Michigan State University Extension
Public Policy Brief

Selected Planning and Zoning Decisions: 2021 (May 2020-May 2021)

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This public policy brief summarizes the important state and federal court cases and Attorney General Opinions issued between May 1, 2020 and May 6, 2021.

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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 based on Michigan law and statute and is intended for use in Michigan. 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

This document reports cases from Michigan courts of record (Appeals Courts, Michigan Supreme Court), or federal courts that have precedential value (Appeals Court [specially the 6th Circuit Court of Appeals], United States Supreme Court). Thus Michigan Circuit, District court cases; federal district court cases are generally not reported here.

Typically, a federal district court's interpretation of state law (as opposed to federal law) is not binding on state courts, although state courts may adopt their reasoning as persuasive. The U.S. Sixth Circuit Court of Appeals takes the position that the doctrine of *stare decisis* makes a federal district court decision binding precedent in future cases in the same court until reversed, vacated, or disapproved by a superior court, overruled by the court that made it, or rendered irrelevant by changes in the positive law. In some cases, U.S. District court rulings may apply only in certain parts of Michigan:

- United States District Court for the Eastern District of Michigan (roughly the east half of the lower peninsula):
  - The Northern Division (located in Bay City) comprises the counties of Alcona, Alpena, Arenac, Bay, Cheboygan, Clare, Crawford, Gladwin, Gratiot, Huron, Iosco, Isabella, Midland, Montmorency, Ogemaw, Oscoda, Otsego, Presque Isle, Roscommon, Saginaw, and Tuscola.
  - The Southern Division (located in Ann Arbor, Detroit, Flint, and Port Huron) comprises the counties of Genesee, Jackson, Lapeer, Lenawee, Livingston, Macomb, Monroe, Oakland, Saint Clair, Sanilac, Shiawassee, Washtenaw, and Wayne.
- United States District Court for the Western District of Michigan (roughly the west half of the lower peninsula and all of the Upper Peninsula):
  - The Northern Division (located in Marquette and Sault Sainte Marie) comprises the counties of Alger, Baraga, Chippewa, Delta, Dickinson, Gogebic, Houghton, Iron, Keweenaw, Luce, Mackinac, Marquette, Menominee, Ontonagon, and Schoolcraft.

- The Southern Division (located in Grand Rapids, Kalamazoo, Lansing, and Traverse City) comprises the counties of Allegan, Antrim, Barry, Benzie, Berrien, Branch, Calhoun, Cass, Charlevoix, Clinton, Eaton, Emmet, Grand Traverse, Hillsdale, Ingham, Ionia, Kalamazoo, Kalkaska, Kent, Lake, Leelanau, Manistee, Mason, Mecosta, Missaukee, Montcalm, Muskegon, Newaygo, Oceana, Osceola, Ottawa, Saint Joseph, Van Buren, and Wexford.

Enforcement

Court finds that drone footage is an unreasonable search under the Fourth Amendment, requires warrant.

Case: *Long Lake Twp v. Maxon*

Court: Michigan Court of Appeals (Published Opinion, LEXIS 1819, 2021 WL 1047366, March 18, 2021, Decided.)

The court held that the trial court erred by denying defendants-property owners' motion to suppress drone photos used by plaintiff-township in this zoning dispute. Plaintiff alleged defendants were operating an illegal salvage or junkyard on their property in violation of a township ordinance. In support, it offered aerial photos taken by a drone. Defendants moved to suppress the photos and resulting evidence claiming plaintiff's actions constituted an unlawful search. The trial court denied their motion, finding they did not have a reasonable expectation of privacy.

On appeal, the court first noted that "the trial court correctly determined that noncompliance with FAA regulations does not, *per se*, establish that a Fourth Amendment violation occurred." However, it proceeded to find that "drone surveillance of this nature intrudes into persons' reasonable expectations of privacy, so such surveillance implicates the Fourth Amendment and is illegal without a warrant or a traditional exception to the warrant requirement." The court noted that drones are "intrinsically more targeted in nature than airplanes and intrinsically much easier to deploy." In addition, "given their maneuverability, speed, and stealth, drones are—like thermal imaging devices—capable of drastically exceeding the kind of human limitations that would have been expected by the Framers not just in degree, but in kind." Further, drones "fly below what is usually considered public or navigable airspace. Consequently, flying them at legal altitudes [under 400-feet] over another person's property without permission or a warrant would reasonably be expected to constitute a trespass."

"Consequently, flying them [drones] at legal altitudes over another person's property without permission or a warrant would reasonably be expected to constitute a trespass."

Finally, the court noted that it would be "unworkable and futile to try to craft a precise altitude test." However, it concluded that "persons have a reasonable expectation of privacy in their property against drone surveillance, and therefore a governmental entity seeking to conduct drone surveillance must obtain a warrant or satisfy a traditional exception to the warrant requirement." Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 75070; March 22, 2021)

Full Text: http://www.michbar.org/file/opinions/appeals/2021/031821/75070.pdf

Due Process and Equal Protection

Right to file a petition of referendum does not apply to an interim zoning ordinance

Case: *Sandstone Creek Solar, LLC v. Township of Benton*

Court: Michigan Court of Appeals (Published Opinion, 2021 Mich. App. LEXIS 792, 2021 WL 400585, February 4, 2021, Decided)

The court held that the trial court did not err by denying plaintiffs' (Sandstone and Walters) motion for a preliminary injunction, granting in part their claim for relief under FOIA, or dismissing counts I, IV, and V of their complaint. However, it did err by dismissing counts II and III without notice and hearing on those counts.

Sandstone began to implement its plan to build a solar power project in defendant-township. But the township, which had operated under the county's zoning ordinance, adopted an interim zoning ordinance. Plaintiffs sued, seeking a declaratory judgment that the interim ordinance was invalid (Count I), that the township improperly imposed a moratorium on projects within it (Count II), alleging that the interim ordinance imposed exclusionary zoning (Count III), and that the township's refusal to accept Walters' referendum petition was improper and unlawful (Count V). They also alleged a violation of the FOIA (Count IV) and moved for a preliminary injunction seeking an order compelling the township to accept the referendum petition, to determine its adequacy, and to place the interim ordinance on the ballot at the next regular or special election.

The trial court denied their motion for a preliminary injunction, granted partial relief on their FOIA claim, and dismissed their complaint in all other respects. On appeal, the court concluded that "the trial court properly held that the right to file a petition for referendum under MCL 125.3402 does not apply to an interim zoning ordinance implemented under MCL 125.3404."

On appeal, the court concluded that "the trial court properly held that the right to file a petition for referendum under MCL 125.3402 does not apply to an interim zoning ordinance implemented under MCL 125.3404."

As to plaintiffs' request for injunctive relief, because they "failed to show that the trial court's denial of their motion for a preliminary injunction falls outside the range of reasonable and principled outcomes," it did not abuse its discretion by denying their motion for a preliminary injunction.

As to their due process argument, the court found that they "had ample notice and an opportunity to be heard regarding the merits of Counts I and V of their second amended complaint." And they were "clearly heard" on their FOIA count as the trial court ordered the township to produce additional documents responsive to their request. However, as to Counts II and III, the court was not convinced that plaintiffs "were on notice that the trial court was prepared to consider the dismissal of those claims." Affirmed in part, reversed in part, and remanded. (Source: State Bar of Michigan *e-Journal* Number: 74809; February 8, 2021)

Full Text: http://www.michbar.org/file/opinions/appeals/2021/020421/74809.pdf

Conditional Zoning Amendment

Conditional zoning amendment is a legislative decision; exhaustion of administrative remedies does not apply in Township with no use variance authority

Case: *Connell v. Lima Twp.*

Court: Michigan Court of Appeals (Published Opinion, 2021 Mich. App. LEXIS 1458, 2021 WL 833299 March 4, 2021, Decided).

The court held that "rezoning is a legislative act" and as a result, "plaintiffs were not required to exhaust administrative remedies or show that they were aggrieved parties," and the trial court erred by granting defendants-township and planning commission summary disposition on these grounds. The Township "rezoned property in its jurisdiction, subject to certain conditions proposed by the property owner. Adjacent property owners sought to challenge the rezoning decision in circuit court, but the court concluded that they did not exhaust certain administrative remedies and were not aggrieved parties." They asserted both procedural-due-process and substantive-due-process claims, claiming that "the Township acted capriciously when it granted the conditional rezoning. Because the exhaustion requirement does not apply to these claims, the trial court erred in ruling that plaintiffs' lawsuit was barred because they had failed to exhaust their administrative remedies."

The court held that "rezoning is a legislative act" and as a result, "plaintiffs were not required to exhaust administrative remedies or show that they were aggrieved parties," and the trial court erred by granting defendants-township and planning commission summary disposition on these grounds.

Defendants argued that under the Supreme Court's decision in *Paragon*, "plaintiffs were still required to appeal to the Board of Appeals before suing in circuit court." The court held that they read too much into *Paragon [Paragon Props. Co. v. City of Novi*, 452 Mich. 568, 550 N.W.2d 772, 1996 Mich. LEXIS 1691 (Supreme Court of Michigan July 23, 1996).

In contrast to the facts there, the Township Board's decision here "to grant the conditional rezoning was a final decision subject to review in the circuit court. Defendants point to no procedure in the Township's Ordinance that would allow owners of adjacent property to seek a use variance for the subject property. Further, defendants cite no appellate caselaw standing for the proposition that a legislative body's decision to grant a rezoning request is not a final decision." Unlike in *Paragon*, where there was no information about "'the potential uses of the property that might have been permitted,' . . . the conditional rezoning request that was approved in this case carried with it very express conditions describing the uses of the property that were permitted by the Township Board."

The trial court erred in holding that plaintiffs' lawsuit was barred because they failed to exhaust their administrative remedies. It also erred by granting defendants summary disposition under MCR 2.116(I)(2) on the basis "that plaintiffs did not qualify as 'aggrieved' parties who could have—but failed to— file an appeal to the Zoning Board of Appeals under MCL 125.3604." That provision did not apply here. Finally, plaintiffs had standing to challenge the conditional rezoning. Reversed, vacated, and remanded. (Source: State Bar of Michigan *e-Journal* Number: 74987; March 8, 2021)

Full Text: http://www.michbar.org/file/opinions/appeals/2021/030421/74987.pdf

Court, Ripeness for Court's Jurisdiction, Aggrieved Party

Wind turbines: anticipated shadow flicker, sound fail to meet aggrieved party status

Case: *Ansell v. Delta Cnty. Planning Comm'n*

Court: Michigan Court of Appeals (Published Opinion, 332 Mich. App. 451, 957 N.W.2d 47, 2020 Mich. App. LEXIS 3688, 2020 WL 3005856, June 4, 2020, Decided)

In an issue of first impression, the court held that the "aggrieved party" standard applicable to appeals of ZBA decisions under MCL 125.3605 also applies where there is no provision for ZBA review. Thus, it affirmed the circuit court's dismissal of appellants' challenges to defendant-planning commission's grant of conditional use permits for the construction of wind turbines for lack of jurisdiction. A plain reading of the relevant provisions of the ZEA, the MCRs, and case law supported "the conclusion that only an aggrieved party may appeal the final determination under a zoning ordinance." The court noted that the "ZEA provides for the creation of a zoning commission in each municipality, but also allows for the continuation of the exercise of powers by township zoning boards and planning commissions established before" it went into effect. Also, the creation of a planning commission under the ZEA did not create a requirement that a ZBA be established. Appellants failed to offer "any persuasive authority explaining why an appeal from a determination under a zoning ordinance from a township board should not be subject to the ZEA requirement that only an 'aggrieved' party has standing to appeal.

Both appeals from a township board and municipal zoning commission planning board are entitled to the same review." *Carleton* clearly states "that to invoke the circuit court's jurisdiction, appellants must have been aggrieved parties. To have the status of 'aggrieved party' for purposes of obtaining the circuit court's appellate review of a decision under a zoning ordinance, 'a party must allege and prove that he or she has suffered some special damages not common to other property owners similarly situated.'"

While they pointed to "... their raising concerns over how the proposed wind turbines would impact the environment, public health, property values," and the area's general aesthetic character, these concerns did not show that they stood "to suffer any greater negative impacts from the proposals than" their neighbors or others.

The circuit court found that appellants failed to show they "suffered special damages or a unique harm not common to other property owners similarly situated." While they pointed to "their participation in the proceedings below, and their raising concerns over how the proposed wind turbines would impact the environment, public health, property values," and the area's general aesthetic character, these concerns did not show that they stood "to suffer any greater negative impacts from the proposals than" their neighbors or others. As to their nuisance argument, they did not distinguish themselves from the unsuccessful appellants in *Olsen*. (Source: State Bar of Michigan *e-Journal* Number: 73200; June 8, 2020)

Full Text: http://www.michbar.org/file/opinions/appeals/2020/060420/73200.pdf

Signs: Billboards, Freedom of Speech

Sign regulation, content-based restriction, *Reed's* "strict scrutiny" standard

Case: *International Outdoor, Inc. v. City of Troy*

Court: U.S. Court of Appeals Sixth Circuit, Eastern District of Michigan (974 F.3d 690, 2020 U.S. App. LEXIS 28244, 2020 FED App. 0294P (6th Cir.), 2020 WL 5269822, September 4, 2020, Filed)

The court affirmed summary judgment for defendant-City of Troy on plaintiff-International Outdoor's claim that the City's sign ordinance constituted an unconstitutional prior restraint. But it vacated the district court's order granting the City's motion to dismiss the claim that its sign ordinance imposed content-based restrictions without a compelling government interest, and remanded for reconsideration under *Reed*'s "strict scrutiny" standard. International Outdoor applied for a permit to erect two digital billboards in the City. The proposed billboards exceeded the City's sign ordinance's size, height, and set-back requirements. The City denied the permit and a variance. On appeal, International Outdoor argued that the district court erred by granting the City summary judgment on its claim that the sign ordinance imposed an "unconstitutional prior restraint." The court held that the City's original sign ordinance did constitute a prior restraint on speech "because the right to display a sign that did not come within an exception as a flag or as a 'temporary sign' depended on obtaining either a permit from the Troy Zoning Administrator or a variance from the Troy Building Code Board of Appeals." In addition, the standards for granting a variance were "vague and undefined," and gave Troy Building Code Board of Appeals "unbridled discretion . . . ."

The court next held that International Outdoor had standing to bring its claim that the sign ordinance imposed "content-based restrictions without a compelling government interest."

However, the City's amended sign ordinance altered the variance provision, and the court agreed with the district court that this mooted International Outdoor's claim for declaratory and injunctive relief. It also lost its damages claim under *Midwest Media* because the variance provision was severable. The court next held that International Outdoor had standing to bring its claim that the sign ordinance imposed "content-based restrictions without a compelling government interest." It found that the district court erred by applying *Central Hudson*, which calls for an intermediate level of scrutiny, instead of *Reed*'s strict scrutiny, because *Reed* was controlling precedent in this case where intermediate scrutiny "applies only to a speech regulation that is content-neutral on its face." Thus, the court vacated the district court's grant of the City's motion to dismiss the content-based restriction claim, and remanded for consideration under *Reed*, as well as to consider the issue of attorney fees. (Source: State Bar of Michigan *e-Journal* Number: 73788; Sept. 10, 2020)

Full Text: http://www.michbar.org/file/opinions/us_appeals/2020/090420/73788.pdf

Short Term Rentals

MI Supreme Court affirms COA published opinion on short-term rental

Case: *Reaume v. Township of Spring Lake*

Court: MI Supreme Court, Case 505 Mich. 1108, 943 N.W.2d 394, 2020 Mich. LEXIS 1042, 2020 WL 3033308 (June 5, 2020, Decided)

[Excerpt from Opinion]

"On May 6, 2020, the Court heard oral argument on the application for leave to appeal the May 21, 2019 judgment of the Court of Appeals [328 Mich. App. 321, 937 N.W.2d 734, 2019 Mich. App. LEXIS 2397, 2019 WL 2195030]. On order of the Court, the application for leave to appeal is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE that part of the Court of Appeals judgment analyzing defendant's ordinance's definition of single-family dwelling and concluding that the definition excludes "temporary occupancy" because family is defined to exclude "transitory or seasonal" relationships. To the contrary, defendant's ordinance defines dwelling to include a "[building . . . occupied . . . as a home, residence, or sleeping place, either permanently or temporarily . . . ." (Emphasis added.) The Court of Appeals erred by conflating the concept of a transient relationship between people with the concept of transient occupancy of the property.

...So regardless of whether the property's bedrooms are "accessible from an outdoor parking area," we conclude that the property fits the ordinance's definition of motel since that definition expressly allows that sleeping units "may not be independently accessible from the outside." We thus conclude that plaintiff's use of her property was not a permitted use of a single-family dwelling under defendant's ordinance. For this reason, we AFFIRM the Court of Appeals judgment. BERNSTEIN, J. (concurring in part and dissenting in part)." (Source: MI Supreme Court Order, No. 159874, June 5, 2020)

Full Text: http://publicdocs.courts.mi.gov/SCT/PUBLIC/ORDERS/159874_79_01.pdf

Other Published Cases

Ordinance is not unreasonable or inconsistent with MMMA, previous decision reversed.

Case: *Charter Twp. of York v. Miller*

Court: Michigan Court of Appeals (Published Opinion, 2021 Mich. App. LEXIS 649, 2021 WL 297449, January 28, 2021, Decided)

On remand, the court held that under the Supreme Court's decision in *DeRuiter* [*DeRuiter v. Township of Byron*, 505 Mich. 130, 949 N.W.2d 91, 2020 Mich. LEXIS 861 (April 27, 2020, Filed)] the zoning ordinance at issue does not directly conflict with the Michigan Medical Marihuana Act (MMMA, Initiated Law 1 of 2008). It held that the "ordinance does not prohibit or penalize all cultivation of medical marijuana, and it does not impose regulations that are unreasonable and inconsistent with the regulations established by the MMMA." Thus, it reversed the declaration in the "judgment that the zoning ordinance, to the extent that it prohibits the outdoor cultivation of medical marijuana, is unenforceable because it conflicts with the MMMA." Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 74751; February 1, 2021)

Full Text: http://www.michbar.org/file/opinions/appeals/2021/012821/74751.pdf

Court upholds the municipal decision to opt-out of marijuana establishments under MRTMA.

Case: *Brightmoore Gardens, LLC v. Marijuana Regulatory Agency*

Court: Michigan Court of Appeals (Published Opinion, 2021 Mich. App. LEXIS 2865, 2021 WL 1822808, May 6, 2021, Decided)

The court held that the trial court did not err by granting defendant-Marijuana Regulatory Agency (MRA) summary disposition of plaintiffs-marijuana license applicants' claims under the Michigan Regulation and Taxation of Marijuana Act (MRTMA, Initiated Law 1 of 2018). Defendant denied plaintiffs' applications to license marijuana establishments, citing their failure to obtain the signatures of the respective city clerks (Emergency Rule 8(1)(e), failure to comply with the cities' ordinances prohibiting marijuana establishments (Emergency Rule 9(2)(g), and failure to obtain confirmation of municipal compliance (Emergency Rule 14(2)(f)). Plaintiffs then filed this action seeking a declaratory judgment that Emergency Rules 8(1)(e), 9(2)(g), and 14(2)(f) were invalid because they are contrary to the MRTMA. The trial court accepted plaintiffs' argument that exhausting their administrative remedies would be futile, but granted defendant's motion for summary disposition, dismissed the complaints for failure to state a claim, and rejected plaintiffs' contention that the MRA's rules were invalid.

The duty and power to administer the MRTMA, and to make rules to implement the act, was assigned to" the MRA. The MRTMA "provides municipalities the power to opt-out of the act or to impose certain restrictions on marijuana establishments within the municipality.

On appeal, the court noted that "the MRTMA provides for the issuance of licenses to eligible applicants for marijuana establishments for the purpose of selling marijuana legally to persons 21 years old or older. The duty and power to administer the MRTMA, and to make rules to implement the act, was assigned to" the MRA. The MRTMA "provides municipalities the power to opt-out of the act or to impose certain restrictions on marijuana establishments within the municipality. Defendant's emergency rules effectuated this intent by giving municipalities sufficient time to opt-out or regulate marijuana establishments during the 90-day window in which the application is considered by defendant. The trial court did not err" in granting defendant summary disposition. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 75395; May 10, 2021)

Full Text: http://www.michbar.org/file/opinions/appeals/2021/050621/75395.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 somewhat 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 are 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

Locational restrictions *allowed* when not in contradiction of the Michigan Medical Marijuana Act (MMMA)

Case: *Charter Twp. of Ypsilanti v. Pontius*

Court: Michigan Court of Appeals (Unpublished Opinion, 2020 Mich. App. LEXIS 8772, 2020 WL 7765766, December 29, 2020, Decided)

On remand from the Supreme Court for reconsideration in light of *DeRuiter* [*DeRuiter v. Township of Byron*, 505 Mich. 130, 949 N.W.2d 91, 2020 Mich. LEXIS 861 (April 27, 2020, Filed)], the court held that the "locational restriction" in plaintiff-township's zoning ordinance did not directly conflict with the MMMA. Thus, it reversed the trial court's order that ruled the ordinance was preempted by the MMMA, and remanded. The court previously affirmed that order, concluding that it was bound by its earlier decision in *DeRuiter*. The Supreme Court reversed its decision in *DeRuiter*, and later vacated its judgment in this case and remanded.

After reviewing *DeRuiter* and *Ter Beek II*, the court concluded that the ordinance here was not preempted by the MMMA. "First, unlike the ordinance in *Ter Beek II*, plaintiff's ordinance does not prohibit or penalize all cultivation of medical marijuana." Rather, this ordinance simply limited "where a primary caregiver may operate a medical marijuana dispensary or medical marijuana nursery. Second, plaintiff did not impose regulations that are unreasonable and inconsistent with regulations established by state law." Like the ordinance at issue "in *DeRuiter*, the 'locational restriction' in plaintiff's ordinance adds to and complements the limitations imposed by the MMMA;" thus, it did not contradict the state statutory scheme. "While the zoning ordinance goes further in its regulation of the medical use of marijuana, it does not do so in a manner that is counter to the MMMA's conditional allowance on the medical use of marijuana." (Source: State Bar of Michigan *e-Journal* Number: 74574; January 22, 2020)

Like the ordinance at issue "in DeRuiter, the 'locational restriction' in plaintiff's ordinance adds to and complements the limitations imposed by the MMMA;" thus, it did not contradict the state statutory scheme.

Full Text: http://www.michbar.org/file/opinions/appeals/2020/122920/74574.pdf

Takings

21 conditions placed on permit for metal recycling facility do not amount to a taking

Case: *Three Rivers Metal Recylers, LLC v. Township of Fabius*

Court: Michigan Court of Appeals, Unpublished Opinion, 2020 Mich. App. LEXIS 3778, 2020 WL 3120261, June 11, 2020, Decided)

Holding that plaintiffs did not establish a regulatory taking arising from defendant-township's actions related to zoning, the court affirmed summary disposition for defendant. Plaintiffs purchased 14.3 acres zoned as I-1 Light Industrial in the township and later sought a special exception use permit (SEUP) "for 5.1 acres of the property and proposed to operate a metal and aggregate recycling facility, specifically, an auto junkyard with a car crusher." The planning commission eventually approved the SEUP subject to 21 conditions.

Plaintiffs appealed the decision to impose conditions to the circuit court, and after a prior appeal to the court, the circuit court issued an order affirming in part and reversing in part, accepting or rejecting the various conditions. Plaintiffs then filed this suit, alleging "inverse condemnation for a regulatory taking of" their property, as well as "deprivation of substantive due process and the 'right to fair and just treatment.'" They asserted that the circumstances relating "to the underlying zoning condition litigation resulted in a taking of property."

The court noted that, in order to show an inverse condemnation occurred via a regulatory taking, they had "to show that defendant's actions were a substantial cause of the property's decline in value." But plaintiffs did not offer an expert to testify about "the amount paid for the property and any diminution in value as a result of the conditions placed on" it to obtain the SEUP or produce "documentary evidence to show that defendant's conditions, as recommended by an independent consulting firm . . . caused a substantial decline in the value of" the property. Thus, they failed to establish "an inverse condemnation, particularly in light of the lack of an appropriate evidentiary response to defendant's proofs." Plaintiffs also did not meet the criteria of the "*Penn Central*" test.

The character of defendant's actions did not "indicate a plot to preclude or sabotage" plaintiffs' proposed use, and plaintiffs "failed to show the economic effect on the property with preserved, admissible documentary evidence." Finally, the court found the doctrine of unconstitutional conditions did not apply to the facts here. (Source: State Bar of Michigan *e-Journal* Number: 73248; June 22, 2020)

Full Text: http://www.michbar.org/file/opinions/appeals/2020/061120/73248.pdf

Nonconforming Uses

The addition of kitchen facilities found to be illegal in a 1953 boarding/rooming house

Case: *Canton Inv. & Dev., Inc. v. Charter Twp. of Canton*

Court: Michigan Court of Appeals (Unpublished Opinion, 2020 Mich. App. LEXIS 5464, 2020 WL 4910813, August 20, 2020, Decided)

The court held that plaintiff-Canton Investment "changed the essential nature and enlarged the nonconforming use when it provided 'cooking' and 'kitchen accommodations' to its tenants" on the property. Thus, whenever these accommodations were added, they "created in an illegal, nonconforming use on the property." Given that there was no question of material fact, the court affirmed the order granting defendant-Charter Township of Canton summary disposition. Plaintiff asserted that it should

have been granted summary disposition instead because "the undisputed facts establish that the property was continually being used in compliance with the 1950 Ordinance" at issue.

The court disagreed. "At the time the 1950 Ordinance was in effect, the property was included in the 'C Districts,' and the 1950 Ordinance permitted buildings in the C Districts to be used to provide 'boarding, rooming and lodging houses[.]'" The court determined that even if plaintiff was "correct that the residential building was used as an apartment building since it was erected in 1953," plaintiff's use of it would not fall within the Ordinance's definition of a "boarding or rooming house" as it asserted. Under that definition, "there could not have been 'any attempt[s]' on the part of the family who dwelled in the home to provide the lessee or rentee with either 'cooking or kitchen accommodations.'"

Consulting a dictionary to define the words cooking, kitchen, and accommodations, the court concluded that the building could not "be considered a 'boarding or rooming house' during the time that the kitchens and/or amenities to cook and prepare meals were present in the units." Even if the building could have been deemed a "boarding or rooming house" when it operated between 1953 and when plaintiff obtained it in 2012, plaintiff's changes created an illegal, nonconforming use. Because the undisputed evidence showed that its use of the building was not allowed under the 1950 Ordinance, its use "could not be considered a legal, nonconforming use and a genuine issue of material fact did not exist for trial." (Source: State Bar of Michigan *e-Journal* Number: 73710; September 4, 2020)

Full Text: http://www.michbar.org/file/opinions/appeals/2020/082020/73710.pdf

Adding second story to nonconforming building does not increase the nonconformity.

Case: *Randazzo v. Lake Twp*

Court: Michigan Court of Appeals (Unpublished, 2020 Mich. App. LEXIS 8266, 2020 WL 7296982, December 10, 2020, Decided)

In its new opinion, it again held that the trial court did not err when it concluded that the ZBA misinterpreted § 1310 of the Zoning Ordinance and reversed the ZBA's decision. Thus, the court affirmed the trial court's order reversing the decision of the ZBA denying a variance request of appellees-the Randazzos. Defendant-Township argued that the trial court erred when it interpreted the plain language of § 1310 and reversed the ZBA's denial of the variance.

Appellees sought to add an additional level to their home. It was "undisputed that the residence is an existing nonconforming building with respect to its setback, being set back only 8.3 feet from the road." The Township argued that it was the "intent of the drafters of § 1310 to 'prohibit *any expansion or alteration* of a nonconforming structure with less than ½ of the required setback distance.' However, the plain language of the ordinance provides that '[n]o conforming building or structure may be enlarged or altered in a way that *increases* its nonconformity.'" The court noted that when "'the words used in a statute or an ordinance are clear and unambiguous, they express the intent of the legislative body and must be enforced as written.'" Here, the court held that "the ZBA's interpretation of § 1310 was contrary to the unambiguous language of § 1310. The proposed improvements to the property would not further decrease the setback, or, in other terms, enlarge or alter the nonconformity of the setback. Moreover, because the Township has elected not to challenge the trial court's findings

The proposed improvements to the property [adding a second story to a nonconforming building] would not further decrease the setback, or, in other terms, enlarge or alter the nonconformity of the setback.

concerning the height requirement, there is no basis for concluding that the proposed improvements would result in a vertical nonconformity by exceeding the height requirement of § 705.4."

Thus, the ZBA's finding were "not supported by competent, material, and substantial evidence because there was no evidence that any nonconformity would be enlarged or altered; in simple terms, the building would be just as nonconforming after the improvements as it was before." (Source: State Bar of Michigan *e-Journal* Number: 74380; December 22, 2020)

Full Text: http://www.michbar.org/file/opinions/appeals/2020/121020/74380.pdf

Conditional Zoning Amendment

Gravel mining operation challenges zoning ordinance validity, use of moratorium, and zoning amendment

Case: *Metamora Twp. v. American Aggregates of MI, Inc.*

Court: Michigan Court of Appeals (Unpublished Opinion, 2021 Mich. App. LEXIS 2090 (April 1, 2021, Decided)

The court held that the trial court did not err by granting plaintiff-Township summary disposition of counterplaintiff's American Aggregates of Michigan (AAOM) counterclaims. AAOM petitioned the Township for conditional rezoning and special land use approval of its owned and leased property in order to conduct mining activities. Shortly thereafter, the Township issued a moratorium, and later amended its existing zoning ordinance. It eventually sought injunctions.

During a lengthy proceeding, the trial court granted a series of summary disposition motions, resulting in the dismissal of each of AAOM's counterclaims. On appeal, the court rejected AAOM's argument that the trial court erred by holding that the amended ordinance was the applicable ordinance, noting it failed to show the Township adopted the amended ordinance to obtain a litigation advantage. In addition, it rejected AAOM's claim that the amended ordinance was preempted by MCL 125.3205 under a direct conflict theory, finding no direct conflict. It also rejected AAOM's contention that the amended ordinance was invalid because it was *ultra vires*, finding the Township "did not 'evade the Legislature's mandate.'" The court next rejected AAOM's argument that the amended ordinance violated due process, finding there was no substantive due process violation under a rational-basis review. It further rejected AAOM's claim "that the moratorium was not a proper exercise of the Township's authority because it was an illegal attempt to amend the ordinance by resolution and because passing moratoria is not authorized by" the MZEA, finding it failed to support this argument.

Moreover, the court rejected AAOM's contention that the moratorium violated due process and equal protection, holding it failed to show it "had a constitutionally protected right to have its application considered in a certain time or had a 'reasonable expectation of entitlement' to the permit," and that "the plain language of the moratorium purports to treat all individuals seeking approval for gravel mining equally." And because it failed to establish a constitutional violation, it was not entitled to damages. Finally, AAOM could not show how it was harmed by the trial court's failure to comply with MCR 3.310 in issuing the *status quo* order. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 75188; April 19, 2021)

Full Text: http://www.michbar.org/file/opinions/appeals/2021/040121/75188.pdf

Aggrieved Party

Homeowner living next to car repair/used car sales is an aggrieved party

Case: *Baker v. Township of Bainbridge*

Court: Michigan Court of Appeals (Unpublished, 2020 Mich. App. LEXIS 3167, 2020 WL 2096049 (Court of Appeals of Michigan April 30, 2020, Decided)

Holding that appellant is "indeed an aggrieved party under" MCL 125.3605, the court vacated the circuit court's ruling, reinstated her appeal, and remanded the case to the circuit court for a ruling on the merits of her appeal of appellee-zoning board of appeals' grant of a special land use permit. Appellee granted a special land use permit that allowed appellant's neighbor to operate an automotive repair shop and used car business on his property. The circuit court subsequently rejected her appeal, finding it lacked authority to adjudicate the substance of her argument because she was not an aggrieved party under MCL 125.3605.

The simple fact is that her home, "and her home alone, is right next to and directly overlooks the car repair facility and would also be so situated in regard to a future used car operation; therefore, she suffers or would suffer unique harm unlike that incurred by anyone else."

On appeal, the court disagreed with the circuit court, holding that appellant was in fact an aggrieved party for purposes of the statute, and distinguishing this case from *Olsen [Olsen v. Township of Chikaming, 2017 Mich. App. LEXIS 2193 (Court of Appeals of Michigan July 14, 2017, Decided)]*. First, "the impact of an automotive repair facility and used car dealership located on the surrounding, and zoned, agricultural environment, including [appellant's] home, is certainly more extreme than the simple construction of a cottage on a smaller than required lot with a shorter than required rear-setback line." Further, nothing in the *Olsen* opinion suggested or indicated "that the neighboring property owners alleged any harm unique to any one particular owner."

Here, though, because of her "unique position of being located next to [her neighbor's] business operation, [her] ability to use and enjoy her property has been detrimentally affected by [appellee's] decision to grant [the neighbor's] request for a special land use permit. The noise, sights, smells, and lack of privacy [appellant] now experiences because of the automotive repair facility, without even considering the addition of a used car lot, are not general concerns or harms experienced by others in the township." The simple fact is that her home, "and her home alone, is right next to and directly overlooks the car repair facility and would also be so situated in regard to a future used car operation; therefore, she suffers or would suffer unique harm unlike that incurred by anyone else." (Source: State Bar of Michigan *e-Journal* Number: 72973; May 5, 2020)

Full Text: http://www.michbar.org/file/opinions/appeals/2020/043020/72973.pdf

Neighbors fail to meet aggrieved party standard for parking garage replacement project

Case: *Our EGR Homeowners Alliance v. City of E. Grand Rapids*

Court: Michigan Court of Appeals, (Unpublished, 2020 Mich. App. LEXIS 3777, 2020 WL 3121035, June 11, 2020, Decided)

The court held that plaintiff-Our EGR Homeowners Alliance (Alliance) did not show that it was an aggrieved party to challenge the decision of defendant-City's Commission to approve intervening appellee-Spectrum's requested zoning variances and site plan. Thus, it affirmed the circuit court's dismissal of Alliance's appeal. The case arose out of a construction project at Spectrum. "According to the City, the appeal must fail because *Olsen [Olsen v. Township of Chikaming, 2017 Mich. App. LEXIS 2193 (Court of Appeals of Michigan July 14, 2017, Decided]* is binding on the court and Alliance" admitted that it could not meet this standard. It was true that Alliance argued that the court improperly interpreted provisions of the MZEA in *Olsen*. However, it also asserted that, "regardless of the analysis in *Olsen*, Alliance 'members plainly meet the statutory test' as aggrieved parties."

"Claims of aesthetic changes are insufficient to constitute special damages."

The court held that this case was comparable to *Olsen*. "Claims of aesthetic changes are insufficient to constitute special damages." Further, like the septic systems at issue in *Olsen*, "vibrations from construction may affect nearby landowners. However, as was also the case" there, Alliance did not "show that its claim that the proposed construction will damage the foundations or driveways of nearby homes was 'more than speculation or anticipation of future harm.'" It did not provide "any evidence disputing Spectrum's claim that the construction will not cause harm to adjacent homes. Further, Alliance members submitted their own site plan proposals for Spectrum's consideration that would require construction" and admitted that the existing parking garage had to be replaced.

Alliance did not establish that "Spectrum's requested variances and proposed site plan will result in more damage than their own proposed plans or the simple replacement of the existing parking garage. In addition, Spectrum was granted variances for parking setbacks and maximum lot coverage in 2008." Alliance did not show that "damage (or additional damage) will occur as a result of the approval of the requested variances." It failed to present "any evidence that the City Commission's approval of the current variances and proposed site plan will cause the harm that it anticipates." Because it failed to show "'special damages different from those of others within the community,' it was not 'aggrieved' pursuant to MCL 125.3605," and could not invoke the circuit court's jurisdiction. (Source: State Bar of Michigan *e-Journal* Number: 73237; June 23, 2020)

Full Text: http://www.michbar.org/file/opinions/appeals/2020/061120/73237.pdf

Failure to establish "aggrieved party", cell tower case remanded to Circuit Court.

Case: *Town v. Township of Mayfield*

Court: Michigan Court of Appeals (Unpublished Opinion, 2020 Mich. App. LEXIS 7570, 2020 WL 6684493, November 12, 2020, Decided)

The court held that the circuit court lacked jurisdiction to address plaintiff's administrative appeal of defendant-township's zoning board's decision to grant intervening defendant a special use permit for a cell tower. As such, it also held that the circuit court's dismissal of plaintiff's remaining claims was null and void and must be remanded for consideration.

Plaintiff claimed defendant's decision to approve intervening defendant's special use permit for the erection of a wireless tower was contrary to law, and that the proposed tower was a nuisance *per se* because it was in violation of defendant's ordinances. The circuit court upheld defendant's grant of the special use permit and dismissed plaintiff's remaining claims.

On appeal, the court found the circuit court was "without jurisdiction to address plaintiff's appeal of" defendant's zoning board's decision. "Because plaintiff failed to plead facts to establish that he is an

aggrieved party," he could not "invoke the jurisdiction of the circuit court with respect to the" zoning board's decision. Consequently, the circuit court's predicate findings for dismissing plaintiff's remaining claims—that no zoning violation occurred—were null and void and required remand for consideration. Vacated in part and reversed in part. (Source: State Bar of Michigan *e-Journal* Number: 47203; November 24, 2020)

Full Text: http://www.michbar.org/file/opinions/appeals/2020/111220/74203.pdf

Fears and speculation are not a basis for demonstrating that a party is aggrieved.

Case: *Grandview Beach Ass'n v. County of Cheboygan*

Court: Michigan Court of Appeals (Unpublished, 2021 Mich. App. LEXIS 1789, 2021 WL 1049882, March 18, 2021, Decided)

The court held that because appellee-Association failed to show it was an "aggrieved party" for purposes of appealing appellee-Planning Commission's zoning decision, it did not have the right to invoke the circuit court's appellate jurisdiction and the circuit court erred by not dismissing the appeal. In a prior appeal, the court affirmed the Commission's decision to grant appellants-Hansons a special use permit to create a therapeutic farm community for people with mental illnesses, with certain conditions. The Commission later held additional public hearings and found the conditions had been satisfied.

The Association filed a claim of appeal in the circuit court, and the Hansons intervened. The circuit court reversed the Commission's decision, "concluding that a more detailed impact study specifically addressing the diagnoses, treatment plans, and 'associated safety concerns' of the Farm's residents was necessary" and thus, that the Commission's decision was not supported by competent, material, and substantial evidence. In this appeal, the court agreed with the Hansons that the circuit court lacked jurisdiction over the Association's appeal because it was not an "aggrieved party" and thus, "had no right to appeal the Commission's decision to the circuit court under MCR 7.122." The court noted that it had not remanded the case in its prior opinion. Rather, it "resolved the issues that had been presented to us on appeal, terminated our jurisdiction over the matter, and allowed the matter to proceed to run its natural course that no longer involved this Court but may involve public hearings before the Commission."

Finally, the circuit court "based its decision on the Association's speculative fears and concerns which are based on nothing more than stereotypes and prejudices associated with mental illness. Such stereotypes and prejudices are not a proper basis for demonstrating that a party has been aggrieved by a zoning decision."

In addition, the Commission "is not a court and was not acting as a tribunal in holding public hearings on the special use permit and rendering its decision related to the special use permit." Further, the Hansons "did not waive their right to challenge the Association's status as an aggrieved party in this appeal by declining to raise such a challenge in the previous, separate circuit court appeal from a different zoning decision." Finally, the circuit court "based its decision on the Association's speculative fears and concerns which are based on nothing more than stereotypes and prejudices associated with mental illness. Such stereotypes and prejudices are not a proper basis for demonstrating that a party has been aggrieved by a zoning decision." Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 75086; April 5, 2021)

Full Text: http://www.michbar.org/file/opinions/appeals/2021/031821/75086.pdf

Marijuana, Other

Medical Marijuana Caregiver Center, MMFLA License application, timing and mootness

Case: *Hillger Enterprises, LLC v. City of Detroit*

Court: Michigan Court of Appeals (Unpublished, 2020 Mich. App. LEXIS 7553, 2020 WL 6684766 (November 12, 2020, Decided)

The court held that the trial court properly determined that plaintiff-marijuana facility applicant's action was moot. After officers seized and destroyed property at plaintiff's marijuana facility, plaintiff sought a declaration that defendant-city had issued it a temporary license for the facility, and an injunction preventing defendant from rescinding the license.

The trial court granted summary disposition for defendant on the basis that plaintiff was only authorized to operate a caregiver center, not a growing facility, and that the case was moot in any event. When plaintiff withdrew its application, "it was no longer an 'applicant for a state operating license.'" As such, the trial court could not grant plaintiff "any of its requested relief; indeed, once plaintiff withdrew its license application, an order granting the relief would have had no practical effect." Affirmed.

Full Text: http://www.michbar.org/file/opinions/appeals/2020/111220/74200.pdf

Open Meetings Act, Freedom of Information Act

Person removed from meeting for words and actions that fail to meet "breach of the peace" standard.

Case: *Cusumano v. Dunn*

Court: Michigan Court of Appeals (Unpublished, LEXIS 5652, 2020 WL 5079615 (August 27, 2020, Decided)

Concluding that "seriously disruptive conduct involving abusive, disorderly, dangerous, aggressive, or provocative speech and behaviors tending to threaten or incite violence" is necessary to constitute a "breach of the peace," the court reversed summary disposition for defendant-township supervisor in this OMA case. It found that the record did not support the trial court's conclusion that, as a matter of law, plaintiff breached the peace, justifying his expulsion from a township Board of Trustees meeting under MCL 15.263(6).

Rather, there were genuine issues of material fact. After reading a letter into the record related to a *quo warranto* action plaintiff filed against another trustee, defendant "directly addressed plaintiff, who was sitting in the public seating area of the board meeting room: 'So, thank you, Mr. Cusumano, you probably have cost us another few thousand dollars.'" While she did not ask him to respond, he contended that her comment was "an invitation to" do so. He also asserted that the record showed "he refrained from making an abusive, dangerous, aggressive, or provocative outburst." Rather, he argued that he went to the lectern to address the Board about "the matter raised by defendant and calmly attempted to clarify what he considered incorrect in" her characterization of his lawsuit. She declined to recognize him "and admonished him to be seated. Plaintiff briefly continued speaking before acquiescing." Defendant asked a deputy to remove him from the meeting, and plaintiff left with the deputy. He alleged that defendant violated MCL 15.263(6).

After reviewing several cases, the court determined that, "under Michigan law a 'breach of the peace' goes well beyond behavior acceptable in a civil society." It also found that "reasonable minds might differ on whether plaintiff committed a breach of the peace." While defendant asserted that plaintiff violated Board policy or rules, the record revealed that "the Board never formally adopted rules governing the manner in which its meetings were to be conducted. No evidence indicates the Board ever established and recorded rules as permitted under MCL 15.263(5) to limit public comment. Defendant cannot rely upon unwritten rules or policy for her action. Further," this provision "does not nullify MCL 15.263(6)'s prohibition against exclusion of any person from a public meeting except for a 'breach of the peace' at the meeting." Remanded. (Source: State Bar of Michigan *e-Journal* Number: 73752; September 8, 2020)

"the Board never formally adopted rules governing the manner in which its meetings were to be conducted. No evidence indicates the Board ever established and recorded rules as permitted under MCL 15.263(5) to limit public comment. Defendant cannot rely upon unwritten rules or policy for her action."

Full Text: http://www.michbar.org/file/opinions/appeals/2020/082720/73752.pdf

NOTE: Readers may remember the May 2019 case, *Holeton v Livonia*, 328 Mich App 88, 99; 935 NW2d 601 (2019), where a person was removed from a 2012 public meeting for failure to follow an address-the-chair rule of procedure. This particular *Holeton* case was reviewed as a constitutional challenge (1st and 14th amendment) and not an Open Meetings Act challenge.

Zoning Administrator/Inspector, Immunity, and Enforcement Issues

Procedural and substantive due process failures; processing an application cannot be conditioned on receipt of information unrelated to rental ordinance

Case: *Waynevest, LLC v. City of Warren*

Court: Michigan Court of Appeals (Unpublished, 2020 Mich. App. LEXIS 4319, 2020 WL 3886188 (July 9, 2020, Decided)

The court held that plaintiffs-property owners' and manager's action against defendant-city was not moot, and that the trial court erred by concluding their claims had to be heard and decided by the federal court under the terms of a prior settlement agreement. Further, even though two of their claims were no longer viable because of their failure to exhaust administrative remedies, their remaining claims were intact. One of the plaintiffs originally sued defendant in federal court, bringing a variety of claims centered on the contention that its inspections of rental properties violated its pertinent ordinance. The parties eventually entered into a settlement agreement. Plaintiff and others then sued defendant in this case, in state court, this time alleging defendant violated its ordinance by rejecting their rental license applications. The trial court ultimately dismissed plaintiffs' claims.

On appeal, the court agreed with plaintiffs that their claims were not mooted by a subsequent amendment to defendant's ordinance because the harm was not completely removed. "The fact that the city amended the [ordinance] did not undo allegedly unconstitutional or retaliatory *conduct* committed by [defendant], nor did the amendment negate or wash away any alleged damages that plaintiffs may have already been sustained." Other than "a claim seeking to enjoin continued enforcement of the prior version of" the ordinance, their lawsuit was not moot. It also agreed with

plaintiffs that the trial court erred by "dismissing their claims under a 'broad-stroke finding' that the federal court had continuing jurisdiction over the claims."

It noted that the present dispute, which arose after the parties' settlement agreement was executed in their federal action, "simply did not constitute a dispute or controversy regarding the administration, enforcement, implementation, or construction of the settlement agreement. The federal case, which focused on city inspections of rental properties, did not concern issues regarding information demanded by the city for purposes of processing rental license applications." Finally, the court found that the trial court effectively invoked the exhaustion of administrative remedies doctrine, but only as to two of the counts. As such, the remaining claims continued to be viable. Affirmed in part, reversed in part, and remanded. (Source: State Bar of Michigan *e-Journal* Number: 73412; July 21, 2020)

Full Text: http://www.michbar.org/file/opinions/appeals/2020/070920/73412.pdf

Without a building permit or owner's permission, previous owner continued to work on foreclosed property.

Case: *County of Livingston v. Bambas*

Court: Michigan Court of Appeals (Unpublished, 2021 Mich. App. LEXIS 1922 (March 25, 2021, Decided)

The court held that plaintiff-county had standing to act to enforce the Single State Construction Code Act (SSCCA) [Stille-Derossett-Hale Single State Construction Code Act, Act 230 of 1972], including seeking an injunction, and the trial court had subject-matter jurisdiction. It also rejected defendant-Bambas's arguments that the Michigan Residential Code (MRC) "does not have the force of law and that enforcing it violates separation-of-powers principles." Further, the SSCCA required him to have a building permit for the construction work he was doing on the property at issue, and the SSCCA applied to the manufactured home on the property. He lacked standing to assert the property was illegally searched because he did not show a genuine issue of material fact as to whether he had an interest in it, and there was no merit to his claim he only performed minor maintenance on it. The court also rejected his other arguments, including his judicial bias claims, as meritless.

When construction is "undertaken contrary to a building permit, the SSCCA, or other applicable laws or ordinances, or without a permit, MCL 125.1512(3) authorizes an enforcing agency to provide written notices to the person doing the construction explaining the violations and requiring the person to appear and show cause why construction should not be stopped." If the person fails to appear, "the enforcing agency may issue a written stop-work order. If that order is not obeyed, the enforcing agency may apply to the circuit court for an order enjoining violation of the stop-work order. Thus," the statute authorized plaintiff, the enforcing agency for the township where the property was located, to take the enforcement actions it did.

As to defendant's separation of powers argument, because "the SSCCA expressly delegates power to an administrative agency and precisely defines the area in which the agency may exercise power, the delegation is constitutional." Further, the BCC "promulgated the MRC under the authority of the SSCCA." The MRC has the force of law because it was promulgated under statutory authority. As to defendant's argument he could not "be forced into a contract with plaintiff to purchase a building permit[,]" the SSCCA did not require him "to have a contractual relationship with plaintiff in order for the SSCCA or MRC to apply. The law itself requires defendant to obtain a building permit." The court affirmed the order granting plaintiff summary disposition and a permanent injunction. (Source: State Bar of Michigan *e-Journal* Number: 75161; April 15, 2021)

Full Text: http://www.michbar.org/file/opinions/appeals/2021/032521/75161.pdf

Nuisance and other police power ordinances

Trash and treasures: vintage vehicles or junk? Plaintiff sues to enforce 2014 Order

Case: *Township of Indianfields v. Carpenter*

Court: Michigan Court of Appeals (Unpublished, 2020 Mich. App. LEXIS 4740, 2020 WL 4249168 (July 23, 2020, Decided)

While the court affirmed summary disposition for plaintiff-township, it concluded that the trial court abused its discretion in denying defendant's motion to amend his answer. Thus, it vacated the denial of his motion to amend the pleadings and remanded. Plaintiff contended that defendant used his property "as a junkyard, demolition site, and storage site for junk and waste." He asserted that he operated a farm and kept "valuable farm equipment, collectable vintage vehicles, necessary spare parts, and some temporary waste items he intends to dispose of."

A prior case involving the parties was settled and resulted in a consent judgment (the 2013 Final Judgment). Plaintiff sued to enforce that judgment in 2014, resulting in the 2014 Order. "The trial court ruled that the 2013 Final Judgment was amended, pursuant to the parties' stipulation, to exempt defendant's Dodge vehicles and all farm machinery." Plaintiff filed this case in 2018. The court agreed with plaintiff that defendant's answer to its complaint was insufficient, and determined that the record supported the trial court's grant of summary disposition, although it found "some aspects of the trial court's ruling troubling." It noted that, "to the extent defendant actually complied with the storage requirements of the 2013 Final Judgment and 2014 Order, his possession of his Dodge vehicle collection, properly licensed semi-trailers, and farm equipment and parts irrespective of their operability constitutes a prior nonconforming use."

It was not apparent from plaintiff's photos "which, if any, of the allegedly improper conditions on defendant's property *are* permitted under the terms of" that judgment and order. But since he did not rebut any of the photos individually, the court did not conclude that the trial court erred in granting summary disposition. However, the "trial court committed an error of law by failing to treat defendant's motion as a motion to amend pursuant to MCR 2.118, as the trial court was required to do pursuant to MCR 2.116(I)(5)." It also clearly erred by ruling that he "was not entitled to amend his pleadings simply because [he] could have made his allegations or arguments previously." The court declined to affirm on alternative grounds given "the unusual circumstances of" the case. (Source: State Bar of Michigan *e-Journal* Number: 73500; August 5, 2020)

Full Text: http://www.michbar.org/file/opinions/appeals/2020/072320/73500.pdf

Moratorium/failure to amend application under new ordinance (Marijuana)

Case: *Bevins v. Detroit Bldg. Safety Engineering & Environmental Department*

Court: Michigan Court of Appeals (LEXIS 5937, 2020 WL 5495290 (September 10, 2020, Decided)

The court held that plaintiff did not establish entitlement to mandamus relief requiring the municipal defendants to review and grant her application to open a medical marijuana caregiver center (MMCC), and that she also was not entitled to relief in the form of a preliminary injunction. Thus, it affirmed the trial court's order denying her requests. The court concluded that under the plain language of the relevant ordinances, "the 2018 ordinances superseded those in effect at the time plaintiff made her original application." Under the terms of § 61-3-354(a), she "had the right to convert her MMCC application into

an application to open a" medical marijuana provisioning center facility "if she submitted an amended application within 45 days of the ordinance's effective date."

Based on the record evidence, the trial court correctly determined that she failed to comply with the ordinance's terms and to provide a completed application. It also did not err in concluding that, because she did not "submit a complete application under the 2018 ordinances, she did not have a clear legal right to assessment of her application by the review board. Similarly, defendants did not have a clear legal duty to submit plaintiff's incomplete application to the review board." Under the ordinance, they were required to dismiss her appeal unless she filed an amended application, and nothing on the record indicated that she did so. Thus, although they "had a clear legal duty, under the facts of this case and the applicable ordinances, the duty was to dismiss plaintiff's incomplete application." As a result, the trial court did not abuse its discretion in ruling that she failed to show she was entitled to mandamus relief. As to a preliminary injunction, she had to show "wrongful conduct by defendants that would be remedied by a grant of equitable relief." But given that her legal claims failed, she had no basis for asserting entitlement to injunctive relief. (Source: State Bar of Michigan *e-Journal* Number: 73815; September 17, 2020)

Full Text: http://www.michbar.org/file/opinions/appeals/2020/091020/73815.pdf

Circuit court order to clean up property upheld on appeal (blight ordinance)

Case: *Township of Oceola v. Nowacki*

Court: Michigan Court of Appeals (Unpublished, 2021 Mich. App. LEXIS 2334, 2021 WL 1478345 (April 15, 2021, Decided)

The court held that the circuit court did not err by ordering defendant to clean up his property and pay a court-appointed receiver. Plaintiff-township filed an action alleging defendant was in violation of its blight ordinance. Meanwhile, the township's board met and adopted a resolution finding that both of defendant's properties were in violation of the ordinance. It then filed an amended complaint. The circuit court eventually entered its final order, requiring defendant to pay the receiver and clean up the properties as directed. On appeal, the court rejected his argument that the circuit court lacked subject matter jurisdiction because the township was actually pursuing an ordinance violation over which the district court had exclusive jurisdiction. While MCL 41.183(6) [Act 246 of 1945 Township Ordinances (sanctions for violations)] provides district courts jurisdiction over "violation of a township ordinance, it does not divest the circuit court of jurisdiction over actions for the abatement of a nuisance and for injunctive relief."

The court also rejected his claim that the blight ordinance was invalid because the township failed to properly enact it, noting that "although technically 'raised' before the circuit court, the argument was abandoned when the first motion raising the issue was withdrawn by [defendant] and the second was dismissed without prejudice." Finally, the court rejected his contention that the circuit court erred by affirming the township board's resolution finding his properties violated the blight ordinance. Although defendant would have preferred the board credit his evidence, "there was an abundance of evidence upon which the [b]oard could base its decision to find that the objects, vehicles, and structures on the property were visible from the roadway or off-site, as required by the blight ordinance." In addition, given that "semi-trailers, like campers, can become worn-out, unusable, or discarded, the mere fact that the trailers lack a motor does not immunize them from being considered junk under the plain language of the blight ordinance." Thus, the court found "no basis to overturn the circuit court's order finding that the [b]oard's decision was supported by competent, material, and substantial evidence." Affirmed. (Source: State Bar of Michigan e-Journal Number: 75231; April 22, 2021)

Full Text: http://www.michbar.org/file/opinions/appeals/2021/041521/75231.pdf

Neighbor-to-neighbor private nuisance claim over fence: the plain language of the ordinance definition trumps Township Supervisor's interpretation.

Case: *Rapske v. Miga*

Court: Michigan Court of Appeals (Unpublished, 2021 Mich. App. LEXIS 2658, 2021 WL 1706710 (April 29, 2021, Decided)

Concluding that the trial court properly applied the plain language of the township zoning ordinance in ruling that plaintiffs failed to establish their nuisance *per se* claim, the court affirmed the no cause of action verdict for defendants in this border fence dispute. It also affirmed summary disposition for them on plaintiffs' spite-fence nuisance claim, finding no genuine issue of material fact that the fence served the useful purposes of increasing privacy and abating altercations. Plaintiffs argued that the trial court erred as a matter of law in reasoning that the "zoning ordinance required fence height to be measured from the 'established grade.'" The court disagreed. They asserted the trial court should have interpreted § 2.18 of the ordinance to require border fences "be measured from the 'existing grade.'" However, that ordinance section clearly limited border fences to a height of "6 feet 'as measured from the *established grade* of the property.'"

The fact that the ordinance used both terms suggested they have different meanings, and another ordinance section defining "established grade" also indicated the term had "its own distinct meaning under the ordinance." Given that § 2.18 states clearly and unambiguously "that border fences shall not exceed a height of 6 feet as measured from the *established grade*, and, when that section is read within the ordinance as a whole, there is no plausible reading of [§] 2.18 that permits 'established grade' to mean 'existing grade,' the trial court did not err by applying the zoning ordinance as written." The court rejected plaintiffs' reliance on the absurd results doctrine, finding that the trial court's result here was "clearly not absurd." Further, the subsequent amendment changing the relevant ordinance to now state "that fence height must be measured from the 'existing grade' reinforces that 'established grade' and 'existing grade' have different meanings."

As to the spite-fence claim, plaintiffs did not create a genuine issue of material fact as to whether the "fence was constructed solely for malicious purposes." The court noted that even if it "was partially motivated by malice," there were no further verbal altercations between the parties after it was constructed. (Source: State Bar of Michigan *e-Journal* Number: 75376; May 17, 2021)

Full Text: http://www.michbar.org/file/opinions/appeals/2021/042921/75376.pdf

Short Term Rentals, Tourist Homes

Use of home meets definition of "tourist home" which was prohibited in the district

Case: *Pigeon v. Ashkay Island, LLC*

Court: Michigan Court of Appeals (Unpublished, 2021 Mich. App. LEXIS 637, 2021 WL 299329 (January 28, 2021, Decided)

The court held that defendant was violating the township zoning ordinance by operating a tourist home and thus, plaintiffs were entitled to summary disposition of their nuisance *per se* claim. Plaintiffs claimed defendant was conducting rental activity on its property in violation of the township zoning ordinance. The trial court denied plaintiffs' motion for summary disposition and granted summary disposition for defendant. On appeal, the court agreed with plaintiffs that the trial court erred by denying their motion

for summary disposition of their nuisance *per se* claim. It agreed with the township that defendant's use of the house met the definition of a "tourist home," which is not permitted in that district. It is a "dwelling that is being rented overnight to transient guests for compensation." And defendant was "undoubtedly providing overnight accommodations as the renters [we]re given exclusive occupation of the house along with numerous other amenities such as the use of the boats on the property." Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 74782; February 16, 2021)

Full Text: http://www.michbar.org/file/opinions/appeals/2021/012821/74782.pdf

Airbnb in City of St. Clair Shores home is a violation of the zoning ordinance

Case: *People of the City of St. Clair Shores v. Dorr*

Court: Michigan Court of Appeals (Unpublished, 2020 Mich. App. LEXIS 7316, 2020 WL 6374724 (October 29, 2020, Decided)

Holding that defendant failed to show the ordinance was unconstitutionally vague, the court affirmed the circuit court order affirming his district court bench trial misdemeanor conviction for violating the City of St. Clair Shores Zoning Ordinance 15.050 (R-A One Family General Residential District). There was no factual dispute that he "was engaged in using his home for short-term rentals through Airbnb." The question was whether the zoning ordinance prohibited this use. Defendant argued that it did not or, in the alternative, that the ordinance was unconstitutionally vague.

"a person of ordinary intelligence would reasonably understand from this language that the business therefore cannot be coextensive with the primary use of the dwelling as a dwelling and that the ordinance therefore prohibits the type of short-term rental business that defendant was running from his home under these circumstances."

The court concluded that the trial court correctly ruled that his "conduct clearly falls within the purview of the ordinance and is plainly prohibited by" the ordinance language. "Ordinance 15.556(1) requires that the home business be 'incidental' to the use of the dwelling as a dwelling." The court further concurred, "with the trial court that a person of ordinary intelligence would reasonably understand from this language that the business therefore cannot be coextensive with the primary use of the dwelling as a dwelling and that the ordinance therefore prohibits the type of short-term rental business that defendant was running from his home under these circumstances." Thus, it provided "fair notice of the conduct prohibited and clear standards to prevent arbitrary or discriminatory enforcement." (Source: State Bar of Michigan *e-Journal* Number: 74145; November 11, 2020)

Full text: http://www.michbar.org/file/opinions/appeals/2020/102920/74145.pdf

Other Unpublished Cases

Negligence-liability: fire erupts after unlicensed tenant opens business in warehouse

Case: *Gabrielle/MHT Ltd. Dividend Housing Partnership v. Hamilton Ave. Property Holding, LLC*

Court: Michigan Court of Appeals LEXIS 5241, 2020 WL 4724553 (August 13, 2020, Decided)

The court held that defendant-Recycling Revolution's (RR) status as a tenant did not prevent it from owing a duty of care to plaintiffs-neighboring property owners and that it was also not entitled to a

directed verdict on the issue of proximate cause. Further, there was sufficient evidence to allow the nuisance claim to go to the jury. The court also concluded that dismissal of the negligence and gross negligence claims against defendant-Statewide Recycling (SR) did not require dismissal of the nuisance claim, on which the jury found it liable. Thus, it affirmed the judgment for plaintiffs.

McCurtis [McCurtis v Detroit Hilton, 68 Mich App 253, 255-256; 242 NW2d 541 (1976)], "recognized that both a tenant and a landlord may be liable for conditions of leased property[.]" The fact RR was a tenant of the building rather than a owner did "not relieve it from liability for conditions on the land within its control that contributed to plaintiffs' damages. The evidence supported a finding that [RR] owed a duty of care to plaintiffs . . . arising from its use of the leased property. It was reasonably foreseeable that the recycling of materials that are considered hazardous or flammable presented a risk of harm to neighboring property owners, especially when conducted in violation of regulations and ordinances related to fire safety."

As to proximate causation, plaintiffs offered evidence that RR "was illegally operating a plastics-recycling business in the warehouse, that the fire could have been controlled if these materials had not been stored near the site of the fire's origin, and that the presence of these materials allowed the fire to rapidly and intensely spread throughout the building and prevented firefighters from offensively attacking" it. A tenant may also be liable for a nuisance created on leased property that it controls. A "legal cause of plaintiffs' damages was the uncontrollable fire at the warehouse and [RR's] recycling and storage of plastic materials in the warehouse, contrary to local ordinances, supported a finding of negligent, reckless, or ultra-hazardous conduct." As to SR, the jury could find that its "continued operation in violation of regulations and ordinances related to fire safety and prevention, as well as its continued storage of hazardous materials, involved, if not negligent, reckless and hazardous conduct that contributed to the intensity and spread of the fire . . . ." (Source: State Bar of Michigan *e-Journal* Number: 73601; August 24, 2020)

Full text: http://www.michbar.org/file/opinions/appeals/2020/081320/73601.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: https://www.canr.msu.edu/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.