Michigan State University Extension
Public Policy Brief

Selected Planning and Zoning Decisions 2022: June 2022-June 2023

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This public policy brief summarizes the important state and federal court cases issued between June 8, 2022, and June 31, 2023.

Contents

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 work refers to university-based peer reviewed research, when available and conclusive, and based on the parameters of the law as it relates to the topic(s) in Michigan. 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. 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. But the U.S. Sixth Circuit Court of Appeals takes the position that the doctrine of stare decisis makes a federal district court decision is 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.) So 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 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.

Restrictions on Zoning Authority

Licensed veteran-owned hot dog stand in conflict with mobile food zoning

Case: *Padecky v. Muskegon Charter Twp.*

Court: Michigan Court of Appeals, No. 357473, 2022 Mich. App. LEXIS 5371, 2022 WL 4112075 (Court of Appeals of Michigan September 8, 2022, Decided).

While the court held that defendant-Township could not effectively bar veterans such as plaintiff "who hold licenses under the Act from selling goods under the guise of zoning regulations [License to Sell Goods (Excerpt) Act 359 of 1921)]" it found that whether the Township's ordinances had this effect was a closer question and remand was required. Plaintiff operates a mobile hot dog stand pursuant to his license. He obtained permission from a grocery store to operate his stand in its parking lot. But the Township prohibited him from doing so because the "store was in a C-1 zoning district. The Township contended that mobile food businesses were only permitted in M-1 zoning districts, and even there only by way of" a Special Use Permit.

Williams "unambiguously established that the Act does not preempt zoning altogether." But the conclusion that the Township's ZO does not conflict with the Act simply by restricting mobile food stands to one zoning district depends on "the practical availability of that zoning district." It was plaintiff's obligation at this stage "to make some kind of initial showing that no such property exists or is suitable for a mobile food stand, perhaps by reference to a zoning map." The court emphasized "that *if* there is no M zoned property within the Township that could be practically suitable for plaintiff's mobile food stand," the ZO would "conflict with—and be preempted by—the Act."

The court emphasized "that if there is no M zoned property within the Township that could be practically suitable for plaintiff's mobile food stand," the ZO would "conflict with—and be preempted by—the Act."

Presuming the existence of such property, "the more interesting and difficult question arises from the fact that *all* uses in M zoning districts are special uses that must be sought by a permit." The court held that for the ZO "to be upheld, permission from the landowner must, under the circumstances, be considered an adequate 'equitable interest' in the subject property for purposes of applying for a [SUP]. To hold otherwise would be to effectively prohibit plaintiff's operation entirely. Secondly, it should be obvious that the Township may not charge plaintiff a fee for seeking a [SUP], so the application fee must be waived."

It may use the SUP "process for the limited purpose of ensuring that plaintiff carries on his sale of goods in an appropriate location and manner, but no more." In addition, it is obligated "to ensure the existence of M zoned property that might be appropriate for a mobile food stand—if necessary, by *sua sponte* rezoning some other zoned property." The court concluded "that resolution of the appropriate relief to be granted is better determined by the trial court . . . ." It vacated summary disposition for defendant and remanded. (Source: State Bar of Michigan *e-Journal* Number: 77674; June 27, 2022.)

Full Text: http://www.michbar.org/file/opinions/appeals/2022/062322/77674.pdf

Takings

Tree ordinance violates 5th amendment, unconstitutional conditions doctrine

Case: *Charter Twp. of Canton v. 44650, Inc.*

Court: Michigan Court of Appeals, No. 354309, 2023 Mich. App. LEXIS 2634 (Court of Appeals of Michigan April 13, 2023, Decided).

The court held that while collateral estoppel did not bar defendant from pursuing its Fourth Amendment unlawful seizure claim, application of plaintiff-township's Tree Ordinance to defendant did not implicate the Fourth Amendment. Collateral estoppel also did not preclude consideration of plaintiff's argument as to the trial court's application of the unconstitutional conditions doctrine, but the court held that a taking occurred under the doctrine. Lastly, it found that the Tree Ordinance's tree fund fees were not punitive and not subject to the Eighth Amendment's Excessive Fines Clause. Thus, the court reversed the trial court's grant of summary disposition to defendant on its Fourth Amendment claim but affirmed the trial court's rulings for defendant on its takings claims under the unconstitutional conditions doctrine and for plaintiff on defendant's excessive fines claim.

On appeal, plaintiff first asserted collateral estoppel barred relitigating of whether application of its ordinance "was an unlawful seizure under the Fourth Amendment, given" a favorable Sixth Circuit decision on this issue for plaintiff in a case brought by the prior owner of defendant's property. The court found that collateral estoppel did not apply due to the absence of privity – in the federal case, the prior owner "only sought to assert rights related to the parcel it retained" and that judgment was entered after assignment of the property at issue here. As to the merits, "significantly for Fourth Amendment purposes, the trees on defendant's 16-acre parcel were located on a fully treed parcel, akin to an open field, and not near a home or its curtilage. Fourth Amendment protections do not extend to 'open fields[,]' but are limited to 'persons, houses, papers, and effects[.]'" Trees are none of these things.

Fourth Amendment protections do not extend to 'open fields[,]' but are limited to 'persons, houses, papers, and effects[.]'" Trees are none of these things.

As to the takings claims, collateral estoppel did not apply because the Sixth Circuit did not rule on the argument plaintiff raised here. But as to the merits, the court held that "plaintiff's demand for money under the Tree Ordinance is subject to the unconstitutional conditions doctrine of *Nollan* and *Dolan*." The court further concluded that plaintiff failed to show "that the permitting conditions (the mitigation measures) are roughly proportional to the impact of defendant's development," and as a result, its "Tree Ordinance as applied is an unconstitutional condition under *Nollan*, *Dolan*, and *Koontz*."(Source: State Bar of Michigan *e-Journal* Number: 79283; April 17, 2023)

Full Text: http://www.michbar.org/file/opinions/appeals/2023/041323/79283.pdf

Takings: Nashville's sidewalk requirements in question

Case: *Knight v. Metropolitan Gov't of Nashville and Davidson County, Tennessee*

Court: US Court of Appeals (6th Circuit) 67 F.4th 816, 2023 U.S. App. LEXIS 11453, 2023 FED App. 0098P (6th Cir.), 2023 WL 3335869 (United States Court of Appeals for the Sixth Circuit May 10, 2023, Filed).

In an issue of first impression, the court held that "*Nollan*'s unconstitutional-conditions test applies just as much to legislatively compelled permit conditions as it does to administratively imposed ones." Thus, it concluded the district court erred by applying *Penn Central*'s balancing test and not the *Nollan* test in determining whether a municipal ordinance imposing sidewalk-related conditions on landowners seeking building permits constituted a "taking" under the Fifth Amendment. Defendant-Tennessee county's (Nashville) sidewalk ordinance requires landowners seeking building permits to "grant an easement across their land and agree to build a sidewalk on the easement or pay an 'in-lieu' fee that Nashville will use to build sidewalks elsewhere."

Plaintiffs unsuccessfully sought a waiver. They sued, alleging a "taking" under the Fifth Amendment and seeking injunctive relief and a return of the in-lieu fee. Nashville argued that *Penn Central*'s balancing test governing land-use restrictions applied; plaintiffs argued that *Nollan*'s unconstitutional-conditions test governing conditions on building permits applied. The district court chose *Penn Central* and granted Nashville summary judgment. On appeal, the court noted that in some cases the government indirectly interferes with constitutional rights "by offering a benefit that it has no duty to provide on the condition that a party waive a right." *Nollan* is applied when "the government imposes 'a *condition* for the grant of a building permit[,]'" as in this case. The court found that one of the conditions here – requiring all permit applicants to grant an easement – left "no doubt that *Nollan* applies[,]" and not *Penn Central*.

Nollan is applied when "the government imposes 'a condition for the grant of a building permit[,]'" as in this case. The court found that one of the conditions here – requiring all permit applicants to grant an easement – left "no doubt that Nollan applies[,]" and not Penn Central.

The court held that it did not matter that one plaintiff chose not to obtain the permit or that plaintiffs were given the opportunity to pay a fee rather than build a sidewalk. "Even assuming that Nashville did not require an easement if [plaintiffs] chose to pay the in-lieu fees, *Nollan* applies because the city undoubtedly would have required this easement if these landowners had built sidewalks."

The court noted there has been disagreement whether *Nollan* should be applied where, as here, the ordinance was passed by Nashville's council "as a 'legislative' condition for all permits." In holding that it applies, the court concluded that nothing "in the text or original understanding of the Takings Clause justifies Nashville's requested distinction. Its requested distinction also conflicts both with the Supreme Court's unconstitutional-conditions precedent and with its takings precedent." Finally, as Nashville "waived any argument that it can satisfy this unconstitutional-conditions test[,]" the court reversed and remanded for proceedings to determine the proper remedy for plaintiffs. (Source: State Bar of Michigan *e-Journal* Number: 79449; May 15, 2023)

Full Text: http://www.michbar.org/file/opinions/us_appeals/2023/051023/79449.pdf

Substantive Due Process

Failing to fill out the application is at issue, not procedural or substantive due process

Case: *Golf Village N. LLC v. City of Powell, OH*

Court: U.S. Court of Appeals Sixth Circuit, 42 F.4th 593, 2022 U.S. App. LEXIS 21286, 2022 FED App. 0167P (6th Cir.) (United States Court of Appeals for the Sixth Circuit, August 2, 2022, Filed).

The court held that defendant-City did not violate plaintiff-Golf Village's procedural or substantive due process rights related to building a hotel on its property where Golf Village failed to follow the City's zoning Code and apply for a zoning certificate. It reached an agreement with the City to rezone land to allow development of a multiple use area. Years later it decided to build a "residential hotel" on the property. Although aware it needed a zoning certificate, it insisted that this project was covered as a "permitted use" in the development plan. The City's zoning administrator, B, informed Golf Village that the zoning staff did not believe the hotel was a permitted use, but suggested applying for a modification.

In what it termed a "Use Determination" application, Golf Village requested that B "confirm the residential hotel is a permitted use of the property." B declined to do so, "saying it would be an 'advisory opinion.'" He told Golf Village to apply for a zoning certificate. Instead, Golf Village appealed to the ZBA and was again told to submit an application. After it failed to obtain relief in state court, it filed this action under § 1983. The district court granted the City summary judgment.

The court previously held that Golf Village had a constitutionally protected property interest in building a residential hotel. Here, it considered whether the City "unlawfully deprived Golf Village of that interest." Golf Village argued it was denied procedural due process because B failed to issue a "use determination." However, the court held the City's Code did not require such a determination "before the application. . . . And Golf Village never applied. So it had no right to a decision about whether a residential hotel was a permitted use of its property." Given that it "was not entitled to a 'use determination,' [B's] failure to issue one couldn't possibly have been a deprivation of procedural due process."

If Golf Village had filed a certificate application as required by the Code, it would have received a response in 30 days. It could not "complain about due process when it didn't use the more-than-adequate procedures already available to it."

The court also rejected Golf Village's argument that the City's patten of "deliberate inaction" established a procedure that violated due process. If Golf Village had filed a certificate application as required by the Code, it would have received a response in 30 days. It could not "complain about due process when it didn't use the more-than-adequate procedures already available to it." Its substantive due-process claim also failed where it was unable to show that the City deprived it of its protected interest "'through arbitrary and capricious action.'" Golf Village could not show that there was "no rational basis" for the City's decision – that the irrationality was "so extreme that it 'shocks the conscience.'" Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 77912; August 17, 2022.)

Full Text: http://www.michbar.org/file/opinions/us_appeals/2022/080222/77912.pdf

Due Process and Equal Protection

Circuit court lacks subject matter jurisdiction, plaintiffs fail to file timely appeal

Case: *Zelasko v. Charter Twp. of Bloomfield*

Court: Michigan Court of Appeals, No. 359002, 2023 Mich. App. LEXIS 3758, 2023 WL 3665863 (Court of Appeals of Michigan May 25, 2023, Decided

In this zoning dispute, the court held that the circuit court "did not deny plaintiffs due process nor otherwise err by granting defendants summary disposition under MCR 2.116(I)(1), though defendants moved for summary disposition under MCR 2.116(C)(4)." Plaintiffs also "were not deprived of notice or a meaningful opportunity to be heard on issues that formed the basis of" the circuit court's ruling. Further,

because they failed to timely file an appeal to the circuit court to challenge the defendant-Board's decision, the circuit court correctly found "that it lacked subject matter jurisdiction over the dispute." Finally, plaintiffs' *res judicata* argument failed because defendants were not granted summary disposition on that basis.

They contended "they were denied procedural due process because the circuit court granted defendants summary disposition under MCR 2.116(I)(1) without notifying" them in advance it was considering dismissing the amended complaint under this court rule. Their argument suggested "that MCR 2.116(C)(4) and (I)(1) are mutually exclusive grounds for granting summary disposition. However, MCR 2.116(I)(1) is a corollary to the various grounds for summary disposition stated in MCR 2.116(C)." Plaintiffs further asserted "the circuit court violated their due-process rights because the circuit court did not advise them in advance that it planned to rule under MCR 2.116(I)(1)." But unlike in *Al-Maliki*, the circuit court here "did not grant defendants summary disposition on an issue raised *sua sponte* by the circuit court.

Rather, defendants moved for summary disposition contending that the circuit court lacked subject matter jurisdiction because plaintiffs had failed to appeal the Board's decision and because plaintiffs were not aggrieved parties. Plaintiffs responded to defendants' motion and the parties addressed the issues at a hearing on the motion. The circuit court subsequently granted defendants summary disposition on the bases raised in their motion." Also, unlike *Lamkin*, plaintiffs here "were not unaware that the circuit court was 'contemplating summary disposition' of their claims. Plaintiffs in this case were aware that defendants had moved for summary disposition, responded to the motion, and participated in the hearing on the motion.

The circuit court thereafter granted defendants summary disposition on the grounds asserted in their motion." Plaintiffs further argued "they lacked notice of the circuit court's intention to address the merits of Counts 1 through 4 of their amended complaint." But the circuit court granted defendants summary disposition on the basis it lacked subject matter jurisdiction. Plaintiffs "had notice and an opportunity to be heard on" that issue and thus, were not denied due process. (Source: State Bar of Michigan *e-Journal* Number: 79555; May 30, 2023.)

Full Text: http://www.michbar.org/file/opinions/appeals/2023/052523/79555.pdf

Zoning Amendment: Voter Referendum, City Charter

Does building height measurement include AC units, stairs, elevator shaft?

Case: *Save Our Downtown v. City of Traverse City*

Court: Michigan Court of Appeals, No. 359536, 2022 Mich. App. LEXIS 6164 (Court of Appeals of Michigan October 13, 2022, Decided)

The court held that while no genuine issue of material fact existed as to whether the height of the proposed building exceeded the height limitation of the charter amendment, the trial court erred by granting plaintiffs declaratory and injunctive relief, including its interpretation of the charter amendment as providing for a different method of building measurement than that provided by the zoning ordinance (ZO).

After defendant-city approved intervening defendant-Innovo's site proposal, plaintiffs sought a declaration that "all construction of any part of a building over sixty feet in height, without an affirmative vote of the electors" is prohibited. The court agreed with the city and Innovo that the trial court erred by adopting plaintiffs' interpretation of the charter amendment and by giving precedence to their

interpretation over the ZO's method of measuring building height. The trial court erred in granting plaintiffs declaratory and injunctive relief based on "its findings that the charter amendment stated a method of measuring building height that differed from, and took precedence over, the method stated in the [ZO]," and the court reversed the portions of the order granting plaintiffs declaratory judgment and injunctive relief. But it found that the trial court did not err in granting them summary disposition. It rejected Innovo's claim the parties' competing affidavits created genuine issues of material fact. Absent "a factual dispute that the building exceeded 60 feet in height as measured in accordance with the [ZO], Innovo has not established that the trial court erred" in granting plaintiffs summary disposition.

The court next rejected the city's contention the trial court erred by not dismissing plaintiffs' request for declaratory and injunctive relief under a theory of unclean hands or estoppel by acquiescence. "Although during the proceedings below plaintiffs offered a different interpretation of the implementation policy than that put forth by the city, there is no dispute that they argued, and the trial court found, that the building in question also violated the charter amendment even when measured according to the [ZO].

Given these circumstances, the city was not entitled to dismissal of plaintiffs' request for declaratory and injunctive under theories of unclean hands or estoppel by acquiescence." Finally, the court rejected Innovo's challenge to plaintiffs' standing. "The trial court determined that this was a case about voting rights and concluded that plaintiffs had standing to pursue their complaint for declaratory and injunctive relief. We agree." Affirmed in part and reversed in part. (Source: State Bar of Michigan *e-Journal* Number:; 78264, /October 17, 2022)

Full Text: http://www.michbar.org/file/opinions/appeals/2022/101322/78264.pdf

Conditional Zoning Amendment

Conditional rezoning for dragway found invalid, fails to advance a reasonable governmental interest.

Case: *Jostock v. Mayfield Twp.*

Court: Michigan Court of Appeals, No. 362635, 2023 Mich. App. LEXIS 3925 (Court of Appeals of Michigan May 4, 2023, Decided)

The court held that the trial court did not err by determining that plaintiffs successfully challenged defendants-township and dragway operator's (A2B) conditional zoning agreement and awarding them declaratory relief. Plaintiffs sought a declaration that the township's rezoning of A2B's property from residential to commercial use to expand its nonconforming use as a drag racing facility was invalid. The trial court agreed, finding the amendment served no purpose and advanced no reasonable governmental interest, and granted plaintiffs' request. On appeal, the court first found that the township properly complied with the MZEA to form an agreement with A2B. It next disagreed with plaintiffs that the zoning agreement constituted impermissible "spot zoning."

"When the agreed rezoning anticipates a use excluded by the zoning district in question, it is fatal to the operation of the conditional zoning agreement."

The conditional rezoning plan "did not create or permit a use that was inconsistent with the surrounding area, because the nonconforming use of the property as a drag racing facility had existed for decades." The court noted that "the trial court did not reference 'spot zoning,' or use inconsistent with the surrounding parcels." Finally, however, it found plaintiffs met their burden in challenging the conditional zoning. "When the agreed rezoning anticipates a use excluded by the zoning district in question, it is fatal to the operation of the

conditional zoning agreement. Thus, the conditional zoning agreement was void according to [the ordinance], and as the trial court held, 'there is no reasonable governmental interest being advanced' by the agreement." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 79600; June 5, 2023.)

Full Text: http://www.michbar.org/file/opinions/appeals/2023/060123/79600.pdf

Court, Ripeness for Court's Jurisdiction, Aggrieved Party

MI Supreme Court imposes three criteria for aggrieved party determination

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

Court: Michigan Supreme Court, No. 160358-9, 509 Mich. 561, 983 N.W.2d 798, 2022 Mich. LEXIS 1360, 2022 WL 2903871 (Supreme Court of Michigan July 22, 2022, Filed)

Holding that the MZEA does not require an appealing party to own real property and to show special damages only by comparison to other real-property owners similarly situated, the court overruled *Olsen*, *Joseph*, and "related Court of Appeals decisions to the *limited extent* that they" impose such requirements. It set forth three criteria that must be met to be a "party aggrieved" under MCL 125.3605 and 125.3606.

The court vacated the relevant portion of the Court of Appeals opinion, vacated the trial court's judgment as to standing, and remanded both cases to the trial court for reconsideration of appellant's arguments regarding standing under MCL 125.3604(1) and 125.3605. Appellant, a nonprofit, challenged the appellee-ZBA's decision that appellant lacked standing to appeal the Township Commission's zoning decision on a proposed residential site condo project. Appellant claimed its members would be uniquely harmed by the development. The Court of Appeals affirmed the trial courts' and the ZBA's decisions, holding that appellant lacked standing to appeal.

The court found that "[n]either the MZEA nor any of Michigan's previous zoning statutes explicitly require one to own real property in order to be 'aggrieved' by local land-use decisions or to prove 'aggrieved' status by comparison to other property owners who are similarly situated." By requiring one to be "a 'party aggrieved' by a zoning decision under MCL 125.3605 and MCL 125.3606, the Legislature implicitly rejected the idea that standing can be based on mere proximity to a development."

The court held that to be "aggrieved" the appellant must meet three criteria: "First, the appellant must have participated in the challenged proceedings by taking a position on the contested decision, such as through a letter or oral public comment. Second, the appellant must claim some legally protected interest or protected personal, pecuniary, or property right that is likely to be affected by the challenged decision. Third, the appellant must provide some evidence of special damages arising from the challenged decision in the form of an actual or likely injury to or burden on their asserted interest or right that is different in kind or more significant in degree than the effects on others in the local community."

The court noted that "on remand the circuit court first must determine whether appellant was aggrieved by the Commission's decision for the purpose of appealing to the ZBA under MCL 125.3604. This determination will inform the subsequent analysis of whether [it] was aggrieved by the ZBA's standing decision for the purpose of appealing in the circuit court under MCL 125.3605 and" 125.3606.

Dissenting, Justice Viviano, joined by Justice Zahra, would have held that to appeal the decision of the ZBA, "plaintiff needed to show that its members would suffer some harms that were different from the harms suffered by similarly situated community members." They would have found that the Court of

Appeals "was correct in determining that plaintiff had not made such a showing" because the harms alleged "were either common to other similarly situated community members or were not damages as a result of the decision of the Commission or the ZBA."(Source: State Bar of Michigan *e-Journal* Number: 77855; July 26, 2022.)

Full Text: http://www.michbar.org/file/opinions/supreme/2022/072222/77855.pdf

Zoning Administrator/Inspector, Immunity, and Enforcement Issues

Evidence gathered from drones is not subject to exclusionary rule for civil matters, no search warrant required.

Case: *Long Lake v. Maxon*

Court: Michigan Court of Appeals, No. 349230, 2022 Mich. App. LEXIS 5544, 2022 WL 4281509 (Court of Appeals of Michigan September 15, 2022, Decided)

UPDATE: In May 2023, the Michigan Supreme Court granted leave to appeal, asking the parties to address: (1) whether the appellee violated the appellants' Fourth Amendment rights by using an unmanned drone to take aerial photographs of the appellants' property for use in zoning and nuisance enforcement; and (2) whether the exclusionary rule applies to this dispute. 989 N.W.2d 810, 2023 Mich. LEXIS 768, 2023 WL 3631900 (Supreme Court of Michigan May 24, 2023, Decided

On remand from the Michigan Supreme Court, the court held that the exclusionary rule did not apply in this civil matter. Thus, even if plaintiff-township violated defendants-Maxons' constitutional rights, suppression was not supported. The Maxons appealed the trial court's denial of their motion to suppress aerial photos taken by the township using a drone without their "permission, a warrant, or any other legal authorization. The township relied on these photos to support a civil action against the Maxons for violating a zoning ordinance, creating a nuisance, and breaching a previous settlement agreement."

The court previously ruled the drone's use violated the Fourth Amendment and reversed. The Supreme Court vacated and remanded as to whether the exclusionary rule applied. Assuming a Fourth Amendment violation, the court considered "whether the exclusionary rule applies in zoning cases such as the one at hand." It noted the U.S. "Supreme Court has repeatedly rejected the application of the exclusionary rule in civil cases." In doing so, it has explained the exclusionary rule's purpose is "to deter police misconduct, and to provide a remedy where no other remedy is available.

When analyzed under the federal or the Michigan Constitution, suppression of the drone evidence does not serve these goals." Guided by *Goldston* and *Kivela*, the question the court had to answer was "whether there is a 'compelling reason' to expand the exclusionary rule to civil zoning actions. We resoundingly hold that there is not." The township sought "a declaratory judgment and to abate a nuisance. There are no police officers involved. Rather, the township enforces its zoning ordinances through the work of inspectors and zoning enforcement officers. The penalty that might be exacted for maintenance of a nuisance is a civil fine, but the township has sought no fine. Even if the township wanted to impose a fine, MCL 117.4q describes the fine as 'civil.'"

The court found that the "unlikelihood of any penalty being exacted, and the fact that this zoning action is not coupled with a criminal prosecution of any sort, removes it from the realm of 'quasi-criminal' matters." Application of the Janis balancing test further showed the exclusionary rule had "no place here. Assuming that the drone search was illegal, it was performed by a private party." And the cost of excluding the evidence was high. "Finally, the Maxons have a powerful remedy for the alleged violation

of their Fourth Amendment rights—a civil lawsuit sounding in constitutional tort." The court noted that "the object of the state officials who allegedly violated the Maxons' rights was not to penalize the Maxons, but to abate a nuisance through the operation of equitable remedies. The proceedings are remedial, not punitive. The exclusionary rule was not intended to operate in this arena, and serves no valuable function." (Source: State Bar of Michigan *e-Journal* Number: 78106; September 19, 2022.)

Full Text: http://www.michbar.org/file/opinions/appeals/2022/091522/78106.pdf

Marijuana Regulation

Scoring criteria and competitive selection process for marijuana license upheld

Case: *Yellow Tail Ventures, Inc. v. City of Berkley*

Court: Michigan Court of Appeals, No. 357654, 2022 Mich. App. LEXIS 7109, 2022 WL 17724345 (Court of Appeals of Michigan December 15, 2022, Decided)

The court held that the trial court did not err by finding defendant-City's ordinance did not conflict with the MRTMA, and that the criteria it enacted conformed with the MRTMA. However, it held that the trial court did err by finding the City violated the OMA by not holding defendant-City manager's scoring process open to the public. Plaintiffs in these consolidated appeals sued the City and several City officials and staff after it rejected their applications for marijuana licenses.

On appeal, the court rejected plaintiffs' argument that the City ordinance did not comply with the MRTMA, noting they read the statute too narrowly. "The plain and ordinary reading of MCL 333.27959(4) authorizes a municipality to adopt a competitive process to select applicants that are best suited to operate within the municipality."

As to their claim that "MCL 333.27956 cabins a municipality's authority to impose local regulations" on a marijuana establishment, the court found that the City's ordinance did not "stray outside the cabin." There was nothing in the record "to suggest that the criteria of which plaintiffs complain are unreasonably impracticable or conflict with any provision of the MRTMA or a promulgated rule. Rather, the criteria fit neatly within a reasonable understanding of the MRTMA's 'time, place, and manner' provision."

There was nothing in the record "to suggest that the criteria of which plaintiffs complain are unreasonably impracticable or conflict with any provision of the MRTMA or a promulgated rule. Rather, the criteria fit neatly within a reasonable understanding of the MRTMA's 'time, place, and manner' provision."

Next, the court disagreed with the trial court's determination that the City violated the OMA. "The City ordinance's procedure that dictated that the City manager would review applications did not involve the work of a 'public body' for the purposes of the OMA because, as recognized in *Herald*, an individual person is not included in the definition of a public body for the purposes of the OMA. Thus, the process by which the City manager scored the applications was not required to be conducted in a public hearing even though the manager enlisted the help of other City employees to accomplish the task.

The ultimate decision on which applications were approved was made by the City council, all in accordance with the OMA." Finally, the court found that the trial court properly denied cross-appellant-Attitude's motion to intervene. "Even though Attitude's interests [were] legitimate, it is not evident that these

interests were a subject of the litigation between the current parties. Moreover, even if the trial court agreed that defendants violated the OMA or that the City's ordinance was preempted by the MRTMA, there were no facts to conclude that Attitude's license would ultimately be revoked after a proper rescoring." Affirmed in part, reversed in part, and remanded. (Source: State Bar of Michigan *e-Journal* Number: 78598; December 19, 2023.)

Full Text: http://www.michbar.org/file/opinions/appeals/2022/121522/78598.pdf

Zoning lot definitions clarified to measure 1,000 foot drug-free zone

Case: *Alosachi v. City of Detroit*

Court: Michigan Court of Appeals, No. 356583, 2022 Mich. App. LEXIS 4102 (Court of Appeals of Michigan April 21, 2022, Decided; approved for publication July 14, 2022)

Concluding that respondent-City's "construction and definition of 'zoning lot'" as used in its ordinances comported with the purposes of its zoning scheme, the court held that the circuit court did not err in affirming the BZA's decision that affirmed the BSEED's denial of petitioner's application to operate a medical-marijuana provisioning center. The ordinances prohibit approval of such a facility within a "drug-free zone," which is defined "in relevant part as the area 'within 1,000 radial feet of the zoning lot of . . . [a] school . . . .'" The BSEED denied the application here on the basis petitioner's proposed facility was located within 1,000 feet of a Catholic school, which was next to the church that operates it.

"The tract upon which the school and church sit consists of 26 contiguous lots, all of which are owned by a single entity." The case turned on "whether the definition of 'zoning lot' includes just the lots upon which the school sits (as petitioner argues), or instead includes all of the lots owned by the entity that owns the church and school property (as respondent contends)." Reviewing the definitions of zoning lot contained in the City's zoning ordinance, the court concluded that, first and foremost, a zoning lot is "a single, continuous portion of land that is assigned a unique identification number by the Officer of Assessor."

The court found that since "the church and school are on a continuous portion of land that is assigned a unique identification number by the Officer of Assessor authorized to do so, the first part of the definition" was met, supporting the City's position. The next part of the definition provides that the single tract of land "must, 'at the time of filing for a building permit' be designated by its owner 'to be used, developed, or built upon as a unit under single or unified ownership or control.'" Given that the school and church occupied the same, single tract of land, the court noted that the tract was "bigger than the land sitting underneath the school classroom building."

In addition, the tract appeared "to have been 'used, developed, or built upon as a unit.'" Given that the ordinances were meant "to enable regulation of land uses and prohibit medical-marijuana facilities within drug-free zones (including schools), some flexibility in determining the extent of property subject to regulation when parties apply for building permits seems consistent with that purpose." [The unpublished opinion from 4/21/22 was covered in *2021-2022 Selected Planning and Zoning Decisions*.] (Source: State Bar of Michigan *e-Journal* Number: 77769; July 18, 2022.)

Full text: http://www.michbar.org/file/opinions/appeals/2022/071422/77769.pdf

Misapplication of local law (regarding 1,000-foot drug-free zone) to other marijuana distribution permits is not enough to establish equal protection claim

Case: *Green Genie, Inc. v. City of Detroit, MI*

Court: U.S. Court of Appeals Sixth Circuit, 63 F.4th 521, 2023 U.S. App. LEXIS 6757, 2023 FED App. 0050P (6th Cir.) (United States Court of Appeals for the Sixth Circuit March 21, 2023, Filed

[This appeal was from the Eastern District-MI.] The court affirmed summary judgment for defendant-City of Detroit as to plaintiff-Green Genie's constitutional claims arising from the denial of a marijuana distribution center permit. It concluded plaintiff could not show it was deprived of a "protected property interest" to support its due process claim and that it did not establish its equal protection rights were violated through discrimination. The City denied the permit because the proposed center was in an area defined in the City code as a "drug-free zone," a location "'within 1,000 radial feet of the zoning lot' containing any one of a number of sensitive places, including a school." Plaintiff alleged the City erred in measuring the distance from a school, yet approved other sites for marijuana distribution that were within the zone.

The court first considered whether plaintiff could establish the necessary deprivation of property to support a due process claim. It held that it could not where "a government benefit, such as a permit, is not a protected entitlement if officials 'may grant or deny it in their discretion.'" Plaintiff argued the City's code required it to transfer applications that met the general requirements to the "Review Committee" for consideration. But the court noted that "a plaintiff may not 'assert a property right in government procedures themselves.'" In this case, plaintiff's "request to be heard by a special committee is little more than an interest in 'a procedure itself, without more.'" Thus, its due process claim was properly dismissed.

As for its equal protection claim, plaintiff argued the City discriminated against it by intentionally treating it "differently from others similarly situated without any rational basis for the difference[,] . . . a class-of-one claim." But to prevail on such a claim, plaintiff had to show "the City 'intentionally treated' Green Genie 'differently from others similarly situated[.]'" Plaintiff was required to show "'an inference' of intentional discrimination 'arising from the fact' that the adverse treatment of Green Genie 'was such a stark outlier from an otherwise consistent pattern of favorable treatment in similarly situated cases.'"

Plaintiff claimed the City "used a different method of measurement when evaluating" its application than it used for other facilities. However, the City offered evidence it used the same method for all applicants and several other comparators were denied permits for the same reason.

Plaintiff claimed the City "used a different method of measurement when evaluating" its application than it used for other facilities. However, the City offered evidence it used the same method for all applicants and several other comparators were denied permits for the same reason. While other facilities were granted permits based on "'sloppy administration' of its permitting system and 'misapplication of . . . local law'" this was not enough to establish an equal protection violation. (Source: State Bar of Michigan *e-Journal* Number: 79142; March 23, 2023.)

Full Text: http://www.michbar.org/file/opinions/us_appeals/2023/032123/79142.pdf

Right to Farm Act

Court rules on attorney costs and fees under Right to Farm Act

Case: *James Twp. v. Rice*

Court: Michigan Supreme Court, 509 Mich. 363, 984 N.W.2d 71, 2022 Mich. LEXIS 1179 (Supreme Court of Michigan June 22, 2022, Filed)

The court held that MCL 286.473b of the RTFA entitles a prevailing farm or farm operation to the actual amount of costs and expenses reasonably incurred in connection with the defense of the action, together with reasonable and actual attorney fees, when so demanded. Thus, it reversed the judgment of the Court

of Appeals and remanded to the trial court for it to determine the amount of actual costs and fees reasonably incurred by defendant in defending the RTFA action brought by plaintiff-township, as well as the amount of his reasonable and actual attorney fees.

Plaintiff filed a municipal civil-infraction citation against defendant alleging violations of its blight ordinance and the Michigan Residential Code because of "junk, junk cars, unpermitted construction on an adjacent building, and improper fence height" on defendant's property. The trial court found defendant's use of the property constituted a "farm" or "farm operation" under the RTFA and that the RTFA was an affirmative defense to those portions of the citation challenging his unpermitted construction and fence-height violations.

The trial court denied costs and fees. The Court of Appeals affirmed but remanded for the trial court to articulate the reasons for its discretionary decision to decline to award costs and fees. The court granted defendant's application for leave to consider whether the statutory language in MCL 286.473b "providing that a 'farm or farm operation may recover from the plaintiff the actual amount of costs and expenses . . .' entitles a successful farm or farm operation under the statute to recover costs." It answered in the affirmative. "MCL 286.473b does not say that the court 'may award' costs, expenses, and fees but that the prevailing farm or farm operation 'may recover' them."

The phrase "may recover" entitled the prevailing farm or farm operation "to recover what the statute permits: the actual amount of costs and expenses reasonably incurred in connection with the defense of the action, together with reasonable and actual attorney fees." Comparing *Bocquet* and *Aaron Rents*, the court observed that, "upon request by a prevailing farm or farm operation, an award of costs, expenses, and fees under MCL 286.473b is mandatory, not discretionary."

Finally, although the trial court "maintains the discretion to determine the amount of costs and fees that were reasonably incurred by the prevailing farm or farm operation, as well as the amount of the prevailing farm or farm operation's reasonable and actual attorney fees . . ." it does not possess "the discretion to decline to award those actual costs and fees reasonably incurred, nor to decline the amount of reasonable and actual attorney fees incurred, when requested by the prevailing farm or farm operation."

[Trial Court] does not possess "the discretion to decline to award those actual costs and fees reasonably incurred, nor to decline the amount of reasonable and actual attorney fees incurred, when requested by the prevailing farm or farm operation."

Dissenting, Justice Welch opined that "the costs provision of the RTFA must be read as merely *authorizing* a prevailing farm or farm operation to request the award of attorney fees and that the trial court—not the defendant farm—has discretion to determine whether an award is warranted under the facts and, if so, in what amount." (Source: State Bar of Michigan *e-Journal* Number: 77671; June 24, 2022)

Full Text: http://www.michbar.org/file/opinions/supreme/2022/062222/77671.pdf

Other Published Cases

Vendor licensing: there is no property interest in a vendor's license; applicants must meet requirements.

Case: *Williams v. City of Detroit, MI*

Court: U.S. Court of Appeals Sixth Circuit, 54 F.4th 895, 2022 U.S. App. LEXIS 33322, 2022 FED App. 0258P (6th Cir.) (United States Court of Appeals for the Sixth Circuit December 2, 2022, Filed)

The court held that plaintiffs-vendors did not have a property interest in vendor licenses and thus, affirmed summary judgment for defendant-City of Detroit on their Fourteenth Amendment claims after the City refused to renew their licenses. Detroit refused to renew the licenses because plaintiffs were located within a 300-foot exclusion zone of Little Caesar's Arena. They sued, arguing that the City violated their rights to due process and equal protection.

The court first considered whether plaintiffs possessed a property interest in their licenses. It held that "[a] State's decision to offer benefits or licenses does not create a property interest 'if government officials may grant or deny it in their discretion.'" The court noted that under the Detroit Code, licenses are not guaranteed, and the City retained the "discretion to deny or suspend licenses to prevent a violation of the rules or to protect public safety. . . . 'The law is clear that a party cannot have a property interest in a discretionary benefit.'"

'The law is clear that a party cannot have a property interest in a discretionary benefit.'

Plaintiffs argued that they had renewed their licenses in the past and expected to do so again. But the court explained that "renewals in the past do not justify expectations of renewal in the future—or, as we have put it, getting a license before does not justify 'assuming that [the license] would be issued again.'" However, plaintiffs were entitled to first preference of other available locations, pursuant to the Code, and the court noted that two of them received new licenses for other locations. The court also held that Detroit had a rational reason for denying the applications—preventing sidewalk congestion—and that "a 300-foot exclusion zone is 'a rational way to correct it.'" (Source: State Bar of Michigan *e-Journal* Number: 78566; December 6, 2022)

Full Text: http://www.michbar.org/file/opinions/us_appeals/2022/120222/78566.pdf

Airport Zoning- Tuscola decision revisited

Case: *Tuscola Area Airport Auth. v. Michigan Aeronautics Comm'n*

Court: Michigan Supreme Court (Order,

In an order in lieu of granting leave to appeal, the court reversed Part III(B) of the Court of Appeals judgment (see e-Journal # 77046, 2/28/22 edition [Case No. 357209, 2022 Mich. App. LEXIS 1049, 2022 WL 572561 (February 24, 2022, Decided)] and remanded the case to the trial court for further proceedings. It held that appellant-Airport Authority "provided sufficient evidence of a concrete and particularized injury to support appellate standing to challenge the issuance of the tall structure permits."

The Authority was "the legal entity charged with control over the airport, and the decision to grant the tall structure permits, which allow for the placement of wind turbines in the immediate vicinity of the airport, impacts the airport. Moreover, the Airport Authority has alleged (and provided evidence in support of its allegation) a concrete and particularized injury—that the turbines will result in a pecuniary loss to the airport."

Dissenting, Justice Viviano did "not believe the peremptory order contains a sufficiently clear legal basis for reversal." He found that neither *Saugatuck Dunes* nor *Federated Ins* was directly on point. Given the lack

of clearly applicable binding case law, he would grant leave to appeal. (Source: State Bar of Michigan *e-Journal* Number: 79796; July 6, 2023)

Full Text: http://www.michbar.org/file/opinions/supreme/2023/063023/79796.pdf

Unpublished Cases

Generally unpublished means there was not any new case law established but presented here as reminders of some legal principles. They are included here because they state current law well, or as a reminder of what current law is. A case is "unpublished" because there was not any new principal of law established (nothing new/different to report), or the ruling is viewed as "obvious." An unpublished case may be a good restatement or summary of existing case law. Unpublished opinions are not precedentially binding under the rules of stare decisis. 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.

Due Process and Equal Protection

Industrial solar SLUP: plaintiffs have standing to appeal, Township failed to follow notice requirements, ordinance validity in question.

Case: *Montrief et al. v. Macon Twp. Bd. of Trs.*

Court: Michigan Court of Appeals, No 360437, 2023 Mich. App. LEXIS 2993, 2023 WL 3140111 (Court of Appeals of Michigan April 27, 2023, Decided).

The court held that the trial court erred by finding plaintiffs-landowners lacked standing to pursue their challenge to defendant-township's amended zoning ordinance (the Solar Ordinance) allowing the development of industrial-size solar farms as a special use. After amending the ordinance, the township approved defendant-solar energy company's SLUP, allowing it to develop an industrial solar farm in the township. Plaintiffs sought a declaratory judgment that the Solar Ordinance was invalid and unenforceable because its passage violated the notice requirements in the MZEA and the procedural requirements in the township's zoning ordinance. They asked the trial court to declare that the SLUP approved under the Solar Ordinance also be declared invalid and to enjoin the township from relying on it to grant SLUPs in the future. The trial court agreed with defendants that plaintiffs lacked standing and dismissed Count I of their complaint on that basis.

On appeal, the court agreed with plaintiffs that they had standing, noting their "interest in the issue presented in this lawsuit is sufficient to ensure sincere and vigorous advocacy." In addition, a declaratory judgment "is necessary to guide the parties' future conduct in order to preserve legal rights. One SLUP has already been granted under the Solar Ordinance and its approval has allegedly harmed plaintiffs in a manner different from the general public. The issue is more than merely hypothetical or speculative, and the parties have demonstrated an adverse interest necessitating the sharpening of the issues raised."

Further, plaintiffs raised "significant questions regarding the validity of the Solar Ordinance and whether the SLUP issued in reliance upon it interfered with their property rights. Because they have a sufficient personal stake in the outcome of the litigation that differs from that of the general public, they have standing to maintain their suit for declaratory judgment against defendants." Finally, they have standing because the township's ordinance "provides them with a legal cause of action to challenge the alleged violation of the" ordinance's notice requirements. Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 79407; May 8, 2023.)

"Because they have a sufficient personal stake in the outcome of the litigation that differs from that of the general public, they have standing to maintain their suit for declaratory judgment against defendants."

Full Text: http://www.michbar.org/file/opinions/appeals/2023/042723/79407.pdf

Appeals, Variances, Interpretation

A zoning administrator's verbal approval or denial is not final

Case: *Anscomb v. Township of Frankenmuth Zoning Bd. Of Appeals*

Court: Michigan Court of Appeals, No. 358016, 2022 Mich. App. LEXIS 5083, 2022 WL 3693643 (Court of Appeals of Michigan August 25, 2022, Decided)

The court affirmed the circuit court's order reversing defendant-ZBA's decision to deny a residential building permit to plaintiffs. Defendant contended that "plaintiffs' appeal to the ZBA was untimely, thereby depriving the ZBA, and as a consequence the circuit court, of subject-matter jurisdiction over" the dispute. The court held that because "the ordinance does not state that noncompliance with the ten-day deadline is jurisdictional, the ordinance is ambiguous on that point, and the ZBA's implicit interpretation" when it took up the appeal "that the deadline is non-jurisdictional would be reasonable." In addition, plaintiffs' building permit request "triggered § 1201(5)(d), because the permit would either be issued or denied.

Although this section of the ordinance is not a model of clarity, it clearly contemplates a written denial including an explanation for the denial, and the source of that denial should be the building inspector rather than the zoning administrator. Furthermore, without receiving a statement of cause, it would be impossible for a person denied a permit to comply with the requirement in § 1204(3) of specifying the grounds for the appeal. The telephone conversation with the zoning administrator on [2/19/21], cannot have been a proper, formal denial of the building permit that would trigger the ten-day deadline for appealing to the ZBA."

Under the totality of the circumstances, the court found the trial court correctly ruled "that the denial of the building permit came in the form of the" township attorney's 3/10/21 letter. "By the township attorney's own logic, the zoning administrator's telephoned statement that the permit was denied could not . . . be the township's decision." In sum, the court held that it was "highly doubtful that the ten-day deadline was actually

"The telephone conversation with the zoning administrator on [2/19/21], cannot have been a proper, formal denial of the building permit that would trigger the ten-day deadline for appealing to the ZBA."

jurisdictional, and in any event, plaintiffs' appeal to the ZBA was timely on these facts."

Defendant next asserted that, "pursuant to its historical interpretation of the ordinance, § 804(2)(a) requires plaintiffs' lot to have a minimum of 200 feet in width of frontage on the road it abuts, and plaintiffs cannot meet this requirement because their lot is only 33 feet" wide. But the court concluded the fact this may be the "front lot line" of the property was "utterly irrelevant. The 'front building line' within the meaning of § 202(8) would be based upon the 1,300-foot-width of the main portion of plaintiffs' property where plaintiffs actually intend to construct their residence." Thus, the trial court correctly held that "the ordinance did not preclude plaintiffs from building on their lot."(Source: State Bar of Michigan *e-Journal* Number: 78065; September 13, 2022.)

Full Text: http://www.michbar.org/file/opinions/appeals/2022/082522/78065.pdf

On definitions and interpretations: mulch manufacturing as an agribusiness

Case: *Tullio v. Attica Twp.*

Court: Michigan Court of Appeals, No. 358343, 2022 Mich. App. LEXIS 4453, 2022 WL 3009714 (Court of Appeals of Michigan July 28, 2022, Decided)

In this zoning dispute, the court affirmed the circuit court order affirming the decision of defendant-Attica Township ZBA to affirm the Township Board's grant of a special land use permit to nonparty-Owen Tree Service (Owen), "which allowed Owen to relocate its mulch manufacturing operation to a site adjoining plaintiffs' campground." Plaintiffs argued that collateral estoppel did not bind the ZBA to accept the circuit court's prior determination that the mulch manufacturing operation was an agribusiness. However, nothing "in the ZBA's decision indicates its belief that it was, in fact, bound by the circuit court's earlier determination".

Instead, the ZBA's decision indicates that it was using the circuit court's determination 'as [its] determination.' Thus, rather than treating the determination as binding, the ZBA instead found it to be persuasive and adopted as its own the circuit court's determination that the mulch manufacturing operation was an agribusiness within the meaning of the relevant zoning ordinances." Because the court held that "the ZBA independently determined that the proposed operation was an agribusiness under the ordinance, plaintiffs' argument that they were denied due process because the ZBA's decision was based exclusively on dictum" had no merit.

Defendant-Township also argued that judicial estoppel precluded plaintiffs from arguing that Owen's operations were properly classified as an agribusiness. The crux of plaintiffs' argument in response to the Township's appeal of the ZBA's first opinion "was that the proposed use might be an agribusiness, not that it unequivocally was an agribusiness. Because the claim must be successfully and unequivocally asserted in the earlier appeal," the court held that the judicial estoppel doctrine did not bar plaintiffs' argument.

Plaintiffs also contended the trial court usurped the ZBA's authority "when it used a dictionary definition of agribusiness to interpret the township's zoning ordinance." The court held that because "the ordinance only gives examples of agribusiness, but not a definition, the trial court properly considered the dictionary definition." Plaintiffs next argued "the ZBA erred because there was not sufficient evidence on the record to show the proposed use properly fit the definition of an agribusiness." But in light of the record, the court held that "the ZBA did not err by determining the proposed use constituted an agribusiness under the zoning ordinance, and the circuit court did not err in concluding there was sufficient evidence to label the proposed operations an agribusiness." (Source: State Bar of Michigan *e-Journal* Number: 77897; August 15 , 2022.)

"the ZBA did not err by determining the proposed use constituted an agribusiness under the zoning ordinance, and the circuit court did not err in concluding there was sufficient evidence to label the proposed operations an agribusiness."

Full Text: http://www.michbar.org/file/opinions/appeals/2022/072822/77897.pdf

Keeping of chickens in residential zoning district not allowed says ZBA; COA disagrees

Case: *Dezman v. Charter Twp. of Bloomfield*

Court: Michigan Court of Appeals, No. 360406, 2023 Mich. App. LEXIS 3923, 2023 WL 3767221 (Court of Appeals of Michigan June 1, 2023, Decided)

The court held that "the plain and unambiguous language of Bloomfield Township Zoning Ordinance § 42-3.1.3" lacked any language prohibiting plaintiffs "from keeping chickens at their one-family detached dwelling," and thus, they were not required to seek a variance. As a result, it reversed "the ZBA and circuit court's orders that plaintiffs were required to have a variance to keep chickens at their" home and remanded.

The language of the zoning ordinance was "less restrictive than that in *Pittsfield Twp*, which expressly stated that *only* the specified uses of land were allowed. But plaintiffs are lawfully using their land as a one-family detached dwelling in conformity with" § 42-3.1.3.

Defendants suggested "that, because the ordinance does not expressly state residents may keep chickens at a one-family detached dwelling, such use is necessarily excluded. Under defendants' logic, however, *every* activity at a one-family detached dwelling must then be excluded because the ordinance does not list *any* activities that may be conducted at a one-family detached dwelling.

Because '[c]ourts attempt not to interpret statutes, and by implication ordinances, in a manner that leads to absurd results,'" the court held that "such interpretation of the ordinance cannot be upheld." Defendants also claimed "that the ZBA's interpretation that keeping chickens is a 'farm activity,' which must be conducted on at least 40 acres of land absent a variance, should be given deference. But custom is only given deference if the ordinance is ambiguous and the municipality's interpretation is reasonable."

Defendants claimed there was "an 'implied ambiguity' based on plaintiffs' attempt to construe the zoning ordinance's definition of a farm to exclude the keeping of chickens as a customarily classified farm activity." But plaintiffs were "not attempting to exclude the keeping of chickens as a farm activity, rather, [they] recognize that the ordinance is silent on whether chickens must be exclusively kept on a farm instead of a one-family detached dwelling."

The court found "no support for defendants' claim that the zoning ordinance is ambiguous, and the ZBA's interpretation need not be given deference. Because the unambiguous, plain language of the zoning ordinance contains no express provision prohibiting plaintiffs from keeping chickens at their one-family detached dwelling or limiting the keeping of chickens to a farm, plaintiffs are not required to obtain a variance, and the circuit court erred in affirming the ZBA's decision." (Source: State Bar of Michigan *e-Journal* Number: 79606; June 20, 2023)

Because the unambiguous, plain language of the zoning ordinance contains no express provision prohibiting plaintiffs from keeping chickens at their one-family detached dwelling or limiting the keeping of chickens to a farm, plaintiffs are not required to obtain a variance, and the circuit court erred in affirming the ZBA's decision."

Full Text: http://www.michbar.org/file/opinions/appeals/2023/060123/79606.pdf

Nonconforming Uses

Excavating company: improper extension and expansion of nonconforming use

Case: *Champion Twp. v. Pascoe*

Court: Michigan Court of Appeals, No. 358584, 2023 Mich. App. LEXIS 829, 2023 WL 1482279 (Court of Appeals of Michigan February 2, 2023, Decided)

The court held that the trial court did not err by granting summary disposition for plaintiff-township and ordering defendants to discontinue their nonconforming uses of the subject property and dismissing their counterclaims with prejudice. Plaintiff issued notices of zoning violations to defendants for operating a commercial business in a residential area. It then sought injunctive relief.

Defendants claimed the use of the property for an excavating business was consistent with the prior nonconforming use allowed by a previous permit. Plaintiff responded that defendants' use improperly extended and enlarged the prior nonconforming use.

In this appeal, the court rejected defendants' argument that plaintiff's action was barred by equitable estoppel or laches. "The trial court correctly recognized that it was [defendant-] Laitala's activities that triggered the zoning enforcement activities, and correctly concluded that before that time, 'any support for use of the property other than as a school and a bus garage was . . . tacit and opinion only.'

Further, with the latter remark, the [trial] court indicated that it considered defendants' argument that plaintiff's history of lax enforcement induced their reliance. Moreover, to the extent that defendants acted in reliance on informal assurances from earlier municipal authorities, or once-friendly relations with the new enforcement officers, defendants ran the risk that those authorities might in time pursue stricter enforcement of the zoning ordinance. In addition, defendants effectively admitted that plaintiff "did not delay in taking exception to the expanded use of the property." The court then concluded that laches did not apply.

Moreover, to the extent that defendants acted in reliance on informal assurances from earlier municipal authorities, or once-friendly relations with the new enforcement officers, defendants ran the risk that those authorities might in time pursue stricter enforcement of the zoning ordinance.

Defendant-Pascoe began renting the "property to Laitala in 2013, and the latter's activities engendering this litigation began in 2013 or 2014. Plaintiff commenced the action to enjoin the zoning violation on [7/7/17]—well within the limitations period—and thus rendering the defense of laches wholly inapplicable." The court also rejected defendants' claim that the trial court erroneously bypassed the requirements of the ZEA, noting they "entirely fail[ed] to specify what provisions of the act were violated." The trial court properly acted on the court's command in a prior appeal "that it exercise its jurisdiction without deference to what plaintiff's planning commission might do." Further, defendants abandoned any constitutional issues. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 78926; February 2, 2023)

Full Text: http://www.michbar.org/file/opinions/appeals/2023/020223/78926.pdf

Court, Ripeness for Court's Jurisdiction, Aggrieved Party

Plaintiff lacks standing after site plan denial, claims were not timely appealed

Case: *Stafa v. City of Troy*

Court: Michigan Court of Appeals, No. 359496, 2023 Mich. App. LEXIS 2594, 2023 WL 2938542 (Court of Appeals of Michigan April 13, 2023, Decided)

The court held that the circuit court did not err in granting defendant-city summary disposition and in dismissing plaintiff-Stafa's amended complaint. He did not have standing to challenge the changes to § 5.06 of the city's zoning ordinances. His claims as to the denial of a "site plan application should have been timely appealed to the circuit court. An order of superintending control was not appropriate because an appeal was available." He argued that his amended complaint "was a permissible original action challenging various" city actions and not an untimely appeal of the ZBA's decision, which denied his appeal from the planning commission's denial of his site plan application.

The complaint made demands for declaratory relief that fit into two categories – (1) declaratory relief as to § "5.06, the new zoning ordinance describing NN Districts; and (2) declaratory relief from the planning commission's denial of Stafa's site plan, and the ZBA's denial of his appeal." The court first determined that he lacked standing to challenge the changes to § 5.06, which "was amended *after* the ZBA denied Stafa's appeal and there is no evidence the newly-enacted language of the ordinance was ever adversely applied to" him. As to his other request for declaratory relief, he "generally contested the planning commission's and the ZBA's assessments and decisions related to his site plan application."

As his claims were directly related to the ZBA's denial of his appeal, he could have pursued them "in an appeal to the circuit court. Because Stafa did not timely appeal these claims to the circuit court, the circuit

court correctly concluded these claims were time-barred under MCL 125.3606(3) and [it] lacked jurisdiction to consider them."

As to his request for a writ of mandamus, an order of superintending control replaces such a writ "'when directed to a lower court or tribunal.'" And given that he "was a party aggrieved by the ZBA's decision, and an appeal of the ZBA's decision was available in the circuit court, the circuit court did not err by dismissing his request for an order of superintending control." Further, his as-applied constitutional challenges could have been addressed in such an appeal. "As such, the circuit court did not err by applying the standards under MCL 125.3604(1) and MCL 125.360, or by relying on the" exhaustion of administrative remedies doctrine in granting the city's motion to dismiss. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 79296; April 24, 2023)

Full Text: https://www.michbar.org/e-journal/eJournalDate/04242023

Open Meetings Act, Freedom of Information Act

No violation of OMA to have first public comment limited to agenda items only, second public unrestricted.

Case: *Ostergren v. Schneider*

Court: Michigan Court of Appeals, No, 359149, 2023 Mich. App. LEXIS 1185, 2023 WL 2144744 (Court of Appeals of Michigan February 21, 2023, Decided)

The court held that plaintiff-Ostergren "neither stated a claim on which relief can be granted nor demonstrated the existence of a genuine issue of material fact" as to whether the conduct of defendant-Schneider, chairman of defendant-county board of commissioners, violated the OMA. Thus, the trial court did not err by granting Schneider summary disposition. Ostergren argued that "Schneider intentionally violated the OMA when Schneider limited the first public comment period to 'agenda items only' before the Board formally 'established and recorded' such a limitation." Like the trial court, the court found no OMA violation.

Ostergren argued that Schneider violated MCL 15.263(5). The court noted the Board's "rules in place at the time of the July 14 meeting did not specifically limit the first public comment period to 'agenda items only,' but they provided defendant with discretion to do so. Board Rule 5.4 required that 'an opportunity shall be afforded to any member of the general public in attendance to deliver his/her comments to the Board,' but the comments were limited to five minutes per person 'unless extended by the chairperson.'

Board Rule 6.4 stated that '[o]ther persons at the meeting [non-Board members] shall not speak unless recognized by the chairperson.'" The court held that these "rules, which were brought 'into existence' and 'set down in writing' before the July 14 meeting, provided Schneider the authority to exercise his discretion in determining who could speak, when the individual could speak, and how long the individual could speak, so long as each individual was not outright denied the opportunity to address the Board.

The court held that these "rules, which were brought 'into existence' and 'set down in writing' before the July 14 meeting, provided Schneider the authority to exercise his discretion in determining who could speak, when the individual could speak, and how long the individual could speak, so long as each individual was not outright denied the opportunity to address the Board.

The July 14 meeting agenda provided for two public comment periods, both of which provided individuals a five-minute speaking period. During the July 14 meeting, Schneider told Ostergren that, 'as the chairman,' he was limiting the first public comment period to 'agenda items only,' but Ostergren would have a chance to address the Board, unrestricted, during the second public comment period.

Notably, Ostergren was not prevented from attending the meeting or speaking. Indeed, Ostergren spoke for more than a minute during the first public comment period and for more than five minutes during the second public comment period. This comports with the purpose of the OMA to allow public access." The court concluded that while he "did not like that he was asked to hold his general comments until the second public comment period, this does not equate to a violation of the OMA." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 79003; March 8, 2023)

...while he "did not like that he was asked to hold his general comments until the second public comment period, this does not equate to a violation of the OMA."

Full Text: http://www.michbar.org/file/opinions/appeals/2023/022123/79003.pdf

Signs: Billboards, Freedom of Speech

Static billboard not entitled to upgrade to digital billboard.

Case: *Outfront Media, LLC v. City of Grand Rapids*

Court: Michigan Court of Appeals (No. 357319, 2022 Mich. App. LEXIS 4717, 2022 WL 3329484 (Court of Appeals of Michigan August 11, 2022, Decided)

The court concluded that the BZA did not commit an error of law by holding that appellant-Outfront "was not entitled to upgrade its existing nonconforming billboards to electronic billboards." Also, Outfront failed to show that it had "been treated differently from other similarly situated permit applicants." The court found that its constitutional arguments lacked merit. Thus, it affirmed the trial court's order affirming the BZA decision to uphold appellee-City's "denial of Outfront's applications for permits to convert existing non-electronic billboards into electronic billboards."

Beginning with the interpretation of the zoning ordinance, the court concluded that "for nine of the billboard locations in question, all electronic signs are prohibited. For the tenth location, in the TN-TBA district, only certain sign types—wall, ground, pylon, and window—may potentially be electronic, and the billboard in question is not among the sign types that may be electronic. Consequently, the BZA did not misinterpret Article 15 or commit an error of law by concluding that electronic billboards were prohibited at the 10 locations at issue."

As to an upgrade of nonconforming billboards, the court held that "structural alteration to make the billboards electronic will create an additional nonconformance that

...the City has legitimate aesthetic interests, including interests in the reduction of visual clutter, to justify rules limiting existing nonconforming billboards to static signs, rather than allowing them to become electronic billboards, and otherwise limiting electronic signs to certain sign types, subject to various size and location requirements."

is precluded by § 5.15.03(B)." As to Outfront's constitutional claims, the court concluded there was "no content-based restriction in the City's sign ordinances" and therefore, "intermediate review for time, place, and manner restrictions applies." In light of "the size requirements applicable to the signs that may be electronic, it is clear that billboards cannot satisfy these requirements. Simply stated, billboards are considerably larger than those sign types that can be electronic in certain zoning districts in the City.

This size distinction provides a sound reason for the distinction drawn in Article 15 in terms of what sign types can be electronic. Further, the City has legitimate aesthetic interests, including interests in the reduction of visual clutter, to justify rules limiting existing nonconforming billboards to static signs, rather than allowing them to become electronic billboards, and otherwise limiting electronic signs to certain sign types, subject to various size and location requirements." (Source: State Bar of Michigan *e-Journal* Number: 77962 ; August 26, 2022.)

Full Text: http://www.michbar.org/file/opinions/appeals/2022/081122/77962.pdf

Special Use and Site Plans

Unpermitted U-Haul business added to commercial storage, court weighs in on short-term vs. long-term storage

Case: *NSC Walker, LLC v. City of Walker*

Court: Michigan Court of Appeals, No. 358403, 2022 Mich. App. LEXIS 7090, 2022 WL 17724288 (Court of Appeals of Michigan December 15, 2022, Decided)

Holding that the circuit court misinterpreted the relevant zoning ordinance (Walker Ordinance, § 94-176(b)), the court reversed the ruling that upheld the decision by defendant-city's ZBA. The prior owner of plaintiff-NSC's property obtained ZBA approval for an indoor self-storage operation. Although it "did not constitute an express permitted principal use for a C-1 zoning district, the ZBA found that it was sufficiently similar to such a use" to be allowed under § 94-176(b)(18). NSC continued to operate the facility, but added a service "in the form of U-Haul trucks and trailers that could be rented and that were shuttled back and forth from the property on an as-needed basis."

NSC received a violation notice and order to abate from the city's code enforcement specialist. The question "was whether the operation of an indoor self-storage facility under Walker Ordinance, § 94-176(b)(18) constituted a permitted principal use which would potentially allow for an accessory use. The ZBA, the circuit court, and the city took the position that the indoor self-storage business was merely *similar* to a permitted principal use in the C-1 district and not an actual permitted principal use."

The court disagreed, concluding that the reference in (18) "to businesses or services that are 'similar' to the list of permitted principal uses merely serves as one of the criteria to guide the ZBA in deciding whether Subdivision (18) is applicable to a given use, along with the requirement that a contemplated use be 'compatible with the intent of the zoning district.' When the ZBA designates a business or service as qualifying for inclusion in a C-1 district under Subdivision (18), it effectively and necessarily becomes a permitted principal use, entitled to the same treatment as the expressly-identified permissible uses, including the potential to operate accessory uses."

The court also found the clear language of the site-plan-approval condition prohibiting long-term trailer or vehicle parking or storage did not prohibit repeated short-term rentals. But its ruling was subject to a determination by the circuit court as to "whether operating the U-Haul component of NSC's business is 'customarily incidental' to operating the indoor self-storage facility such that the U-Haul aspect of the

business qualifies as an 'accessory use' . . . ." The ZBA concluded it was not but the circuit court did not address the issue. The court remanded for the circuit court to do so. (Source: State Bar of Michigan *e-Journal* Number: 78606; January 4, 2023.)

Full Text: http://www.michbar.org/file/opinions/appeals/2022/121522/78606.pdf

Marijuana Related

Marijuana licensing competitive selection process, township used proper procedure

Case: *Leoni Wellness, LLC v. Easton Twp.*

Court: Michigan Court of Appeals, No. 358818, 2022 Mich. App. LEXIS 6760, 2022 WL 16858764 (Court of Appeals of Michigan November 10, 2022, Decided)

The court held that defendant-township's Ordinance 44 as to marijuana establishments within its boundaries was not preempted by and did not conflict with the Marijuana Act. It also concluded that while the trial court erred in dismissing plaintiff's constitutional claims under MCR 2.116(C)(4), they were nonetheless correctly dismissed. Further, "plaintiff's claim for any violation of the Open Meetings Act" was moot and an amendment of its complaint was not justified. Thus, the court affirmed summary disposition for defendant.

Plaintiff and another business applied "to be the sole business selling marijuana within defendant's boundary." Defendant's board awarded the other business the license. As to plaintiff's claim "Ordinance 44 was preempted by, or otherwise in conflict with, the Marijuana Act[,]" the court found that the Act did not occupy the entire field of regulation. The Act specifically allows "municipalities to adopt regulatory ordinances and take actions consistent with the Marijuana Act[.]" As to conflict, Ordinance 44 mirrored MCL 333.27959(4)'s language. The ordinance "requires that the board use a competitive process for selecting among applicants with the objective that the candidate who is best suited to comply with the Marijuana Act in the Township be selected. This is fully consistent with MCL 333.27959(4)." And the tie-breaking provision in Ordinance 44 "is consistent with the requirements stated under MCL 333.27959(4)."

As to plaintiff's due process claim, the court has "held that a first-time applicant for a license to operate a marijuana establishment generally has no property interest in the application process that is protected by due process." Absent a property interest, "review is limited to determining whether the government's decision was arbitrary or capricious." Defendant's decision "was not arbitrary or capricious because the record showed that [its] board followed the procedures set out in the Marijuana Act and Ordinance 44." As to equal protection, when the "board rescored both applicants it explicitly stated that it did not consider residency as a factor." Further, the other factors it considered, "including plaintiff's lapsed medical-marijuana license and the proposed location for [its] proposed business, were rationally related to the legitimate-government purpose of effectuating the Marijuana Act." (Source: State Bar of Michigan *e-Journal* Number: 78427; November 22, 2022)

...the court has "held that a first-time applicant for a license to operate a marijuana establishment generally has no property interest in the application process that is protected by due process." Absent a property interest, "review is limited to determining whether the government's decision was arbitrary or capricious."

Full Text: http://www.michbar.org/file/opinions/appeals/2022/111022/78427.pdf

Marijuana licensing: scoring criteria, selection committee structure upheld

Case: *Blue Water Cannabis Co., LLC v. City of Westland*

Court: Michigan Court of Appeals, No. 359144, 2023 Mich. App. LEXIS 2643, 2023 WL 2941569 (Court of Appeals of Michigan April 13, 2023, Decided)

The court held that the waivers in plaintiffs' applications for licenses to sell marijuana in defendant-city were valid and enforceable. In addition, they failed to show they were entitled to relief on the ground that the city's adopted criteria for evaluating applications conflicted with the MRTMA. Finally, the OMA did not apply. Plaintiffs (and intervening plaintiffs) sued defendants after their applications for licenses to sell marijuana in the city were denied. The trial court found the city and intervening defendants were entitled to summary disposition on the basis of waivers in the application forms. It also ruled that the OMA was not violated and that the city's ordinance did not conflict with the MRTMA.

On appeal, the court first agreed with the trial court that the waivers were valid and enforceable. Even on appeal, plaintiffs "have not offered any factual reasons why the waivers would not be enforceable." As such, the court was "not persuaded that summary disposition on the basis of the waiver provisions was either inappropriate or premature." In addition, they did not show "that any provision of the MRTMA clearly prohibits the waivers adopted by the" city.

The court next rejected plaintiffs' arguments that the city was not permitted to adopt criteria for evaluating an applicant's suitability to operate a marijuana business within the community that were not directly relevant to the applicant's suitability to operate a business in compliance with the MRTMA. "There is nothing in the language of MCL 333.27956 or MCL 333.27959(4) that suggests that the state intended to restrict the criteria a municipality can consider when evaluating competing licensing applications, other than those limitations specifically prescribed in MCL 333.27956. Thus, a municipality may consider criteria unique to its own community and citizens, subject to the restrictions in MCL 333.27959(4)."

"There is nothing in the language of MCL 333.27956 or MCL 333.27959(4) that suggests that the state intended to restrict the criteria a municipality can consider when evaluating competing licensing applications, other than those limitations specifically prescribed in MCL 333.27956. Thus, a municipality may consider criteria unique to its own community and citizens, subject to the restrictions in MCL 333.27959(4)."

Finally, the court found that because the city's selection committee "was not operating as a public body, it was not required to comply with the OMA." And plaintiffs failed "to establish an independent claim for breach of contract." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 79292; April 27, 2023.)

Full Text: http://www.michbar.org/file/opinions/appeals/2023/041323/79292.pdf

MMFLA case: application fee does not factor into the completeness of the application, case remanded.

Case: *Triple K Wealth, LLC v. City of Eastpointe Med. Marihuana Facility Application Comm.*

Court: Michigan Court of Appeals, No. 361599, 2023 Mich. App. LEXIS 2811, 2023 WL 3028143 (Court of Appeals of Michigan April 20, 2023, Decided)

The court concluded that plaintiff, a medical marijuana provisioning center permit applicant, "was entitled to a writ of mandamus compelling defendant to review plaintiff's completed permit application on the merits, and either approve or deny it." The trial court's opinion to the contrary was reversed, and the case was remanded to enter an order granting plaintiff's motion for a writ of mandamus. This case involved the implementation, under the MMFLA, of the City of Eastpointe's medical marijuana facilities licensing ordinances.

"Plaintiff submitted to defendant a permit application to operate a medical marijuana provisioning center in Eastpointe." Defendant denied the "application and refused to consider it on the merits, concluding that it was incomplete." Plaintiff argued that the trial court erred by concluding "that its permit application was materially incomplete due to the missing fee." The court held that, "because the site-plan-application fee did not factor into a site-plan application's 'completeness' under the applicable ordinances, defendant and the trial court erred by concluding that the missing fee rendered plaintiff's permit application incomplete." It further concluded "plaintiff was entitled to a writ of mandamus compelling defendant to review plaintiff's completed permit application on the merits."

While the parties disagreed whether the requested act was ministerial, the court found that it was, "at least as applied to plaintiff's application[.]" Further, the court agreed "with plaintiff that a writ of mandamus is the only available remedy to achieve its desired result." (Source: State Bar of Michigan *e-Journal* Number: 79361; May 3, 2023)

Full Text: http://www.michbar.org/file/opinions/appeals/2023/042023/79361.pdf

Prior History: Macomb Circuit Court. LC No. 2022-001009-AW. *Triple K Wealth LLC v. City of Eastpointe*, 2022 Mich. App. LEXIS 6500 (Mich. Ct. App., Oct. 27, 2022)

Other Cases

Fish ladder and dam modification within a public park does not require voter approval

Case: *Buckhalter v. City of Traverse City*

Court: Michigan Court of Appeals, No. 357216, 2022 Mich. App. LEXIS 6345, 2022 WL 12071718 (Court of Appeals of Michigan October 20, 2022, Decided)

The court held that the trial court erred in ruling that sections of defendant-City's ordinances (the TCO) required a vote of approval by the city electorate before the City could move forward with plans to modify and improve a dam in a City-owned and controlled park (the Property). The plans included "an experimental system for managing fish passage upstream" (the Project). The trial court granted plaintiff a preliminary injunction and later summary disposition.

On appeal, after reviewing the language of two relevant TCO provisions, the court concluded there was "no evidence that the Project involves selling, exchanging, leasing, or alienating the Property. The City retains ownership of the Property throughout the duration of the Project. Authorizations to perform work or research on the Property do not entail the sale of the Property, an exchange of the Property, the leasing of the Property, or the alienation of the Property. At most, they convey a simple license."

The court determined that "the act of *disposing* of a park . . . has a broader reach than the other ordinal verbs. In relevant part, to 'dispose' of something means 'to transfer to the control of another,' but it can also mean 'to get rid of.'" The court found that it is possible to dispose of a park "without conveying, transferring, deeding, or otherwise relinquishing the park to another." However, in this case "the Property continues to be used for valid park purposes under the Project. There will be no meaningful deviation in the usage of the Property as a park such that a vote of the electorate is necessary to execute the Project.

Both the current use of the Dam and its planned use under the Project regulate lake levels, control flooding, and aim to control the passage of fish."

There will be no meaningful deviation in the usage of the Property as a park such that a vote of the electorate is necessary to execute the Project.

The court noted that the "trial court based its decision largely on the Project's research elements, but occupying space on the Property for purposes of conducting research related to the passage of fish, which matter has been part of the operation of the Dam and a characteristic of the Property since the addition of the fish ladder in 1987, does not transform the park into something other than a park. Moreover, engaging in environmental research concerning the habitat of species found in the area has a natural connection to the Property's purpose and use as a park." Reversed and remanded for entry of an order summarily dismissing the complaint. (Source: State Bar of Michigan *e-Journal* Number 78311: October 28, 2022)

Full Text: http://www.michbar.org/file/opinions/appeals/2022/102022/78311.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. A list of educators by territory and contact information can be found at www.canr.msu.edu/planning/

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.
- **clean-hands doctrine:** The clean-hands doctrine is the principle that a party's own inequitable misconduct precludes recovery based on equitable claims or defenses. The doctrine requires that a party act fairly in the matter for which they seek a remedy.
- **de novo:** Latin, "anew." For example, a trial de novo is a trial anew or a new trial, as opposed to a mere review of the record of the first trial. De novo is one of the standards of review used, for example, by a trial court when reviewing the decision of a referee, or by an appellate court when considering a case on appeal.
- **estoppel:** 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.
- **injunction:** 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.
- **laches:** noun Law unreasonable delay in asserting a claim, which may result in its dismissal. ORIGIN Middle English (in the sense 'negligence'): from Old French laschesse, from lasche 'lax', based on Latin laxus.
- **mandamus:** 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'.

For more information on legal terms refer to:

1. Cornell Legal Information Institute, https://www.law.cornell.edu/,

2. *Handbook of Legal Terms* prepared by the Michigan Judicial Institute for Michigan Courts: https://www.courts.michigan.gov/resources-for/judges-court-staff/court-staff/mji-resources-for-trial-court-staff/other-resources/

- **pecuniary:** Adjective formal relating to or consisting of money. DERIVATIVES pecuniarily adverb ORIGIN C16: from Latin pecuniarius, from pecunia 'money'.
- **sua sponte:** 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:** 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.