Michigan State University Extension
Public Policy Brief

Selected Planning and Zoning Decisions: 2022 (May 2021-June 2022)

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This public policy brief summarizes the important state and federal court cases and Attorney General Opinions issued between May 1, 2022 and June 3, 2022.

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"I know of no safe depository of the ultimate powers of the society but the people themselves . . . and if not enlightened enough to exercise their control the remedy is to inform their discretion."
Thomas Jefferson

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

Published Cases

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

Typically, a federal district court's interpretation of state law (as opposed to federal law) is not binding on state courts, although state courts may adopt their reasoning as persuasive. The U.S. Sixth Circuit Court of Appeals takes the position that 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. Given the geography of federal district courts in Michigan, 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

City substantially burdens the religious exercise of Muslim group, violates RLUIPA

Case: *United States of America v. City of Troy*

Court: US District Court, Eastern District of Michigan Southern Division. 16 F.4th 198, 2021 U.S. App. LEXIS 30529, 2021 FED App. 0240P (6th Cir.), 2021 WL 4771734 (October 13, 2021, Filed)

Federal courts ruled in favor of the Justice department, finding that the City of Troy violated the equal terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA). RLUIPA is a federal law that protects religious institutions from land use regulation that imposes a substantial burden to religious exercise. The law requires that places of worship be treated on "equal terms" meaning religious assemblies must be treated at least as well as nonreligious assemblies and institutions.

Troy had 'no compelling governmental interest in prohibiting Adam, a religious place of assembly, from operating from the property'

The judge found that the City of Troy's zoning regulation "substantially burdened the religious exercise of Muslim group seeking to establish the only permanent place of worship in the City of Troy". The case describes several other assembly uses treated differently than places of worship. This case is related to the 2018 case, *Adam Community Center v. City of Troy*, No 18-cv-13841, which alleged that the City of Troy, PC, ZBA, and others, violated 1st, 5th, and 14th amendments when denying a variance requested by the Adam Community Center or "Adam". In this recent case, the judge found that Troy had 'no compelling governmental interest in prohibiting Adam, a religious place of assembly, from operating from the property'. Source: The US Department of Justice, US Attorney's Office, Eastern District of Michigan.

Full text: https://cases.justia.com/federal/district-courts/michigan/miedce/2:2019cv12736/341744/56/0.pdf?ts=1647687818&msclkid=b9f391d5ab9911ec81132bbfef8674c2

Takings

Access to a public park through private streets not a taking

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

Court: U.S. Court of Appeals Sixth Circuit (Published Opinion, No. 20-4117, 14 F.4th 611, 2021 U.S. App. LEXIS 28845, 2021 FED App. 0226P (6th Cir.) (September 23, 2021, Filed).

The court affirmed the district court's dismissal of plaintiffs' takings and procedural due process claims against defendant-City of Powell, Ohio, holding that plaintiffs failed to allege a taking where the City did not appropriate a right of public access to the still-private portions of the streets at issue. Plaintiffs (related entities that own, maintain, and administer approximately 900 acres of property that was developed as a planned community, the Golf Village Community, within the City) alleged that the City took their property without just compensation or due process when it built an entrance to a new municipal park on Golf

Village's private street system, and that the City planned to convert certain private roads into public streets for access to the park. They claimed that the City "diminished its right to exclude and its right to use and enjoy its property."

The court first held that the district court properly dismissed the takings claim because "the complaint did not 'contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory'"— factual content that the City appropriated a right of public access. As to plaintiffs' claim for a breach of the "right to exclude" under *Cedar Point Nursery* (141 S. Ct. 2063, 210 L. Ed. 2d 369, 2021 U.S. LEXIS 3394, 28 Fla. L. Weekly Fed. S 960, 2021 WL 2557070 (Supreme Court of the United States June 23, 2021, Decided), they failed "'to allege that they are no longer able to exclude the public from accessing the property or *how* Defendants' construction of the park diminishes that right.'" Plaintiffs also argued that its "right to use and enjoy property" was violated through higher maintenance costs due to increased traffic on the private roads, and that this increased presence would "make it impossible to maintain a private commercial community."

However, the court rejected this claim because "the City never appropriated a right of access for members of the public." It also affirmed the district court's ruling that the City construction crew's temporary invasion of the property was not a taking. The court then dismissed plaintiffs' procedural due process claim for the same reasons that it dismissed the takings claim. Finally, it upheld dismissal with prejudice where plaintiffs "had already amended the complaint, failed to move for further leave to amend, and did not move to alter or amend the district court's judgment." (Source: State Bar of Michigan *e-Journal* Number: 76233 ; October 7, 2021.)

Full Text: http://www.michbar.org/file/opinions/us_appeals/2021/092321/76233.pdf

Tree ordinance fails "rough proportionality test", represents an unconstitutional taking

Case: *F.P. Dev., LLC v. Charter Twp. of Canton, MI*

Court: U.S. Court of Appeals Sixth Circuit (Nos. 20-1447/1466, 16 F.4th 198, 2021 U.S. App. LEXIS 30529, 2021 FED App. 0240P (6th Cir.), 2021 WL 4771734 (October 13, 2021, Filed)

While the court held that defendant-township's (Canton) tree ordinance, adopted in 2006, was not an unreasonable seizure and did not impose an excessive fine, it did constitute a taking without just compensation under the unconstitutional-conditions doctrine. Thus, the court affirmed summary judgment for plaintiff-F.P. Development on its takings claim and for Canton on the other claims. The ordinance prohibited F.P. from removing certain trees on its land within the township without a permit and required it to mitigate the removal.

On appeal, as an initial matter, the court found an argument based on prudential ripeness concerns was forfeited and it declined to apply the doctrine *sua sponte* here. Turning to the merits, it agreed with F.P. that the ordinance violated the Fifth Amendment, through the Fourteenth Amendment. Applying the essential nexus and rough proportionality test provided in *Nollan*. *Dolan*, and *Koontz*, because the parties agreed there was an essential nexus, the court only addressed the rough proportionality prong. It concluded that Canton failed "to carry its burden to show that it made the required individualized determination." The ordinance required F.P. to "replant one tree for every non-landmark tree removed and three trees for every felled landmark tree." Canton further required it "to bear the associated costs, whether F.P.

Because Canton did not make the necessary individualized determination, the ordinance, as applied to F.P., failed rough proportionality and was "an unconstitutional condition under Nollan, Dolan, and Koontz."

does the replanting and relocation itself or outsources the task to the township. Of course, Canton's mitigation options could offset F.P.'s tree removal, and they arguably involve some individualized assessment given that Canton must determine the number and type of trees cut. But *Dolan* requires more."

The information Canton presented as to the amount of money F.P. had to spend to satisfy its requirements was based on tree replacement costs calculated "in 2006. That limited and arguably stale information does not suffice." The court noted that according "to Canton's own representative, F.P.'s removal of regulated trees triggers the mitigation requirements, regardless of the specific impact caused by their removal." Because Canton did not make the necessary individualized determination, the ordinance, as applied to F.P., failed rough proportionality and was "an unconstitutional condition under *Nollan*, *Dolan*, and *Koontz*." [This appeal was from the ED-MI.] (Source: State Bar of Michigan *e-Journal* Number: _76317; October 18, 2021.)

Full Text: http://www.michbar.org/file/opinions/us_appeals/2021/101321/76317.pdf

Due Process and Equal Protection

Request for PUD and annexation for a township property into a village, results in 14th amendment challenge

Case: *Rice v. Village of Johnstown, OH*

Court: U.S. Court of Appeals Sixth Circuit, 30 F.4th 584, 2022 U.S. App. LEXIS 9454, 2022 FED App. 0068P (6th Cir.) (April 8, 2022, Filed)

The court held that whatever the merits of the Fourteenth Amendment due process claim, plaintiff-Rice family had standing to bring it where all three elements of standing were met. But the family's claims for declaratory and injunctive relief were mooted by amendment of the relevant ordinance. Only the claim for damages survived. Thus, the court affirmed the district court's grant of summary judgment to defendant-Johnstown Village on the claims for declaratory and injunctive relief, reversed it on the claim for monetary relief, and remanded.

The Rice family devised a plan to annex its 80-acre farm into Johnstown and have the property zoned for a residential development. The application was rejected. Because the farm was not located in Johnstown, but in an adjacent township, the district court held that the family lacked standing to bring its claim. The court concluded that whether or not the family did "enough to survive summary judgment on the merits," it showed a procedural injury. The family alleged that due to "Johnstown's unconstitutional delegation to the P&Z Commission, its zoning application was subjected to a standardless and conclusive review by allegedly private parties (the Commissioners), who acted for arbitrary reasons." Given that the zoning "application was subject to the P&Z Commission's allegedly unconstitutional process and its outcome affected the family's ability to develop its land[,]" an injury-in-fact was shown.

The court rejected Johnstown's argument that its ordinance did not apply. The ordinance set "forth the process for considering zoning applications. And there can be no question that the Rice family's zoning application in fact ran through that process. The family has produced uncontested evidence, moreover, that annexation by Johnstown was not a prerequisite to entering the zoning process; indeed, it was 'typical' for the two processes to run concurrently." The court found that the family showed "the ordinance was applied to it and that the results of the proceeding could have affected the family's interests." As to causation, the family showed that "its zoning application was denied through an allegedly unconstitutional process" and the facts here were sufficient to allow "the inference that the zoning and annexation decisions were

intertwined." Finally, whether or not the claim for monetary relief had merit, it satisfied the redressability requirement. (Source: State Bar of Michigan *e-Journal* Number: 77258; April 22, 2022.)

Full Text [http://www.michbar.org/file/opinions/us_appeals/2022/040822/77258.pdf]

Zoning restrictions on wineries, Federal court takes issue with several SLU conditions required by Township.

Case: *Wineries of the Old Mission Peninsula v. Peninsula Township*

Court: US District Court, Western District of Michigan Southern Division, 2022 U.S. Dist. LEXIS 108038, 2022 WL 2155097 (June 3, 2022, Filed)

This case involves a group of wineries on the Old Mission Peninsula disputing the Township's winery special land use restrictions and the extent to which actions allowed under the Michigan Liquor Control Code (MLCC) preempt local zoning. The court upheld that the MLCC did not preempt local rules placed on the winery, such as ceasing "guest activity" at 9:30 pm (the MLCC prohibits selling, giving away, or furnishing alcohol between 2:00AM and 7:00AM). The court upheld zoning restrictions on the wineries' hours of operation. The court also held that under Michigan law, a complete prohibition of amplified music under zoning is preempted. However, zoning may limit amplified music level (by volume, decibel, etc.). Regulation in the ordinance restricting the use of on-site kitchens for off-site catering were found to conflict with Michigan laws that allow a kitchen with a catering permit to serve food off-site with limited restrictions.

The plaintiffs were successful in challenging the validity of several zoning requirements under the dormant Commerce Clause. The Peninsula Township ordinance (in several sections) requires that grape wine that is processed, tasted, and sold in Farm Processing Facility contain 85% juice from fruit grown in the Mission Peninsula. Producers cited years where grape shortages on the Peninsula made it impossible to produce wine without importing greater than 15% of the juice from other sources. The Court did not find the Township's argument persuasive that juice source restrictions furthered the government interest of preserving agriculture. The court found the 85% minimum juice provision unlawful. Restrictions on other activities such as weddings, meetings, and logos on merchandise, also failed to show they furthered a legitimate governmental interest or were the minimum regulation necessary. The court also struck down additional elements of the ordinance due to vagueness/due process (e.g. the meaning of "Guest Activity").

The Court did not find the Township's argument persuasive that juice source restrictions furthered the government interest of preserving agriculture.

Full Text: https://www.oldmission.net/wp-content/uploads/2022/06/Winery-Lawsuit-Judge-Maloney-Opinion-6-3-22.pdf

Appeals, Variances (use, non-use)

No intent to abandon original variance allowing advertising sign over public art

Case: Detroit Media Group, LLC v. Detroit Bd. of Zoning Appeals

Court: Michigan Court of Appeals (Published Opinion, No. 352452) 2021 Mich. App. LEXIS 5670, 2021 WL 4394570 (September 23, 2021, Decided)

The court held that it is the conduct and actions of the leaseholder that are critical to the analysis, and that the record evidence supported the trial court's analysis and conclusion that appellee-DMG rebutted the presumption of abandonment. It did "not establish that DMG intended by act or omission to voluntarily abandon the variance." The court held that because appellant-ZBA "engaged in misdirected analysis based upon a fundamental mistake of law, its conclusion lacked support by competent, material, and substantial evidence." Thus, it concluded that the trial court "correctly interpreted and applied the law and supported its decision with competent, material, and substantial evidence." The trial court did not err by reversing the ZBA's reconsideration decision that an advertising use had been abandoned.

The central issue was "whether, when determining if a variance that applies to a leased portion of a freehold has been abandoned, the ZBA must base its determination on the conduct of the leaseholder or the freeholder?" The ZBA and the appellant-City argued that the trial "court erred by reversing the ZBA's reconsideration decision on the ground that competent, material, and substantial evidence did not support the decision which applied a wrong principle of law." They contended that the ZBA properly decided "the abandonment issue by considering the building title owner's conduct alone, which they assert established abandonment of the variance, and properly disregarded DMG's conduct . . . ." The trial court had to interpret and analyze the ZBA's interpretation and application of "City Ordinance, § 50-15-31,5 which specifies conditions under which a nonconforming use variance may be presumed abandoned and how that presumption may be overcome." Both parties agreed that "the abandonment analysis requires determination of the owner of the property interest."

The case involved the lease of a portion of the subject property to DMG. "DMG must be understood as an owner as defined under § 50-16-324's definition of the term 'owner,' for purposes of interpreting and applying the City's zoning ordinance provisions in § 50-15-31." Thus, the trial court did not err by holding that "DMG constituted an 'owner' under § 50-16-324's definition, and did not err by considering DMG's conduct for determination of the abandonment issue." The ZBA's and the City's claim that "abandonment is determined by only examining the conduct of the 'dominant owner' lacks merit because it disregards § 50-16-324's definitional distinctions that must be understood and applied for proper analysis and application of § 50-15- 31." Affirmed. (Source: State Bar of Michigan e-Journal #: 76234, September 27, 2021)

The ZBA's and the City's claim that "abandonment is determined by only examining the conduct of the 'dominant owner' lacks merit because it disregards... definitional distinctions that must be understood and applied for proper analysis and application..."

Full Text: http://www.michbar.org/file/opinions/appeals/2021/092321/76234.pdf

Signs: Billboards, Freedom of Speech

US Supreme Court: Austin's off-premise sign regulation is content neutral, not subject to strict scrutiny under the 1st Amendment

Case: *City of Austin v. Reagan Nat'l Advertising of Austin*, LLC, 142 S. Ct. 1464, 212 L. Ed. 2d 418, 2022 U.S. LEXIS 2098, 29 Fla. L. Weekly Fed. S 221, 2022 WL 1177494

Court: Supreme Court of the United States, 142 S. Ct. 1464, 212 L. Ed. 2d 418, 2022 U.S. LEXIS 2098, 29 Fla. L. Weekly Fed. S 221, 2022 WL 1177494 (April 21, 2022, Decided)

The City of Austin, TX placed restrictions on off-premises signs and prohibited the construction of new off-premises signs. While existing signs could remain as nonconforming signs, they could not be altered to increase their nonconformity. When two companies (Reagan National Advertising and Lamar Advantage Outdoor) sought permits to digitize off-premises signs, the City denied the applications. There was not a similar prohibition for digitizing on-premises signs. Reagan National Advertising filed suit alleging that the prohibition of digitizing off-premises signs, but not on-premises signs, violated the First Amendment free speech clause.

The Supreme Court held that the sign regulation was content neutral and not subject to strict scrutiny.

Federal District Court applied intermediate scrutiny to the City's on/off premises standards and found the ordinance met the standard for content neutrality. The Court of Appeals then reviewed the ordinance under strict scrutiny and held that the City failed to satisfy the content neutrality standard [Reagan Nat'l Advertising of Austin v. City of Austin, 972 F.3d 696, 2020 U.S. App. LEXIS 27276, 2020 WL 5015455]. The Supreme Court held that the sign regulation was content neutral and not subject to strict scrutiny. The words of the messages on the sign were not restricted, the message on the sign mattered only to the sign's location on or off-premises. (Source: Nexis Uni/Lexis Nexis)

Editor's Note: Additional information from Cornell Law School, Legal Information Institute (https://www.law.cornell.edu/supct/cert/20-1029) may help the reader compare this case to content-based restrictions and the application of the strict scrutiny standard applied under *Reed v. Town of Gilbert* [576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236, 2015 U.S. LEXIS 4061, 83 U.S.L.W. 4444]

Full text: https://www.supremecourt.gov/opinions/21pdf/20-1029_i42k.pdf

Zoning Administrator/Inspector, Immunity, and Enforcement Issues

Zoning violation not time-limited in the case of hogs kept in a commercial district

Case: *Township of Fraser v. Haney*

Court: Michigan Supreme Court, (No. 160991, 2022 Mich. LEXIS 349, 2022 WL 388013 (February 8, 2022, Filed)

The court held that plaintiff-township's nuisance-abatement action for injunctive relief to enforce its zoning ordinance was timely under MCL 600.5813 because the alleged wrong – defendants maintaining hogs on their commercially zoned property – was ongoing when plaintiff filed the action. Thus, the court reversed the Court of Appeals judgment, reinstated the trial court's order denying defendants summary disposition, and remanded to the trial court. Defendants first brought a hog onto their property in 2006. Plaintiff filed this action in 2016. Defendants moved for summary disposition on the ground that it was time-barred by the six-year limitations period in MCL 600.5813. The court concluded that the statute of limitations did not bar the action because plaintiff sought "injunctive relief to address violations of the zoning ordinance that occurred within the six-year limitations period."

The wrong alleged in plaintiff's complaint is defendants' keeping of hogs on their property. The presence of the hogs on the property constitutes the wrong, and that wrong, along with the attendant harms it causes, is being committed as long as the piggery operates." MCL 125.3407, part of the Zoning Enabling Act, "states that a 'use' of land in violation of a zoning ordinance is a nuisance per se. 'Use' means '[t]he application or employment of something; esp., a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional . . . .' A 'use' thus is inherently ongoing."

The presence of the hogs on the property constitutes the wrong, and that wrong, along with the attendant harms it causes, is being committed as long as the piggery operates.

The court found that the Court of Appeals erred when it determined that plaintiff's action would only have been timely under the now abrogated continuing-wrongs doctrine. The doctrine was irrelevant here. Plaintiff did "not seek to reach back and remedy or impose monetary fines for violations that occurred outside the" limitations period. It sought injunctive relief "to remedy only present violations, which occurred within" the limitations period. The court noted that *Garg*, in which it abrogated the continuing-wrongs doctrine, "did not operate to immunize future wrongful conduct." In this case, defendants were "not free to continue committing zoning-ordinance violations simply because plaintiff did not bring an action against their first zoning violation."

(Source: State Bar of Michigan *e-Journal* Number: 76951 ; February 9, 2022)

Full Text: http://www.michbar.org/file/opinions/us_appeals/2022/020822/76951.pdf

Chalking of tires to enforce parking regulation is not a valid administrative search, violates 4th amendment

Case: *Taylor v. City of Saginaw, MI*

Court: US Court of Appeals Sixth Circuit (Published, Decided August 25, 2021, No. 20-1538/1588

The court reversed the district court's grant of summary judgment for defendant-City of Saginaw, holding that the administrative-search exception to the warrant requirement did not justify its suspicionless chalking of car tires to enforce its parking regulations. However, defendant-parking officer (Hoskins) was entitled to qualified immunity. Plaintiff-Taylor's § 1983 action alleged that the City's policy of having officers chalk a vehicle's tires in the process of issuing parking tickets constituted an unlawful warrantless search in violation of the Fourth Amendment. The district court ruled that there was no Fourth Amendment violation where tire chalking fell under the automobile and/or community caretaking exceptions, but the court reversed. On remand, the district court granted defendants summary judgment based on the administrative-search exception. Thus, in this appeal, the court considered whether that exception could justify suspicionless tire chalking.

It held that the procedure could not be considered a valid administrative search where the subject of the search is not "'afforded an opportunity to obtain pre-compliance review before a neutral decisionmaker.'" The City argued that tire chalking fell under a limited sub-class that does not require this precondition, such as "closely regulated industries." But the court rejected this argument where "municipal parking plainly does not 'pose a clear and significant risk to the public welfare'" such as the mining industry, liquor sales, and firearm industry. The exception for a program "'designed to serve special needs, beyond the normal need

...the alleged unconstitutionality of suspicionless tire chalking was not clearly established.

for law enforcement'" such as sobriety checkpoints also did not apply as there was no special need here. The court further held that Hoskins was entitled to qualified immunity where "the alleged unconstitutionality of suspicionless tire chalking was not clearly established." Thus, it affirmed summary judgment for Hoskins, reversed as to the City, and remanded. (Source: State Bar of Michigan *e-Journal* Number: 76078; August 27, 2021)

Full text: http://www.michbar.org/file/opinions/us_appeals/2021/082521/76078.pdf

Other Published Cases

Airport Zoning Variance: court addresses practical difficulty, unnecessary hardship as applied to airport zoning and finds lack of substantial evidence on the record

Case: *Pegasus Wind, LLC v. Tuscola County*

Court: Michigan Court of Appeals (Case No. 355715) 2022 Mich. App. LEXIS 1064 (February 24, 2022, Decided).

The court rejected plaintiff-Pegasus' claim that the outcome here should be identical with its previous appeal as to "the circuit court's reversal of the AZBA's denial of the variance requests for 33 wind turbines because the record and arguments" were identical. But it held that none of intervenor-AZBA's three stated reasons for finding that Pegasus failed to establish a practical difficulty were "supported by the record, let alone supported by substantial evidence, and the circuit court misapplied the practical difficulty standard." Thus, the circuit court erred by affirming that determination. It also erred in ruling that the AZBA's decision as to public safety or flight approach protections was supported by competent, material, and substantial evidence on the record.

The case arose from "local regulatory authorities' decisions on a wind energy system being built by Pegasus." As to the similar outcome claim, the court found that regardless of the similarity to the record in the previous appeal, the record here was different. The eight turbines at issue here "were in different locations. Because Pegasus already had variances approved for 33 turbines at the time it sought these variances, the AZBA's decision was made in an entirely different context than its previous denial. Under these circumstances, neither the AZBA's decision, nor the circuit court's determination on appeal were prescribed by the previous appeal. Further, Pegasus failed to provide any legal citation to support its contention that the outcome of the previous appeal required the AZBA to authorize the variances or the circuit court to reverse the denials" here.

The court concluded that none of the AZBA's stated reasons for finding that Pegasus failed to establish a practical difficulty were supported by the record.

Next, noting that there appeared to be confusion between the requirements of practical difficulty and unnecessary hardship, the court used "this case as an opportunity to distinguish those requirements in the application of variances." It noted that "the requirement of showing unique circumstances inherent in the property is not an element of practical difficulty, but of unnecessary hardship." Given that Pegasus sought "a nonuse variance, it was only required to establish a practical difficulty." The court concluded that none of the AZBA's stated reasons for finding that Pegasus failed to establish a practical difficulty were supported by the record. Reversed in part and remanded. [Editor's Note: Pending application for appeal to MSC with amicus briefs filed by MML and MTA] (Source: State Bar of Michigan *e-Journal* Number: 77044; February 28, 2022.)

Full Text: http://www.michbar.org/file/opinions/appeals/2022/022422/77044.pdf

Airport Zoning: Board of Zoning Appeals nor Airport Authority is an aggrieved party

Case: *Tuscola Area Airport Zoning Bd. of Appeals v. Michigan Aeronautics Commission*

Court: Michigan Court of Appeals (Case No. 357209, Published) 2022 Mich. App. LEXIS 1049, 2022 WL 572561 (February 24, 2022, Decided)

In these consolidated cases addressing an issue of first impression as to the interpretation of "aggrieved party" under the Tall Structure Act, the court held that neither appellant-AZBA nor appellant-Airport Authority was an aggrieved party. Appellee-Pegasus applied to the TAZA for 40 wind turbine permits within the airport zoning area. The TAZA approved 7 permits but denied the others because the turbines would violate certain airport zoning ordinances. The AZBA denied Pegasus's request for variances. Pegasus appealed to the Tuscola Circuit Court, which reversed the AZBA's decision. The AZBA then issued the 33 variance certificates, and appellee-MAC issued the tall structure permits.

The AZBA and Airport Authority appealed to the Ingham Circuit Court alleging they were aggrieved parties of the MAC's order issuing the permits. That court granted Pegasus's motion to dismiss, finding that although it had jurisdiction, neither the AZBA nor the Airport Authority were aggrieved parties. On appeal, the court rejected the AZBA's argument that the circuit court erred by concluding it was not an aggrieved party with standing to appeal the MAC's decision to issue a permit to Pegasus. The "AZBA has the opportunity to regulate the structures *before* any tall structure permit ever gets issued. That is, a tall structure permit is generally not issued unless the AZBA has already authorized the variances necessary.

To permit the AZBA to be an aggrieved party to the MAC's issuance of tall structure permits, particularly in this case in which the permits were issued in reliance on the AZBA's certificates of variance approval, would give the AZBA an unwarranted second bite at the apple." It would be both "illogical and inconsistent for us to conclude that the AZBA has the ability, let alone the authority, to appeal the MAC's issuance of a tall structure permit."

To permit the AZBA to be an aggrieved party to the MAC's issuance of tall structure permits, particularly in this case in which the permits were issued in reliance on the AZBA's certificates of variance approval, would give the AZBA an unwarranted second bite at the apple."

As to the Airport Authority, "[a]bsent some way to correlate the loss of revenue to the installation of turbines, [its] assertion of harm is nothing more than speculation." Further, the record "does not support that there is any injury to Airport Authority's safety interests from the building of the turbines." There also was no evidence that the "Airport Authority bears any real risk of losing future funding from the FAA as a result of Pegasus building turbines that the FAA has explicitly determined are not a hazard. This purported harm is nothing but a mere possibility arising from some unknown and future contingency." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 77046; February 28, 2022.)

Full Text: http://www.michbar.org/file/opinions/appeals/2022/022422/77046.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 or serve 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 useful citations of published cases found in the unpublished case.

Restrictions on Zoning Authority

Special use permit to fill floodplain in mobile home park was not preempted

Case: *Lawson Vill., LLC v. Monroe Charter Twp.*

Court: Michigan Court of Appeals (No. 354357) 2021 Mich. App. LEXIS 5164, 2021 WL 3828807 (August 26, 2021, Decided)

Concluding that defendants established good cause and a meritorious defense, the court found that the trial court did not abuse its discretion in granting their motion to set aside the default entered against them. Further, defendant-township's (Monroe) zoning ordinance was not more stringent than or inconsistent with the MHCA [Mobile Home Commission Act, Act 96 of 1987, MCL 125.2301-125.2350] or federal rules, its requirement of a SUP to fill in a floodplain was not preempted, and the EGLE permit did not eliminate the need for a SUP from Monroe. Thus, the court also affirmed summary disposition for defendants in this zoning dispute over the installation of new mobile homes in an existing mobile home park. As to the motion to set aside the default, defendants explained that "there was a miscommunication between co-counsel regarding which attorney would file the answer to the complaint.

Although defendants did not timely file an answer, they responded within days of the deadline and immediately moved to set aside the default. The trial court looked at the totality of the circumstances and specifically noted, on the record, that defendants acted quickly to remedy their failure." Further, they denied the allegations in the complaint and identified their defenses, "such as failure to exhaust administrative remedies." As to the summary disposition motion, the federal and state rules cited by plaintiff "relate to the construction and installation of the mobile home unit on the parcel it is intended to be installed on.

However, the rules do not relate to the filling of a floodplain in the surrounding parcel." Thus, Monroe's zoning ordinance "regulates a different issue." In addition, the township's "regulation of floodplains unquestionably falls within its authority to exercise its police power to protect health and safety." Finally, the EGLE permit, "by its terms, stated that other permits may be required for plaintiff's intended development. Monroe's zoning ordinance, which governs floodplains, provides for the requirement to obtain special use permits when the intended use is not a permitted use in the floodplain." Thus, the trial court did not err in granting defendants summary disposition. (Source: State Bar of Michigan *e-Journal* Number: 76122; September 15, 2021.)

In addition, the township's "regulation of floodplains unquestionably falls within its authority to exercise its police power to protect health and safety."

Full Text: http://www.michbar.org/file/opinions/appeals/2021/082621/76122.pdf

Takings

Wastewater treatment plant agreement and subsequent denial of development proposal result in multiple disputes, including takings and substantive due process

Case: *Milford Hills Props., Inc. v. Charter Twp. of Milford*

Court: Michigan Court of Appeals (Nos. 353249; 353489) 2021 Mich. App. LEXIS 5305, 2021 WL 4005866 (September 2, 2021, Decided)

The court held that defendant-charter township was entitled to governmental immunity on plaintiffs-real estate developers' tort claims arising from a zoning dispute, and entitled to summary disposition of their contract, promissory estoppel, takings, and substantive due process claims. But it agreed with the trial court that defendant did not show arbitration under the parties' contract was in order. Thus, it affirmed the trial court's ruling that the arbitration agreement should not be enforced at this time but reversed the denial of defendant's summary disposition motion as to "each of plaintiffs' claims as pleaded and supported."

The contract (the capacity agreement) related to "plaintiffs' construction of a wastewater treatment plant in connection with" their development of property in the township. It "stated that 'the Township shall be obligated to use its "best efforts" to expeditiously provide approval of all plans, paperwork, permits or otherwise to effectuate this Agreement.'" Plaintiffs later unsuccessfully applied for a conditional rezoning of "property to allow the construction of a development of a density that far exceeded the current zoning." Their complaint alleged claims of breach of contract, promissory estoppel, taking without just compensation as to the water treatment plant and the property, denial of substantive due process as to the property and the plant, tortious interference with prospective economic advantages, fraudulent misrepresentation, and innocent misrepresentation.

The court first held that the trial court erred in denying defendant summary disposition as to the tort claims based on governmental immunity, noting that "plaintiffs made no effort to plead in avoidance of governmental immunity below[.]" As to the contract claim, it concluded "that the capacity agreement on its face did not obligate defendant to rezone the subject property to accommodate plaintiffs' development aspirations, and, alternatively, that any such promise would have been unenforceable as an attempt to constrain defendant's future legislative prerogatives." Promissory estoppel "does not operate in controversies arising from a written contract." There was no merit to plaintiffs' resort to the constitutional takings doctrine, and rejection of their "rezoning request did not provide a factual basis upon which to ground" their substantive due process claims. Remanded. (Source: State Bar of Michigan **e-Journal #:** 76151; September 21, 2021)

Full Text: http://www.michbar.org/file/opinions/appeals/2021/090221/76151.pdf

Appeals, Variances (use, non-use)

Circuit Court lacks jurisdiction to hear untimely appeal, dismisses case

Case: *Williams v. City of Harbor Springs*

Court: Michigan Court of Appeals (No. 350552) 2021 Mich. App. LEXIS 6337, 2021 WL 5225902 (November 9, 2021, Decided)

Holding that "a circuit court lacks jurisdiction to hear an untimely appeal from a ZBA," the court affirmed the circuit court's dismissal order. It was undisputed that plaintiff missed the filing deadline. Regardless of

the reason behind his untimely filing, the circuit court lacked jurisdiction to address the merits of his appeal. Thus, the court held that the circuit court did not err by dismissing his appeal. In light of this conclusion, the court did not address plaintiff's remaining arguments on appeal.

[Part of this appeal included a casual e-mail exchange between attorneys where the City's attorney affirmed "yes, 30 days from May 15, 2019 " as the time to appeal. The statute requires an appeal be filed within 21-days from the date the minutes are approved, and 30 days from the date of the decision (MCL 125.3606(3). The appealing party's attorney relied on that information and missed the filing deadline.] (Source: State Bar of Michigan *e-Journal* Number: 76459; November 29, 2021.)

Full Text: http://www.michbar.org/file/opinions/appeals/2021/110921/76459.pdf

When practical difficulty is owner created, ZBA lacks authority to grant nonuse variance

Case: *Duda (as Trustee for MLND INTERESTS) v. Township of Little Traverse*

Court: Michigan Court of Appeals (No. 352293) 2021 Mich. App. LEXIS 3170, 2021 WL 2025202 (May 20, 2021, Decided)

While the court rejected defendant-Township's assertion that it lacked jurisdiction to hear plaintiff-trustee's appeal, it held that the circuit court did not err in affirming the Township ZBA's denial of her request for a nonuse variance. As to the jurisdictional issue, because "the ZBA made its decision after a public hearing that was not comparable to a court proceeding . . . the ZBA did not act as a tribunal in the present case, and MCR 7.203(A)(1)(a) does not apply to preclude this appeal as of right from the circuit court order affirming" its decision.

As to the merits, the court noted that the ZBA had the authority to grant the nonuse variance if plaintiff "had not created the practical difficulty." However, given that the record evidence established that she "created the practical difficulty, the ZBA lacked authority to grant the variance." As a result, the circuit court did not err in affirming the ZBA's decision. In contrast to the applicant in *City of Detroit*, who simply "purchased the property with the knowledge that an ordinance banned billboards and then sought a variance[,]" this case was similar to *Johnson* in that plaintiff "physically altered the property after the 2011 Amendment" to the Township zoning ordinance became effective "and then sought a variance." Affirmed. (Source: State Bar of Michigan e-Journal Number: 75508; June 9, 2021)

However, given that the record evidence established that she "created the practical difficulty, the ZBA lacked authority to grant the variance."

Full Text: http://www.michbar.org/file/opinions/appeals/2021/052021/75508.pdf

With unusual circumstances, trial court should expand statutory time limit to file appeal

Case: *Green Skies Healing Tree, LLC v. Flint Zoning Bd. of Appeals*

Court: Michigan Court of Appeals (No. 355574) 2022 Mich. App. LEXIS 401, 2022 WL 188313 (January 20, 2022, Decided).

The court held that the trial court erred by failing to apply its equitable power to expand the statutory time limit for plaintiff to file an appeal from defendant-zoning board's decision in light of the unusual circumstances here. Plaintiff sought a variance to expand its medical marijuana business to sell recreational

marijuana. The city planning commission denied the request and defendant affirmed. Plaintiff unsuccessfully sought leave to file a late appeal. The court agreed with plaintiff that the trial court erred by failing to find unusual circumstances existed.

"First, defendant was no longer operating in its usual manner because of the COVID-19 pandemic." And instead of "timely submitting the meeting minutes to plaintiff in accordance with the representations, plaintiff was not made aware of the approval" of the minutes "until the time for filing the claim of appeal had passed." The trial court indicated it would not engage its equitable authority because "MCL 125.3606 did not require defendant to provide plaintiff with a copy of the approved minutes and the challenges of the COVID-19 pandemic, by itself, did not rise to level of unusual circumstances. However, defendant's regularly scheduled in-person meetings were suspended, and the meeting minutes were traditionally approved at those meetings." As such, plaintiff was "unable to determine when" they would be approved. Further, defendant did not dispute that plaintiff "made repeated requests for the minutes, did not object to plaintiff's motion to file a late appeal, and did not dispute plaintiff's factual allegations" about the representations made by its agents.

"As such, an "ordinarily prudent person that volunteered to notify plaintiff when the minutes were approved would have given such notice in a timely manner, and not a month later."

Defendant's representatives' promise to "notify plaintiff of the approval of the meeting minutes constituted an assumption of a voluntary duty because no statute required defendant, or its employees, to give such notice. Plaintiff repeatedly informed defendant's employees that notice of when the minutes were approved was crucial to its ability to file an appeal." As such, an "ordinarily prudent person that volunteered to notify plaintiff when the minutes were approved would have given such notice in a timely manner, and not a month later." Due to defendant's employees' indication they would notify plaintiff when the minutes were approved, "plaintiff's counsel relied on this promise and ceased its repetitive contacts with defendant's representatives." The court concluded that plaintiff reasonably relied on defendant's promise, and because defendant conceded that the "mere seven-day late appeal does not create any significant prejudice, the trial court should have allowed plaintiff's motion to file a late appeal." Reversed and remanded. (Source: State Bar of Michigan e-Journal Number: 76856; February 3, 2022)

Full Text: http://www.michbar.org/file/opinions/appeals/2022/012022/76856.pdf

Definition of zoning lot, court upholds measurement of 1,000-foot drug-free zone

Case: *Alosachi v. City of Detroit*

Court: Michigan Court of Appeals (No. 356583) 2022 Mich. App. LEXIS 2255, 2022 WL 1194634 (April 21, 2022, Decided)

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 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)."

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." (Source: State Bar of Michigan *e-Journal* Number: 77313; May 4, 2022)

Full Text: http://www.michbar.org/file/opinions/appeals/2022/042122/77313.pdf

Zoning Amendment: Voter Referendum

Zoning (signs) cannot be enacted by ballot initiative petition

Case: *Protect Rd. Funding v. Detroit City Council*

Court: Michigan Court of Appeals (No. 358364) 2021 Mich. App. LEXIS 5284, 2021 WL 4006023 (September 2, 2021, Decided).

In this expedited election-related appeal, the court held that the trial court did not err in denying mandamus relief to plaintiff. Plaintiff collected sufficient signatures for a ballot initiative seeking to amend the Advertising and Sign Ordinance Chapter 4 of the 2019 Detroit City Code. After it sought a writ of mandamus against defendants to place the initiative proposal on the ballot, the trial court denied relief, "holding that because the proposal sought to adopt a zoning ordinance, it was unlawful under *Korash*." As that court noted in its opinion, *Korash* held "that zoning ordinances cannot be enacted through initiative proceedings." In this case, "although repealing the sign ordinance of Chapter 4 would be permissible by way of initiative, enacting (or re-enacting) the prior Chapter 61 would not be permissible through an initiative petition because, while Chapter 4 is not a zoning provision, Chapter 61 was. As a zoning ordinance, Chapter 61 could not be brought back to life through an initiative petition."

The court held that *Adams I* and *II* were distinguishable from this case. "Those decisions addressed a very particular type of sign ordinance that was specifically related to police powers (i.e., the removal of old, dangerous signs)." In this case, "if approved, the petition would enact the entire zoning ordinance relative

to signs, including setbacks, sizes, spacing from schools/playgrounds/parks etc., spacing between signs, landscaping around signs, and more. The ordinance that would be enacted even states, 'Non-zoning provisions for signs are found in Chapter 3 of this Code . . . .' (proposed/former Section 61-6-47). In other words, the former Section 61 is a zoning ordinance, and non-zoning ordinances related to signs can be found elsewhere. And since it's a zoning ordinance, it can't be enacted by initiative petition." Affirmed. (Source: State Bar of Michigan e-Journal #: 76165; September 22, 2021.)

Full Text: http://www.michbar.org/file/opinions/appeals/2021/090221/76165.pdf

Court, Ripeness for Court's Jurisdiction, Aggrieved Party

Trial court cannot rely on evidence (a map with notation) not produced during discovery for decades-long enforcement of a nonconformity involving auto-related business

Case: *Charter Twp. of Canton v. IMAC Props., LLC*

Court: Michigan Court of Appeals (No. 352880) 2021 Mich. App. LEXIS 5007, 2021 WL 3700380 (August 19, 2021, Decided)

In this zoning ordinance violation case, the court found that the record was inadequate to determine whether the exhibit (Exhibit NN) on which the trial court clearly relied in granting plaintiff-township summary disposition was proper and dispositive evidence. This case involved a longstanding dispute as to defendants' use of their property. They argued that plaintiff's aerial photo (Exhibit NN) on which a box was drawn "did not accurately represent the terms of the parties' 2006 stipulation and defendants were deprived of the opportunity to prove it was inaccurate because it was not produced during the discovery period." Thus, they asserted that "the trial court's reliance on this 'evidence' to grant plaintiff's motion for summary disposition was improper and erroneous." The court tended to agree.

Exhibit NN was an aerial photo "of defendants' property and, consistent with the 2006 stipulation, there is a square box drawn designating an area labeled 'Storage Area 225 ft x 145 ft.'" Plaintiff placed this designation on the photo—"defining the permissible storage area—and submitted it to the trial court in support of its motion for summary disposition. And in reaching its ruling on the cross-motions for summary disposition, the trial court specifically referred to and relied upon plaintiff's Exhibit NN[.]" Defendants challenged the admissibility of this exhibit on the grounds that it was not provided during discovery and it did not present "an inaccurate interpretation of the 2006 stipulation." Under MCR 2.313(C)(1), if a party fails to provide information required by MCR 2.302(A), "the party is not allowed to use that information to support a motion unless the failure was substantially justified or harmless."

The failure to provide defendants this photo reflecting "plaintiff's interpretation of the 2006 stipulation through the placement of a square box labeled 'Storage Area 225 ft x 145 ft' was" clearly not harmless because they did not have an "opportunity during the discovery period to prove it was inaccurate and the trial court substantially relied on it to grant" plaintiff summary disposition. In addition, the trial court did not address "defendants' argument that plaintiff's interpretation of the 2006 stipulation as depicted in Exhibit NN was inaccurate." Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 76049; September 2, 2021)

Full Text: http://www.michbar.org/file/opinions/appeals/2021/081921/76049.pdf

Awarding of court costs and attorney fees under Right to Farm Act

Case: *James Twp. v. Rice*

Court: Michigan Court of Appeals (No. 349558) LEXIS 3351, 2021 WL 2184101 (Court of Appeals of Michigan May 27, 2021, Decided) [Note: Application for leave to appeal to MSC granted Oct 8, 2021, SC 163053]

While the court rejected defendant's argument that the award of attorney fees and costs to a farm or farm operation that successfully defends a nuisance action is mandatory under the RTFA, it remanded the case to the district court to explain its rationale for denying his request for fees and costs on the record. The court issued an order as to the proceedings on remand and retained jurisdiction. Plaintiff-township issued defendant a municipal civil infraction citation "for alleged violations of its blight ordinance and the Michigan Residential Code. The matter was heard by the district court, where defendant successfully asserted an affirmative defense under" the RTFA to part of the citation. Both parties unsuccessfully requested costs and fees.

Defendant argued on appeal that the RTFA's plain language, in MCL 286.473b, "grants a farmer or farm operation discretion to decide whether to seek attorney fees and costs, and the court has discretion only in determining what amount of fees and costs are reasonable." But the court noted that there is persuasive authority directly contradicting this position – two unpublished opinions, *Templeton* and *Rondigo*. Further, his argument asked the court to ignore the plain language of the statute and the Legislature's intent.

Defendant argued on appeal that the RTFA's plain language, in MCL 286.473b, "grants a farmer or farm operation discretion to decide whether to seek attorney fees and costs, and the court has discretion only in determining what amount of fees and costs are reasonable."

"As the circuit court accurately stated in its opinion and order, the term 'may,' as used in MCL 286.473b, afforded the district court discretion whether to award defendant attorney fees and costs." The court also noted that he only partially prevailed in the district court, and it is commonplace "to decline to assess costs and fees when neither party has prevailed in full." However, the district court failed to explain its reasoning for denying both parties' requests for fees and costs. As a result, the court was "not in a position to properly review the district court's reasons for denying defendant's request." Affirmed but remanded. (Source: State Bar of Michigan *e-Journal* Number:75602 ; June 18, 2021) [Note: Application for leave to appeal to MSC granted Oct 8, 2021, SC 163053]

Full Text: http://www.michbar.org/file/opinions/appeals/2021/052821/75602.pdf

Aggrieved party demonstrates unique harm caused by 8 new adjacent rental units

Case: *Kullenberg v. Township of Crystal Lake*

Court: Michigan Court of Appeals (No. 354688) 2021 Mich. App. LEXIS 6000, 2021 WL 4929114 (October 21, 2021, Decided)

Holding that plaintiff-property owner "alleged facts, which if proven, could establish the harm she would suffer from" defendant-ZBA's decision was singular and unique to her, the court reversed the trial court's order finding she was not an aggrieved party and dismissing her appeal of the ZBA's decision. She filed an appeal with the ZBA disputing a zoning permit issued to her neighboring property owner to remodel a building. The ZBA upheld the decision and the circuit court affirmed, finding plaintiff was not an aggrieved party. It also declined to decide the issue of whether a gap in zoning made the use of the neighboring parcels lawful.

On appeal, the court agreed with plaintiff that she satisfied the standard to be considered an aggrieved party under MCL 125.3605. Plaintiff "outlined specific harms singular and unique to her that she suffered in her affidavit, like being subjected to loud cars and drunken parties, garbage that piled over onto her property, dogs running loose onto her property, and even neighbors defecating on her land." Her property was both "adjacent to and uphill from the" parcels at issue, which caused her to be "constantly bombarded by" the disturbances. "By contrast, other neighbors were sufficiently separated from the" parcels due to distance and a dense forest that "muffled the noise and provided a barrier to infiltration by the" animals and garbage, "and straying residents who apparently used plaintiff's land as a toilet. The record reflects that plaintiff alleged and attested to suffering unique harms dissimilar to similarly situated property owners."

Plaintiff "outlined specific harms singular and unique to her that she suffered in her affidavit, like being subjected to loud cars and drunken parties, garbage that piled over onto her property, dogs running loose onto her property, and even neighbors defecating on her land."

The court noted that a building on the parcels "had been vacant for a period of at least 10 years, and the zoning permit allowed [the owner] to build eight new rental units, for a possible total of 32 additional people to live on the property. The presence of loud cars, unrestrained dogs, drunken parties, domestic altercations, and the already overflowing garbage very likely would be exacerbated by an increase in population." Overall, plaintiff showed "harm unique from similarly situated property owners that would be worsened by the addition of more rental units on" one of the parcels. (Source: State Bar of Michigan *e-Journal* Number: 76374 ; October 29, 2021)

Full Text: http://www.michbar.org/file/opinions/appeals/2021/102121/76374.pdf

Parking, noise, and privacy issue fail to establish aggrieved party status

Case: *Hiser v. Village of Mackinaw City*

Court: Michigan Court of Appeals (No. 354806; 354807) 2021 Mich. App. LEXIS 6022, 2021 WL 4932055 (October 21, 2021, Decided)

The court held that the trial court correctly found plaintiff-property owner failed to allege unique harms that caused special damages from defendant-ZBA's zoning decisions that satisfied the aggrieved-party requirement to invoke its jurisdiction, and thus, did not err by granting intervenors' (plaintiff's neighbors) motion and dismissing her appeals for lack of jurisdiction.

The dispute arose over the ZBA's approval of a building permit allowing intervenors to build a garage. After much litigation, the trial court found that plaintiff failed to allege harms from the zoning decisions that satisfied the "aggrieved party" standard to invoke its jurisdiction to hear and decide her appeals. As such, it granted intervenors' motion and dismissed plaintiff's appeals. The court first found that under *Olsen*, intervenors "did not and could not waive their jurisdiction argument by not raising it before" the ZBA.

Although she "contended that only her property bordered the village's right-of-way land and [she was] the only property owner affected by the alleged harms, mere proximity is insufficient."

It next found that the trial court properly determined that plaintiff's objections to intervenors' "residence and garage size and her noise and privacy complaints constituted generalized aesthetic harms no different than those suffered by people in the community and, therefore, failed to establish" her aggrieved-party status. Further, her complaint regarding the height of the garage "failed to articulate any cognizable harm." Finally, it found that any issues of trespass

on plaintiff's "property similarly did not relate to the permits because the permits did not authorize" intervenors or their visitors to go onto her property. Although she "contended that only her property bordered the village's right-of-way land and [she was] the only property owner affected by the alleged harms, mere proximity is insufficient." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 76376 ; November 1, 2021)

Full Text: http://www.michbar.org/file/opinions/appeals/2021/102121/76376.pdf

Party not aggrieved, appeal untimely for approved permit on nonconforming lot

Case: *Eveleigh v. City of Charlevoix*

Court: Michigan Court of Appeals (No. 354984) 2021 Mich. App. LEXIS 5999, 2021 WL 4932573 (October 21, 2021, Decided)

The court held that because plaintiff-property owner could not show she was an aggrieved party "by failing to establish any special harm or anything more than mere speculation of potential future harm," the trial court did not err by dismissing her appeal for lack of jurisdiction. It also held that the trial court did not err by finding her appeal untimely. Plaintiff filed an appeal with the ZBA disputing a building permit issued by defendant-city's zoning administrator to her neighboring property owner to build a house. She claimed the property was an illegal nonconforming lot. The ZBA affirmed, finding the property was a legal nonconforming lot. The circuit court dismissed plaintiff's appeal for lack of jurisdiction, holding she was not an aggrieved party.

On appeal, the court rejected plaintiff's argument that the building permit issued to her neighbor interfered with the use of her "private driveway," noting she admitted she shares the driveway with the neighboring owners. "Although this shared driveway distinguished plaintiff from other neighbors, the alleged harm resulting from increased traffic and water runoff does not constitute special damages sufficient to establish plaintiff as an aggrieved party."

The court also rejected her contention that the trial court erred by finding her appeal untimely. "The ZBA heard and decided plaintiff's appeal of the zoning administrator's decision on January 23, 2019, and the chairperson signed and adopted the decision on April 1, 2019 rendering finality to the matter. Plaintiff then had 30 days in which to appeal that decision to the circuit court pursuant to MCL 125.3606(3)(a), which the" trial court properly found did not occur. Further, there "is no mention of applying for a rehearing or a tolling of the specific deadline set forth in MCL 125.3606(3)." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 76378 ; November 4, 2021)

Full Text: http://www.michbar.org/file/opinions/appeals/2021/102121/76378.pdf

Although this shared driveway distinguished plaintiff from other neighbors, the alleged harm resulting from increased traffic and water runoff does not constitute special damages sufficient to establish plaintiff as an aggrieved party.

ZBA not granted the authority to hear appeals/appeal directly to trial court

Case: *Matem, LLC v. City of Howell*

Court: Michigan Court of Appeals (No. 355166) 2021 Mich. App. LEXIS 5999, 2021 WL 4932573 (October 21, 2021, Decided)

The court held that the trial court did not err by granting summary disposition for lack of subject-matter jurisdiction as plaintiffs were required to appeal directly to the trial court and not the ZBA. Under the MZEA and the city ordinance at issue, "there was no authority granted to the ZBA to hear plaintiffs' appeal

from" the planning commission's decision on the special land use application. Thus, the trial court "had no authority to grant plaintiffs' request for a writ of mandamus or superintending control forcing the ZBA to hear their appeal." The court also noted that, because the 30-day deadline had passed, plaintiffs could no longer file a timely appeal.

Intervenors sought a special land use permit from defendant-city. The planning commission approved the permit over opposition from plaintiffs and others. Plaintiffs sought to appeal to defendant-ZBA, but the appeal was dismissed for lack of authority to hear such appeals. They then sought a writ of mandamus and superintending control, as well as a declaratory judgment, asking the trial court to declare that the ZBA had authority to hear their appeal and to force it to do so. The trial court disagreed, finding plaintiffs were required to appeal directly to the trial court and not the ZBA. By the time they did so, the 30-day deadline to appeal had passed.

On appeal, the court rejected plaintiffs' argument that the trial court erred and that the ordinance explicitly allowed for appeals to the ZBA from the planning commission's decisions on special land use applications. It noted there was nothing in the ordinance that explicitly conveyed such authority to the ZBA. "It is the Administrator and deputies who enforce the" ordinance, while the commission "merely decides." Thus, there was "no power granted to the ZBA to hear appeals from the" commission as to special land use decisions. The court agreed with the trial court that the special land use language placed in a section of the ordinance "was presumably erroneously inserted there." Moreover, plaintiffs' interpretation conflicted with other ordinance provisions. Their claim for mandamus failed because defendants "had no clear legal duty to hear plaintiffs' appeal, and plaintiffs had no clear legal right to this performance." As to superintending control, an "appeal *was* available to plaintiffs: an appeal to the [trial] court. They chose the wrong avenue by attempting to appeal to the ZBA." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 76732; January 11, **2022**)

Thus, there was "no power granted to the ZBA to hear appeals from the commission" as to special land use decisions.

Full Text: http://www.michbar.org/file/opinions/appeals/2021/122121/76732.pdf

Open Meetings Act, Freedom of Information Act

Does substantial compliance for public meeting notice (but not full compliance) under OMA defeat a claim for damages, court costs and attorney fees?

Case: *Spalding v. Swiacki*

Court: Michigan Court of Appeals (No. 354598) 2021 Mich. App. LEXIS 4221, 2021 WL 2877826 (July 8, 2021, Decided)

The court's review of the text and context of the civil-liability provision (MCL 15.273(1)) confirmed "that the substantial-compliance standard does not apply to a claim for statutory damages, court costs, and attorney fees under the OMA." Thus, the trial court erred in granting summary disposition to defendants-township officials on this basis. Because the trial court did not reach the question of whether they

intentionally violated the Open Meetings Act (OMA), the court declined to reach it for the first time on appeal.

The case arose from defendants' decision to proceed with a meeting of the "Township Board of Trustees despite the board's failure to post timely notice of the meeting on the township's website. Although the board substantially complied with the notice requirements by, among other things, physically posting notice in the township's office and posting the notice to the website several hours before the meeting, there is no question that it did not strictly comply with the OMA's notice provisions."

Although the board substantially complied with the notice requirements by, among other things, physically posting notice in the township's office and posting the notice to the website several hours before the meeting, there is no question that it did not strictly comply with the OMA's notice provisions.

The court held that a claim for statutory damages "is not defeated by a showing of substantial compliance." Thus, the trial court erred in concluding that it is. Plaintiffs here chose to pursue only an action for statutory damages, costs, and fees. The court agreed with the trial court that there was "no genuine issue of material fact that the board failed to comply strictly with the OMA's public-notice provision, but that it did comply substantially with the provision." Defendants argued that this conclusion was "fatal to plaintiffs' claim for statutory damages, court costs, and attorney fees, pointing to" the holdings in *Arnold Transit* and *Nicholas*. However, in doing so they failed "to distinguish between the various types of relief available under the OMA."

The court found that Michigan "case law stresses the importance of focusing on the particular type of relief sought for violation of the OMA. *Arnold Transit* and *Nicholas* held that a public body's decision will not be invalidated or injunctive relief imposed for a public-notice violation as long as the public body substantially complied with the OMA." But neither case "involved a claim for statutory damages against a public official." Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 75837 ; July 12, 2021.)

Full Text: http://www.michbar.org/file/opinions/appeals/2021/070821/75837.pdf

Court determines compliance with OMA and FOIA when ZBA minutes approved in special meeting.

Case: *Williams v. City of Harbor Springs*

Court: Michigan Court of Appeals (No. 354207) 2021 Mich. App. LEXIS 5157, 2021 WL 3818049 (August 26, 2021, Decided)

Holding that defendant-city complied with both the OMA and the FOIA, the court affirmed the trial court's order granting its motion for summary disposition. Plaintiff-homeowner objected to the construction of a new building on defendant's waterfront, claiming it would significantly impair the views and value of his home. Defendant's planning commission approved the building. Plaintiff appealed to the ZBA, which denied the appeal on the ground that he was not an "aggrieved person." He then submitted a FOIA request to defendant, asking for materials related to the ZBA meeting so that he could appeal the decision to the circuit court. A week after the ZBA meeting, the ZBA held a special meeting and approved the meeting minutes. The next day, defendant responded to plaintiff's FOIA request by providing several documents pertaining to the ZBA meeting, including the typed minutes and a written decision and order denying plaintiff's appeal.

Plaintiff filed an appeal in the circuit court, which dismissed the appeal as untimely. He then filed this action, asserting violations of the OMA and the FOIA, and he asked the circuit court to invalidate the actions taken by the ZBA at the special meeting. On appeal, the court rejected his argument that defendant violated the OMA by failing to provide sufficient notice of the special meeting on its website. It agreed with the trial court's finding that plaintiff "failed to refute the evidence showing that notice of the [special] meeting was posted on defendant's website" and on its Facebook page.

...any deficiency in the meeting minutes is not a ground upon which to invalidate an action by a public body.

The court also rejected his claim that defendant violated the OMA by failing to make all corrections to the special meeting minutes at its subsequent meeting, noting that the late correction of the date and time in the special meeting minutes "did not result in the impairment of the public to participate" in the meeting, and "any deficiency in the meeting minutes is not a ground upon which to invalidate an action by a public body." Finally, defendant did not violate FOIA by failing to provide documents related to the special meeting. It "fully granted the request and provided several documents, including a signed copy of the approved . . . meeting minutes and a signed decision and order denying plaintiff's appeal." The court concluded that plaintiff "failed to establish that defendant violated FOIA or that defendant's insufficient response prejudiced plaintiff's ability to file an appeal." (Source: State Bar of Michigan *e-Journal* Number: 76120; September 16, 2021.)

Full Text: http://www.michbar.org/file/opinions/appeals/2021/082621/76120.pdf

Substantive Due Process

Zoning Administrator/Inspector, Immunity, and Enforcement Issues

Cannot use writ of mandamus to compel enforcement against sand mining operation.

Case: *Bertog v. Benton Charter Twp.*

Court: Michigan Court of Appeals (No. 356489) 2021 Mich. App. LEXIS 7017, 2021 WL 5976479 (Court of Appeals of Michigan December 16, 2021, Decided)

The court held that defendant-Township's decisions about defendant-Millburg Equipment Company's compliance with its zoning ordinances involved "the exercise of discretion and judgment by the Township's Building Officials." Thus, it affirmed the trial court's denial of plaintiffs' request for a writ of mandamus and grant of summary disposition to the Township. Millburg operates a sand mine on property in the Township's "Heavy Industrial Corridor." Plaintiffs' property is located adjacent to Millburg's property.

They alleged that the Township failed to enforce certain ordinances and requested in part "that the trial court issue a writ of mandamus and order the Township to enforce its ordinances." The court noted that whether Millburg's "use of the property violated the Township's ordinances required the Township to determine whether Millburg Equipment Company was complying with the special use permit and other existing ordinances. These matters were not ministerial in nature and instead required professional judgment, specialized knowledge and experience, and the exercise of discretion." In addition, contrary to plaintiffs' appellate arguments, the undisputed evidence in the record showed that "the matter was investigated and" it was determined that Millburg was not in violation of any ordinance. (Source: State Bar of Michigan *e-Journal* Number: 76694; January 4, 2022)

Full Text: http://www.michbar.org/file/opinions/appeals/2021/121621/76694.pdf

Court: Neighbor fence dispute: spite fence nuisance claim and interpreting existing versus established grade

Case: *Rapske v. Miga*

Court: Michigan Court of Appeals (No. 353258) 2021 Mich. App. LEXIS 2658, 2021 WL 1706710 (April 29, 2021, Decided)

Concluding that the trial court properly applied the plain language of the township zoning ordinance in ruling that plaintiffs failed to establish their nuisance per se claim, the court affirmed the no cause of action verdict for defendants in this border fence dispute. It also affirmed summary disposition for them on plaintiffs' spite-fence nuisance claim, finding no genuine issue of material fact that the fence served the useful purposes of increasing privacy and abating altercations.

Plaintiffs argued that the trial court erred as a matter of law in reasoning that the "zoning ordinance required fence height to be measured from the 'established grade.'" The court disagreed. They asserted the trial court should have interpreted § 2.18 of the ordinance to require border fences "be measured from the 'existing grade.'" However, that ordinance section clearly limited border fences to a height of "6 feet 'as measured from the established grade of the property.'" The fact that the ordinance used both terms suggested they have different meanings, and another ordinance section defining "established grade" also indicated the term had "its own distinct meaning under the ordinance." Given that § 2.18 states clearly and unambiguously "that border fences shall not exceed a height of 6 feet as measured from the established grade, and, when that section is read within the ordinance as a whole, there is no plausible reading of [§] 2.18 that permits 'established grade' to mean 'existing grade,' the trial court did not err by applying the zoning ordinance as written."

Further, the subsequent amendment changing the relevant ordinance to now state "that fence height must be measured from the 'existing grade' reinforces that 'established grade' and 'existing grade' have different meanings."

The court rejected plaintiffs' reliance on the absurd results doctrine, finding that the trial court's result here was "clearly not absurd." Further, the subsequent amendment changing the relevant ordinance to now state "that fence height must be measured from the 'existing grade' reinforces that 'established grade' and 'existing grade' have different meanings." As to the spite-fence claim, plaintiffs did not create a genuine issue of material fact as to whether the "fence was constructed solely for malicious purposes." The court noted that even if it "was partially motivated by malice," there were no further verbal altercations between the parties after it was constructed. (Source: State Bar of Michigan *e-Journal* Number: 75376 ; May 17, 2021)

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

Plaintiff asserts the Zoning Administrator "didn't have a clue", facts state otherwise.

Case: *Township of Rose v. Devoted Friends Animal Society*

Court: Michigan Court of Appeals (No. 356599) 2022 Mich. App. LEXIS 2199, 2022 WL 1194623 (April 21, 2022, Decided)

Holding that the trial court properly concluded there was no question of material fact whether defendants could prevail on their estoppel argument, the court affirmed summary disposition for plaintiff-township. The case arose from defendants housing approximately 60 to 75 dogs on a property within the Township's "zoning authority without the necessary special land use approval." Defendants argued that the trial court erred by prematurely rejecting their equitable estoppel defense in ruling on a summary disposition motion. They primarily argued that it erred by engaging in impermissible fact-finding as to their equitable estoppel defense. They asserted their estoppel defense turned on whether it was reasonable for them to rely

on instructions from plaintiff's zoning administrator (P), and reasonableness was a question for the finder of fact.

According to defendant-Borden's (a board member of defendant-Devoted Friends Animal Society) "testimony, she believed that [P] 'didn't have a clue' about the process of ensuring that Devoted Friends was in compliance with all applicable requirements, and [P] promised to talk to the county, but 'it was all very vague and it was going to be worked out.' Borden further testified that she received notice from *the county* that she should individually license all of defendants' dogs." Also, defendants "had some prior experience seeking a special land use permit and a kennel license when their operation had been based in" another township.

Also, defendants "had some prior experience seeking a special land use permit and a kennel license when their operation had been based in" another township. As such, they "could not have been wholly ignorant of the distinction between township and county ordinances and requirements."

As such, they "could not have been wholly ignorant of the distinction between township and county ordinances and requirements." Further, they "could not have had any reason to rely on [P] for advice, given his apparent cluelessness and reliance on the county—which was the entity that apparently *actually* told defendants what they should do. Therefore, irrespective of any distinction that may exist between reasonable and justifiable reliance, the trial court correctly found no genuine question of material fact whether defendants' actual reliance had an adequate basis." (Source: State Bar of Michigan *e-Journal* Number: 77314; May 12, 2022)

Full Text: http://www.michbar.org/file/opinions/appeals/2022/042122/77314.pdf

Nuisance and other police power ordinances

The defendant claims they cannot afford to remove the blighted structure...

Case: *West Bloomfield Charter Twp. v. Alkatib*

Court: Michigan Court of Appeals (No. 355370) 2021 Mich. App. LEXIS 7115, 2021 WL 5984156 (December 16, 2021, Decided)

The court held that the trial court did not err by denying defendants-property owners' motion to set aside the default judgment obtained by plaintiff-township and in granting plaintiff the right to demolish the condemned property at issue at defendants' expense. Plaintiff sued defendants alleging various code violations, blight, and nuisance conditions of the property. Plaintiff obtained a default judgment, which the trial court declined to set aside.

On appeal, the court rejected defendants' argument that the trial court erred by granting the default judgment, denying their motion to set it aside, and allowing plaintiff to handle the demolition. Because defendants "offered no evidence in support of their claims and acknowledged the property's various code violations," they did not establish a meritorious defense. And because they failed to do so, "the issue of good cause need not be considered."

However, even if they did assert a meritorious defense, the court found that they failed to show good cause for failing "to timely answer plaintiff's complaint." The court also rejected their claim that the trial court erred by failing to consider lesser sanctions. "The trial court did not mistakenly believe it lacked discretion, and its decision to enter a default on the basis of defendants' behavior, was not outside the range of principled outcomes." Finally, the court noted that because plaintiff's request to impose sanctions or award fees and costs was simply included in its appellate brief, "it does not constitute a motion as necessitated by

the applicable court rule to obtain the requested recoupment for fees and costs incurred on appeal." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 76684; January 6, 2022)

Full Text: http://www.michbar.org/file/opinions/appeals/2021/121621/76684.pdf

Other Unpublished Cases

Airport Zoning Board of Appeals has authority to impose conditions on variances related to proposed wind energy development.

Case: *Pegasus Wind, LLC v. Tuscola Area Airport Zoning Bd. of Appeal*

Court: Michigan Court of Appeals (Unpublished, 2021 Mich. App. LEXIS 2874, 2021 WL 1827631 (May 6, 2021, Decided

The court held that the circuit court's prior order did not preclude defendant-AZBA [Airport Zoning Board of Appeals] from imposing conditions on the variances the circuit court ruled were improperly denied, and the AZBA was authorized to impose conditions. Thus, the court reversed the 3/13/20 order granting plaintiff's emergency motion to enforce the 11/27/19 order, and remanded for the circuit court to rule "on the reasonableness and necessity of the conditions imposed on the variances by the AZBA based on the existing record, after which [it] may order the variances to be issued immediately without any further conditions and without the inclusion of any of the conditions" it concludes should be stricken under MCL 259.454(1) [Act 23 of 1950, Airport Zoning Act] and the relevant ZO.

In the 11/27/19 order, the circuit court ruled that the AZBA's denial of "the variances for the 33 wind turbines was not supported by competent, material, and substantial evidence." The court determined that the clear effect of the order, which reversed the AZBA's conclusion denying the variances, "was to (1) return the parties to their respective positions they had occupied before the AZBA issued its denial by undoing or voiding that denial, (2) indicate that denying the variances was improper, and (3) indicate that" the AZBA must approve them. But the order was silent as to whether that approval could include conditions. MCL 259.454(1) authorizes an airport ZBA "to grant variances 'subject to any reasonable condition or condition subsequent that'" it deems necessary to effectuate the Airport Zoning Act's purposes.

The relevant ZO also "provides that 'any variance may be allowed subject to any reasonable condition or conditions'" the AZBA deems necessary to effectuate the ZO's purpose. The court found that the AZBA fully complied with the 11/27/19 order because it granted the variances as required. It rejected plaintiff's reliance on MCL 259.461 in arguing that the AZBA lacked authority to add conditions, noting that "the AZBA necessarily had to take some type of further action to approve the variances since the circuit court's reversal had rendered the AZBA's previous decision denying" them to be without effect. But the AZBA did not have "unfettered discretion" in imposing conditions. While the circuit court struck the added conditions in its 3/13/20 order, it did not analyze their "reasonableness or necessity, leaving this Court with no ruling on this issue to review." (Source: State Bar of Michigan *e-Journal* Number: 75410; May 20, 2021)

Full text: http://www.michbar.org/file/opinions/appeals/2021/050621/75410.pdf

It rejected plaintiff's reliance on MCL 259.461 in arguing that the AZBA lacked authority to add conditions, noting that "the AZBA necessarily had to take some type of further action to approve the variances since the circuit court's reversal had rendered the AZBA's previous decision denying" them to be without effect. But the AZBA did not have "unfettered discretion" in imposing conditions.

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

Glossary

aggrieved party

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

aliquot

1 a portion of a larger whole, especially a sample taken for chemical analysis or other treatment.

2 (also aliquot part or portion) Mathematics a quantity which can be divided into another an integral number of times.

3 Used to describe a type of property description based on a quarter of a quarter of a public survey section.

n verb divide (a whole) into aliquots.

ORIGIN from French aliquote, from Latin aliquot 'some, so many', from alius 'one of two' + quot 'how many'.

amicus (in full amicus curiae)

n noun (plural amici, amici curiae) an impartial adviser to a court of law in a particular case.

ORIGIN modern Latin, literally 'friend (of the court).'

certiorari

n noun Law a writ by which a higher court reviews a case tried in a lower court.

ORIGIN Middle English: from Law Latin, 'to be informed', a phrase originally occurring at the start of the writ, from certiorare 'inform', from certior, comparative of certus 'certain'.

corpus delicti

n noun Law the facts and circumstances constituting a crime.

ORIGIN Latin, literally 'body of offence'.

curtilage

n noun An area of land attached to a house and forming one enclosure with it.

ORIGIN Middle English: from Anglo-Norman French, variant of Old French courtillage, from courtil 'small court', from cort 'court'.

dispositive

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

En banc

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

ORIGIN French.

estoppel

n noun Law the principle which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person or by a previous pertinent judicial determination.

ORIGIN C16: from Old French estouppail 'bung', from estopper.

et seq. (also et seqq.)

n adverb and what follows (used in page references).

ORIGIN from Latin et sequens 'and the following'.

hiatus

n (plural hiatuses) a pause or gap in continuity.

DERIVATIVES hiatal adjective

ORIGIN C16: from Latin, literally 'gaping'.

in camera

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

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

ORIGIN Lat. in chambers.

in limine

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

ORIGIN Lat. At the threshold or at the outset

injunction

n noun

1 Law a judicial order restraining a person from an action, or compelling a person to carry out a certain act.

2 an authoritative warning.

inter alia

n adverb among other things.

ORIGIN from Latin

Judgment non obstante veredicto

Also called judgment notwithstanding the verdict, or JNOV.

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

laches

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

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

littoral

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

mandamus

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

ORIGIN C16: from Latin, literally 'we command'.

mens rea

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

ORIGIN Latin, literally 'guilty mind'.

obiter dictum

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

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

pari materia

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

pecuniary

Adjective formal relating to or consisting of money.

DERIVATIVES pecuniarily adverb

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

per se

n adverb Law by or in itself or themselves.

ORIGIN Latin for 'by itself'.

quo warranto

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

res judicata

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

ORIGIN Latin, literally 'judged matter'.

riparian

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

scienter

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

ORIGIN Latin, from scire 'know'.

stare decisis

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

ORIGIN Latin, literally 'stand by things decided'.

sua sponte

n noun Law to act spontaneously without prompting from another party. The term is usually applied to actions by a judge, taken without a prior motion or request from the parties.

ORIGIN Latin for 'of one's own accord'.

writ

n noun

1 a form of written command in the name of a court or other legal authority to do or abstain from doing a specified act. (one's writ) one's power to enforce compliance or submission.

2 archaic a piece or body of writing.

ORIGIN Old English, from the Germanic base of write.

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