MICHIGAN STATE UNIVERSITY | Extension

Selected Planning and Zoning Decisions: 2012
May 2011-April 2012

Kurt H. Schindler, AICP, MSU Extension Land Use Educator
Greening Michigan Institute, Government & Public Policy Team

This public policy brief summarizes the important state and federal court cases and Attorney General Opinions issued between May 1, 2011 and April 30, 2012.

Table of Contents

Published Cases

(New law)

Land Divisions & Condominiums

Land Division Act does not convey property rights

Court: Michigan Supreme Court (489 Mich. 99; 802 N.W.2d 1; 2011 Mich. LEXIS 953; No. 139394, June 3, 2011)

Case Name: *Beach v. Township of Lima*

JUDGE(S): YOUNG, JR., M. KELLY, HATHAWAY, M.B. KELLY, AND ZAHRA

The court held that an action that seeks to establish a substantive property right arises independently of a Land Division Act (LDA) (MCL 560.101 *et seq.*) action to vacate, correct, or revise a recorded plat. It is only after such a property right is recognized that the need arises under the LDA to revise a plat that does not reflect the newly recognized property right. Until that property right is legally recognized, the LDA is inapplicable. The language of the LDA and cases analyzing the LDA establish that an LDA action is appropriate when a party's interest arises from or is traceable to the plat or the platting process. An action to quiet title by adverse possession confers judicial recognition that the possessor acquired marketable title of record to the property. A successful quiet title action also establishes a substantive property right that was not previously shown within the plat. Without possessing record title to the property, no one, including plaintiffs, had a basis on which to request an alteration of the plat under the LDA. Thus, plaintiffs were not required to file their action under the LDA.

The dispute arose from a disagreement between plaintiff-Florence Beach and the defendant-township over property rights to areas of land shown as platted streets on a village plat. The plat, which was made and recorded in 1835, has remained unaltered since its execution. Through several conveyances that occurred in 1854, 1881, and 1897, the Beach family acquired the area of land now known as the Beach Family Farm. In 1954 the township purchased lots and in 2004, the township purchased several more lots intending to build a fire department substation. The township also intended to use and develop roads for ingress and egress to the substation. Plaintiffs disputed the township's right to use the undeveloped property designated as streets on the plat and filed to quiet title based on adverse possession. The trial court held that the plaintiffs established the elements of adverse possession and that they did not have to proceed under the LDA.

The Court of Appeals affirmed.

The Michigan Supreme Court concluded that the dispute concerned "the establishment of a substantive right neither reflected in the plat nor traceable to the platting process." The court held that plaintiffs, who filed an action to quiet title based on adverse possession, were not required to proceed with an action under the LDA. Their

> title action was the appropriate action to establish their entitlement to hold record title to the property at issue. Because plaintiffs' quiet title action established a substantive property right that was not reflected in the plat or traceable to the platting process, their action involved more than merely correcting the plat to reflect a preexisting interest in land.

While they could have filed an action under the LDA contingent on establishing their substantive right in a quiet title action, they were not required to do so because they did not expressly request the alteration of the plat and because their quiet title action established a substantive property right for the first time. The court affirmed the judgment of the Court of Appeals. However, it ordered the trial court to strike the portion of its order that corrected the plat to reflect plaintiffs' successful quiet title action because plaintiffs did not request that relief.

DISSENTING JUDGE(S): MARKMAN AND CAVANAGH

The dissent believed that since plaintiffs' quiet-title action necessarily sought to "vacate, correct, or revise" the plat, they should have been required to bring their cause of action pursuant to the LDA. If plaintiffs wished to proceed under the LDA, they should be allowed to amend their complaint and to add all necessary parties. The dissenting justices believed that the majority's contrary interpretation undermined "the primary purpose of the LDA, which is to ensure that plats on file remain accurate" and its holding

> will introduce greater uncertainty and instability into this state's property law, while incentivizing artful pleadings and gamesmanship. Under the law of this case, Michigan plats are destined over time to become increasingly more inaccurate and

> increasingly less reflective of actual property interests in this state.

Thus, they respectfully dissented and would reverse the judgment of the Court of Appeals. (Source: State Bar of Michigan e-Journal Number: 48982, June 7, 2011)
Full Text Opinion:
http://www.michbar.org/opinions/supreme/2011/060311/48982.pdf

Due Process and Equal Protection

See also: *Edw C. Levy Co. v. Marine City Bd. of Zoning Appeals*, page 3.

Equal Protection claim must meet "plausibility standard"

Court: U.S. Court of Appeals Sixth Circuit (_ Mich. _; _ N.W.2d _; 2011 Mich. LEXIS _; No. 09-2185, June 1, 2011)
Case Name: *Rondigo, L.L.C. v. Township of Richmond* (Michigan)

The court held that the plaintiffs' factual allegations in the complaint, viewed together with the attached exhibits, were insufficient to make out a valid equal protection claim under the "plausibility standard" prescribed by the U.S. Supreme Court in *Bell Atl. Corp. v. Twombly* and *Ashcroft v. Iqbal*. Thus, the district court erred by denying the state defendants' motion to dismiss based on qualified immunity.

The plaintiffs operate a farm in the defendant-township. Township officials became concerned about composting operations at the farm. This led to inspections and regulatory actions by State officials and a state court case to prohibit composting at the farm. Plaintiffs filed a 54-page, 6-count complaint in federal court, asserting federal and state claims against, *inter alia*, the defendants-state officials. The district court granted the state officials' motion to dismiss all claims against them except the equal protection claim. Since the ruling on their motion to dismiss was a denial of qualified immunity on the equal protection claim, the state defendants appealed this interlocutory ruling under the collateral order doctrine. The district court construed the equal protection claim as one for gender-based discrimination against a female-owned business. However, the court held that plaintiffs' "mere allegations" that plaintiff-Michaels was a woman and plaintiff-Rondigo was a woman-owned business did "not make out a claim for gender-based discrimination targeting them as members of a suspect class."

On appeal, the plaintiffs argued that their allegations made out a valid "class of one" theory of discrimination, relying on their claims that a man (M) "who operated a similarly situated farm operation which conducted on-farm composting" received more favorable treatment than they did. They alleged that they were subjected to less favorable treatment than M in three ways. However, accepting that M was not subjected to any of those adverse treatments,

> an inference of discriminatory animus arises only if the state defendants' proffered reasons for the actions are negatived or shown to be irrational.

Plaintiffs' exhibits showed that "the state defendants gave facially legitimate reasons for their actions." The

> requirements for an updated site plan, soil borings and revised nutrient management plan were triggered by the discoveries, during site inspections, that plaintiffs had stockpiled large amounts of leaves in an area with a seasonal high water table, creating potential for groundwater pollution.

Their allegations did not impugn the genuineness or significance of these discoveries or assert that M's operation was subject to similar problems. The court concluded that the complaint contained "precious little factual support for the theory that the state defendants' more favorable treatment of" M showed that plaintiffs were victims of unlawful discrimination.

Thus, the court held that their factual allegations fell "far short" of making out a "plausible claim of entitlement to relief" under either equal protection theory and their "insubstantial" equal protection claim was ripe for dismissal under the qualified immunity doctrine. (Source: State Bar of Michigan *e-Journal* Number: 48971, June 3, 2011)

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2011/060111/48971.pdf

Nonconforming Uses

Three out of five votes of ZBA members required to reverse Zoning Administrator

Court: Michigan Court of Appeals (293 Mich. App. 333; 2011 Mich. App. LEXIS 1294; Published No. 296023 July 19, 2011)
Case Name: *Edw C. Levy Co. v. Marine City Bd. of Zoning Appeals*

On remand from the Michigan Supreme Court, the Appeals Court held that the trial court did not err in interpreting MCL 125.3603(2) and in finding

substantial evidence supported the Marine City Zoning Board of Appeals' (ZBA) denial of the plaintiffs-Edw C. Levy Co and Levy Indiana Slag Co, (d/b/a St Clair Aggregates) (collectively SCA) 's appeal in this case involving the use of a parcel of riverfront property.

The intervening appellee St. Clair County Road Commission (Road Commission) owned the parcel, which it used for storage and distribution of aggregate, rock salt, and calcium chloride. The city rezoned the property in1999 from "I-2" to "Waterfront Recreation and Marine." However, the parcel retained its industrial status as a prior nonconforming use.

SCA owns a deep water port adjacent to the parcel. In 2007, SCA approached the Road Commission with a proposal to purchase the parcel. The Road Commission rejected the proposal, but determined that it could obtain revenue by leasing the parcel to a commercial operator. It published a request for proposals, and received proposals from SCA and others. The Road Commission accepted a proposal from intervening appellee-Detroit Bulk Storage (DBS) and entered into a five-year lease of the parcel. A condition of the lease was that DBS obtain a business license from the city.

This required the City Manager to certify that the proposed use was allowed under the Marine City Zoning Ordinance or constituted a prior nonconforming use. The City Manager certified that the proposed use was allowed, and the city commission granted DBS a conditional business license.

SCA appealed to the ZBA, which denied the appeal and affirmed the City Manager's decision by a three-to-two vote. SCA appealed to the trial court. The trial court did not address the merits of the appeal, but found that the one of the ZBA's members (who was also a member of the city commission) should have recused himself from voting. The trial court vacated the ZBA's decision and remanded to the ZBA for a new vote based on the same record made before the ZBA at the original hearing. Only three ZBA members were present at the meeting where the new vote occurred. The ZBA voted two-to-one to reverse the City Manager's decision and to grant SCA's appeal.

SCA filed an amended claim of appeal in the trial court, incorporating the ZBA's latest ruling. The trial court ruled that under MCL 125.3603(2), to prevail in their appeal of the City Manager's decision SCA had to obtain votes from a majority of all the ZBA members, not just those present when the vote was taken. Since SCA only received two votes, and not the required three, the City Manager's decision was still effective. The trial court also held that ZBA's decision affirming the City Manager's decision that the use was allowed was supported by competent evidence on the record.

The Appeals Court held that the unambiguous language of MCL 125.3603(2) requires a majority of the ZBA's members to reverse the City Manager's certification. Thus, three of the five members had to vote to reverse the certification. The vote of two members to reverse was insufficient. Further, "there was no competent evidence that the traffic and hours of operation would, in fact, increase" by DBS's use. DBS's counsel identified facts showing that the Road Commission used the parcel for bulk storage of materials like stone and salt, and that is what DBS used it for - "it was the same activity, only now being carried out by two different operators." There was no evidence that the tonnage allowed under the lease would be a significant increase over the Road Commission's use. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 49315, July 21, 2011)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2011/071911/49315.pdf

Open Meetings Act, Freedom of Information Act

Handwritten notes for personal use are not public records

Court: Michigan Court of Appeals (2011 Mich. App. LEXIS 1806; 39 Media L. Rep. 2513,; Published No. 300170, October 20, 2011)

Case Name: *Hopkins v. Township of Duncan*

The Appeals Court held that a township board member's (P) handwritten notes taken for his personal use, not circulated among other board members, not used in creating the minutes of any of the board meetings, and destroyed or retained at his sole discretion, were not public records subject to disclosure under the The Freedom of Information Act (FOIA)(MCL 15.231 *et seq.*). Thus, the court affirmed the trial court's order granting the defendant-township summary disposition on the plaintiff's claim that defendant violated the FOIA.

Defendant argued that the notes did not constitute "public records." The court noted that "the heart of this case" was whether the "notes were taken in the performance of an official function." If so, they were subject to disclosure under the FOIA. Plaintiff relied on

Walloon Lake Water Sys., Inc. v. Melrose Twp. and *WDG Inv. Co., LLC v. Michigan Dep't of Mgmt. & Budget* (Unpub.) in support of his claim that P's "personal notes were transformed into public documents."

In *Walloon*, a private letter became public because it was read into the record of a township meeting and the township board used it to resolve a specific issue. P'[s notes "were never read into the record, nor is there any evidence that the notes were used in the furtherance of the township's decisions." They were kept for his personal use and were not given to any of the other board members. *WDG* also was not helpful to plaintiff since the court in *WDG* specifically declined to decide whether "personal notes" could be considered public documents. The focus in *WDG* was on the defendants' duty to conduct a reasonable search to request and locate documents, which they clearly did not do. Here, the township clerk asked the township board members if they had any notes from the year's meetings. Only P had notes, which he contended were his personal diary. Plaintiff pointed to an affidavit by an individual (J) who attended several township meetings. J stated in the affidavit that during one of the meetings, he saw P refer to his prior notes to answer a citizen's inquiry about to whom she was previously referred for bringing her home into compliance. The court concluded that accepting the averment as true, it appeared that P "did little other than offer the citizen contact information. Such information had nothing to do with substantive decision-making."

The Appeals Court concluded that while not directly on point, *Howell Educ. Ass'n MEA/NEA v. Howell Bd. of Educ.* was instructive.

> Just as not every email prepared and sent by a teacher on school-owned computer equipment was not subject to disclosure, not every hand-written note prepared by a member of a public body, not otherwise utilized by the body's remaining members, should be subject to disclosure.

Rather, individual notes taken by a decision-maker on a governmental issue are "only a public record when the notes are taken in furtherance of an official function." The court concluded that *Porter Cnty. Chapter of Izaak Walton League of Am., Inc. v. U.S. Atomic Energy Agency (ND IN)* was the case most on point, where a federal district court concluded that "untitled, undated and uncirculated hand-written personal notes were not subject to disclosure under the federal FOIA." (Source: State Bar of Michigan *e-Journal* Number: 50000, October 24, 2011)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2011/102011/50000.pdf

Conflict of Interest, Incompatible Office, Ethics

Ethics laws upheld, not an infringement on free speech

Court: United States Supreme Court (131 S. Ct. 2343; 180 L. Ed. 2d 150; 2011 U.S. LEXIS 4379; 79 U.S.L.W. 4461; 22 Fla. L. Weekly Fed. S 1130, April 27, 2011; No. 10-568; June 13, 2011)

Case: *Nevada Commission on Ethics v Carrigan*

Judges: J. SCALIA delivered the opinion of the Court, in which C. J. ROBERTS, THOMAS, KENNEDY, GINSBURG, BREYER, SOTOMAYOR, AND J. J. KAGAN, joined. J. KENNEDY filed a concurring opinion. J. ALITO, filed an opinion concurring in part and concurring in the judgment.

The U.S. Supreme Court ruled the Nevada Ethics in Government Law is not unconstitutionally overbroad, Pp. 3–11, and overturned a Nevada State Supreme Court ruling on the issue. The Court upheld the Nevada law that bars lawmakers from voting on or even debating matters in which they have a conflict of interest.

Nevada's Ethics in Government Law requires public officials to recuse themselves from voting on, or advocating the passage or failure of, "a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by," *inter alia* , "[h]is commitment in a private capacity to the interests of others," Nev. Rev. Stat. §281A.420(2) (2007), which includes a "commitment to a [specified] person," e.g., a member of the officer's household or the officer's relative, §281A.420(8)(a)–(d), and "[a]ny other commitment or relationship that is substantially similar" to one enumerated in paragraphs (a)–(d), §281A.420(8)(e).

Petitioner-Commission administers and enforces Nevada's law. The Commission investigated respondent-Carrigan, an elected local official who voted to approve a hotel/casino project proposed by a company that used Carrigan's long-time friend and campaign manager as a paid consultant. The Commission concluded that Carrigan had a disqualifying conflict of interest under §281A.420(8)(e)'s catchall provision, and censured him for failing to abstain from voting on the project.

Carrigan sought judicial review, arguing that the Nevada law violated the First Amendment . The State District Court denied the petition, but the Nevada Supreme Court reversed, holding that voting is protected speech and that §281A.420(8)(e)'s catchall definition is unconstitutionally overbroad.

The Supreme Court ruled that law prohibits a legislator who has a conflict both from voting on a proposal and from advocating its passage or failure. If it was constitutional to exclude Carrigan from voting, then his exclusion from advocating during a legislative session was not unconstitutional, for it was a reasonable time, place, and manner limitation, *Clark v. Community for Creative Non-Violence* , 468 U. S. 288 . Pp. 3–4.

Also "[A] 'universal and long-established' tradition of prohibiting certain conduct creates 'a strong presumption' that the prohibition is constitutional.' " *Republican Party of Minn. v. White*, 536 U. S. 765 . Here, dispositive evidence is provided by "early congressional enactments," which offer "'contemporaneous and weighty evidence of the Constitution's meaning,'" *Printz v. United States*, 521 U. S. 898 . Within 15 years of the founding, both the House and the Senate adopted recusal rules. Federal conflict-of-interest rules applicable to judges also date back to the founding. The notion that Nevada's recusal rules violate legislators' First Amendment rights is also inconsistent with long-standing traditions in the States, most of which have some type of recusal law. Pp. 4–8.

Finally the court found restrictions on legislators' voting are not restrictions on legislators' protected speech. A legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. He casts his vote "as trustee for his constituents, not as a prerogative of personal power." *Raines v. Byrd*, 521 U. S. 811 . Moreover, voting is not a symbolic action, and the fact that it is the product of a deeply held or highly unpopular personal belief does not transform it into First Amendment speech. Even if the mere vote itself could express depth of belief (which it cannot), this Court has rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message. See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U. S. 351 . *Doe v. Reed*, 561 U. S. ___, distinguished. Pp. 8–10.

The U.S. Supreme Court reversed and remanded the case. (Source: Cornell University Law School Legal Information Institute.)

Full text opinion:
http://www.law.cornell.edu/supct/pdf/10-568P.ZO

Zoning Administrator/Inspector, Immunity, and Enforcement Issues

Consent Judgement continues when facts, law has not changed

Court: U.S. Court of Appeals Sixth Circuit (647 F.3d 606; 2011 U.S. App. LEXIS 15525; 2011 FED App. 0197P (6th Cir.); 80 Fed. R. Serv. 3d (Callaghan) 227; No. 09-2388, July 28, 2011)

Case Name: *Northridge Church v. Charter Twp. of Plymouth*

Since the consent judgment was not void when entered and the plaintiff-Northridge did not show that the factual or legal landscape had unexpectedly and dramatically changed since that time, the court affirmed the district court's judgment denying Northridge's motion to modify or set aside the consent judgment.

Seventeen years ago, Northridge sought a special permit from defendant-Plymouth Township to build its church and related structures in the Township. Fearful of the impact Northridge would have on the community, the defendant-Township Planning Board denied Northridge's application. Northridge filed this case and wrestled a partial victory. It reached a consent judgment with Plymouth Township allowing Northridge to build its church with limitations.

Nearly 16 years later, due to the expansion of its membership and desired services, Northridge moved to reopen this case and modify or set aside the consent judgment under Rule 60(b). Northridge primarily argued that the consent decree was void because it was invalid under Religious Land Use & Institutionalized Persons Act (RLUIPA) (42 USC § 2000cc *et seq.*). However, Northridge overlooked the Supreme Court's recent decision in *United Student Aid Funds, Inc. v. Espinosa*. (Whether "[a] consent judgment that violates federal law or constitutional rights must be vacated as void even when the parties have agreed to its entry")

The U.S. Court of Appeals Sixth Circuit held that the fact that a consent judgment may violate a federal statute, let alone a subsequently enacted federal statute, does not render the judgment "void" under Rule 60(b)(4). Northridge Church did not rely on either of the two bases that would allow it to challenge the consent judgment under Rule 60(b)(4) - a lack of jurisdiction or a violation of due process in the

judgment's issuance - so the consent judgment was not void. Northridge also contended that "[a] consent judgment that violates federal law or constitutional rights must be vacated as void even when the parties have agreed to its entry." However,

> such an argument is cognizable only to the extent that the district court improperly entered the consent judgment or the subsequent enactment of a new law invalidated it.

Perhaps realizing this, Northridge suggested in its reply brief that its contention fell in the former category, and that the consent judgment was void because it "violated The Religious Freedom Restoration Act (RFRA) (42 USC § 2000bb *et seq.*) (now repealed and replaced with RLUIPA) in the first place." While Northridge relied on *Crosby v. Bradstreet Co.* (2nd Cir.), *Shelley v. Kraemer*, and *Safeco Ins. Co. of Am. v. City of White House*, the court held that none of those cases were on point. Thus, the court rejected Northridge Church's argument that the consent judgment was void. Northridge also argued that changed legal and factual circumstances required modification of the consent judgment under Rule 60(b)(5). The U. S. Supreme Court has explained that

> [a] consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in nature. But it is an agreement that the parties desire and expect will be reflected in, and be enforced as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees.

The consent judgment here was a prime example of this fact, as it imposed ongoing restrictions on Northridge's ability to build or undertake various activities, all of which were supervised by the district court. Thus, Rule 60(b) is just as applicable to motions to modify or vacate consent judgments as it is to motions to modify or vacate other judgments. However, the court rejected Northridge's claim that the enactment of the RLUIPA constituted a changed legal circumstance warranting modification of the consent judgment. Further, the changed factual circumstances, individually and cumulatively, failed to satisfy the "heavy burden" of convincing the court that the district court abused its discretion in declining to modify the consent judgment. (Source: State Bar of Michigan *e-Journal* Number: 49435, August 4, 2011)

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2011/072811/49435.pdf

Other Published Cases

Medical Marihuana Joint Cooperative/sharing of Plants Prohibited

Michigan Attorney General Opinion Number 7259, June 28, 2011

The Michigan Medical Marihuana Act, Initiated Law 1 of 2008 (MCL 333.26421 *et seq.*) (MMMA), prohibits the joint cooperative cultivation or sharing of marihuana plants because each patient's plants must be grown and maintained in a separate enclosed, locked facility that is only accessible to the registered patient or the patient's registered primary caregiver.

A primary caregiver is expressly limited to assisting no more than five patients, MCL 333.26426(d), and the primary caregiver must also keep each patient's plants in an "enclosed, locked facility." MCL 333.26424(b)(2). Further, because the MMMA only authorizes a patient to have 12 marihuana plants at any given time, primary caregivers assisting more than one patient must keep each patient's plants segregated and in a separate enclosed, locked facility. The definition of "enclosed, locked facility," uses the singular "a", and the disjunctive term "or" between "registered primary caregiver" and "qualifying patient," confirms that only the registered primary caregiver may have access to the facility containing the individual patient's plants. MCL 333.26423(c). See *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 148; 783 NW2d 133 (2010) ("In general, 'or' is a disjunctive term, indicating a choice between two alternatives, i.e., a unit or a portion of the common elements."); *Yankee Springs Twp v Fox*, 264 Mich App 604, 608; 692 NW2d 728 (2004). Thus, a registered primary caregiver's patients may not have access to their caregiver's enclosed, locked facility.

Full Text Opinion:
http://www.ag.state.mi.us/opinion/datafiles/2010s/op10338.htm

Dispensary for sale of Marijuana not authorized by Michigan Medical Marijuana Act

Court: Michigan Court of Appeals (293 Mich. App. 644; 2011 Mich. App. LEXIS 1512; Published No. 301951, August 23, 2011)

Case Name: *State of MI v. McQueen*

Note: This case is now pending before the Michigan Supreme Court

Holding that the defendants' operation of a medical marijuana dispensary was an enjoinable public nuisance because it violated the Public Health Code (PHC)

(MCL 333.1101 *et seq.*) and the violation was not excused by the Michigan Medical Marihuana Act (MMMA)(MCL 333.26421 *et seq.*), the court reversed the Isabella County Circuit Court's order denying the plaintiff's request for a preliminary injunction and remanded for entry of judgment for plaintiff.

The dispensary (an LLC) was a place where its members (who were either registered qualifying patients or their primary caregivers) purchased marijuana that other members stored in their lockers rented from the LLC. Via operation of the LLC, defendants provided the mechanism for the sale of marijuana and retained at least 20% of the sale price. Plaintiff, through the Isabella County prosecuting attorney, sued defendants for injunctive relief, asserting that their operation of the LLC was not in accordance with the MMMA's provisions and thus, was a public nuisance because it violated the PHC. The trial court ruled that defendants operated the LLC in accordance with the MMMA's provisions.

The Appeals Court disagreed, holding, *inter alia*, that the "medical use" of marijuana as defined by the MMMA does not include patient-to-patient marijuana "sales," and no other MMMA provision could be read to permit those sales. Thus, defendants-dispensary LLC had no authority to actively engage in and carry out the selling of marijuana between the LLC's members.

The Appeals Court concluded that the trial court erred in its factual findings that (1) it was the LLC's members who rented the lockers, and not defendants, who possessed the marijuana stored in the lockers and (2) defendants did not sell the marijuana, but only "facilitated its transfer from patients to patients." The Appeals Court held that the defendants possessed the marijuana stored in the lockers and were full participants in the selling of marijuana.

Defendants argued the LLC's operation complied with the MMMA because medical use of marijuana includes its "delivery" and "transfer," and patients engaged in the medical use of marijuana when they transferred it to other patients. However, the members (aided by defendants' services) did not simply deliver or transfer marijuana to other members - they did so for a price. Thus, the court concluded that the members were selling their excess marijuana. Further, the court held that the **sale** of marijuana is not the equivalent to **delivering** or **transferring** it. The medical use of marijuana as defined by the MMMA allows for its delivery and transfer, but not its sale.

The Appeals Court could "not ignore, or view as inadvertent, the omission of the term 'sale' from the definition of the 'medical use'" of marijuana. The court also held that neither §§4(e) nor 4(k) of MMMA permit the sale of marijuana. Further, because defendants were engaged in selling marijuana, which is not the "using or administering" of marijuana, they were not entitled to immunity granted by §4(I) of MMMA. Because they possessed marijuana, and possessed it with the intent to deliver it to the LLC's members, their operation of the LLC violated the PHC.

Since the PHC was designed to protect the health, safety, and welfare of the people of Michigan, the public was presumed harmed by defendants' violation of the PHC. The judgment for plaintiff-prosecutor "shall include the entry of any order that may be necessary to abate the nuisance and to enjoin defendants' continuing operation of" the LLC. (Source: State Bar of Michigan *e-Journal* Number: 49588, August 25, 2011)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2011/082311/49588.pdf

Smoking marihuana is prohibited in public places

Michigan Attorney General Opinion Number 7261, September 15, 2011

2009 PA 188, which prohibits smoking in public places and food service establishments, applies exclusively to the smoking of tobacco products. Because marihuana is not a tobacco product, the smoking ban does not apply to the smoking of medical marihuana.

The Michigan Medical Marihuana Act, Initiated Law 1 of 2008, MCL 333.26421 *et seq*, prohibits qualifying registered patients from smoking marihuana in the public areas of food service establishments, hotels, motels, apartment buildings, and any other place open to the public. (MCL 333.26427(b)(3)(A) and (B))

An owner of a hotel, motel, apartment building, or other similar facility can prohibit the smoking of marihuana and the growing of marihuana plants anywhere within the facility, and imposing such a prohibition does not violate the Michigan Medical Marihuana Act, Initiated Law 1 of 2008, MCL 333.26421 *et seq.*

Full Text Opinion:
http://www.ag.state.mi.us/opinion/datafiles/2010s/op10340.htm

Police cannot return Marihuana to Patient or primary caregiver: Federal Law supercedes state law.

Michigan Attorney General Opinion Number 7262, November 10, 2011

The Michigan Attorney General was asked whether a law enforcement officer who arrests a patient or primary caregiver registered under the Michigan Medical Marihuana Act (MMMA) (Initiated Law 1 of 2008, MCL 333.26241 *et seq.*) must return marihuana found in the possession of the patient or primary caregiver upon his or her release from custody.

The people of this State, even in the exercise of their constitutional right to initiate legislation, cannot require law enforcement officers to violate federal law by mandating the return of marihuana to registered patients or caregivers. This conclusion is consistent with the federal district court's opinion in *United States v Michigan Dep't of Community Health*, ___ F Supp 2d ___, *supra*. The Michigan Attorney General' issued opinion is:

> therefore, section 4(h) of the Michigan Medical Marihuana Act, MCL 333.26424(h), which prohibits the forfeiture of marihuana possessed for medical use, directly conflicts with and is thus preempted by, the federal Controlled Substances Act, 21 USC 801 *et seq.*, to the extent section 4(h) requires a law enforcement officer to return marihuana to a registered patient or primary caregiver upon release from custody.

Full Text Opinion:
http://www.ag.state.mi.us/opinion/datafiles/2010s/op10341.htm

Cannot operate motor vehicle with marihuana in one's system, even with Medical Marihuana

Court: Michigan Court of Appeals (2012 Mich. App. LEXIS 691; Published No. 301443, April 17, 2012)

Case Name: *People v. Koon*

The court held that the "zero tolerance" provision of MCL 257.625(8), which prohibits operating a motor vehicle with any amount of a Schedule 1 controlled substance in the driver's body, still applies if the driver used marijuana under the Michigan Medical Marihuana Act (MMMA) (MCL 333.26421 *et seq.*). Thus, the court reversed and remanded the trial court's order affirming the district court's order that the MMMA protected defendant from prosecution under MCL 257.625(8), unless the prosecution could show that he was actually impaired by the presence of marijuana in his body.

The court held that defendant was properly charged with a violation of MCL 257.625(8) and CJI2d 15.3a may be given at any trial in the case. Defendant was pulled over for speeding 83 MPH in a 55 MPH zone. The arresting officer smelled intoxicants, and defendant admitted to having consumed one beer sometime within the last couple of hours. He consented to a pat down of his person, voluntarily removed a pipe, and explained that he had a medical marijuana registry card and had last smoked marijuana five to six hours previously. A blood test showed that he had active THC in his system. Defendant was charged with operating a motor vehicle with a Schedule 1 controlled substance in his body under the "zero tolerance" law.

In affirming the district court's order, the trial court concluded that the MMMA superseded the zero tolerance law. Under MCL 333.7212(1)(c), marijuana remains a Schedule 1 controlled substance despite the passage of the MMMA. The MMMA recognizes a number of circumstances under which the medical use of marijuana is not permitted.

> One of those exceptions specifically states that the protections will not apply to operating a motor vehicle while under the influence of marijuana. Thus, the MMMA permits the medical use of marijuana, but it recognizes that the use of marijuana is inconsistent with engaging in some activities at the same time as the use of the marijuana.

The court was left with the MMMA,

> which affords a certain degree of immunity from prosecution for possession or use of marijuana for a medical purpose, and the Michigan Motor Vehicle Code, which prohibits operating a motor vehicle while there is any amount of marijuana in the driver's system.

The Appeals Court held that these two provisions were not in conflict. "The MMMA (or the Legislature) could have rescheduled marijuana to one of the other schedules. But it did not." Thus, marijuana remains a Schedule 1 controlled substance. Further, while the MMMA does not provide a definition of "under the influence of marijuana," MCL 257.625(8)

> essentially does, establishing that any amount of a Schedule 1 controlled substance, including marijuana, sufficiently influences a person's driving ability to the extent that the person should not be permitted to drive.

The Appeals Court held that the MMMA grants immunity from arrest and prosecution - it does not grant a right to use marijuana. "Thus, contrary to

defendant's claim, he does not have a blanket right to internally possess medical marijuana." The MMMA does not permit all types of medical use of marijuana under all circumstances. The court further held that the MMMA does not provide a protection against prosecution for violating MCL 257.625(8).

> Driving is a particularly dangerous activity; Schedule 1 substances are considered particularly inimical to a drivers' ability to remain in maximally safe control of their vehicles; and the danger of failing to do so affects not only the driver, but anyone else in the vicinity.

(Source: State Bar of Michigan *e-Journal* Number: 51363, April 19, 2012)
Full Text Opinion:
http://www.michbar.org/opinions/appeals/2012/041712/51363.pdf

Unpublished Cases

(Generally unpublished means there was not any new case law established, but presented here as reminders of some legal principles. They are included here because they state current law well, or as a reminder of what current law is.) A case is "unpublished" because there was not any new principal of law established (nothing new/different to report), or the ruling is viewed as "obvious." An unpublished case may be a good restatement or summary of existing case law. Unpublished opinions are not precedentially binding under the rules of *stare decisis*.[1] Unpublished cases might be cited, but only for their persuasive authority, not precedential authority. One might review an unpublished case to find and useful citations of published cases found in the unpublished case.)

Restrictions on Zoning Authority

Shooting Range as a for-profit business is not a Sport Shooting Range

Court: Michigan Court of Appeals (Unpublished No. 301294, April 10, 2012)
Case Name: *People of the Twp. of Addison v. Barnhart*

After remand to the district court, the appeals court held that based on the undisputed facts the circuit court correctly concluded that defendant-Barnhart's range was not a sport shooting range within the meaning of the Claims related to the Sport Shooting Ranges Act (SSRA) (MCL 691.1541 *et seq.*);. Also, because he acknowledged the business or commercial purposes for the range, the law of the case required the conclusion that his range was not a sport shooting range within the meaning of the SSRA. Thus, he was required to comply with local zoning rules.

The case returned to the appeals court following a remand requiring the district court to apply the law of the case and the SSRA. On remand, the district court entered a judgment for defendant. Plaintiff-Addison Township appealed the decision to the circuit court, which reversed the district court's decision. Defendant appealed the circuit court's decision. The circuit court found that the law of the case from the court's *Barnhart I* opinion was unequivocal. The circuit court concluded that the law of the case established that "to the extent that there was testimony to suggest that defendant's operation of a shooting range was for business or commercial purposes," MCL 691.1542a(2)(c) did "not provide freedom from compliance with local zoning controls." The circuit court noted the parties' stipulation that prior to the effective date of the relevant part of the SSRA, defendant's range was used for recreational and business purposes. Based on the stipulation and other evidence, the circuit court held that defendant's range was not a sport shooting range within the meaning of the relevant part of the SSRA. The circuit court decided that because the range was not a sport shooting range, the SSRA did not protect it from enforcement of local zoning controls.

Defendant's challenge on appeal was to the circuit court's application of the statutory definition to the

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

undisputed facts, not to any specific factual resolution by the district court. Thus, the issue of whether defendant's range was a sport shooting range within the meaning of the SSRA was a legal issue the circuit court could properly review *de novo*. The circuit court correctly interpreted and applied the law of the case. The circuit court correctly recognized the undisputed facts established that defendant was operating the range for both recreational and business purposes as of the effective date of the SSRA, and correctly concluded that his range was not a sport shooting range within the meaning of the SSRA. Affirmed. (Source: State Bar of Michigan e-Journal Number: 51274, April 17,, 2012)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2012/041012/51326.pdf

Takings

See *Otsego County v. Bradford Scott Corp* on page 12.

Taking claims and inverse condemnation

Court: Michigan Court of Appeals (Unpublished No. 299510 January 10, 2012)

Case Name: *AM Rodriguez Assocs., Inc. v. City Council of the City of the Vill. of Douglas*

In light of *Houdini Props., LLC v. Romulus* and the fact that the plaintiff's inverse condemnation claim was dependent on evidence not contained in the administrative record established before the defendant-City Council, the court concluded that the trial court erred by dismissing plaintiff's takings claim on the basis of *res judicata*.

Plaintiff owns real property in the defendant-City consisting of approximately 16 acres. Plaintiff submitted an application to the City to build and develop a Planned Unit Development (PUD) on the property. After reviewing the PUD proposal, the City planning commission recommended that the City Council deny plaintiff's application, and the City Council voted to deny the application.

Plaintiff sought review of the City Council's decision in another case. The trial court in that case upheld the City Council's denial of plaintiff's PUD application. Plaintiff later filed a second case in the trial court, alleging, *inter alia*, that the City's planning commission and City Council violated Michigan's zoning statutes by denying the PUD application, that the defendants had unconstitutionally taken plaintiff's private property without just compensation, and that they violated plaintiff's constitutional rights to equal protection, procedural due process, and substantive due process.

The City removed that case to the U.S. District Court for the Western District of Michigan. The federal court determined that plaintiff's equal protection, substantive due process, and takings claims were unripe, and declined to exercise supplemental jurisdiction over the claim for alleged violation of Michigan's zoning statutes.

Plaintiff then filed this case in Michigan trial court, asserting, *inter alia*, that defendants violated Michigan's zoning statutes and had unconstitutionally taken plaintiff's private property without just compensation. The trial court ruled that all of plaintiff's claims were barred by *res judicata*.

The Appeals Court disagreed as to plaintiff's takings claim.

> Plaintiff's inverse condemnation claim was not merely a challenge to the adequacy of defendants' procedures, as were the claims set forth in counts 1 and 2 of the complaint. Nor was the question of an unconstitutional taking of private property '[n]ecessarily . . . involved' in the prior administrative appeal.

When reviewing the City Council's decision in the original administrative appeal, the trial court was sitting as an appellate tribunal and was limited to the administrative record as it existed before the City Council. However, the City Council "plainly lacked the authority and jurisdiction to consider and decide plaintiff's constitutional takings claim" - thus, the trial court could not have ruled on the inverse condemnation claim in the original administrative appeal. The court also rejected the trial court's

> alternative conclusion that plaintiff's takings claim was legally insufficient because plaintiff could not demonstrate a vested property right in the proposed PUD project.

While the court reversed the trial court's order granting defendants summary disposition as to plaintiff's inverse condemnation claim, it affirmed the trial court's order as to plaintiff's other claims. (Source: State Bar of Michigan *e-Journal* Number: 50608, February 7, 2012)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2012/011012/50608.pdf

Land Divisions & Condominiums

Normal process, delays associated with obtaining permits, if acting diligently and in good faith, not a temporary taking

Court: Michigan Court of Appeals (Unpublished No. 295828, July 21, 2011)

Case Name: *Otsego County v. Bradford Scott Corp.*

The court held, *inter alia*, (in this case where the defendant-Bradford Scott Corporation (BSC) attempted to obtain permission to build a bridge to its landlocked property) that the rule of finality was applicable and BSC did not satisfy the rule. Thus, the trial court properly summarily dismissed its unconstitutional temporary takings claim.

BSC is a developer that owns all of the lots in two platted subdivisions – Enchanted Forest #2 (EF 2) and Enchanted Forest #4 (EF 4). EF 2 and EF 4 are peninsulas that are divided by a channel-waterway that connects two lakes. The parties agreed that EF 4 is landlocked, and the case involved BSC's efforts to build a bridge over the channel in order to connect EF 2 and EF 4, thus providing access to EF 4 via EF 2. The plats were created and recorded in the early 1970's and they envisioned access to EF 4's seven lots through seven non-buildable lots on the peninsula tip of EF 2, although a bridge was not expressly identified as the means of access. The plats were approved the County Road Commission, the township board, the district health department, and the county plat board.

Separate litigation in 2000 failed to give BSC a viable land route to EF 4. Over time BSC and the county went through various procedures and never agreed on the bridge project. BSC alleged that the municipal "gyrations" took four years and by the time it was finally granted approval to build the bridge, the properties' values had diminished greatly. BSC blamed the county for the delays and lost value of its properties.

The court noted that the concept of temporary taking has been recognized by the courts as a basis to demand just compensation. However, normal delays associated with obtaining permits, changes in zoning ordinances, variances, etc. do not amount to a compensable regulatory taking. As to the rule of finality, a claim that governmental actions related to zoning regulations affect the taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision as to the application of the regulations to the relevant property. Such a challenge is not ripe for review until the landowner can establish that a final governmental decision caused the alleged injury. Thus, the property owner must have pursued alternative relief, such as a variance. In *Hendee v. Putnam Twp* ("rule of finality"), the Supreme Court found that the plaintiffs never submitted an application for rezoning or a variance, and held that their constitutional claims were not ripe for judicial review under the rule of finality.

The appeals court concluded this case did not entail purposeful bureaucratic delay, bad faith, and intentional stalling or obfuscation by the plaintiff. BSC did not pursue the alternative steps required to move its project forward. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 49372, August 23, 2011)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2011/072111/49372.pdf

Substantive Due Process

Ten acre minimum parcel requirement can be for a legitimate governmental interest

Court: Michigan Court of Appeals (Unpublished No. 298858, November 17, 2011)

Case Name: *DF Land Dev., LLC v. Charter Twp. of Ann Arbor*

The court held, *inter alia*, that because the plaintiff-DF Land Development LLC (DF Land) failed to meet the requisite burden of proof and the trial court's findings were entitled to substantial deference, the trial court properly granted summary disposition in favor of the defendant-township in this zoning dispute.

DF Land owns 54 acres of vacant land in the northeast portion of the township. The property is currently zoned "A-1," which permits farming and agricultural use or, alternatively, residential development restricted to construction of 1 residential unit for each 10 acre parcel. DF Land petitioned to rezone the property to "R-7," to allow for the development of multi-family residential units at a higher density of units for each acre of land. The Planning Commission and Board of Trustees denied the request for rezoning.

DF Land sued asserting, *inter alia*, a substantive due process claim as to the restricted use of the property. On appeal DF Land challenged the dismissal of its substantive due process claim, arguing that retention of A-1 zoning for the property was arbitrary and capricious. DF Land contended that the current zoning of the property was unreasonably restrictive as it

precluded a more economically viable use for the land. DF Land asserted "the current zoning violates due process as it effectively results in an inverse condemnation of the property through regulation."

The Appeals Court began with an analysis of whether the ordinance served a legitimate governmental interest.

> Evidence was submitted that the township's zoning ordinance served to preserve the rural character, natural features and availability of open areas by limiting residential development on the property through density restrictions. Even the expert proffered by DF Land agreed that the township's zoning ordinance served certain legitimate governmental interests and that the current zoning of the property advanced those interests.

While the trial court acknowledged that the experts presented by the parties disagreed as to the township's interest in maintaining the property as currently zoned and the benefits and impact of rezoning as requested by DF Land, "such disagreements comprised nothing more than differences of opinion, which are insufficient to demonstrate a constitutional violation." DF Land's argument that failure to rezone the property precludes its most economically viable function was irrelevant as "property need not be zoned for its most lucrative use." Since the denial of the rezoning request was consistent with the property's historical use

> and served recognized, legitimate governmental interests pertaining to the maintenance of the character of the area, it did not comprise an arbitrary or capricious act.

To the extent that DF Land implied that a substantive due process violation can occur where the property has been condemned by inverse condemnation, the court noted that an inverse condemnation claim was not pleaded. Further, the Appeals Court has specifically determined that

> claims of permanent or temporary regulatory taking of private property for public use without just compensation come within the protection of the Fifth Amendment

and thus, "cannot invoke the Due Process Clause" of the United States Constitution. Affirmed. (Source: State Bar of Michigan e-Journal Number: 50189, December 5, 2011)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2011/111711/50189.pdf

Due Process and Equal Protection

See *AM Rodriguez Assocs., Inc. v. City Council of the City of the Vill. of Douglas* on page 11.

Nonconforming Uses

See *Charter Twp. of Portsmouth v. Woys* on page 20.

Abandonment of nonconforming use

Court: Michigan Court of Appeals (Unpublished No. 299359, October 25, 2011)

Case Name: *Soo Twp. v. Pezzolesi*

The court vacated the trial court's order dismissing the case and remanded to the trial court for further proceedings consistent with the court's determination that the nuisance and junkyard ordinances are regulatory in nature and apply to defendant's prior nonconforming use. Defendant should have an opportunity to argue below that he either did not violate these regulatory ordinances, that they are not within the range of conferred powers, that they are unreasonable, or that they were adopted in bad faith and resulted in a regulatory taking of his property.

Defendant bought a parcel of property in the plaintiff-township in 1987. At the time, the property was zoned commercial. He soon began operating a junk/salvage yard. In 2001, the property was zoned residential. On August 3, 2009, Soo Township filed a "complaint for abatement of nuisance," arguing that defendant's property constituted a common law nuisance and was in violation of the nuisance and junkyard ordinances. The complaint also stated that the property was not zoned to be a junkyard and defendant was not licensed to operate a junkyard. He responded that he operated a salvage yard, not a junkyard, and the property was grandfathered prior to 2001. At trial, the township supervisor (P) testified that the property was zoned residential and defendant never requested a junkyard variance. P also said he did not see any commercial activity occurring on the property, the entryway to the property was regularly blocked, and there was no "signage" on the property. Pictures were introduced showing heavy-duty equipment, tires, and other items being stored there.

Defendant testified that he had used the property as an "equipment yard" or "salvage yard" since 1987, and that he salvaged "engines, transmissions, differentials,

axles, and tires" from equipment. Two weeks before trial, he sold some scrap stored on the property on two occasions for $213 and $140.32. When asked if he had employees, defendant said that when he needed help there were several men he called on Saturdays, when they were free. He did not know their last names and his Canadian company that sold scrap paid them.

The trial court dismissed all claims, and in a written opinion found that defendant continually operated his salvage business in its current form since 1987, the property was zoned commercial when defendant purchased it, and plaintiff rezoned the property to residential after he purchased it. The trial court concluded defendant's use of the property was a legal nonconforming use, and was not subject to the licensing requirements in the zoning ordinance.

The Appeals Court held that based on the trial evidence, it was not left with a definite and firm conviction that the trial court made a mistake in concluding that defendant continually operated his salvage business in its current form since 1987, and by extension, that he had not abandoned his right to the nonconforming use of his property. The court also concluded that the trial court erred in holding that defendant's property was not subject to the junkyard and nuisance ordinances. The court held that both ordinances at issue were regulatory ordinances that applied to defendant's prior nonconforming use. The trial court erred in concluding otherwise. (Source: State Bar of Michigan *e-Journal* Number: 50059, November 15, 2011)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2011/102511/50059.pdf

Court, Ripeness for Court's Jurisdiction, Aggrieved Party

See *Otsego County v. Bradford Scott Corp* on page 12.

See *AM Rodriguez Assocs., Inc. v. City Council of the City of the Vill. of Douglas* on page 11.

Must exhaust local administrative process before going to court

Court: Michigan Court of Appeals (Unpublished No. 296321, June 30, 2011)

Case Name: *Guay v. Beaver Creek Twp.*

Since the plaintiff-Guay failed to exhaust her administrative remedies when she did not appeal the decision of the Beaver Creek Township Planning Commission to the trial court, the appeals court held, *inter alia*, that her claim for declaratory relief based on issues previously addressed by the planning commission was barred.

Plaintiff's home is located in a residentially zoned neighborhood. Defendant prohibits the operation of businesses in a residentially zoned area with the exception of "Home Occupations" which are defined in defendant's Beaver Creek Township Zoning Ordinance §14.21. In 2006 or 2007 she began operating a cat haven in her home as a tax exempt nonprofit cat rescue service. Plaintiff claimed that she started the rescue operation in order to provide service to the community, which included taking in cats, neutering and spaying them, giving them shots, and offering them for adoption. She also asserted that the "rescued cats" were never let outside.

Township officials became aware of the cat haven after a newspaper article about plaintiff's business. B, the township's zoning administrator, contacted plaintiff and told her that defendant-township had received complaints about her property. He said that she could face a civil infraction under a local ordinance if the number of cats she housed exceeded the number allowed by the ordinance. He also advised her that she could seek a variance if she chose to continue the cat rescue operation. She retained an attorney, who notified B that she was not required to obtain a permit in order to operate a home business, and that she reserved the right to pursue any necessary course of action in furtherance of her position.

The attorney also enclosed an application for a special use permit. Plaintiff described her special use as a "Home Business/Feline Rescue/Trapping and Adoption/Shot Clinic for the Public Monthly." After a public hearing, the township planning commission decided that her animal rescue did not qualify as a "home occupation," and denied her application. She sought review by the township zoning board of appeals, but was told that based on the local ordinance, the planning commission's decision could only be appealed directly to the circuit court. Rather than appealing the decision, plaintiff chose to file this suit against defendant. Defendant argued her failure to appeal the decision of the planning commission precluded her from raising the issues here. She filed an amended complaint seeking declaratory relief in the form of an order declaring that her cat rescue was a "home occupation" consistent with the township zoning

ordinance.

Relying on *Krohn v. City of Saginaw*, the trial court granted defendant summary disposition because she failed to exercise her available administrative remedy to appeal the decision of the planning commission. The court concluded that like the plaintiff in *Krohn*, plaintiff's request for declaratory relief represented no more than a collateral attack on the planning commission's decision. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 49210, July 27, 2011)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2011/063011/49210.pdf

Open Meetings Act, Freedom of Information Act

See also *Jersevic v. District Health Dep't No. 2* on page 21.

Open Meeting Act does not Require Meetings be Called to Order

Court: Michigan Court of Appeals (Unpublished, Nos. 295836; 298811, September 15, 2011)

Case Name: *Loud v. Lee Twp. Election Comm'n*

The trial court properly granted summary disposition under Michigan Court Rules (MCR) 2.116(C)(8) for the defendant-Lee Township Election Commission and awarded $11,503.10 in sanctions against plaintiff-Loud for filing frivolous claims.

The trial court concluded, *inter alia*, that plaintiff's claim under the Open Meetings Act (OMA) (MCL 15.261 *et seq.*) for the alleged failure of the township board to call meetings to order using particular methods was devoid of arguable legal merit and thus, frivolous. The trial court did not clearly err. The OMA does not require meetings of public bodies to be called to order using a particular method. In fact, the OMA does not require that meetings of public bodies be called to order at all.

The trial court also found plaintiff's claims regarding M and W, requesting the trial court to order defendant to relieve M of her duties as an election inspector and to "punish" defendant for its failure to address the conduct of M and W, were devoid of arguable legal merit. The trial court's decision was not clearly erroneous. Plaintiff did not provide the trial court with any legal basis to conclude that defendant was vicariously liable for the alleged tortious acts of M and W. The "test" for a principal-agent relationship "is whether the principal has the right to control the agent." Plaintiff did not allege that M and W were acting as defendant's agents at the time of their alleged tortious conduct. Plaintiff did not provide the trial court with any legal basis to challenge M's appointment as an election inspector. MCL 168.674(3) provides that the county chairs of major political parties may challenge the appointment of an election inspector and thus, implicitly excludes other individuals such as plaintiff, from challenging the appointment. Further, the trial court found that plaintiff's claims relating to MCL 168.873 were devoid of arguable legal merit.

The trial court's conclusion was not clearly erroneous. Plaintiff had no legal basis to assert private causes of action against defendant on the basis of MCL 168.873. A trial court may sanction a party for filing frivolous claims regardless of whether the party is represented by counsel. Thus, the trial court could have sanctioned plaintiff even if she had no prior litigation experience. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 49689, September 22, 2011)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2011/091511/49689.pdf

Failure to set OMA fee means fee is $0.

Court: Michigan Court of Appeals (Unpublished No. 298016, September 20, 2011)

Case Name: *Speicher v. Columbia Twp.*

Concluding that the defendants set the fee provided for under the Open Meeting Act (OMA) (MCL 15.266(1)) at $0, through their silence, the court held that the plaintiff met each of the statutory duties imposed on him. Thus, the trial court erred in granting defendants summary disposition on his claim that they violated MCL 15.266(1), based on the fact he did not pay a fee. The court also held, *inter alia*, that genuine issues of material fact existed as whether an exception to the intracorporate conspiracy doctrine applied, and the trial court made impermissible factual findings.

It was undisputed that plaintiff requested notice before the meeting at issue occurred, the defendants did not establish a yearly fee as authorized by MCL 15.266(1), and plaintiff made no attempt to pay a fee. In ruling that because he did not pay a fee, plaintiff was not entitled to notice under MCL 15.266(1), the trial court implicitly concluded "that the statutory scheme placed the burden of paying a reasonable fee on plaintiff regardless of whether defendants had established any such fee."

The Appeals Court disagreed, concluding that it was "clear that plaintiff was precluded from paying the

fee in question only because defendants failed to establish it." MCL 15.266(1) sets forth two conditions precedent to a requesting party's entitlement to notice:

1. a written demand and
2. payment of a yearly fee.

Plaintiff made a written demand, but did not pay a yearly fee. Based on the plain language of the statute, the court could not conclude that the Legislature "intended to place a duty on a requesting party that was impossible to fulfill." The statute authorized the defendant-township to set "a yearly fee of not more than the reasonable estimated cost for printing and postage of" required notices. The term "not more than" showed that the Legislature placed a ceiling on the amount of the fee that can be charged a requesting party. However, the Legislature did not set a minimum limit on the fee. Thus, "defendants had the authority to set as low of a fee as they desired."

As to plaintiff's claim that defendants conspired to intentionally violate the OMA, the court concluded that factual questions existed as to whether the defendants-board members

> were acting for a personal purpose of their own, out of self-interest, and whether they had an independent personal stake in who became treasurer, and were actually acting on their own behalf. While the board was ultimately free to select whomever it wanted for the position of treasurer, it was not free to purposefully exclude plaintiff from the process . . . "

The court also determined that viewing the record in the light most favorable to plaintiff,

> reasonable minds could differ on the existence of a conspiracy. Simply because defendants' testimony was plausible does not preclude the possibility that plaintiff's characterization of events was true, and the trial court's finding to the contrary was erroneous.

Affirmed in part, reversed in part, and remanded. (Source: State Bar of Michigan *e-Journal* Number: 49723, September 27, 2011)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2011/092011/49723.pdf

Signs: Billboards, Freedom of Speech

Sign removal requirement is valid for cities

Court: Michigan Court of Appeals (Unpublished No. 298069, July 14, 2011)

Case Name: *City of Albion v. CLK Props., LLC*

In this dispute over application of the plaintiff-city's sign ordinance to require removal of an empty sign frame from defendant's property, the court held that the ordinance was a valid and enforceable exercise of plaintiff's police power under the The Home Rule City Act (MCL 117.1 *et seq.*) to which prior nonconforming use analysis was inapposite. Since there was no dispute that defendant's sign violated the sign ordinance, and defendant did not establish the necessary elements of the affirmative defense of laches, the court affirmed the trial court's order denying defendant's motion for summary disposition and granting plaintiff's motion for summary disposition.

Plaintiff-city took issue with a large sign from which the front and back advertising panels were removed that remained on the property. The record indicated that there actually were two sign frames on the property. The smaller of the two appeared customary in size and design for signs typically found along city streets. The second sign frame was substantially larger. Defendant described it as a "giant lighted edifice designed to be seen from the nearby expressway." The front and back panels were removed from each of the signs, leaving only the sign frames with attendant lighting fixtures and supporting polls in place.

Apparently, plaintiff took issue with only the continued presence of the larger sign frame. In May 2002, plaintiff enacted a sign ordinance. On or about September 8, 2008, plaintiff sent defendant a Notice of Sign Violation. Defendant did not take any action, and on July 6, 2009, plaintiff sued seeking removal of the sign. Defendant argued that the trial court erred by failing to recognize that defendant's sign constituted a valid prior nonconforming use, which may be continued pursuant to MCL 125.3208(1), despite plaintiff's enactment of the sign ordinance.

Defendant did not assert that the enactment of the sign ordinance was beyond plaintiff's authority, or that it was invalid or irregular in any way. Instead, the issue raised was whether the sign ordinance was a zoning ordinance, subject to well-established limitations on plaintiff's zoning authority and permitting the

continuation of prior nonconforming uses, or whether it was enacted under the authority given to plaintiff under the Home Rule City Act , with the result that nonconforming use analysis was inapposite.

The Appeals Court held that plaintiff's sign ordinance constituted a valid and enforceable exercise of its police power, and defendant's contention that it was entitled to maintain its sign as a prior nonconforming use lacked merit. Further, since defendant was not prejudiced by plaintiff's delay in enforcing its ordinance, laches did not bar plaintiff's claim. (Source: State Bar of Michigan *e-Journal* Number: 49299, August 1, 2011)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2011/071411/49299.pdf

Zoning ordinance restrictive sign provisions in scenic rural areas is okay

Court: Michigan Court of Appeals (Unpublished No. 293709, August 9, 2011)

Case Name: *Sackllah Invs. L.L.C. v. Charter Twp. of Northville*

The court held that the trial court properly ruled that the defendant-Township's sign ordinance was a constitutional land use restriction. The Township's intent was not to restrict the plaintiff's freedom of speech, "but to limit the proliferation of outdoor signs, especially in its more scenic rural areas." Further, plaintiff presented no evidence, beyond his personal beliefs, that the Township singled him out for negative treatment.

Sackllah, the sole owner of plaintiff-Sackllah Investments, was an aggrieved landowner in the Township. Sackllah developed a strip mall in a rural area of the Township. He attributed his lack of financial success in this venture to the Township's stringent restrictions on outdoor signs and the Township's refusal to make exceptions for him. Sackllah challenged the constitutional validity of the Township's sign ordinance on First Amendment grounds and the Township's actions in enforcing the ordinance. He contended that the ordinance was unconstitutional, both facially and as applied to his property. He asserted that the ordinance pervasively restricted both commercial and noncommercial protected speech in the "All Other Areas" sign district by prohibiting all permanent window signs and by severely limiting the use of temporary signs based on content. Sackllah "exhaustively" analyzed the ordinance under the standards applicable to content-based restrictions of both commercial and noncommercial speech before concluding that the ordinance failed all tests of constitutionality. He adapted the same arguments to his claim that the ordinance violated his right to free speech as applied.

The court concluded that portions of the Township's sign ordinance were clearly content-neutral and Sackllah did not challenge their validity as permissible regulations on the placement and design of signs. "Those provisions governing the size, physical placement, illumination, and other design elements of signs have no relation to the message conveyed." Also, these types of regulations impose only "reasonable time, place, and manner restrictions,"
were narrowly tailored to serve the Township's interests in traffic safety and aesthetics, and left open ample channels of communication as the speaker may erect signs within allowable size, design and location limits.

However, the court was given pause by the ordinance provisions exempting certain signs from the ordinance's prohibitions and permit requirements. Its concern stemmed from the fact that no clear standards guided its determination of whether the exemptions impermissibly favored the topic or viewpoint of speech, thus qualifying as "content-based." Choosing to follow the lead of the Sixth Circuit, the court held that pursuant to the standard advanced in *HDV-Greektown, LLC v. Detroit* (6th Cir.) (Content-based restrictions), the Township's sign ordinance was content-neutral. "The ordinance broadly prohibits certain types of signs regardless of content, such as banners, temporary window signs, inflatable signs and sandwich boards." The ordinance permits ground and permanent window signs, also without regard to content. "The ordinance controls the location of the permitted styles of signs, but not the speech itself."

The Appeals Court held that the Township's sign ordinance was narrowly tailored to achieve its stated significant government interests. Taken as a whole, the Township permitted larger and more numerous signs in congested commercial areas where the sign's presence will have little effect on the aesthetics of the surrounding area or an impact on traffic safety. However, in the rural area where plaintiff's property was located, "signage must be more severely restricted to accomplish the government's goals." The Township's ordinance also left open ample channels of communication. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 49504, August 31, 2011)

Full Text Opinion:

http://www.michbar.org/opinions/appeals/2011/080911/49504.pdf

Sign spacing requirements is okay

Court: Michigan Court of Appeals (Unpublished No. 296661, October 27, 2011)

Case Name: *Township of Blair v. Lamar OCI N. Corp.*

The court held, *inter alia*, in this action to abate a nuisance per se that after applying the four-prong test in *Metromedia, Inc. v. San Diego*, it was clear that The Blair Twp. Zoning Ordinance's (BTZO) 2,640 foot spacing requirement was constitutional. Michigan courts have found that billboards are a substantial hazard to traffic and aesthetics alone have been held to be a sufficient reason to justify billboard regulations. Thus, the trial court properly determined that the BTZO's spacing requirement was valid.

Defendant-Lamar OCI N. Corporation leases property on a major highway in the plaintiff-Blair Township on which it maintains commercial billboards. One was a "double decker" billboard, which has a two-level sign, installed prior to enactment of the relevant township ordinances in 2005. The billboard was a non-conforming use under the BTZO because its display area exceeded 300 square feet, its height exceeded 30 feet, and it was located closer than 2,640 feet from another billboard.

In December 2008 defendant removed the upper part of the sign and installed a LED display face on the remaining board. While the changes eliminated the nonconformities in the display area, the double decker face, and height, the distance between the billboard and other signs did not change. Defendant did not contact plaintiff before making changes to the billboard.

Plaintiff filed suit claiming that the billboard, which was a pre-existing nonconforming use, was a nuisance *per se*. Defendant filed a counterclaim alleging that the spacing requirement between signs violated the First Amendment, and that the BTZO did not set out the standards that controlled the zoning administrator's decision to approve or deny a request for a permit to change a nonconforming sign. The trial court found for the plaintiff-township. Defendant challenged the requirement in BTZO § 20.07.3 that the billboards be located 2,640 feet apart as constitutionally invalid. The trial court found that the enumerated purpose of the ordinance, to enhance the aesthetic desirability of the environment and reduce hazards to life and property in the township, satisfied the constitutional protections afforded commercial speech.

The Appeals Court agreed with the holding, affirmed, and lifted the stay previously imposed. (Source: State Bar of Michigan *e-Journal* Number: 50067, October 21, 2011)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2011/102711/50067.pdf

Zoning Administrator/Inspector, Immunity, and Enforcement Issues

Zoning violation, superintending control

Court: Michigan Court of Appeals (Unpublished No. 296035, May 17, 2011)

Case Name: *Township of Brooks v. Davis*

In this case involving an alleged zoning violation, the court held that the trial court erred by enjoining the plaintiff-Township from enforcing its zoning ordinance against defendant-Davis.

Davis asserted that during the winter of 2007-08, ice buildup on the lake damaged the revetment wall in front of her and her neighbors' properties. According to her, she had a patio behind the revetment wall, which was also damaged. The person she hired to make repairs stated in an affidavit that he replaced the revetment wall and installed a concrete cap over the preexisting patio, and added that the cap was necessary to protect the patio, which he did not enlarge in any way. On April 15, 2009, the Township's zoning administrator issued a citation to Davis for placing a concrete slab along the waterfront of her property in violation of the Township's zoning ordinance.

Davis did not request a formal hearing before the district court judge, so an informal hearing was held before the district court magistrate on May 11, 2009. The magistrate found that Davis had violated the ordinance and ordered her to be in compliance with the ordinance within 30 days. After the initial 30-day period, Davis was granted 30 more days to comply. The magistrate then determined at a July 27, 2009, hearing that Davis had still failed to comply, imposed a fine of $100, and again ordered her to bring the property into compliance within 30 days. However, the magistrate never reduced any of these orders to writing.

MCL 600.8719(4) requires the magistrate to enter an order upon finding a defendant responsible for a civil infraction, and MCR 2.602(A)(1) requires that orders be in writing.

> Until the magistrate enters a written order, its decision has no legal effect, because "a court speaks through its written orders and judgments,

not through its oral pronouncements."

By failing to enter an order, the magistrate failed to perform a clear legal duty. Further, there was no legal remedy because Davis could not properly appeal the magistrate's decision until a written order subject to appeal was entered. MCR 4.101(H)(2) controls appeals from informal hearings, and it does not provide for interlocutory appeals. However, "[a] person seeking superintending control in the circuit court must file a complaint with the court." No such complaint was filed here. Instead, the trial court invoked its power of superintending control *sua sponte*. If the trial court had a complaint for superintending control before it, the trial court would have been justified in responding by way of an order requiring the magistrate to enter a final order. But the trial court "erred in exercising its power of superintending control in the absence of an attendant complaint." It then "compounded its error by invoking superintending control as a vehicle through which to address the merits of the case, including Davis's due process claims."

Davis may address those issues through the usual course of appeals, once an appeal is properly set in motion. The trial court committed an error of law by exercising superintending control over an issue for which there was an appeal available. Thus, the trial court's use of the power of superintending control was an abuse of discretion. "It was also entirely unnecessary. As the magistrate never entered a written order, there was yet no final decision from which Davis could properly appeal." The court instructed the magistrate on remand to enter an order reflecting its original finding that Davis was responsible for a zoning violation. Davis will then have seven days from the entry of the magistrate's order to bring her appeal de novo to the district court. Reversed and remanded to the district court magistrate. (Source: State Bar of Michigan *e-Journal* Number: 48840, June 6, 2011)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2011/051711/48840.pdf

Building demolition and immunity

Court: Michigan Court of Appeals (Unpublished No. 301754, January 24, 2012)

Case Name: *Patton v. Village of Cassopolis*

Despite finding that it lacked subject matter jurisdiction over the complaint, the trial court correctly proceeded to hold that plaintiff failed to state a claim against defendants upon which relief could be granted. Thus, dismissal of the complaint under MCR 2.116(C)(8) was appropriate.

Plaintiff-Patton appealed the trial court's order granting defendants' motion for summary disposition arising from the condemnation and demolition of his commercial building located in the Village of Cassopolis. The village served plaintiff with a condemnation notice on March 26, 2009, describing the structure as "in a significantly deteriorated state of repair," setting out the many structural deficiencies, violations of the International Property Maintenance Code (IMPC), and advising plaintiff that the structure met the criteria for demolition set out in the IMPC. The notice, signed by the village manager (defendant-Gillette) directed plaintiff to take immediate action to secure the building, obtain demolition permits, hire a demolition contractor, and told him that if he failed to take this action, it would secure the building at plaintiff's expense and would solicit bids and hire a contractor to perform the demolition. The notice told plaintiff that he had 20 days to appeal the condemnation in writing and that the Village "fully intends to have this structure removed in the very immediate future."

Plaintiff appealed the notice by letter. At the village council meeting on April 13, 2009, he read a statement setting out his position as to the condition of the property. The village council voted to authorize the solicitation of bids for demolition. Later, the village denied plaintiff's appeal by letter, claiming that he failed to show any factual inaccuracy in the description of the condition of the building or its visible defects. On May 11, 2009, at a village council meeting plaintiff was again permitted to state his position as to the property's condition. Then, the council voted to accept a demolition bid. Plaintiff was notified by letter that the council had authorized demolition of the building and told him to remove any personal items. The building was demolished.

Plaintiff sued asserting claims of gross negligence, "simulating legal process," ethnic intimidation, conversion, severe physical and emotion distress and violation of various state laws. He claimed he was denied due process, *inter alia*. Defendants moved for summary disposition claiming that the trial court lacked subject matter jurisdiction. The trial court agreed because plaintiff failed to seek a writ of superintending control to prevent demolition and granted their motion for summary disposition.

The Appeals Court held that the trial court's

conclusion that it lacked subject matter jurisdiction was in error. It noted that defendants did not condemn and demolish plaintiff's building in accordance with the procedures specified by the Housing Law of Michigan (M.C.L. 125.538, *et seq.*). The court held that the defendants-village failed to follow the proper procedures and at no time was plaintiff provided with a notice of hearing to decide if the building was a dangerous structure. However, the trial court correctly concluded, *inter alia*, that the defendants-city were entitled to absolute immunity from tort liability arising from the decision to demolish the building. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 50772, February 27, 2012)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2012/012412/50772.pdf

Contempt of court for violation of court order concerning zoning violation

Court: Michigan Court of Appeals (Unpublished, No. 302319, February 9, 2012)

Case Name: *Charter Twp. of Portsmouth v. Woys*

Holding, *inter alia*, that defendant's due process rights were not violated by issuance of the contempt order and that the trial court's act of totally suppressing the nonconforming use fell within its remedial powers, the court affirmed the trial court's order finding defendant-Jerry L. Woys in contempt of court.

Defendant owns a parcel of real estate in the plaintiff-Portsmouth Township. The township sued for injunctive relief in 1983 seeking to restrain defendant-Woys from using his residential property as a junk yard in violation of the township's zoning and anti-blight ordinances. The trial court entered a consent order requiring defendant to "keep and maintain the front and yard areas surrounding the . . . garage free of scrap, junk, and disabled equipment and vehicles." He was also required to

> perform or permit no activities or conditions on the . . . premises which would constitute an expansion of the activities being conducted on the premises as of September 11, 1984, unless such uses are established entirely within enclosed buildings.

In the following years, plaintiff-township filed several verified petitions for order to show cause, each alleging defendant failed to comply with the consent order . A petition in 1997 resulted in issuance of an injunctive order, and a finding that defendant was in contempt of court. The trial court later entered an order purging this contempt and amending the consent order to include more specific restrictions on the use of his property.

Plaintiff-township later filed another verified petition for order to show cause alleging that defendant failed to comply with the amended consent order. After oral arguments and several personal visits to the property, the trial court issued a written opinion and order on March 25, 1999, finding defendant in contempt of court and ordering him to take numerous remedial actions. The order also provided that if he failed to comply,

> defendant shall cease and desist from any commercial operations or storage of any materials not presently permitted under the zoning ordinances as if a non-conforming use did not exist.

Plaintiff again filed a verified petition for order to show cause in July 2009. The trial court held hearings on August 24, 2009 and September 10, 2010. At the 2010 hearing, the trial court gave both parties an opportunity to present proofs, but both declined. The trial court noted that it had again visited the property, and stated, *inter alia*, there was "a great deal of additional materials that were brought onto that property" and that defendant had "flaunted this Court's order to clean the property up." The trial court found him in contempt of court and gave him the opportunity to purge the contempt by removing the materials on or before December 1, 2010. On January 10, 2011, the trial court entered an order *nunc pro tunc* finding defendant in contempt of court for failure to comply with prior court orders and imposing sanctions.

The Appeals Court noted, *inter alia*, that the trial court informed defendant of the "dire" consequences he would face if he failed to comply with prior court orders, including the possibility of jail time, which put him on notice of the nature of the charge brought against him. Further, he had months to prepare a defense, retain counsel, and the opportunity to present a defense. The court also rejected defendant's argument that the trial court lacked the authority to terminate his nonconforming use by way of a contempt order. A "court may take advantage of an expansion of a nonconforming use to compel a complete suppression of the nonconformity." (Source: State Bar of Michigan *e-Journal* Number: 50856, February 27, 2012)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2012/020912/50856.pdf

Keeping complainant source confidential - must be express desire of the informant

Court: Michigan Court of Appeals (Unpublished No. 306659, March 27, 2012)

Case Name: *Jersevic v. District Health Dep't No. 2*

The court held that there was a genuine issue of material fact as to the affirmative defense (there was a question of fact as to whether the informant wanted his or her identity to remain confidential) and the trial court properly denied the parties' motions for summary disposition. Further, the trial court's decision did not prejudice plaintiff-Jersevic (restaurant owner) because the trial court gave the parties notice of the factual issue to be determined at trial and time to conduct discovery. Even if it could reasonably be concluded that Michigan Court Rule 2.111(F)(3) limits the party asserting the affirmative defense to the specific acts alleged, given the trial court's rulings, the defendant-District Health Department Number 2 would have been entitled to amend its affirmative defenses to accord with the trial court's legal determinations.

Plaintiff owns a restaurant. A patron witnessed other patrons smoking at the end of the bar in violation of the ban on smoking in bars and restaurants. The patron-witness approached an employee about the violation, but the management took no action. The witness left and called in a complaint to the Health Department-defendant. The defendant called plaintiff about the allegations and asked him to re-educate his staff about the smoking ban. Plaintiff agreed and defendant closed the matter.

Plaintiff-restaurant owner then submitted a request under the Freedom of Information Act (FOIA) MCL 15.243(1)(b)(iv). He asked the Health Department to turn over all information as to the smoking complaint. The Health Department provided plaintiff with a copy of the complaint, but redacted the patron-witness-informant's name, telephone number, and facts that would reveal the informant's identity.

Plaintiff sued the Health Department in an effort to obtain an unredacted copy of the complaint. The defendant responded by filing an affirmative defense asserting that the informant was a confidential source - and as such - it was exempt from disclosing the informant's identity. In support of its defense, the Health Department alleged that it had a policy to treat all informants as confidential in order to prevent a chilling effect as to the persons coming forward to report violations.

Both parties moved for summary disposition. The trial court concluded that the Health Department's policy was insufficient to establish that a source was confidential, and that the confidential status must be determined from the informant's perception. The trial court held that there was a question of fact as to whether the informant wanted his or her identity to remain confidential and denied the motions. Plaintiff argued that defendant had only pleaded that the informant was a confidential source under its policy, and did not plead the subjective belief of the informant. The Health Department offered to amend its pleading, but the trial court proceeded with the trial.

The testimony of the Health Department's employee, who took the informant's complaint, indicated that the informant expressed a desire to remain anonymous. The trial court conducted an in camera examination of the informant via telephone. After talking with the informant and listening to closing arguments, the trial court stated that the evidence showed that the informant had an express understanding of confidentiality and had concerns that plaintiff might retaliate. The trial court entered an order of no cause of action. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 51274, April 11,, 2012)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2012/032712/51274.pdf

Demolish historic building owned by another city

Court: Michigan Court of Appeals (Unpublished No. 298802, April 19, 2012)

Case Name: *City of Grosse Pointe Park v. Detroit Historic Dist. Comm'n*

The court held that the review board reasonably concluded that petitioner failed to present adequate evidence in support of the requirements for issuing a notice to proceed with its proposed demolition. Thus, the court affirmed the trial court's order denying appellate relief to petitioner and affirming the decisions of the respondent-Commission and the review board, which rejected petitioner's petition to demolish vacant buildings it owns in Detroit.

The court rejected petitioner's argument that the trial court grossly misapplied the substantial-evidence test to the review board's findings and that the decisions of the review board and respondent were not supported by competent, material, and substantial evidence. The court concluded that the review board's

decision set forth a reasonable view that petitioner's evidence "was inadequate to establish that the buildings posed a hazard sufficient to warrant issuance of a notice to proceed." The court explained that petitioner's engineer's "letter offered no specific facts to establish the basis for his opinion that the buildings were in structural failure, unsafe, uninhabitable, and a public hazard and nuisance." Similarly, the court noted, petitioner's inspector's affidavit "gave no details to explain why he concluded that the buildings were dangerous to human life and public welfare." While the inspector documented his findings of building-code violations,

> the review board explained that historic buildings by their nature require work to comply with building codes and that the failure to meet current codes does not establish a distinct safety hazard warranting demolition.

Further, the review board adequately explained why, even if a hazard existed, petitioner's evidence failed to show that demolition was necessary to substantially improve or correct the conditions of the buildings. The court also rejected petitioner's argument that it was entitled to relief because the trial court failed to address an alleged substantial and material error of law committed by respondent when it applied the U.S. Secretary of the Interior's standards for rehabilitation.

The court concluded that, even though the trial court failed to correct the assumedly erroneous administrative conclusion that the Interior standards applied to a notice to proceed, its ultimate decision was correct. Finally, the court rejected petitioner's argument that it was entitled to relief because it was not required to prove that the buildings posed an immediate or imminent hazard to the public. The court explained that although the review board's description of petitioner's burden "was perhaps imprecise at times," the review board's language, viewed in its entirety, did not express a legal conclusion that the relevant provisions required proof that the hazard was immediate or imminent. (Source: State Bar of Michigan *e-Journal* Number: 51402, April 27,, 2012)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2012/041912/51402.pdf

Other Unpublished Cases

Need physician's statement and state card prior to use of Medical Marijuana

Court: Michigan Court of Appeals (Unpublished No. 303644, March 20, 2012)

Case Name: *People v. Orlando*

The court held that because the defendant did not receive the necessary physician's statement prior to the date of his arrest, and because the record showed there was no evidence that he could present to establish otherwise, the trial court did not err by denying his motion to assert a § 8 defense under the Michigan Medical Marijuana Act (MMMA) (MCL 333.26428 *et seq.*).

On July 28, 2009, police, acting under a search warrant, discovered five marijuana plants growing in a locked shed behind defendant's home. He was charged with manufacturing marijuana. Six days later, complaining of chronic lower back pain, he was seen by Dr. S. After his examination, Dr. S signed an affidavit stating that defendant was his patient, that he suffered from severe and chronic lower back pain, and the use of medical marijuana was likely to be a palliative or therapeutic benefit to him. After receiving the affidavit, defendant applied for and received a medical marijuana registry card from the Michigan Department of Public Health (MDPH). He then moved to have the criminal charges against him dismissed pursuant to § 8 of the MMMA.

The trial court denied the motion on the ground that defendant did not possess and had not applied for a medical marijuana registry card at the time the search warrant was issued. Before the trial court decided his motion, the prosecutor moved to exclude from trial any evidence showing that defendant subsequently possessed a registry card or was using marijuana for medical purposes. The trial court granted the prosecutor's motion on the basis that defendant's actions after the search warrant were irrelevant and any probative value would be more prejudicial that substantive. Defendant filed another § 8 motion. The trial court denied it on the same ground and also noted that defendant had failed to get a physician's statement prior to the date of his arrest. He was convicted.

On appeal he argued that the trial court erred by denying his motion to assert a medical marijuana defense. Pursuant to *People v. Reed*, a defendant must have received the required physician's statement prior

to the commission of the offense. It was undisputed that defendant did not do so, in fact, he had not even been examined by a physician prior to the date of the offense. Thus, he was not entitled to assert a defense under § 8. On appeal, he contended that the court's holding in *People v. Kolanek* only supported the denial of his motion to dismiss the charges, but did not support the denial of his motion to assert a § 8 defense. Here, there was no question of fact that defendant received the sort of physician's statement as called for under § 8 only after the date of the offense. He did not assert that there were any proofs that he could submit at trial that would establish he received a qualifying physician's statement on any date other than August 17, 2009. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 51216, April 4, 2012)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2012/032012/51216.pdf

Glossary

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

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

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

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

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

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

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

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

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

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

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

in camera
Refers to a hearing or inspection of documents that takes places in private, often in a judge's chambers. Depending on the circumstances, these can be either on or off the record, though they're usually recorded.

In camera hearings often take place concerning delicate evidentiary matters, to shield a jury from bias caused by certain matters, or to protect the privacy of the people involved and are common in cases of guardianships, adoptions and custody disputes alleging child abuse.
ORIGIN
Lat. *in chambers*.

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

inter alia
n adverb among other things.
ORIGIN
from Latin

Judgment *non obstante veredicto*
also called **judgment notwithstanding the verdict**, or **JNOV.**

A decision by a trial judge to rule in favor of a losing party even though the jury's verdict was in favor of the other side. Usually done when the facts or law do not support the jury's verdict.

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

littoral
n *noun* Land which includes or abuts a lake or Great Lake is "littoral." When an inland lake it includes rights to access, use of the water, and certain bottomland rights. When a Great Lake it includes rights to access and use of the water. See "riparian."

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

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

nunc pro tunc
adj. Law changing back to an earlier date of an order, judgment or filing of a document. Such a retroactive re-dating requires a court order which can be obtained by a showing that the earlier date would have been legal, and there was error, accidental omission or neglect which has caused a problem or inconvenience which can be cured.
ORIGIN
Latin, "now for then."

obiter dictum
n *noun* (plural **obiter dicta**) *Law* a judge's expression of opinion uttered in court or in a written judgement, but not essential to the decision and therefore not legally binding as a precedent.
ORIGIN
Latin obiter 'in passing' + dictum 'something that is said'.

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

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

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

riparian
n *noun* Land which includes or abuts a river is riparian, and includes rights to access, use of the water, and certain bottomland rights. *Thies v Howland*, 424 Mich 282, 288 n 2; 380 NW2d 463 (1985). (Land which includes or abuts a lake is defined as "littoral." However, "the term 'riparian' is often used to describe both types of land," *id.*) See "littoral."

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

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

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

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

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

Contacts

For help and assistance with land use training and understanding more about these court cases contact your local MSU Extension land use educator. For a list of who they are, territory covered by each and contact information see: http://tinyurl.com/msuelanduse

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

[May 10, 2012 (5:27pm); C:\Documents and Settings\Kurt\My Documents\wp\LU Court Cases\SelectedPlan&ZoneDecisions2011-12.wpd]