Michigan State University Extension
Public Policy Brief

Selected Planning and Zoning Decisions: 2020 (May 2019-April 2020)

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This public policy brief summarizes the important state and federal court cases and Attorney General Opinions issued between May 1, 2019 and April 30, 2020.

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"If a policeman must know the Constitution, then why not a planner?"
Justice William J. Brennan Jr.

This is a fact sheet developed by experts on the topic(s) covered within MSU Extension. Its intent and use is to assist Michigan communities making public policy decisions on these issues. This document is written for use in Michigan and is based only on Michigan law and statute. One should not assume the concepts and rules for zoning or other regulation by Michigan municipalities and counties apply in other states. In most cases they do not. This is not original research or a study proposing new findings or conclusions.

Published Cases (New Law)

Restrictions on Zoning Authority

Michigan Supreme Court rules that municipalities can regulate medical marijuana caregiver grow operations.

Case: *DeRuiter v. Township of Byron*

Court: Michigan Supreme Court (2020 Mich. LEXIS 861 (Supreme Court of Michigan, April 27, 2020, Filed).

Holding that defendant-township's home-occupation zoning ordinance did not directly conflict with the Michigan Medical Marihuana Act (MMMA), the court reversed the Court of Appeals' holding [325 Mich App 275, 287; 926 NW2d 268 (2018)] to the contrary and remanded.

Plaintiff, a registered qualifying patient and primary caregiver under the MMMA, cultivated medical marijuana on rented commercially zoned property in defendant's boundaries. Her landlord was directed by defendant's supervisor to cease and desist or face legal action. When defendant attempted to enforce the ordinance, she sought a declaratory judgment as to its legality. Defendant then sought the same. The trial court held that the ordinance directly conflicted with, and thus was preempted by, the MMMA, and granted her motion for summary disposition. The Court of Appeals affirmed.

On appeal, the court rejected plaintiff's argument that the ordinance directly conflicts "with the MMMA because the act protects a registered caregiver from 'penalty in any manner' for 'assisting a qualifying patient . . . with the medical use of marihuana' so long as the caregiver abides by the MMMA's volume limitations and restricts the cultivation to an 'enclosed, locked facility.'"

It concluded that "because an enclosed, locked facility could be found in various locations on various types of property, regardless of zoning, this requirement is not in conflict with a local regulation that limits *where* medical marijuana must be cultivated." Further, because the "geographical restriction imposed by [the] ordinance adds to and complements the limitations imposed by the MMMA," the court did not believe there was "a contradiction between the state law and the local ordinance."

It then held that the MMMA does not nullify a municipality's inherent authority to regulate land use under the MZEA...

It then held that the MMMA does not nullify a municipality's inherent authority to regulate land use under the MZEA "so long as the municipality does not prohibit or penalize all medical marijuana cultivation" and "does not impose regulations that are 'unreasonable and inconsistent with regulations established by state law.'"

Finally, it rejected plaintiff's claim that the permit requirement directly conflicted with the MMMA because it impermissibly infringed her medical use of marijuana, noting this requirement did not effectively prohibit the medical use of marijuana. As such, defendant "may require primary caregivers to obtain a permit and pay a fee before they use a building or structure" in the township to cultivate medical marijuana. (Source: State Bar of Michigan *e-Journal* Number: 72932, April 29, 2020)

Full Text: http://www.michbar.org/file/opinions/supreme/2020/042720/72932.pdf

Civil Rights

Federal Court: Equal protection claim fails to show selective enforcement.

Case: *Straser v. City of Athens, TN*

Court: U.S. Court of Appeals Sixth Circuit (951 F.3d 424, 2020 U.S. App. LEXIS 6178, 2020 FED App. 0063P (6th Cir.), February 28, 2020.

The court held that plaintiff-Straser failed to establish that he was treated differently than non-Christian individuals when the defendant-City of Athens fined him for building his carport too close to the road. After Straser learned that his Muslim neighbor was also cited, he sued the City and some of its officials, arguing that they "violated his constitutional rights by fining him because he is a Christian and because they didn't want to favor him over his Muslim neighbor."

Applying the standard for selective-enforcement claims found in *Gardenhire*, the court held that Straser failed to establish the element of "differential enforcement" where he could "not identify any cases in which the City refused to enforce the 30-foot rule against non-Christians." His evidence only supported the "*enforcement* of the ordinance against someone outside Straser's identified group—his Muslim neighbor. That's not discrimination. It's equal treatment, indeed the epitome of equal treatment."

In addition, he failed to show "discriminatory purpose and effect" where there was no evidence that the defendant-City Attorney was even aware of Straser's religious beliefs. Straser also appealed the district court's denial of his motion add a claim that the City violated the ADA by charging a non-refundable $135 fee before it would consider a zoning variance request. The court held

"That's not discrimination. It's equal treatment, indeed the epitome of equal treatment."

that the ADA claim was time-barred. It affirmed summary disposition for defendants. (Source: State Bar of Michigan *e-Journal* Number: *72530*, March 9, 2020)

Full Text: http://www.michbar.org/file/opinions/us_appeals/2020/022820/72530.pdf

Removal from meeting for failure to follow rules is not a constitutional violation

Case: *Holeton v. City of Livonia*

Court: Michigan Court of Appeals, 328 Mich. App. 88, 935 N.W.2d 601, 2019 Mich. App. LEXIS 1722, 2019 WL 2016252 (May 7, 2019, Decided)

Holding that plaintiffs did not identify a deprivation of their rights under the First and Fourteenth Amendments to the U.S. Constitution and thus, the trial court should have granted all of the defendants summary disposition on plaintiffs' § 1983 claims, the court reversed the denial of defendants' motions and remanded for dismissal of those claims.

Plaintiffs alleged that defendant-Brosnan, the chairperson of the defendant-city council infrastructure community transit committee, deprived plaintiff-Pauline Holeton of her constitutional rights when she ordered her to leave a meeting. However, they "did not allege or present any evidence that Brosnan implemented an address-the-chair rule in order to curtail anyone's speech on the basis of the content or viewpoint expressed. They also did not allege or present evidence that the rule was unreasonable for the forum." It was undisputed that they were able to speak at prior meetings, and "the evidence showed that Pauline was invited to express her views at" this meeting.

Plaintiffs based their § 1983 claim "on the fact that that Brosnan took steps to end Pauline's speech and petition activities for failing to comply with an address-the-chair" rule, suggesting she could not do so unless Pauline breached the peace. However, the court concluded that the "rule was on its face reasonably calculated to ensure the orderly participation of the community members who wished to express their views without targeting the content or their viewpoint." Thus, it was "reasonable and consistent with the requirements of the First Amendment for limited public fora."

Further, while "removing Pauline for a violation of the rule might have amounted to a violation of" the OMA, this did "not itself establish that Brosnan's actions also deprived Pauline of her rights under the First and Fourteenth Amendments." The court held that plaintiffs failed to show that she "violated Pauline's constitutional rights by admonishing her to follow the rule and then asking her to leave when she was unwilling" to comply. Brosnan was also entitled to summary disposition based on qualified immunity, and even if she "acted pursuant to a policy or procedure implemented by Livonia, a reasonable jury could not find that the policy caused a deprivation of rights." (Source: State Bar of Michigan *e-Journal* Number: 70421, May 9, 2019)

The court held that plaintiffs failed to show that she "violated Pauline's constitutional rights by admonishing her to follow the rule and then asking her to leave when she was unwilling" to comply.

Full Text: http://www.michbar.org/file/opinions/appeals/2019/050719/70421.pdf

Due Process and Equal Protection

U.S. Supreme Court reverses course on requiring the exhaustion of all state and local venues before bringing takings challenge to the federal level.

Case: *Knick v. Township of Scott, Pennsylvania*

Court: United States Supreme Court, 139 S. Ct. 2162, 204 L. Ed. 2d 558, 2019 U.S. LEXIS 4197, 49 ELR 20109, 27 Fla. L. Weekly Fed. S 1020, 2019 WL 2552486 (June 21, 2019, Decided)

The court issued a June 21, 2019 Judgment in a 5-4 vote which overruled a portion of the 1985 decision (*Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*) where the courts determined that all compensation questions around private property takings claims must be taken to the local and state courts first before a case can be heard at the federal level. The *Williamson County* decision had set the standard for ripeness for over three decades.

The *Knick v. Township of Scott* decision emphasizes that the unfair compensation claims resulting from taking of land for a public benefit is a constitutional violation and is therefore ripe for the federal court system. Chief Justice John Roberts wrote "We now conclude that the state litigation requirement imposes unjustifiable burden".

The dissenting opinion written by Justice Elena Kagan, notes that the majority decision rejects "far more than a single decision in 1985" and that the *Williamson County* decision "was rooted in an understanding of the Fifth Amendment's Taking Clause stretching back to the late 1800". Justice Kagan warns of a consequence to this majority opinion of channeling "a mass of quintessentially local cases involving complex state-law issues into federal courts." [1]

In this case, Rose Mary Knick owned a 90-acre farm since 1970. In 2008, a neighbor found documentation showing that there may be a cemetery on Knick's property. The Township passed an ordinance in 2012 stating that cemeteries must be open to the public and accessed by a public easement extending to the nearest public road. A Township official then went onto Knick's property without permission, found a set of stones, determined it was a cemetery, and issued two complaints (but not a violation). Knick believed her land had been taken without just compensation and sought relief at the state level but the court refused to hear the case because the Township had not taken formal enforcement action. She then took the case to the US District Court citing violations of her Fourth and Fifth Amendment rights[2].

Nonconforming Uses

Short term rentals (STR): existing use not "grandfathered" after STR ordinance adopted

Case: *Reaume v. Township of Spring Lake*

Court: Michigan Court of Appeals, 328 Mich. App. 321, 937 N.W.2d 734, 2019 Mich. App. LEXIS 2397, 2019 WL 2195030 (May 21, 2019, Decided). Published OpinionNo. 341654

[1] NPR, *Supreme Court Overturns Precedent in Property Rights Case- A Sign of Things to Come*? Nina Totenberg, June 22, 2019. https://www.npr.org/2019/06/22/734919303/supreme-court-overturns-precedent-in-property-rights-case-a-sign-of-things-to-co

[2] Wikipedia, *Knick v. Township of Scott, Pennsylvania,* https://en.wikipedia.org/wiki/Knick_v._Township_of_Scott,_Pennsylvania

The court held that the trial court did not err by affirming defendant-township's denial of plaintiff's application for a short-term rental license. Plaintiff began allowing short-term rentals of her property after a couple of defendant's employees allegedly indicated that doing so was lawful. Her neighbors objected to the use of her property for short-term rentals and lodged complaints with defendant. Defendant subsequently adopted ordinances prohibiting or restricting short-term rentals. It later denied plaintiff's application for a short-term rental license. The ZBA denied her appeal, and the trial court affirmed defendant's decision.

On appeal, the court rejected her claim that her use of the property was "grandfathered," and defendant may not deny her permission to continue using it for short-term rentals. It found that her "argument turns on making untenable extrapolations from statements made by individuals who had no authority to bind" defendant. It determined there was "nothing in the record to show that [any employee] had any individual authority to bind [defendant] to a zoning determination." Plaintiff mostly relied on "seriously mischaracterizing statements made by individuals." As such, there was "no basis for estopping, formally or substantively, [defendant] from enforcing its zoning or regulatory ordinances to preclude plaintiff from using the property for short-term rentals."

The court also rejected her claim that her use of the property was lawful prior to the adoption of the ordinances, finding that short-term rentals were "not permitted in the R-1 district at any time." Thus, she was "not entitled to continue doing so as a prior nonconforming use, notwithstanding [defendant's] failure to enforce its zoning requirements."

Finally, the court found that publication here was warranted. The case cited by plaintiff, *Garfield [Concerned Property Owners of Garfield Twp., Inc. v. Charter Twp. of Garfield*, Michigan Court of Appeals, 2018 Mich. App. LEXIS 3389 (October 25, 2018) Unpublished Opinion, No. 342831)], was unpublished, and the court did not rely on it in its substantive analysis. However, its existence "supports that the issues presented in the current matter are of increasing importance and commonality in Michigan, and that the bench and bar would benefit from the certainty that a published opinion would bring." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 70560; May 23, 2019.)

Full Text: http://www.michbar.org/file/opinions/appeals/2019/052119/70560.pdf

[Editor's Note: The Michigan Supreme Court has agreed to hear this case, look for more on STRs in 2020 or 2021]

Court, Ripeness for Court's Jurisdiction, Aggrieved Party

MZEA's timelines for appeal cannot be extended by circuit court.

Case: *Quality Mkt. v. City of Detroit Bd. of Zoning Appeals*

Court: Michigan Court of Appeals, 2020 Mich. App. LEXIS 931 (February 6, 2020, Decided) Published Opinion No. 346014.

The court vacated the circuit court's orders reversing the respondent-Board of Zoning Appeal's (BZA) denial of a variance and denying the BZA's motion to dismiss, and remanded for entry of an order granting the BZA's motion to dismiss. The BZA approved the minutes reflecting its denial of petitioner-Quality Market's requested spacing waiver on 2/27/18, and later issued a written decision and order reflecting its denial on 3/15/18. Quality Market did not file its appeal until 4/6/18. Thus, its "appeal was untimely under either MCL 125.3606(3) or MCR 7.112(B) if the applicable time period is measured from the approval of the BZA's minutes, which occurred before the issuance of the BZA's written decision."

Quality Market urged the court "to interpret MCL 125.3606(3) as mandating that when a zoning board issues a written decision, the 30-day deadline in MCL 125.3606(3)(a) applies, regardless of the date of the approval of the minutes." The court found that it was "not permitted to make such a construction of clear statutory language, which amounts to speculation about the intent of the Legislature beyond the language it chose to use," and it declined to do so.

Quality Market also argued that the language of the BZA's written decision was misleading as to the time for an appeal, and thus that the BZA should be estopped from arguing that the appeal was untimely. The court disagreed.

The time limit for an appeal to the circuit court is jurisdictional. "Subject-matter jurisdiction may not be conferred on a court by the actions of the parties." Also, while the BZA's language as to "appeals may not have been a model of clarity, it did make reference to the relevant statute in which the relevant deadlines for appeal could be found." Finally, to the extent that the circuit court held "that it had the ability to consider Quality Market's untimely appeal as a late application for leave to appeal, it erred. MCR 7.105(G) does permit the filing of late applications for leave to appeal." But MCR 7.103(B)(4) "provides that the circuit may grant leave to appeal from 'a final order or decision of an agency if an appeal of right was not timely filed and a statute authorizes a late appeal[.].'

The latter requirement was lacking, in that MCL 125.3606(3) does not authorize an appeal by leave granted or a late appeal." Thus, the circuit court "erred by concluding that it could review Quality Market's untimely-filed appeal as on leave or by delayed leave granted." Because the appeal to the circuit court was not timely filed, it lacked jurisdiction over the appeal. (Source: State Bar of Michigan *e-Journal* Number: 72346; February 13, 2020)

Full Text: http://www.michbar.org/file/opinions/appeals/2020/021120/72346.pdf

Open Meetings Act, Freedom of Information Act

RLUIPA, Open Meetings Act, First Amendment, and equal protections claims filed when mosque is denied.

Case: *Youkhanna v. City of Sterling Heights*

Court: U.S. Court of Appeals Sixth Circuit, 934 F.3d 508, 2019 U.S. App. LEXIS 24165, 2019 WL 3808509 (August 14, 2019, Filed)

The court held that some plaintiffs had standing, but that the challenged consent judgment (CJ) in the underlying case was not invalid. It rejected plaintiffs' First Amendment and equal protection claims, and also found no violation of the Michigan Open Meetings Act (OMA). Finally, a plaintiff's removal from a city council meeting did not constitute a seizure under the Fourth Amendment where she lost her privilege to stay in the meeting due to her behavior, the police did not use "painful force," and she was free to go where she wished once she left the building.

In the underlying case, defendant-City of Sterling Heights was sued under the Religious Land Use and Institutionalized Persons Act (RLUIPA) over its denial of zoning permission to build a mosque. Plaintiffs here challenged the consent judgement (CJ) entered in that case, raising several constitutional claims and a claim under Michigan's OMA.

While the court found that at least some plaintiffs had standing to challenge the CJ, it rejected their argument that the CJ was invalid based on the City's alleged violation of its Zoning Ordinance and the Michigan Zoning Enabling Act by approving the settlement in an improper manner. The record indicated that the Council considered all relevant factors and complied with the required procedures.

The court also rejected plaintiffs' claims that their First Amendment and equal protection rights were violated by the defendant-Mayor's restrictions on public comments during the public meeting debate over approving the CJ. The court held that the restriction that all comments be "relevant to the agenda" did not violate the right to speak about religion when it concerned zoning regulations. The Council meeting was a "limited" public forum, in which "the government can impose reasonable restrictions based on speech content . . . ."

The court considered the two content-based restrictions—the relevance rule and the rule prohibiting attacks on people and institutions—and held that the relevance rule was reasonable under the circumstances. While the no attack rule was a "more difficult" case, plaintiffs' comments were restricted by the relevance rule.

Their equal protection claims failed for the same reasons. The court found that the Establishment Clause claim, alleging that defendants' "actions had the effect of endorsing Islam" and disapproving of Chaldean Christians, lacked merit where it rested on their own perceptions. Also, the Council's decision to exclude the audience from its chambers during deliberations did not violate Michigan's OMA where there was a "breach of the peace" during the meeting. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: *71153*, 8-16-19)

Full Text: http://www.michbar.org/file/opinions/us_appeals/2019/081419/71153.pdf

Zoning Administrator/Inspector, Immunity, and Enforcement Issues

Cannot use fees to make up revenue shortfalls in previous years (Building Department)

Case: *Michigan Ass'n of Home Builders v. City of Troy*

Court: Michigan Supreme Court, 504 Mich. 204, 934 N.W.2d 713, 2019 Mich. LEXIS 1257, 2019 WL 3059716 (July 11, 2019, Filed)

The court held that defendant-City's use of the revenue generated by building inspection fees to pay its Building Department's budgetary shortfalls in previous years violated MCL 125.1522(1). It further held that "there is no express or implied monetary remedy" for such a violation, but that "plaintiffs may seek declaratory and injunctive relief to redress present and future violations of MCL 125.1522(1)." Lastly, it found that there was no record evidence establishing that plaintiffs were "taxpayers" with standing to file suit under the Headlee Amendment.

Thus, it reversed the Court of Appeals judgment (which affirmed the trial court's grant of summary disposition for the City) and remanded. The issue was whether the building inspection fees assessed by the City were "intended to bear a reasonable relation to the cost" of acts and services provided by the Building Department under the CCA. The court held that the "City's use of the revenue generated by those fees to pay the Building Department's budgetary shortfalls in previous years violates MCL 125.1522(1).

While fees imposed to satisfy the alleged historical deficit may arguably be for 'the operation of the enforcing agency or the construction board of appeals,' this does not mean that such fees 'bear a reasonable relation' to the costs of acts and services provided by the Building Department." Plaintiffs offered sufficient evidence to determine that "the City established fees that were not intended to 'bear a reasonable relation' to the costs of acts and services necessary to justify the City's retention of 25% of all the fees collected." The court rejected plaintiffs' argument that a statutory cause of action for a violation of MCL 125.1522(1) may be implied, but found that their claim "would constitute an 'actual controversy' for the purposes of an action for a declaratory judgment."

It remanded for further proceedings in light of the City's evidence justifying the retention of a portion of the fees and to allow plaintiffs "an opportunity to establish representational standing" to maintain a Headlee Amendment claim. Source: State Bar of Michigan *e-Journal* Number: 70914; July 15, 2019

Full Text: http://www.michbar.org/file/opinions/supreme/2019/071119/70914.pdf

Other Published Cases

Tribal governments have inherent sovereign authority and are not the equivalent of a local government.

Case: *Paquin v. St. Ignace*

Court: Michigan Supreme Court, 504 Mich. 124, 934 N.W.2d 650, 2019 Mich. LEXIS 1246, 2019 WL 2931288 (Supreme Court of Michigan July 8, 2019, Filed)

Holding that a federally recognized Indian tribe is not "local government" under Const. 1963, art. 11, § 8, the court reversed the judgment of the Court of Appeals. Also, it vacated the circuit court order denying plaintiff's motion for summary disposition and remanded to the circuit court. Plaintiff served the Sault Ste. Marie Tribe of Chippewa Indians as the chief of police and as an elected member of the board of directors, until he pled guilty to conspiracy to defraud the United States by dishonest means. "The underlying conduct involved the misuse of federal funds granted to the tribal police department."

In both 2013 and 2015, plaintiff sought to run for a position on defendant-city's council in the November general election. He was rebuffed each time based on art. 11, § 8 on the basis that his prior felony conviction barred him from running for city council. Intervening defendant-Attorney General argued that, "because the Tribe functions as a local government, the Tribe is a local government under [art 11, § 8].

To agree would be to write language into our Constitution that is not there and that the people of this state did not choose to include. Nowhere in our Constitution does it state that local-government equivalency suffices; the provision simply states 'local . . . government.'" Thus, it was "irrelevant to note all of the functions that the Tribe provides that are similar to that of, for example, [the city]—that the two entities function similarly in some respects does not make them the same. To the extent that the Court of Appeals relied on language from the Supreme Court of the United States stating that tribes 'retain[] their original natural rights in matters of local self-government,' this language merely recognizes that tribes retain *the right to self-governance*, not that they *are local governments*."

Also, whatever "local governmental functions the Tribe might fulfill, the Tribe is different in kind from a local government like the city of St. Ignace, which does not have inherent sovereign authority." That the Tribe defies easy characterization was "further support to the finding that its inclusion under the term 'local . . . government' would be to reach for a strained interpretation of that term. Because the cornerstone of constitutional interpretation is to seek the common understanding of the people," the court found that the Tribe is not a "local government" as that term is used in art. 11, § 8. Source: State Bar of Michigan *e-Journal* Number: 70891; July 9, 2019

Full Text: http://www.michbar.org/file/opinions/supreme/2019/070819/70891.pdf

Restrictive covenants prohibit modular home (site-built v. modular home)

Case: *Theil v Goyings*

Court: Michigan Supreme Court, 504 Mich. 484, 939 N.W.2d 152, 2019 Mich. LEXIS 1287, 2019 WL 3331810 (Supreme Court of Michigan July 24, 2019, Filed).

Holding that a fair reading of the restrictive covenants at issue prohibited a home that was more modular than not, and that defendants' home was mostly not modular, the court reversed the Court of Appeals and reinstated the trial court's decision dismissing the case. Plaintiffs-neighbors asserted that defendants "violated the subdivision's restrictive covenants that bar 'pre-fabricated or modular home[s]' (along with mobile homes, berm-houses, geodesic domes, shacks, and barns) and that they must tear it down."

After a bench trial, the trial court found no cause of action. In reversing, the Court of Appeals reasoned that the home "unambiguously fit the commonly understood definition of 'modular' but never construed the disputed term used in the covenants—'modular home.'" The court concluded that "the most natural reading of the phrase 'modular home' is a home that is mostly or generally modular."

It found that "the covenants categorically bar landowners from moving or placing relocated residences or manufactured homes onto a parcel. These categorical restrictions apply to any structure that may be considered, without substantial further construction, to be a home or residence upon delivery." While it agreed with the trial court "that an entirely prefabricated, manufactured, or modular home cannot be placed on or moved to a lot in" the subdivision, it found that the language imposed "a more stringent standard than the trial court found."

The prohibition was designed to bar "homes that are mostly modular or prefabricated." Applying the covenants to the undisputed facts found by the trial court, the court held that the home was "not a 'pre-fabricated or modular home'" under the restrictive covenants. Plaintiffs did not show that it violated "either of the two narrow restrictions." It did not fit the definition "of 'relocated residence'—the modules were not a 'residence' when placed on the lot." Plaintiffs did not contend that it was a "manufactured home" or a "manufactured housing unit" and it would not fit the common understanding of these terms.

The covenant language supported "the trial court's finding that there is a distinction between a modular or prefabricated home and a site-built home with modular or prefabricated components. And the trial court found that the defendants' home was mainly stick-built, with modular components integrated into it."

The court agreed. The concurrence agreed that the Court of Appeals erred in ruling that the home was modular, but also found an alternate ground for reversal – "the Court of Appeals' erroneous conclusion that 'where defendants' home was in clear violation of the unambiguous restrictive covenant, the only solution was to grant injunctive relief and order that the non-conforming home be removed.'" If the Court of Appeals had correctly determined that the home violated the covenant, the case should have been remanded for the trial court to exercise its discretion in deciding on an equitable remedy.

The dissent concluded that "a review of common and ordinary understandings of what comprises a modular home" showed that defendants acted in violation of the "straightforward prohibition" in the restrictive covenant by erecting a modular home and thus, breached a promise made in the covenant. "As a result, the 'congenial' enjoyment of plaintiffs' property rights" in the restrictive covenants "was substantially undermined." Further concluding that there were "no contrary equitable considerations" in defendants' favor, the dissent would affirm the Court of Appeals' ruling that the house be removed. Source: State Bar of Michigan *e-Journal* Number: 71010; July 26, 2019

Text: http://www.michbar.org/file/opinions/supreme/2019/072419/71010.pdf

[Editor's Note: Restrictive covenants held between parties are enforced by those parties (not zoning administrators or building inspectors). This case was included here primarily for the detailed discussion of housing types (modular, custom-built, hybrid, stick-built and combinations thereof).]

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. 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

Zoning regulations in Warren are preempted by the Michigan Medical Marijuana Act

Case: *City of Warren v. Bezy*

Court: Court of Appeals, 2019 Mich. App. LEXIS 2250, 2019 WL 2146275 (May 16, 2019, Decided), Unpublished Opinion, No. 341639

Finding no error, the court affirmed the circuit court's order affirming a decision by the district court, which held that several zoning ordinances enacted by plaintiff-city were preempted by the Michigan Medical Marihuana Act (MMMA). The case concerned a city's ability to enforce zoning regulations that affect medical marijuana cultivation. Plaintiff and *amici curiae* argued that "the lower courts erred in finding that there was a direct conflict between the MMMA and the city's ordinances." They asserted that "the city's ordinances, which did not fully ban medical marijuana use and only added certain safety restrictions, could coexist with the MMMA."

However, the court held that "the MMMA prohibits local governments from restricting MMMA-compliant behavior." As it stated in *DeRuiter* (325 Mich. App. 275, 926 N.W.2d 268, 2018 Mich. App. LEXIS 2812, 2018 WL 3446236, Court of Appeals, July 2018), as "long as caregivers conduct their medical marijuana activities in compliance with the MMMA—including that caregivers cultivate medical marijuana in an 'enclosed, locked facility' as defined by MCL 333.26423(d) and do not violate the prohibitions of MCL 333.26427(b)—such conduct cannot be restricted or penalized." Applying that rule here, the city's ordinances could not stand. They "add 'a layer of restrictions and regulations' that restricts defendant's cultivation of medical marijuana. The lower courts did not err in concluding that the ordinances in this case directly conflict with the MMMA and, as such, may not be enforced." (Source: State Bar of Michigan *e-Journal* Number: 70529, June 6, 2019)

Full Text: http://www.michbar.org/file/opinions/appeals/2019/051619/70529.pdf

Appeals, Variances (use, non-use)

A future greenway is not a "drug free zone" to warrant denial of medical marijuana caregiver permit.

Case: *The Jazz Club 2 LLC v. City of Detroit Bd. of Zoning Appeals*

Court: Michigan Court of Appeals, 2020 Mich. App. LEXIS 161, 2020 WL 114133 (January 9, 2020, Decided). Unpublished Opinion. No. 343872.

The court held that the trial court erred by affirming defendant-Board of Zoning Appeal's (BZA) decision upholding a determination that plaintiff was ineligible for a medical marijuana caregiver business license because it is located in a drug-free zone.

On appeal, the court agreed with plaintiffs that the trial court erred by upholding defendant's decision on the ground that the area at issue, a future greenway, qualifies as a park under the applicable zoning ordinance. The trial court erred by finding the area "was an 'outdoor recreation facility' within the meaning of the zoning ordinance." Under any definition of "park," and under "the plain language of the updated ordinance, the proposed greenway" did not qualify as a park.

"The concept of a park seems tied to the idea that it is being used by the public for some sort of recreational enjoyment or is being preserved in its natural state. Neither is occurring with the" area in question. Rather, "it is an unmaintained parcel of land that is predominantly used for illegal activities."

Indeed, the record showed that the city did "not consider the area to be a park." The court also concluded that the proposed greenway did "not fit the definition of 'outdoor recreation facility.'" It noted that the city "intentionally omitted the term 'greenway' from the definition. . . . Moreover, the proposed usage of the land—connecting parks with benches, garbage cans, and walking/biking trails—is not included in the definition of 'outdoor recreation facility.'

Instead, the definition provides an enumerated list of activities for which the land could be used, such as a golf course, a skating rink, a playground, a swimming pool, or a tennis court, but it does not include biking, walking, or land that is used to connect parks to each other." While not dispositive, the exclusion of those "uses and the inclusion of many others further" supported the court's conclusion that the proposed greenway did "not otherwise qualify as an 'outdoor recreation facility' within the meaning of the zoning ordinance." Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 72108; January 29, 2020)

Full Text: http://www.michbar.org/file/opinions/appeals/2020/010920/72108.pdf

Courts uphold ZBA interpretation that wedding barns are not "seasonal agri-tourism"

Case: *Nixon v. Webster Twp.*

Court: Michigan Court of Appeals, 2020 Mich. App. LEXIS 438, 2020 WL 359625 (January 21, 2020, Decided). Unpublished Opinion, No. 343505.

The court held that the defendant-Township's ZBA's "decision to exclude wedding barns from the term 'seasonal agri-tourism' was authorized by law and supported by competent, material, and substantial evidence on the whole record and was a reasonable exercise of its discretion." It also concluded that the trial court should have deferred to the ZBA's expertise, and "erred by failing to apply the correct legal principles, by misapplying the substantial-evidence test to the ZBA's findings of fact and conclusions of law, and by reversing the ZBA's determination that 'seasonal agri-tourism' did not include wedding barns."

The Township and *amici curiae* argued "that the trial court improperly applied rules of statutory and ordinance construction and exceeded its reviewing authority when it reversed the ZBA's factual findings and conclusions of law." The court agreed, concluding that the ZBA complied with the rules of interpretation when it interpreted Township ordinance "§ 9.10(B)(ix) to exclude wedding barns from the permitted uses under 'seasonal agri-tourism.'" Although plaintiffs argued that there was a "'wedding season' generally from May to September, weddings are unrelated to an agricultural or harvest season that takes place on a farm as contemplated by the Ordinance."

The court held that the "ZBA considered the Ordinance scheme, the purpose of the Agriculture District, and the rural character of the Township and rejected plaintiffs' proffered definitions of 'agri-tourism' from other sources and jurisdictions as specific to those communities. Additionally, it concluded that plaintiffs' proffered definitions of 'agri-tourism' were contrary to the plain language and legislative scheme of the Ordinance."

More specifically, "the ZBA found that weddings have concentrated traffic patterns at the beginning and end of the event and that sounds associated with wedding receptions are not traditional agricultural sounds that can be associated with agricultural activities." Thus, its determination that weddings did "not promote the rural character of the Agriculture District and the Township was supported by its findings." The ZBA also properly considered the legislative history when it "considered that the Township previously decided that wedding barns were a commercial activity and were therefore not appropriate as a 'special use' within the Agriculture District." (Source: State Bar of Michigan *e-Journal* Number: 72160; February 3, 2020)

Thus, its determination that weddings did "not promote the rural character of the Agriculture District and the Township was supported by its findings."

Full Text: http://www.michbar.org/file/opinions/appeals/2020/012120/72160.pdf

ZBA fails to make factual findings on a variance request for a cell tower.

Case: *Kingsbury Country Day Sch. v. Addison Twp.*

Court: Michigan Court of Appeals, 2020 Mich. App. LEXIS 1250, 2020 WL 814703 (February 18, 2020, Decided). Unpublished Opinion, No. 344872.

After concluding that it had jurisdiction to hear the appeal and that appellants were entitled to appeal the appellee-ZBA's decision as "aggrieved parties," the court held that the appellee-Township's application did not meet the ordinance requirements so as to enable the ZBA to grant the nonuse variance at issue. Thus, the ZBA's decision was not supported by competent, material, and substantial evidence.

... the ZBA's decision was not supported by competent, material, and substantial evidence.

The court reversed the circuit court's order affirming the ZBA's decision. Appellee-New Par entered into an agreement with the Township to place a cell tower on the parcel at issue. Appellant-Kingsbury Country Day School is located on adjacent property. The Township successfully applied for "a variance from the 20-acre dimensional requirement of" its Wireless Communication Facilities ordinance. The court noted that the ZBA did not make factual findings or "articulate whether the Township had met the requirements" for granting a variance. Further, the record indicated that there was "no support for the conclusion that the Township's application established" the standards required by the ordinance. It did not show that the parcel had "special conditions and circumstances peculiar to it that are not generally applicable to other parcels in the same" district.

Rather, the record suggested that it was "simply too small to meet the dimensional requirement" in the ordinance. The court noted that the "proximity of the tower site to the property line" created a great deal of public concern whether its fall zone posed a danger to the school. Similarly, the application did not show that denying "the variance would deny the Township the rights that are availed to other properties in the area that are zoned appropriately[.]"

Given that the ZBA failed to "make findings that the Township met the standards for granting a variance under the" ordinance, and that the application did not establish entitlement to a variance, "the circuit court erred in concluding the ZBA's decision was supported by competent, material, and substantial evidence on the record and was not an abuse of the ZBA's discretion." (Source: State Bar of Michigan *e-Journal* Number: 72397; March 2, 2020)

Full Text: http://www.michbar.org/file/opinions/appeals/2020/021820/72397.pdf

Nonconforming Uses

Unlawful installation of LED lighting (to replace neon lighting) is not considered maintenance of a nonconformity.

Case: *Southfield Lodge, Inc. v. City of Southfield Zoning Bd. of Appeals*

Court: Michigan Court of Appeals, 2019 Mich. App. LEXIS 3357, 2019 WL 2605778 (June 25, 2019, Decided). Unpublished Opinion No. 343783.

After holding that it had jurisdiction, the court concluded that the circuit court did not err in ruling that competent, material, and substantial evidence supported the appellee-ZBA's decision to deny appellant's request for a variance. While the ZBA contested the court's jurisdiction to hear the case, the circuit court's order was a final order under MCR 7.202(6)(a)(i), and thus, it was appealable as of right under MCR 7.203(A)(1).

Appellant argued that "the circuit court erred in affirming the ZBA's denial of appellant's variance to maintain the existing LED exterior lighting on the outside of" the hotel. Specifically, it asserted that the ZBA's denial "was in contravention of appellant's right to maintain the existing LED lighting on the hotel because appellant has a vested property right in the lighting because it is a nonconforming use." It argued that the originally installed neon tube light was lawfully installed approximately 15 years before "the enactment of the amended ordinance, and the existing LED lighting" was a continuation of this vested nonconforming use. It also contended that "the modification of the lighting from the original neon tube lighting to the existing LED lighting did not expand, enlarge, or change the nature of the lighting," and as a result, it was entitled to maintain the existing lighting.

The ZBA argued that "appellant lost any right that it had to maintain the neon tube lighting after the effective date of Section 5.22-4 of the amended ordinance when appellant removed the neon tube lighting from the hotel and commenced work on the unlawful installation of the existing LED lighting."

The circuit court agreed with the ZBA. The court concluded that the circuit court did not err in affirming the ZBA's denial of the variance. It was unclear exactly when appellant began work on the LED light installation. There was a moratorium period before the effective date of Section 5.22-4. However, the court concluded that "whether appellant installed the LED lighting during the moratorium period or after the effective date of Section 5.22-4, the ZBA did not err in denying appellant's request" for a variance. The time period in which the work on the LED lighting began was not dispositive. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 70827; July 11, 2019)

Full Text: http://www.michbar.org/file/opinions/appeals/2019/062519/70827.pdf

Court, Ripeness for Court's Jurisdiction, Aggrieved Party

The plaintiff lacked standing to appeal Township decision, not an aggrieved party.

Case: *Saugatuck Dune Coastal Alliance v. Saugatuck Twp.*

Court: Michigan Court of Appeals, 2020 Mich. App. LEXIS 1250, 2020 WL 814703 (February 18, 2020, Decided). Unpublished Opinion No. 342588.

The court held that the trial court properly concluded that plaintiff-nonprofit was not an aggrieved party pursuant to MCL 125.3605, and thus, its appeals to defendant-township zoning board of appeals (ZBA) were correctly dismissed.

Plaintiff sought to appeal defendant-township's planning commission's approvals of a condominium development project planned by defendant-developer (North Shores). The trial court affirmed the ZBA's determination that plaintiff lacked standing.

On appeal, the court first found that it had jurisdiction to hear the appeal, disagreeing with North Shores' "implied contention that the ZBA acted as a 'tribunal' for purposes of MCR 7.203(A)(1)(a)." It then found that plaintiff's appeals were correctly dismissed. Plaintiff "submitted numerous affidavits apparently tending to show that the affiants will suffer harms distinct from the general public." However, it did not show that they "will suffer harms distinct from other property owners similarly situated."

The court noted that "some of the affiants are not even actual owners of nearby property; and otherwise all of the articulated concerns are either speculative, broad environmental policy matters, or pertain to harms that could be suffered by any nearby neighbor, business, or tourist." It concluded that, "[i]rrespective of the seriousness of those harms, or of whether those harms might differ from the citizenry at large, the trial court properly concluded that plaintiff was not an aggrieved party . . . ." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 71254; September 16, 2019)

Full Text: http://www.michbar.org/file/opinions/appeals/2019/062519/70827.pdf

Circuit Court has jurisdiction to abate a zoning violation

Case: *Township of Champion v. Pasco*

Court: Michigan Court of Appeals, 2020 Mich. App. LEXIS 2207 (March 23, 2020, Decided). Unpublished Opinion No. 351381

Holding that the circuit court had subject-matter jurisdiction over this action to enjoin a zoning ordinance (ZO) violation and that the ripeness doctrine did not preclude plaintiff-township from litigating its claim, the court reversed the grant of summary disposition to defendants under MCR 2.116(C)(4) and remanded. Plaintiff contended that defendants' use of the property at issue, which was zoned residential, had "improperly extended and enlarged the prior nonconforming use" for a school and a bus garage. Defendants successfully moved to adjourn the bench trial, "arguing that the matter was not ripe for judicial review because the Planning Commission had not held a hearing and rendered a final decision on the use of the property."

The court concluded that in light of several statutory provisions, "circuit courts plainly have jurisdiction to enforce zoning ordinances. This includes disputes regarding the expansion of prior nonconforming uses." The ripeness doctrine prohibits "adjudication of a hypothetical or contingent claim before an actual injury is incurred." Under *Huntington Woods*, a "claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." However, the court concluded that plaintiff's claim was "not contingent upon future events." Instead, it alleged that defendants were currently violating the ZO.

…"circuit courts plainly have jurisdiction to enforce zoning ordinances. This includes disputes regarding the expansion of prior nonconforming uses."

This claim was "ripe for review notwithstanding that the Planning Commission *may* take action on the property in the future that will remedy the alleged violation. The Michigan Supreme Court reached a similar conclusion in" *City of Hillsdale*. Plaintiff's ZO permitted it to seek abatement of violations in court. Plaintiff was not obligated "to ask the Planning Commission for clarification or alteration of the nonconforming use." While defendant-Pascoe submitted an application requesting such relief, the Zoning Administrator rejected it based on a lack of information. Thus, there was "no pending application before the Planning Commission.

In any event, plaintiff is not required to wait for a property owner to obtain a ruling from the Planning Commission before it can enforce" the ZO. The court directed that on remand, the circuit court "rule on plaintiff's motion for summary disposition under MCR 2.116(C)(9)." (Source: State Bar of Michigan *e-Journal* Number: 70954; July 30, 2109)

Full Text: http://www.michbar.org/file/opinions/appeals/2019/071819/70954.pdf

Open Meetings Act, Freedom of Information Act

A record that does not exist cannot be produced (including text messages)

Case: *Bormuth v. City of Jackson*

Court: Michigan Court of Appeals, 2019 Mich. App. LEXIS 6308, 2019 WL 5204544 (October 15, 2019, Decided). Unpublished Opinion No. 347449.

While the court disagreed with plaintiff that there was a genuine issue of material fact as to the existence of public records responsive to his FOIA request, and concluded that summary disposition for defendant-city was proper, it also held that the trial court properly denied the city's request for attorney fees and costs.

Plaintiff asserted that the city violated the FOIA by failing to produce text messages allegedly sent by defendant's mayor (D) to a local community activist (J). He argued that there was a genuine issue of fact as to the recoverability of text messages responsive to his FOIA request. He contended that D's "testimony, that he 'can't recall' whether he 'back[ed] up' the data on his stolen phone was on iTunes or iCloud, created a genuine issue of disputed fact . . . ."

The court disagreed. *Coblentz (Coblentz v. City of Novi 475 Mich. 558 | 719 N.W.2d 73 | 2006 Mich. LEXIS 1429)* held that "where the public body denies the existence of any records and provides evidence supporting that position, the burden to avoid summary disposition shifts to the plaintiff to produce countering evidence." The city attached an affidavit from D "stating that he 'conducted a thorough and diligent search of [his] text messages' and 'checked all of [his] backups to locate any text messages that may have been saved'

but 'did not locate any texts from'" J in the backups. He also stated that he did not possess any official text messages between himself and J. The trial court gave plaintiff an opportunity to directly examine D on this issue, and his testimony was consistent with his affidavit.

Despite the "opportunity to develop and introduce additional evidence, plaintiff was unable to present any proofs that defendant retained any text messages responsive to" his FOIA request. A record that does not exist cannot be produced.

A record that does not exist cannot be produced.

In the absence of factual support contradicting D's affidavit and testimony, the trial court did not err in granting the city summary disposition. It also did not err in denying the city attorney fees and costs. As to MCL 15.240(6), the court noted that "defendant's 'deterrence' argument is utterly incompatible with" FOIA's purpose. Its arguments for fees under MCR 1.109 and MCL 600.2591 failed for the same reasons – "plaintiff did not file this action in bad faith; [he] had some reason to believe that the text messages sought may have existed at one point in time; and [his] belief that the text messages were potentially recoverable was not unreasonable." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 71550 ; October 29, 2019)

Full Text: www.michbar.org/file/opinions/appeals/2019/101519/71550.pdf

Signs: Billboards, Freedom of Speech

MDOT sign permits issued in error, courts uphold order to bring them into compliance or removed (Administrative Law)

Case: *Wolverine Sign Works v. Department of Transportation*

Court: Michigan Court of Appeals, 2019 Mich. App. LEXIS 2393, 2019 WL 2194965 (May 21, 2019, Decided). Unpublished Opinion No. 340621

Holding that the circuit court clearly erred in reviewing the administrative law judge's (ALJ) decision and applied incorrect legal principles, and that the ALJ's decision was supported by law and should have been upheld, the court reversed the circuit court's decision and reinstated the ALJ's decision in this dispute under the HAA. The ALJ determined that petitioner-Wolverine Sign Works owned six signs that were out of compliance with § 7b (MCL 252.307b) of the HAA, and ordered that they "be brought into compliance or removed."

The circuit court reversed the ALJ's decision. The court concluded that the circuit court clearly erred "by disregarding the ALJ's factual findings and failing to apply the appropriate standard of review. Essentially, the circuit court substituted its judgment for that of the ALJ." Its decision was based largely "on its conclusion that MDOT had allowed the signs to contain phone numbers, websites, and more for several years.

After concluding that MDOT was responsible for the nonconforming signs," the circuit court determined that "MDOT was estopped from enforcing" the HAA's restrictions. However, the court noted that "the APA does not allow the reviewing court to 'set aside an administrative decision it finds inequitable.'" Further, it appeared that the circuit court did not "consider whether the ALJ committed an error of law or whether its decision was supported by competent, material, and substantial evidence."

As the circuit court applied incorrect legal principles when it failed to review the ALJ's decision under the proper standard, its decision was clearly erroneous. The court held that, "as a matter of law, the ALJ appropriately concluded that MDOT's decision was appropriate, and that the expansion of items permissible on directional signs, such as the use of websites, phone numbers, and slogans, did not fit within the limitations established by the HAA."

To the extent the circuit court determined that "the ALJ's decision was arbitrary and capricious," the record did not support this conclusion. "The ALJ correctly found that MDOT's decision was based on a sound determining principle, namely, that the signs were not in compliance with the relevant statutes. Additionally, the ALJ correctly held that MDOT's interpretation of the law was supported by the guidance provided by FHWA." (Source: State Bar of Michigan *e-Journal* Number: 70565; June 7, 2019)

Full Text: http://www.michbar.org/file/opinions/appeals/2019/052119/70565.pdf

Public Water, Sewer, and Transit

Well pump facility for a commercial operation is not an "essential public service"

Case: *Nestle Waters N. Am., Inc. v. Osceola Twp.*

Court: Michigan Court of Appeals, 2019 Mich. App. LEXIS 7659, 49 ELR 20192, 2019 WL 6499586 (December 3, 2019, Decided). Unpublished Opinion No. 341881.

The court held that the trial court erred in reversing the decision of the ZBA to refuse plaintiff's requested permit, and that the ZBA properly denied the request. As an initial matter, the trial court's "conclusion that plaintiff's commercial water-bottling operation is an 'essential public service'" was clearly erroneous. Defendant-township's Zoning Ordinance referenced, but did not define, "essential public services" in the catchline of § 2.8.

The court agreed "with the trial court's observation that water is essential to human life, as well as to agriculture, industry, recreation, science, nature, and essentially everything that humans need." However, the trial court went on to hold "that because selling bottled water at a profit supplies a public demand somewhere, it constitutes a 'public service.' A 'public service' means 'the business of supplying a commodity (as electricity or gas) or service (as transportation) to any or all members of a community' or 'a service rendered in the public interest.' . . .

The first definition would not be unreasonable if the sale of bottled water approximated a public utility subject to regulation by the Public Service Commission or a similar entity. The second definition would not be unreasonable if plaintiff was primarily in the business of supplying bottled water to areas that lacked any other source of potable water." But plaintiff's commercial operation satisfied neither understanding of a "public service." Further, except in areas lacking any "other source of water, *bottled* water is not essential."

The trial court erred in effectively holding "that because water is essential, the provision of water in any form, manner, or context is necessarily an 'essential public service.'" The court also rejected plaintiff's alternative contention that its booster-pump facility was entitled to a special land-use permit. Its proposed facility could not "be considered an 'essential public service,' and, even if it could be considered an 'essential public service,' it would still impermissibly interfere with the planned uses of the A-1 agricultural district. Therefore, trial court erred by reversing the ZBA's decision on the basis of plaintiff's proposal constituting an 'essential public service.'" Reversed. (Source: State Bar of Michigan *e-Journal* Number: 71865 ; December 17, 2019)

Full Text: http://www.michbar.org/file/opinions/appeals/2019/120319/71865.pdf

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

Challenge SLU decision, substantial evidence on the record, and aggrieved party

Case: *Deer Lake Prop. Owners Ass'n v. Charter Twp. of Independence*

Court: Michigan Court of Appeals, 2019 Mich. App. LEXIS 6202, 2019 WL 5092617 (October 10, 2019, Decided). Unpublished Opinion No. 343965.

The court held that the trial court did not err by finding defendant-township planning commission had the authority to grant a SLUP to intervening defendant-homeowners association, that its decision was supported by competent, material, and substantial evidence on the record, and that plaintiffs-property owners were an aggrieved party.

On appeal, the court rejected plaintiffs' argument that defendant lacked authority to issue the SLUP because intervening defendant's "proposed use of the outlot as a private marina unlawfully expanded it to a nonconforming use," and the outlot did not qualify for the special land use process. It found defendant "had authority to issue the SLUP as the outlot, even with the NVC [nonconforming validation certificate], qualified for the special land use process . . . ."

The court also rejected plaintiffs' claim that competent, material, and substantial evidence did not support the SLUP decision because the evidence defendant relied on was anecdotal and conjectural. It noted that "consideration of the outlot by-laws and the site plan, which disclosed how the outlot would be used, was relevant."

Finally, the court rejected the intervening defendant's contention that the trial court erred by finding plaintiffs were an aggrieved party because there was no evidence that intervening defendant's docking would harm it in any way, let alone evidence that the docking would cause harm distinct from that of the general public who also use the public lake. "As riparian owners who share this shoreline, they have an interest beyond that of other lake users, the public at large, or even similarly situated neighbors." In addition, they "are more likely to be affected by these additions and line of sight alterations than the public, or other lake users, by virtue of their proximity to the outlot and the situation of its members respective properties in relation to the outlot." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 71507 ; October 24, 2019)

Full Text: http://www.michbar.org/file/opinions/appeals/2019/101019/71507.pdf

Planning Commission, Plans

Planning Commission's authority to deny a site plan based on a "high set of standards" is within their discretion.

Case: *KI Props. Holdings LLC v. Ann Arbor Charter Twp.*

Court: Michigan Court of Appeals, 2020 Mich. App. LEXIS 865, 2020 WL 563652 (February 4, 2020, Decided). Unpublished Opinion No. 348010.

The court held that the circuit court erred in determining that defendant-township's Planning Commission (PC) lacked authority to deny the preliminary site plan and related permit applications on the basis they did not "minimize the harm to the natural resources on the property" at issue. Further, it erred in ruling that the PC's decision was not supported by substantial evidence. Given that the ZBA did not err in finding that the PC properly applied the law and that substantial evidence supported its decision, the circuit court should have affirmed the ZBA's decision on plaintiff-DF Development's appeal.

The court also held that the circuit court erred to the extent it found that plaintiff-KI Properties had an appeal of right from the ZBA's decision, and in dismissing plaintiffs' civil claims without giving them notice and an opportunity to be heard. Thus, it (1) remanded for entry of an order dismissing KI's appeal of the ZBA's decision; (2) reversed the decision granting plaintiffs appellate relief, vacated the order granting appellate and injunctive relief, and remanded for entry of an order affirming the ZBA's decision; and (3) reversed the dismissal of plaintiffs' due process, declaratory relief, takings, and § 1983 claims, vacated the order dismissing them, and remanded for further proceedings.

It found that the zoning ordinances gave the PC "a set of guidelines governing the approval of the site plan at issue and its associated permits." The fact that they "set a high standard for development did not equate with a conferral of unfettered discretion on" the PC.

The record also showed that substantial evidence supported the PC's findings. "The evidence showed that the proposed site plan did not include design features to better preserve the natural topography of the property and to preserve more of the mature trees that were located on the property." The PC could properly deny the application and related permit requests because the "evidence established that the site plan did not minimize the cutting, grading, and tree removal, as required by" the ordinances. The circuit court should have affirmed the ZBA's denial of the appeal from the PC's decision. Further, absent evidence showing KI had aggrieved party status, it should have dismissed that KI's appeal of the ZBA's decision for lack of jurisdiction. Its dismissal of plaintiffs' independent civil claims implicated due process. (Source: State Bar of Michigan *e-Journal* Number: 72319; February 24, 2020)

Full Text: http://www.michbar.org/file/opinions/appeals/2020/020420/72319.pdf

Other Unpublished Cases

Bike path within the road right-of-way was not a trespass, encroachment, or civil wrong.

Case: *Grimaldi v. OHM and Orion Township*

Court: Michigan Court of Appeals, 2020 Mich. App. LEXIS 2235 (March 24, 2020, Decided) Unpublished Opinion No. 345270

The court affirmed summary disposition for OHM and defendant-township [Orion Township] in this case arising from development of a bike path alongside the road on which plaintiff lived. OHM was an architectural, engineering, and planning firm employed by the township in connection with the bike path. The court noted that plaintiff (1) "did not allege an unconstitutional taking in his complaint; (2) [he] did not raise the issue of or claim an unconstitutional taking at the time of summary disposition; (3) [he] did not even present such an issue in his motion for reconsideration; and (4) [he] did not submit documentary evidence showing that any of his property was actually taken or encroached upon."

Even pro se plaintiffs have to comply with the court rules and brief arguments to preserve them, and ignorance of the law is no excuse. Plaintiff failed to present "any preserved claim or argument that could serve as the basis to reverse the trial court's order granting" the township summary disposition on the ground of governmental immunity. As to OHM, on "the basis of the actual allegations in plaintiff's complaint," it moved for summary disposition under MCR 2.116(C)(10), countering those specific allegations, and "properly attached relevant documentary evidence in support of the motion, including evidence that there was no trespass or encroachment of any kind."

The trial court did not err in granting OHM's motion. As to plaintiff's claim he should have been given an opportunity to amend his complaint, he essentially presented nothing to the trial court "by way of relevant argument, and the 'evidence then before the court,' none of which reflected a trespass, an encroachment, or any civil wrong, did not justify an amendment of the pleadings." (Source: State Bar of Michigan e-Journal Number 72688; April 10, 2020)

Full Text: http://www.michbar.org/file/opinions/appeals/2020/032420/72688.pdf

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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

Appendix A: 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.

in personam

adverb or adjective

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.