury in fact.

According to plaintiff, because it relied on a claim of overbreadth, it did not need to demonstrate an injury in fact (separate from that under the height and size requirements) to establish standing to proceed. The court held even though plaintiff advanced an overbreadth challenge, it was still required to show an injury in fact to challenge the provisions of the ordinance yet to be litigated. Plaintiff's standing with regard to the size and height requirements did not "magically carry over to allow it to litigate other independent provisions of the ordinance without a separate showing of an actual injury under those provisions." Although it was undisputed plaintiff had standing to challenge defendant's billboard height and size requirements, it must separately establish an injury in fact under the numerous other provisions it sought to challenge.

Plaintiff had not, in connection with its remaining claims, suffered an injury redressable by a favorable decision, as required to establish constitutional standing. The district court's dismissal of plaintiff's remaining challenges to the ordinance on the basis of standing was affirmed. (Source: State Bar of Michigan *e-Journal* Number: 35863, May 10, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2007/050807/35863.pdf

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[6]Court: U.S. Court of Appeals Sixth Circuit (No. 05-6343, January 22, 2007); Case Name: *Prime Media, Inc. v. City of Brentwood*

Agreeing with the Eleventh Circuit's approach in *CAMP Legal Defense Fund, Inc. v. City of Atlanta* (11th Cir.), the court held in the question of standing the critical inquiry is whether a plaintiff can allege an injury arising from the specific rule being challenged, rather than an entirely separate rule appearing in the same section of the municipal code.

Even though it was undisputed plaintiff-Prime Media, Inc. had standing to challenge the defendant-city's billboard height and size requirements, it must separately establish an injury in fact under the other challenged provisions. The district court properly dismissed Prime Media, Inc.'s remaining challenges to the sign ordinance on the basis of standing. Prime Media, Inc. filed this suit to challenge a sign ordinance of the city. In a prior appeal, the court reversed the district court's entry of summary judgment for Prime Media, Inc., ordering the dismissal of its constitutional challenge as applied. On remand, the district court dismissed Prime Media, Inc.'s remaining challenges to the ordinance on the basis of standing. The district court held Prime Media, Inc. no longer met the standing requirement of injury in fact after the court held the city's size and height requirements were constitutional. The district court reasoned Prime Media, Inc. had to rely on the "overbreadth doctrine" and third-party standing to have standing. Because the district court determined Prime Media, Inc. had suffered no injury in fact in relation to its remaining claims, it lacked standing. Prime Media, Inc.'s standing as to the size and height requirements did not "magically carry over to allow it to litigate other provisions of the ordinance without a separate showing of an actual injury." There was little dispute the remaining portions of the ordinance had not caused and did not imminently threaten any injury to Prime Media, Inc.. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 34591, January 24, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2007/012207/34591.pdf

See also: *Little Mack Entm't II, Inc. v. Marengo Twp.* on page 7.

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

Jurisdiction of U.S. Clean Water Act (Wetland) Regulation

Court: U.S. Supreme Court (126 S. Ct. 2208; 165 L. Ed. 2d 159 (2006), June 19, 2006)

Case Name: *Rapanos et ux., et al. v. United States*

(*Certiorari* to the United States Court of Appeals for the Sixth Circuit)

As relevant here, the United States Clean Water Act (CWA or Act) makes it unlawful to discharge dredged or fill material into "navigable waters" without a permit (33 U. S. C. §§1311(a)), and defines "navigable waters" as "the waters of the United States, including the territorial seas" (§1362(7)). The Army Corps of Engineers (Corps), which issues permits for the discharge of dredged or fill material into navigable waters, interprets "the waters of the United States" expansively to include not only traditional navigable waters (33 CFR §328.3(a)(1)) but also other defined waters (§328.3(a)(2), (3)); "[t]ributaries" of such waters (§328.3(a)(5)); and wetlands "adjacent" to such waters and tributaries, (§328.3(a)(7)). "[A]djacent" wetlands include those "bordering, contiguous [to], or neighboring" waters of the United States even when they are "separated from [such] waters … by man-made dikes … and the like." §328.(c).

These cases involve four Michigan wetlands lying near ditches or man-made drains that eventually empty into traditional navigable waters. In court case number 04–1034, the United States brought civil enforcement proceedings against the Rapanos petitioners, who had backfilled three of the areas without a permit. The U.S. District Court found federal jurisdiction over the wetlands because they were adjacent to "waters of the United States" and held petitioners liable for CWA violations. Affirming, the U.S. Sixth Circuit found federal jurisdiction based on the sites' hydrologic connections to the nearby ditches or drains, or to more remote navigable waters. In court case number 04–1384, the Carabell petitioners were denied a permit to deposit fill in a wetland that was separated from a drainage ditch by an impermeable berm. The Carabells sued, but the U.S. District Court found federal jurisdiction over the site. Affirming, the U.S. Sixth Circuit held that the wetland was adjacent to navigable waters.

Held: The judgments are vacated, and the cases are remanded. No. 04–1034, 376 F. 3d 629, and No. 04–1384, 391 F. 3d 704, vacated and remanded.

Justice Scalia, joined by The Chief Justice, Justice Thomas, and Justice Alito, concluded:

1. The phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams," "oceans, rivers, [and] lakes," *Webster's New International Dictionary* 2882 (2d ed.), and does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps' expansive interpretation of that phrase is thus not "based on a permissible construction of the statute." *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 . Pp. 12–21.

(a) While the meaning of "navigable waters" in the CWA is broader than the traditional definition found in The Daniel Ball, 10 Wall. 557, see *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U. S. 159 (*SWANCC*); *United States v. Riverside Bayview Homes, Inc.*, 474 U. S. 121 , the CWA authorizes federal jurisdiction only over "waters." The use of the definite article "the" and the plural number "waters" show plainly that §1362(7) does not refer to water in general, but more narrowly to water "[a]s found in streams," "oceans, rivers, [and] lakes," *Webster's New International Dictionary* 2882 (2d ed.). Those terms all connote relatively permanent bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Pp. 12–15.

(b) The Act's use of the traditional phrase "navigable waters" further confirms that the CWA confers jurisdiction only over relatively permanent bodies of water. Traditionally, such "waters" included only discrete bodies of water, and the term still carries some of its original substance, *SWANCC*, supra, at 172. This Court's subsequent interpretation of "the waters of the United States" in the CWA likewise confirms this limitation. See, e.g., *Riverside Bayview, supra*, at 131. And the CWA itself categorizes the channels and

conduits that typically carry intermittent flows of water separately from "navigable waters," including them in the definition of "'point sources,'" (33 U. S. C. §1362(14)). Moreover, only the foregoing definition of "waters" is consistent with CWA's stated policy "to recognize, preserve, and protect the primary responsibilities and rights of the States … to plan the development and use … of land and water resources … ." (§1251(b)). In addition, "the waters of the United States" hardly qualifies as the clear and manifest statement from Congress needed to authorize intrusion into such an area of traditional state authority as land-use regulation; and to authorize federal action that stretches the limits of Congress's commerce power. See *SWANCC, supra*, at 173. Pp. 15–21.

2. A wetland may not be considered "adjacent to" remote "waters of the United States" based on a mere hydrologic connection. *Riverside Bayview* rested on an inherent ambiguity in defining where the "water" ends and its abutting ("adjacent") wetlands begin, permitting the Corps to rely on ecological considerations only to resolve that ambiguity in favor of treating all abutting wetlands as waters. Isolated ponds are not "waters of the United States" in their own right, see *SWANCC, supra*, at 167, 171, and present no boundary-drawing problem justifying the invocation of such ecological factors. Thus, only those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between the two, are "adjacent" to such waters and covered by the Act. Establishing coverage of the Rapanos and Carabell sites requires finding that the adjacent channel contains a relatively permanent "wate[r] of the United States," and that each wetland has a continuous surface connection to that water, making it difficult to determine where the water ends and the wetland begins. Pp. 21–24.

3. Because the U.S. Sixth Circuit Court applied an incorrect standard to determine whether the wetlands at issue are covered "waters," and because of the paucity of the record, the cases are remanded for further proceedings. P. 39.

Justice Kennedy concluded that the U.S. Sixth Circuit Court correctly recognized that a water or wetland constitutes "navigable waters" under the Act if it possesses a "significant *nexus*" to waters that are navigable in fact or that could reasonably be so made, *SWANCC*, but did not consider all the factors necessary to determine that the lands in question had, or did not have, the requisite nexus. *United States v. Riverside Bayview Homes, Inc.*, 474 U. S. 121 , and *SWANCC* establish the framework for the inquiry here. The *nexus* required must be assessed in terms of the Act's goals and purposes. Congress enacted the law to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (33 U. S. C. §1251(a)) and it pursued that objective by restricting dumping and filling in "waters of the United States" (§§1311(a), 1362(12)). The rationale for the Act's wetlands regulation, as the Corps has recognized, is that wetlands can perform critical functions related to the integrity of other waters—such as pollutant trapping, flood control, and runoff storage (33 C. F. R. §320.4(b)(2)). Accordingly, wetlands possess the requisite *nexus*, and thus come within the statutory phrase "navigable waters," if the wetlands, alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional sense. When, in contrast, their effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the term "navigable waters." Because the Corps' theory of jurisdiction in these cases—adjacency to tributaries, however remote and insubstantial—goes beyond the *Riverside Bayview* holding, its assertion of jurisdiction cannot rest on that case. The breadth of the Corps' existing standard for tributaries—which seems to leave room for regulating drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes toward it—precludes that standard's adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Absent more specific regulations, the Corps must establish a significant *nexus* on a case-by-case basis when seeking to regulate wetlands based on adjacency to nonnavigable tributaries, in order to avoid unreasonable applications of the Act. In the instant cases the record contains evidence pointing to a possible significant nexus, but neither the agency nor the reviewing courts considered the issue in these terms. Thus, the cases should be remanded for further proceedings. Pp. 1–30.

Scalia, J., announced the judgment of the Court, and

delivered an opinion, in which Roberts, C. J., and Thomas and Alito, JJ., joined. Roberts, C. J., filed a concurring opinion. Kennedy, J., filed an opinion concurring in the judgment. Stevens, J., filed a dissenting opinion, in which Souter, Ginsburg, and Breyer, JJ., joined. Breyer, J., filed a dissenting opinion. (Source: Cornell Law School Legal Information Institute, http://www4.law.cornell.edu/supct/html/04-1034.ZS.html
Syllabus: http://www.law.cornell.edu/supct/pdf/04-1034P.ZS
Opinion: http://www.law.cornell.edu/supct/pdf/04-1034P.ZO
Concurrence, Roberts:
http://www4.law.cornell.edu/supct/pdf/04-1034P.ZC
Concurrence, Kennedy:
http://www4.law.cornell.edu/supct/pdf/04-1034P.ZC1
Dissent, Stevens:
http://www4.law.cornell.edu/supct/pdf/04-1034P.ZD
Dissent, Breyer:
http://www4.law.cornell.edu/supct/pdf/04-1034P.ZD1

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

Did a judge improperly consider matters outside the pleadings and failed to accept all allegations in the complaint as true? Did plaintiffs had a full and fair opportunity to litigate the constitutionality of the ordinance in the state court?

Court: U.S. District Court Eastern District of Michigan (Case No. 05-10045 (2006 U.S. Dist. LEXIS 83752), November 6, 2006)

Case Name: *Dickson v. Township of Novesta*

The court adopted in part the federal magistrate's report and recommendation, granted the defendant's "dispositive motion" construed as a motion for summary judgment, and dismissed with prejudice the amended complaint, concluding plaintiffs' claims were barred by collateral estoppel or *res judicata*.

Plaintiffs challenged the defendant-Novesta Township's Junk and Dismantled Car Ordinance, which they were convicted of violating. The township filed a "dispositive motion," arguing plaintiffs' claims were barred by the doctrine of collateral estoppel or *res judicata* and the individual defendants, as members of the Novesta Township Board of Trustees, were entitled to qualified immunity. Defendants' motion requesting dismissal of the complaint, titled "Defendants' Initial Dispositive Motion," failed to cite either Rule 12(b)(6) or Rule 56. Although defendants attached numerous exhibits to their motion, the magistrate judge considered the motion to be a motion to dismiss pursuant to Rule 12(b)(6). Plaintiffs objected, arguing the magistrate judge improperly considered matters outside the pleadings and failed to accept all allegations in the complaint as true as required by Rule 12(b)(6). Defendants did not specify the rule under which they brought their "dispositive motion." However, the addition of materials outside the pleadings in this case should have put all concerned on notice Rule 56 set out the proper manner of proceeding. Consideration of the documents submitted by defendants required the motion to be considered one for summary judgment. Since defendants did not specifically denominate their motion as arising under Rule 12(b), and because they and plaintiffs presented materials outside the pleadings, Rule 56 was the governing procedural rule.

The court concluded plaintiffs obtained review of the constitutionality of the ordinance in state court, and their claim the defendants violated the Fourth Amendment by entering their property to take pictures of the junk on it should have been litigated during their trial. Further, Widgren precluded relief on plaintiffs' Fourth Amendment claim. (Source: State Bar of Michigan *e-Journal* Number: 34135, December 19, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/district/2006/110606/34135.pdf

Other Published Cases

MDOT must utilize material having lowest life-cycle cost; local government can not alter selection and/or pay difference

Michigan Attorney General Opinion No. 7194, May 16, 2006. (Requested by Honorable Raymond Basham, State Senator)

Under M.C.L. 247.651h(1), the Michigan Department of Transportation is required to design and award certain paving projects "utilizing material having the lowest life-cycle cost." A municipality may not alter the selection of the material to be used on a state highway project by paying the difference between the cost of the material having the lowest life-cycle cost and the more expensive material desired by the municipality.

The question asked of the Attorney General was if a municipality may select the type of pavement to be used on a state highway project by paying the difference between the cost of the pavement material having the lowest life-cycle cost and the more expensive material

desired by the municipality.

The Attorney General's opinion concluded that under M.C.L. 247.651h(1), the Michigan Department of Transportation is required to design and award certain paving projects "utilizing material having the lowest life-cycle cost." A municipality may not alter the selection of the material to be used on a state highway project by paying the difference between the cost of the material having the lowest life-cycle cost and the more expensive material desired by the municipality. (Source: State of Michigan, department of Attorney General.)

Full Text Opinion:
http://www.ag.state.mi.us/opinion/datafiles/2000s/op10270.htm

Scope of a municipality's constitutional authority to exercise "reasonable control" over its streets

Court: Michigan Supreme Court (475 Mich. 109; 715 N.W.2d 28 (2006), May 31, 2006)

Case Name: *City of Taylor v. The Detroit Edison Co.*

Judge(s): Young, Jr., Taylor, Weaver, Corrigan, and Markman; Concurring in the result only – Cavanagh; Dissent – Kelly

Reconciling a municipality's "constitutional authority to exercise 'reasonable control' over its streets" with the The Michigan Public Service Commission's (MPSC) "broad regulatory control over public utilities," the court held the exercise of such "reasonable control" cannot "impinge on matters of statewide concern nor can a municipality regulate in a manner inconsistent with state law." To the degree the plaintiff-City of Taylor's ordinance regarding the relocation of utility wires underground conflicted with the MPSC's rules on the subject, "the ordinance exceeds plaintiff's power to exercise 'reasonable control' over its streets and is invalid." Reaffirming *People v. McGraw*, which interpreted the similarly worded predecessor of art. 7, § 29 in the 1908 Michigan Constitution, the court concluded City of Taylor's ordinance requiring all public utilities with lines or poles adjacent to Telegraph Road to relocate underground all of their overhead lines and wires and remove all poles etc. at the utilities' sole cost and expense might be incongruent with the MPSC's regulations governing underground relocation of wires (and the regulation of the defendant-utility Detroit Edison Co.) and thus, might be invalid. The court further held the MPSC had primary jurisdiction over the issue of cost allocation. The trial court should have granted defendant's motion to dismiss and required plaintiff to seek a remedy from the MPSC. The court also overruled the Court of Appeals cases, such as *City of Pontiac v. Consumers Power Co.*, applying the proprietary function/governmental function test in this area of the law. The judgment of the Court of Appeals was reversed and the case was remanded to the trial court to grant defendant summary disposition, without prejudice to plaintiff's right to seek a remedy before the MPSC.

The dissent, stating the majority had "made a drastic change in the law," concluded Michigan courts have long held the right of "reasonable control" includes the right to order a utility to move its facilities to another location at the utility's expense, the state had not occupied the field in this area of law, the ordinance was not preempted, and the MPSC's primary jurisdiction was not implicated. The dissent would affirm the judgment of the Court of Appeals. (Source: State Bar of Michigan *e-Journal* Number: 31931, June 1, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/supreme/2006/053106/31931.pdf

The Indian sovereignty doctrine; Proper interpretation of the 1854 Treaty

Court: U.S. Court of Appeals Sixth Circuit (452 F.3d 514 (2006), June 26, 2006)

Case Name: *Keweenaw Bay Indian Community v. Naftaly et al., Township of L'anse, et al.*

The district court properly granted the plaintiff's motion for summary judgment on the ground the 1854 Treaty disallows involuntary alienation of real property held by plaintiff or its members, entered a declaratory judgment the Michigan General Property Tax Act (Act) (M.C.L. §211.1 *et seq*.) was not valid as applied to real property held in fee simple by plaintiff or its members within the exterior boundaries of the L'Anse Indian Reservation, and enjoined defendants from enforcing the Act against the real property. In 1854, the President of the United States and the Chippewa Indians of Lake Superior and Mississippi entered into a treaty (1854 Treaty). Under the 1854 Treaty, the Chippewa Indians ceded to the United States a substantial amount of land in eastern Minnesota. In exchange, the United States set aside permanent reservations for the various bands of Lake Superior and Mississippi Chippewa. The focus of the analysis was Article 11 of the 1854 Treaty, which states in relevant part, "[T]he Indians shall not be

required to remove from the homes hereby set apart for them." Defendants-L'Anse Township and Baraga Township issued *ad valorem* tax bills for real property held by plaintiff or its members located within the exterior boundaries of the reservation. Plaintiff asserted the provision disallows any form of involuntary alienation, including the sale of real property in fulfillment of a tax judgment. In support, plaintiff offered an expert opinion and report. While defendants offered an alternative interpretation of the 1854 Treaty, principles of American Indian treaty construction supported the district court's decision. The district court's interpretation of the 1854 Treaty, finding the treaty prevented involuntary state alienation and thus state taxation of real property, comported with the backdrop of American Indian sovereignty and principles of treaty construction in favor of American Indians.

The appeals court agreed with plaintiff's expert the Chippewa Indians did not know or have reason to know that, in setting aside a permanent reservation for them, the 1854 Treaty also required them to pay taxes each year on allotted land, with the potential of losing those allotted lands. The Chippewa Indians envisioned land set aside for them permanently – it did not make sense they would disapprove of the mass removal of their society but would sanction a gradual removal of individuals through involuntary alienation. As the expert noted, this was especially true considering the Chippewa Indians did not have much hard currency to pay annual property taxes. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 32265, June 28, 2006.)

Appeal to the U.S. Supreme Court was denied.

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2006/062606/32265.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*.[7] They are included here because they state current law well, or as a reminder of what current law is.)

Restrictions on Zoning Authority

Zoning jurisdiction over Detroit International Bridge Company

Court: Michigan Court of Appeals (Unpublished No. 257369 and No. 257415, September 14, 2006)

Case Name: *Detroit Int'l Bridge Co. V. City of Detroit* (Consolidated Cases: *Detroit International Bridge Company, V. City of Detroit*, and *City of Detroit, v. Ambassador Bridge Company a/k/a Detroit International Bridge Company*.)

Agreeing with the defendant-City of Detroit the petitioner-Detroit International Bridge Company (DIBC) was not a federal instrumentality and federal law did not preempt the city from enforcing its zoning ordinances as to construction projects within the Ambassador Bridge plaza, the court reversed the trial court's order for declaratory and injunctive relief.

The Bridge Authority, which owns the American side of the Bridge, sought to construct tollbooths and diesel fuel pumps as part of a plan to begin collecting tolls after traffic has alighted from the Bridge and for Customs to conduct inspections before traffic enters the Bridge. DIBC argued any attempt by the city to enforce its zoning and building ordinances against DIBC was precluded by federal preemption. The court held while the Bridge was constructed to facilitate interstate and international commerce, the DIBC was not. DIBC simply owns, maintains, and operates the Bridge. Further, the trial court clearly erred in finding there was sufficient federal government control over DIBC to designate it a federal instrumentality. The Bridge is not an instrumentality exclusive to the federal government. The trial court record also did not show the federal government suggested or otherwise compelled DIBC to undertake any of the projects. As to preemption, there was no federal statute, regulation, or rule regulating the land use of areas immediately surrounding the Bridge, and there were no federal statutes inconsistent with the city's zoning ordinances – there was no field or conflict preemption. Reversed and remanded.. (Source: State Bar of Michigan *e-Journal* Number: 33107, September 21, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/091406/33107.pdf

The Right to Farm Act; Is a farm activity was protected under the Act; Whether the Act preempted the zoning ordinance; If both MCL 286.473(1) and (2) must be met; Commercial activity not protected under the Act; The agricultural buildings exception under MCL 125.1510(8) of the Stille-DeRossett-Hale Single State Construction Code Act.

Court: Michigan Court of Appeals (Unpublished No. 268920, September 19, 2006)

Case Name: *Papadelis v. City of Troy*

Concluding the plaintiffs' use of their northern parcel satisfied the definition of "farm operation" and the nursery products involved in their business constituted "farm products," the court held plaintiffs' use was protected under MCL 286.473(1).

An affidavit by the president of one of the plaintiffs stated the parcel was used for agricultural operations, including the growing and storage of floriculture and horticulture products, and the greenhouses and cold frames on the parcel were only used for cultivating plants and other agricultural products. The affidavit stated plaintiffs' operations complied with all generally accepted agricultural and management practices (GAAMPs), as required by the statute, and defendants failed to produce any evidence to the contrary.

[7] *Stare decisis* (MCR 7.215(c)(1). See *Dyball v Lennox*, 260 Mich. App. 698; 705 n 1 (2003). Unplublished cases need not be followed by any other court, except in the court issuing that opinion. But, a court may find the unpublished case persuasive and dispositive, and adopt it or its analysis. Unpublished cases often recite stated law or common law. Readers are cautioned in using or referring to unpublished cases; and should discuss their relevance with legal counsel before use.

Defendants also argued the The Right to Farm Act (RTFA) (M.C.L. 286.471 *et seq.*) did not protect plaintiffs' operations because they did not exist before the parcel was zoned for residential use.

This presented the issue of whether both M.C.L. 286.473(1) and (2) must be met before a farm or farming operation is protected under the RTFA. The court held M.C.L. 286.473(1) and (2) are to be read separately and protection under one subsection does not depend on a party's satisfaction of the requirements in the other subsection. According to the plain language of M.C.L. 286.473(1) a farm or farm operation conforming to the GAAMPs is entitled to the protection provided by the RTFA without regard to the historic use of the property. The court affirmed the trial court's order granting plaintiffs partial summary disposition and granting defendants summary disposition on plaintiffs' §1983 claim. (Source: State Bar of Michigan *e-Journal* Number: 33182, September 27, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/091906/33182.pdf

For additional information about this and other Right to Farm Act court cases see "Questions About Intent and Application of Michigan's Right to Farm Act" by Patricia Norris and Gary Taylor, pp5-11, *Planning and Zoning News*, March 2007. Also see *Public Policy Brief; Selected Zoning Court Cases Concerning the Michigan Right to Farm Act 1964-2006* by Patricia Norris found at:
http://web1.msue.msu.edu/wexford/LU/pamphlets.htm#court

See also *Township of Armada v. Marah* on page 39.

Wetland usage and regulation of private residential property; If the Natural Resources Environmental Protection Act preempts local regulation of wetlands

Court: Michigan Court of Appeals (Unpublished No. 261766, November 2, 2006)

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

Holding the township-defendants' ordinances and Natural Resources Environmental Protection Act (NREPA) (M.C.L. 324.101 *et seq.*) were not in conflict and the trial court did not err in determining defendants' imposition of conditions upon issuance of the wetland permit was consistent with the authority conveyed by the statute and ordinance, the court affirmed the trial court's order granting the defendants summary disposition and declaratory relief.

Plaintiffs argued NREPA expressly preempted local regulation of wetlands and defendants' ordinances conflicted with NREPA because they improperly shifted the burden of proof concerning a determination of essentiality and provided for an environmental features setback. There was no conflict because it was the responsibility of the municipality under both the ordinance and the statute to make a determination of essentiality. M.C.L. 324.30309, designating the factors to be considered in making a determination of essentiality, was identical in wording to the local ordinance. The court concluded based on plaintiffs having actual notice of the essentiality determination as to the subject wetland, the notification requirement was fulfilled and they could not claim they were materially prejudiced by the failure to obtain a separate written determination in accordance with M.C.L. 324.30309. While plaintiffs also took issue with the imposition of a setback, contending it was in violation of M.C.L. 324.30307(4), they failed to effectively challenge defendants' authority to regulate areas surrounding environmental features such as wetlands through zoning provisions. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 33739, November 9, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/110206/33739.pdf

See also: *Billboards by Johnson, Inc. v. Township of Algoma* on page 35.

Takings

Takings, due process, substantive due process, and equal protection

Court: Michigan Court of Appeals (Unpublished No. 265163, August 8, 2006)

Case Name: *Dicicco v. City of Grosse Pointe Woods*

Utilizing the *Penn Cent. Transp. Co. v. New York City* balancing analysis, the court held plaintiffs failed to make out a case of regulatory taking and the trial court should have granted the defendant-City's motion for summary disposition. This case marked the fourth time the parties were before the court in a controversy dating back to 1997, involving plaintiffs' 1995 purchase of a 42-foot wide parcel of residential property in the city for $5,500 with the intent to build a 4,000 square foot home. Plaintiffs filed the present suit challenging the constitutionality of the city's zoning classification under its ordinance (requiring lots to be at least 60 feet

wide), as applied to their property, on taking, due process, and equal protection grounds. The trial court dismissed any facial challenge to the ordinance after finding plaintiffs challenged the ordinance only as applied and denied defendant's motion related to the taking claim and with regard to the "as applied" constitutionality of the ordinance. (1) The court held the first factor of the *Penn Central* test was not discussed by the trial court and did not appear to be at issue. (2) As to the second factor, the court held plaintiffs had not shown the property was without value or unmarketable as zoned. (3) Regarding the third *Penn Central* factor, the record showed plaintiffs were unreasonable in believing their $5,500 lot was buildable, and since the ordinance at issue was enacted in 1975 (plaintiffs bought the parcel in 1995), plaintiffs knew or should have known the property did not meet the 60-foot minimum width requirement. Thus, the trial court erred in finding a question of fact as to the reasonableness of plaintiffs' expectations regarding the property's buildability. Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 32764, August 17, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/080806/32764.pdf

Inverse condemnation

Court: Michigan Court of Appeals (Unpublished No. 260283, September 19, 2006)

Case Name: *Huffman v. City of Marlette*

The plaintiff in an inverse condemnation case must show action directed at plaintiff's property in order to establish the claim, but need not establish "intent" on the part of the government. Since plaintiff alleged her property was permanently subjected to intermittent but inevitable runoff caused by the defendant-city's improvement of the street in front of her home, she properly pleaded a taking by inverse condemnation in avoidance of governmental immunity. Thus, the trial court properly denied defendant's motion for summary disposition.

The defendant (City of Marlette) renovated the street in front of plaintiff's home (Huffman) including installation of a concrete curb and gutter, storm water sewers, and elevation and repaving of the road surface. She alleged the renovation increased the ground water flowing into her home by channeling water runoff into the foundation. Plaintiff claimed the water running into her home created an accumulation of toxic black mold making her ill, and rendering her home completely unlivable. In her first amended complaint, she alleged she was entitled to recover for a constitutional taking that "occurred when Plaintiff was left with no use or enjoyment of her home [because of]…water damage and the presence of black mold." Defendant contended plaintiff's takings claim was barred under *Heinrich v. Detroit* because she could not show the city intended to impact her property when it allegedly caused water runoff to flow onto her property. The court rejected defendant's attempt to inject an "intent" element into the *Hinojosa* test. Questions of fact remain. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 33151, September 25, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/091906/33151.pdf

Civil Rights

Compel the defendant-township to issue a building permit

Court: Michigan Court of Appeals (Unpublished No. 271400, December 19, 2006)

Case Name: *Herne v. Charter Twp. of Waterford*

While the plaintiff did not have to show he was a member of a protected class to establish a selective enforcement claim, the trial court properly granted the defendant-township summary disposition because mandamus was not an appropriate remedy in this case.

Plaintiff (Mr. Herne), without a permit, built a covered porch on his home extending about 12 feet into a 35-foot setback area. He also built, without a permit, a shed extending about one and a half feet into a five-foot setback area. At least four of plaintiff's neighbors had built similarly offending porches, also allegedly without permits. When plaintiff applied for a building permit, he was allegedly directed to seek a variance from the Zoning Board of Appeals (ZBA), which denied his request. Plaintiff appealed to the trial court, and the ZBA's decision was affirmed. He then filed this suit seeking a writ of mandamus to compel the Charter Township of Waterford to issue a building permit. The court concluded even if plaintiff would be entitled to a permit if he could show the zoning ordinance was selectively enforced against him without reason, he could not show a clear legal right to the permit before establishing the necessary facts and thus, could not show the township had a clear legal duty to

issue the permit. He also failed to show he had no other equitable or legal remedy available. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 34319, January 5, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/121906/34319.pdf

Land Divisions & Condominiums

Action to quiet title

Court: Michigan Court of Appeals (Unpublished No. 256252, May 2, 2006.)

Case Name: *Bowman v. The Treasurer for the State of Mich*.

The trial court properly dismissed the plaintiff's claims to quiet title and to vacate the dedication of a portion of Island Street in Harrison Township. The trial court also properly held the defendant-Macomb County Road Commission Chairperson timely accepted the dedication of the disputed street. The rule is that a valid dedication of land for a public purpose requires two elements—(1) a recorded plat designating the areas for public use evidencing a clear intent by the plat proprietor to dedicate those areas to public use and (2) acceptance by the proper public authority. If a township or county has effectively and timely accepted the public dedication of a road, a circuit court has no authority to vacate the road absent consent by the township or county. On the basis of the arguments and stipulated exhibits of the parties, the trial court correctly found the defendant-chairperson of the road commission, by its actions, accepted the dedication by the mid-1970's at the latest. The Road Commission's act of placing a guardrail at the end of the street and the placement of the storm sewer were sufficient to demonstrate an acceptance of that dedication. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 31640, May 11, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/050206/31640.pdf

Land Division Act and Driveway Act

Court: Michigan Court of Appeals (Unpublished No. 264695, May 4, 2006)

Case Name: *Jaikins v. Rose Twp*.

Since the plaintiffs failed to comply with the defendant-township's ordinance by properly completing the private road application process, they were not entitled to a judgment on their land division application. Plaintiffs acquired 118 acres of property in the defendant-township. They decided to divide the property into several smaller parcels, and began building a private road to provide access to the proposed divisions. In November 2000, plaintiffs submitted to defendant a land division application and a private road application. Defendant's planning commission recommended denial of the private road application. Plaintiffs never received a formal final approval or denial. The township said the application was incomplete because plaintiffs had not complied with the requisite local ordinance, which requires final approval of a private road application before defendant will consider a land division application. Plaintiff filed suit seeking mandamus, alleging constitutional violations, and violation of the Freedom of Information Act. In September 2001, the planning commission recommended preliminary approval of the private road application, subject to five conditions. In April 2002, defendant's board passed a resolution stating it would finalize and approve the land division only if the five conditions were met first. Plaintiffs' argument that once they complied with the requirements in the Land Division Act (LDA) (MCL 560.101 *et seq.*) itself, defendant was required to act on their land division application, irrespective of the more restrictive local ordinance, was without merit. Because their private road application was never formally approved by defendant, plaintiffs' land division application remained incomplete under the township's land division ordinance. Defendant was entitled to withhold its final approval and the trial court properly granted defendant-township judgment on this issue. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 31676, May 12, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/050406/31676.pdf

Zoning and Land Division Act

Court: Michigan Court of Appeals (Unpublished No. 258102, June 13, 2006.)

Case Name: *Grant Twp. v. Vander Wall*

The trial court properly held the plaintiff-township had the authority to promulgate §3.53 of the Grant Township Zoning Ordinance.[8] The dispute arose out of

[8]Section 3.53 of the Grant Township Zoning Ordinance reads "Land Divisions. No property within the Township shall be split, divided or subdivided until and unless a permit has been obtained from the Township Zoning Administrator (or such other Township official as is designated by the Township Board by

(continued...)

a series of land divisions occurring just prior to the effective date (March 31, 1997) of the Land Division Act (LDA) (MCL 560.101 *et seq*.)(1996 PA 591), which amended and renamed its predecessor statute, the Subdivision Control Act (SCA) (1967 PA 288). The SCA was inapplicable to the divisions here because by its terms it did not regulate divisions of land that did not result in 5 or more splits in 10 years. Defendants argued because the SCA did not limit their preexisting common law rights as landowners to divide their property (provided the division resulted in fewer than five parcels), the township had no authority to do so. The challenged ordinance did not seek to impose a requirement of a different kind than those contemplated under the SCA. Rather, the ordinance had the effect of carrying out the provisions of the act, and requiring compliance with zoning requirements. Thus, had the divisions at issue been subject to the SCA, the ordinance would be valid under the SCA. The court found no basis to conclude the Legislature, in enacting the SCA, intended to abrogate the authority otherwise granted to townships so as to preclude them from regulating the division of parcels not subject to the SCA to the same extent they were permitted to regulate parcels subject to the SCA. The court also did not find the LDA's inclusion of provisions related to the division of land not subject to the platting requirements indicative of the Legislature's intent in enacting the SCA years before. The court held §3.53 of the township zoning ordinance was a valid exercise of authority under the The Township Zoning Act (TZA) (MCL 125.271-125.310). Section 3.53 aids in enforcing plaintiff's various substantive ordinances because it prevents divisions resulting in parcels violating substantive zoning provisions. Plaintiff's various substantive zoning ordinances were presumed valid and defendants failed to prove otherwise. The judgment for plaintiff was affirmed.. (Source: State Bar of Michigan *e-Journal* Number: 31995, June 21, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/061306/31995.pdf

If casual recreational use of the disputed portion of Outlot A constituted a reasonable basis for objecting to the petition to vacate the plat

Court: Michigan Court of Appeals (Unpublished No. 266888, June 29, 2006)

Case Name: *Martin v. Cavan*

Rejecting plaintiffs' argument the intervening parties' use of the disputed portion of Outlot A (in a plat approved under the Land Division Act (M.C.L. 560.221 *et seq*.) for launching boats and outdoor recreation did not constitute a reasonable basis for objecting to plaintiffs' petition to vacate the plat. The court affirmed the trial court's denial of plaintiffs' motion for summary disposition and grant of summary disposition for the intervening parties. Plaintiffs, owners of Lot 21, adjacent to Outlot A, commenced this action to establish their ownership of the disputed portion of Outlot A. The plat dedication showed all of Outlot A was reserved for the use of the lot owners. The owner of Lot 21 and the disputed portion of Outlot A at the time it was platted, Fritch, signed the plat dedication, but then later conveyed both Lot 21 and the disputed portion of Outlot A. After remand of the case to the trial court by the Supreme Court, the trial court found plaintiffs were not entitled to summary disposition because defendants' objections to vacation of the plat were reasonable, and Fritch transferred the disputed portion of Outlot A as part of a private dedication. The court concluded defendants' use of the disputed portion of Outlot A for seasonable use for boat transportation constituted a reasonable objection to plaintiffs' proposed vacation. The court also held plaintiffs failed to show a mutuality of mistake such as might support the grant of relief by way of reformation of the plat dedication instrument. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 32343, July 12, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/062906/32343.pdf

If township appropriately interpreted and applied its zoning ordinance in a land division review under

[8](...continued)
resolution) authorizing such land division. This section shall apply to all land divisions whether the property involved is an unplatted parcel of land, a platted lot, or site condominium unit. . . . Anyone desiring to split, divide, or subdivide a piece of land, create a site condominium unit or to create an access easement shall fill out and file the form required by the Township together with any fee set by the Township Board for such permits. If the proposed land division and resulting lots, parcels, site condominium units and/or access easements meet the requirements of the Grant Township Zoning Ordinance as to area, width, frontage, and other applicable requirements, the land division permit shall be granted. The Township shall have discretion to require that the property owner supply a survey by a registered land surveyor showing all resulting parcels or properties and easements or rights-of-way as proposed by the land division prior to issuing a land division permit. . . ."

the Land Division Act

Court: Michigan Court of Appeals (Unpublished Nos. 259206; 260239, July 27, 2006)

Case Name: *Ortell v. York Charter Twp.*

Since the Township Zoning Board of Appeals correctly interpreted and applied its zoning ordinance in denying the plaintiffs' requests for a land-division and variance, the trial court properly dismissed the complaint. Plaintiffs own real property in the defendant-township, sought to divide the property into three parcels, and filed a land division application with the township. The Township board denied their request, concluding the proposed divisions would only be accessible by Sizemore Drive, a private road failing to comply with defendant's ordinances. Plaintiffs then filed an appeal of their application with the Zoning Board of Appeals, a request for a variance, and a second land-division application with the Board. All three requests were denied and plaintiffs filed suit in the trial court. The trial court denied plaintiffs' motion for summary disposition and granted defendants' motion. The court concluded the Appeals Board did not err in deciding the plaintiffs' proposed land divisions did not meet the requirements of zoning ordinance §3.28(A). M.C.L. 560.263 of the Land Division Act (M.C.L. 560.101 *et seq.*) requires all proposed divisions must comply with existing township zoning ordinances. The language of §3.28(A) requires the proposed uses, buildings, or structures be on parcels adjoining a public or private road. What satisfies the "private road" requirement is qualified. Any private roads adjoining pertinent parcels must comply with county road standards. It was undisputed Sizemore Dive did not comply with these standards because it is unpaved. Thus, plaintiffs' proposed divisions did not comply with defendant's ordinances. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 32654, August 8, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/072706/32654.pdf

Local ordinance jurisdiction over condominium; Claims in a land use dispute related to plaintiff's woodland ordinances

Court: Michigan Court of Appeals (Unpublished No. 268939, September 19, 2006)

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

Presuming the current West Bloomfield Charter Township woodlands ordinance at issue was constitutional, the court reversed the trial court's award of summary disposition to defendants (Mastis) because it was undisputed they removed or authorized removal of trees from some of the premises without a permit. The case was a land use dispute concerning plaintiff's woodland ordinances.

Defendants' property is a five-acre parcel containing a house known as unit six of a condominium. The property contains about two acres of regulated woodlands. The court concluded the 1995 version of the ordinance was in effect when defendants cut the trees between the fall of 1999 and April 2000, and based on the ordinance defendants were required to obtain a permit before cutting the trees. Defendants contended unit 6 was not "an existing one-family residential lot" as defined by the ordinances. **The court disagreed because the ordinances defined "lot" broadly enough to encompass unit six as being a parcel or lot within the condominium**. Thus, they were required to obtain a permit before removing the trees. The original woodland permit allowed a total of 614 trees with diameters of 12 inches or larger to be cut, and the developer exceeded this limitation. At the time the defendants cut the trees, no more trees could be cut. Reversed and remanded, but the court did not order the trial court to grant plaintiff summary disposition because the issue requires consideration of whether defendants stated a valid defense to the claims, which was not argued or at issue on appeal. (Source: State Bar of Michigan *e-Journal* Number: 33183, September 26, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/091906/33183.pdf

Land division Act: "parent parcel"; How a continuous area or acreage of land should be described in order to be considered a parcel

Court: Michigan Court of Appeals (Unpublished No. 259986, November 2, 2006)

Case Name: *For the Kids, L.L.C. v. Charter Twp. of Chesterfield*

The trial court did not err in determining the property plaintiff wished to divide was a "parent parcel" within the meaning of the Land Division Act (LDA) (M.C.L. 560.101 *et seq.*) and in granting plaintiff summary disposition.

While the defendant did not dispute plaintiff's property was lawfully in existence on the effective date of the LDA, it disputed whether the property constituted

a parcel. While the LDA defines a "parcel" as "a continuous area or acreage of land which can be described as provided for in this act," it does not have a specific provision mandating how a continuous area or acreage of land should be described in order to be considered a parcel.

Plaintiff's property was extensively described in the warranty deed and the parties' stipulated facts. Those descriptions would meet the requirements for descriptions of final proprietor plats and assessor plats, which are the only description requirements actually found in the LDA. Since plaintiff's property met those requirements, the court concluded the property was a continuous area of land that can be described as provided for in the LDA. The defendant argued a portion of a lot cannot, by definition, be a parcel. The court said:

> A "lot" is defined as "a measured portion of a parcel or tract of land, which is described and fixed in a recorded plat." MCL 560.102(m). Moreover, § 263 of the land division act implies that a lot is a parcel. MCL 560.263 provides in part that "[n]o lot, outlot or other parcel of land in a recorded plat shall be further partitioned or divided unless in conformity with the ordinances of the municipality." Under that section, lots are subject to divisions. A "division" is defined as "the partitioning or splitting of a parcel or tract of land by the proprietor . . . ." MCL 560.102(d). Further, a "tract" is defined as "2 or more parcels that share a common property line and are under the same ownership." MCL 560.102(h). Lots would therefore appear to be parcels because only parcels or tracts of land are subject to divisions and lots are subject to divisions. Moreover, § 263 governs "lot[s]," "outlot[s]," and "*other* parcel[s] of land" (emphasis added). The use of the word "other" implies that "lot[s]" and "outlot[s]" are themselves "parcels of land" within the meaning of the act.

The court held plaintiff's property was a parent parcel as the term is defined in the LDA since it fell within the broad definition given the term "parcel." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 33738, November 9, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/110206/33738.pdf

If Judge's order granted developer one injunction based on the site plan or two injunctions (a second one independent of the site plan)

Court: Michigan Court of Appeals (Unpublished No. 271558, February 27, 2007)

Case Name: *Hynes v. Port Cove Condo. Ass'n*

Concluding Judge Kuhn granted defendant-Port Cove Condo Association an injunction to enforce the site plan and a second injunction to prevent disruption of the natural state of an island, the court held Port Cove has an injunction permitting it to forbid the plaintiffs-Hynes from any activity on the island altering its "natural state," but *res judicata* should not be applied to that injunction (the court did not address the injunctions based on the site plan).

The factual background of the case was undisputed, but the procedural background was unusually complex. In 1981, a developer received approval from the defendant-Township of a site plan for a condominium project utilizing two parcels of land on Cass Lake. The original plans entailed construction on one parcel, with the other parcel (the island) to remain in its "natural state." The final consolidated master deed the developer conveyed to Port Cove Condo Association in 1989 omitted the island. Instead, the developer sold the island to plaintiffs – Hynes. Since 1992, the parties have been litigating what rights, if any, the Hyneses have to develop and improve the island. The Township filed a complaint seeking to enjoin the Hyneses from cutting trees, mowing, excavating, or doing anything on the island in alleged violation of the Port Cove site plan or in violation of township ordinances. The first trial court granted the Township an injunction requiring the Hyneses to leave the island in its natural state. Another judge was assigned to the case (Kuhn) and eventually he issued the two injunctions at issue. The court held the "unusual and convoluted" nature of the case made it one of the rare cases in which a strict application of *res judicata* would be inappropriate. The facts have changed over time. The record showed the Township had at least tentatively approved an alteration to the site plan permitting the Hyneses to develop a part of the island. The court concluded the elements of *res judicata* were met, but the doctrine should not be applied. The court affirmed the finding Judge Kuhn granted Port Cove an injunction independent of the site plan, reversed the finding *res judicata* should bar the action, and remanded.. (Source: State Bar of Michigan *e-Journal* Number: 35087, March 7, 2007.)

Full Text Opinion:

http://www.michbar.org/opinions/appeals/2007/022707/35087.pdf

See also *Romeo Plank Investors, L.L.C. v. Macomb Twp* on page 32.

Road Access, Driveway Permit

Driveway Permit

Court: Michigan Court of Appeals (Unpublished No. 266724, May 16, 2006)

Case Name: *City of S. Haven v. Van Buren County Rd. Comm'n*

The trial court properly granted summary disposition on the plaintiff-City of South Haven's claims for mandamus and substantive and procedural due process violations in favor of defendant-Van Buren County Road Commission. The case arose from the road commission's refusal to grant the city's request for a driveway permit allowing access from a commercial parcel owned by the city onto a county road designated by the road commission as a "controlled access corridor." The city asserted nothing in the The Driveway Act ((M.C.L. 247.321 *et seq*.); 1979 AC, 247.231(1) and 247.234), the rules promulgated thereunder, or the road commission resolution concerning regulation of controlled access corridors vested within the road commission's discretion in the grant or denial of a driveway permit. Rather, the city argued, where a permit applicant has complied with the rules and has shown the proposed driveway did not violate the principles of access management, issuance of the requested permit is a ministerial task requiring neither judgment nor discretion. The court did not agree, however, access management decisions are the product of simple formulas involving no discretion or judgment on the part of the highway authority to which the responsibility to issue driveway permits has been delegated. Rather, the court agreed with the road commission such decisions involve consideration of a number of principles, predicated primarily on public safety, which can only be applied on a case-by-case basis. Further, there was a factual basis for the requested comparative traffic impact analysis and the road commission's request for additional information and analysis was neither arbitrary nor capricious. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 31810, May 24, 2006.)

Full Text Opinion:

http://www.michbar.org/opinions/appeals/2006/051606/31810.pdf

See also *Swiecicki v. City of Dearborn* on page 31.

Due Process and Equal Protection

If procedural due process rights violated when village demolished the building without notice

Court: Michigan Court of Appeals (Unpublished No. 259536, June 29, 2006)

Case Name: *Penzien v. Village of Capac*

The defendant-village's compliance with section 140 of P.A. 167 of 1917, as amended, (Housing Law of Michigan, M.C.L. 125.540) adequately protected plaintiffs' due process rights, but the trial court erred in determining plaintiffs' fee interest in the property was a prior recorded encumbrance on the land superior to defendant's demolition lien. Plaintiffs entered into a land contract for the sale of the property, and the vendees' land contract interest was later assigned to Holmes. A fire damaged the building on the property in 1999, and after repairs were not made, the building was declared a dangerous building at a village council meeting in 2002. Notice of the hearing was sent to Holmes, but not to plaintiffs. The question was whether the notice to Holmes was constitutionally sufficient. Holmes received the notice and appeared at the hearing. There was nothing to alert defendant he needed to provide any additional notice to another party. Jones stands for the proposition a governmental entity does not have the obligation to search government records for a new address and by inference, is not required to perform a title search. The fact plaintiffs had an interest in the property and did not receive actual notice was insufficient to show the notice requirements of M.C.L. 125.540 were constitutionally inadequate. Summary disposition for the defendant on counts II through V was proper. However, the trial court erred in removing the demolition lien from plaintiffs' title. Defendant's demolition lien was not extinguished by the land contract forfeiture action and pursuant to section 40 of P.A. 206 of 1893, as amended (the General Property Tax Act, M.C.L. 211.40), continued until paid. Affirmed in part, reversed in part, and remanded. (Source: State Bar of Michigan *e-Journal* Number: 32337, July 12, 2006.)

Full Text Opinion:

http://www.michbar.org/opinions/appeals/2006/062906/32337.pdf

If creation of the a PUD was within a City's authority and it complied with applicable procedural requirements

Court: Michigan Court of Appeals (Unpublished No. 267089, August 1, 2006)

Case Name: *Barlow et al. v. City of Hastings*

The defendant-City acted within its authority, and complied with applicable procedural requirements[9] when it created the Court Street Planned Unit Development (PUD) District as set forth in the City of Hastings Zoning Ordinance Article VII-A. Thus, the court affirmed the trial court on this issue. The court also affirmed the trial court's dismissal of plaintiffs' claim the City violated city ordinances by including their property within the PUD. Plaintiff's property was included within the PUD district because it fell within the boundaries created for the district. Since the PUD district was validly enacted, plaintiffs' challenge, which essentially concerned the location of the PUD district, could not succeed. It was undisputed several plaintiffs applied for rezoning of their property, defendant's planning commission suspended action on the requests, defendant has the authority pursuant to the zoning ordinance §90-5 to initiate a zoning amendment, defendant initiated an amendment creating the Court Street PUD District as set forth in the zoning ordinance Article VII-A, and plaintiffs' property was within the PUD. Plaintiffs claimed because the City acted as applicant for the PUD, it was required to comply with Article VII of the zoning ordinance. The City argued, and the trial court agreed, in creating the PUD, it did not act as an applicant, but initiated a zoning amendment to create a zoning district in which future rezoning and development must be done in accordance with the specific requirements in Article VII-A. Thus, Hasting Zoning Ordinance Article VII was not applicable to its actions in creating a new zoning district. The court held the City properly enacted the PUD. However, the court agreed with plaintiffs the trial court erred in granting the City summary disposition on plaintiffs' takings claims because the record was insufficient to allow it to determine plaintiffs' takings claims failed as a matter of law. Affirmed in part, reversed in part, and remanded. (Source: State Bar of Michigan *e-Journal* Number: 32706, August 9, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/080106/32706.pdf

Cannot issue a special use permit, if the special use is not specifically listed in the respective zoning district.

Court: Michigan Court of Appeals (Unpublished No. 259758, August 17, 2006)

Case Name: *Bracelin v. Allegan Twp. Zoning Bd. of Appeals*

The trial court properly affirmed the defendant-Board's nullification of a special use permit allowing the petitioners to operate a motocross track in an agricultural-zoned district because it was not authorized by law. Petitioners argued the agency decisions were contrary to law because the township's zoning ordinance failed to adhere to the requirements of the Township Enabling Act, specifically M.C.L. 125.286b(1) and 125.286d(1).[10] However, the township's ordinance expressly provided for special uses in an agricultural zone, including single-family dwellings, home occupations, roadside stands, office buildings, and intensive livestock operations. The ordinance also specified the planning commission was charged with granting approval. In addition, it specified the criteria upon which decisions shall be based. The court agreed with the trial court the zoning ordinance gave the planning commission the authority to grant special use permits only "within various zone classifications designated as special uses."

> "A special use permit is a '[p]ermitted exception (*sic.*) to the zoning ordinance . . . . A special use permit allows a property owner to use his property in a way which the zoning regulation expressly permit under the conditions specified in the regulations themselves.' *Black's Law Dictionary* (6th ed).[11] The ordinance does not expressly provide for a motocross track as a special use in

[9]This case concerns procedural requirements of the old City and Village Zoning Act (MCL 125.581 *et seq.* repealed 7/1/06) but applicable here for this court case.

[10]This case concerns procedural requirements of the old Township Zoning Act (MCL 125.271 *et seq.* repealed 7/1/06) but applicable here for this court case.

[11]See also *Black's Law Dictionary* (7th ed) (a special use is "[a] zoning board's authorization to use property in a way that is **identified as a special exception** in a zoning ordinance.") (Emphasis Added).

an agricultural district. Therefore, the planning commission was without power to grant petitioners a special use permit for a motocross track. Accordingly, the circuit court properly affirmed the zoning board of appeals' decision nullifying the special use permit because it was not authorized by law.

Petitioners argue, however, that because 'there is absolutely no provision in the ordinance for any motocross track or any other type of track at all,' the Allegan Township zoning ordinance is contrary to M.C.L. 125.297a and is therefore contrary to law. Again, we disagree.

M.C.L. 125.297a provides:

> 'A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a township in the presence of a demonstrated need for that land use within either the township or surrounding area within the state, unless there is no location within the township where the use may be appropriately located, or the use is unlawful.'

To establish a violation of M.C.L. 125.297a, petitioners must establish the following proofs in order to sustain a claim that the zoning ordinance is invalid: (1) there is a demonstrated need for the excluded land use in the township or surrounding area, (2) the use is appropriate for the location, and (3) the use is lawful. *Adams Outdoor Adv, Inc v City of Holland*, 234 Mich App 681, 694; 600 NW2d 339 (1999). Petitioners bear the burdens of production and persuasion, *id.* at 693, but have met neither burden here."

Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 32889, August 28, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/081706/32889.pdf

If a zoning ordinance was unconstitutionally vague because it allegedly did not provide fair notice of the conduct proscribed and granted the local zoning board of appeals unfettered discretion in its application; Whether the ordinance denied the plaintiff state and federal substantive due process because the moving factor behind it was aesthetics.

Court: Michigan Court of Appeals (Unpublished, No. 265363, March 27, 2007)

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

The trial court properly dismissed the Mr. Daley's (plaintiff's) complaint, in which he objected to the Charter Township of Chesterfield's (defendants') use of the zoning ordinance to disallow his installation of two 16-foot long doors on his garage. Plaintiff contended the zoning ordinance was unconstitutionally vague because it did not provide fair notice of the conduct proscribed.

The appeals court held, insofar as the number of doors suggested the garage in question was designed to house more than three cars, the doors were properly regulated by the ordinance. A reasonable person would conclude – as did the township building inspector, the planning and zoning administrator, and the zoning board of appeals (ZBA) – a garage with two 16-foot long doors was designed to house four cars. Plaintiff, when presenting the matter to the ZBA, indicated he wanted two 16-foot long doors, in part, so he could have a "4-car garage." Accordingly, the trial court did not err in holding the ordinance provided fair notice of the conduct proscribed.

The court further concluded the record indicated the defendants did not operate with unfettered discretion in applying the ordinance. Rather, the ordinance contained adequate standards to guide the defendants in applying it and it appeared to be consistently applied throughout the township.

Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 35406, April 12, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2007/032707/35406.pdf

Standing to Appeal; Does a DDA have standing to appeal the Board of Zoning Appeals decision in court?

Court: Michigan Court of Appeals (Unpublished No. 262311, April 12, 2007)

Case Name: *City of Detroit Downtown Dev. Auth. v. US Outdoor Adver., Inc*.

The court dismissed the appeal for lack of the petitioner's standing to file an appeal in the trial court challenging a decision of the Zoning Board of Appeals (ZBA).[12] The petitioner is a downtown development authority (DDA).

[12]This case concerns procedural requirements of the old City and Village Zoning Act, M.C.L. 125.585(11) *et seq.* repealed 7/1/06) but applicable here for this court case.

The ZBA granted the defendant-US Outdoor's a zoning variance to hang advertisements called "super graphics" on two selected properties in Detroit. US Outdoors argued the trial court erred when it ruled the DDA had standing to appeal the ZBA's orders in the trial court. The court's review of the record revealed the DDA failed to present evidence it suffered a concrete injury in fact fairly traceable to the ZBA's decision regarding US Outdoor's variance requests. Although the DDA argued the super graphics would harm its overall development plan of the downtown area, the DDA's opinion was unsupported by evidence. Such conjecture was insufficient to satisfy the required "concrete," "injury in fact" required by *Lee v. Macomb County Bd. of Comm'rs*.

Thus, the DDA lacked constitutional standing because it had not claimed an actual, particularized injury. The DDA argued because it had an "interest affected by the zoning ordinance," it had standing under M.C.L. 125.585(11) regardless of whether it could satisfy the elements required by *Lee*. The question then became whether former M.C.L. 125.585(11) was sufficient, standing alone, to confer standing on the DDA. Applying the holding of *Michigan Educ. Ass'n v. Superintendent of Pub. Instruction*, the court held in the absence of the constitutionally required elements of standing, former M.C.L. 125.585(11) was not sufficient to confer standing to the DDA. Further, to the extent former M.C.L. 125.585(11) conferred standing broader than the limits imposed by the Michigan Constitution, it was unconstitutional and did not confer standing on the DDA to file an appeal in the trial court challenging a decision of the ZBA. The court did not reach the substantive issue of the ZBA's decisions regarding the variance for the property. Dismissed. (Source: State Bar of Michigan *e-Journal* Number: 35595, April 20, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2007/041207/35595.pdf

See also *Pulte Land Co., LLC v. Alpine Twp.* on page 31.

See also *Charter Twp. of W. Bloomfield v. Mastis* on page 25.

See also *Papadelis v. City of Troy* on page 20.

See also *Romeo Plank Investors, L.L.C. v. Macomb Twp* on page 32.

Variances (use, non-use)

If the court erred by affirming the Appeals Board's non-use variance when a use variance was necessary

Court: Michigan Court of Appeals (Unpublished, No. 265782, March 22, 2007)

Case Name: *Blue Lake Fine Arts Camp v. Blue Lake Twp. Zoning Board of Appeals, the Forrest J. Harris Trust, and Wayne Harris*

The trial court erred by affirming the Blue Lake Township Zoning Board of Appeals' (ZBA) non-use variance when a use variance was necessary. The variances would allow defendants-Harris and the Trust to construct single-family homes on certain parcels of land.

Two months before defendants applied for the non-use variance, the township amended its zoning ordinance to create four Forest Recreation-Residential zoning districts and a single Forest Recreation-Institutional zoning district. Because the amendment was new, the ZBA proceeded with the assumption the area in question was zoned forest residential (instead of forest-institutional in which dwellings are not a permitted use). The court held the trial court erred by speculating about what the ZBA would have done if it had applied the appropriate law and made the correct factual findings, e.g., would have granted a use variance had the ZBA known that was what was needed. The court also erred by relying on the ZBA's conclusory findings of lost value to assume the ZBA would have made a far-reaching decision regarding the unconstitutionality of the new ordinance. A township's ZBA does not have power to legislate and "may not in the guise of a variance amend the zoning ordinance or disregard its provisions." The trial court found the ZBA failed in several respects to establish a sufficient factual record, and the ZBA misapplied the law because it was operating under the mistaken impression the anticipated structures were allowed in the zone. In reality, residential structures were not merely limited by the size of lot, but instead were entirely disallowed in the newly amended zone (forest-institutional).

Nevertheless, the trial court affirmed the ZBA's actions on the basis of a series of presumptions. It first

held the ZBA had the discretion to modify the zoning ordinance's requirements to avoid injustice, so it did not need to comply with the ordinance's procedural requirements before granting the use variances. It then held the loss of the properties' value alone would have justified the ZBA's actions. The record did not adequately support the trial court's assumptions, and the appeals court reversed its decision. On remand, the ZBA should apply its zoning ordinance and make the relevant factual findings leading it to a just result. Reversed and remanded to the Zoning Board of Appeals. (Source: State Bar of Michigan *e-Journal* Number: 35363, April 3, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2007/032207/35363.pdf

If a court's order granting a zoning amendment of property violated the separation of powers doctrine; Whether the consent judgment between the plaintiffs and the defendant-township was impermissible because it achieved a result contrary to a prior referendum

Court: Michigan Court of Appeals (Unpublished No. 259759 and 261199, September 12, 2006)

Case Name: *Pulte Land Co., LLC v. Alpine Twp.*

While agreeing in substance with the trial court's resolution of the case, the court vacated the trial court's order granting rezoning of the property because the order violated the separation of powers doctrine, and remanded for entry of a suitable order, noting there was no prohibition against the trial court entering a modified order achieving the same functional result by enjoining the defendant-township from interfering with the development of the property.

The property was 52 acres of historically agricultural property on which plaintiff-Pulte sought to construct a residential development. While the principal litigation was pending, plaintiffs and the township reached an agreement, which, in significant part, allowed plaintiffs' proposed use of the property. The trial court entered a partial consent judgment reflecting the agreement. The intervening defendant, a motivating force behind a referendum rejecting a previously approved rezoning of the property, argued the consent judgment was impermissible because it achieved a result contrary to the referendum. However, a consent judgment in which a township agrees to grant a use variance[13] is entirely permissible and the court declined to adopt a special rule for situations where there has been a referendum contrary to the consent judgment. The court also rejected the intervening defendant's argument the trial court erred in finding a taking, holding the trial court did not commit clear error in reaching the factual determination the "balancing test" factors, viewed in the aggregate, weighed sufficiently in plaintiffs' favor to make the zoning ordinance a taking. Vacated and remanded. (Source: State Bar of Michigan *e-Journal* Number: 33081, September 18, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/091206/33081.pdf

If a Zoning Board of Appeals' grant of a non-use variance was correct; if difficulty of the parcel was unique to the property; if need for the variance was self-created; if the lot split violated the Land Division Act

Court: Michigan Court of Appeals (Unpublished No. 262892 and 263066, September 12, 2006)

Case Name: *Swiecicki v. City of Dearborn* (consolidated case)

The trial court properly affirmed the Dearborn Zoning Board of Appeals' grant of a nonuse variance to defendant-Da'Fish. The consolidated cases involved property to which the parties referred to as Lot D in a residential neighborhood. Da'Fish bought Lot D in 2001 and planned to develop it into four parcels for single-family homes. Plaintiffs own residential parcels near Lot D and objected to both the lot split and the building of homes not abutting a public road as required by a local ordinance. The Zoning Board of Appeals (ZBA) granted Da'Fish a variance to permit access to the lots by private road and the city council granted Da'Fish's request to split the Lot D. The court held the ZBA and the trial court properly treated Da'Fish's request as one for a nonuse variance from the Dearborn Zoning Ordinance §2.10B requiring the front lot line of all lots to abut onto a publicly dedicated road. Lot D was zoned residential and Da'Fish's proposed construction of four single-family homes was consistent with that use. Because Da'Fish's proposed use was permitted within the zoning district, it was not required

[13]This case concerns procedural requirements of the old Township Zoning Act (MCL 125.271 *et seq.* repealed 7/1/06) but applicable here for this court case.

to seek a "use" variance, the effect of which would be similar to rezoning. Da'Fish's request to build a private rather than a public road was more like a variance of "area, height, setback, and the like." Thus, the ZBA and the trial court properly treated this as a request for a nonuse variance. However, the court held without complying with the platting requirements of the Land Division Act (M.C.L. 560.108 and 108(2)(a)), Da'Fish could only divide Lot D into two parcels pursuant to MCL 560.108(5)(b)(i). Affirmed in part, reversed in part, and remanded. (Source: State Bar of Michigan *e-Journal* Number: 33088, September 18, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/091206/33088.pdf

If there was competent, material, and substantial evidence to support the Appeals Board's denial a variance

Court: Michigan Court of Appeals (Unpublished No. 269805, October 19, 2006)

Case Name: *Fox v. Charter Twp. of Oxford*

While it was unfortunate for plaintiffs the exterior staircase and porch they had constructed to the second level of their home must be altered or removed to comply with the ordinance, the court agreed with the trial court the level of exceptional circumstances present in *Pittsfield Twp. v. Malcom* was not present here.

Plaintiffs (Fox) obtained a building permit for the construction of an exterior stairway and porch from the second level of a home. After the addition was completed, the township cited them because the addition did not comply with the side-yard setback. Plaintiffs requested a variance, but the Oxford Township Zoning Board of Appeals (ZBA) denied the request. Plaintiffs filed an appeal to the ZBA decision and a separate complaint against defendants-township.[14] The township filed a counterclaim seeking an injunction to force removal of the porch and stairway. The trial court held there was sufficient evidence to support the ZBA's denial of the appeal, and subsequently granted defendant's motion for summary disposition finding there was no dispute the ordinance was violated and plaintiff failed to demonstrate exceptional circumstances. Thus, equitable estoppel did not prevent the township from enforcing its ordinance. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 33561, October 26, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/101906/33561.pdf

If Appeals Board's denying a property division request complied with the law, applicability of the Land Division Act

Court: Michigan Court of Appeals (Unpublished No. 266415, February 20, 2007)

Case Name: *Romeo Plank Investors, L.L.C. v. Macomb Twp.*

Concluding the decision of the defendant-township's zoning board of appeals (ZBA) denying a request for a property division and transfer of one parcel to adjacent property owned by the plaintiff complied with the law, was based on proper procedure, and was supported by competent, material, and substantial evidence on the record, the appeals court reversed the trial court's order reversing the ZBA's decision. The court agreed with the trial court the proposed property division was not governed by the Land Division Act (LDA) (MCL 560.101 *et seq.*). However, the trial court erred in finding because the property division was not governed by the LDA, defendant lacked the authority to regulate or prohibit the division and transfer.

The court held in *Conlin v. Scio Twp.* the LDA is not preeminent in the field of dividing parcels of land. Where the LDA does not govern a property division, a township remains free to regulate the division.

> "This conclusion is supported by the language of the LDA, which expressly provides that "approval of a division is not a determination that the resulting parcels comply with other ordinances or regulations." MCL 560.109(6). In other words, even where a division is allowed by the LDA, the LDA "expressly allows municipalities to impose stricter requirements." *Conlin, supra.* It therefore follows that where the LDA does not govern a property division, a township remains free to regulate the division."

Defendant-township's ordinance applied to a broader range of land transfers than described in the LDA, governing any division, partition, or land split. The court concluded defendant's ordinance, which prohibited alteration of a nonconforming use, likely

[14]This case is based on former M.C.L. 125.293a(1)(a), repealed effective July 1, 2006, but still applicable to this case pursuant to M.C.L. 125.3702(2).

violated the Township Zoning Act (TZA)[15]. The denial was based on the remainder of the parcel would not be in compliance with the existing zoning ordinance. The ZBA provided "reasonable terms" to alter the property and continue its nonconforming use as a nursery if it complied with ordinances applicable to this use in a C-2 zone. The ZBA also considered whether denial of the request would cause any practical difficulties or unnecessary hardships under M.C.L. 125.293. The ZBA's decision represented the reasonable exercise of discretion granted the ZBA by law. The court reversed the trial court's decision and reinstated the ZBA's decision. (Source: State Bar of Michigan *e-Journal* Number: 34976, February 27, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2007/022007/34976.pdf

See also *City of Detroit Downtown Dev. Auth. v. US Outdoor Adver., Inc.* on page 29.

Nonconforming Uses

If historical use of the property was properly considered when determining the scope of a nonconforming use; terms for continuation of a nonconforming use

Court: Michigan Court of Appeals (Unpublished, No. 263757, March 29, 2007)

Case Name: *City of Essexville v. Carrollton Concrete Mix, Inc.*

Since the trial court did not err in considering the defendant's historical use of the subject property when determining the scope of the nonconforming use, it did not abuse its discretion in denying plaintiff's new trial motion. This zoning dispute was the subject of a prior appeal to the court.

Following an amendment to City of Essexville's (plaintiff's) zoning ordinance, defendant-Carrollton enjoys a nonconforming use of its riverfront property. On remand the trial court determined the scope of the nonconforming use. The city argued the trial court erred in considering Carrollton's historical use of the property in determining the scope of the nonconforming use. Plaintiff's argument is the nature and scope of the nonconforming use must be evaluated by reference only to the activity actually occurring on the date the ordinance was passed was without merit.

The appeals court concluded evaluation of the nature and scope of a nonconforming use requires considerations beyond merely assessing conditions on the date the ordinance was passed making the use nonconforming. Rather, these determinations involve considering the historical use of the property. The date of the amendment or enactment establishes an endpoint on what activity may be considered for purpose of determining the existence, nature, or scope of a nonconforming use (the activity occurring prior to its adoption). The historical use of the property up to and including the effective date of the ordinance provided the most accurate indication of the existence and scope of the use. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 35491, April 12, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2007/032907/35491.pdf

Ripeness for Court's Jurisdiction, Aggrieved Party

Appeal to court filed too late

Court: Michigan Court of Appeals (Unpublished No. 267925, July 20, 2006)

Case Name: *Weiss & Klempp Dev., L.L.C. v. Charter Twp. of Mundy*

The trial court properly granted the defendant's (Mundy Twp.) motion for summary disposition because plaintiff (Weiss & Klempp Dev.) was late in claiming an appeal and the complaint counts challenging the planning commission's decision denying his request for a special land use permit were properly dismissed. Plaintiff, the owner of real property zoned for residential-agricultural use, sought site-plan approval from defendant's planning commission for a proposed 49-unit condominium development. The planning commission denied plaintiff's application for a special land use permit based on a letter from a county health department indicating a test well on adjacent property contained high arsenic levels and on concerns of adjacent property owners. Plaintiff filed suit challenging the planning commission's decision and the validity of the special land use review procedure in defendant's zoning ordinance. Defendant moved for summary disposition challenging the trial court's subject matter

[15]This case is based on former M.C.L. 125.293, repealed effective July 1, 2006, but still applicable to this case pursuant to M.C.L. 125.3702(2).

jurisdiction and addressing the merits of plaintiff's claims. The trial court held plaintiff had a duty to appeal the planning commission's decision to defendant's zoning board of appeals and granted the motion. The court held plaintiff's facial challenge to the zoning ordinance at issue was moot because the ordinance was amended so condominium projects no longer require special land use approval. The court also concluded the trial court erred in finding the ordinance established plaintiff had a right to appeal the planning commission's decision to the zoning board of appeals. Defendant established only a statement of intent regarding appealing to the zoning board of appeals. Although plaintiff was not required to first appeal the planning commission's decision before appealing to the trial court, dismissal of the trial court action was warranted because the case was untimely filed.

The court said:

> "Where the law provides for appellate review of a decision, but does not provide a time frame for the appeal, the court rules generally applicable to such matters are utilized. See *Krohn v Saginaw,* 175 Mich App 193, 196; 437 NW2d 260 (1988); *Schlega v Detroit Bd of Zoning Appeals,* 147 Mich App 79, 81; 382 NW2d 737 (1985). Looking to the 21-day period for appeals as of right to circuit court, MCR 7.101(B)(1), plaintiff's circuit court action, filed approximately four months after the planning commission issued its decision, was untimely. *Krohn, supra* at 196. Therefore, to the extent plaintiff's complaint asserted claims challenging the planning commission's decision, those claims were time-barred."

Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 32566, July 28, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/062906/32337.pdf

Conflict of Interest, Incompatible Office, Ethics

Whether township board member remains a member of plaintiff-township's Appeals Board after leaving the township board

Court: Michigan Court of Appeals (Unpublished Nos. 269193 and 271251, December 19, 2006)

Case Name: *Porter Twp. v. Fields*

The trial court erred by granting the plaintiff-township's motion for summary disposition in this case concerning a dispute over whether defendant remains a member of the township's zoning board of appeals (ZBA).

In 2000, the Township Board appointed Billings to serve as its representative on the ZBA. In May 2004, after Billings was recalled from his position as the township supervisor, the Township Board appointed Fields (defendant) who was a trustee on the Township Board, to serve on the ZBA. The township (plaintiff) asserted the Township Board appointed Fields/defendant to serve out the remainder of Billings' term on the ZBA and this term ended on November 20, 2004. Defendant, who has since continued serving on the Township Board as the township supervisor, denied his term was over and refused to relinquish his seat on the ZBA.

The Township Board appointed Billings to serve as its representative on the ZBA on December 12, 2000. Based on the plain language of MCL 125.288(5), Billings' term on the ZBA expired when he lost his position as supervisor on the Township Board. This occurred before the Township Board appointed defendant to the ZBA on May 25, 2004. Because Billings' term had already expired, the trial court erred in finding the Township Board appointed defendant to serve out the remainder of his term on the ZBA. Based on the documentary evidence presented by plaintiff, it was apparent the resolution appointing defendant to the ZBA failed to specify an end date for his term. Although the Township Board attempted to provide an end date at its March 8, 2005, meeting, this occurred more than nine months after it issued the resolution appointing defendant to the ZBA. **The unambiguous language of MCL 125.288(5) provides the term length of a township board's representative on a zoning board of appeals must be "stated in the resolution appointing" him**.[16] Because the Township

[16]This case is based on former M.C.L. 125.293a(1)(a), repealed effective July 1, 2006, but still applicable to this case pursuant to M.C.L. 125.3702(2). The equivalent language in the Michigan Zoning Enabling Act is found at M.C.L. 125.3601(9), and does not include the requirement to state an expiration date in the appointing resolution. The new act reads:

> (9) The terms of office for members appointed to the zoning board of appeals shall be for 3 years, except for members serving because of their

(continued...)

Board did not provide an end date in the original resolution, the only factor limiting defendant's term on the ZBA is the length of his term on the Township Board. Reversed and remanded for entry of an order granting defendant summary disposition and vacating the award of costs and fees to plaintiff. (Source: State Bar of Michigan *e-Journal* Number: 34294, July 28, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/121906/34294.pdf

Signs: Billboards, Freedom of Speech

Highway Advertising Act preemption of local zoning

Court: Michigan Court of Appeals (Unpublished No. 267920, July 20, 2006)

Case Name: *Billboards by Johnson, Inc. v. Township of Algoma*

The trial court properly granted summary disposition in favor of the defendant-Algoma Township in this action arising out of a dispute regarding the placement of a billboard for advertising on a section of property in the township. Plaintiff entered into a lease agreement for property located in the township for the purpose of installing a double-sided billboard. The property was located in an "adjacent area" of US-131. Therefore, any billboards or commercial signs on the property are subject to state regulation under Michigan's Highway Advertising Act (MCL 252.301 *et seq.*). Plaintiff sought and obtained from the state of Michigan permits for outdoor commercial advertising at the location. The property was also zoned C-2, which is defendant's general business district. Plaintiff sought a building permit from defendant, but was informed §25.8(c) of the township's zoning ordinance designates a billboard as the principal use of a parcel and limits each parcel to a single principal use. The property already contained a principal use consisting of a commercial strip mall building. Plaintiff asserted the ordinance designating a billboard as the principal use of a parcel was invalid because the Legislature intended to preempt the field of use designations, and because the ordinance directly conflicted with the statutory designation. There was no ambiguity in the act regarding the state and local government's respective role in the regulation and control of signs and billboards. Section 4 states the Highway Advertising Act regulates and controls the entire field of size, lighting and spacing of signs. However, §4 of the Act further provides an exception, allowing a township to enact an ordinance regulating these areas as long as the ordinance is more restrictive than the regulation in the Michigan Highway Advertising Act. Because the provision was clear and unambiguous, it was improper and unnecessary to resort to the legislative findings in the "purpose" section of the act to ascertain the Legislature's intent and meaning with regard to this area of regulation. The court also rejected plaintiff's argument defendant's ordinance violated its constitutional due process and free speech rights. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 32565, July 28, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/072006/32565.pdf

Highway Advertising Act; Whether the trial court lacked subject-matter jurisdiction because plaintiff did not file its trial court complaint within 21 days of the Zoning Board of Appeals (ZBA)'s written decision and order; What suffices as "entry of the order" in zoning matters

Court: Michigan Court of Appeals (Unpublished No. 270740, December 19, 2006)

Case Name: *Billboards By Johnson, Inc. v. Billings Twp.*

While in light of the court's decision in *Homer Twp. v. Billboards by Johnson, Inc.*, the trial court correctly rejected plaintiff's claim (count II) the The Highway Advertising Act (HAA) (MCL 252.301 *et seq.*) preempted the defendant-township's ordinance, the untimeliness of plaintiff's appeal from the Zoning Board of Appeals (ZBA) decision was not a basis for dismissing other counts of plaintiff's complaint (count IV).

Plaintiff, a commercial outdoor advertising agency,

[16](...continued)
membership on the zoning commission or legislative body, whose terms shall be limited to the time they are members of those bodies. When members are first appointed, the appointments may be for less than 3 years to provide for staggered terms. A successor shall be appointed not more than 1 month after the term of the preceding member has expired. Vacancies for unexpired terms shall be filled for the remainder of the term.

entered into a lease agreement for property and sought to erect a billboard on M-30 in the township in an area within the scope of HAA. Defendant's zoning ordinance essentially prohibited the use of property in a C-1 zoning district, which was where the property at issue is located, for off-premises signs. Plaintiff applied for a zoning permit to erect a 12-by-24-foot sign on the property. Defendant denied the application. Plaintiff then filed an appeal of this decision with defendant's ZBA, which denied the appeal on the basis the billboard was prohibited by the ordinance. Plaintiff conceded the trial court's dismissal of count II was controlled by Homer Twp.

The court declined to accept plaintiff's invitation to revisit Homer Twp., which plaintiff asserted was wrongly decided. The decision is binding precedent. However, counts I (essentially alleged that defendant's ordinance was unconstitutional (First Amendment, commercial free speech; and did not advance or was more extensive than necessary to serve a governmental interest)) and III (unconstitutional (ordinance was an "invalid, unlawful, arbitrary, capricious and unreasonable exercise of the police powers" granted by the state)) of plaintiff's complaint were constitutional challenges to the ordinance itself, distinct from the challenge to the ZBA's denial of plaintiff's appeal. Thus, those constitutional claims are not subject to the 21-day limitation period[17] for filing a circuit court appeal. Affirmed as to the dismissal of Counts II (claim that the HAA preempted defendant's ordinance) and IV (denial of the land use application because appeal was not within 21 days), the dismissal of Counts I and III was reversed, and the case was remanded. (Source: State Bar of Michigan *e-Journal* Number: 34307, December 27, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/121906/34307.pdf

Public Water and Sewer

If ordinances requiring defendants to connect to plaintiff-City's water system were a valid application of the City's police power

Court: Michigan Court of Appeals (Unpublished No. 266954, August 8, 2006)

Case Name: *City of Gaylord v. Maple Manor Invs., LLC*

The trial court properly granted summary disposition in favor of the defendant-City of Gaylord in this case where the City annexed defendants' property and they were notified city ordinances required them to connect to the City's sewage and water systems and cease using their wells. The City filed this action seeking declaratory and injunctive relief asking the trial court to declare defendants were required to connect to the City's water system. The trial court held the City's ordinances were valid and enforceable exercises of the City's police power. The court also found defendants' (Maple Manor Invs., LLC) argument the ordinances constituted an invalid application of the City's police power without merit. The City is a home rule city. Home rule cities have the power to adopt resolutions and ordinances relating to their municipal concerns, property, and government subject to the constitution and law. Ordinances are presumed valid and the burden is on the person challenging the ordinance to rebut the presumption. Defendants did not identify any statute or constitutional provision expressly denying municipalities the power to require property owners to connect to a municipal water supply. While the right to use groundwater is a valuable property right, the court did not agree with defendants that home rule cities lack the authority to enact ordinances affecting property rights. Requiring property owners to connect to the

[17]The former township zoning act formerly authorized circuit court review of decisions of the zoning board of appeals, but did not specify any time limit. (See former MCL 125.293a, repealed by 2006 PA 110, effective July 1, 2006.). This Court and the Supreme Court therefore applied the 21-day time limit for filing an appeal in circuit court pursuant to MCR 7.101(B)(1). See *Macenas v Village of Michiana,* 433 Mich 380, 388 n 11; 446 NW2d 102 (1989). That rule provides in part that except as prescribed by another statute or court rule, an appeal of right must be taken within "21 days after the **entry of the order** or judgment appealed from."

The question of what suffices as **"entry of the order"** in zoning matters is addressed in *Davenport v City of Grosse Pointe Farms Bd of Zoning Appeals,* 210 Mich App 400, 405; 534 NW2d 143 (1995). There, the defendant ZBA denied the plaintiffs' request for a variance at a January 27, 1992, meeting, but did not certify the minutes of the meeting until February 25, 1992. Certification of the minutes is the "entry of the order," or (as this case ruled) "entry of the order" may be the date of a ZBA's written order.

The Effective July 1, 2006, the Michigan zoning enabling act specifies that a circuit court appeal from a decision of a zoning board of appeals "shall be filed within 30 days after the zoning board of appeals certifies its decision in writing or approves the minutes of its decision." M.C.L. 125.3606(3). The new provisions (continued...)

[17](...continued)
have no effect on cases decided under the former act. M.C.L. 125.3702.

municipal water supply is rationally related to the legitimate government interest of promoting public health by ensuring a safe and pure water supply. The ordinances also did not constitute regulatory takings under the traditional balancing test. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 32770, August 18, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/080806/32770.pdf

Intergovernmental Cooperation

Whether property in one jurisdiction may be used to satisfy the zoning requirements of another jurisdiction

Court: Michigan Court of Appeals (Unpublished No. 259708, June 20, 2006)

Case Name: *City of Pleasant Ridge v. Pinetree Props., L.L.C.*

The trial court correctly ruled an office building owned by defendant (Pinetree Props., L.L.C.) in the City of Pleasant Ridge could not be coupled with a companion parcel in the City of Ferndale less than 300 feet away, to establish parking space requirements under the Pleasant Ridge zoning ordinance (PRZO), and granted defendant summary disposition. Plaintiff (City of Pleasant Ridge) filed suit after defendant failed to comply with plaintiff's directive to cease using a portion of an office building owned by defendant in Pleasant Ridge because the building lacked sufficient parking spaces to comply with zoning requirements. Plaintiff alleged the building previously complied with the requirements on the basis of additional parking spaces down the street from the building on another parcel defendant owned in Ferndale. However, in 2002, part of the Ferndale property was partially converted to a retail garden business, resulting in inadequate parking for the operation of the building in Pleasant Ridge. Plaintiff alleged although the building was a legal nonconforming use at one time, it lost this status when a prior owner began using the nearby Ferndale property as additional parking, which met current zoning rules. Plaintiff informed defendant the Ferndale parking was necessary "to keep the [office] building conforming, and to enable [defendant] to rent the entire square footage of the building." Thus, defendant could not discontinue use of the Ferndale parcel as additional parking without providing substitute parking sufficient to meet the current PRZO requirements. The trial court correctly held there was no "linkage" between the office building and the Ferndale parcel, allowing plaintiff to require continued use of the Ferndale parcel for parking to satisfy the PRZO. The trial court properly ruled the office building constituted a legal nonconforming under the PRZO. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 32155, June 3, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/062006/32155.pdf

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

Keyhole (anti-funneling) regulations

Court: Michigan Court of Appeals (Unpublished No. 269453, December 28, 2006)

Case Name: *Pheasant Ridge Dev. Co. v. Nottawa Twp.*

While the trial court correctly held the defendant-Nottawa Township's anti-funneling ordinance did not apply to plaintiffs' use of a riparian lot (Lot A) as a private marina for the owners of Lot A, the trial court erred in concluding plaintiffs' use was permitted under the R-2 zoning classification in defendant's ordinances.

Plaintiffs were owners as tenants in common of Lot A, which was zoned for single-family residential use. All but one of the plaintiffs also owned nonriparian lots in the developer's subdivisions. The deed conveying Lot A to plaintiffs required all owners to be members of the Lot A Association, which had a charter and bylaws. This document indicated the members were each assigned a boat slip on Lot A, and there was a dock for every two boat slips. The township objected to the use of Lot A as a private marina. The anti-funneling ordinance did not apply because plaintiffs were owners of Lot A and exercised their riparian rights by virtue of this ownership, not their ownership of nonriparian lots. However, while accessory uses associated with single-family residential structures were permitted in an R-2 district, and a dock would be an accessory use, Lot A was not being used for a single-family residence or an accessory use associated with such a residence. The lot had 18 docks, 36 boat slips, and was being used as a private marina. This was not an accessory use associated with a single-family residence, as required by

the ordinance. Further, this was not an accessory use – it was the primary use. Affirmed in part, reversed in part, and remanded for an order granting defendant summary disposition. (Source: State Bar of Michigan *e-Journal* Number: 34433, January 18, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/122806/34433.pdf

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

If court should have permitted the property owner to his pleading to challenge township's new blight ordinance

Court: Michigan Court of Appeals (Unpublished No No. 272870, March 8, 2007.)

Case Name: *Elmwood Twp. v. Miller*

The trial court properly granted summary disposition to the plaintiff-township in this action for injunctive relief to comply with the township's blight ordinance. The case arose from a mobile home on defendants' property in Elmwood Township.

On June 15, 2005, plaintiff passed a blight ordinance taking effect on July 15, 2005. Plaintiff argued the 12- by 60-foot mobile home violated the township's blight ordinance and had to be removed. The defendant-property owner argued the trial court should have permitted him to amend his responsive pleading to challenge plaintiff's recently enacted blight ordinance as it applied to his particular circumstances. However, defendant never moved to amend his pleadings at any time. Because he never moved to amend, the court had no decision regarding amendment to review. In any event, the amendment of defendant's pleadings would have been futile in light of the holding of *Casco Twp. v. Brame* and its progeny. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 35202, March 21, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2007/030807/35202.pdf

Nuisance and other police power ordinances

Nuisance ordinance does apply to plaintiff's manufacturing operations in an industrial zone

Court: Michigan Court of Appeals (Unpublished, No. 273998, April 26, 2007)

Case Name: *Kendor Steel Rule Die, Inc. v. City of Fraser*

The trial court properly granted summary disposition to the defendant-City on plaintiff's action for a declaratory judgment requesting the court to find the City's nuisance ordinance did not apply to its manufacturing operations in an industrial restricted zone (IRD).

Plaintiff has manufactured steel blanks in the City since 1980. The Kendor site is located in an IRD under a zoning ordinance in Chapter 32, §§ 32-144 of the City's Code of Ordinances. In 2002, based on residents' complaints Kendor's operations created excessive noise and vibration, the City prosecuted Kendor for violating the nuisance ordinance in Chapter 15, §§ 15-1 to 15-11, of the Code of Ordinances. Kendor was found guilty in district court. The district court issued an amended order of non-reporting probation directing Kendor not to violate any criminal law of any governmental unit of Michigan and not to violate any ordinance, including the City's ordinances. The district court later noticed a probation violation, based on residents' complaints Kendor's operations were a nuisance in violation of Chapter 15. Kendor argued the Chapter 15 ordinance did not apply to its operations because the noise level regulation in Chapter 32 for business in IRDs specifically controlled and preempted the application of Chapter 15. The trial court found Kendor was subject to both the zoning ordinance in Chapter 32 and the general nuisance ordinance in Chapter 15.

The appeals court agreed, holding the zoning ordinance for IRDs in Chapter 32 did not preempt the nuisance ordinance in Chapter 15 because Chapter 32-21 specifically contemplates even a specified use under Chapter 32 could exist or be operated "in such a manner as to constitute a nuisance." Affirmed.. (Source: State Bar of Michigan *e-Journal* Number: 35804, May 10, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2007/042607/35804.pdf

Other Unpublished Cases

Enforcement of certain subdivision deed restrictions

Court: Michigan Court of Appeals (Unpublished No. 260439, September 145, 2006)

Case Name: *McCabe v. Horizons Unlimited, Inc.*

The trial court properly issued an order finding the defendants in contempt of court for violating the trial court's previous ruling granting summary disposition in

favor of plaintiffs (a homeowner's association and others) on their equitable action to enforce certain subdivision deed restrictions. The trial court did not err in finding plaintiff was not allowed to store his trailer on the street for more than 48 hours in a week because the language of the negative covenant indicated the drafters intended for the restrictions on storage to apply throughout the subdivision.

Defendant-Remsing (Horizons Unlimited, Inc.) agreed to relinquish certain rights when he purchased his home in River Run Estates. Storing the trailer outdoors in the subdivision for a period greater than 48 hours in a week obviously violated the contract Remsing entered and entitled plaintiffs to equitable relief. The trial court properly found Remsing violated the trial court's earlier ruling. However, the court agreed with defendants the trial court erred in prohibiting the placement of a sign on the trailer under the deed restrictions because this provision conflicted with a township ordinance requiring signs on trailers be imprinted with the owner's name and address for identification purposes. This requirement was incompatible with a covenant prohibiting placement of a sign on a trailer. Thus, the restrictive covenant was against public policy. Affirmed in part, reversed in part, and remanded. (Source: State Bar of Michigan *e-Journal* Number: 33114, September 21, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/091406/33114.pdf

Right to Farm Act does not apply to a non-farm.

Court: Michigan Court of Appeals (Unpublished No. 268142, September 26, 2006)

Case Name: *Township of Armada v. Marah*

The trial court erred by denying the plaintiff-township's motion for summary disposition because the doctrine of *res judicata* precluded defendants from invoking the protection of the Right to Farm Act (RFA) (M.C.L. 286.471 *et seq.*).

Plaintiff sought injunctive relief, contending the defendants' raising of between 18 and 20 llamas on their slightly less than six-acre parcel in the township, in an area zoned residential/agricultural, ran afoul of plaintiff's ordinances (requiring a farm be at least 10 acres in size and for keeping large animals (as a hobby or as a farm) a minium of two acres plus one acre for each animal after the first) and constituted a nuisance per se. In a prior misdemeanor case Marah (defendant) argued he was not conducting farm activities and thus did not need to have 10 acres. His argument was successful in district court. On appeal the circuit court upheld the district court decision.

In the meantime, in July 2004, the township filed a complaint in the circuit court, asserting that defendants continued to raise between 18 and 20 llamas, and that this continued to run afoul of ordinances requiring two acres for the first animal and one acre for each in additional animal. In this case Marah raised as an affirmative defense they were conducting farming activities and that the RFA applied. The RFA would preclude local zoning from having regulations about the 10 acres and acres per animal.

The township (plaintiff) argued because Marah successfully asserted in a prior misdemeanor case he was not engaged in farming activities, the doctrine of *res judicata* precluded defendants from labeling themselves farmers in this action for purposes of invoking the RFA. In this case, defendants testified they began their llama operation in the late 1990s, hoping to generate a retirement income. They detailed the selling of fleece, manure, and offspring of their llamas, and also selling wood, fruit, chickens, and eggs raised on the property. Defendants described a continuous operation, interrupted only by the misdemeanor proceedings, and did not suggest there had been any material change in the nature of the operation from the onset. The circuit court ruled agreed with Marah and the RFA applied.

The Court of Appeals ruled it was irrelevant the previous adjudication on the identical underlying issue was decided in a criminal context and the doctrine of *res judicata* applied. Thus the Appeals Court reversed the trail court and remanded the case. (Source: State Bar of Michigan *e-Journal* Number: 33259, October 5, 2006.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2006/092606/33259.pdf

For additional information about this and other Right to Farm Act court cases see "Questions About Intent and Application of Michigan's Right to Farm Act" by Patricia Norris and Gary Taylor, pp5-11, *Planning and Zoning News*, March 2007. Also see *Public Policy Brief; Selected Zoning Court Cases Concerning the Michigan Right to Farm Act 1964-2006* by Patricia Norris found at:
http://web1.msue.msu.edu/wexford/LU/pamphlets.htm#court

Residential Builders Act barred plaintiff's claim because he did not have a residential builder's license

Court: Michigan Court of Appeals (Unpublished No. 262603, December 19, 2006)

Case Name: *Gabara v. Gentry*

The trial court erred when it failed to grant defendants' motion for summary disposition and dismiss plaintiff's claim because plaintiff was barred from bringing suit under M.C.L. 339.2412 because he was an unlicensed residential builder.

Defendants argued the trial court erred when it denied defendants' motion for summary disposition because plaintiff lacked the legal capacity to bring a suit to recover for unpaid labor, materials, and equipment rentals. Plaintiff argued he did not need a license because he was not a residential builder. Plaintiff sought to recover compensation for his involvement in the construction of defendants' home, other than "wages for personal labor only," including compensation for his payments to subcontractors, for the rental of construction equipment, and for construction supplies. Plaintiff is a residential builder for purposes of the statute. Because plaintiff did not have a builder's license, MCL 339.2412(1) barred his claim to recover compensation for these expenditures (*Stokes v. Millen Roofing Co.*). Reversed and remanded for entry of judgment in favor of defendants. (Source: State Bar of Michigan *e-Journal* Number: 34240, December 27, 2006.)

Full Text Opinion: http://www.michbar.org/opinions/appeals/2006/121906/34240.pdf

Glossary

aggrieved party

one whose legal right has been invaded by the act complained of, or whose pecuniary interest is directly and adversely affected by a decree or judgment. The interest involved is a substantial grievance, through the denial of some personal, pecuniary or property right or the imposition upon a party of a burden or obligation. It is one whose rights or interests are injuriously affected by a judgment. The party's interest must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment. Only aggrieved parties can appeal a particular order or judgement.

aliquot

1 a portion of a larger whole, especially a sample taken for chemical analysis or other treatment.

2 (also **aliquot part** or **portion**) *Mathematics* a quantity which can be divided into another an integral number of times.

3 Used to describe a type of property description based on a quarter of a quarter of a public survey section.

n *verb* divide (a whole) into aliquots.

ORIGIN

C16: from French *aliquote*, from Latin *aliquot* 'some, so many', from *alius* 'one of two' + *quot* 'how many'.

certiorari

n noun *Law* a writ by which a higher court reviews a case tried in a lower court.

ORIGIN

Middle English: from Law Latin, 'to be informed', a phrase originally occurring at the start of the writ, from *certiorare* 'inform', from *certior*, comparative of *certus* 'certain'.

dispositive

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

estoppel

n *noun Law* the principle which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person or by a previous pertinent judicial determination.

ORIGIN

C16: from Old French *estouppail* 'bung', from *estopper*.

et seq. (also **et seqq.**)

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

hiatus
n (plural **hiatuses**) a pause or gap in continuity.
DERIVATIVES
hiatal *adjective*
ORIGIN
C16: from Latin, literally 'gaping'.

injunction
n *noun*
1 *Law* a judicial order restraining a person from an action, or compelling a person to carry out a certain act.
2 an authoritative warning.

inter alia
n adverb among other things.
ORIGIN
from Latin

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

pecuniary
adjective formal relating to or consisting of money.
DERIVATIVES
pecuniarily adverb
ORIGIN
C16: from Latin pecuniarius, from pecunia 'money'.

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

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

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

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

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