Public Policy Brief

Selected Planning and Zoning Decisions: 2024 (August 2023-August 2024)

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This public policy brief summarizes the important state and federal court cases, and Attorney General Opinions issued between August 1, 2023, and August 1, 2024.

Contents

This is a fact sheet developed by experts on the topic(s) covered within MSU Extension. Its intent and use is to assist Michigan communities making public policy decisions on these issues. This 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. This is not original research or a study proposing new findings or conclusions.

Published Cases

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

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

- United States District Court for the Eastern District of Michigan (roughly the east half of the lower peninsula):
  - The Northern Division (located in Bay City) comprises the counties of Alcona, Alpena, Arenac, Bay, Cheboygan, Clare, Crawford, Gladwin, Gratiot, Huron, Iosco, Isabella, Midland, Montmorency, Ogemaw, Oscoda, Otsego, Presque Isle, Roscommon, Saginaw, and Tuscola.
  - The Southern Division (located in Ann Arbor, Detroit, Flint, and Port Huron) comprises the counties of Genesee, Jackson, Lapeer, Lenawee, Livingston, Macomb, Monroe, Oakland, Saint Clair, Sanilac, Shiawassee, Washtenaw, and Wayne.
- United States District Court for the Western District of Michigan (roughly the west half of the lower peninsula and all of the Upper Peninsula):
  - The Northern Division (located in Marquette and Sault Sainte Marie) comprises the counties of Alger, Baraga, Chippewa, Delta, Dickinson, Gogebic, Houghton, Iron, Keweenaw, Luce, Mackinac, Marquette, Menominee, Ontonagon, and Schoolcraft.
  - The Southern Division (located in Grand Rapids, Kalamazoo, Lansing, and Traverse City) comprises the counties of Allegan, Antrim, Barry, Benzie, Berrien, Branch, Calhoun, Cass, Charlevoix, Clinton, Eaton, Emmet, Grand Traverse, Hillsdale, Ingham, Ionia, Kalamazoo, Kalkaska, Kent, Lake, Leelanau, Manistee, Mason, Mecosta, Missaukee, Montcalm, Muskegon, Newaygo, Oceana, Osceola, Ottawa, Saint Joseph, Van Buren, and Wexford.

Takings

Heavy rain and loss of soil strength cause dam failure, not a takings.

Case: *Bruneau v. Michigan Dep't of Env't, Great Lakes, & Energy*

Court: U.S. Court of Appeals Sixth Circuit (104 F.4th 972, 2024 U.S. App. LEXIS 14977, 2024 FED App. 0135P (6th Cir.) (June 20, 2024, Filed)

The court held that defendants-Michigan counties were entitled to summary judgment on plaintiffs-landowners' federal and state takings claims. It concluded they could not support their allegations that the counties intended to "take" their land by deciding not to change the water levels at the lake above the Edenville Dam. And findings that static liquification caused the dam's collapse kept them from showing "that the government's conduct amounted to 'a substantial cause' of the decrease in the value of" their property.

The Michigan Department of Environment, Great Lakes, and Energy has regulatory authority over the dam. In compliance with the NREPA, the counties "assembled a task force to manage the lake above the dam. . . . Under Michigan law, any entity with 'delegated authority' to manage a lake, such as the task force, must 'maintain' a 'court-determined normal [water] level.'" In 2019, the counties chose "to keep the lake levels where they had been for more than nine decades." The dam failed almost a year later after days of historic rainfall.

Plaintiffs argued that "the counties 'took' their properties by urging the state court to maintain the dam's historic water levels, all while knowing that its spillway system ran the risk of overflowing." However, an independent study by the Federal Energy Regulatory Commission revealed that "[u]ndetected defects since the dam's construction led to a sudden loss of soil strength around the base of the dam during the rainfall." The district court ruled that "the counties' efforts to keep the water behind the dam at existing levels did not show that they intended to flood the downstream properties and 'take'" plaintiffs' land.

The court agreed, explaining that all the counties did was to "*preserve* the lake depth at the same level that had existed for roughly a century. Wise or not, that action does not show that they meant to flood the downstream properties." The court added "that the lake levels had little to do with the dam's collapse. As the Federal Energy Regulatory Commission's independent forensic team determined, it was soil vulnerabilities, in place since the dam's construction, that caused the collapse." Plaintiffs also failed to establish a taking under the Michigan Constitution where they could not establish causation. "The two causes of the collapse—heavy rains and static liquefaction—had nothing to do with the counties' decision to seek permission from the state court to keep the lake levels where they had been for 90 plus years." Affirmed. [This appeal is from the Eastern District of Michigan] (Source: State Bar of Michigan *e-Journal* Number: 81794 ; June 24, 2024

Full Text: https://www.michbar.org/Portals/0/opinions/us_appeals/2024/062024/81794.pdf

Civil Rights/RLUIPA

Whether defendant-township's zoning ordinance as applied to plaintiffs "Prayer Trail" violated the Religious Land Use & Institutionalized Persons Act (RLUIPA)

Case: *Catholic Healthcare Int'l, Inc. v. Genoa Charter Twp., MI*

Court: U.S. Court of Appeals Sixth Circuit (82 F.4th 442, 2023 U.S. App. LEXIS 23951, 2023 FED App. 0210P (6th Cir.) (United States Court of Appeals for the Sixth Circuit September 11, 2023, Filed)

[This appeal was from the Eastern MI District- Federal Court.] The court held that defendant-Township's decision to treat plaintiff-Catholic Healthcare's "prayer trail" as the equivalent of a church requiring a SLUP imposed a "substantial burden" on its religious exercise, and that plaintiffs were likely to succeed on the merits of the RLUIPA claim. Catholic Healthcare wished to construct a prayer trail in the Township, which included the "Stations of the Cross." The Township's Community Development Director informed it the trail would be treated as a church, and that it would have to file additional land-use and plan-review applications, among other requirements. Plaintiffs were unsuccessful at getting the project approved but still built the trail.

The Township ordered the religious displays removed, but plaintiffs did not comply. Instead, they sought a SLUP for a chapel, along with the trail. The permit was eventually rejected, and plaintiffs were again ordered to remove the displays. They sued, claiming the Township's zoning ordinance, as applied to them, violated the federal and state constitutions and the RLUIPA. A state court enjoined the religious display and banned gatherings on the property. Plaintiffs' second SLUP application was denied.

The district court ruled that the claim based on the forced removal of the religious displays was unripe. It partially granted plaintiffs' request for an injunction, allowing organized gatherings on the property but not restoration of the religious displays. After concluding it had jurisdiction to review the ripeness decision, the court found that decision was "was plainly mistaken." It held that in "land-use cases, the necessary event is simply that the government has adopted a 'definitive position' as to 'how the regulations at issue apply to the particular land in question.'" The Township has twice refused plaintiffs SLUPs, and a concrete injury was established "because the Township has actually forced them to remove the religious displays from their property."

The court explained that the district court had conflated ripeness, or finality in this context, with exhaustion. In the land-use context, ripeness "requires only a 'relatively modest' showing that the 'government is committed to a position' as to the strictures its zoning ordinance imposes on a plaintiff's proposed land use." The court held that it was error for the district court to require plaintiffs to have "'*also* complied with administrative process in obtaining that decision.'" Further, they were "likely to succeed on the merits of their RLUIPA claim as to the specific injunction they" sought and the other preliminary-injunction factors likewise favored them. Affirmed in part (as to organized gatherings) and reversed in part and remanded as to the displays. (Source: State Bar of Michigan *e-Journal* Number: 80168; September 14, 2023

Full Text: http://www.michbar.org/file/opinions/us_appeals/2023/091123/80168.pdf

Previous 2021 Case: *Catholic Healthcare Int'l, Inc. v. Genoa Charter Twp.*, 2021 U.S. App. LEXIS 33937, 2021 FED App. 0515N (6th Cir.), 2021 WL 5277096 (United States Court of Appeals for the Sixth Circuit November 12, 2021, Filed)

Appeals, Variances (use, non-use)

Supreme Court: if the use is not listed, it is not allowed. Reverse and remand COA decision on chicken coop.

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

Court: Michigan Supreme Court, Case No. 165878, 2023 Mich. LEXIS 1936, 2023 WL 8115828 (Supreme Court of Michigan November 22, 2023, Decided)

In an order in lieu of granting leave to appeal, the court reversed the Court of Appeals judgment [e-Journal # 79606, 2023 Mich. App. LEXIS 3923, 2023 WL 3767221, June 1, 2023, Decided], which held that "plaintiffs were not required to seek a variance and permission to keep chickens in a chicken coop on their property." The court noted that the zoning ordinance at issue "stated what activities are permitted at the one-family detached dwelling on plaintiffs' property: accessory uses and accessory structures customarily incidental to one-family detached dwellings." Pursuant to *Pittsfield Twp*, under an ordinance that "specifically sets forth permissible uses under each zoning classification . . . absence of the specifically stated use must be regarded as excluding that use." The court remanded the case to the Court of Appeals for consideration of whether the trial court erred in affirming the decision of defendant-Charter Township's Zoning Board of Appeals to deny "plaintiffs' request to keep chickens in a chicken coop on their property." (Source: State Bar of Michigan *e-Journal* Number: 80571; November 29, 2023

Full Text: https://www.michbar.org/e-journal/eJournalDate/11292023

Nonconforming Uses

Plaintiffs lack a protected property interest to use property for STR

Case: *Moskovic v. City of New Buffalo*

Court: 6th Circuit Court of Appeals (2023 U.S. App. LEXIS 33273, 2023 FED App. 0528N (6th Cir.), 2023 WL 8651272 (United States Court of Appeals for the Sixth Circuit, December 14, 2023, Filed)

In a suit challenging a city's restrictions on short-term rentals (STRs), the original zoning ordinance's plain language prohibited STRs and since plaintiffs never received permits allowing STRs under the original ordinance, as first-time permit applicants, plaintiffs lacked a protected interest in receiving the permits.

Plaintiffs purchased properties with the intent to use them for short term rentals (STR). Prior to 2019, the city's zoning ordinance was silent on STRs, however it prohibited uses that were not specifically authorized. In 2019 the City passed an ordinance requiring property owners to register an STR and obtain a permit. In May 2020, the City imposed a moratorium on the issuance of new STRs and extended the moratorium through December 13, 2021. A new ordinance was adopted that prohibited STRs in the subject R-1, R-2, and R-3 districts, in which the Plaintiff's owned property. Plaintiffs failed to register or apply for an STR permit. The ordinance allowed for the continuance of the 93 existing STRs located in the R-1, R-2, and R-3 districts that registered between 2019 and May 2020.

The Plaintiff's sued the city in separate actions, which the district court consolidated. They asserted violations to the Michigan Zoning Enabling Act, substantive due process and equal protections violations under the US and Michigan Constitutions, and takings.

The court found that the plaintiffs "lacked a protected property interest in using their homes as STRs, so their substantive due process, regulatory takings, and MZEA claims fail". The court affirmed the judgement of the district court.

Full Text: https://www.opn.ca6.uscourts.gov/opinions.pdf/23a0528n-06.pdf

Zoning Amendment: Voter Referendum

Format standards of referendum petition in question, courts determine substantial compliance after voters reject rezoning

Case: *GWCC Holdings, LLC v. Alpine Twp.*

Court: Michigan Court of Appeals (2024 Mich. App. LEXIS 3244, 2024 WL 1813471 (April 25, 2024, Decided)

The court held that the circulator compliance statement in the referendum petition at issue did not comply with the requirement in MCL 168.482(8) where it "was placed to the right and across the page from the circulator check box." But it concluded that while the petition "was technically deficient and generally needed to strictly comply with applicable requirements" the voters' rejection of the rezoning ordinance in question cured the technical defect. Finally, while it did not need to address the issue, it agreed with the trial court that MCL 168.544c(1)'s type-size requirements did not apply to the petition. Thus, the court affirmed the trial court's grant of summary disposition to defendants.

The petition sought a referendum on defendant-township's approval of a rezoning ordinance requested by plaintiff-GWCC. While this appeal was pending, the township's citizens voted to reject the ordinance. GWCC argued "the trial court incorrectly interpreted the meaning of 'below' in MCL 168.482(8)—and erroneously concluded that type-size requirements under MCL 168.482 and MCL 168.544c(1) did not apply—to find the petition in compliance with applicable requirements." The court determined that "the trial court's interpretation of below is inconsistent with common meanings and common sense, especially considering the overall context of the statute governing the form and content of physical documents." The court found that, applying "the definitions 'underneath' or 'lower on the same page or on a following page,' which are materially synonymous in the present context, the petition did not comply with the statutory requirements of MCL 168.482(8). . . . Placement across the document is not underneath or lower on the same page or on a following page" and does not comply with MCL 168.482(8)'s requirement "that the circulator compliance statement be placed below the circulator check box."

While defendants contended the petition only had to substantially comply with the statute's requirements, "strict, rather than substantial, compliance with MCL 168.482(8) is usually necessary." However, the court noted that this case was "now in the period after the election and voters have affirmatively rejected the ordinance. Under these circumstances, . . . the reasoning of *Stand Up*, *City of Jackson*, and *Carman* support the application of substantial compliance." (Source: State Bar of Michigan *e-Journal* Number: 81489; April 29, 2024

Full Text: https://www.michbar.org/Portals/0/opinions/appeals/2024/042524/81489.pdf

Conditional Zoning Amendment

Conditional rezoning invalid if the proposed use is not a permitted use (by right or special approval) within proposed zoning district

Case: *Jostock v. Mayfield Twp.*

Court: Michigan Supreme Court (2024 Mich. LEXIS 1128 (July 1, 2024, Filed)

The court held that a "conditional rezoning is invalid under MCL 125.3405(1) if the proposed use is not a permitted use—either by right or after special approval—within the proposed zoning district." A dragway has operated on the property at issue for decades "as a lawful nonconforming use with limited

hours[.]" Defendant-A2B Properties purchased it in 2018, expanded the facilities, and extended the hours of operation. After prior litigation, "A2B filed a conditional-rezoning agreement with the Township, seeking to have the property rezoned to C-2 (General Commercial District), subject to limitations on the dragway's hours and operations." The Township Board voted to approve the agreement "and conditionally rezoned the property to C-2 subject to the terms of the" agreement. Plaintiffs, who live near the dragway, sued seeking declaratory and injunctive relief. The trial court granted them the former but denied them the latter. The Court of Appeals affirmed.

At issue was whether the "Township could conditionally rezone a property to allow the use of a dragway when a dragway is not otherwise a permitted use in the new zoning district." Noting that the issue was one of statutory interpretation, the court found that A2B's interpretation of MCL 125.3405(1) was inconsistent with statutory interpretation principles. A2B would read the statute "in a way that renders a portion of [it] nugatory." Under its interpretation, "the type of zoning district a property is conditionally rezoned to would be immaterial."

The court noted that "if a use can be one that is not permitted in the new zone—i.e., it is irrelevant what the property is zoned to as long as the municipality allows the use when it grants the conditional rezoning—then the language 'as a condition to a rezoning of the land or an amendment to a zoning map' does no work in MCL 125.3405(1)." Further, A2B did not read the statute "in the context of the entire MZEA, and its interpretation is inconsistent with provisions in the Township's" Zoning Ordinance. The court added that A2B's interpretation "would largely circumvent the need for use variances under MCL 125.3604." The question of the validity of the property's conditional rezoning depended "on whether a dragway is a permitted use in the C-2 zoning district in the Township." But the parties did not specifically address that issue below, and the court found the trial court should first address it. Vacated and remanded to the trial court. (Source: State Bar of Michigan *e-Journal* Number: 81911; July 1, 2024)

Full Text: https://www.michbar.org/Portals/0/opinions/supreme/2024/070124/81911.pdf

Open Meetings Act, Freedom of Information Act

OMA does not apply to members of an elected body not yet seated

Case: *Armstrong v. Ottawa Cnty. Bd. of Comm'rs*

Court: Michigan Court of Appeals (2024 Mich. App. LEXIS 685 (January 25, 2024, Decided)

The court held that the trial court did not err in ruling the Open Meetings Act (OMA) did not apply to the elected but not yet seated members of defendant-county commission because, until they were sworn in and seated, "they did not constitute a public body for purposes of the OMA." As to plaintiffs' constitutional claims, they failed to present anything allowing the court to conclude these individuals were governmental actors before they were seated. Thus, it affirmed summary disposition for defendant.

Plaintiffs alleged that after the "Ottawa 9" (eight elected but not yet seated commissioners and one incumbent) "were elected, but before they took the oath of office and were seated as members of" defendant on 1/3/23, they "met in private, deliberated over public policy, made public-policy decisions to be implemented once they assumed office, and issued prospective orders to Ottawa County employees and agents about those decisions. Plaintiffs further allege that after taking their oaths of office, [they] implemented the decisions that they made before they statutorily assumed office." Plaintiffs contended "the Ottawa 9 exercised governmental authority by delegation." But the court found that, assuming "for the sake of argument that whether a public body subject to the OMA delegated to the Ottawa 9 the

exercise of governmental authority is a fact question, plaintiffs did not allege such delegation in their complaint, nor have they suggested how further discovery would reveal facts that would establish that such delegation occurred."

Given that plaintiffs did not "plead that a public body subject to the OMA delegated the exercise of governmental or proprietary authority to the Ottawa 9, and because the discovery they propose could not establish that such delegation occurred, the trial court did not err by concluding that the OMA did not apply to the Ottawa 9 before they assumed office because they did not meet the OMA's definition of a public body." As to plaintiffs' argument the trial court interpreted the OMA too strictly, the court noted that "the principle that the OMA may be broadly interpreted cannot be used to supersede the plain language of the Act." Given that eight of the Ottawa 9 were only a commissioner-elect at the time, absent "a delegation of power, they were neither a governing body, . . . nor a public body for purposes of the OMA[.]" (Source: State Bar of Michigan *e-Journal* Number: 80952; January 29, 2024)

Full Text: https://www.michbar.org/file/opinions/appeals/2024/012524/80952.pdf

Ranking and recommending: Marijuana Review Committee subject to OMA

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

Court: Michigan Supreme Court (No. 164869, July 31, 2024, Decided)

Holding that defendant-City's Marihuana Review Committee (the Review Committee) was a public body subject to the OMA, the court reversed the Court of Appeals decision to the contrary and remanded the case to that court. "Plaintiffs applied for and were denied licenses to open medical marijuana dispensaries after the city council voted to approve, without discussion, the" Review Committee's recommended rankings. The trial court concluded defendants "violated the OMA during the Review Committee applicant selection process." Determining that the Review Committee was not a public body subject to the OMA, the Court of Appeals reversed. On appeal, the court disagreed, holding "that the Review Committee was a public body because it was a governing body and was empowered by the Marijuana Ordinance to exercise the governmental function of scoring medical marijuana dispensary applicants.

Even though the Marijuana Ordinance said the Review Committee had only the power to make recommendations, the Review Committee was a 'governing body' because, in reality, [it] ranked applications and effectively decided which applicants would receive licenses—the city council did not do that work." As a result, the Review Committee was "required to comply with the OMA." The court found that the "Court of Appeals majority erred when it confined its analysis to the Marijuana Ordinance language itself and failed to consider how the Review Committee in fact operated. Viewing the relevant ordinance language together with the actual operation of the Review Committee, the Review Committee was a 'governing body' that was 'empowered by . . . ordinance . . . to . . . perform a governmental . . . function[.]'"

Viewing the relevant ordinance language together with the actual operation of the Review Committee, the Review Committee was a 'governing body' that was 'empowered by . . . ordinance . . . to . . . perform a governmental . . . function[.]'"

In addition, it "then made the de facto decision who would receive licenses . . . ." The court also found "the Court of Appeals majority incorrectly determined *Herald* was dispositive" here, because that case was distinguishable. Rather, as in *Booth*, "the city council delegated its job as a 'public body' to the

Review Committee," making it subject to the OMA. Reversed and remanded to the Court of Appeals "to consider whether the few meetings that were conducted subject to the OMA remedied the violations of the OMA and to consider other issues preserved by the parties."

Dissenting, Justice Viviano (joined by Justice Zahra) disagreed "with the majority's analysis and would instead affirm the judgment of the Court of Appeals. The Review Committee was only empowered to make and only made recommendations— it had no decision-making authority. Therefore, it was not a public body under the OMA." (Source: State Bar of Michigan *e-Journal* Number: 82041; August 1, 2024)

Full Text: https://www.michbar.org/Portals/0/opinions/supreme/2024/073124/82041.pdf

Signs: Billboards, Freedom of Speech

Content based exceptions are severable, remaining sign requirements valid and enforceable

Case: *Int'l Outdoor v. City of Troy*

Court: United States Court of Appeals for the Sixth Circuit (77 F.4th 432, 2023 U.S. App. LEXIS 20847, 2023 FED App. 0171P (6th Cir.) August 10, 2023, Filed)

[This appeal was from the Eastern District of MI.] The court held that the content-based exceptions to defendant-City of Troy's billboard permit requirement, which did not satisfy strict scrutiny, were severable from its sign ordinance under a severability clause. This left intact the ordinance's height, size, and setback requirements, which plaintiff-International Outdoor's proposed billboards did not meet. Thus, the court affirmed summary judgment for the City.

The case arose after the City denied International's permit application to erect billboards in the City. International sued under the First Amendment. The court previously affirmed the district court's ruling that the ordinance did not constitute a prior restraint. But it concluded that the exceptions to the permit requirement "were content-based restrictions," and remanded for the district court to examine the exceptions under the strict scrutiny standard. On remand, the district court ruled that although the exceptions did not survive strict scrutiny, they could be severed, and the remaining height, size, and setback requirements were valid and enforceable.

On remand, the district court ruled that although the exceptions did not survive strict scrutiny, they could be severed, and the remaining height, size, and setback requirements were valid and enforceable.

In this appeal, the court agreed that the content-based exceptions to the permit requirement were severable where the ordinance contained a severability clause, and "[t]he severability clause's plain language controls." The court explained that if the permit requirement was not "integral" to the operation of the ordinance, then the "exceptions to that permit requirement cannot be either." And if found that "the content-based exceptions to the permit requirement were not so entangled with the rest of the Ordinance, such that the remainder would be inoperable without them."

While International argued that severing the exceptions would require all signs to obtain a permit, and that it was entitled to damages because it paid a permitting fee, it did not raise these arguments in the district court until its motion for reconsideration. "Arguments raised for the first time on a motion for reconsideration are untimely and, barring exceptional circumstances, we do not consider them." Finally, the dismissal of International's last claim meant that its motion for attorneys' fees under § 1988 was also properly dismissed. (Source: State Bar of Michigan *e-Journal* Number: 79977 ; August 14, 2023)

Full Text: https://www.michbar.org/file/opinions/us_appeals/2023/081023/79977.pdf

Zoning Administrator/Inspector, Immunity, and Enforcement Issues

Exclusionary rule not applicable in enforcement action relying on drone's aerial photos.

Case: *Long Lake Twp. v Maxon*

Court: Michigan Supreme Court (Long Lake Twp. v. Maxon, 2024 Mich. LEXIS 841, 2024 WL 1960615 (May 3, 2024, Filed))

The court declined to address whether the use of a drone under the circumstances here was an unreasonable and unconstitutional search because "the exclusionary rule does not apply to this civil proceeding to enforce zoning and nuisance ordinances." It noted "Michigan aligns with courts across the nation in that, as a general matter, we apply the exclusionary rule in the context of criminal" proceedings, but only rarely in civil proceedings (quasi-criminal legal matters or the warrantless extraction of blood from a person). The court declined "to extend application of the exclusionary rule to civil enforcement proceedings that effectuate local zoning and nuisance ordinances and seek only prospective, injunctive relief."

The issue was whether plaintiff-Township violated defendants-the Maxon's rights "by using an unmanned drone to take aerial photo[s] and video of defendants' property and," if so, whether this "evidence must be excluded from a civil nuisance abatement proceeding." The court noted its "prior decisions applying the exclusionary rule to two narrow categories of civil cases do not support the application of the exclusionary rule to proceedings to enforce local zoning and nuisance ordinances." Further, it is "clear that application of the exclusionary rule 'involves weighing the costs and benefits in each particular case.' But neither we nor the Supreme Court of the United States has ever 'suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence.'" As to cost, "the zoning-enforcement action is meant to prevent the Maxons from continuing to thwart the Township's zoning laws.

Suppressing the evidence would require the court to "ignore important evidence of this ongoing violation and to close our eyes to ongoing illegal activity." As to the benefits, excluding the photos and video "may indeed deter the Township and other municipal and state officials from using drones in an intrusive and potentially unconstitutional manner. But the deterrence would be minimal."

In short, "nuisance- and zoning ordinance cases that seek only prospective injunctive relief, unlike asset-forfeiture cases, are not quasi-criminal proceedings in which the exclusionary rule may justifiably be applied." Aerial surveillance of land "from the air involves substantially less intrusion than when law enforcement search a person's home or their body. The Township searched the yard and curtilage of the Maxons' property, but these areas are less private than inside the home and, by extension, far less private than the body. Our narrow, limited application of the exclusionary rule to suppress unlawfully seized evidence from a person's blood in civil proceedings is therefore inconsistent with the Maxons' request that we apply the rule expansively in the present case."

...the costs of applying the exclusionary rule here would outweigh the benefits. It would prevent the Township from "effectuating its nuisance and zoning ordinances—a serious cost."

Finally, the costs of applying the exclusionary rule here would outweigh the benefits. It would prevent the Township from "effectuating its nuisance and zoning ordinances—a serious cost. It would do so for little benefit given that exclusion of the" photos and video would not deter future misconduct by law

enforcement officers or their adjuncts, proxies, or agents. Affirmed, but remanded. (Source: State Bar of Michigan *e-Journal* Number: 81562 ; May 6 , 2024

Full Text: https://www.michbar.org/Portals/0/opinions/supreme/2024/050324/81562.pdf

Nuisance and other police power ordinances

Fireworks ordinance cannot include requirements that conflict with state statute.

Case: *People of the City of Sterling Heights v. Bahnke*

Court: Michigan Court of Appeals (2024 Mich. App. LEXIS 1215 (February 15, 2024, Decided))

The court held that the ordinance at issue was preempted by state law regulating fireworks due to a direct conflict between the relevant state statute and the ordinance. Thus, the court reversed an order of the circuit court denying defendant's appeal and affirming the district court order that affirmed the magistrate's ruling against defendant, and remanded. The case arose out of a citation for violating a city ordinance requiring "fireworks vendors to hand out a flyer to purchasers and display signs that provide notice to customers of city and state laws regarding fireworks usage."

Defendant, who manages a fireworks store, did not hand out the flyers. He argued that the MFSA, "MCL 28.457, preempts plaintiff's ordinance because the ordinance directly conflicts with the statute and because the field of fireworks sales was exclusively occupied by the state." The court agreed "that the ordinance directly conflicts with the statute and is therefore preempted by state law."

The MFSA provision at issue was MCL 28.457(1). The court concluded that it "simply cannot be said that an ordinance requiring that sellers of fireworks supply their customers with detailed notices *when selling fireworks*, and imposing a fine upon them if they fail to comply, somehow does not 'regulate' the sale of fireworks. The ordinance certainly, at the very least, 'pertains to' the sale of fireworks, which in itself places it beyond the reach of the local authorities." Plaintiff's claim that the ordinance was "merely an additional layer of regulation of the use of fireworks and therefore not in conflict with the statute is simply not persuasive." The court also found it "worth noting that the requirements the ordinance imposes appear to be subject to change without notice[.]" (Source: State Bar of Michigan *e-Journal* Number: 81030 ; February 20, 2024

Full Text: https://www.michbar.org/file/opinions/appeals/2024/021524/81030.pdf

Standing, Aggrieved Party, Ripeness

Aggrieved party status under MCL 125.3605 does not apply to claim of nuisance under MCL 125.3407

Case: *Sakorafos v. Lyon Charter Township*

Court: MI Court of Appeals, 2023 Mich. App. LEXIS 8430 (Court Appeals of Michigan, November 21, 2023, Decided)

This case addresses issues around zoning enforcement and standing of a private party to sue in order to abate a public nuisance. The subject property included a veterinary hospital in operation since 1975. The current owner purchased the property in 2003 and started to make improvements in 2013 to add a dog kennel facility and outdoor dog runs.

The Township started enforcement proceedings on the kennel in 2015 – and eventually the applicants applied for and were denied a special land use permit in 2017. By 2018, the township attorney had determined that the dog kennel facility was nonconforming and in 2020 the plaintiffs, who live adjacent to the property, received a letter that the township would not enforce against the kennel due to the doctrine of laches. The plaintiffs then sued the Township to compel enforcement against the kennel.

Plaintiffs alleged that the Township failed to enforce the zoning ordinance as required by MZEA Sec. 407. Sec 407 says, in summary, that a violation of a zoning ordinance is a nuisance per se and the court shall order the nuisance abated.

The trial court found that plaintiffs had not demonstrated special damages and therefore did not have standing to bring the action. The trial court did not address whether plaintiffs had standing under Chapter 48, §11.04 of the Township's Ordinance which stated that "any person aggrieved or adversely affected by a violation of [the] ordinance" could institute a suit (but this section was subsequently amended after this suit started). In reaching this conclusion, however, the trial court [incorrectly] applied the aggrieved party test applicable to a party seeking to appeal a zoning decision under MCL 125.3605.

The Court of Appeals held that the aggrieved party test or status according to MZEA Sec. 605 (aka the *Saugatuck Dunes* test 509 Mich. 561, 983 N.W.2d 798) does not apply to a claim of nuisance under MZEA Sec. 407. The aggrieved party standard required by Sec. 605 is limited to the context of who may appeal the administrative actions of zoning officials as discussed in that statutory section. Regarding standing under MZEA Sec. 407 (the Nuisance Per Se section), "Private citizens may bring an action "to abate a public nuisance, arising from the violation of zoning ordinances or otherwise, when the individuals can show damages of special character distinct and different from the injury suffered by the public generally." [Towne v Harr, 185 Mich App 230, 232; 460 NW2d 596 (1990); see also Ansell, 332 Mich App at 461.]

Here, the plaintiffs demonstrated sufficient standing to initiate a lawsuit to abate the nuisance, but the trial court did not apply the test for standing correctly. The CoA affirmed in part, vacated in part, and remanded the case to circuit court to determine whether plaintiffs have standing under MZEA Sec. 407 and to determine which version of ordinance § 11.04 applies.

Full Text: https://www.courts.michigan.gov/4a5c60/siteassets/case-documents/uploads/opinions/final/coa/20231121_c362192_35_362192.opn.pdf

Other Published Cases

Airport Zoning: Court of Appeals applied incorrect standard of review

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

Court: Michigan Supreme Court (2024 Mich. LEXIS 637, April 9, 2024, Filed).

The court held that "the Court of Appeals applied the incorrect standard of review when it considered the lower adjudicators' conclusions that" appellee-wind energy system's (Pegasus) request for variances for the construction of wind turbines near the TAA "would be 'contrary to the public interest[.]'" Thus, it reversed the part of the Court of Appeals opinion addressing that matter, reinstated appellant-AZBA's denial of the variances, and vacated the remainder of the Court of Appeals opinion.

Pegasus sought the variances for the construction of eight wind turbines. The AZBA denied the request and the circuit court affirmed, but the Court of Appeals reversed, finding the variances should have been granted. The court disagreed with the Court of Appeals' conclusion that the circuit court erred by affirming the AZBA's findings, noting the factual findings of a ZBA are entitled to deference. "And we cannot say that the circuit court 'misapprehended or grossly misapplied the substantial evidence test' to the AZBA's factual findings." The circuit court's "examination of the evidence could have been clearer and

more comprehensive. Nonetheless, under the deferential standard of review applied by a circuit court to a [ZBA's] factual findings, we are not 'left with the definite and firm conviction' that the circuit court erred."

The Court of Appeals majority opinion "went beyond the question of whether the circuit court properly applied the substantial-evidence test. Instead, noting that 'the substantial-evidence test includes a qualitative component,' [it] weighed the evidence anew, essentially making its own factual findings." Although it "styled its holding as a conclusion that substantial evidence did not support the AZBA's findings, that is not an accurate description of what amounted to a *de novo* analysis on the part of the Court of Appeals." The Court of Appeals "identified evidence contrary to the evidence on which the AZBA relied and declared the contrary evidence dispositive. This was inappropriate. Although there is a qualitative element to the substantial-evidence test, an appellate court may not conduct the equivalent of *de novo* review of the facts."

After reviewing the record, the court could not "say that the circuit court clearly erred by deeming" the record evidence that supported the AZBA's findings "more than a mere 'scintilla' and enough to make the AZBA's conclusion reasonable."

Dissenting, Justice Bolden disagreed with the majority's finding that the Court of Appeals applied the incorrect legal standard. "[I]n my view, the Court of Appeals majority reviewed the entire record, applied the proper analysis, and correctly concluded that the findings of the [AZBA] were not supported by substantial, competent, and material evidence." She found the Court of Appeals majority opinion "well-reasoned and supported by the whole record." She would have denied the AZBA's application for leave to appeal. (Source: State Bar of Michigan *e-Journal* Number: 81392; April 10, 2024)

Full Text: https://www.michbar.org/Portals/0/opinions/supreme/2024/040924/81392.pdf

Unpublished Cases

(Generally unpublished means there was not any new case law established but presented here as reminders of some legal principles. They are included here because they state current law well, or as a reminder of what current law is.) A case is "unpublished" because there was not any new principal of law established (nothing new/different to report), or the ruling is viewed as "obvious." An unpublished case may be a good restatement or summary of existing case law. Unpublished opinions are not precedentially binding under the rules of stare decisis. Unpublished cases might be cited, but only for their persuasive authority, not precedential authority. One might review an unpublished case to find and useful citations of published cases found in the unpublished case.)

Restrictions on Zoning Authority

On zoning regulation of utilities, necessity, debris and sludge removal from sewer lines

Case: *Great Lakes Water Auth. v. Midwest Mem'l Group, LLC*

Court: Michigan Court of Appeals (2024 Mich. App. LEXIS 479, 2024 WL 203766 (January 18, 2024, Decided)

In this condemnation action, the court held that while plaintiff-Great Lakes Water Authority (GLWA) "is not immune from local regulation," the project at issue (related to removing debris from a sewer line) was allowable under the applicable local zoning ordinance as a "basic utility." Thus, it affirmed the trial

court's order denying defendant-property owner's motion to review necessity. GLWA argued on appeal "that a zoning challenge is not justiciable in condemnation proceedings." But the court rejected this argument in *Riverview-Trenton* [332 Mich App at 593-594].

The next issue was "whether GLWA is immune from local zoning ordinances under its enacting statute[,]" the Municipal Sewer and Water Supply Systems Act (MSWSSA). The court noted the most relevant case was *Pittsfield*. It found that "GLWA's most persuasive argument rests on its statutory power to determine the location of its projects, which is similar to the language held in *Pittsfield* to exempt counties from township ordinances in determining where to site county buildings. However, the MSWSSA must be interpreted using its own terms, and, in MCL 124.284(2)(e), the Legislature expressly exempted water and sewer authorities from complying with 'any other law' with respect to their design power. Because the Legislature knew how to expressly exempt authorities from other laws, it should be inferred that [it] did not intend to do so with respect to the power to determine project locations. At the very least, it cannot be said that there is a 'clear expression' of Legislative intent to exempt water and sewer authorities from local regulation."

The court then turned to the issue of whether the proposed project would violate the local zoning ordinance (Detroit's). The court agreed "with GLWA that the project meets the requirements of a basic utility. Maintenance and cleaning of the outfall sewer is a necessary part of the infrastructure service provided by the sewer system, and it is undisputed that the project needs to be located near the sewer line." It disagreed with defendant's contention that the project qualified as a "waste-related use" under the ordinance. Because defendant's zoning challenge failed, it failed "to identify an 'error of law' underlying the determination of necessity." Finally, the court found that, considering "the totality of the circumstances, defendant has not carried its burden of establishing that the project location is outside the zone of reasonable alternatives."(Source: State Bar of Michigan *e-Journal* Number: 80924; February 1, 2024)

Full Text: https://www.michbar.org/file/opinions/appeals/2024/011824/80924.pdf

Appeals, Variances (use, non-use)

Courts uphold ZBA denying variance to build/re-construct on adjacent 40-foot lots.

Case: *DiMercurio v. City of Royal Oak*

Court: Michigan Court of Appeals (2023 Mich. App. LEXIS 7516 (October 19, 2023, Decided)

After concluding it had jurisdiction over plaintiffs' appeal as of right, the court held that the circuit court properly affirmed defendant-ROZBA's decision to deny their request for a dimensional zoning variance. The property at issue was comprised of two 40-feet wide and 110-feet deep lots, making it "80-feet wide and 110-feet deep with a total area of 8,800 square feet." It contained a single-family home and detached garage. It was purchased with the intent to separate it "back into two 40-feet wide by 110-feet deep lots, demolish the structures, and build two new single-family homes." This required the variance.

On appeal, defendants asserted the court lacked jurisdiction because the circuit court had considered "an appeal from another 'tribunal'—the ROZBA; therefore, [its] order affirming the ROZBA decision was not appealable as of right under MCR 7.203(A)(1)(a)." The court concluded it was bound by *Pegasus Wind*, which established "that jurisdiction exists in an appeal as of right from a circuit-court order affirming a zoning board of appeals' denial of an application for a variance." But plaintiffs' appeal failed on the merits. The court concluded the "ROZBA's decision regarding Royal Oak Code, § 770-124E(2)(a), was determinative of all" their arguments.

Under the ZO, they "were required to prove five different things, one of which is that the relevant provisions of the [ZO] 'unreasonably prevent [them] from using the property for a permitted purpose.'" The court noted the ROZBA found that this requirement was not met. Thus, "any additional findings were not required[.]" As to plaintiffs' claim the ROZBA's factual findings "were not 'supported by competent, material, and substantial evidence on the record[,]'" the court found there was evidence supporting "the ROZBA's decision that the [ZO] was not unreasonably preventing plaintiffs from using the subject property as a one-family residence." Their own statements showed it was being used in this "manner, and the only issue with the [ZO] occurred if the property was split.

Further, plaintiffs' attempted reliance on lack of marketability did not pertain to use of the property and was not supported by any" record evidence. Thus, "the ROZBA's decision was supported by adequate evidence under MCL 125.3606(1)(c)." Given this, neither the ROZBA nor the circuit court abused its discretion. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 80378; October 31, 2023

Full Text: https://www.michbar.org/file/opinions/appeals/2023/101923/80378.pdf

Zoning Amendment: Voter Referendum

Petition must identify city or township of residence.

Case: *Wickman v. Norway Twp. Clerk*

Court: Michigan Court of Appeals (2024 Mich. App. LEXIS 5611 (July 18, 2024, Decided))

The court held that the trial court correctly granted defendants-Township Clerk and Township Board (the Board) summary disposition of plaintiff's complaint for mandamus. Plaintiff sought to compel defendants to put a referendum on the Township ballot as to a zoning ordinance the Board "passed despite the fact that he and other signature gatherers failed to identify their city or township of residence." The trial court dismissed his complaint for mandamus and a preliminary injunction.

On appeal, the court rejected his argument that the trial court erred by finding MCL 168.544c required strict compliance and then striking his and other signature gatherers' petition sheets as failing to comply with its formal requirements. A "petition sheet must strictly comply with MCL 168.544c. MCL 168.544c requires a circulator to indicate the circulator's city or township in the circulator's certification. By listing" an unincorporated village instead of his township or city of residence, he failed to comply with this requirement. Thus, the "signatures contained on his deficient sheets are invalid."

The court also rejected his claim that the trial court erred by applying the statute as written. "The trial court correctly concluded that the mandatory language in these cross-referenced statutory provisions imposed requirements and left no room for 'substantial compliance.'" The court next found that plaintiff's petition sheets did not strictly comply with the Michigan Election Law when he did not indicate his city or township. "Because the circulator's failure to fill in or incorrect entry of information regarding the elector's city or township is not one of the explicit exceptions that do not affect the validity of a circulator's certification, and through it, the validity of the petition sheet, [plaintiff's] failure to indicate his city or township when filling out the certification is not an error that can be excused."

In addition, by "failing to meet the requirements of MCL 168.544c(1), [his] petition sheets do not meet the requirements of MCL 168.482, because he listed an unincorporated village instead of his township or city of residence. Any signatures obtained on his petition sheets are invalid." Finally, because he did not establish "that his petition sheets complied with form and content requirements, his sheets are not valid, and the petition does not have enough valid signatures to be placed on the ballot." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 81948, July 19, 2024

Full Text: https://www.michbar.org/Portals/0/opinions/appeals/2024/071824/81948.pdf

Court, Ripeness for Court's Jurisdiction, Aggrieved Party

Circuit Court standard of review for a gravel mine SLU (where ordinance does not provide for appeal to ZBA).

Case: *Top Grade Aggregates, LLC v. Township of Richland*

Court: Michigan Court of Appeals (2023 Mich. App. LEXIS 4474, 2023 WL 4144564 (June 22, 2023, Decided)

The court held that the circuit court erred by affirming the decision of appellee-Township Planning Commission denying appellants-property and gravel pit owners' request for a special use permit (SUP). Appellee denied appellants' request for a SUP to mine gravel on 292 acres of land owned by appellant-Liberty within the Township. The circuit court affirmed. The court agreed with appellants that the circuit court erred by reviewing the Township Planning Commission's decision under the standard applicable to an appeal from a decision of a zoning board of appeals (ZBA). "[A]lthough the circuit court acknowledged that the order appealed was that of the Township's Planning Commission and not a decision of a [ZBA], the circuit court nonetheless applied the review standard under MCL 125.3606 applicable to an appeal from a" ZBA.

In a case such as this, when "the decision appealed is a decision of a planning commission and no right of appeal to a [ZBA] exists, the appeal is reviewed under the standard articulated in Const 1963, art 6, § 28 and MCR 7.122(G)(2)." As such, the circuit court "erred by applying the standard set forth in MCL 125.3606, applicable to appeals from a" ZBA. The court disagreed with appellees' contention that "*Krohn* means that an appeal from a decision of a planning commission to circuit court where no appeal to a [ZBA] exists must be reviewed by the circuit court under MCL 125.3606[.]" Having resolved the case on jurisdictional grounds, "the discussion of the proper review standard was not necessary to this Court's decision in *Krohn*," which it declined to follow. And because the circuit court's "ruling was devoid of any actual analysis under either set of review standards, but instead was conclusory in nature[,]" the error was not harmless.

Finally, the court rejected appellants' claim that the circuit court should have reviewed the Planning Commission's decision *de novo*, noting that a circuit court "reviewing a challenged zoning decision of a planning commission regarding gravel mining is . . . required to apply the review standard of Const 1963, art 6, § 28 and MCR 7.122(G)(2), to determine whether [it] properly denied a request for a [SUP] in accordance with MCL 125.3205." Vacated and remanded. (Source: State Bar of Michigan *e-Journal* Number: 79714; July 7, 2023.)

Full Text: http://www.michbar.org/file/opinions/appeals/2023/062223/79714.pdf

Neighbors meet standard for aggrieved party, ZBA decision upheld to approve maintenance building/accessory use.

Case: *Posa v. Charter Twp. of Northville*

Court: Michigan Court of Appeals (2024 Mich. App. LEXIS 2994, 2024 WL 1689533 (April 18, 2024, Decided)

The court held that plaintiffs were aggrieved by the "ZBA's decision and had standing to challenge it in the circuit court." Also, the circuit "court properly analyzed the maintenance facility as an accessory use

rather than an accessory building or structure." Plaintiffs' claims as to compliance with zoning ordinances lacked merit. Finally, the circuit court did not err by allowing the special land use applicant, Meadowbrook Country Club (MCC), to intervene in plaintiffs' appeal from the ZBA's decision. Thus, the court affirmed the circuit court's order affirming the decision of the ZBA approving defendant-Township's grant of special land use to MCC.

MCC, which owns a golf course, applied for approval to construct a 16,100 square-foot maintenance facility. As to whether plaintiffs were "aggrieved" by the ZBA's decision, the court applied the *Saugatuck Dunes* criteria. It noted that "plaintiffs have taken a position in the contested decision opposing the special land use approval with public comment and through their attorney at every stage of the decision. [They] have claimed protected property rights involving the use of their residential properties will 'likely be affected' by the approval of MCC's project on the MCC land closest to their homes." The court noted that although MCC "claimed maintenance operations at the golf course would not increase, the maintenance building specifications include a new driveway by which the tractors-trailers will enter the MCC property. This driveway is closer to plaintiffs' properties than Meadow Court, which provided access to the previous maintenance facilities. Further, though MCC characterizes the new maintenance building as mitigating the impacts of the maintenance operations . . . the maintenance equipment will be leaving from the new building, as early as 5:30 a.m." The court noted that "this was not the case before, because the maintenance area was spread over a larger area, centered farther from the residences."

It concluded that "because plaintiffs cited increased noise, particularly early morning noise, from the tractor trailers and maintenance equipment as likely burdens and presented evidence to support that this noise would be brought closer to their homes by the construction of the maintenance building adjacent to their small neighborhood, these concerns are not 'mere generalizations,' which cannot constitute special damage." However, the court agreed "with the circuit court that this proposed facility is an 'accessory use.'" The court deemed "a maintenance facility as being related to a clubhouse in that it is not part of the land upon which golf is played but it is important to the course's operations." And it held that the ZBA's conclusion that the required special use standards "were satisfied was supported by competent, material, and substantial evidence." (Source: State Bar of Michigan *e-Journal* Number: 81464; April 30, 2024)

Full Text: https://www.michbar.org/Portals/0/opinions/appeals/2024/041824/81464.pdf

Health Club has standing to appeal daycare post *Saugatuck Dunes/Tuscola* rulings.

Case: *Beverly Hills Racquet & Health Club, Ltd. v. Village of Beverly Hills Zoning Bd. of Appeals*

Court: Michigan Court of Appeals (2024 Mich. App. LEXIS 5048, 2024 WL 3216459, June 27, 2024, Decided).

The court held that while appellant-Beverly Hills Racquet and Health Club (BHC) lacked standing to challenge one of the two zoning variances at issue, it had standing to challenge the other. It also concluded the circuit court correctly rejected BHC's arguments that two nonparties (the applicants) were not aggrieved persons who could seek a variance from the BHZBA. A planned childcare facility was involved in this dispute. The applicants successfully sought multiple zoning variances. After unsuccessfully objecting to the grant of the variances, BHC appealed to the circuit court, which ruled that BHC lacked standing to appeal.

One of the variances at issue allowed "for a smaller-than-required outdoor play area" and the other allowed "closer proximity to another licensed childcare facility". While BHC lacks standing to challenge the play area variance, it has standing to challenge the proximity variance. The court noted that BHC

seemed "to abandon any challenge to the play area variance, focusing only on the proximity variance". Regardless, the court concluded it clearly could not establish standing as to this variance. "BHC's only claim of special damages is financial; BHC claims that granting the variances will cause them to lose business. We can discern no basis upon which to conclude that allowing the applicants to have a smaller outdoor play space would harm BHC's business prospects."

But as to the proximity variance, the court found Tuscola "controlling, and the takeaway from Tuscola is that the Saugatuck Dunes test is a low bar." The court determined that "the potential for harm to the health club requires smaller leaps of logic" than were required in Tuscola – "it is reasonable to infer that the presence of a facility across the street offering the same services as BHC's facility would cause people who would otherwise patronize BHC to instead patronize the business across the street.

The Tuscola decision suggests that even one parent dropping their kids across the street who would otherwise have used BHC is enough to establish special damages. BHC's concerns might not ultimately warrant relief, but they were sufficient to support its status as an aggrieved party with a statutory right to appeal to the circuit court." Reversed and remanded for consideration of the merits of BHC's appeal and a determination of whether competent, material, and substantial evidence on the record supported the BHZBA's decision. (Source: State Bar of Michigan *e-Journal* Number: 81866; July 12, 2024

Full Text: https://www.michbar.org/Portals/0/opinions/appeals/2024/062724/81866.pdf

Zoning Administrator/Inspector, Immunity, and Enforcement Issues

On remand from Supreme Court, Court upholds ZBA decision to prohibit chicken-coop

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

Court: MI Court of Appeals, 2024 Mich. App. LEXIS 5043, 2024 WL 3216449, June 27, 2024, Decided.

On remand from the Supreme Court, the court concluded "the circuit court did not err by affirming the ZBA's decision to deny plaintiffs' request to keep chickens and a coop on their residential property because the accessory use and accessory structures did not comply with" the applicable zoning ordinance. The record reflected that the ZBA's decision was "supported by competent, material, and substantial evidence." The ZBA relied on the information provided by a neighbor, nonparty-G, "to conclude that 'the use of the accessory structure is inappropriate for the neighborhood and the location will hinder and discourage the adjacent neighbor to live in harmony on their property due to issues associated with the proposed use.'

As such, the accessory structure failed to comply with" Zoning Ordinance § 42-7.6.6. Plaintiffs focused only on the issues of G's "allergies and the visibility of the chicken coop, but [G] listed several other ways in which the chicken coup would hinder her use of her property and ability to live in harmony, including the odor, noise, risk of predators, risk of disease, and decreased property values." While another witness disagreed with G "and expressed support for plaintiffs having the chicken coop, the information provided by [G] supported the ZBA's factual findings which must be affirmed, even if alternative findings could have been supported by the record."

Lastly, although plaintiffs did "not challenge the sufficiency of the ZBA's findings, the ZBA did not 'merely repeat the conclusionary language of the zoning ordinance without specifying the factual findings underlying the determination that the requirements of the ordinance were satisfied in the case at hand.'" The court held that even "though the ZBA did not address each requirement listed in the ordinance, not all were applicable." It concluded that the "circuit court appropriately reviewed the record and applied

correct legal principles. The circuit court did not misapprehend or grossly misapply the substantial-evidence test to the ZBA's factual findings." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 81863; July 10, 2024)

Full Text: https://www.michbar.org/Portals/0/opinions/appeals/2024/062724/81863.pdf

Aggregates, sand, gravel mining

Circuit Court standard of review for a gravel mine SLU (where ordinance does not provide for appeal to ZBA).

Case: *Top Grade Aggregates, LLC v. Township of Richland*

Court: Michigan Court of Appeals (2023 Mich. App. LEXIS 4474, 2023 WL 4144564 (June 22, 2023, Decided))

The court held that the circuit court erred by affirming the decision of appellee-Township Planning Commission denying appellants-property and gravel pit owners' request for a special use permit (SUP). Appellee denied appellants' request for a SUP to mine gravel on 292 acres of land owned by appellant-Liberty within the Township. The circuit court affirmed. The court agreed with appellants that the circuit court erred by reviewing the Township Planning Commission's decision under the standard applicable to an appeal from a decision of a zoning board of appeals (ZBA). "[A]lthough the circuit court acknowledged that the order appealed was that of the Township's Planning Commission and not a decision of a [ZBA], the circuit court nonetheless applied the review standard under MCL 125.3606 applicable to an appeal from a" ZBA.

In a case such as this, when "the decision appealed is a decision of a planning commission and no right of appeal to a [ZBA] exists, the appeal is reviewed under the standard articulated in Const 1963, art 6, § 28 and MCR 7.122(G)(2)." As such, the circuit court "erred by applying the standard set forth in MCL 125.3606, applicable to appeals from a" ZBA. The court disagreed with appellees' contention that "*Krohn* means that an appeal from a decision of a planning commission to circuit court where no appeal to a [ZBA] exists must be reviewed by the circuit court under MCL 125.3606[.]" Having resolved the case on jurisdictional grounds, "the discussion of the proper review standard was not necessary to this Court's decision in *Krohn*," which it declined to follow. And because the circuit court's "ruling was devoid of any actual analysis under either set of review standards, but instead was conclusory in nature[,]" the error was not harmless.

Finally, the court rejected appellants' claim that the circuit court should have reviewed the Planning Commission's decision *de novo*, noting that a circuit court "reviewing a challenged zoning decision of a planning commission regarding gravel mining is . . . required to apply the review standard of Const 1963, art 6, § 28 and MCR 7.122(G)(2), to determine whether [it] properly denied a request for a [SUP] in accordance with MCL 125.3205." Vacated and remanded. (Source: State Bar of Michigan *e-Journal* Number: 79714; July 7, 2023.)

Full Text: http://www.michbar.org/file/opinions/appeals/2023/062223/79714.pdf

Substantiating the "need" for aggregates: competent, material and substantial evidence

Case: *Northstar Aggregates, LLC v. Watson Twp.*

Court: Michigan Court of Appeals (2023 Mich. App. LEXIS 5340, 2023 WL 4830432 (July 27, 2023, Decided))

Concluding that the circuit court clearly erred as "to the issue of 'need' and engaged in an inadequate examination on the matter of 'very serious consequences,'" the court reversed the order affirming the decision of defendant-WTPC denying plaintiff's SUP application, and remanded. Plaintiff sought a SUP "to operate a sand and gravel mining business on certain real property located within the boundaries of" defendant-township that was zoned low-density residential. For purposes of MCL 125.3205(4), there was no dispute that valuable natural resources are located on plaintiff-Northstar's property.

"Northstar's 'need' analysis focused on [its] need, not the market served by Northstar." The court held that "in order for the sand and gravel or aggregate to be needed by Northstar, it had to be requisite, desirable, or useful, and there had to be a lack of aggregate such that a supply was required." The court found that as "to the WTPC's fact-finding on the issue of 'need,' the WTPC's actual findings were sparse." The court concluded the circuit court clearly erred by ruling "that there was competent, material, and substantial evidence on the whole record supporting the WTPC's factual finding that Northstar did not have a need for the natural resources located on its property." It also determined "that the circuit court's ruling on the issue of 'very serious consequences' was woefully inadequate."

The court noted it was "not holding that the circuit court's ruling on the matter constituted error, but on remand" it needed to address the "distinctions between the competing studies and reports." More importantly, the court concluded that even assuming "the circuit court properly found that there was competent, material, and substantial evidence demonstrating that Northstar's planned mining operation would decrease property values in the township, the [circuit] court failed to take the necessary next step in the analysis." The court held that the circuit court "was tasked with assessing whether there was identifiable competent, material, and substantial evidence supporting the WTPC's particular findings on the various issues, which [it] did not do, except in connection with the property-value issue, and even then [its] analysis was inadequate and incomplete."

Finally, the court noted "the circuit court appeared to accept Northstar's contention that the vote on its SUP application was predetermined as gleaned by comments and remarks made by WTPC members. But [it] made short shrift of" this issue, which went to "whether the WTPC's decision was arbitrary and capricious." (Source: State Bar of Michigan *e-Journal* Number: 79934; August 7, 2023)

Full Text: http://www.michbar.org/file/opinions/appeals/2023/072723/79934.pdf

Marijuana Related

Medical marijuana grower facility prohibited in Detroit's drug-free zone

Case: *Green Acres Collective, LLC v. City of Detroit*

Court: Michigan Court of Appeals (2023 Mich. App. LEXIS 5368, 2023 WL 4828437 (July 27, 2023, Decided).

The court concluded that the circuit court properly affirmed the BZA's decision that appellant could not operate a MMGF on its property because it was in a drug-free zone. The BZA complied with the law and its decision was supported by competent, material, and substantial evidence. The BZA affirmed the determination of appellee-City's BSEED "that appellant is located in a drug-free zone, as defined in Detroit Ordinances, § 50-16-172, and thus cannot operate a" MMGF. The court noted that the BSEED's assertion that an entity called the Generators Club was a school was not upheld below. and the court disagreed "that a drug-free zone is determined by looking at how the property is zoned or its legal use. Rather, it is necessary to consider how it is operating.

The BZA correctly refused to uphold the BSEED's determination that the Generators Club was a school, despite its legal land use designation, and the circuit court did not err." Appellant contended "the BZA's determination that the Generators Club is a youth activity center was outside the scope of its review, not supported by the evidence, and not supported by sufficient findings and reasoning." The court noted testimony "that the Generators Club holds youth activities at the building 10 to 15 times a year" and that activities are also "held outside the building, at other locations.

This evidence, along with the other testimony, was substantial evidence that the Generators Club's primary purpose was to provide recreational activities for minors." Finally, appellant argued "that the BZA's findings were not sufficient and it failed to provide any reasoning for its decision." Unlike in *Reenders*, the BZA's decision did not lack "factual or logical support. The BZA did not merely repeat language of the ordinance without specifying findings underlying its determination. The record is sufficient to determine that its decision is supported by competent, material, and substantial evidence, and appellant was not denied due process." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 79910: August 9, 2023)

Full Text: http://www.michbar.org/file/opinions/appeals/2023/072723/79910.pdf

Challenge to marijuana business ordinance, 700-foot buffer, scoring rubric.

Case: *Golden Rockies, Inc. v. City of Utica*

Court: Michigan Court of Appeals (2023 Mich. App. LEXIS 7351, 2023 WL 6782537 (October 12, 2023, Decided))

The court held that the trial court did not err by denying plaintiff's motion for partial summary disposition and granting summary disposition for defendant-city. After its application to become a medical marihuana provider was denied, plaintiff sued the city alleging that its marihuana business ordinance was not properly enacted and that various provisions of the ordinance violated the MRTMA. The court rejected plaintiff's argument that the trial court erred by dismissing its claim that the city's marihuana business ordinance was not duly enacted under the city charter.

The trial court properly found that any claim that the ordinance "was not properly enacted should have been raised sooner, and that it would be inequitable to allow plaintiff to belatedly challenge the validity of the enactment procedure after" the city denied its application and awarded licenses to two competitors. "The trial court properly found that the necessary prejudice was established in this case because the city acted in reliance on the adopted and unchallenged ordinance in reviewing all of the submitted applications and awarding licenses to" the other applicants. As such, the trial court did not err by applying laches to preclude plaintiff from pursuing its claim that the ordinance was not properly enacted.

As the trial court noted, the mere requirement that a marihuana establishment be located at least 700 feet apart from another such establishment is not overly onerous, and there was no evidence that a 700-foot distance between marihuana establishments significantly limited potential locations for multiple establishments within the city

The court also rejected plaintiff's contention that the requirement of a 700-foot buffer zone between marihuana establishments in the ordinance is invalid because it conflicts with and is preempted by the MRTMA. "As the trial court noted, the mere requirement that a marihuana establishment be located at least 700 feet apart from another such establishment is not overly onerous, and there was no evidence that a 700-foot distance between marihuana establishments significantly limited potential locations for multiple establishments within the city." The trial court was also correct "that the requirement

would not otherwise subject potential licensees to unreasonable risks or require an inordinate investment of money, time, or other resources or assets that a reasonably prudent businessperson would decline to operate a marihuana establishment."

Finally, the court rejected plaintiff's argument that the scoring rubric in the ordinance conflicts with the MRTMA, finding the requirements "reflect unique and important local concerns specific to the community, and they 'fit neatly within a reasonable understanding of the MRTMA's "time, place, and manner" provision.'" Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 80342; October 20, 2023

Full Text: https://www.michbar.org/file/opinions/appeals/2023/101223/80342.pdf

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

Plaintiff's claim not frivolous: Dredging a channel within 100' of Lake Charlevoix, stays, appeals, zoning permit issued in error

Case: *Kozma v. Law*

Court: Michigan Court of Appeals (2024 Mich. App. LEXIS 1973, 2024 WL 1125408 (March 14, 2024, Decided))

Holding that "plaintiff's claim was not frivolous because it was sufficiently grounded in" fact and law, the court reversed the award of sanctions to defendants and remanded. The parties own parcels of lakefront property in a township. The case arose from plaintiff's efforts to prevent defendants from dredging the lakeshore and building a boathouse. The court noted "the trial court essentially assumed that the automatic-stay provision of MCL 125.3604(3) only applies to a specific zoning permit sought by a landowner." The trial court determined that absent "a pending permit for the dredging and boathouse project or facts showing that defendants may begin the project without applying for required permits, MCL 125.3604(3)" did not apply to plaintiff's claim. But the court concluded the MZEA supported her "argument that an appeal of a determination that no permit is necessary for a project triggers the automatic-stay provision."

While resolving the underlying issue may turn out to be a close question, there was legal merit to her assertion "the automatic-stay provision applies to construction while an appeal regarding a determination relating to the project is pending. The facts of this case demonstrate how excluding construction from the statute's application would be problematic and contrary to the purpose of allowing an appeal. In this case, had defendants actually begun dredging, there would have been no means to prevent the irreparable destruction of a portion of the lakeshore. Importantly, the [ZBA] ultimately concluded" plaintiff's interpretation of the township "zoning ordinance was correct and that the ordinance prohibited dredging and the construction of boathouses on the shoreline.

Under the circumstances, plaintiff's claim was sufficiently grounded in law." The court further determined that her claim was "sufficiently grounded in fact to state a claim upon which relief could have been granted. [She] alleged facts in her amended complaint, supported by evidence offered in her initial verified complaint, to plausibly support the contention that defendants planned to begin dredging the shoreline before the" ZBA decided her appeal. The court held that the trial court abused its discretion in awarding defendants "costs and attorney fees because it committed legal and factual errors." (Source: State Bar of Michigan *e-Journal* Number: 81219; March 27, 2024)

Full Text: https://www.michbar.org/file/opinions/appeals/2024/031424/81219.pdf

Nuisance and other police power ordinances

Plaintiff had standing in nuisance case; abatement action based on violation of city's lighting ordinance

Case: *Hasenohrl v. Immaculate Conception of Traverse City*

Court: Michigan Court of Appeals (2024 Mich. App. LEXIS 3192, 2024 WL 1826047 (April 25, 2024, Decided))

The court held that plaintiff had standing to file a nuisance-abatement action against defendant, and that the trial court did not err by finding defendant's violation of the city's lighting ordinance constituted a nuisance per se. Plaintiff filed this action claiming defendant was in violation of the city's lighting ordinance. She asserted its lights were trespassing on her property, creating a nuisance, and interfering with her peaceful use and enjoyment of her property. The trial court agreed, finding she suffered "distinct and different effects from defendant's exterior lighting compared to the public in general '[d]ue to the location of Plaintiff's real property and its proximity to the School[.]'"

As such, it held that plaintiff had standing to pursue her nuisance action, and that defendant's exterior light fixtures violated the ordinances at issue and thus, constituted a nuisance per se. However, it found she failed to demonstrate a private nuisance as the "utility of exterior light outweighs the gravity of the alleged harm" she suffered. The trial court entered an order for equitable relief directing defendant to add "cut-off shielding" to its outdoor antique lights within 60 days and, until the installation of the shielding, to "maintain the current lumen output of 350."

On appeal, the court rejected defendant's argument that the trial court erred by finding plaintiff had standing, noting that because she "suffered 'distinct' and 'different' injuries from the general public who do not have a direct line of sight to the school, the trial court did not err by finding that plaintiff has standing to pursue her claim." The court also rejected defendant's claim that the trial court erred by finding its exterior light fixtures violated the city's ordinances and thus constituted a nuisance per se under MCL 125.3407. "The record shows that defendant maintains light fixtures on its property that violate the ordinance. Under MCL 125.3407, the use of land or a dwelling, building, or structure in violation of a zoning ordinance is a nuisance per se." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 81517 ; May 2, 2024)

Full Text: https://www.michbar.org/Portals/0/opinions/appeals/2024/042524/81517.pdf

Authors

This publication was developed in collaboration by:

- Mary Reilly, AICP, Educator, Michigan State University Extension, Government & Community Vitality Team
- Eric Warman, JD, Educator, Michigan State University, Government & Community Vitality Team

To find contact information for authors or other MSU Extension experts use this web page: http://msue.anr.msu.edu/experts.

Contacts

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

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.

Curtilage: 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'.

Defendant: A person or group accused of a having done something illegal (criminal or civil)

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

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

Injunction: (1) Law a judicial order restraining a person from an action, or compelling a person to carry out a certain act. **(2)** an authoritative warning.

Laches: unreasonable delay in asserting a claim, which may result in its dismissal.

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

Mandamus: 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'.

Plaintiff: A person who brings a legal action against another in a court of law.

For more information on legal terms, see Handbook of Legal Terms prepared by the produced by the Michigan Judicial Institute for Michigan Courts:

https://www.courts.michigan.gov/4a838f/siteassets/offices/mji/resources-for-trial-court-staff/holt.pdf