MICHIGAN STATE UNIVERSITY | Extension

Selected Planning and Zoning Decisions: 2016
May 2015-April 2016

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This public policy brief summarizes the important state and federal court cases and Attorney General Opinions issued between May 1, 2015 and April 30, 2016.

Table of Contents

Restrictions on Zoning Authority

See *Reed et al v. Town of Gilbert, Arizona, et al.*, page 7.

Compliance with GAAMPs required for RTFA protection for a new farm in an area

Case: *Township of Williamstown v. Hudson*
Court: Michigan Court of Appeals (311 Mich. App. 276; 874 N.W.2d 419; 2015 Mich. App. LEXIS 1344, May 19, 2015)
[This opinion was originally released as an unpublished opinion on May 19, 2015, now a published case.]

Holding that the Right to Farm Act (RTFA) (MCL 286.471 *et seq.*) did not protect the defendant's Hudson family farm from the plaintiff-Township's zoning ordinances in light of the trial court's determination that the farm was not in compliance with the Manure Management and Utilization Manual (Manure Manual), the court affirmed the trial court's ruling that the farm was a nuisance *per se* and enjoining defendant's farming operations.

In 2012 the defendants started the farm, with a variety of farm animals, in a zoning district where it was not disputed the zoning ordinance does not permit such animals. Defendant claimed they had RTFA protection because the farm was (1) a farm operation, (2) producing farm products, (3) which was commercial, and (4) followed generally accepted agricultural and management practices (GAAMPs). The township countered contending GAAMPs were not being followed.

The RTFA's protections constitute an affirmative defense. Thus "the party asserting RTFA protection bears the burden of proving" that:

(1) "the challenged condition or activity constitutes a 'farm' or 'farm operation'" and
(2) "the farm or farm operation conforms to the applicable GAAMPs."

Only the second element was at issue. The trial court held three GAAMPs applied to this farm, but lack of compliance existed with one of the GAAMPs concerning Manure Manual. As to the farm's manure practices, the investigation by an The Michigan Department of Agriculture and Rural Development (MDARD) Environmental Manager (W) "clearly outlined problems concerning direct discharge from a surface grate, as well as issues concerning a bare soil area, manure runoff, and necessary soil testing." Despite defendant's submission of two Manure Management System Plans (MMSPs), W indicated on August 23, 2013 that "the farm was still not compliant with the Manure Manual. Even worse, as of that date, MDARD still had not received any documentation" from defendant as to "the potential pollution on his property."

He did not contest the Manure Manual's applicability on appeal. Rather, he claimed the farm complied with it, citing his "wife's testimony that the farm complied with all applicable GAAMPs and that the necessary corrective action occurred after" W's most recent letter. However, because the substance of the trial court's ruling fell under MCR 2.504(B)(2), it was empowered "to make its own factual findings and credibility determinations, which it did." It found the wife's testimony "incredible based upon her contradictory statements regarding the number of animals on the farm and her understanding about how the property was zoned" when the family moved onto their land. It was on these grounds that the trial court apparently discounted her conclusion that their remedial measures (conducted after W's last letter) "satisfied the Manure Manual's requirements."

Finding that her testimony was "convoluted at best on these points," the court concluded that it was "in no position to disturb the trial court's decision to discount her testimony." (Source: State Bar of Michigan *e-Journal* Number: 60000, 60333; June 2, 2015 and July 7, 2015.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2015/070215/60333.pdf

Ordinance against horses (including "service" horses) within a city violates ADA

Case: *Anderson v. City of Blue Ash*
Court: U.S. Court of Appeals Sixth Circuit (798 F.3d 338; 2015 U.S. App. LEXIS 14293; 2015 FED App. 0191P (6th Cir.) August 14, 2015

Because disputes remained whether plaintiff-Anderson's disabled daughter's (C.A.) miniature service horse entitled her to a "reasonable modification" of the defendant-City's ordinance prohibiting horses within the City limits, the City was improperly granted summary judgment on the

plaintiffs' Americans with Disabilities Act (ADA) (42 USC 12101 *et seq.*) reasonable modification claim. The court also reversed summary judgment for the City on plaintiffs' Fair Housing Amendments Act (FHAA) (42 USC § 3601 *et seq.*) reasonable accommodation claim.

After determining that Anderson's conviction in municipal court for violating the City's ordinance had no preclusive effect on her civil case under Ohio law, the court considered the City's argument that no ADA reasonable modification was required because the horse did "not help C.A. with her daily life activities . . . ." Anderson claimed that the miniature horse was "individually trained . . . to assist C.A. by steadying her as she walks so that she can enjoy independent recreation and exercise in her backyard."

The court noted that there was no "authority to support, the proposition that an animal must be needed in all aspects of daily life or outside the house to qualify for a reasonable modification under the ADA. Many service animals are trained to provide specialized assistance that may be necessary only at certain times or places." Construing the evidence in Anderson's favor, the court held that the horse was "'individually trained to do work or perform tasks for the benefit of the individual with a disability[,]'" as required under ADA regulations.

The court then considered the "assessment factors" for modification, and concluded that fact issues remained; thus, summary judgment for the City on the ADA reasonable-modification issue was improper. However, it was entitled to summary judgment on the ADA intentional-discrimination claim because the evidence showed that it "was citizens' complaints that motivated the City's actions," and that there was "no evidence to support an inference of discriminatory intent."

As for the FHAA reasonable-accommodation claim, the court determined that there were genuine disputes whether Anderson's requested accommodation was "reasonable and necessary to afford her and C.A. an equal opportunity to use and enjoy their dwelling," and it reversed summary judgment for the City on that claim. It affirmed summary judgment for the City on the plaintiffs' FHAA disparate-treatment and disparate-impact claims. (Source: State Bar of Michigan *e-Journal* Number: 60637; August 24, 2015.)

Full Text Opinion:
http://www.michbar.org/file/opinions/us_appeals/2015/081415/60637.pdf

Civil Rights

Civil contempt, Governmental Immunity, Substantive and Procedural Due Process.

Case: *Paterek v. Village of Armada, MI* (801 F.3d 630; 2015 U.S. App. LEXIS 15932; 2015 FED App. 0223P, September 8, 2015)
Court: U.S. Court of Appeals Sixth Circuit

The U.S. District Court (east Michigan District) abused its discretion by failing to hold the defendant-Village of Armada in contempt after it violated a clear and unambiguous court order to issue a Certificate of Occupancy (CoO) for additional business space that conformed with the then existing Special Approval Land Use permit (SUP). Also, because a jury could reasonably find that the defendants retaliated against the plaintiffs-Patereks for having complained about Village officials, in violation of the First Amendment, the defendants were improperly granted summary judgment on most of the plaintiffs' constitutional claims.

This case reflects a long standing set of several issues between Paterik (concerning a business he owns); a member of the village planning commission, Delecke; and the Village of Armada. A short summary here does not do it justice. The court's opinion (below) does for those interested. Paterik bought a former school auto shop for his injection molding company. He applied three times for a SUP and received the SUP in 1993. The SUP had a 7am-8pm limit on hours of operation, pave a parking lot, and prohibiting "outside storage of any materials, supplies, or parts." The business was very successful, resulting in exceeding operating hours to meet demands, and not paving the parking lot. In 1995 Paterek pro-actively re-visited the planning commission to try to address those issues and modify the SUP conditions. Then the village sent a letter informing Peterek of the village's intent to take legal action for failing to comply with the SUP and building a retaining wall. Peterek immediately built the retaining wall and putting crushed limestone on the parking lot as an intermediate solution before paving the parking lot. The planning commission rejected the request for two more years to pave the lot, allowing three more employees, and different operating hours. Planning commissioner Delecke made the motion to deny. Delecke attended the Village Council meeting to oppose modification of the SUP. Village Council voted to investigate the Planning Commission's issuing the

SUP in the first place.

In 2012 the village building inspector notified Peterek of an SUP violation because of outside storage of work materials. Subsequent planning commission meetings intensified the dispute. Outside storage of work materials were ultimately removed. But further action was taken, at the instruction of Delecke, for removal of outdoor storage of materials (a barbeque grill located next to an outdoor employee lunch area). Paterek did not agree the barbeque grill was "outdoor storage", and the village issued its first violation ticket in May 2012.

In 2004 Paterek was appointed chair of the Armada Downtown Development Authority (DDA). Peterek alleged that Delecke campaigned to have Paterek removed from the DDA because of the above disputes. But in 2011 Peterek was still on the DDA and had been elected Supervisor of Armada Township. Delecke's and Peterek's disputes intensified, and in 2011 the village sent a letter threatening his removal from the DDA chairmanship. Ultimately Village Council dissolved the DDA board in 2013 and appointed Delecke as the new chairman of the DDA (with the Planning Commission constituting the new DDA board.

In 2013 Peterek expended by buying neighboring land and workshop building with a second floor apartment. The village, with Delecke being the driving source, sent notice that new, or expended business on the neighboring land required village approval and a CoO. Peterek applied for a SUP, but withdrew the application when his attorney advised the existing SUP for the neighboring property transfers to Peterek upon purchase of the land and is still a valid SUP. But a SUP and CoO were needed and applied for, for repairs and renovation to the apartment.

The village filed suit. Peterek found evidence that seven other businesses had no CoO, and other irregularities when compared to what Peterek was required to do. Peterek filed suit against the village, Delecke in September 2013.

> Relevant to this appeal, Plaintiffs-Peterek asserted a retaliation claim under the First Amendment, substantive and procedural due process claims under the Fourteenth Amendment, and an equal protection claim, also under the Fourteenth Amendment. Plaintiffs also asserted that the Village violated the Michigan Freedom of Information Act.

The Appeals Court found the original SUP contained only one condition as to hours of operation, while the CoO contained "rigid time constraint[s]." The Village violated the district court's order by "patently disregard[ing] the district court's unequivocal instruction for Defendants to issue a CoO that conformed with the then existing SUP."

The district court did not abuse its discretion by denying the plaintiffs' motion for criminal contempt. It erred by granting the defendants summary judgment on the plaintiffs' First Amendment retaliation claim where they offered sufficient circumstantial evidence that "their recurring speech activities resulted in an escalating animus between Defendants and the Patereks, which ultimately led Defendants to take the adverse actions at issue in this case." Because "a reasonable jury could conclude that Defendants retaliated against Plaintiffs for their protected speech activity," summary judgment for the defendants on the retaliation claim "was inappropriate[.]"

> A jury could also find that they arbitrarily and capriciously ticketed Plaintiffs, in violation of substantive due process; [and] that Defendants, due to their animus against Plaintiffs, subjected Plaintiffs' business to disparate treatment, in violation of the Equal Protection Clause[.]

However, they were properly granted summary judgment on the plaintiffs' procedural due process claim.

Defendant-Delecke, the Commissioner of the Village Planning Commission, was not entitled to qualified immunity because the evidence suggested that he "used his government post to harass and retaliate against Plaintiffs by causing tickets to be issued and by denying Plaintiffs the rights bestowed to them under their SUPs." Since each alleged constitutional violation stemmed "from the decision of an official with final decision-making authority related to the particular policy" at issue, "the Village is liable if a jury finds in Plaintiffs' favor." (Source: State Bar of Michigan *e-Journal* Number: 60737; September 14, 2015.)

Full Text Opinion:
http://www.michbar.org/file/opinions/us_appeals/2015/090815/60737.pdf

Substantive Due Process

See also: *Paterek v. Village of Armada, MI*, page 3.

Due Process and Equal Protection

See also: *Paterek v. Village of Armada, MI*, page 3.

Repeated notices adequate for due process

Case: *Yang v. City of Wyoming, MI* (793 F.3d 599; 2015 U.S. App. LEXIS 12017; 2015 FED App. 0146P (6th Cir.), July 13, 2015)

Court: U.S. Court of Appeals Sixth Circuit [This appeal was from the WD-MI.]

The court held that the plaintiffs-property owners (the Yangs) received adequate notice before the defendant-City of Wyoming demolished their "dilapidated" commercial building.

The city sent notice through signature-required certified mail, but the letter was returned unclaimed. Then, "the city made four other attempts to reach the Yangs on top of the certified mail it sent to the couple's home address." Notices were posted on the Yangs' building, and they received a notice regarding the demolition hearing by regular mail. This hearing notice was also forwarded to the Yangs' realtor. After the hearing and before the demolition, the city sent them an additional letter by regular mail.

"All of these forms of notice considered, the city satisfied due process before tearing down a building that even the Yangs do not deny was dangerous and dilapidated." The court rejected the Yangs' "divide and conquer approach" in attacking the adequacy of notice, noting that "neither Jones nor any other case holds that the city acts unreasonably simply because its subsequent responses would not—each by themselves—independently satisfy due process . . . ." At "some point, the question must turn from how often—and in how many forms—notice is due to how many times the property owner neglects to respond with the diligence that is due. Either way, the city satisfied its reasonableness requirements."

The fact that the Yangs "chose (apparently) not to visit their property for fourteen months or chose (apparently) not to open their mail does not diminish the city's reasonable efforts at providing notice. 'The law expects at least some diligence from the property owner,' . . . and that reality necessarily affects how courts gauge reasonable efforts." The court affirmed the district court's grant of summary judgment to the city.

There was dissenting opinion which found the notice attempts by the city does not pass constitutional muster in part because the content of the notices did not provide enough information. (Source: State Bar of Michigan *e-Journal* Number: 60361; July 16, 2015.)

Full Text Opinion:
http://www.michbar.org/file/opinions/us_appeals/2015/071315/60361.pdf

Zoning Amendment: Voter Referendum

Must be citizen of county to challenge zoning referendum in court

Case: *Salem Springs, LLC v. Salem Twp.*

Court: Michigan Court of Appeals (312 Mich. App. 210; 2015 Mich. App. LEXIS 1669, September 8, 2015)

Holding that the plaintiff-LLC lacked statutory standing to challenge the results of the zoning referendum election under the revised judicature act (MCL 600.4545) because it was not a citizen of the county, the appeals court reversed the trial court's order denying the intervening defendants' summary disposition motion and remanded for entry of an order granting their motion.

The underlying dispute concerned the zoning of property in Washtenaw County. Plaintiff previously owned it, but transferred it to another LLC (a non-party, Salem Springs Owner (SSO)) in 2009. Plaintiff is the sole manager of SSO, but they are separate and distinct LLCs. The property was zoned Agricultural/Residential, but the defendant-Salem Township's Board of Trustees approved plaintiff's application to rezone it to General Commercial. One of the intervening defendants successfully petitioned to have the zoning amendments submitted to the electorate for approval, and the voters reversed the township board's zoning decision.

Plaintiff filed an amended complaint, including a *quo warranto* action challenging the election results under MCL 600.4545. The intervening defendants moved for summary disposition, arguing that plaintiff lacked statutory standing to bring an action under MCL 600.4545. The trial court concluded that plaintiff had standing. The court disagreed. To "file suit under MCL 600.4545, plaintiff must qualify as a 'citizen of the county,' and the issue" became whether it was a citizen of Washtenaw County.

The appeals court consulted a dictionary to

determine the plain meaning of the phrase and concluded that, "to be a 'citizen of the county' it would appear that, at a minimum, the person would need to inhabit or reside in the specific county in question." Plaintiff clearly "did not in any way inhabit Washtenaw County as required to be considered a 'citizen of the county.'" Its registered office was in Oakland County, other documents listed its address as in Wayne County, and there was no indication that it owned property in Washtenaw County or had a place of business there. Even if SSO's "mere ownership of the property establishes citizenship" for SSO "in Washtenaw County, neither plaintiff's former ownership of the property nor its management of" SSO conferred this citizenship on plaintiff. Further, it could not amend its pleadings to add SSO as a plaintiff because the time limit for bringing the action has expired and the relation-back doctrine does not apply to the addition of new parties. (Source: State Bar of Michigan *e-Journal* Number: 60740, September 10, 2015.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2015/090815/60740.pdf

Open Meetings Act, Freedom of Information Act

University "informal" meetings can be closed to the public (applies only to university governing boards)

Case: *Detroit Free Press, Inc. v. University of MI Regents*
Court: Michigan Court of Appeals (Published Opinion No. 328182, 2016 Mich. App. LEXIS 852, April 26, 2016)

The court affirmed the Court of Claims' holding that defendant's "closed informal sessions" do not violate the OMA and the Michigan Constitution.

Plaintiffs contended that "closed informal sessions" defendant holds violate the OMA and article 8, § 4 of the Constitution. At issue was "defendant's practice of conducting informal meetings, which plaintiffs alternatively call 'closed door meetings,' privately."

Defendant described the informal meetings as "being more informational than decisional, and although agendas were prepared for them and a quorum was present, voting did not take place and was not even discussed at the informal meetings."

Plaintiffs contended, "very generally, that all such meetings are required by law to be open to the public." Plaintiffs' claims on appeal depended on their assertions that the facts here were distinguishable from those in *Federated Publ'ns, Inc. v. Board of Trs. of MI State Univ.* and that the Court of Claims relied on *dicta*.

> The latter argument failed
> as a matter of well-established precedent that if our Supreme Court "intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such a decision is not a *dictum*, but is a judicial act of the court which it will thereafter recognize as a binding decision."

It was clear that nothing in *Federated* "was in the nature of a gratuitous and irrelevant remark with no bearing on the case." To the extent any discussion in Federated was relevant here, the Court of Claims was obligated to treat it as binding. The former argument also failed. Plaintiffs were correct that *Federated* "entailed the rather special circumstance of a university searching for a replacement" president. However, the Supreme Court "did not employ reasoning that was restricted only to such contexts, and indeed noted that under discussion was 'the question of the Legislature's power to regulate public universities.'" It was clear and unambiguous that the Supreme Court "has already determined the outcome of this matter, and the Court of Claims has already applied it. The Constitution permits defendant to hold informal meetings in private; defendant is only required to hold its formal meetings in public." (Source: State Bar of Michigan *e-Journal* Number: 62565, April 28, 2016.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2016/042616/62565.pdf

Conflict of Interest, Incompatible Office, Ethics

Okay to be on Township Board of Review and Planning Commission

Michigan Attorney General Opinion No. 7289
April 11, 2016.

In answer to the question as to if a member of a township's board of review may also be a member of the same township's planning commission under the Michigan Planning Enabling Act (MPEA), MCL 125.3801 *et seq.* the Michigan Attorney General issued an opinion which said:

Neither the Michigan Planning Enabling Act, MCL 125.3801 *et seq.*, nor the General Property Tax Act, 1893 PA 206, MCL 211.1 *et seq.*, prohibits a member of a

township board of review from simultaneously serving as a member of a township planning commission in the same township.

The Incompatible Public Offices Act, 1978 PA 566, MCL 15.181 *et seq.*, does not prohibit a member of a township board of review from simultaneously serving as a member of a township planning commission in the same township unless circumstances arise that would result in the individual being unable to protect, advance, and promote the interests of both offices simultaneously.

Copy of the opinion:
http://www.ag.state.mi.us/opinion/datafiles/2010s/op10368.htm

Signs: Billboards, Freedom of Speech

See also: *Paterek v. Village of Armada, MI*, page 3.

Case: *Reed et al v. Town of Gilbert, Arizona, et al*
Court: Supreme Court of the United States (134 S. Ct. 2900; 189 L. Ed. 2d 854; 2014 U.S. LEXIS 4687; 83 U.S.L.W. 3011, June 18, 2015)

The U. S. Supreme Court ruled that differentiating types of signs (based on subject matter, sign function, or purpose) for different regulations than other signs are content-based regulations of speech which is a regulation that is not allowed. In this case the types of signs were political signs for an election, ideological signs, and temporary directional signs. This court case means that many, if not all sign ordinances or the sign part of a zoning ordinance in Michigan needs, to be reviewed and likely changed.

THOMAS, J., delivered the opinion of the court, in which ROBERTS, C. J., and SCALIA, KENNEDY, ALITO, and SOTOMAYOR, JJ., joined.

ALITO, J., filed a concurring opinion, in which KENNEDY and SOTOMAYOR, JJ., joined.

BREYER, J., filed an opinion concurring in the judgment.

Kagan, J., filed an opinion concurring in the judgment, in which GINSBURG and BREYER, JJ., joined.

Gilbert, Arizona (Town), has a comprehensive code (Sign Code) that prohibits the display of outdoor signs without a permit, but exempts 23 categories of signs, including three relevant here. "Ideological Signs," defined as signs "communicating a message or ideas" that do not fit in any other Sign Code category may be up to 20 square feet and have no placement or time restrictions. "Political Signs," defined as signs "designed to influence the outcome of an election," may be up to 32 square feet and may only be displayed during an election season. "Temporary Directional Signs," defined as signs directing the public to a church or other "qualifying event," have even greater restrictions: No more than four of the signs, limited to six square feet, may be on a single property at any time, and signs may be displayed no more than 12 hours before the "qualifying event" and 1 hour after.

Petitioners, Good News Community Church (Church) and its pastor, Clyde Reed, whose Sunday church services are held at various temporary locations in and near the Town, posted signs early each Saturday bearing the Church name and the time and location of the next service and did not remove the signs until around midday Sunday. The Church was cited for exceeding the time limits for displaying temporary directional signs and for failing to include an event date on the signs. Unable to reach an accommodation with the Town, petitioners filed suit, claiming that the Sign Code abridged their freedom of speech. The U. S. District Court denied their motion for a preliminary injunction, and the Ninth U. S. Circuit affirmed, ultimately concluding that the Sign Code's sign categories were content neutral, and that the Sign Code satisfied the intermediate scrutiny accorded to content-neutral regulations of speech.

The U.S. Supreme Court held the Sign Code's provisions are content-based regulations of speech that do not survive strict scrutiny. (See pages 6–17 in the Supreme Court's opinion.) The supreme court ruling included:

(a) Because content-based laws target speech based on its communicative content, they are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *E.g., R. A. V. v. St. Paul*, 505 U. S. 377, 395. Speech regulation is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. *E.g., Sorrell v. IMS Health, Inc.*, (564 U.S. 1051; 131 S. Ct. 3091; 180 L. Ed. 2d 911; 2011 U.S. LEXIS 5003; 80 U.S.L.W. 3003, June 28, 2011). And courts are required to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. *Id.*, at ___. Whether laws define regulated speech by particular subject matter or by its function or purpose, they are subject to strict scrutiny. The same is true for laws that, though facially content neutral, cannot be " 'justified without reference to the content of the

regulated speech,' " or were adopted by the government "because of disagreement with the message" conveyed. *Ward v. Rock Against Racism*, 491 U. S. 781, 791. See pages 6–7 in the Supreme Court's opinion.

(b) The Sign Code is content based on its face. It defines the categories of temporary, political, and ideological signs on the basis of their messages and then subjects each category to different restrictions. The restrictions applied thus depend entirely on the sign's communicative content. Because the Sign Code, on its face, is a content-based regulation of speech, there is no need to consider the government's justifications or purposes for enacting the Sign Code to determine whether it is subject to strict scrutiny. See page 7 in the Supreme Court's opinion.

(c) None of the Ninth Circuit's theories for its contrary holding is persuasive. Its conclusion that the Town's regulation was not based on a disagreement with the message conveyed skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech. *Cincinnati v. Discovery Network, Inc.*, 507 U. S. 410, 429. Thus, an innocuous justification cannot transform a facially content-based law into one that is content neutral. A court must evaluate each question—whether a law is content based on its face and whether the purpose and justification for the law are content based—before concluding that a law is content neutral. *Ward* does not require otherwise, for its framework applies only to a content-neutral statute.

The Ninth Circuit's conclusion that the Sign Code does not single out any idea or viewpoint for discrimination conflates two distinct but related limitations that the First Amendment places on government regulation of speech. Government discrimination among viewpoints is a "more blatant" and "egregious form of content discrimination," *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 829, but "[t]he First Amendment's hostility to content-based regulation [also] extends . . . to prohibition of public discussion of an entire topic," *Consolidated Edison Co. of N. Y. v. Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 537. The Sign Code, a paradigmatic example of content-based discrimination, singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter.

The Ninth Circuit also erred in concluding that the Sign Code was not content based because it made only speaker-based and event-based distinctions. The Sign Code's categories are not speaker-based—the restrictions for political, ideological, and temporary event signs apply equally no matter who sponsors them. And even if the sign categories were speaker based, that would not automatically render the law content neutral. Rather, "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Turner Broadcasting System, Inc. v. FCC*, 512 U. S. 622, 658. This same analysis applies to event-based distinctions. See pages 8–14 in the Supreme Court's opinion.

(d) The Sign Code's content-based restrictions do not survive strict scrutiny because the Town has not demonstrated that the Sign Code's differentiation between temporary directional signs and other types of signs furthers a compelling governmental interest and is narrowly tailored to that end. See *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U. S. ___, ___. Assuming that the Town has a compelling interest in preserving its aesthetic appeal and traffic safety, the Sign Code's distinctions are highly underinclusive. The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town when other types of signs create the same problem. See *Discovery Network*, *supra*, at 425. Nor has it shown that temporary directional signs pose a greater threat to public safety than ideological or political signs. See pages 14–15 in the Supreme Court's opinion.

(e) This decision will not prevent governments from enacting effective sign laws. The Town has ample content-neutral options available to resolve problems with safety and aesthetics, including regulating size, building materials, lighting, moving parts, and portability. And the Town may be able to forbid postings on public property, so long as it does so in an evenhanded, content-neutral manner. See *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U. S. 789, 817. An ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—e.g.,warning signs marking hazards on private property or signs directing traffic—might also survive strict scrutiny. Pp. 16–17. 707 F. 3d 1057, reversed and remanded.

(Source U.S. Supreme Court Syllabus (headnote)
Full text opinion:
http://www.supremecourt.gov/opinions/14pdf/13-502_9olb.pdf

Zoning Administrator/Inspector, Immunity, and Enforcement Issues

See also: *Township of Williamstown v. Hudson*, page 2.
See also: *Paterek v. Village of Armada, MI*, page 3.

Loss of qualified immunity in local ordinance enforcement

Case: *DiLuzio v. Village of Yorkville, OH* (796 F.3d 604; 2015 U.S. App. LEXIS 13720; 2015 FED App. 0179P (6th Cir.), August 6, 2015)
Court: U.S. Court of Appeals Sixth Circuit

The U.S. Sixth Circuit Appeals Court held that the defendants-Village of Yourkville, Ohio, (mayor, fire chief, and police chief) government officials were properly denied qualified immunity on the plaintiff-property owner's due process claims arising from the demolition of one of his burned buildings.

Plaintiff-DiLuzio argued that defendant-Mayor DiFilippo wanted him to sell his property to a developer, so DiFilippo "knowingly faked" an "emergency situation" to order the demolition and then threatened huge daily fines to pressure him into selling.

Discarding the "fact-based or 'evidence sufficiency' portion" of the defendants' appeal, the court accepted the plaintiff's record-supported facts and concluded that a jury could reasonably find from the evidence that defendant-Police Chief Morelli's conduct violated substantive due process. It noted that it had no jurisdiction to review Morelli's "disagreement with the facts (or inferences therefrom) as that is solely a challenge to DiLuzio's evidence." It concluded that a jury could reasonably find "that Chief Morelli 'intended to injure' DiLuzio in a way 'unjustifiable by any governmental interest' such that his conduct 'shocks the conscience' . . . ." A jury could also reasonably find that a plan existed between "'Morelli and Mayor DiFilippo to undertake a series of flawed legal actions'" to force DiLuzio to sell his property.

The court lacked jurisdiction to decide the Mayor's appeal to the extent he claimed that he believed the damage to the burned building created an emergency. This argument was solely a challenge to DiLuzio's evidence. DiLuzio presented evidence that the Mayor violated procedural due process by "act[ing] in bad faith," and that there was no actual emergency or need for "quick action"—his stated reason for demolition was "pretextual."

As for DiLuzio's conspiracy claim, the court held that, assuming the "intracorporate conspiracy doctrine" applied to municipal government officials in a § 1983 action, it did not apply here because the conspiracy would "fall outside the scope of their employment." The court also concluded that a jury could reasonably find from DiLuzio's evidence that defendant-Police Officer Davis's conduct was an "unlawful seizure." DiLuzio asserted that "Davis unlawfully physically seized him, despite his verbal refusal, and placed him in a police car to drive him to a meeting." A jury could reasonably find "that a reasonable person would not have felt free to ignore Officer Davis in this context . . . ."

NOTE: Qualified immunity shields government officials in the performance of their discretionary functions from standing trial for personal liability, unless their actions violate clearly established rights: (1) a constitutional right which was (2) clearly established. This case upheld the U.S. District Court's ruling the municipal officials were properly denied qualified immunity. (Source: State Bar of Michigan *e-Journal* Number: 60596,August 13, 2015.)
Full Text Opinion:
http://www.michbar.org/file/opinions/us_appeals/2015/080615/60596.pdf

Ordinance must have clear and specific standard(s), not vague, for successful enforcement

Case: *People v. Gasper*
Court: Michigan Court of Appeals (2016 Mich. App. LEXIS 448, March 8, 2016)

Holding that the plaintiff-Grand Rapids city's noise ordinance was unconstitutionally vague, the appeals court reversed and remanded for dismissal of the citations against the defendants-bar owners and employee.

Defendants were issued the citations on the ground that the music coming from their establishment was too loud. The district court dismissed the citations, holding that the ordinance was unconstitutionally vague because "reasonable minds could differ regarding what destroys the peace and tranquility of a neighborhood," and that there was "no objective way for police to make that determination."

The circuit court reversed in part, finding the ordinance was not unconstitutionally vague because,

when read in conjunction with other sections, it "provided notice to residents of maximum sound levels during the day and night," and how those levels would be measured.

On appeal, the appeals court agreed with defendants that the circuit court erred in finding the ordinance constitutional. It noted that "the existence of maximum decibel limits in §9.63(11) does not aid a citizen in determining whether his or her conduct violates §9.63(3), nor does it place any constraints on enforcing officers' discretion." The court compared the ordinance to similar ordinances that were struck down as vague, noting there is "no standard for determining what 'destroys' the peace and tranquility of a neighborhood, which compels 'men of common intelligence' to guess as to what conduct is proscribed by §9.63(3)."

Further, because the ordinance "fails to provide explicit standards for determining what 'destroys the peace and tranquility of the surrounding neighborhood,' law enforcement officers and finders of fact are necessarily vested with 'virtually complete discretion' to determine whether a violation of §9.63(3) has occurred."

The court also distinguished the case from cases involving challenges to disturbing the peace statutes, noting the ordinance "does not proscribe conduct that merely disturbs or disrupts the peace and tranquility, but rather that which destroys the peace and tranquility. Thus, a person of ordinary intelligence would still have to guess whether his or her conduct was" lawful.

Finally, the court noted that there was "no narrowing construction of" the ordinance that would render it constitutional. "Although the district court attempted . . . to read into §9.63(3) a requirement that a violation of §9.63(11) have occurred, such a reading effects a substantial revision of the ordinance and essentially amounts to rendering §9.63(3) nugatory or surplusage . . . ." (Source: State Bar of Michigan *e-Journal* Number: 62125, March 10, 2016.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2016/030816/62125.pdf

Other Published Cases

State can do performance audit of building department, not entire city; court can rule on building permit fees

Case: *Michigan Ass'n of Home Builders v. City of Troy*
Court: Michigan Supreme Court (497 Mich. 281; 871 N.W.2d 1; 2015 Mich. LEXIS 1394, June 4, 2015)
Judges: Memorandum Opinion - YOUNG, JR., MARKMAN, KELLY, ZAHRA, MCCORMACK, VIVIANO, and BERNSTEIN

The court held that the trial court erred by concluding that the plaintiffs (builders, contractors, and plumbers associations) were required to exhaust the administrative remedy in Administrative procedures under the Single State Construction Code Act (CCA); MCL 125.1509b before they could file suit against the defendant-city for allegedly violating the CCA, MCL 125.1522 and a provision of the Headlee Amendment to the Michigan Constitution of 1963, art. 9, § 31.

Plaintiffs sued defendant City of Troy claiming its building department fees produced "significant monthly surpluses" that were used to augment its general fund in violation of § 22 of the CCA and constituted an unlawful tax increase in violation of the Headlee Amendment. The trial court granted summary disposition for defendant, holding that it lacked jurisdiction because plaintiffs had failed to exhaust the administrative procedure outlined in § 9b of the CCA.

The Court of Appeals affirmed, holding that "because § 9b of the CCA provided an administrative procedure in which plaintiffs could have raised their claim," they were required to exhaust that procedure before proceeding. The panel also held that although plaintiffs' complaint alleged a constitutional violation, they "were still required to exhaust their administrative remedies when the constitutional claim was intermingled with an issue properly before an administrative agency."

The Supreme Court disagreed, finding that the plain language of MCL 125.1509b "provides that the director may conduct performance evaluations of defendant's 'enforcing agency' and does not provide any administrative procedure relative to the entity responsible for establishing fees pursuant to MCL 125.1522(1) . . . ." Defendant maintains that § 9b applies to the "entire city." However, the Legislature made a clear distinction between the "enforcing agency" (defined;

MCL 125.1502a(t)) and the "governmental subdivision" (defined; MCL 125.1502a(v)). Under the definitional sections of the CCA, the "governmental subdivision" is the municipality that has assumed responsibility for code enforcement, whereas the "enforcing agency" is the governmental agency within the governmental subdivision that is responsible for code enforcement. Had the Legislature intended to permit the director to conduct a performance evaluation of the Troy City Council, it surely could have said so.

Thus, "the plain language of § 9b indicates that it applies only to the 'enforcing agency' and not the 'legislative body of a governmental subdivision.'" Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 60117, June 2, 2015.)

Full Text Opinion:
http://www.michbar.org/file/opinions/supreme/2015/060415/60117.pdf

No MMMA Immunity for non qualifying patients or primary care givers

Case: *People v. Mazur*

Court: Michigan Supreme Court (497 Mich. 302; 872 N.W.2d 201; 2015 Mich. LEXIS 1422, June 11, 2015)

Judges: BERNSTEIN, KELLY, MCCORMACK, and VIVIANO:

The Supreme Court held that "a defendant claiming that he or she is solely in the presence or vicinity of the medical use of marijuana is not entitled to immunity under" § 4(i) "when the medical use of marijuana was not in accordance" with the Michigan Medical Marihuana Act (MMMA) (MCL 333.26421 *et seq.*) . Further, a defendant is not entitled to immunity under § 4(i) when his or her "conduct goes beyond assisting with the use or administration of marijuana." However, it also held that "marihuana paraphernalia," as used in § 4(g), "includes items that are both specifically designed or actually employed for the medical use of marijuana."

Thus, the Supreme Court reversed the Court of Appeals judgment, which affirmed the trial court's denial of defendant's motion to dismiss, and remanded the case to the trial court for further proceedings.

The defendant "provided her husband, who was both a qualifying patient and a registered caregiver, with sticky notes for the purpose of detailing the harvest dates of his plants. This activity constitutes the provision of 'marihuana paraphernalia' because the objects were actually used in the cultivation or manufacture of marijuana." Thus, her provision of the sticky notes fell within the scope of § 4(g), and the prosecution was "prohibited from introducing or otherwise relying on the evidence relating to defendant's provision of marihuana paraphernalia—i.e., the sticky notes—as a basis for the criminal charges against defendant."

The court concluded that the Court of Appeals erred in relying on the doctrine of in *pari materia* and adopting the PHC's definition of "drug paraphernalia" to define the term "marihuana paraphernalia," which is not explicitly defined in the MMMA. However, it agreed with the Court of Appeals that defendant was not entitled to either type of immunity under § 4(i) because "the evidence showed that the marijuana operation was not in accordance with" the MMMA and defendant "was not merely assisting her husband with conduct involving the actual ingestion of marijuana; instead, she assisted him with the cultivation of marijuana."

Concurring in part, Dissenting in part – MARKMAN:

Justice Markman agreed that defendant was not entitled to immunity under § 4(i), but disagreed that she was entitled to immunity under § 4(g). He would instead hold that "marihuana paraphernalia" as used in § 4(g) "means 'any equipment, product, material, or combination of equipment, products, or materials, which is *specifically designed* for use in planting; propagating; cultivating; growing; harvesting; manufacturing; compounding; converting; producing; processing; preparing; testing; analyzing; packaging; repackaging; storing; containing; concealing; injecting, ingesting, inhaling, or otherwise introducing [marijuana] into the human body,'" and thus, because "sticky notes are not 'specifically designed' for any such use," they are not marihuana paraphernalia. He would affirm the Court of Appeals judgment.

Dissenting in part – ZAHRA and YOUNG, JR.:

Justice Zahra and Chief Justice Young also agreed that defendant was not entitled to immunity under §4(i) but disagreed that "marihuana paraphernalia" as used in § 4(g) "'includes [any] items that are . . . employed for the medical use of marihuana.'" Thus, they disagreed with "the proposition that because the sticky notes at issue here were 'used in the cultivation or manufacture of marijuana,' they are 'marihuana paraphernalia' entitling defendant to immunity" under § 4(g). Rather, "marijuana paraphernalia must be an item or items intended to assist in the administration of marijuana to a qualifying patient under the MMMA.

Because the sticky notes in question here were not used for the administration of marijuana to a qualifying patient, defendant's act of assisting her husband with the cultivation and manufacture of marijuana through the use of sticky notes was not immune" under § 4(g). They would affirm the Court of Appeals judgment.

(Source: State Bar of Michigan *e-Journal* Number: 60163, June 2, 2015.)

Full Text Opinion: http://www.michbar.org/file/opinions/supreme/2015/061115/60163.pdf

MMMA step-by-step process and standards for immunity (§4) and affirmative defense (§8)

Case: *People v. Hartwick*

Court: Michigan Supreme Court (498 Mich. 192; 870 N.W.2d 37; 2015 Mich. LEXIS 1639, July 27, 2015)

Judges: ZAHRA, YOUNG, JR., MARKMAN, KELLY, MCCORMACK, VIVIANO, AND BERNSTEIN

Holding in these consolidated cases (*People v Hartwick* and *People v Tuttle*) that the trial courts must conduct new evidentiary hearings to determine the defendants' entitlement to immunity under §4 of the Michigan Medical Marihuana Act (MMMA) (MCL 333.26421 *et seq.*), and that they were not entitled to an affirmative defense under §8, the court affirmed in part, reversed in part, and remanded both cases.

In *Hartwick*, defendant was arrested for illegally growing and possessing marijuana. In *Tuttle*, defendant was arrested for selling marijuana to a Confidential informant (CI) and was charged with the sale and production of marijuana and felony-firearm. The Supreme Court consolidated the cases in order to interpret both §§ 4 and 8.

As to the immunity issue, it held that "specific factual findings made by the trial court in a §4 immunity hearing are reviewed under the clearly erroneous standard," that "questions of law surrounding the grant or denial of §4 immunity are reviewed de novo," and that "the trial court's ultimate grant or denial of immunity is fact-dependent and is reviewed for clear error."

(1) entitlement to §4 immunity is a question of law to be decided by the trial court before trial;
(2) the trial court must resolve factual disputes relating to §4 immunity, and such factual findings are reviewed on appeal for clear error;
(3) the trial court's legal determinations under the MMMA are reviewed de novo on appeal;
(4) a defendant may claim immunity under §4 for each charged offense if the defendant shows by a preponderance of the evidence that, at the time of the charged offense, the defendant
    (i) possessed a valid registry identification card,
    (ii) complied with the requisite volume limitations of §4(a) and §4(b),
    (iii) stored any marijuana plants in an enclosed, locked facility, and
    (iv) was engaged in the medical use of marijuana;
(5) the burden of proving §4 immunity is separate and distinct for each charged offense;
(6) a marijuana transaction by a registered qualifying patient or a registered primary caregiver that is not in conformity with the MMMA does not per se taint all aspects of the registered qualifying patient's or registered primary caregiver's marijuana-related conduct;
(7) a defendant is entitled to a presumption under §4(d) that he or she was engaged in the medical use of marijuana if the defendant has shown by a preponderance of the evidence that, at the time of the charged offense, the defendant
    (i) possessed a valid registry identification card, and
    (ii) complied with the requisite volume limitations of §4(a) and §4(b);[1]
(8) the prosecution may rebut the §4(d) presumption that the defendant was engaged in the medical use of marijuana by presenting evidence that the defendant's conduct was not for the purpose of alleviating the registered qualifying patient's debilitating medical condition;
(9) non-MMMA-compliant conduct may rebut

[1] Valid registry identification card is a prerequisite to establish immunity under § 4. But possession of a valid registry identification card, alone, does not establish any presumption for the purpose of § 4. Further, the verification and confidentiality provisions in § 6(c) and § 6(h) do not establish that a defendant has engaged in the medical use of marijuana, or complied with the requisite volume and storage limitations of § 4.

the §4(d) presumption of medical use for otherwise MMMA-compliant conduct if a nexus exists between the non-MMMA-compliant conduct and the otherwise MMMA-compliant conduct;

(10) if the prosecution rebuts the §4(d) presumption of the medical use of marijuana, the defendant may still establish, on a charge-by-charge basis, that the conduct underlying a particular charge was for the medical use of marijuana; and

(11) the trial court must ultimately weigh the evidence to determine if the defendant has met the requisite burden of proof as to all elements of §4 immunity.

Regarding §8, we hold:

(1) a defendant must present prima facie evidence of each element of §8(a) in order to be entitled to present a §8 affirmative defense to a fact-finder;

(2) if the defendant meets this burden, then the defendant must prove each element of §8(a) by a preponderance of the evidence; and

(3) a valid registry identification card does not establish any presumption under §8.[2]

–Michigan Supreme Court Opinion, pp. 5-6

It also held that the defendant has the burden of proving four elements by a preponderance of the evidence, noting that both a "qualifying patient" and a "primary caregiver" must prove that "at the time of the charged offense, he or she" (elements required to establish immunity)

(1) possessed a valid registry identification card;

(2) possessed no more marijuana than allowed under §4(b);

(3) stored any marijuana plants in an enclosed, locked facility; and,"

(4a) As to a qualifying patient "was engaged in the medical use of marijuana"

(4b) As to a primary caregiver "was assisting connected qualifying patients with the medical use of marijuana."

If they establish "the first and second elements, then a presumption exists that [they were] engaged in the medical use of marijuana, thereby establishing the fourth element."

However, "the prosecution may rebut the presumption of medical use for each claim of immunity." The court held that "the prosecution may not rebut a primary caregiver's presumption of medical use by introducing evidence of conduct unrelated to the primary caregiver," and "may not rebut a qualifying patient's presumption of medical use by introducing evidence that the connected primary caregiver used the qualifying patient's marijuana for nonmedical purposes."

As to the affirmative defense issue, it found that a defendant seeking to assert the defense must show that a physician determined the patient's suitability for the medical use of marijuana, that he or she did not possess more marijuana than was reasonably necessary, and that there was a medical use.

Applying its holdings to both defendants, the court concluded that new §4 evidentiary hearings were necessary, but they were not entitled to the §8 defense.

(Source: State Bar of Michigan *e-Journal* Number: 60509, July 29, 2015.)

Full Text Opinion:
http://www.michbar.org/file/opinions/supreme/2015/072715/60509.pdf

MMMA not a defense in federal court

Case: *United States v. Brown*

Court: U.S. Court of Appeals Sixth Circuit (801 F.3d 679; 2015 U.S. App. LEXIS 16148; 2015 FED App. 0228P (6th Cir.); 98 Fed. R. Evid. Serv. (Callaghan) 608, September 11, 2015)

While the search warrant affidavit supplied a "tenuous nexus" between drug trafficking and defendant-Brown's home, under the totality of the circumstances, there was sufficient probable cause for the U.S. Eastern District Court, Michigan, magistrate judge to issue the search warrant.

Brown argued that the district court erred by denying his motion to suppress the drug and firearm evidence because the warrant lacked probable cause. The Appeals Court held that it was "a close question."

[2] A valid registry identification card is prima facie evidence that a physician has determined the registered qualifying patient has a debilitating medical condition and will likely benefit from the medical use of marijuana to treat the debilitating medical condition. In addition, a valid registry identification card issued after April 1, 2013, the effective date of 2012 PA 512, is also prima facie evidence that a physician has conducted a full, in-person assessment of the registered qualifying patient. We reach this conclusion because § 6(c) requires the state to verify all the information contained in an application for a registry identification card; therefore, a valid registry identification card is prima facie evidence of anything contained in the application. This prima facie evidence satisfies two elements of § 8(a)(1), but does not satisfy the last element requiring prima facie evidence of a bona fide physician-patient relationship.

The "affidavit contained no evidence that Brown distributed narcotics from his home, that he used the residence to store narcotics, or that any suspicious activity had taken place there." There was no suggestion that a reliable confidential informant (CI) "had purchased drugs there, that the police had ever conducted surveillance at Brown's home, or that the recorded telephone conversations linked drug trafficking to" his home. "Key to the issuance of this search warrant was Brown's status as a previously-convicted drug dealer, coupled with the police investigation of Brown's involvement in ongoing trafficking of heroin and possibly cocaine, the drug dog's detection of narcotic odor in Brown's 2002 Yukon," and the vehicle's registration to Brown at his home. The "magistrate judge could reasonably infer . . . that Brown had recently used the Yukon . . . to ferry narcotics and that there was a fair probability that a search of his residence would turn up contraband or evidence of a crime."

The court concluded the affiant's information had not become stale in the 22 days between Brown's arrest and the application for a search warrant. Even if the affidavit had lacked probable cause, the Leon good faith exception would apply. The drug ledger was not hearsay but rather offered "as circumstantial evidence of a 'tool of the trade' to prove that Brown was involved in illegal drug trafficking." Also, because the ledger was "nontestimonial," the Confrontation Clause was inapplicable. The ledger was also sufficiently authenticated.

The district court did not err by excluding evidence of Brown's Michigan medical marijuana license because while "state law may permit marijuana use for medicinal purposes under defined circumstances, federal law treats any possession, distribution, or manufacture of marijuana as a federal offense, and medical necessity is not a defense to a federal criminal prosecution for manufacturing or distributing marijuana." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 60792, September 17, 2015.)

Full Text Opinion:
http://www.michbar.org/file/opinions/us_appeals/2015/091115/60792.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*.[3] 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

Local government can regulate hours of sales of fireworks.

Case: *Rodriguez v. Township of Delta*
Court: Michigan Court of Appeals (Unpublished Opinion No. 324444, February 9, 2016)

Rejecting the plaintiff's argument that the defendant-Township's ordinance directly conflicted with MCL 28.457(1), and concluding that the ordinance did not fall within the field of fireworks regulation, the court affirmed the trial court's order granting the Township summary disposition.

Plaintiff "operates tents that sell fireworks out of leased spaces." The Township issued him a permit to sell fireworks. The Township informed him that he could not sell fireworks between 9:00 PM and 9:00 AM pursuant to an ordinance regulating vendor hours. He sued, "alleging in part that the ordinance conflicted with a statute that prohibits localities from regulating"

[3] *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.

firework sales, MCL 28.457(1).

The court noted that a "statute and an ordinance directly conflict when the ordinance permits what the statute prohibits, or when the ordinance prohibits what the statute permits." In order for "direct preemption to exist, the conflicting provisions must address the same subject." The ordinance here "does not address fireworks, and MCL 28.457(1) does not address hours of operation. Neither expressly prohibits what the other expressly permits."

Plaintiff also argued that "the words 'any manner' in the statute means that no ordinance may even incidentally affect the sale of fireworks." However, he ignored "a pertinent rule of statutory construction." The court "reads the provisions of statutes 'reasonably and in context,' and reads subsections of cohesive statutory provisions together." MCL 28.457(1) prohibited the Township

> from enacting or enforcing "an ordinance . . . pertaining to or in any manner regulating the sale, display, storage, transportation, or distribution of fireworks . . . ." When used in this manner, the word "of" indicates that the word that follows is a component or part of the previous word or phrases.

Its use in the statute indicated "that the ordinance in question must 'pertain to' or be related in some manner to fireworks." The ordinance "does not pertain to the sale of fireworks—it pertains to hours that vendors can operate. Unlike the firearm ordinance at issue" in *Distinguishing Michigan Coal. for Responsible Gun Owners v. Ferndale*, the ordinance here "does not concern the statute's subject matter at all." (Source: State Bar of Michigan *e-Journal* Number: 61919; February 26, 2016.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2016/020916/61919.pdf

Takings

Repeal of regulations after being enforced does not erase takings claims

Case: *Lakeside Resort, LLC v. Crystal Twp.*
Court: Michigan Court of Appeals (Unpublished Opinion No. 324799, April 5, 2016)

Concluding that plaintiff-Lakeside failed to adequately allege and/or factually support its inverse condemnation claims, the court held that the defendant-township was entitled to summary disposition on the claims. Lakeside did not challenge the summary dismissal of the equal protection and due process claims; thus, dismissal of those claims was also affirmed.

The case arose out of Lakeside's

> failed efforts to develop, by way of a planned campground and marina, its property located on Crystal Lake, which envisioned development was effectively blocked, according to Lakeside, by unlawful actions taken by the township, including the enactment of two now-repealed ordinances.

The trial court ruled that Lakeside's claims, to the extent that they were based on Lake Access Ordinance No. 15 (LAO § 15 & 15-A), were rendered moot with the repeal of LAO § 15-A in 2012.

The Appeals Court disagreed. It held that the repeal of the ordinance after approximately 10 years "of existence and enforcement did not magically erase" those years of application and any resulting taking and injury. Repeal

> of the ordinance by the township that had effectively been in place for 10 years may have halted a taking, but it did not preclude Lakeside from claiming at least a temporary taking with respect to the period during which LAO § 15 and § 15-A were applicable and enforceable. The situation did not concern normal delays attendant to, for example, obtaining building permits; rather, LAO § 15 and § 15-A governed for a decade.

Thus, Lakeside's inverse condemnation claims, as based on the ordinances, were not moot simply because the township repealed LAO § 15-A. Also, the Appeals Court held that to the extent Lakeside alleged valid inverse condemnation claims and sufficiently supported those claims with documentary evidence, governmental immunity could not bar the claims. However, the court concluded that each of the township's actions "did not, alone, constitute a taking or inverse condemnation or even partially lend themselves to such a conclusion," and thus, "the actions viewed collectively or in the aggregate could not have amounted to a taking." (Source: State Bar of Michigan *e-Journal* Number: 62398, April 28, 2016.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2016/040516/62398.pdf

Substantive Due Process

See *Mirabella v. Township of AuTrain*, page 16.

Due Process and Equal Protection

Enforcement of zoning ordinance permitting transient rentals as a "conditional use"

Case: *Mirabella v. Township of AuTrain*
Court: Michigan Court of Appeals (Unpublished No. 320191, June 9, 2015)

Holding that the plaintiffs-property owners failed to show any procedural or substantive due process violation, the Appeals Court affirmed the trial court's order granting summary disposition to the township-defendants in this action to enjoin enforcement of amendments to the defendant-Township's zoning ordinance, which permitted transient rentals as a conditional [special] use.

Plaintiffs, who are Florida residents, owned vacation property in the Township. They asserted that they relied on the prior zoning ordinance, which prohibited transient rentals.

In 2011, a master plan was adopted that recommended the zoning ordinance be amended to clarify regulations on transient rentals. The amendments at issue followed in 2012. The master plan "noted the contentious nature of the rentals" in the area "and included as a goal addressing the issue."

Plaintiffs did not rebut these facts or show that they were "insufficient to guide zoning decisions" in the Township. Further, the Township's actions "did not change the zoning district the property at question was located within, but only allowed a new conditional [special] use, which required its own permitting procedure."

Plaintiffs admitted that they contested the changes at the public hearings. Thus, they "failed to show any violation of procedural due process." Plaintiffs also argued that the Township's action was "a violation of substantive due process because it destroyed a vested party interest." However, they failed to show or cite any actual zoning ordinance "that was changed; the property remains under the same zoning classification." The court rejected their reliance on *Lansing v. Dawley* .

The court also found plaintiffs' reliance on *Keating Int'l Corp. v. Orion Twp.* unpersuasive, concluding that it could not be said that the Township's "conduct demonstrated 'bad faith and unjustified delay'" because the Township began the master plan process on September 15, 2011, while plaintiffs' earlier mandamus action (which was pending when they filed this case) was not filed until October 11, 2011, and they did not file this case until October 10, 2012. The court noted that the mandamus action was dismissed as moot shortly after plaintiffs filed this case, and they did not appeal that decision. (Source: State Bar of Michigan *e-Journal* Number: 60143, June 18, 2015.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2015/060915/60143.pdf

Variances (use, non-use)

Deadlines and court rules in ZBA appeals to circuit court

Case: *Hovey v. Township of Peninsula*
Court: Michigan Court of Appeals (Unpublished No. 322452, October 15, 2015

The circuit court abused its discretion when it dismissed as untimely the Hovey-plaintiff's appeal as of right from defendant-Peninsula Township Zoning Board of Appeals' (ZBA) decisions regarding requested dimensional variances (Count I) because the circuit court did not provide notice that the record had been filed, as required under MCR 7.109(G)(3).

The circuit court also abused its discretion when it denied the plaintiff's motion for reconsideration where "plaintiff demonstrated a palpable error of law by which the court was misled, and a different disposition of defendants' motion must result from correction of the error . . . ."

Plantiff purchased land in March 2006 and an adjacent parcel in November 2006. In 2007 plaintiff applied for a zoning permit for a new home straddling the two parcels. Only the first of the new parcels had frontage on a private road. The zoning permit was issued with the condition the two parcels would not be split apart from each other. The house was never built. Plaintiff lost ownership of the parcel with the frontage on the private road, but still owned the second parcel. Plaintiff aquired an easement from the private road to the second parcel.

In August 2012 plaintiff inquired about a zoning permit to build a home on the second parcel he learned he would have to build a road (built to private road standards in the zoning ordinance) and the parcel and no longer had required road frontage. To build the road he needed several dimensional variances from private

road standards and eight of the nine were denied by the ZBA.

Suit was filed to (1) appeal the ZBA decision, (2) private road standards violated his right to equal protection under United States and Michigan constitutions, and violated MCL 125.3201(2), and (3) a regulatory taking of his property. An amended complaint omitted the third count on takings. The township filed a motion to dismiss the appeal because Hovey failed to file his suit within the requisite time frame set forth in Michigan Court Rules.

The Appeals Court reversed the circuit court's order to dismiss the zoning appeal in Count I of the plaintiff's first amended complaint and remanded for further proceedings. The court determined that the defendants were entitled to summary disposition on the plaintiff's constitutional claims (count 2) where he failed to state a takings claim or a substantive due process claim.

As for his as-applied equal protection claim, the court rejected the plaintiff's argument that he was not required "to set forth specific facts, by affidavit or otherwise, showing that there was a genuine issue of material fact for trial." Additionally, the plaintiff "failed to demonstrate that there was no rational basis for the application of the road frontage and private road requirements" to his property, and could not establish that the defendants' decision to deny the variances "was motivated by animus or ill will[.]" Affirmed in part, reversed in part, and remanded for further proceedings. (Source: State Bar of Michigan *e-Journal* Number: 60996, October 28, 2015.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2015/101515/60996.pdf

Open Meetings Act, Freedom of Information Act

Open Meeting Act violation and injunctive relief: plaintiff gets court costs and attorney fees

Case: *Speicher v. Columbia Twp. Bd. of Trs.*
Court: Michigan Court of Appeals (Unpublished 313158, July 21, 2015)

On remand from the Supreme Court, the court again affirmed the trial court's denial of the invalidation of the hiring of the township fire chief, and again reversed and remanded as to plaintiff's motion for costs and actual attorney fees. (See *Speicher v. Columbia Twp. Bd. of Trs.*, Michigan Supreme Court (No. 148617, December 22, 2014;497 Mich. 125; 860 N.W.2d 51; 2014), page 4 of Selected Planning and Zoning Decisions: 2015, http://lu.msue.msu.edu/pamphlet/Blaw/SelectedPlan&ZoneDecisions2014-15.pdf.)

The court held that because the trial court properly found that the rights of the public were not impaired, it did not abuse its discretion by refusing to invalidate the defendant-Board's appointment of the new fire chief. However, here, unlike in *Speicher*, "plaintiff sought and obtained the injunctive relief described" by the Supreme Court. "In *Speicher*, the plaintiff sought a declaration that a public body had violated the Open Meetings Act (OMA) (MCL 15.261 *et seq.*), as well as an injunction against the body for further noncompliance with the OMA." Plaintiff eventually obtained the former, but not the latter, and the Supreme Court held that "such success was insufficient to entitle the plaintiff to court costs and attorney fees under MCL 15.271(4)."

By contrast, here, "plaintiff sought, and obtained, both a declaration that the Board violated the OMA and an order enjoining the Board from further noncompliance with the OMA. Thus, under *Speicher*," he sought and obtained injunctive relief, which entitled him to court costs and attorney fees under MCL 15.271(4). (Source: State Bar of Michigan *e-Journal* Number: 60438, July 28, 2015.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2015/072115/60438.pdf

Open Meeting Act and a 180-day period of limitations

Case: *Holetom v. City of Livonia*
Court: Michigan Court of Appeals (Unpublished No. 321501, July 21, 2015)

The court held that the trial court properly granted summary disposition for the individual defendants as to plaintiffs' claim for statutory damages under MCL 15.273. It also held that their claims for injunctive and declaratory relief under MCL 15.271 were not barred by the same 180-day period of limitations, but that the trial court reached the correct result because these claims were barred by laches. However, it remanded with instructions to allow plaintiffs to file their first amended complaint naming a police officer as a defendant and setting forth new assault, battery, false arrest, false imprisonment, and § 1983 claims against him.

Plaintiffs (husband and wife) are community activists who oppose the installation of advanced

metering infrastructure (AMI) meters, also known as "smart meters," by the Detroit Edison Company (DTE). They "regularly present remarks at public meetings in an effort to persuade local units of governments to adopt resolutions opposing AMI meters." They alleged that they were "mistreated and repeatedly interrupted by the members of the Livonia City Council" during appearances at Council meetings.

Defendants argued, among other things, that plaintiffs' claims were barred by the 180-day period of limitations set forth in MCL 15.273(2). They noted that the last alleged violation of the Open Meetings Act (OMA) (MCL 15.261 *et seq.*) giving rise to plaintiffs' claims had occurred on March 19, 2012, but that plaintiffs had not filed their complaint until January 6, 2014. It was undisputed that defendants' last alleged violation of the OMA occurred on March 19, 2012, more than 180 days before the filing of the complaint. "An action for damages under MCL 15.273(1) must be commenced within 180 days of the alleged violation."

The more important question was whether plaintiffs' claims for injunctive and declaratory relief under MCL 15.271 were barred by this same 180-day period of limitations. The appeals court held that they were not. The trial court erred by ruling that their claims for injunctive and declaratory relief under MCL 15.271 were barred by the 180-day limitations period of MCL 15.273(2). However, the trial court reached the correct result. The appeals court affirmed the trial court's denial of plaintiffs' motion for leave to amend the complaint to add the City Council and a City Council committee as parties for purposes of their OMA claims, but reversed as to adding the police officer who removed one of the plaintiffs from a committee meeting and to assert new claims against him. Affirmed in part, reversed in part, and remanded.

(Source: State Bar of Michigan *e-Journal* Number: 60455, July 29, 2015.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2015/072115/60455.pdf

Zoning Administrator/Inspector, Immunity, and Enforcement Issues

Court, not local government, can convict and impose fines for zoning violation

Case: *Claybanks Twp. v. Feorene*
Court: Michigan Court of Appeals (Unpublished No. 322043, December 8, 2015)

Holding that the trial court did not abuse its discretion in concluding that the best way to abate the defendants-property owners' violation of the The Claybanks Township Zoning Ordinance (CTZO) was to order the plaintiff-township to issue zoning permits, the court affirmed the trial court's amended order granting the defendants summary disposition. It also upheld the trial court's award of attorney fees to the defendants, on the basis "that plaintiff brought the action for the purpose of harassing and injuring defendants after they failed to pay the illegally imposed $3,100 penalty."

Defendants built a greenhouse, a gazebo, and later a hay barn without obtaining zoning permits. When told permits were needed, they tried to obtain them. There was "no indication or evidence that plaintiff would have denied the zoning permits. Rather, the evidence showed that plaintiff conditioned the granting of the zoning permits on defendants' payment of the $3,100 fine" that it imposed under §208 of the CTZO.

"The relevant sentence in §208 of the CTZO contains the words 'conviction' and 'prosecution.'" In light of the plain and ordinary meaning of these words, the fine "is the fine that is imposed after there has been a judicial determination, made in district court" that the person "has violated the CTZO. Plaintiff did not bring an action in district court against defendants for an ordinance violation" and thus, there was "no judicial determination in the district court that defendants violated the CTZO.

Accordingly, plaintiff could not fine defendants under §208 for each day of their violation of the ordinance." In ordering plaintiff to issue zoning permits for the structures for the standard fee, the trial court abated the nuisance *per se*, "complying with MCL 125.3101 *et seq.*" (Michigan Zoning Enabling Act). The evidence showed that only "after defendants refused to pay the $3,100 fine, did plaintiff file its complaint and seek the destruction of defendants' three structures.

Under these circumstances, where plaintiff conditioned the grant of the requested zoning permits on the payment of the $3,100 fine, which it did not have the authority to impose, and then only sought destruction of defendants' structures after defendants refused to pay the fine, plaintiff's position was tainted with inequitableness and bad faith." (Source: State Bar of Michigan *e-Journal* Number: 61437, January 4, 2016.)

Full Text Opinion:
http://146.20.28.148/file/opinions/appeals/2015/120815/61437.pdf

File notice to pro-actively enforce zoning can be done if zoning authorizes

Case: *208 Pioneer Club Rd. SE LLC v. City of E. Grand Rapids*
Court: Michigan Court of Appeals (Unpublished Opinion No. 323413, January 21, 2016)

Holding that the defendant-City was engaged in a governmental function when it filed an affidavit under MCL 565.451a related to the plaintiff's parcels of real property, the appeals court affirmed the trial court's order granting the City summary disposition on plaintiff's common law and statutory slander of title claims.

It concluded that there was "no reasonable dispute that the City's act of filing the affidavit was in furtherance of its larger, more general function of ensuring compliance with" its zoning ordinance . The enforcement of a zoning ordinance "is a governmental function." Section 5.44(B) of the City's zoning ordinance "provided that if two adjacent lots, one or more of which is nonconforming, have a common owner, the lots shall be considered to be one undivided whole, and no division can be made which leaves any portion nonconforming without approval from the City in the form of a variance." Plaintiff-Pioneer Club did not dispute that § 5.44(B) applied to its parcels.

Despite this ordinance, "the City had already once been confronted with" an attempt by the sole member of Pioneer Club "to convey the parcels to two separate entities, in violation of the ordinance. Given this history, it was appropriate for the City to undertake proactive measures to ensure future compliance" with its zoning ordinance "by recording an affidavit that would put interested persons on notice that it was the City's position that the ordinance applies to the parcels."

While Pioneer Club argued that the City "did not have the specific authority to file an affidavit as a means of ensuring compliance" with its zoning ordinance, § 5.118(D) of the zoning ordinance authorizes the City's agents to enforce the zoning ordinance "by any means 'necessary and proper.'"

The appeals court concluded that it was "reasonable and proper to file an affidavit that might prevent future disputes by making interested parties aware of specific issues involving real property." Further, MCL 565.451a specifically authorizes such an affidavit. The City was entitled to governmental immunity on the slander of title claims. Pioneer Club's request for equitable relief failed as a matter of law because the City was authorized to file the affidavit.
(Source: State Bar of Michigan *e-Journal* Number: 61794, February 16, 2016.)

Full Text Opinion:
http://www.michbar.org/file/opinions/appeals/2016/012116/61794.pdf

Glossary

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

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

amicus (in full **amicus curiae**)
n noun (plural **amici**, **amici curiae**) an impartial adviser

to a court of law in a particular case.
ORIGIN
modern Latin, literally 'friend (of the court).'

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

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

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

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

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

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

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

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

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

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

in limine
To pass a motion before the trial begins. Usually requested in order to remove any evidence which has been procured by illegal means or those that are objectionable by jury or which may make the jury bias.
ORIGIN
Lat. *At the threshold* or *at the outset*

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

inter alia
n adverb among other things.
ORIGIN
from Latin

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

JNOV.

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

laches

n noun Law unreasonable delay in asserting a claim, which may result in its dismissal.

ORIGIN

Middle English (in the sense 'negligence'): from Old French *laschesse*, from *lasche* 'lax', based on Latin *laxus*.

littoral

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

mandamus

n *noun Law* a judicial writ issued as a command to an inferior court or ordering a person to perform a public or statutory duty.

ORIGIN

C16: from Latin, literally 'we command'.

mens rea

n *noun Law* the intention or knowledge of wrongdoing that constitutes part of a crime. Compare with **actus reus**.

ORIGIN

Latin, literally 'guilty mind'.

obiter dictum

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

ORIGIN

Latin obiter 'in passing' + dictum 'something that is said'.

pari materia

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

pecuniary

adjective formal relating to or consisting of money.

DERIVATIVES

pecuniarily adverb

ORIGIN

C16: from Latin pecuniarius, from pecunia 'money'.

per se

n adverb Law by or in itself or themselves.

ORIGIN:

Latin for 'by itself'.

quo warranto

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

res judicata

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

ORIGIN

Latin, literally 'judged matter'.

riparian

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

scienter

n *noun Law* the fact of an act having been done knowingly, especially as grounds for civil damages.

ORIGIN

Latin, from *scire* 'know'.

stare decisis

n *noun Law* the legal principle of determining points in litigation according to precedent.

ORIGIN

Latin, literally 'stand by things decided'.

sua sponte

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

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

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

Contacts

For help and assistance with land use training and understanding more about these court cases contact your local MSU Extension land use educator. For a list of who they are, territory covered by each and contact information see: http://msue.anr.msu.edu/program/info/land_use_education_services

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

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