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Selected Planning and Zoning Decisions: 2008 May 2007-April 2008

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This public policy brief summarizes the important state and federal court cases and Attorney General Opinions issued between May 1, 2007 and April 30, 2008.

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Restrictions on Zoning Authority

If building an apartment complex constitutes a "religious exercise" under Religious Land Use and Institutionalized Persons Act.

Court: Michigan Supreme Court (478 Mich. 373; 733 N.W.2d 734; 2007 Mich., June 27, 2008)

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

JUDGE(S): MARKMAN, TAYLOR, CORRIGAN, AND YOUNG, JR.

Regarding whether the Religious Land Use and Institutionalized Persons Act (RLUIPA) (42 USC 2000cc *et seq.*) entitled plaintiff (Greater Bible Way Temple of Jackson) to the rezoning of its property from single-family residential to multiple-family residential to allow plaintiff to build an apartment complex, the court held a refusal to rezone does not constitute an "individualized assessment," and thus, the RLUIPA was inapplicable. Plaintiff's particular circumstances were simply not determinative of the city's decision whether to rezone. Thus, the defendant-city's decision did not constitute an "individualized assessment" within the meaning of that term. Plaintiff cited no cases in support of its position a refusal to rezone property constituted an "individualized assessment," and the court found none. Moreover, plaintiff presented no evidence to suggest the city had in place procedures or practices to permit the city to make "individualized assessments" when determining whether to rezone property.

Further, even if RLUIPA was applicable, the building of an apartment complex did not constitute a "religious exercise," where it appeared the only connection between the proposed apartment complex and "religious exercise" was the fact the apartment complex would be owned by a religious institution. Even if it did constitute a "religious exercise," the city's refusal to rezone plaintiff's property did not substantially burden plaintiff's religious exercise where the city was simply regulating where the apartment complex can be built. Even if it did substantially burden plaintiff's religious exercise, the imposition of the burden was in furtherance of a compelling governmental interest (preserving single-family neighborhoods) and constituted the least restrictive means of furthering that interest. Therefore, even if the RLUIPA was applicable, it was not violated. The judgment of the Court of Appeals was reversed and the case was remanded to the trial court for the entry of a judgment in favor of defendants, City of Jackson.

JUDGE(S): CONCURRENCE - CAVANAGH AND WEAVER; SEPARATE CONCURRENCE - KELLY

Justice Cavanagh and Weaver agreed with part IV(B) of the majority opinion. The justices wrote separately because they believed it was unnecessary to determine whether defendants made an individualized assessment in this case or whether the statutory test of strict scrutiny was met, because plaintiff failed to show its petition for rezoning was related to plaintiff's exercise of religion. The justices would reverse the Court of Appeals judgment on that basis and remand to the trial court for dismissal of plaintiff's claim.

JUDGE(S): SEPARATE CONCURRENCE - KELLY

Justice Kelly agreed with the order in which the majority opinion interpreted the relevant provisions of the RLUIPA. She concurred in the majority's holding there was no individualized assessment in this case and therefore the RLUIPA was not applicable. The Justice wrote separately because she believed it was unnecessary to discuss (1) whether the building of an apartment complex was a religious exercise, (2) whether the refusal to rezone plaintiff's property substantially burdened the alleged religious exercise, and (3) whether the alleged burden was in furtherance of a compelling governmental interest and constituted the least restrictive means of furthering that interest. The Justice would reverse the Court of Appeals judgment because she believed RLUIPA was inapplicable in this case. (Source: State Bar of Michigan *e-Journal* Number: 36445, June 28, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/supreme/2007/062707/36445.pdf

Equal Protection under Religious Land Use and Institutionalized Persons Act.

Court: Michigan Supreme Court Order (480 Mich. 1143; 746 N.W.2d 105; 2008 Mich., March 28, 2008)

Case Name: *Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp.*

JUDGE(S): TAYLOR, WEAVER, CORRIGAN, YOUNG, JR., AND MARKMAN;

VOTING TO GRANT LEAVE TO APPEAL - CAVANAGH;

DISSENT - KELLY

At first the Michigan Supreme Court denied the Greater Bible Way Temple's request for rehearing of *Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp.* (*Shepherd* II).

Then, in an order in lieu of granting leave to appeal, the court vacated the judgment of the Court of Appeals in a published case (see below) and remanded the case to the Court of Appeals for reconsideration in light of *Greater Bible Way Temple of Jackson v. City of Jackson* (above). In particular, the Court of Appeals was instructed to reconsider whether the denial of the zoning variance imposed a "substantial burden" on the plaintiff's religious exercise – whether the denial of variance "coerce[s] individuals into acting contrary to their religious beliefs." A "mere inconvenience or irritation" or something simply making "it more difficult in some respect to practice one's religion does not constitute a 'substantial burden.'"

In addition, the Supreme Court reversed the Court of Appeals' August 21, 2007 order awarding plaintiff sanctions for a vexatious motion for reconsideration. In light of the facts and the law at issue in the case, the court held the Court of Appeals clearly erred in imposing sanctions.

The dissent would not remand the case to the Court of Appeals for reconsideration in light of Greater Bible Way Temple for the reasons stated in her concurrence in that case. Rather, Justice Kelly would grant leave to appeal to consider whether the denial of a variance implicates the Religious Land Use and Institutionalized Persons Act (RLUIPA) (42 USC § 2000cc). If it does, the court should then determine whether it imposed a substantial burden on plaintiff's exercise of its religious beliefs. (Source: State Bar of Michigan *e-Journal* Number: 38921, April 2, 2008.)

Full Text Opinion: http://www.michbar.org/opinions/supreme/2008/032808/38921.pdf

This is the summary of the remanded case, referred to above:

Court: Michigan Court of Appeals (275 Mich. App. 597; 739 N.W.2d 664; 2007 Mich. App., May 22, 2007)

Case Name: *Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp.* (*Shepherd* II)

The court reversed the trial court's order granting defendants summary disposition on plaintiff's Religious Land Use and Institutionalized Persons Act (RLUIPA) (42 USC §2000cc) and equal protection claims and denying plaintiff summary disposition, holding defendants violated the RLUIPA, application of the defendant-township's zoning ordinance violated the equal protection guarantee of the United States Constitution, the defendant-Zoning Board of Appeals' (ZBA) decision was contrary to law, and the trial court erred in affirming the ZBA's denial of plaintiff's request for a variance.

Plaintiff operated a Catholic Montessori day care program and wanted to lease additional adjacent property to operate a Catholic Montessori school for grades K-3. Plaintiff anticipated having 25 students and hoped to use space that had been occupied by a non-religious pre-school day care program, which had received approval from defendants to accommodate up to 100 students. The property was zoned "office park." The defendant-township zoning official informed plaintiff primary schools were not permitted uses in office park districts and denied the proposed use. Plaintiff filed a petition with the ZBA appealing the decision, seeking, *inter alia*, a use variance. The ZBA rejected plaintiff's appeal and plaintiff filed suit.

The case was previously before the court in *Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp*. 259 Mich App 315, 321-323; 675 NW2d 271 (2003) (*Shepherd I*). See page 11 of *Public Policy Brief Selected Planning and Zoning Decisions: 2004* (http://web5.msue.msu.edu/lu/pamphlet/LUCourtCaseAnnualSum2004.pdf).

The Appeals Court held the trial court failed to apply the law of the case on remand when it considered case law from other jurisdictions to find real estate costs or market conditions could not place a substantial burden on plaintiff's religious exercise and in its reasoning regarding the differing treatment accorded to the non-religious pre-school day care program and to plaintiff. The trial court should have granted plaintiff summary disposition on its RLUIPA claim because reasonable minds could not differ about whether denial of the variance substantially burdened plaintiff's religious exercise. Further, the Appeals Court held defendants had treated a secular entity more favorably than plaintiff, a religious entity, and offered no evidence showing their denial of plaintiff's variance was precisely tailored to achieve a compelling governmental interest. Thus, plaintiff was also entitled to summary disposition on its equal protection claim. Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 36015, May 24, 2007.)

Full Text Opinion:

If activity is protected under the Right to Farm Act
Court: Michigan Supreme Court ORDER[1] (478 Mich. 934; 733 N.W.2d 397; 2007 Mich., June 29, 2007)
Case Name: *Papadelis v. City of Troy*

The unanimous Supreme court order indicates that because no provisions of the Right To Farm Act (M.C.L. 286.471 *et seq*. (RTFA), or any published Generally Accepted Agricultural and Management Practice (GAAMPs) address operations of greenhouses, no conflict exists between RTFA and a zoning ordinance. Thus a city can enforce zoning. Part of the court order's significance the points (1) RTFA does not contain specific regulation, and (2) there are not **published** GAAMPs.

In an order in lieu of granting leave to appeal, the court reversed in part the judgments of the trial court and the Court of Appeals to extent they held the RTFA and the State Construction Code exempted the plaintiffs from the defendant-city's ordinances "governing the permitting, size, height, bulk, floor area, construction, and location of structures used in the plaintiffs' greenhouse operations."

The court concluded assuming plaintiffs' acquisition of additional land entitled them under the city's zoning ordinance to make agricultural use of the north parcel (although the court expressed no opinion on this point), plaintiffs' structures were still "subject to applicable building permit, size, height, bulk, floor area, construction, and location requirements under" the city's zoning ordinances. Plaintiffs' "greenhouses and pole barn are not 'incidental to the use for agricultural purposes of the land' on which they are located within the meaning of MCL 125.1502a(f)." Since no RTFA provisions or any published GAAMP "address the permitting, size, height, bulk, floor area, construction, and location of buildings used for greenhouse or related agricultural purposes," there was no conflict between the RTFA and the city's ordinances regulating such matters precluding enforcement of the ordinances under the facts of the case.

The court remanded the case to the trial court for further proceedings not inconsistent with this order. In all other respects, the applications for leave to appeal were denied because the court was not persuaded it should review the remaining questions. (Source: State Bar of Michigan *e-Journal* Number: 36466, July 6, 2007.)

The Supreme Court's order reads in its entirety:

> "On order of the Court, the motion for leave to file brief *amicus curiae* is GRANTED. The application for leave to appeal the September 19, 2006 judgment of the Court of Appeals and the application for leave to appeal as cross-appellants are considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we REVERSE in part the judgments of the Oakland Circuit Court and the Court of Appeals to the extent that they hold that the Right to Farm Act, MCL 286.471 *et seq*. (RTFA), and the State Construction Code, MCL 125.1502a(f), exempt the plaintiffs from the defendant city's ordinances governing the permitting, size, height, bulk, floor area, construction, and location of structures used in the plaintiffs' greenhouse operations. Assuming that the plaintiffs' acquisition of additional land entitled them under the city's zoning ordinance to make agricultural use of the north parcel (a point on which we express no opinion, in light of the defendant city's failure to exhaust all available avenues of appeal from that ruling after the remand to the Oakland Circuit Court in the prior action, see *City of Troy v Papadelis (On Remand)*, 226 Mich App 90 (1997)), the plaintiffs' structures remain subject to applicable building permit, size, height, bulk, floor area, construction, and location requirements under the defendant city's ordinances. The plaintiffs' greenhouses and pole barn are not "incidental to the use for agricultural purposes of the land" on which they are located within the meaning of MCL 125.1502a(f). As no provisions of the RTFA or any published generally accepted agricultural and management practice address the permitting, size, height, bulk, floor area, construction, and location of buildings used for greenhouse or related agricultural purposes, no conflict exists between the RTFA and the defendant city's ordinances regulating such matters that would preclude their enforcement under the facts of this case. We REMAND this case to the Oakland Circuit Court for further proceedings not inconsistent with this order. In all other respects, the applications are DENIED, because we are not persuaded that the

[1]Order — A direction of a court made or entered in writing. One which terminates the action itself, or decides some matter litigated by the parties.

remaining questions presented should be reviewed by this Court."

See the Appeals case, Michigan Court of Appeals *Papadelis v. Troy* (Oakland County) (Unpublished No. 268920 (2006)) page 20 of *Selected Planning and Zoning Decisions: 2007; May 2006-April 2007* (http://web1.msue.msu.edu/wexford/pamphlet/SelectedPlan&ZoneDecisions2006-07.pdf)

Full Text Opinion:
http://www.michbar.org/opinions/supreme/2007/062907/36466.pdf

If a zoning ordinance creating a classification but not applying the classification to any land is exclusionary.

Court: Michigan Supreme Court ORDER[2] (480 Mich. 964; 741 N.W.2d 518; 2007 Mich., December 7, 2007)

Case Name: *Anspaugh v. Imlay Twp.*

JUDGE(S): TAYLOR, CAVANAGH, WEAVER, KELLY, CORRIGAN, YOUNG, JR., AND MARKMAN

In an order in lieu of granting leave to appeal, the court vacated the judgment of the Court of Appeals in a published opinion ((273 Mich. App.122; 729 N.W.2d 251 (2006), December 5, 2006)) (see page 2 of *Selected Planning and Zoning Decisions: 2007 May 2006-April 2007* (http://web5.msue.msu.edu/lu/pamphlet/SelectedPlan&ZoneDecisions2006-07.pdf)) and remanded the case to the trial court for further hearing, if necessary, and additional findings of fact.

The Supreme Court held the Court of Appeals engaged in appellate fact finding in concluding "'the I-2 zoning provided for by defendants was exclusionary,' because 'there is no direct route of travel' to the property zoned for I-2 use, and consequently 'the I-2 land use siting provided by the township is not appropriate to foster the commercial uses to which land designated for I-2 uses must be put.'" The Supreme Court instructed the trial court (Lapeer County) on remand to determine whether, as the Court of Appeals held, the township's zoning ordinance effectively excluded lawful and otherwise appropriate I-2 uses for which there was a demonstrated need, due to the unsuitability for I-2 uses of the available access routes to the I-2 zoned property in the township. In making this determination, the trial court was directed to consider whether there were available indirect routes providing reasonably suitable access to the I-2 zoned property.

(The original Appeals Court ruling said a zoning ordinance creating a classification but not applying the classification to any land is exclusionary on its face.[3] 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.) (Source: State Bar of Michigan *e-Journal* Number 37836, December 13, 2007 and Number 34106, December 7, 2006.)

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

Full text of Supreme Court Decision:
http://www.michbar.org/opinions/supreme/2007/120707/37836.pdf

Takings

Constitutional takings means deprived of all economically viable use of land

Once tried in state court, cannot be relitigated in federal court

Court: U.S. Court of Appeals Sixth Circuit (19 F.3d 285; 2008 U.S. App.; 2008 FED App. 0098P (6th Cir.), March 3, 2008)

Case Name: *Trafalgar Corp. v. Miami County Bd. of Comm'rs*

Holding the district court correctly determined issue and claim preclusion barred further litigation of the plaintiffs' (Trafalgar Corp.) takings and equal protection claims, the court affirmed the district court's order dismissing the case on a motion for summary judgment.

Plaintiff-Trafalgar owned land in the defendant-township zoned A-2 Agricultural. Trafalgar

[2]Order — A direction of a court made or entered in writing. One which terminates the action itself, or decides some matter litigated by the parties.

[3]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."

successfully applied several times to the defendant-county board of commissioners to rezone the property to single-family residential. However, each time a voter referendum vetoed the change. Trafalgar sued the defendants and "exhaustively litigated its claims in state court prior to bringing an action in federal court." Trafalgar sought a declaratory judgment overturning the voter referendum statute for as-applied or facial unconstitutionality under the United States and Ohio Constitutions, and alternatively sought just compensation for a regulatory taking of property by the state.

The trial court rejected Trafalgar's challenge to the referendum statute and ruled its takings claim was not cognizable in declaratory judgment but could be filed as a request for a writ of mandamus. The state appellate court upheld the trial court's decision. Trafalgar later filed a complaint for a writ of mandamus, seeking to compel rezoning and compensation for a taking of its property, asserting its right to compensation under the U.S. and Ohio Constitutions. Trafalgar's claims again failed.

Trafalgar then filed this suit in federal district court. The court held issue preclusion barred further litigation under the Takings Clause. The state courts determined Trafalgar could not make out a claim for compensation because it failed to present sufficient evidence it was deprived of all economically viable use of its land. Trafalgar sought to again litigate the issue of just compensation under the Takings Clause, but because the issue was directly decided in a prior state court action, it could not be relitigated in federal district court. Claim preclusion barred further litigation of Trafalgar's equal protection claim. The court noted a new claim was not created every time the Board rezoned another property. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 38656, March 5, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2008/030308/38656.pdf

Due Process and Equal Protection

Township's Use of a Security (letters of credit).

Court: Michigan Supreme Court (480 Mich. 962; 741 N.W.2d 511; 2007 Mich., December 5, 2007)

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

JUDGE(S): TAYLOR, CAVANAGH, WEAVER, KELLY, CORRIGAN, YOUNG, JR., AND MARKMAN

In an order in lieu of granting leave to appeal, the Supreme Court affirmed in part and reversed in part the judgment of the Court of Appeals in a published opinion, reversing the holding the defendant-Howell Township acted beyond the scope of §20.15 of its ordinance by drawing on the letter of credit without first incurring compensable expenses.

The Supreme Court concluded the "ordinance did not prohibit the township from retaining some form of security to ensure compliance with the contract," and held the "township did not violate its ordinance when it drew on the letter of credit." The court affirmed the Court of Appeals in all other respects, and reinstated the trial court's judgment. (Source: State Bar of Michigan *e-Journal* Number: 37814, December 11, 2007.)

Full Text Supreme Court Opinion:
http://www.michbar.org/opinions/supreme/2007/120507/37814.pdf

Text of the Appeals Court decision:
http://www.michbar.org/opinions/appeals/2006/112806/34031.pdf

Variances (use, non-use)

Use variance denial; ZBA cannot decide on substantivite due process and takings claims

Court: Michigan Supreme Court Order (No 480 Mich. 1022; 743 N.W.2d 198; 2008 Mich., January 18, 2008)

Case Name: *Houdini Props., LLC v. City of Romulus*

JUDGE(S): CAVANAGH, WEAVER, KELLY, YOUNG, JR., AND MARKMAN.

In an order in lieu of granting leave to appeal, the Michigan Supreme Court reversed the judgment of the Court of Appeals and vacated the trial court's orders granting defendant summary disposition on the grounds of failure to comply with MCR 2.203(A) and *res judicata*.

The case stemmed from a developer who was seeking a use variance to allow a billboard on property in a zoning district which does not otherwise allow

billboards. The use variance was denied by the zoning board of appeals (ZBA). The plaintiff then sued making the claim denial of the billboard use was a taking.

Plaintiff's claim of appeal pursuant to MCL 125.585(11) was not a "pleading." As defendant acknowledged, the joinder rules of MCR 2.203 do not apply to a claim of appeal from the decision of a ZBA. The trial court's decision on appeal from the ZBA's denial of a use variance was not *res judicata* on plaintiff's constitutional claims. The ZBA did not have jurisdiction to decide plaintiff's substantive due process and takings claims. Under MCL 125.585(11), the trial court's review was confined to the record and decision of the ZBA. Thus, the trial court could not rule on takings issues in plaintiff's appeal. The Court of Appeals and the trial court erred in relying on the unpublished decision in *Sammut v. City of Birmingham*. The Supreme Court remanded the case to the trial court for further proceedings not inconsistent with this order. **JUDGE(S):**DISSENT – CORRIGAN; JOINING IN PARTS I AND III OF THE DISSENT – TAYLOR

The dissent disagreed with the majority's decision to reverse the judgment of the Court of Appeals and vacate the trial court's orders. While agreeing the compulsory-joinder rules of MCR 2.203(A) did not apply, the dissent believed the trial court's decision on appeal from the ZBA's denial of a use variance was *res judicata* barring plaintiff's takings claim. (Source: State Bar of Michigan *e-Journal* Number: 38233, January 24, 2008.)

Full Text Supreme Court Opinion:
http://www.michbar.org/opinions/supreme/2008/011808/38233.pdf

Text of reversed Court of Appeals Opinion:
http://www.michbar.org/opinions/appeals/2006/061306/32032.pdf

Ripeness for Court's Jurisdiction, Aggrieved Party

If one did not seek Just Compensation in State Courts, then cannot later seek the same in Federal Court

Court: U.S. Court of Appeals Sixth Circuit (519 F.3d 564; 2008 U.S. App.; 2008 FED App. 0110P (6th Cir.), March 13, 2008)

Case Name: *Braun v. Ann Arbor Charter Twp.*

Even assuming plaintiffs' procedural due process, substantive due process, equal protection, and § 1983 claims were not ancillary to their Takings Clause claim (which the district court properly ruled was not ripe for review in federal court), the court held the district court appropriately granted the defendant-township summary judgment on the claims.

The plaintiffs-Braun owned property in the township, which they contracted to sell to a real estate developer. They asked the township to rezone the property to permit, *inter alia*, a mobile home park. The Township Board adopted a resolution denying the application for rezoning based on its determination the proposed rezoning would have a significant and detrimental impact on the community. Plaintiffs inquired about the possibility of receiving a variance from the Zoning Board of Appeals (ZBA). The township stated the ZBA did not have the jurisdiction to change a zoning classification, grant a use variance, or hear any other appeal from the Township Board.

Plaintiffs sued in state court, which granted the township summary disposition after finding plaintiffs' Takings Clause claim was not yet ripe for review. Plaintiffs then sought a use variance from the ZBA, which was denied on the basis the ZBA lacked the appropriate jurisdiction.

Plaintiffs then filed this action in federal court. Noting the parties agreed Michigan provided an adequate just compensation procedure, the court held because the plaintiffs did not fulfill their obligation of seeking just compensation in state court, the court did not have jurisdiction to reach the merits of their takings claim. Further, the court found plaintiffs' procedural due process claim was defective because it was ancillary to the takings claim and was without any factual basis showing the deprivation of a property right. Their substantive due process claim failed because no genuine issue of material fact existed as to whether the township's decision was arbitrary and capricious. Summary judgment was also proper on their equal protection and §1983 claims. Affirmed.. (Source: State Bar of Michigan *e-Journal* Number: 38743, March 17, 2008.)

Full Text Court Opinion:
http://www.michbar.org/opinions/us_appeals/2008/031308/38743.pdf

See *Kallman v. Sunseekers Prop. Owners Ass'n, L.L.C.* on page 12.

Open Meetings Act, Freedom of Information Act

Settlement Agreement and Notice of Rejection are "public records"

Court: Michigan Supreme Court (480 Mich. 1079; 744 N.W.2d 667; 2008 Mich., February 27, 2008)

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

JUDGE(S): TAYLOR, CAVANAGH, WEAVER, CORRIGAN, YOUNG, JR., AND MARKMAN; CONCURRENCE - KELLY

In an order, the court granted the motions for immediate consideration of the defendant's application for leave to appeal the February 13, 2008 order of the Court of Appeals and the motion to file a brief *amicus curiae*. The Supreme Court also denied the application for leave to appeal because it was not persuaded it should review the questions presented.

The court held the trial court did not err in concluding the Settlement Agreement (Deposition Exhibit 11) and the Notice of Rejection (Deposition Exhibit 10) were "public records" and subject to disclosure pursuant to the FOIA. The court also concluded the plaintiff-*Detroit Free Press's* Freedom of Information Act (FOIA) requests were sufficiently specific, and there is no FOIA exemption for settlement agreements. Further, a public body cannot contract away its FOIA obligations. The court also held the trial court did not abuse its discretion in dissolving the non-disclosure provision in its prior order, and allowing (with one redaction) the disclosure of the deposition in question. The motion for a stay was granted to the extent the trial court's February 5, 2008 order granting the motion to disclose was stayed pending the return of the trial court record to the trial court. The motion to seal the court's record was granted to the extent the court's file shall remain sealed until the release of documents as ordered by the trial court.

Justice Kelly concurred in the decision to deny leave to appeal but wrote separately to discuss the trial court's decision to disclose the deposition transcript. Under Michigan Court Rules (MCR) 2.411(C)(5) statements made during mediation are confidential. At several points during the deposition, an attorney was specifically questioned about incidents occurring during court-ordered facilitation. Because the attorney's "detailed recounting of events included 'statements made during mediation' and 'communications between the parties or counsel,'" Justice Kelly believed parts of the deposition involved confidential communications under MCR 2.411(C)(5). However, the defendant did not argue for redaction of this testimony, but instead asked the trial court to exempt the entire deposition from disclosure. Since most of the deposition testimony did not fall within the parameters of the court rule, the trial court properly decided not to exempt the entire transcript from disclosure and did not abuse its discretion in not *sua sponte* ordering redaction. (Source: State Bar of Michigan *e-Journal* Number: 38616, February 28, 2008.)

Full Text Supreme Court Opinion: http://www.michbar.org/opinions/supreme/2008/022708/38616.pdf

Signs: Billboards, Freedom of Speech

Dismissed plaintiff-Prime Media's (PM) suit because it lacked standing under the "overbreadth doctrine" Standing to challenge the defendant-city's sign ordinance

Court: U.S. Court of Appeals Sixth Circuit (485 F.3d 343; 2007 U.S. App.; 2007 FED App. 0164A (6th Cir.), May 8, 2007)

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

The court vacated its prior opinion[4] and replaced it

[4]Court: U.S. Court of Appeals Sixth Circuit (474 F.3d 332; 2007 U.S. App.; 2007 FED App. 0031P (6th Cir.), 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

(continued...)

with this amended opinion.

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

Village's traffic code constituted an unconstitutional restriction on commercial speech or a content-neutral restriction.

Court: U.S. Court of Appeals, Sixth Circuit (492 F.3d 766; 2007 U.S. App.; 2007 FED App. 0248P (6th Cir.), June 29, 2007)

Case Name: *Pagan v. Fruchey*

JUDGE(S): *EN BANC* - GIBBONS, BOGGS, MARTIN, DAUGHTREY, MOORE, COLE, CLAY, AND GILMAN; DISSENT – ROGERS, SILER, BATCHELDER, SUTTON, COOK, MCKEAGUE, AND GRIFFIN

The district court erred by granting summary judgment in favor of the defendants-village and police chief because they failed to produce evidence justifying the restrictions on commercial speech imposed by the ordinance. Plaintiff, a resident of the village, posted a "For Sale" sign on a vehicle he wanted to sell and left it parked on the public street in front of his home. An officer notified plaintiff the sign was a violation of a traffic code, and asked him to remove it or face being cited for a municipal violation. The parties agreed the posting of "For Sale" signs on cars was protected commercial speech. The primary question was whether the village established the restriction directly and materially advanced its regulatory interests. While defendants relied on *Metromedia v. City of San Diego*, the record demonstrated no comparable legislative or judicial history supporting the conclusion restrictions placed on "For Sale" signs posted on vehicles address concrete harms or materially advance a governmental interest.

The position advocated by defendants assumed, without discussion, billboards and "For Sale" signs posted on parked cars raised practically indistinguishable aesthetic and traffic safety issues.

[4](...continued)
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

Defendants' analogy appeared to sidestep the ultimate issue – whether or not the speech the village sought to regulate posed the harms all agreed would justify regulation. If "For Sale" signs are a threat to the physical safety of the village's citizens or implicate aesthetic concerns, it seemed no great burden to require the village to come forward with some evidence of the threat or the particular concerns.

The court's decision did not prescribe the manner by which municipalities must justify these sorts of ordinances. The court simply concluded it could not discharge its obligation to scrutinize commercial speech restrictions if it deemed sufficient the conjectural affidavit of the police chief offering nothing more than a statement of what he believed to be the village's regulatory objectives. It was the village's obligation to provide something in support of its regulation, and the court did not find itself free to hold this obligation was discharged based on principles of common sense or obviousness, especially where, as here, all did not agree as to what was obvious or a matter of common sense. Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 36463, May 10, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2007/062907/36463.pdf

Township's sign regulation violated the First and Fourteenth Amendment or not

Court: U.S. Court of Appeals Sixth Circuit (6th Circuit), (503 F.3d 456; 2007 U.S. App.; 2007 FED App. 0401P (6th Cir.), October 1, 2007)

Case Name: *Midwest Media Prop., L.L.C. v. Symmes Twp.*, Ohio

Since the plaintiffs did not challenge the height and size regulations, and they had filed nine applications to post a sign in the defendant-township violating those regulations, the court concluded plaintiffs could not show success in challenging other regulations (such as the township's original off-premises advertising ban or its sign-approval process) would redress any injury caused by the regulations.

Plaintiffs alleged the township's sign regulations violated the First and Fourteenth Amendment. The "key problem" was redressability. Even if they could show the original off-premises advertising ban or the sign-approval process violated the First Amendment, each of plaintiff-Midwest Media's nine sign applications sought permission to post signs plainly violating the township's size and height regulations, which plaintiffs did not challenge in their complaint. Even if the court invalidated the challenged regulations, this would not redress plaintiffs' injury since the size and height restrictions would still preclude the township from approving their sign applications and still prevent plaintiffs from putting up their signs. Noting the similarities between this case and *Prime Media, Inc. v. City of Brentwood*, the court also concluded plaintiffs' invocation of the overbreadth doctrine did not solve this problem. As in *Prime Media*, all of the signs plaintiffs wanted to construct violated the township's size and height requirements, and they failed to provide the court with any facts showing they intended to display signs complying with those provisions. "Having suffered no cognizable injury, they lack standing to mount an attack on the township's sign regulations–whether under the overbreadth doctrine or under any other doctrine."

The court affirmed the district court's order granting the township summary judgment on plaintiffs' claims because plaintiffs lacked standing. (Source: State Bar of Michigan *e-Journal* Number: 37263, October 3, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2007/100107/37263.pdf

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

Road ends at lake shore.

Michigan Attorney General Opinion number 7211, January 30, 2008:

This AG Opinion covers issues about the scope of permissible "public uses" of roads that end at the shore of a lake in platted subdivisions. The principles found in court cases *Jacobs v Lyon Twp* (*Jacobs I*), 181 Mich App 386, 391; 448 NW2d 861 (1989), *Jacobs v Lyon Twp* (After Rem) (*Jacobs II*), 199 Mich App 667; 502 NW2d 382 (1993), and *Higgins Lake Property Owners Ass'n v Gerrish Twp*, 255 Mich App 83; 662 NW2d 387 (2003) apply.

In short the answer is while the Legislature has the authority to modify the law, any legislative modification of the judicially established rules of property law that have shaped the rights and expectations of property owners regarding the meaning of "public use" in the context of platted roads ending at the shore of a lake has

the potential to impact existing property rights and would be subject to the constitutional protections against the taking of property without due process and just compensation.

In more detail: A dedication of land in a plat "for public use" not only describes who may use the land and how it may be used but also serves as an offer of a gift of that land for public use. Under the statute by which the plats had been created and case law dealing with dedication, it has become well established that where land has been given for a public use, the permissible uses to which that property may be put are governed by the intent of the person who dedicated that land. In the case of a plat, the intent of the dedicator is determined from the language used in the dedication and the surrounding circumstances. In addition to dedications to the public through the recording of a plat, there may also be "dedications" of land for the exclusive private use of persons designated in the dedication. Private rights arise in dedicated or reserved areas of the plat upon the sale of lots within the plat. It is well established that a purchaser of property in a recorded plat receives not only the interest as described in a deed to the property but also whatever rights are described in the plat.

Jacobs II is regarded as the leading case concerning rights in dedicated streets ending at water, summarized by the Court as follows:

> Publicly dedicated streets that terminate at the edge of navigable waters are generally deemed to provide public access to the water. *Thies v Howland*, 424 Mich 282, 295; 380 NW2d 463 (1985);[5] *McCardel v Smolen*, 404 Mich 89, 96; 273 NW2d 3(1978); *Backus v Detroit*, 49 Mich 110; 13 NW 380 (1882). The members of the public who are entitled to access to navigable waters have a right to use the surface of the water in a reasonable manner for such activities as boating, fishing, and swimming. An incident of the public's right of navigation is the right to anchor boats temporarily. *Thies, supra* at 288. The right of a municipality to build a wharf or dock at the end of a street terminating at the edge of navigable waters is based upon the presumption that the platter intended to give access to the water and permit the building of structures to aid in that access.[6] *Thies, supra* at 296. The extent to which the right of public access includes the right to erect a dock or boat hoists or the right to sunbathe and lounge at the road end depends on the scope of the dedication. *McCardel, supra* at 97; *Thom v Rasmussen*, 136 Mich App 608, 612; 358 NW2d 569 (1984). The intent of the dedicator is to be determined from the language used in the dedication and the surrounding circumstances. *Thies, supra* at 293; *Bang v Forman*, 244 Mich 571, 576; 222 NW 96 (1928). [*Jacobs II*, 199 Mich App at 671-672.]

In the *Jacobs I* case, the Court of Appeals had held that the construction of a public boat dock at the shore of a dedicated, platted road was within the scope of the dedicated public use and that the use of surface waters adjoining the road end for swimming, wading, fishing, and boating and to temporarily anchor boats were also within the scope of the dedicated public use. *Jacobs I*, 181 Mich App at 391. But the Court also held that the "construction of boat hoists, seasonal boat storage and the use of road-ends for lounging and picnicking **exceed the scope and intent of the dedication** of property for use as streets." *Id.* (Emphasis added.) *Jacobs II* continued these holdings in the subsequent decision on appeal after remand.

Concerning the legislature adopting statutes or local ordinances, such laws can not allow activities at road ends which exceed the uses contemplated by the dedication of streets for public use in the plat. A municipality has no right to appropriate road ends to any use inconsistent with the dedication. If a dedication is made for a specific or defined purpose, **neither the legislature**, a municipality or its successor, nor the general public **has any power to use the property for any other purpose than the one designated**, whether such use be public or private, and whether the dedication is a common-law or a statutory dedication; and this rule is not affected by the fact that the changed use may be advantageous to the public. This can only be done under the right of eminent domain. On the other hand, the municipality cannot impose a more limited and restricted use than the dedication warrants.

[5] In *Thies*, the Court ruled that public ways that terminate at the edge of a navigable body of water are treated differently from those that run parallel to the shore. *Thies,* 424, *supra* at 295.

[6] However, it is not to be inferred that the municipality has the right to appropriate the road ends to any use inconsistent with the dedication. *Backus, supra* at 120.

The Court's rulings in *Jacobs I* and *II* and *Higgins Lake* were based on over 100 years of common law precedent, and any alteration of the property interests identified in those decisions must, therefore, be considered in that context. The rights and expectations of property owners are legitimately grounded in long-standing recognition of those rights and expectations. Const 1963, art 3, § 7 provides that the "common law and the statute laws now in force . . . shall remain in force until they expire by their own limitations, or are changed, amended or repealed." Thus, the Legislature has the ability to modify the law but, Legislature is subject to constitutional limitations. Both the United States and Michigan Constitutions prohibit the taking of private property without just compensation and due process of law. US Const, Am V; Const 1963, art 10, §2.

Copy of Opinion 7211:
http://www.ag.state.mi.us/opinion/datafiles/2000s/op10287.htm

Keyhole/funnel activity can be a nuisance in fact.

Court: Michigan Supreme Court (480 Mich. 1099; 745 N.W.2d 122; 2008 Mich., March 7, 2008)

Case Name: *Kallman v. Sunseekers Prop. Owners Ass'n, L.L.C.*

JUDGE(S): TAYLOR, KELLY, CORRIGAN, YOUNG, JR., AND MARKMAN;

CONCURRENCE - WEAVER; VOTING TO DENY LEAVE TO APPEAL - CAVANAGH

In an order in lieu of granting leave to appeal, the court reversed in part the Court of Appeals judgment (see link, below) and remanded the case to the trial court for further proceedings, holding the Court of Appeals erred in reversing the trial court's ruling concerning nuisance in fact but the Court of Appeals properly *sua sponte* raised the issue of plaintiffs' standing to pursue their nuisance *per se* claim under M.C.L. 125.294.

The Supreme Court concluded the trial court did not err in determining the defendant's 184-foot dock, with 6 mooring sites on a piece of property with 25 feet of lake frontage, and its use of the property as a "keyhole" or "funnel" lot for its unlimited membership substantially interfered with plaintiff-Kallman's use of her property, constituting a nuisance in fact.

However, the Court of Appeals properly raised the standing issue. When the trial court has not made findings concerning standing because standing was never challenged in the trial court, the proper course of action is to remand for a hearing on the issue of standing. On remand, the plaintiffs must demonstrate they have a substantial interest, which would be detrimentally affected in a manner different from the citizenry at large. Standing may be established by showing "the 'defendant's activities directly affected the plaintiff[s'] recreational, aesthetic, or economic interests.'"

The concurrence agreed only with the order reversing the Court of Appeals judgment and remanding the case to the trial court for further proceedings. Justice Weaver wrote separately because she disagreed with the order's discussion of the standing test in *Lee v. Macomb County Bd. of Comm'rs*, *National Wildlife Fed'n v. Cleveland Cliffs Iron Co.*, *Rohde v. Ann Arbor Pub. Sch.* and *Michigan Citizens for Water Conservation v. Nestlé Waters N. Am. Inc.*. (Source: State Bar of Michigan *e-Journal* Number: 38705, March 12, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/supreme/2008/030708/38705.pdf

Full Text of the Court of Appeals Opinion:
http://www.michbar.org/opinions/appeals/2007/020107/34730.pdf

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

Unlawful disposal of scrap tires
Site with over 500 scrap tires to be delivered could operate without a license as a "Type B" transfer station

Court: Michigan Court of Appeals (276 Mich. App. 165; 740 N.W.2d 534; 2007 Mich. App., June 28, 2007)

Case Name: *People v. Schumacher*

Holding the Legislature intended Natural Resources and Environmental Protection Act (NREPA) (MCL 324.16902(1)) § 16902(1) to establish a "public welfare offense" and the only intent necessary to show violation of § 16902(1) is the accused intended to perform the prohibited act, the court concluded the evidence produced at the defendant's trial was sufficient to support his conviction of unlawful disposal of scrap tires in violation of § 16902(1).

Defendant argued there was insufficient evidence to prove beyond a reasonable doubt he knowingly violated the statute. The parties disagreed whether § 16902(1) imposed strict liability or required proof of *mens rea*. In

Morissette the United States Supreme Court approved strict liability for "public welfare offenses" having "'very different antecedents and origins' than the common law." Section § 16902(1) does not codify a common-law crime. It is part of the NREPA, a "comprehensive statutory scheme containing numerous parts, all intended to protect the environment and natural resources of this state."

The court concluded § 16902(1) fit the description of a public welfare offense discussed in *Morissette v. United States*. Further, the Legislature did not include anywhere in NREPA part 169 a requirement criminal culpability depends on the actor knowingly violating its terms. There is no language in § 16902(1) from which it can be implied guilty knowledge is a required element of the offense. The evidence was more than sufficient to find defendant knowingly and voluntarily caused over 500 scrap tires to be delivered to a site, which was not "a collection site registered under" § 16904, "a disposal area licensed under part 115, an end user, a scrap tire processor, a tire retailer, or a scrap tire recycler" in compliance with NREPA part 169. Defendant's claim was not he did not cause the scrap tires to be delivered to the site, only that he did not realize his actions were illegal. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 36449, July 2, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2007/062807/36449.pdf

Zoning ordinances regarding land application of septic material

Court: Michigan Court of Appeals (276 Mich. App. 568; 741 N.W.2d 587; 2007 Mich. App. [This opinion was previously released as an unpublished opinion No. 273469 on July 24, 2007] September 6, 2007.)

Case Name: *Houdek v. Centerville Twp.*

The trial court properly granted summary disposition in favor of the defendant-township in this action challenging a zoning ordinance. Plaintiffs did not establish the zoning ordinance was exclusionary in violation of MCL 125.297a.[7]

Plaintiffs, owners of a septic pumping service, were only able to utilize a small portion of their property in the township for land application of septic material pursuant to a special use permit issued by defendant. They were also unable to construct a septic material holding facility on their land because it was zoned agricultural. Plaintiffs argued the zoning ordinance was exclusionary on its face regarding land application of septic material within the township. They argued in particular the ordinance violated MCL 125.297a because there was a demonstrated need in the township for the land application of septic material, there were appropriate locations within the township for land application, and the use was lawful pursuant to MCL 324.11701 *et seq*.

A review of the record revealed there were currently two sites in the township approved for land application of septic material. Plaintiffs admitted in February 2002, the township approved their application for a special use permit to land apply septic material to a five acre parcel on their property and issued the permit in March 2002. Also, in addition to the land they owned, plaintiffs admitted they had a preexisting permit to land apply septic material to land owned by Plamondon via the grandfather clause in the ordinance. The Plamondon land was located in the township. Plaintiffs had used this site to dispose of septic material by obtaining the permission of Plamondon, but Plamondon revoked his permission due to a disagreement regarding a missing tractor on Plamondon's land. Thus, the record showed plaintiffs currently hold permits to land apply septic material on two parcels of land in the township and for this reason, they could not show the zoning ordinance was exclusionary because it totally prohibited the use. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 36620, July 30, 2007; and Number 36993, August 10, 2007.)

Full Text unpublished Opinion:
http://www.michbar.org/opinions/appeals/2007/072407/36620.pdf

Full Text published Opinion:
http://www.michbar.org/opinions/appeals/2007/090607/36993.pdf

[7]This case concerns and quotes the old Township Zoning Act (M.C.L. 125.297a *et seq.* repealed 7/1/06) 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 (continued...)

[7](...continued)
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."

Other Published Cases

Health Department authority to promulgate regulations restricting smoking

Note, this case is a bit off-topic concerning planning and zoning, but is instructive in relationship to the narrow jurisdiction of police power ordinance making authority by counties. Generally counties cannot adopt police power ordinances – unless there is specific legislative authority to do so. This case focuses on a similar issue, only concerning local health departments, a county/state agency.

Court: Michigan Court of Appeals (275 Mich. App. 686; 741 N.W.2d 27; 2007 Mich. App., June 5, 2007)

Case Name: *McNeil v. Charlevoix County and Northwest Michigan Community Health Agency*

The trial court properly denied the plaintiffs' motion for summary disposition in this action for declaratory relief. Plaintiffs (McNeil and others) argued the defendant-Northwest Michigan Community Health Agency (NMCHA) lacked authority to promulgate regulations restricting smoking. Plaintiffs argued, pursuant to M.C.L. 333.12613, implementation and enforcement of the act and rules promulgated under it was a power within the exclusive province of the State Department of Community Health (DCH).

Plaintiffs' argument was not sustained by the plain language of §12613(2) of Part 126, which expressly provides "the department may authorize a local health department to enforce this part and the rule promulgated under this part." Moreover, even if responsibility for implementation and enforcement of the restrictions established by Part 126 was exclusively granted to the DCH, the fact does not deny a local health department the authority to promulgate, implement, and enforce similar regulations of its own. Part 24 of the Public Health Code (PHC) (M.C.L. 333.2401 *et seq*.) (also known as the Michigan Clean Indoor Air Act (MCIAA)) authorizes the creation of local health departments, and was the vehicle used to create the NMCHA. Pursuant to § 2433 of Part 24, these departments are charged with the certain duties. The regulation at issue was consistent with the required duties and was authorized for promulgation by the NMCHA in §§2435 and 2441 of Part 24, which provide a local health department may "[a]dopt regulations to properly safeguard the public health," M.C.L. 333.2435(d), or "are necessary or appropriate to implement or carry out the duties or functions vested by law in the local health department," M.C.L. 333.2441(1). The only limitation placed by the Legislature on the promulgation and adoption of such regulations is they "be at least as stringent as the standard established by state law applicable to the same or similar subject matter." The regulation at issue here, being more restrictive than the standards set by the MCIAA, met this requirement. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 36164, June 7, 2007.)

This case is pending before the Michigan Supreme Court.

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2007/060507/36164.pdf

Public health ordinance impinged upon one's religious freedom

Court: U.S. District Court Eastern District of Michigan (475 F. Supp. 2d 671; 2007 U.S. Dist., 2008 U.S. App., 2008 FED App. 213N (6th Cir.), February 20, 2007 [Not recommended for full-text publication])

Case Name: *Beechy v. Central Michigan District Health Department*

The court granted the defendants' (health department) motion for summary judgment and dismissed the case, finding the uncontested facts, established mainly by the plaintiffs' (practitioners of the Old Order Amish faith) own testimony, demonstrated their objections to a 750-gallon septic tank and the preference for a 300-gallon tank were based on secular, not religious concerns.

At issue was a requirement by Central Michigan District Health Department (CMDHD) for a 750-gallon septic tank to be installed on permitted property owned by the plaintiffs. According to the plaintiffs, their lifestyles would not cause them to generate enough wastewater so as to require a septic tank on residential property as large as 750 gallons, and having a tank with such excess capacity would create a temptation for them to adopt more worldly ways. According to the defendants, the 750-gallon requirement is the product of an agreement reached between the Amish in Gladwin County and the CMDHD in the early 1990s to accommodate their religious practices. Nowhere in their affidavits or deposition testimony did plaintiffs actually state installation of a 750-gallon septic tank as required by the CMDHD health code violated their religion or interfered with the practice of their faith. In their depositions, plaintiffs-Beechy, Slabaugh, and Daniel

Mast did not mentioned religion at all when asked for the reasons they objected to installing a larger septic tank. They cited only considerations of cost and convenience. Slabaugh also stated he believed he should not depart from the position of the group because they "should stick together." Amos Weaver testified installing a larger tank might expose him to the temptation to violate the Amish rule of simplicity because a tank of that capacity would make it possible to install flush toilets, which would be a violation of the Ordnung. However, he never actually stated installation the 750-gallon tank required by the health department itself would interfere with his religious practices. Their religious beliefs, which dictate their lifestyle, were offered as explanations for why they did not need a larger tank, and nothing more (Source: State Bar of Michigan *e-Journal* Number: 36014, June 14, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/district/2007/022007/36014.pdf

Lack of standing to challenge Nestlé infringement on Riparian Rights to areas not used by the plaintiffs.

Court: Michigan Supreme Court (479 Mich. 280; 737 N.W.2d 447; 2007 Mich., July 25, 2007)

Case Name: *Michigan Citizens for Water Conservation v. Nestlé Waters N. Am. Inc.*

JUDGE(S): YOUNG, JR., TAYLOR, CORRIGAN, AND MARKMAN

The court limited its opinion to the issue of standing. The Supreme Court held plaintiffs had standing to bring a Michigan Environmental Protection Act (MEPA) (MCL 324.1701 *et seq.*) claim against defendant-Nestlé to protect their riparian property rights to Thompson Lake and the Dead Stream. However, they failed to demonstrate they used the Osprey Lake Impoundment (Osprey Lake) and Wetlands 112, 115, and 301, and as a result, their recreational, aesthetic, or other interests have been impaired. Thus, pursuant to Michigan Court Rules (MCR) 7.302(G)(1), in lieu of granting leave to appeal, the court affirmed the Court of Appeals in part, but reversed the Court of Appeals holding the plaintiffs have standing to bring a MEPA claim regarding Osprey Lake and Wetlands 112, 115, and 301, and remanded the case to the trial court for further proceedings consistent with the court's opinion.

Armed with the required permits allowing defendant to operate 4 wells at a combined maximum water pumping rate of 400 gallons per minute, defendant began pumping "spring water" in 2002. The court refined the plaintiffs' MEPA claim and held they had standing related to whether defendant's pumping activities inflicted an injury in fact with respect to the Dead Stream and Thompson Lake, but did not establish standing with respect to Osprey Lake and Wetlands 112, 115, and 301. The Supreme Court rejected the Court of Appeals "interconnectedness" theory of standing as inconsistent with ; *National Wildlife Fed'n v. Cleveland Cliffs Iron Co.* and *Lee v. Macomb County Bd. of Comm'rs*. The court affirmed the Court of Appeals in part, but reversed the Court of Appeals holding regarding the issue of whether plaintiffs had standing with regard to Osprey Lake Impoundment and the specific wetlands where they did not establish a concrete interest in them, and remanded to the trial court for further proceedings.

JUDGE(S): DISSENT – WEAVER.

In her dissent, Justice Weaver would hold plaintiffs had standing under MCL 324.1701(1) to bring an action to enjoin water pumping and bottling production activities the plaintiffs alleged would irreparably harm natural resources and would affirm the Court of Appeals decision plaintiffs have standing with respect to all the affected properties at issue.

JUDGE(S): DISSENTING SEPARATELY – CAVANAGH

Justice Cavanagh concurred fully with Justice Weaver's dissent because he also believed the majority's systematic dismantling of the court's standing principles was seriously misguided. He would find plaintiffs had standing because the evidence they presented soundly demonstrated the conduct of defendant is perpetrating detrimental environmental effects on the ecosystem about which plaintiffs' complaint was concerned.

JUDGE(S): ALSO DISSENTING SEPARATELY – KELLY.

While Justice Kelly agreed with Justice Weaver's conclusion and her analysis, she recognized *Lee v. Macomb County Bd. of Comm'rs* and *National Wildlife Fed'n v. Cleveland Cliffs Iron Co.* now constitute binding precedent, and because she would hold plaintiffs have established standing under those cases, she would find it unnecessary to consider whether these cases should be overruled. The justice opined the majority opinion allowed defendant to use the standing doctrine as a sword to insulate its questionable activity from legal challenge and dissented from the "erroneous" decision. (Source: State Bar of Michigan *e-Journal* Number:

36632, July 26, 2007.)
Full Text Opinion:
http://www.michbar.org/opinions/supreme/2007/072507/36632.pdf

Calculated Floor Area under the Occupational Code

Attorney General Opinion No. 7208; Date: October 3, 2007

Basements are not included in the definition of "calculated floor area" under section 2012(1)(d) of the Occupational Code, MCL 339.2012(1)(d), irrespective of whether they are finished or unfinished. Unless the plans were prepared by a licensed architect or engineer, the seal requirements for architects or engineers set forth in Article 20 of the Occupational Code, MCL 339.2001 – MCL 339.2014, do not apply to plans prepared for a one- or two-family residence not exceeding 3,500 square feet in calculated floor area as defined in that act.

Copy of the Opinion:
http://www.ag.state.mi.us/opinion/datafiles/2000s/op10284.htm

Zoning Approval and Federal Bureau of Alcohol, Tobacco & Firearms federal firearms license

Court: U.S. Court of Appeals Sixth Circuit (509 F.3d 273; 2007 U.S. App.; 2007 FED App. 0478P (6th Cir.), December 13, 2007)

Case Name: *Morgan v. Federal Bureau of Alcohol, Tobacco & Firearms*

Since the defendant, Federal Bureau of Alcohol, Tobacco & Firearms (BAT&F), properly relied on Redford Township's interpretation of its zoning laws in denying renewal of plaintiff's federal firearms license and because he presented no genuine issue of material fact, the court affirmed the district court's grant of summary judgment to defendant.

Plaintiff, who deals in firearms from his residential premises in Redford Township, applied in 2003 for a renewal of his federal firearms license. Based on an opinion of the Township's legal counsel plaintiff's firearms business violated local zoning regulations, defendant, BAT&F, denied the renewal application. He filed a petition for judicial review of defendant's final denial pursuant to 18 USC §923(f)(3), and the district court granted defendant's motion for summary judgment.

Plaintiff first obtained a federal firearms license in 1993, authorizing him to deal in firearms from his residential premises, which he identified as the relevant "business address." This location is classified "residential" under Redford Township zoning regulations. He timely sought renewal of his license every three years as required by federal regulations. Beginning in 1994, applicants were required to certify, "the business to be conducted under the license is not prohibited by State or local law." Plaintiff obtained an opinion from a local attorney stating his business was permissible within the township regulations. The defendant sought and obtained a written opinion from the township's legal counsel, indicating plaintiff's operation of a firearms business from his home in a residential district was not permitted under the relevant zoning ordinance. Based on the opinion defendant denied plaintiff's request for license renewal.

The court held defendant proceeded appropriately in denying the renewal based on plaintiff's lack of compliance with local law. The court also held plaintiff's argument the federal courts are obligated to independently construe and interpret the local laws without regard to the locality's interpretation was without merit. The district court's grant of summary judgment was proper in spite of plaintiff's "novel" interpretation of 18 USC §923(d)(1)(F). Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 37873, December 17, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2007/121307/37873.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*.[8] They are included here because they state current law well, or as a reminder of what current law is.)

Restrictions on Zoning Authority

Attorney fees and costs under the Right to Farm Act

Court: Michigan Court of Appeals (Unpublished No. 271082, November 13, 2007)

Case Name: *People v. Templeton*

The trial court did not abuse its discretion in denying the Templeton-defendants' motion for attorney fees and costs under the Right to Farm Act (RTFA) (MCL 286.471 *et seq.*) (MCL 286.473b) in this nuisance action. The relevant statute makes clear a prevailing farm or farm operation is not automatically entitled to attorney fees and costs. Rather, it is within the trial court's discretion whether to award them. Because defendants succeeded in obtaining a dismissal of plaintiff's nuisance action, they arguably prevailed according to the plain meaning of that term. However, the trial court did not err in denying defendants' motion.

The trial court noted the parties reached a resolution pursuant to which plaintiff agreed to dismiss the case if defendants' application for a farmland and open spaces agreement was approved. Thus, the parties agreed to resolve their dispute in lieu of trial. Contrary to defendants' argument, it did not appear the plaintiff brought this action merely to harass defendants. Plaintiff's contention the RTFA did not apply to the property appeared well founded. Although tax records listed the property as "agricultural," the designation did not necessarily mean the property was used for farming. Defendant-Nelson Templeton's income tax returns did not reflect any income or loss from farming activities until he filed an amended 2004 return after plaintiff filed suit. Further, defendants' agreement to use the property for the next 10 years pursuant to the farmland and open spaces agreement, did not suggest the land was previously used for farming. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 37610, November 16, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2007/111307/37610.pdf

The Sport Shooting Ranges Act and district court's dismissal of civil infraction ticket for violating zoning ordinance by operating a shooting range without a zoning permit

Court: Michigan Court of Appeals (Unpublished No. 272942, March 13, 2008)

Case Name: *People of the Twp. of Addison v. Barnhart*

The court reversed the dismissal of the plaintiff-township's citation issued to defendant-Barnhart for violating township ordinance No. 300 by operating a shooting range without a zoning compliance permit, which the trial court affirmed.

Defendant contended the citation should be dismissed because of lack of notice and by statute, his use of the property superseded any zoning ordinance. A township supervisor testified defendant came to plaintiff in 1993, with a request for permission to construct a range on his property. Defendant represented he tested firearms for various companies and he wanted to use the range for himself and his family. There was no indication the firearm range would be used by any other individuals or for any other purpose. Later, the supervisor was shown advertisements indicating the property was being used for firearms classes, *inter alia*, which violated the zoning ordinances. The defendant asserted the range existed in 1993 and he was entitled to expand its use.

The district court agreed and the trial court affirmed the decision. The issue involved the application of §1452a, an amendment to the Sport Shooting Ranges Act (SSRA) (M.C.L. 691.1541 *et seq.*) effective on July 5, 1994. The court concluded the district court failed to conduct an analysis of the underlying provisions of the statute and failed to make factual findings regarding the

[8] *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.

application of the SSRA to the case. Following its analysis of the relevant statutory sections, the court concluded the township supervisor testified defendant was given permission to vary the zoning for the limited purpose of private activity. However, it was asserted he subsequently changed the nature of the activity to a private commercial enterprise, which expanded the scope beyond what was contemplated by the zoning at issue.

Accordingly, the court reversed dismissal of the citation and remanded to the trial court to address whether the criteria for M.C.L. 691.1542a were established and to examine the provisions of the SSRA as a whole. Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 38749, March 19, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/031308/38749.pdf

Takings

See *Taylor v. City of Westland* on page 21.

Due Process and Equal Protection

Boathouse zoning enforcement action for a 50-foot setback requirement

Court: Michigan Court of Appeals (Unpublished No. 273870, May 1, 2007)

Case Name: *Napoleon Twp. v. Nevins*

Summary disposition for defendants was improper because further discovery was necessary regarding whether the plaintiff-township was estopped from enforcing the 50-foot setback requirement against them, material issues of fact were created by the affidavit of the township zoning administrator, and the defendants failed to support their summary disposition motion with sufficient documentary evidence.

The township asserted defendants had started construction of a boathouse on their property located at the water's edge, with three open sides and a roof held up by beams or pillars, and the boathouse was a "structure" under its zoning ordinances. The trial court ruled the township was estopped from claiming defendants violated a 50-foot setback requirement and there was no factual basis supporting the alleged violation. There were no affidavits or deposition testimony from the defendants, the township building inspector, or the township attorney concerning a visit to the site in May 2006. The only documentary evidence relating directly to the estoppel issue was the zoning administrator's affidavit and the township's enforcement report. Defendants produced no documentary evidence about when construction began, the alleged early discussion with the building inspector in 2005, any communications or contact with township personnel from April 2005 to early May 2006, the substance of any discussions with the zoning administrator during the May 2006 site visit, the amount and type of work completed, or the time and construction costs expended on the project. Those matters were relevant regarding whether estoppel was established as a matter of law.

Examining the existing documentary evidence, the appeals court found factual issues existed. Holding "structure" as used in the ordinance scheme encompassed the boathouse, the court reversed and remanded regarding the estoppel issue. (Source: State Bar of Michigan *e-Journal* Number: 35837, May 18, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2007/050107/35837.pdf

Zoning Enforcement procedures under challenge.

Court: Michigan Court of Appeals (Unpublished, No. 272570, June 14, 2007)

Case Name: *Stops v. Charter Twp. of Watersmeet*

Given the plaintiff untimely sought to challenge defendant's decision in the trial court, the trial court correctly granted defendant summary disposition, although summary disposition should have been granted under MCR 2.116(C)(4) instead of subrule (C)(7).

Plaintiff undisputedly failed to pursue an appeal to the trial court of defendant's zoning board/planning commission's October 1, 2003 denial of his request for a variance. In this appeal, the parties argued concerning the propriety of plaintiff's commencement of this action challenging the validity of defendant's Ordinance §5.04C, focusing their arguments on two published decisions of the court.

The court found the case more similar to *Krohn v. Saginaw*. As in *Krohn*, and unlike *Sun Communities v. Leroy Twp.*, plaintiff's complaint challenged an underlying administrative action of defendant's zoning administrator and planning commission, specifically the denial of his application for a certificate to construct his proposed dock and a variance for this purpose. Plaintiff never requested a zoning or rezoning decision by

defendant. Further, plaintiff's complaint plainly focused on the alleged procedural defects occurring with respect to the enactment of §5.04C. The procedural allegations and the few paragraphs characterizing the application of §5.04C as an arbitrary and capricious violation of plaintiff's due process rights "all raise issues relative to the decision of the [zoning administrator and] planning commission and the procedures employed by the [zoning administrator and] planning commission in reaching that decision."

Because the allegations of the complaint, filed nearly two years after defendant's administrative decision denying the dock construction certificate and variance, all raised issues regarding the propriety of defendant's denial and the procedures by which it made the decision, "they do not establish separate causes of action." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 36317, June 27, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2007/061407/36317.pdf

Do not have "appeal of right" to appeal ZBA decision.

Court: Michigan Court of Appeals (Unpublished No. 278984, August 24, 2007).

Case Name: *Paeth v. Worth Township ZBA,*

The Michigan Court of Appeals dismissed an appeal of right from Circuit Court filed on behalf of a municipal Zoning Board of Appeals, holding that M.C.L. 125.3606(3) does not provide for an "appeal of right." Rather it is an "application for leave to appeal" (e.g., seeking the court's permission to hear the appeal, and generally the court decides to hear, or not hear, the case based its finding the case raises an issue of public importance). This ruling agrees with 2007 Mich OAG No. 7201 (March 21, 2007) and disagreeing with Clan Crawford, Jr.'s, *Michigan Zoning and Planning*, 39 (3 ed. Supp. 2007).

On July 13 2007 a claim of appeal is DISMISSED by the Michigan Court of Appeals

> "for lack of jurisdiction because the June 8, 2007 order, which stems from an appeal to the circuit court from a tribunal, is not an order that is appealable as a matter of right. MCR 7.203(A)(1)(a). As a result, appellant may only challenge the order in question by filing a delayed application for leave to appeal under MCR 7.205."

On August 24, 2007 the appeals court,

> "acting under MCR 7.203(F)(2), orders that the motion for reconsideration is DENIED. M.C.L. 125.3606(3) does not provide for an appeal of right, it provides for an appeal. Faced with the same situation in the teacher tenure act this Court concluded that because the legislature did not expressly state that there is an appeal of right, the appeal is by application for leave to appeal. See *Watt v Ann Arbor Board of Education*, 234 Mich App 701 (1999)."

M.C.L. 125.3606(3) reads:

> "An appeal under this section shall be filed within 30 days after the zoning board of appeals certifies its decision in writing or approves the minutes of its decision. The court shall have jurisdiction to make such further orders as justice may require. An appeal may be had from the decision of any circuit court to the court of appeals."

The 2007 Mich OAG No. 7201 (March 21, 2007), in part reads:

> "In order to comply with the 30-day deadline for appealing to the circuit court from a decision of a zoning board of appeals set forth in section 606(3) of the Michigan Zoning Enabling Act, MCL 125.3606(3), a party must file the appeal within 30 days of the date on which the zoning board of appeals certifies its decision in writing or the date on which it approves the minutes of the meeting at which its decision was made, whichever is earlier. 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**." (Emphasis added.)

Ultimate authority to enact proposed zoning amendments with the municipal legislative body.

Court: Michigan Court of Appeals (Unpublished No. 275236, December 20, 2007)

Case Name: *Pavlovskis v. City of E. Lansing*

The Appeals Court concluded plaintiff's (Pavlovskis') argument that the City of East Lansing Ordinance 1097 (O-1097) was void failed because Ordinance 1035C (O-1035C) vested ultimate authority with the municipal legislative body to enact proposed zoning amendments. Also O-1035C advanced reasonable government interests, and O-1097 was not

arbitrary, capricious, or invalid spot zoning, the court affirmed the trial court's order granting the defendants-city and city clerk summary disposition.

Plaintiff owned residential property in a neighborhood in the city originally zoned Medium Density Single-Family Residential, which permitted the principal use of single-family dwellings and the rental of those dwellings. The city adopted O-1035C, which amended the city's zoning ordinance to create three "Residential Rental Overlay Districts." Those districts allow the residents of certain residential districts to preclude all or certain types of rental properties within the boundaries created by the overlay. While O-1035C included a citizen-initiated mechanism for proposing the adoption of the overlay districts, **ultimate adoption of the overlay was within the city council's discretion**. Residents of plaintiff's neighborhood circulated petitions for adoption of an overlay district in the neighborhood, a proposed ordinance (O-1097) was drafted, and the city council adopted it. Plaintiff filed suit seeking a declaratory judgment both ordinances were invalid.

The Appeals Court held by virtue of the city council's independent action in enacting O-1097, which plaintiff did not dispute complied with the The City and Village Zoning Act (CVZA) (MCL 125.581 et seq.)[9], it was unnecessary to address plaintiff's claim the procedures underlying the enactment of O-1097 did not conform to O-1035C. The court also held O-1035C survived plaintiff's substantive due process challenge, and after reviewing the city's comprehensive plan, rejected plaintiff's claim O-1097 was not enacted in accordance with the plan. Further, O-1097 was not void as impermissible spot zoning because "no small zone of inconsistent use was created within a larger zone." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 37986, January 4, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2007/122007/37986.pdf

[9]This case concerns and quotes the old City and Village Zoning Act (M.C.L. 125.581 *et seq.* repealed 7/1/06. However the principles concerning following due process and the importance of following the procedure spelled out in the statute is important.

Nothing bars township from eliminating a condition in a site plan approval and special use permit as part of a consent judgment

Court: Michigan Court of Appeals (Unpublished No. 276713, April 17, 2008)

Case Name: *Old EPI Bldg. v. Meridian Charter Twp.*

Finding nothing in the statutes or ordinances barring the defendant-township from eliminating the road improvement condition in a site plan approval and special use permit, as the township did via a consent judgment in prior litigation, the court held plaintiffs-Old EPI Building had no clear legal right to have the township enforce the properly eliminated condition. Further, the township had no clear legal duty to enforce the properly eliminated condition, and a discretionary (as opposed to a ministerial) action was involved. Thus, the appeals court held the trial court properly granted the township summary disposition in this action where plaintiffs sought a writ of mandamus directing the township to enforce the site plan approval relative to the road improvement condition before any further development of the property in question.

Plaintiffs owned property on a mostly unimproved and unpaved road. They sought to force the township to enforce a condition contained in a site plan approval and special use permit relative to the obligations of the owner-developer of property, also located on the road, which the owner-developer was responsible for improving and paving the road. As a collateral matter in prior zoning litigation between the owner-developer and the township (in which plaintiffs did not participate), a consent judgment was entered eliminating the road improvement condition and allowing the owner-developer to develop the property without being required to improve and pave the road.

The court held the writ of mandamus was properly denied. Further, since the township had authority to eliminate the condition via the consent judgment and its actions were not contrary to the ordinances or statutes, plaintiffs-Old EPI Building were not denied due process of law. The court also concluded plaintiffs' interest in the subject matter of the prior litigation was insufficient to render their presence in the action essential to permit complete relief since they had no legal say in the township's decision to eliminate the condition. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 39118, April 24, 2008.)

Full Text Opinion:

http://www.michbar.org/opinions/appeals/2008/041708/39118.pdf

Substantive Due Process

Sand Dune Protection and Management Act Denial of request for a special exception to build a driveway in a critical dune area

Court: Michigan Court of Appeals (Unpublished, No. 268016, August 23, 2007)

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

The director of the Michigan Department of Environmental Quality (DEQ) denied the Jacques' request for a special exception (equivalent to a non-use variance) for a driveway in a Critical Sand Dune area. The trial court reversed the order of the respondent-DEQ's director. Petitioner planned to build a lakeside home in a critical dune area. He claimed the respondent did not have the statutory authority to regulate the driveway proposal because its impact on the critical dune areas throughout the state, considered as a whole, was insignificant. Because respondent's interpretation of the The Sand Dune Protection and Management Act (SDPMA) (MCL 324.35301 *et seq.*) comported with the language of the statute, the trial court gave it deference and concluded the respondent's legal conclusion was authorized by law.

The Appeals Court ruled the trial courts ruling was in error. The Appeals Court also held the trial court misapprehended or grossly misapplied its review of respondent's factual findings. In its initial ruling, the trial court asserted because, in its opinion, the driveway proposal and the park-and-walk proposal were equally supported by the evidence, "the prerogative ought to be with the property owner." However, it did not matter which way the trial court believed the evidence preponderated, as long as respondent's decision was supported by substantial evidence. The trial court also stated it could not see anything in the record to indicate the driveway would be more detrimental to the dunes than the park-and-walk proposal. However, the DEQ hearing referee found the park-and-walk design impacted less square footage, confined the impact to a more limited area of the property while minimizing impacts to regulated slopes, the access provided by the park-and-walk proposal would more closely follow the natural terrain, and it would require less vegetation removal to implement. These findings were adopted in respondent's final order, in which respondent's DEQ director emphasized the impact to the dunes would be greater under the driveway proposal because the proposed driveway would largely be located on slopes with an incline measure in excess of 33 percent. The trial court erred by substituting its judgment for respondent's because respondent's decision was supported by substantial evidence. Reversed and remanded for entry of an order reinstating the respondent's final determination and order. (Source: State Bar of Michigan *e-Journal* Number: 36902, August 29, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2007/082307/36902.pdf

Denial of special land use approval violated the plaintiffs' substantive due process rights, effected a constitutional taking of the property, exclusionary zoning

Court: Michigan Court of Appeals (Unpublished, No. 269454, September 20, 2007)

Case Name: *Taylor v. City of Westland*

Concluding the plaintiffs could not establish plain error because it did not appear the defendant-city's denial of special land use approval was arbitrary and capricious or without any reasonable basis, the court affirmed the trial court's order granting defendants' motion for an injunction in this zoning and land use dispute.

The individual plaintiff, Taylor, operated the two plaintiffs-businesses (a towing service for stranded vehicles and a vehicle storage/refurbishing service) on a property in the city. In May 2005, several city employees inspected the premises, noted several violations, and told Taylor she could not operate her businesses until she received special approval from the city. The building was "red-tagged."

Plaintiffs alleged, *inter alia*, the city's denial of special land use approval violated their substantive due process rights because the ordinance, as applied, was arbitrary and capricious. Plaintiffs' arguments, however, pertained to the city council's denial of their special land use application and contended the denial, rather than the ordinance, was arbitrary and capricious. However, there were three letters in the trial court record from neighbors opposing the grant of a special land use permit, and despite the fact the city's planning commission initially recommended approval of the permit, plaintiffs conceded the city council's denial was based on those letters.

The court also concluded plaintiffs failed to show enforcement of the ordinance would preclude the use of the property for any purpose to which it was reasonably adapted, and they could not demonstrate the city's zoning decisions had the effect of totally prohibiting their proposed land uses under the former MCL 125.297a (which was applicable because the case was pending when the statute was repealed). Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 37174, September 27, 2007.)

Full Text Opinion: http://www.michbar.org/opinions/appeals/2007/092007/37174.pdf

See: *Pavlovskis v. City of E. Lansing*, on page 19.

See: *People of the City of Roseville v. Stross* on page 26.

Variances (use, non-use)

ZBA interpretation of the ordinance concerning accessory use, and ZBA's findings supported by competent, material and substantial evidence on the whole record

Court: Michigan Court of Appeals (Unpublished No. No. 270228, September 13, 2007)

Case Name: *Americorp Fin. Group, Inc. v. City of Birmingham*

The court vacated the trial court's order interpreting the defendant-City of Birmingham's zoning ordinance and reversing the defendant-board of zoning appeals (BZA)'s denial of plaintiff's request for a use variance. The appeals court said the trial court erred in finding the definition of "use, accessory" did not require the presence of the principal use on the same lot. Also the trial court did not adequately identify a proper ground for reversing the BZA's decision, and no adequate basis was apparent.

Plaintiff sought to use its property at 1140 Webster Street in the city as a parking lot for an office building it owned across the street. 1140 Webster Street was zoned O-2, office and commercial use. The city contended a freestanding parking lot was not a permissible use in an O-2 district under its zoning ordinance, parking was allowed in an O-2 district only as an accessory use. Plaintiff appealed the city's interpretation to the BZA, and in the alternative applied for a use variance. The BZA denied the appeal and the variance request.

The trial court concluded the BZA erred in its interpretation of the ordinance and reversed the BZA's denial of the variance request. The ordinance unambiguously stated parking was an accessory use in the O-2 district. While plaintiff argued the definition of accessory use did not require the accessory use occur on the same lot as the associated principal use, §126-26 of the ordinance defined "use, accessory" as "a subordinate use which is customarily incidental to the principal use on the same lot." The appeals court agreed with defendants' interpretation of "customarily incidental" – by definition, an accessory use takes place on the same lot as the principal use. The appeals court also held the BZA's decision denying plaintiff a variance was not contrary to applicable law or proper procedure, and was adequately supported by competent, material, and substantial evidence. Vacated and remanded for reinstatement of the BZA's decision. (Source: State Bar of Michigan *e-Journal* Number: 37079, September 20, 2007.)

Full Text Opinion: http://www.michbar.org/opinions/appeals/2007/091307/37079.pdf

Nonconforming Uses

Vested rights to develop and use the property, and zoning referendum on rezoning

Court: Michigan Court of Appeals (Unpublished No. 278914, October 4, 2007)

Case Name: *Soss v. Whiteford Twp.* and *Gateway Fireworks, L.L.C. v Whiteford Twp and Soss*

The trial court correctly denied intervening defendant-Gateway's motion for summary disposition, finding as a matter of law it had not obtained vested rights in a prior nonconforming use of the property, and the trial court had the authority under M.C.L. 125.3204 to order the defendant-Whiteford Township to hold an election on the zoning change.

These consolidated cases arose out of a zoning change adopted by the township board regarding the property at issue, which would allow it to be used by Gateway for the retail sale of fireworks (hazardous materials district), a use not previously permitted (highway business district). Plaintiff-Soss circulated a petition in an effort to challenge the zoning change and to place the issue before the township voters. She succeeded in obtaining the necessary number of signatures. But the township clerk found there were not

enough signatures, rendering the board's zoning change effective. Prior to Soss filing a suit challenging the clerk's determination, Gateway bought the property and proceeded to develop it into a retail fireworks business. It spent about $1.4 million in developing the property, and argued on appeal the trial court erred in ruling it had not acquired vested rights to develop and use the property as a retail fireworks business.

Relying on the relevant case law, the court held because "substantial construction" means construction reflecting or making apparent the nonconforming use, and given the alleged prior nonconforming use here was the operation/building a retail fireworks store, Gateway's work on the property failed to reflect the prior nonconforming use. Thus, reversal was unwarranted. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 37300, October 11, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2007/100407/37300.pdf

Proper method to challenge the township board's actions in rezoning

Court: Michigan Court of Appeals (Unpublished No. 275186, January 15, 2008)

Case Name: *Anderson v. Meridian Charter Twp.*

The trial court properly dismissed the plaintiffs' complaint, but abused its discretion in denying their motion to amend or supplement the complaint. The amend or supplement of the complaint arised from an application to rezone property pursued by the intervening defendants-Eyde, and the approval of a resolution and adoption of a zoning amendment by the township board. The rezoning was from a rural residential (RR) to a single family – medium density (RA) district with a Planned Residential Development (PRD) overlay district.

Regarding the order granting summary disposition in favor of defendants entered in March 2005 relative to plaintiffs' 2004 complaint, the court rejected Eydes' argument the court lacked jurisdiction to entertain and address the order for failure by plaintiffs to comply with Michigan Court Rules (MCR) 7.204(C)(1) and (D)(1). Eydes' argument lacked merit because the final order being appealed from was the December 2006 order denying the motion to amend or supplement, which was attached and identified for purposes of MCR 7.204(C)(1) and (D)(1), thus satisfying the court rules.

"Where a party has claimed an appeal from a final order, the party is free to raise on appeal issues related to *other orders* in the case." Accordingly, the jurisdictional argument failed.

The court also concluded plaintiffs' challenge of the township board's actions in the form of an original action – the filing of a complaint – was the proper procedure to use. However, the court affirmed the dismissal of plaintiffs' complaint. Regarding plaintiffs' motion to amend or supplement the complaint, on the other hand, the court held the trial court abused its discretion in finding undue delay, and the defendants had reasonable notice. The court reversed and remanded with respect to the denial of plaintiffs' motion to amend or supplement the complaint. Affirmed in part, reversed and remanded in part. (Source: State Bar of Michigan *e-Journal* Number: 38181, January 25, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/011508/38181.pdf

Land use permit; Prior nonconforming use

Court: Michigan Court of Appeals (Unpublished No. 276281, April 29, 2008)

Case Name: *Bialik v. Stambaugh Twp.*

The trial court erred by affirming the decision of the respondent-township's Board of Zoning Appeals (ZBA) denying the petitioner's application for a land use permit. The case involved an attempt by petitioner to obtain a land use permit to repair or replace a boathouse on her property. The boathouse constituted a nonconforming use because it was located within 75 feet of the normal high water mark, which was prohibited by local ordinance Article 7, Section 7.3. However, because the boathouse had been constructed well before the enactment of the zoning ordinances, it enjoyed prior nonconforming use status.

Petitioner argued the decision of the ZBA, subsequently upheld by the trial court, was contrary to law because there was no showing she intended to abandon her prior nonconforming use. Respondent contended the testimony of area residents as to the condition of the boathouse was sufficient to infer petitioner's intent to abandon her prior nonconforming use. In addition to the testimony of area residents as to the condition of the boathouse, petitioner submitted an affidavit to the ZBA affirmatively stating she never intended to abandon the nonconforming use. In addition, petitioner's affidavit stated watercraft had been stored in the boathouse, except when it was being

used in the lake, from the time it was constructed until the fall of 2003 when a fallen roof timber damaged the canoe currently being stored there. Some area residents who testified as to the general disrepair of the boathouse also admitted they could not see into the boathouse to say for sure it was not being used.

The evidence did not support the conclusion petitioner intended to abandon using the boathouse. Without such a showing, the elements of abandonment could not be satisfied. Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 39195, May 2, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/042908/39195.pdf

See *People of the Twp. of Addison v. Barnhart* on page 17.

Due Process: Voter Referendum

PUD Ordinance Amendment is subject to referendum.

Court: Michigan Court of Appeals (Unpublished No. 270458, November 27, 2007)

Case Name: *Sundry Dev. v. City of Lowell*

Holding the trial court erred in enjoining the referendum election because the ordinance, the Planned Unit Development (PUD) rezoning for the developer's-plaintiff's property, was subject to a referendum, and in finding there had been a taking of plaintiff's property because the fact plaintiff lost a particular contract for a specific development plan was insufficient to constitute a taking by the defendant-city, the court reversed the trial court's order granting judgment in plaintiff's favor.

Plaintiff, which was in the business of developing residential property, purchased property in the city with the goal of developing it. Discussions were held between plaintiff's owner, the city manager, and others to arrange for a PUD development. An ordinance was passed pertaining to zoning map amendments, in recognition of the fact plaintiff sought PUD status for the property, and plaintiff submitted a PUD rezoning application. The PUD rezoning ordinance was eventually approved by the city council. However, members of the community petitioned for a referendum to overturn the ordinance. After the city clerk certified the referendum petitions, the city council decided to hold a referendum election regarding the ordinance rather than either reject the petitions or repeal the ordinance.

Plaintiff successfully sued to stop the referendum election, and the trial court later granted the developer damages, finding city's acts were wrongful and the delay due to the referendum caused plaintiff to suffer a taking.

The appeals court held the city properly determined the ordinance was subject to a referendum pursuant to its charter and ordinances. Further, the trial court erred in finding plaintiff's property was taken by any of the city's acts, which were "nothing more than following its rezoning procedure, which in turn carried with it the possibility of a referendum." The court also concluded even if the property had been taken, plaintiff would not have had any compensable losses because they would have been too speculative. Reversed. (Source: State Bar of Michigan *e-Journal* Number: 37716, December 3, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2007/112707/37716.pdf

See *Soss v. Whiteford Twp.* on page 22.

Ripeness for Court's Jurisdiction, Aggrieved Party

Standing to challenge issuance of the special use permit

Court: Michigan Court of Appeals (Unpublished, No. 264109 and No. 265753 and 265962, September 20, 2007)

Case Name: *Concerned Citizens of Acme Twp. v. Acme Twp.* (Long name: *Concerned Citizens of Acme Township v. Acme Township and Acme Township Board of Trustee, Village at Grand Traverse, LLC, and Meijer, Inc.*) And *Acme Township and Acme Township Board of Trustees v. Village at Grand Traverse LLC, and Meijer, Inc.* And *Village at Grand Traverse, LLC, and Meijer, Inc. v. Acme Township and Acme Township Board of Trustees.*)

The trial court properly held the plaintiff-Concerned Citizens of Acme Township (CCAT) had standing to challenge the defendant-Acme Township Board's issuance of the special use permit (SUP). These three cases were consolidated for appeal. The consolidated cases arose from the Acme Township Board of Trustee's issuance of a SUP to Village at Grand Traverse (VGT) and Meijer, Inc.

CCAT submitted the affidavits of two of its members claiming they will be harmed by the environmental impact caused by the proposed

development. The affidavit of Gokey reflected he was concerned the runoff problems caused by the development will cause environmental damage to Acme Creek and to his property. Another member of CCAT, Garvey, submitted an affidavit stating he used Acme Creek and the surrounding area for recreation activities, including "trout fishing, hiking, snowshoeing, and wildlife viewing." Garvey also stated he was concerned about the environmental impact the development will have on the area and he would discontinue these activities if the development went forward. The preliminary environmental assessment cited a finding by the Michigan Department of Natural Resources (MDNR) the "[p]hysical habitat conditions were being adversely impacted by sedimentation from nonpoint sources such as subdivision development and streambank instability problems in the Village of Acme." The assessment then expressed concern "the large scales and widespread paving and grading of the site as proposed will irreparably alter the site hydrology and likely result in water quality impacts on Acme Creek."

According to *National Wildlife Fed. v. Cleveland Cliffs Iron Co.*, CCAT carried its burden in establishing it had standing. The two affidavits established an injury in fact by alleging their property, aesthetic, and recreation activities will be harmed by the activities of VGT and Meijer, and this assertion was supported by expert documentation. It could not be reasonably disputed the development will be the cause of their environmental concerns. Finally, a favorable decision for CCAT would help preserve the environmental integrity of Acme Creek for the foreseeable future. Thus, the redressability requirement was satisfied. Affirmed in part, reversed in part, and remanded for reinstatement of the SUP. (Source: State Bar of Michigan *e-Journal* Number: 37169, October 2, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2007/092007/37169.pdf

Standing to appeal is not just because one is within 300 feet

Court: Michigan Court of Appeals (Unpublished, No. 276720, March 4, 2008)

Case Name: *Stewart v. City of Detroit*

Concluding the plaintiff-Stewart failed to show any of them faced "a concrete and particularized invasion of a legally protected interest," or would "suffer special damages not common to similarly situated neighbors," the court held the trial court properly dismissed plaintiffs' suit on the basis they lacked standing to sue.

According to plaintiffs, defendant-City Heat Cabaret obtained a permit for extensive renovations, and then substantially demolished the existing structure under a plan to rebuild with much greater ground-level floor space. Plaintiff-Stewart lived within 300 feet of City Heat Cabaret, and another plaintiffs operated a rival business nearby. Contending the City Heat Cabaret project threatened to intensify a nonconforming use, plaintiffs tried to persuade the City of Detroit authorities to revoke the permit. Stewart applied to the Board of Safety Engineering to submit the matter for review to the defendant-City of Detroit Board of Zoning Appeals (BZA), but the BZA refused to accept the application on the basis the permit was not subject to review because no zoning ordinances were implicated.

Plaintiff then filed suit seeking, *inter alia*, a writ of mandamus to compel revocation of the permit or submission of the matter to the BZA. The trial court dismissed the suit on the basis plaintiffs lacked standing. While plaintiffs argued Stewart had standing because he owned a residence within 300 feet of the subject property, they supported this claim only by showing due to his proximity, he was entitled by city ordinance to written notice of hearings in connection with the property.

"Entitlement to notice of existing proceedings is not the same as standing to initiate litigation." General concerns relating to increased traffic or reductions in property values also do not bring standing, and the other plaintiffs' financial interest in their competing business was "not the kind of legally protectable property right or privilege, the threatened interference with which grants standing to seek review." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 38673, March 10, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/030408/38673.pdf

Preliminary Injunction is possible prior to ZBA approval of minutes.

Court: Michigan Court of Appeals (Unpublished No. 271953, April 1, 2008)

Case Name: *Wade v. Whiteford Twp.*

The trial court did not err in determining the doctrine of laches applied to the case. The township Zoning Board of Appeals (ZBA) granted a dimensional

zoning variance to intervenor-Donnelly for the construction of a pole barn. Petitioners argued the ZBA granted Donnelly a dimensional, or nonuse, variance without a showing of practical difficulty and a use variance without a showing of peculiar or exceptional hardship. They contended they exercised due diligence, but the ZBA took nearly one year to certify the June 8, 2004 meeting minutes. Where a zoning board of appeals issues no written order granting a variance request, the date the meeting minutes are certified most closely approximates the date the order was entered. Thus, petitioners argued they could not pursue their appeal to the trial court until after the ZBA certified the meeting minutes on April 12, 2005.

Regardless whether petitioners' appeal was timely, they could have pursued a preliminary injunction any time after Donnelly received his building permits, which would have been based on the granted variance, or after he began construction of his barn. A final order is not a prerequisite for the issuance of a preliminary injunction. Petitioners would have known Donnelly began construction of his barn. They claimed they were close enough to Donnelly's property they experience dust and vibrations from the work he does in his barn. Thus, presumably, they were close enough to hear a barn being constructed. Once petitioners knew Donnelly began construction of his barn, they could have moved for a preliminary injunction, which if granted, would have prevented Donnelly from incurring any further expenses in the building of his barn until the issue was resolved. Yet, petitioners stood by inactive while Donnelly built his barn. They asserted there was only a passage of time and no other change in conditions between the construction of the barn and the filing of the appeal at the trial court, making laches inapplicable. However, in addition to the passage of time, between July 2004 and September 2004, Donnelly built his barn. Donnelly's expenditure of money and labor to build his barn evidenced there was a material change in conditions.

The court also concluded Donnelly was prejudiced by his expenditure of time and money building a barn on his property. Thus, the court held the ZBA carried its burden of showing petitioners lacked due diligence resulting in prejudice to Donnelly and the doctrine of laches barred petitioners' claim. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 38961, April 10, 2008.)

Full Text Opinion:

http://www.michbar.org/opinions/appeals/2008/040308/38961.pdf

Signs: Billboards, Freedom of Speech

Prohibiting lettering on a mural is unconstitutional regulation of commercial speech
Failure to appeal the ZBA's decision does not waive ability to raise a constitutional challenge

Court: Michigan Court of Appeals (Unpublished, No. 271764, February 21, 2008)

Case Name: *People of the City of Roseville v. Stross*

Holding the variance restriction prohibiting lettering on defendant's (Stross') mural was an unconstitutional regulation of commercial speech, infringing on his First Amendment protections, the court reversed his conviction for violating the City of Roseville's sign ordinance. The court agreed in part with defendant's argument the variance the city granted him was unconstitutional as applied to his circumstances. Defendant's failure to appeal the ZBA's earlier decision did not waive his constitutional challenge asserted as a defense against enforcement of the variance.

The court also rejected plaintiff's (City of Roseville's) argument the defendant was estopped from challenging the constitutionality of the variance conditions because he retained the benefit of the variance for over seven years. Defendant apparently did not accept the purported conditions since he disputed whether the variance prohibited the display of female breasts and maintained he was allowed to title the mural despite the variance condition pertaining to lettering.

The court concluded the primary interests involved were traffic safety and the aesthetic value of the neighborhood, which were substantial governmental interests. Further, it appeared the restrictions of the variance advanced the asserted governmental interests. The court also held there was a "reasonable fit" between the restriction regarding genitalia and the governmental interests. However, while prohibiting lettering to a certain extent might be a reasonable means of achieving the goals of aesthetics and traffic safety, totally prohibiting lettering appeared "to be an excessive restriction compared to the interests sought to be advanced." It did not appear the word "Love" on the mural would distract motorists or detract from the neighborhood's aesthetic value. Thus, the court held the total ban on all lettering was too restrictive to promote the goals of aesthetics and traffic safety, and was not

narrowly tailored to achieve those objectives. Because the jury was allowed to convict defendant based on the unconstitutional provision prohibiting lettering, his conviction had to be reversed. (Source: State Bar of Michigan *e-Journal* Number: 38558, February 28, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/022108/38558.pdf

Immunity and Enforcement Issues

Civil contempt power is exceeded when revoked one's right to maintain the prior legal non-conforming use
Civil infraction sanction must be remedial, not punitive.

Court: Michigan Court of Appeals (Unpublished No. 274368, February 28, 2008)

Case Name: *Halash v. Township of Exeter Zoning Bd. of Appeals*

Holding the trial court exceeded its civil contempt power when it revoked the intervener's right to maintain the prior legal non-conforming use, the court vacated the trial court's contempt order and remanded with instruction to enter an order consistent with its civil contempt power.

The zoning board had ordered the intervener to utilize his land in a manner consistent with the land's use in 1987, which was the year the intervener's predecessor was granted a prior legal non-conforming use to operate a used car and salvage yard on the property. When he failed to abide by the trial court's order, defendant-township brought a motion to show cause, which the trial court granted. At a later hearing, the trial court found the intervenor to be in civil contempt. As a sanction for the contempt, the trial court revoked his right to maintain the prior legal non-conforming use.

The parties and the trial court clearly understood the contempt proceedings to be civil in nature. As a result, **any sanction issued by the trial court had to be coercive or remedial, not punitive**. Yet the revocation of the intervenor's right to maintain a prior legal non-conforming use of his land was not a coercive or remedial sanction. Rather, the sanction was clearly imposed as punishment for the intervenor's failure to comply with the trial court's order. Accordingly, it was a criminal sanction. Because the trial court did not conduct a criminal contempt proceeding, it was without authority to impose a criminal sanction. Vacated and remanded.. (Source: State Bar of Michigan *e-Journal* Number: 38630, March 5, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/022808/38630.pdf

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

Special use permit for the construction of a boat launch
Must determine if there was a nonconforming use established prior to the adoption of the zoning ordinance

Court: Michigan Court of Appeals (Unpublished No. 264189, November 8, 2007)

Case Name: *VanFarowe v. Cascade Charter Twp. and GPO*

Since the trial court did not conduct an evidentiary hearing to determine the use of Lot 25 and the nature of the usage prior to the enactment of the keyhole ordinance and did not consider the applicable case law, the court reversed and remanded for a determination of the actual existence of nonconforming uses of the land subject to an easement and to determine the scope of any nonconforming uses.

Plaintiffs-VanFarowe live adjacent to Lot 25 in the defendant-township, on which defendant-Goodwood Plat Owners, Inc. (GPO) planned to build a boat launch for the use of the owners of the plat. When the initial owners (the Goods) established the plat, they included a dedication stating in part, "the street as shown on said plat is hereby dedicated to the use of the public and Lot 25 is dedicated to the use of the property owners." It was undisputed the plat now consists of 43 lots, 22 lots along a river and 21 across the street. After the plat was established, the Goods transferred Lot 25 to GPO and the deed granted Lot 25 to GPO subject to building and use restrictions of the township-defendant's ordinance, subject also to any rights of common usage of owners of other lots in the plat. In late 2004, GPO applied and received a MDEQ permit to build a boat launch. GPO applied for a Type II special use permit under the keyhole development provision of the zoning ordinance (§4.33(7)). The special use permit was granted with conditions. Plaintiffs expressed concern about the boat

launch and noted they were opposed to the special use permit because of the noise and increased traffic. They took issue with the approval of the nonconforming use in the trial court. On appeal plaintiffs argued, *inter alia*, the trial court erred in concluding there was a nonconforming parcel established prior to the adoption of the zoning ordinance (lot 25 was 75 feet wide, where zoning required 100 feet of width). The court could not conclude based on the record whether the trial court erred, and remanded for a determination regarding the actions taken toward establishing a nonconforming parcel. Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 37585, November 15, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2007/110807/37585.pdf

If road was validly accepted as a public road

Court: Michigan Court of Appeals (Unpublished, No. 276725, February 26, 2008)

Case Name: *Bear Lake Trading Co. v. Ericks*

Holding the defendant-county road commission's McNitt Act resolution indicating the road in question, Fourth Street, was a certified public road was by itself enough for acceptance when it expressly identified the road, the court concluded the road commission's 1940 resolution constituted a valid acceptance of Fourth Street as a public road and the trial court properly granted the plaintiff summary disposition.

The subdivision was platted and the roadways were dedicated to public use in 1897. The road commission passed a resolution in 1940 certifying Fourth Street was a public street and was used for at least three months a year. The resolution included a map in which the streets identified as certified county roads were marked in green. Fourth Street dead-ends into a lake. Defendants apparently maintained a dock at the end of Fourth Street for several years. Plaintiff requested the trial court grant declaratory relief declaring Fourth Street was a public road and the defendants did not have a right to keep a dock at this location. The trial court granted plaintiff's motion for summary disposition, concluding the 1940 resolution constituted sufficient acceptance of the road. Defendants' only argument on appeal was Fourth Street was not validly accepted because there was no affirmative act of acceptance in addition to the 1940 resolution. To validly accept land designated for public use, a governmental authority must publicly accept or confirm the offer, or exercise authority over the land through improvement or regulation. There was a McNitt Act resolution by the road commission indicating Fourth Street was a certified public road, and Fourth Street was specifically identified by its inclusion on the color-coded map attached to the resolution. No further action was required for the county to accept the road. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 38607, March 3, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/022608/38607.pdf

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

Miscellaneous debris ordinance violation
Proving the storage debris created a hazard to health, safety, and the public welfare

Court: Michigan Court of Appeals (Unpublished No. 275570 March 25, 2008)

Case Name: *Forsyth Twp. v. Malashanko*

The court affirmed the trial court's order finding defendant-Malashanko violated the plaintiff-township's miscellaneous debris ordinance and ordering him, *inter alia*, to remove all identified miscellaneous debris from his lakefront property, concluding the ordinance did not require the first category of miscellaneous debris to create a hazard to the public's health, safety, or welfare, and the trial court's finding the storage of used hospital equipment created a hazard to the public's health, safety, or welfare was not clearly erroneous.

Defendant owned a 10-acre parcel of lakefront property where he had accumulated about 35 vehicles and large quantities of other items, including used hospital equipment such as x-ray machines. The township's miscellaneous debris ordinance defined two categories of miscellaneous debris – (1) unsheltered storage in open areas of, *inter alia*, scrap iron and old, unused, stripped, junked or other automobiles not in good and safe operating condition and (2) unsheltered storage in open areas of any vehicles, machinery, implements, equipment, or personal property of any kind no longer safely and properly usable for the purposes for which it was manufactured, which created a hazard to the public health, safety, or welfare.

The court held the trial court did not err in finding defendant's storage of inoperable vehicles, tires, and "obvious junk" violated the ordinance. In light of the township's description of the used hospital equipment

stored on his property, the court concluded this equipment was properly classified as "scrap iron and other metals" under the first ordinance category. Even assuming it was not, however, it was clear the equipment was not used for the purposes for which it was manufactured. Given the nature of the equipment and the testimony concerning theft and vandalism on defendant's property, the trial court did not clearly err in finding the unsheltered storage of the used hospital equipment violated the ordinance. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 38886, April 2, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/032508/38886.pdf

Other Unpublished Cases

Nuisance in fact from noise

Court: Michigan Court of Appeals (Unpublished, No. 268685, June 26, 2007)

Case Name: *Wilke v. Adkins*

Based on defendant-Central Concrete's extended hours of operation and the effect it had on plaintiffs' enjoyment of the land, the trial court properly held the addition of a redi-mix cement plant on property abutting plaintiffs' residences constituted a nuisance in fact.

Defendant-Adkins owns Central Concrete, Inc, a business engaged in cement operations. Plaintiffs own property adjacent to the property upon which Central Concrete is located. Prior to 1998, the cement operation was a small plant at the south end of the property, which did not affect plaintiffs. Central Concrete expanded, adding silos and a building, and, according to plaintiffs, engaging in rock crushing. Plaintiffs alleged after the expansion, diesel trucks began coming and going at all hours, and the amount and duration of the noise from the cement operation increased dramatically, thereby creating a nuisance.

The trial court found Central Concrete's operations at the new plant and the crushing operations on the north parcel caused a high level of noise that could be heard inside plaintiffs' residences. The trial court primarily relied on plaintiffs' testimony and the testimony of Central Concrete's expert witness regarding his decibel readings in and around the properties and the new plant. The trial court record reflected the new plant operations and the rock crushing began early in the morning and continued until late in the evening. Defendants' expert testified he recorded peak value noise dosimeter readings in the backyard of plaintiffs' residences as high as 119 decibels. He testified this was as loud as a "jet engine." A review of the trial court record showed the expert conducted the noise readings on a weekday from 9:00 AM to 12:30 PM. An independent review of the videotapes admitted at trial also supported the trial court's conclusion Central Concrete's operations caused loud noises that could be heard at plaintiffs' residences. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 36430, July 5, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2007/062607/36430.pdf

If proposed development unreasonably burdened an access easement

Court: Michigan Court of Appeals (Unpublished)

Case Name: *Lamkin v. Hamburg Twp. Planning Comm'n*

While the trial court did not abuse its discretion in granting plaintiffs' motion to amend the pleadings to conform to the evidence as to the easterly portion of Island Shore Drive, it abused its discretion in permitting the amendment as to the westerly portion. Allowing the amendment in this regard clearly prejudiced defendant-BJD.

Plaintiffs sought to enjoin BJD's development of its parcel into a condo project, objecting the development would unreasonably increase the burden on Island Shore Drive, which provided access to their property and to BJD's property. The original plaintiffs all owned property on the east end of Island Shore Drive. The trial court directed them to add all property owners abutting or using Island Shore Drive. Some of these additional parties owned property to the east of plaintiffs' parcels and some owned property to the west. The westerly parcels were located between the main road and BJD's property. Most of the added parties were dismissed by stipulation. While several realigned with plaintiffs, none were westerly lot owners.

The litigation focused on the nature of BJD's easement over plaintiffs' properties and whether the proposed development unreasonably burdened the easement. During trial, the trial court questioned the nature of BJD's easement over the westerly parcels and ruled it did not need to address the nature of BJD's easement over plaintiffs' parcels or whether the development would unreasonably burden the easement because BJD only had a prescriptive easement over the

westerly parcels. The court concluded the nature of the easement to the westerly portion was never at issue in the case until raised by the trial court. BJD's expert testified he had not done a title search as to an easement over the westerly portion of Island Shore Drive. Further, the trial court erred in granting plaintiffs relief on the basis of rights belonging to added parties who were dismissed and who did not align with plaintiffs. The westerly owners did not object to the development. Affirmed in part, reversed in part, and remanded. (Source: State Bar of Michigan *e-Journal* Number: 37744, December 7, 2007.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2007/112907/37744.pdf

Does ZBA have the discretion to reject plaintiff's request for approval of the sports court

Court: Michigan Court of Appeals (Unpublished No. 267493, January 8, 2008)

Case Name: *Perlman v. Charter Twp. of Bloomfield*

Because there was insufficient evidence to determine if the sports court is above the existing grade the appeals court remanded for a determination involving whether the sports court has sides above the existing grade. Plaintiff built a sports court in his backyard without obtaining a building permit or the required township approvals. Once the township became aware of the non-conforming and illegally constructed structure, the township instructed plaintiff to obtain after-the-fact approval for the structure from the Zoning Board of Appeals (ZBA).

The ZBA denied the request to approve the sports court as a permitted accessory structure. Plaintiff appealed the decision to the trial court, and the trial court reversed the decision of the ZBA denying approval of the sports court as an accessory structure. However, the trial court affirmed the ZBA's denial of approval for the fence associated with the court. Defendants (township) argued the trial court erred when it ruled the ZBA did not have the discretion to reject plaintiff's request for approval of the sports court. The parties did not dispute the sports court is an accessory use and a "principal use permitted" in the residential district where it is located. Such a use must be located as required in "Article XV, General Provisions" of the township ordinance. The general provision governing accessory structures is §1503 of the ordinance. The parties did not dispute the sports court meets the requirements of §1503, requiring an accessory use must be in a rear yard, at least 16 feet from the lot lines, and not higher than one story. In dispute is whether the sports court is a structure with sides above the existing grade of the rear yard and is governed by §1503(6) of the ordinance, which specifically incorporates the additional standards of §1804 of the ordinance.

"The omission of a provision in one part of a statute that is included in another part should be construed as intentional . . . ." Thus, if the sports court is not above the existing grade, then no other standards are included in the ordinance for the ZBA to consider, specifically, the standards of §1804. Remanded. (Source: State Bar of Michigan *e-Journal* Number: 38064, January 14, 2008.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2008/010808/38064.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
from French *aliquote*, from Latin *aliquot* 'some, so many', from *alius* 'one of two' + *quot* 'how many'.

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

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

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

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

laches
n noun Law unreasonable delay in asserting a claim, which may result in its dismissal.
ORIGIN
Middle English (in the sense 'negligence'): from Old French *laschesse*, from *lasche* 'lax', based on Latin *laxus*.

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

mens rea
n *noun Law* the intention or knowledge of wrongdoing that constitutes part of a crime. Compare with **actus reus**.
ORIGIN
Latin, literally 'guilty mind'.

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

per se

n adverb Law by or in itself or themselves.
ORIGIN:
Latin for 'by itself'.

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

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

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

sua sponte
n *noun Law* to act spontaneously without prompting from another party. The term is usually applied to actions by a judge, taken without a prior motion or request from the parties.
ORIGIN
Latin for 'of one's own accord'.

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

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

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