MICHIGAN STATE UNIVERSITY | Extension

Selected Planning and Zoning Decisions: 2014
May 2013-April 2014

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This public policy brief summarizes the important state and federal court cases and Attorney General Opinions issued between May 1, 2013 and April 30, 2014.

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Published Cases

(New law)

Restrictions on Zoning Authority

See also *Hucul Adver., LLC v. Charter Twp. of Gaines* on page 10.

THE Medical Marijuana/Marihuana case

Court: Michigan Supreme Court (297 Mich App 446, 450 n 1; 823 NW2d 864 (2012), lv gtd 493 Mich 957 (2013), February 6, 2014)

Case Name: *Ter Beek v City of Wyoming*

Judges: McCormack, Young Jr., Cavanagh, Markman, Kelly, Zahra, Viviano.

The Michigan Supreme Court affirmed the Court of Appeals' judgment which held the federal controlled substances act (21 USC 801 *et seq.*) (CSA) does not preempt §4(a) of the Michigan Medical Marihuana Act (MCL 333.26421 *et seq.*) (MMMA), but §4(a) preempts a local ordinance prohibiting medical marijuana as that directly conflicts with the MMMA. It appears regulation of the activity, as long as the regulations do not effectively prohibit, might still be done.

John Ter Beek, a resident of the city of Wyoming, filed an action in the Kent Circuit Court against the city, seeking to have a city zoning ordinance declared void and an injunction entered prohibiting its enforcement. The city's ordinance generally prohibited

uses that were contrary to federal law, state law, or local ordinance, and permitted punishment of violations by civil sanctions. Ter Beek was a qualifying patient and held a registry identification card under the MMMA. He wished to grow and use marijuana for medical purposes in his home and argued that §4(a) of the MMMA (MCL 333.26424(a)), which provides that registered qualifying patients shall not be subject to arrest, prosecution, or penalty in any manner for certain medical use of marijuana in accordance with the act, preempted the ordinance.

Both parties moved for summary disposition. Ter Beek argued that because the federal CSA, prohibited the use, manufacture, or cultivation of marijuana, the ordinance likewise prohibited the use, manufacture, or cultivation of marijuana for medical use and therefore conflicted with and was preempted by the MMMA. The city argued instead that the CSA preempted the MMMA.

The Kent County Circuit Court, (Judge Dennis B. Leiber) granted summary disposition in favor of the city, agreeing that the CSA preempted the MMMA. Ter Beek appealed.

The Court of Appeals (Judges Shapiro, Hoekstra, and Whitebeck) reversed, concluding that the ordinance conflicted with §4(a) of the MMMA and that the CSA did not preempt §4(a) because it was possible to comply with both statutes simultaneously and the state-law immunity for certain medical marijuana patients under §4(a) did not stand as an obstacle to the federal regulation of marijuana use (297 Mich App 446 (2012)[1]).

The Supreme Court granted the city leave to appeal (493 Mich 957 (2013)). In a unanimous opinion by Justice McCormack, the Supreme Court held: **The federal controlled substances act does not preempt §4(a) of the MMMA, but §4(a) preempts the ordinance because the ordinance directly conflicts with the MMMA.**

1. The Supremacy Clause of the United States Constitution (US Const, art VI, cl 2) invalidates state laws that interfere with or are contrary to federal law. Under 21 USC 903, which specifically addresses the CSA's preemption of state statutes, the relevant inquiry is whether there is a positive conflict between the federal and state statutes so that the two cannot consistently stand together. Such a conflict can arise when it is impossible to comply with both the federal and the state requirements or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

2. The CSA does not preempt §4(a) on the ground of impossibility preemption. Impossibility preemption requires more than the existence of a hypothetical or potential conflict. It results when state law requires what federal law forbids or vice versa. It is not impossible to comply with both the CSA and §4(a) of the MMMA. The CSA makes manufacture, distribution, or possession of marijuana a criminal offense under federal law. Section 4(a) of the MMMA does not require commission of that offense, however, nor does it prohibit punishment under federal law. Instead, if certain individuals choose to engage in MMMA-compliant medical use of marijuana, §4(a) provides them a limited state-law immunity from arrest, prosecution, or penalty, an immunity that could not and does not purport to prohibit the federal criminalization of, or punishment for, that conduct.

3. Section 4(a) does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the CSA, and the CSA accordingly does not preempt §4(a) on that ground. A state law presents an obstacle to a federal law if the purpose of the federal law cannot otherwise be accomplished. Under the CSA, Congress categorized marijuana as a Schedule I controlled substance, thereby designating it as contraband for any purpose and indicating that it has no acceptable medical uses. Michigan also has designated marijuana as a Schedule 1 controlled substance, and its possession, manufacture, and delivery remain punishable offenses under Michigan law. In enacting the MMMA, however, the people of the state chose to part ways with Congress only regarding the scope of acceptable medical use of marijuana, allowing a limited class of individuals to engage in certain uses in an effort to provide for the health and welfare of Michigan citizens. While the MMMA and the CSA differ with respect to the medical use of marijuana, the limited state-law immunity for that use under §4(a) does not frustrate the CSA's operation or prevent its purpose from being accomplished. The immunity does not purport to alter

[1] 297 Mich App 446 (2012) is reported in pages 2-3 of the May 2012-April 2013 summary of cases: http://lu.msue.msu.edu/pamphlet/Blaw/SelectedPlan&ZoneDecisions2012-13.pdf (found at web page http://lu.msue.msu.edu/pamphlet/Blaw/SelectedPlan&ZoneDecisions2012-13.pdf).

the CSA's federal criminalization of marijuana or interfere with or undermine federal enforcement of that prohibition. Moreover, by expressly declining in 21 USC 903 (CSA) to occupy the field of regulating marijuana, the CSA explicitly contemplates a role for the states in that regard, and there is no indication that the purpose or objective of the CSA was to require states to enforce its prohibitions.

4. The city's local ordinance is preempted by §4(a). Under the Michigan Constitution (Const 1963, art 7, §22) a municipality's power to adopt resolutions and ordinances relating to its municipal concerns is subject to the Constitution and the law. A municipality is therefore precluded from enacting an ordinance if the ordinance directly conflicts with the state's statutory scheme or if the statutory scheme preempts the ordinance by occupying the field of regulation that the municipality seeks to enter, to the exclusion of the ordinance, even if there is no direct conflict between the two schemes of regulation. A direct conflict exists when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits. The city's ordinance directly conflicts with the MMMA by permitting what the MMMA expressly prohibits: the imposition of any penalty, including a civil one, on a registered qualifying patient whose medical use of marijuana falls within the scope of the immunity granted under §4(a).

Thus, the Michigan Supreme Court affirmed the Court of Appeals' judgment which reversed the summary disposition in favor of the city. The case was remanded to the circuit court for entry of summary disposition in favor of Ter Beek.

The decision was unanimous, there was not any dissent.

An important footnote (*9) also explains:

> . . . this outcome does not "create a situation in the State of Michigan where a person, caregiver or a group of caregivers would be able to operate with no local regulation of their cultivation and distribution of marijuana." Ter Beek does not argue, and we do not hold, that the MMMA forecloses all local regulation of marijuana; nor does this case require us to reach whether and to what extent the MMMA might occupy the field of medical marijuana regulation.

Source: Supreme Court's syllabus prepared by the Reporter of Decisions: Corbin R. Davis, used with permission from the Michigan Supreme Court Office of Public Information.

For More background information and for links to this case's briefs and *Amicus Briefs*:
http://courts.mi.gov/courts/michigansupremecourt/oral-arguments/2013-2014/pages/145816.aspx

Copy of the syllabus and court case:
http://lu.msue.msu.edu/pamphlet/Blaw/MMMA%20TerBeek%20v%20Wyoming_145816opinion.pdf

Copy of updated *Land Use Series* "Restrictions on Zoning Authority":
http://lu.msue.msu.edu/pamphlet/Blaw/AcrobatZoningCanNot.PDF

Local Regulation not preempted from liquor control regulation

Court: Michigan Court of Appeals (Published No. 302931, 302 Mich. App. 505; 838 N.W.2d 915; 2013 Mich. App. LEXIS 1524, August 6, 2013 (Review by the Michigan Supreme Court was denied))

Case Name: *Maple BPA, Inc. v. Charter Twp. of Bloomfield*

The court held that "state law does not preempt the field of liquor control regulation" and that the plaintiff did not provide any evidence allowing the trial court to conclude that the defendant-township's ordinance was arbitrary and capricious. The ordinance was constitutional, and it was uniform under the Michigan Zoning Enabling Act (MZEA) (MCL 125.3101 *et seq.*). Thus, the appeals court affirmed the trial court's order granting defendant summary disposition.

Plaintiff's property contained a mix of land uses, including gasoline fuel pumps and a convenience food store. Under the ordinance, "retail package outlets" are a permitted use in the zoning district. "A retail package outlet is any building in a commercial business district that is allowed to sell packaged alcohol as an ancillary use of the business." Plaintiff applied to the Michigan Liquor Control Commission (MLCC) for a specially designated merchant license, which allows the holder to engage in the retail sale of beer and wine for off-premises consumption. The MLCC denied the application on the basis plaintiff did not comply with defendant's zoning ordinance.

Plaintiff sought a declaratory judgment that state law preempted the ordinance, the ordinance violated the MZEA, and it violated plaintiff's rights to due process and equal protection. Plaintiff argued, *inter alia*, that the state granted the MLCC exclusive control over the sale of alcoholic beverages and thus, state law expressly preempted the ordinance.

The appeals court disagreed, noting that Michigan Administrative Code R 436.1003 & R 436.1005(3) provide that "an application for a liquor license 'shall be denied if the commission is notified, in writing, that the

application does not meet all appropriate . . . local . . . zoning . . . ordinances . . . .'" The court concluded that the MLCC's decision to recognize local zoning authority indicated that "the Legislature did not intend to preempt every local zoning statute that concerns alcoholic beverage sales." Thus, the state "has not expressly provided that its authority to regulate the field of liquor control is exclusive."

The appeals court also rejected plaintiff's claim that the state statute and the ordinance directly conflict, concluding that *Noey v. Saginaw* was distinguishable.

> Unlike in *Noey*, here, the Legislature has not expressly spoken concerning the sale of alcohol in buildings with drive-through windows, the minimum building area of buildings at which alcohol is sold, or the number of parking spaces a building requires. To the extent that the Legislature has expressly spoken on this issue,

defendant's zoning ordinance was not more restrictive. "The ordinance mirrors the statutory language - it does not provide any further constraint, or prohibit what the statute permits." (Source: State Bar of Michigan e-Journal Number:55209, August 13, 2013 and Number 55437, September 23, 2013.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2013/080613/55209.pdf

One of THE Right to Farm cases: Person claiming Right to Farm affirmative defense has burden of proof by preponderance of evidence

Court: Michigan Court of Appeals (Published Nos. 306575 and 306583, 302 Mich. App. 483; 838 N.W.2d 898; 2013 Mich. App. LEXIS 1525, September 19, 2013)
Case Name: *Lima Twp. v. Bateson*

The court held that the trial court erred in granting the appellee-Lima Township's motion for summary disposition because the trial court erred in applying Michigan's Right to Farm Act (RTFA) (MCL 286.471 *et seq.*) and there were genuine factual issues as to whether appellants' activities were protected under the RTFA. The court also held that the RTFA is an affirmative defense and that the party relying on the defense has the burden of proof by a preponderance of the evidence. Further, the evidence presented by the parties required the trial court to weigh all of the evidence and articulate findings of fact to determine whether appellants proved by a preponderance of the evidence that the alleged nuisance conditions and activities arose from the commercial production of trees. It erred in failing to do so.

Appellant-Gough, appellant-Bateson's wife, purchased approximately 30 acres of land zoned AG-1 (agricultural) in Lima Township (the property). Later, Lima filed a complaint for injunctive relief against appellants, alleging improper use of the property and improper storage of commercial vehicles, materials, and equipment on the property. Lima alleged that Bateson was using the property to conduct commercial business operations and store commercial vehicles and equipment. Lima claimed that these uses were not permitted under the Lima Township Zoning Ordinance (LTZO) and were a nuisance *per se*.

On the same day Lima filed its complaint, Gough filed a complaint for declaratory relief against Lima, alleging that she and Bateson were developing a tree farm on the property, activity that was permitted in the AG-1 zone. Gough alleged that she had certain materials, supplies, equipment, and vehicles delivered to the property for purposes of preparing the property for the tree farm. Gough requested an order declaring that she was permitted to maintain the equipment on the property. On appeal, appellants contended that summary disposition was inappropriately granted in favor of Lima because the trial court made credibility determinations and resolved factual disputes. The trial court held an evidentiary hearing where both parties presented evidence. It then proceeded to make findings based on that evidence by concluding that appellants' activities were prohibited under the LTZO and not protected by the RTFA. Based on those findings, the trial court granted summary disposition in favor of Lima. The court held that this amounted to error. Reversed and remanded. The court retained jurisdiction and provided an order as to the further proceedings.

In reviewing this case the Appeals Court reviewed the RTFA, and made the following points:

1. However, "[u]nder the RTFA, a farm or farming operation cannot be found to be a nuisance if it meets certain criteria. . . ." (MCL 125.3407; *Travis v Preston*, 249 Mich App 338, 351; 643 NW2d 235 (2002) at 342-343.)
2. > … we hold that a party relying on the RTFA as a defense in a nuisance action has the burden to prove that the challenged conduct is protected under the RTFA.
3. In keeping with our State's jurisprudence on the applicable *standard* of proof, [because the RTFA is silent and there is no published case

law addressing the issue] we hold that, where a party asserts the RTFA as a defense, the party asserting the defense bears the burden to prove by a *preponderance of the evidence* that the challenged conduct is protected under the RTFA. [emphasis and brackets added]

4. it is clear that in determining whether an activity is protected under the RTFA, a two-prong analysis is required: first, the activity must constitute either a "farm" or a "farm operation," and second, the "farm" or "farm operation" must conform to the applicable generally accepted agricultural and management practices. (GAAMPs).
5. As noted above, in order for a party to successfully assert the RTFA as a defense, that party must prove the following two elements: (1) that the challenged condition or activity constitutes a "farm" or "farm operation" and (2) that the farm or farm operation conforms to the relevant GAAMPs.

"Farm" and "farm operation" means the land, plants, animals, buildings, structures, machinery, and so on which are used in the **"commercial production"** of **"farm products"** and is not limited to a longer list of activities and operations found in the RTFA (MCL 286.472.)

6. . . . . under "the plain language of the RTFA, a farm or farming operation cannot be found to be a nuisance if it is commercial in nature and conforms to GAAMPs . . . . (*Shelby Twp v Papesh*, 267 Mich App 92, 107; 704 NW2d 92 (2005)) at 101.)
7. This Court has previously defined "commercial production" as "the act of producing or manufacturing an item intended to be marketed and sold at a profit." (*Shelby* at 101.) However, "there is no minimum level of sales that must be reached before the RTFA is applicable." (*Shelby* at 101 n 4.)
8. If a party asserting an RTFA defense successfully proves that they maintain a farm or are engaged in a farm operation, then the party must also prove that the farm or farm operation complies with applicable GAAMPs "according to policy determined by the Michigan commission of agriculture." MCL 286.473(1). A party can satisfy this element by introducing credible testimony or other evidence to show that their farm or farm operation complies with applicable GAAMPs as set forth by the Michigan Commission of Agriculture.

Thus trees are "farm products", but not resolved is if the appellants' showed a preponderance of evidence of intent to produce trees for sale. Also the compliance with GAAMPS was not established in the trial court (the the appellants (the farmer) having the burden of proof). In a footnote the court said:

> If, on remand, the trial court determines that appellants are engaged in the commercial production of a farm product, then the LTZO is inapplicable. See *Travis v. Preston*, 249 Mich App at 344. However, if the trial court determines that the RTFA does not apply, before awarding injunctive relief, it should articulate findings as to whether appellants are in violation of the LTZO. See id. at 351; MCL 125.3407. (p. 10, n. 7)

For those interested in RTFA case law, this court case is worth reading in its entirety.

(Source: State Bar of Michigan e-Journal Number:55435, September 23, 2013.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2013/091913/55435.pdf

Road Commission permit not preempted by Right to Farm

Court: Michigan Court of Appeals (Published No 308486, 303 Mich. App. 12; 840 N.W.2d 186; 2013 Mich. App. LEXIS 1751, October 24, 2013)

Case Name: *Sena Scholma Trust v. Ottawa Cnty. Rd. Comm'n*

The court held that the plaintiffs were not entitled to any relief under the driveways, banners, events and parades act ("the Driveway Act") (MCL 247.321 *et seq.*) or the Right to Farm Act (RTFA) (MCL 286.471 *et seq.*), and reversed and remanded for entry of judgment in favor of defendant-Ottawa County Road Commission (Road Commission) (OCRC).

After a bench trial, the trial court entered an order requiring the Road Commission to allow the plaintiffs reasonable access to a 30-acre parcel of undeveloped land from Horizon Lane (a temporary cul-de-sac in an adjacent subdivision) for farm operations. Traditional access to the 30 acres was from 56th Avenue, but that access has been hampered from wet conditions during spring). The plaintiff-Trust owns the property and plaintiff-Morren farms it. The plaintiffs submitted a permit application to the Road Commission for a field driveway from Horizon Lane. After the Road

Commission denied the permit application, plaintiffs sued.

Plaintiffs requested declaratory relief for violations of the Driveway Act and the RTFA. The Driveway Act enables city, village, and county road commissions the ability to promulgate rules for driveways, banners, events, and parades. That may be done by adopting rules formulated by the Michigan Department of Transformation or adopting local rules. In this case the Road Commission adopted its own rules. The RTFA (MCL 286.474(6) reads:

> Beginning June 1, 2000, except as otherwise provided in this section, it is the express legislative intent that this act preempt any local ordinance, regulation, or resolution that purports to extend or revise in any manner the provisions of this act or generally accepted agricultural and management practices developed under this act. Except as otherwise provided in this section, a local unit of government shall not enact, maintain, or enforce an ordinance, regulation, or resolution that conflicts in any manner with this act or generally accepted agricultural and management practices developed under this act.

The trial court held that under the Driveway Act, the Road Commission was required to consider the RTFA and the agricultural aspects of some of the property because the statutes work "hand in hand." Further, the trial court held that the Road Commission was required to grant plaintiffs access to the property from Horizon Lane. The Road Commission appealed.

The Appeals Court disagreed where "the OCRC's denial of the permit application had a sufficient reasoned basis and evidentiary support. The decision was not a totally unreasonable exercise of power by the OCRC." Thus, plaintiffs were not entitled to any relief under the Driveway Act. The court also held that the RTFA was not implicated by defendant's actions. This case was similar to *Papadelis v. City of Troy* (478 Mich 934; 733 NW2d 397 (2007)) (*Papadelis IV*), where the Michigan Supreme Court held that the RTFA did not exempt the plaintiffs from a zoning ordinance governing the requirements for construction of a building used for agricultural purposes. Here, "nothing in the RTFA or the GAAMPS [generally accepted agricultural and management practices] addresses the permitting or location of field driveways."

> Further, the Legislature intended the RTFA to be used as a shield by farmers. It enacted the RTFA to protect farmers from nuisance lawsuits. *Travis v. Preston (On Rehearing)*, 249 Mich App at 342-343; *Northville Twp*, 170 Mich App at 448-449; *Papesh*, 267 Mich App at 99. The RTFA provides a defense to farmers in order to protect their farms or farm operations when the farms or operations are claimed to be a nuisance, including for the reasons stated in MCL 286.473. *Id.* However, plaintiffs are not using the RTFA as a shield, and no one has claimed the farm to be a nuisance. Plaintiffs thus are not using the RTFA for its intended purpose of protecting a farming operation from an action by the OCRC (or anyone else). Rather, plaintiffs are using the RTFA as a sword, seeking to force the OCRC to grant them access to the property from Horizon Lane, because the conditions of the property, especially in early spring, make it difficult, less effective, or perhaps even sometimes impossible, to access the west side of the property from 56th Avenue. However, no provision of the RTFA requires a local unit of government to take affirmative action, and to thereby change the status quo, to allow or enable a farmer to more effectively comply with the GAAMPs.

Thus, no conflict existed between the Road Commission's denial of the permit application and the RTFA and the GAAMPs. The RTFA did not preempt the Road Commission's denial of the permit application and plaintiffs were not entitled to any relief under the RTFA. (Source: State Bar of Michigan e-Journal Number: 55669, October 28, 2013.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2013/102413/55669.pdf

See also *Selected Zoning Court Cases Concerning the Michigan Right to Farm Act*:
http://lu.msue.msu.edu/pamphlet/Blaw/SelectedPlan&ZoneCourt%20RTFA%201964-2006.pdf (found at web page http://lu.msue.msu.edu/pamphlets.htm#court)

Land Division Act does not preempt township land division regulations

Michigan Attorney General Opinion Number 7276, March 11, 2014

By its terms the Land Division Act (MCL 560.101 *et seq.*) does not preempt the broad authority granted townships under the Michigan Zoning Enabling Act, (MZEA) (MCL 125.3101 *et seq.*), and the township ordinance act (MCL 41.181) to adopt ordinances that regulate lands also subject to the Land Division Act. A township may thus adopt ordinances regulating parent parcels or parent tracts remaining after a land division,

or parcels affected by adjacent land transfers.

The Land Division Act authorizes a township to adopt depth to width ratios smaller than those imposed by the Act, with the exception that the application of depth to width ratios to the remainder of a parent parcel or parent tract is prohibited by the Act. MCL 560.109(1)(b). Further, a township may adopt depth to width ratios applicable to lands affected by adjacent land transfers under generally applicable township land use ordinances adopted pursuant to its statutory authority under the MZEA and MCL 41.181.

A local ordinance that does not substantively change the meaning of "exempt split" as defined in section 102(e) of the Land Division Act (MCL 560.102(e)) and does not otherwise conflict with the Land Division Act, is not preempted by the Act.

Full Text Opinion:
http://www.ag.state.mi.us/opinion/datafiles/2010s/op10355.htm

Existing shooting ranges must be allowed to continue

Court: Michigan Supreme Court (No. 145144, 495 Mich. 90; 2014 Mich. LEXIS 598, April 1, 2014)
Case Name: *Addison Twp. v. Barnhart*
Judge(s): CAVANAGH, YOUNG, JR., MARKMAN, KELLY, ZAHRA, MCCORMACK, AND VIVIANO

The Supreme Court held that, in order for MCL 691.1542a(2) of the Sport Shooting Range Act (SSRA) (MCL 691.1541 *et seq.*) to apply to a shooting range, it must "(1) be a sport shooting range that also existed as a sport shooting range as of July 5, 1994, and (2) the sport shooting range must operate in compliance with the generally accepted operation practices." The Court of Appeals erred in interpreting MCL 691.1541(d) when it held that "a shooting range owner cannot have a commercial purpose in operating a sport shooting range."

The court reversed the judgment of the Court of Appeals in *Barnhart I* (*Addison Twp. v. Barnhart* (Unpub.) (Barnhart I & II)) and vacated the judgment of the Court of Appeals in *Barnhart II*. After considering the evidence in the record, it held that Barnhart-defendant's shooting range is entitled to protection under MCL 691.1542a(2). Thus, it remanded to the district court for entry of an order dismissing the case.

The dispute arose out of defendant's operation of a shooting range on his property, allegedly in violation of a local zoning ordinance. In 1993, the plaintiff-township approved defendant's request to build a shooting range on his property because only he and his family would use it. In 2005, the township issued defendant a misdemeanor citation for operating the shooting range without a zoning compliance permit. The court held that, for a shooting range to fall within subsection (2), it must be a "'sport shooting range,' as defined by MCL 691.1541(d), that also existed as of the effective date of the SSRA amendment, July 5, 1994." Also, the sport shooting range must "operate in compliance with generally accepted operation practices."

Instead of addressing the district court's conclusion that defendant's activities on the shooting range were protected under MCL 691.1542a(2)(c), the Court of Appeals in *Barnhart I* "shifted the focus of the case, interpreting the definition of 'sport shooting range' under MCL 691.1541(d)." The court noted that, "in order for a shooting range to be a sport shooting range, it must have been 'designed and operated' for the use of the firearm-related activities that the Legislature referred to in MCL 691.1541(d) of the SSRA." Thus, it held that it was clear that the focus of the Legislature when defining the term "'sport shooting range' was on the shooting range's design and operation, which does not turn on individual shooters' intentions for using the shooting range." Further, because MCL 691.1541(d) defines a "sport shooting range" as "an area designed and operated for the use of" various sport shooting activities, "a shooting range owner's commercial purpose for operating a shooting range is irrelevant." Thus, the Court of Appeals erred by concluding that defendant's pecuniary purpose was "relevant, let alone dispositive, to the determination whether his shooting range was a sport shooting range as defined by MCL 691.1541(d)."

As to whether the shooting range was entitled to protection under MCL 691.1542a(2), the court held that it satisfied the criteria. On remand, the parties entered into a stipulated order, stating that the "property was used for recreational and business shooting range purposes, prior to the [SSRA]. Recreational shooting uses started before the business use but both came before the act." As the district court duly recognized, "a shooting range designed and operated for the use of recreational shooting activities plainly falls within the scope of sport shooting ranges contemplated by MCL 691.1541(d)." Thus, the court held that the shooting range existed as a sport shooting range before the effective date of MCL 691.1542a. Further, it did not believe that there was enough evidence indicating that the shooting range "stopped being operated within the

framework of MCL 691.1541(d) such that" it "should be deprived of protection under MCL 691.1542a(2)" which prevents local government regulation from closing down existing shooting ranges. (Source: State Bar of Michigan e-Journal Number:56781, April 3, 2014.)

Full Text Opinion:
http://www.michbar.org/opinions/supreme/2014/040114/56781.pdf

Takings

Low Density Zoning is not a Takings

Court: Michigan Court of Appeals (Published No. 305594, 2014 Mich. App. LEXIS 220, February 4, 2014)
Case Name: *Grand/Sakwa of Northfield, LLC v. Township of Northfield*

Concluding that each of the *Penn Central Transp. Co. v. New York City* factors weighed in the defendant-township's favor, the court held that the trial court did not err by finding that the rezoning of the property low-density residential did not constitute an unconstitutional regulatory taking. It also held that the evidence did not show that obtaining a litigation advantage was the predominate reason for the ordinance change and thus, the trial court did not clearly err by applying low-density residential zoning as the law of the case.

Plaintiffs-Lelands own 4 parcels of land totaling approximately 220 acres (the property). Before the events that gave rise to this dispute, the property was zoned Agricultural (AR), and had been farmed for over 100 years. After plaintiffs applied to rezone the property to Single-family residential (SR-1), and a successful referendum that left the property zoned AR, it was rezoned to low-density residential.

Plaintiffs argued that any zoning more restrictive than SR-1 constituted an unconstitutional governmental taking.

The court first rejected their claim that the trial court erred by ruling that their challenge went to the low-density residential classification in place when it made its decision rather than the AR classification in place when the suit was filed. As to their taking claim, *Penn Central* calls for the court to consider three factors -

> "the character of the government's action, the economic effect of the regulation on the property, and the extent by which the regulation has interfered with distinct, investment-backed expectations."

Penn Central provides that the

> "central question in analyzing the character of the governmental action is whether that action constituted a physical invasion."

It was undisputed that the actions of the township board did not create a physical invasion of plaintiffs' property. "Zoning regulations are not a physical invasion." *Penn Central* "cited zoning ordinances as 'the classic example' of government action affecting land interests and stated that such regulations are generally permissible." *Penn Central* further provided that the

> "'government may execute laws or programs that adversely affect recognized economic values[,]' and that a regulatory taking will not be found where a state tribunal reasonably concludes that the land-use limitation is in the general welfare, even if it 'destroy[s] or adversely affect[s] recognized real property interests.'"

Thus, the trial court did not clearly err by finding that the first prong of the *Penn Central* test weighed in the township's favor.

The court also held that there was sufficient evidence to allow the trial court to properly conclude that the diminution in value was not so significant as to weigh the second prong of the *Penn Central* test in plaintiffs' favor. Further, plaintiff-Grand/Sakwa

> "chose to purchase AR-zoned property upon which, according to its own arguments and expert testimony, it could not build an economically viable development. It made efforts to get the zoning changed and failed."

The court was unaware of any case law "that provides that monies expended in pursuit of a zoning change are, in themselves, grounds to claim a taking." Thus, the trial court did not clearly err in holding that the third *Penn Central* factor favored the township.

It also did not err by ruling for the township on plaintiffs' due process and equal protection claims. Affirmed. (Source: State Bar of Michigan e-Journal Number: 56375, February 6, 2014.)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2014/020414/56375.pdf

Open Meetings Act, Freedom of Information Act

Attorney Fees for Open Meeting Act Violation

Court: Michigan Court of Appeals (Published No. 306684, 303 Mich. App. 475; 843 N.W.2d 770; 2013 Mich. App. LEXIS 2202, December 19, 2013 (Appeal to the Michigan Supreme Court was denied))

Case Name: *Speicher v. Columbia Twp. Board of Trustees and Planning Commission*

In an order, the Appeals Court granted the plaintiff's motion for reconsideration and vacated the part of its prior opinion (see http://www.michbar.org/opinions/appeals/2013/012213/53749.pdf, unpublished, January 22, 2013) that found he was not entitled to attorney fees. In its opinion issued on reconsideration, it stated that it would find he was not entitled to attorney fees and costs under MCL 15.271(4) because he did not succeed in obtaining injunctive relief. However, pursuant to binding case precedent, he was entitled to attorney fees because the court had determined that he was entitled to declaratory relief. It noted its disagreement with the relevant cases and called for the convening of a special panel pursuant to MCR 7.215(J)(3).

In March 2010, the defendant-Columbia Township Board established that the regular meetings for both the Board and the defendant-Columbia Township Planning Commission would take place every month. However, at a October 16, 2010 Planning Commission meeting, the Commission discussed and decided to hold quarterly rather than monthly meetings beginning in 2011. MCL 15.265(3) of the Open Meeting Act (OMA) requires that changes to "the schedule of regular meetings of a public body be posted within 3 days after the meeting at which the change is made." However, it was clear from the record that defendants did not post notice of this change on or before October 21, 2011 - within 3 days of the October 18, 2011, meeting at which the Commission changed its regular meeting schedule.

In the original case before the Appeals Court the ruling was because defendants plainly violated the OMA by failing to post notice of changes to "the schedule of regular meetings of a public body . . . within 3 days after the meeting at which the change is made," the Appeals Court held that the trial court erred in failing to grant declaratory relief to plaintiff. The Appeals Court, upon first hearing further concluded that plaintiff failed to show his entitlement to injunctive relief and that, as a matter of law, the trial court correctly granted summary disposition in favor of defendants as to this request for relief. Thus, plaintiff was entitled to summary disposition and declaratory relief on this particular issue. Affirmed in part, reversed in part, and remanded.

Upon reconsideration the Appeals Court, in *Leemreis v. Sherman Twp.*, identified the three elements a plaintiff must satisfy in order to obtain attorney fees under the statute:

> (1) a public body must not be complying with the act, (2) a person must commence a civil action against the public body "for injunctive relief to compel compliance or to enjoin further noncompliance with the act," and (3) the person must succeed in "obtaining relief in the action."

Plaintiff met the first two elements. The issue was whether, when he obtained declaratory relief but not injunctive relief, he succeeded in "obtaining relief in the action."

The Appeals Court concluded that the phrase "obtaining relief in the action" in MCL 15.271(4) "refers not to a plaintiff's success in obtaining any relief, including declaratory relief, but instead, commands the award of costs and attorney fees only when the plaintiff has obtained injunctive relief." Thus, it

> would conclude that according to the plain meaning of the statute, a plaintiff can recover attorney fees and costs under MCL 15.271(4) only when a public body violates the OMA the plaintiff requests injunctive relief, and the plaintiff receives injunctive relief.

The Appeals Court would overrule its

> prior interpretations of MCL 15.271(4) that allow for the recovery of attorney fees when injunctive relief was not obtained, equivalent or otherwise, on the basis that this now common interpretation of MCL 15.271(4) is contrary to the plain and express language of the statute.

However, because it was required to follow cases like *Craig v. Detroit Pub. Schs. Chief Executive Officer*, *Herald Co. v. Tax Tribunal*, and *Nicholas v. Meridian Charter Twp. Bd.*, it remanded to the trial court to award plaintiff attorney fees and costs under MCL 15.271(4). (Source: State Bar of Michigan e-Journal Number: 56081, December 23, 2013)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2013/121913/56081.pdf

Signs: Billboards, Freedom of Speech

Prohibition of digital billboard not a 1st Amendment violation

Court: U.S. Court of Appeals Sixth Circuit (No. 12-2343, 14a0047p.06;, 2014 U.S. App. LEXIS 4479; 2014 FED App. 0047P (6th Cir.), February 5, 2014 [This appeal was from the WD-MI.])

Case Name: *Hucul Adver., LLC v. Charter Twp. of Gaines*

In a previously unpublished decision designated for publication, the court held that the defendant-Township's zoning ordinance, which prohibited the plaintiff from constructing a digital billboard within 4,000 feet of another digital billboard, did not violate the First Amendment. Further, the district court did not abuse its discretion by exercising supplemental jurisdiction over the Zoning Board of Appeals appeal.

The district court properly applied the "time, place, and manner" test to the plaintiff's First Amendment claim, rather than the test for commercial speech. The court held that the zoning ordinance constituted a valid "time, place, and manner" restriction on speech. The restriction was "content-neutral," seeking to "promote traffic safety and aesthetics and preserve property values, without reference to the content of the regulated speech." Also, the asserted governmental interests - "aesthetics, traffic safety, and the preservation of property values" - were significant. The court further held that the restriction was sufficiently "narrowly tailored."

The defendant-township was not required to follow the Michigan Highway Advertising Act (MHAA) (MCL 252.301-.323), which sets "'a minimum spacing requirement rather than a mandatory or maximum spacing requirement.'" Even though defendant "could reasonably have imposed a spacing requirement of less than 4,000 feet," this "does not render its choice unreasonable or substantially broader than necessary to achieve its goals." The court also noted that defendant justified its decision to treat digital billboards differently. As the district court explained (and plaintiff's witnesses acknowledged) "digital billboards can have a greater effect on safety and aesthetics than static ones due to their increased visibility and changing display." Finally, the court concluded that the spacing requirement left "open ample alternative channels for communication."

In addition, the district court properly exercised supplemental jurisdiction over the plaintiff's state-law zoning appeal, which involved the same factual issues as its "related federal claims, i.e., the denial of its application for permission to construct a digital billboard on its property." Moreover, the plaintiff did

> "not argue that the zoning appeal raised a novel or complex issue of state law or predominated over [its] numerous federal claims. Nor did the district court dismiss all the claims over which it had original jurisdiction; instead, it resolved [its] First Amendment and equal-protection claims on the merits."

No "compelling circumstances exist for declining to exercise jurisdiction in this case." Affirmed. (Source: State Bar of Michigan e-Journal Number: 56595, March 17, 2014)

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2014/031114/56595.pdf

Other Published Cases

Volunteer firefighter an "employee," thus can't be on planning commission or appeals board

Court: U.S. Court of Appeals Sixth Circuit (No. 12-1231, 13a0232p.06;, 727 F.3d 565; 2013 U.S. App. LEXIS 16922, August 15, 2013 (further appeal was denied))

Case Name: *Mendel v. City of Gibraltar*

[This appeal was from the ED-MI.]

EDITOR'S NOTE: A court case of this nature might normally be considered off-topic for a review of planning and zoning case-law. However the Michigan Planning Enabling Act does not allow an "employee" of the local unit of government, except ex-officio members, to be a member of a planning commission (MCL 125.3815(5)) and the Michigan Zoning Enabling Act does not allow an "employee or contractor" of the legislative body to be a member of the zoning board of appeals (MCL 125.3601(6)). Frequently the question has come up are volunteer fire fighters considered "employees" and thus not able to be members of a planning commission or appeals board. For what it is worth, this court case addresses some of the facets of answering that question. As always, consult with your municipal attorney, possibly the municipal auditor or bookkeeper that handles payroll issues with the federal Internal Revenue Service to make the determination in your government.

Holding that the defendant-City's allegedly volunteer firefighters were "employees" under the Fair Labor Standards Act (FLSA) and the Family Medical

Leave Act (FMLA), the court reversed the lower court's judgment for the City on the plaintiff's FMLA interference claim and remanded for further proceedings.

Plaintiff was a dispatcher in the City's police department before his employment was terminated. In moving for summary judgment on his FMLA claim, the City argued that it did not employ the necessary number of employees for application of the FMLA because its volunteer firefighters were not employees for FMLA purposes. The district court agreed and granted the City's motion.

To answer the question of whether the "volunteer" firefighters fell within the scope of the FMLA's definition of an "employee," the U.S. Court of Appeals (6th Circuit) turned to the relevant section of the FLSA, §203(e), and concluded that the City's firefighters fell within the FLSA's broad definition of employee. They were "suffered or permitted to work," and they received "substantial wages for their work." However, under §203(e)(4)(A), individuals who volunteer to perform services for a public agency are not employees under the FLSA under certain conditions.

Thus, the issue became whether the firefighters fell within this exception - whether the wages they were paid constituted "compensation" or only a "nominal fee." While the firefighters "are not required to respond to any emergency call, they are paid $15 per hour for the time they do spend responding to a call or maintaining equipment." The court held that in "the context of the economic realities of this particular situation," the wages they were paid were compensation and not nominal fees. "Each time a firefighter responds to a call, he knows he will receive compensation at a particular hourly rate - which happens to be substantially similar to the hourly rates paid to full-time employed firefighters in some of the neighboring areas." Essentially, the City's firefighters

> are paid a regular wage for whatever time they choose to spend responding to calls. These substantial hourly wages simply do not qualify as nominal fees.

The court noted that:

> the Supreme Court has held that those who "work in contemplation of compensation" are "employees" within the meaning of the FLSA, even though they may view themselves as "volunteers."

The court also held that §203(y) did not apply to the case. (Source: State Bar of Michigan e-Journal Number: 55280, September 12, 2013)

Full Text Opinion:
http://www.michbar.org/opinions/us_appeals/2013/081513/55280.pdf

Michigan Medical Marihuana Act supersedes the Michigan Vehicle Code

Court: Michigan Supreme Court (No. 145259, 494 Mich. 1; 832 N.W.2d 724; 2013 Mich. LEXIS 709, May 21, 2013)

Case Name: *People v. Koon*

JUDGE(S): PER CURIAM - YOUNG, JR., CAVANAGH, MARKMAN, KELLY, ZAHRA, MCCORMACK, AND VIVIANO

> The Michigan Supreme Court held that the Michigan Medical Marihuana Act (MMMA) (MCL 333.26421 *et seq.*) is inconsistent with [other state statutes], and therefore supersedes, Michigan Vehicle Code's (MVC) (MCL 257.1 *et seq.*) MCL 257.625(8) unless a registered qualifying patient loses immunity because of his or her failure to act in accordance with the MMMA.

Thus, in lieu of granting leave to appeal, the court reversed the judgment of the Court of Appeals, reinstated the circuit court's judgment, and remanded the case to the district court.

Defendant was stopped for speeding. During the traffic stop, he voluntarily produced a marijuana pipe and told the arresting officer that he was a registered patient under the MMMA and was permitted to possess marijuana. A blood test to which defendant voluntarily submitted several hours later revealed that his blood had a THC content of 10 ng/ml.

The prosecution charged him with operating a motor vehicle with the presence of a schedule 1 controlled substance in his body under MCL 257.625(8). The prosecution sought a jury instruction that the presence of marijuana in defendant's system resulted in a *per se* violation of the MVC.

Defendant argued that the zero-tolerance provision could not possibly apply to MMMA registered patients because the MMMA prevents the prosecution of registered patients for the medical use of marijuana, including internal possession, and only withdraws its protection when the patient drives while "under the influence" of marijuana. Also, the MMMA resolves conflicts between all other acts and the MMMA by exempting the medical use of marijuana from the application of any inconsistent act.

The district court and circuit court agreed with defendant, but the Court of Appeals reversed. The Supreme Court held that the immunity from

prosecution provided under the MMMA to a registered patient who drives with indications of marijuana in his or her system but is not otherwise under the influence of marijuana "inescapably conflicts" with the MVC's prohibition against a person driving with any amount of marijuana in his or her system. When the MMMA conflicts with another statute, the MMMA provides that "[a]ll other acts and parts of acts inconsistent with [the MMMA] do not apply to the medical use of marihuana . . . ." Thus, the MVC's zero-tolerance provision, MCL 257.625(8), which is inconsistent with the MMMA, does not apply to the medical use of marijuana.

The Supreme Court held that the Court of Appeals incorrectly concluded that defendant could be convicted under MCL 257.625(8) without proof that he acted in violation of the MMMA by "operat[ing] . . . [a] motor vehicle . . . while under the influence" of marijuana. While the MMMA does not define "under the influence," the court concluded that "it contemplates something more than having any amount of marijuana in one's system and requires some effect on the person." (Source: State Bar of Michigan e-Journal Number: 54611, May 23, 2013)

Full Text Opinion:
http://www.michbar.org/opinions/supreme/2013/052113/54611.pdf

Uncompensated transfer, delivery of marijuana between registered patients not legal

Court: Michigan Supreme Court (SC: 146990 COA: 308133, 494 Mich. 865; 831 N.W.2d 460; 2013 Mich. LEXIS 925, June 19, 2013)

Case Name: *People v. Green*

JUDGE(S): YOUNG, JR., CAVANAGH, MARKMAN, KELLY, ZAHRA, MCCORMACK, AND VIVIANO

Holding that the Court of Appeals erred in its published opinion (see page 11 of *Selected Planning and Zoning Decisions: 2013*, May 2012-April 2013) by affirming the trial court's order that granted the defendant's motion to dismiss the delivery of marijuana charge, the Supreme Court reversed the Court of Appeals judgment and remanded the case to the trial court for reinstatement of the charges against defendant and for further proceedings.

The Supreme Court noted that it was undisputed that defendant, a registered qualifying patient under the the Michigan Medical Marihuana Act (MMMA) (MCL 333.26421 *et seq.*), transferred a small amount of marijuana to another person who was a registered qualifying patient. In *Michigan v. McQueen*, the court held that

> "'§ 4 immunity does not extend to a registered qualifying patient who transfers marijuana to another registered qualifying patient for the transferee's use because the transferor is not engaging in conduct related to marijuana for the purpose of relieving the transferor's own condition or symptoms.'"

(Source: State Bar of Michigan e-Journal Number:54936, June 26, 2013)

Full Text Opinion:
http://www.michbar.org/opinions/supreme/2013/061913/54936.pdf

Road Commission cannot void reasonable township traffic ordinance

Court: Michigan Court of Appeals (Published No. 304986, 301 Mich. App. 462; 2013 Mich. App. LEXIS 1163, June 25, 2013)

Case Name: *Oshtemo Charter Twp. v. Kalamazoo Cnty. Rd. Comm'n*

The court held that MCL 257.726(3) conflicts with Article 7, § 22 of the Michigan 1963 Constitution to the extent that it purports to grant defendant-Kalamazoo County Road Commission's (CRC) the authority to void a township's reasonable traffic control ordinance when that ordinance does not conflict with state law. Further, the plaintiff-Oshtemo Charter Township's truck route ordinance did not conflict with state law, and the defendant-CRC did not determine that the ordinance was unreasonable. Thus, the CRC's decision to void the ordinance violated the Michigan Constitution, and the trial court erred in concluding that the CRC's decision was authorized by law.

The court reversed the trial court's order granting the CRC and the defendants-townships summary disposition and remanded for entry of summary disposition in plaintiff's favor. MCL 257.726(1) allows local authorities to pass an ordinance that prohibits trucks on specified routes. MCL 257.726(3) allows a township to make an objection to an adjoining township's truck route ordinance, and provides that the CRC will resolve the objection if necessary. Adjoining Kalamazoo Charter Township and Alamo Township challenged the plaintiff's truck route ordinance. The CRC determined that the routes prohibited by the ordinance were primary roads, and voided the ordinance.

The Appeals Court noted that "a township does not have the authority to adopt any ordinance that conflicts with state law." While an ordinance can conflict with

state law by conflicting with an administrative agency's rules, CRCs,

> despite being administrative agencies, do not have the authority to promulgate rules. A truck route ordinance does not conflict with state law either directly or through the operation of an administrative agency under MCL 257.726(3). Because a reasonable truck route ordinance does not conflict with state law, a township has the authority to adopt one.

Further, "the Legislature may not override a power provided in the Constitution." Thus, to the extent MCL 257.726(3) allows a CRC to void a traffic control ordinance without showing that the ordinance is unreasonable, "it conflicts with the Michigan Constitution's grant of the power to townships to adopt reasonable traffic control ordinances, and is unconstitutional as applied." The CRC "only has the authority to void an unreasonable traffic control ordinance." Plaintiff's ordinance did not directly conflict with the statute because MCL 257.726(1) allowed it to pass an ordinance regulating truck routes, and the ordinance did not conflict with MCL 257.726(3) "simply by existing, as subdivision (3) provides that an ordinance may be valid or may be void." (Source: State Bar of Michigan e-Journal Number:54942, June 27, 2013)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2013/062513/54942.pdf

Only Michigan Resident to have Medical Marijuana Card

Court: Michigan Court of Appeals (Published No. 312065, 301 Mich. App. 566; 837 N.W.2d 7; 2013 Mich. App. LEXIS 1205, July 9, 2013)

Case Name: *People v. Jones*

Because the court held, *inter alia*, that residency is a prerequisite to valid possession of a registry identification card and that questions of fact as to the applicability of § 4 of the Michigan Medical Marijuana Act (MMMA) (MCL 333.26421 *et seq.*) immunity must be resolved by the trial court, the court vacated the trial court's order and remanded for further proceedings.

Following a traffic stop defendant was arrested and charged with possession of marijuana with intent to deliver. Before the preliminary hearing, she moved for dismissal of the charges pursuant to the immunity provided by § 4 of the MMMA and the prosecution moved *in limine* to preclude defendant from asserting § 4 immunity. After conducting a contested preliminary hearing, the district court denied defendant's motion to dismiss and bound her over to the trial court on the charge. The district court also denied the prosecution's motion *in limine* to preclude defendant from asserting § 4 immunity. It also addressed the prosecution's argument that defendant was not entitled to the protections of the MMMA because she was not a Michigan resident at the time of her application for a registry identification card or at the time that she was found to be in possession of marijuana.

On appeal, the prosecution argued that the trial court erred by ruling that questions of fact pertaining to the application of § 4 immunity must be submitted to a jury. Defendant agreed with the prosecution, but maintained that the trial court erred by finding that residency is a prerequisite to the valid possession of registry identification cards. While the MMMA does not address whether factual questions arising in the application of § 4 immunity should be resolved by the trial court during pretrial proceedings or by a jury, the Michigan Supreme Court has instructed that the requirements of § 4 "are intended to encourage patients to register with the state and comply with the act in order to avoid arrest and the initiation of charges and obtain protection for other rights and privileges." Further, the Supreme Court directed courts to consider "well-established principles of criminal procedure" when deciding a motion to dismiss asserting the § 8 affirmative defense. Because the court saw no reason to distinguish § 8 and § 4 in terms of reliance on "well-established principles of criminal procedure" as instructed by *People v. Kolanek*, it looked to comparable Michigan law for guidance in resolving the § 4 issue presented in this case. The "well-established principles of criminal procedure" suggest that under certain circumstances, it is necessary for the trial court to make factual determinations before trial. Thus, the question became whether § 4 immunity fact-finding is most appropriately placed with the jury or the trial court.

The Appeals Court held that § 4 immunity fact-finding is a question for the trial court to decide. Thus, the trial court's decision finding that § 4 immunity fact-finding is a question for the jury was reversed and the case was remanded for the trial court to determine whether defendant is entitled to § 4 immunity.

In light of the reference to Michigan citizens, and the provisions regarding a visiting qualifying patient in the MMMA, the court agreed with the trial court that

Michigan residency is a prerequisite to the issuance and valid possession of a registry identification card. Thus, the court affirmed the trial court's conclusion that Michigan residency is a prerequisite to valid possession of a registry identification card. Affirmed in part, vacated in part, and remanded. (Source: State Bar of Michigan e-Journal Number:55005, July 11, 2013)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2013/070913/55005.pdf

Editable Marijuana is not usable Medical Marijuana

Court: Michigan Court of Appeals (Published No. 309987, 301 Mich. App. 590; 837 N.W.2d 16; 2013 Mich. App. LEXIS 1212, July 11, 2013)

Case Name: *People v. Carruthers*

In an issue of first impression, the Appeals Court held that an edible containing THC extract from marijuana resin is not "usable marijuana" under the Medical Marihuana Act (MMMA) (MCL 333.26421 *et seq.*). Thus, the brownies the defendant possessed were not "usable marijuana," and the court concluded that the trial court did not err in denying him immunity from prosecution under MMMA § 4. However, the court also concluded that because the state of the law changed while his appeal was pending, he was entitled to move the trial court for dismissal and an evidentiary hearing on his ability to assert a § 8 affirmative defense.

Thus, the Appeals Court remanded the case to the trial court for defendant to file a motion to dismiss and for an evidentiary hearing as to the *prima facie* existence of the elements of a § 8 defense. The court retained jurisdiction and issued an order with its opinion setting deadlines for the proceedings on remand.

Defendant was convicted of possession of marijuana with intent to deliver following a traffic stop. He unsuccessfully moved to dismiss the charge because at the time of the traffic stop, he possessed a medical marijuana card for himself, caregiver applications for four patients, and a caregiver certificate. The court noted that in contrast to the statutory definition of marijuana, the definition of usable marijuana under the MMMA "does not include 'all parts' of the cannabis plant." Specifically, it "does not include 'the resin extracted from' the cannabis plant." To constitute usable marijuana under the MMMA, "any 'mixture or preparation' must be of 'the dried leaves or flowers' of the marijuana plant." The court rejected the prosecution's argument

> that "usable marihuana" merely constitutes "marihuana" that is "usable," and that a brownie containing THC extracted from the resin of a marijuana plant is "usable marihuana" because it is "marihuana" that is "usable" simply by virtue of its ingestion.

Since the brownies were not usable marijuana under the MMMA, none of the weight of the brownies should have been counted toward determining whether defendant possessed over 12.5 ounces of usable marijuana (the amount he was arguably entitled to possess). However, "the brownies did constitute 'marihuana' under its statutory definition." Thus, the court held that he was not entitled to immunity under § 4 because he possessed

> an "amount of marijuana" that exceeded the permitted amount of usable marijuana he may have been allowed to possess. By possessing edibles that were not "usable marihuana" under the MMMA, but that indisputably were "marihuana," he failed to meet the requirements

for § 4 immunity.

However, the court concluded that he was entitled to retrospective application of *People v. Kolanek* and that he may attempt to assert the § 8 defense to his prosecution for possession with intent to deliver as to both the raw marijuana and the edibles containing THC that were found in his possession (Source: State Bar of Michigan e-Journal Number:55021, July 15, 2013)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2013/071113/55021.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*.[2] 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

Medical Marijuana local jurisdiction

Court: Michigan Court of Appeals (Unpublished No. 308906, February 4, 2014)

Case Name: *Roe v. Bloomfield Twp.*

See also *TerBeck v Wyoming*, on page 1.

Agreeing with the trial court that the injury plaintiff sought to prevent was "hypothetical" in nature, the court affirmed the trial court's order denying his request for a declaration that two ordinances enacted by the defendant-township were partially void because they prohibit conduct permitted by the Michigan Medical Marihuana Act (MMMA) (MCL 36421 *et seq.*).

Plaintiff argued that the ordinances were preempted by the MMMA to the extent that they prohibit the medical usage of marijuana permitted under the MMMA and require a medical marijuana patient who is registered under the MMMA to also register with defendant's police department. A declaration was also sought that the registration requirements conflicted with and were preempted by rules promulgated pursuant to the MMMA. Plaintiff argued on appeal that the trial court erred in dismissing the case on the basis that no actual controversy existed.

The Appeals Court noted that it was "unclear from the trial court's decision what process under the MMMA it believed would apply if defendant elected to enforce its ordinances against plaintiff to thereby render this case 'moot.'" The record indicated that "plaintiff was seeking a declaratory judgment to guide his future conduct regarding the cultivation of marijuana and registration requirements." He did not have to wait until an arrest or other injury to seek declaratory relief. "Thus, the trial court incorrectly applied mootness principles to the controversy in this case." However, the

> most that can be said from the allegations in the complaint is that plaintiff alleged that he is a registered patient and caregiver, who wanted to remain anonymous. A party seeking declaratory relief must still plead and prove facts demonstrating an adverse interest necessitating the sharpening of the issues raised.

Plaintiff failed to "offer any evidence that he is a registered medical marijuana patient or caregiver. Although the trial court considered this issue in the context of a motion for summary disposition, considering that plaintiff's allegations were made anonymously, and his failure to offer any evidence to demonstrate his adverse interest," the court affirmed the trial court's determination that no actual controversy under MCR 2.605(A)(1) was shown. (Source: State Bar of Michigan e-Journal Number: 56380, February 24, 2014)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2014/020414/56380.pdf

Must follow *Bateson* in RTFA cases

Court: Michigan Court of Appeals (Unpublished No. 313479, April 22, 2014)

Case Name: *Township of Webber v. Austin*

The court held that the trial court erred in ruling for the defendant because its ruling directly contradicts the recently-decided *Lima Twp. v. Bateson* (page 4) decision.

The plaintiff-township sought to enjoin defendant him from using property he obtained for a horse rescue project, claiming it violated the commercial zoning ordinance. The trial court entered a preliminary injunction, which required defendant to cease the

[2] *Stare decisis* (MCR 7.215(c)(1). See *Dyball v Lennox*, 260 Mich. App. 698; 705 n 1 (2003). Unpublished cases need not be followed by any other court, except in the court issuing that opinion. But, a court may find the unpublished case persuasive and dispositive, and adopt it or its analysis. Unpublished cases often recite stated law or common law. Readers are cautioned in using or referring to unpublished cases; and should discuss their relevance with legal counsel before use.

project. It later ruled in favor of defendant and awarded attorney fees and costs.

On appeal, the court agreed with plaintiff-township that the trial court erred by determining that defendant's horse rescue project was a valid nonconforming use of the property.

> The undisputed trial evidence demonstrates that the horse rescue project was significantly different than [defendant's-Austin's] predecessors' use of the property. The predecessors did not raise livestock on the property, nor did they offer livestock for sale.

Thus, "his horse rescue project was not a nonconforming use."

The court also agreed with plaintiff that the trial court erred by declining to receive evidence concerning compliance with the Generally Accepted Agricultural Management Practices (GAAMPs), finding that its "refusal to consider the GAAMPs in this case is directly contrary to the *Bateson* holding."

However, the court rejected plaintiff's argument that the trial court erred by determining that the horse rescue project was a commercial production within the meaning of the the Right to Farm Act (RTFA) (MCL 286.471 *et seq.*), finding there was no clear error in the trial court's determination.

> The RTFA does not define the term "commercial production." In *Shelby Charter Twp v Papesh*, 267 Mich App 92, 100-101; 704 NW2d 92 (2005), the Court defined commercial production under the RTFA as "the act of producing or manufacturing an item intended to be marketed and sold at a profit." The *Papesh* Court noted "there is no minimum level of sales that must be reached before the RTFA is applicable." *Id.* at 101 n 4. Similarly, the *Bateson* Court determined that a farmer has the burden of proving by a preponderance of the evidence that he or she intended to produce farm products and to sell them at a profit (302 Mich App at 498).

Finally, the court concluded that, under *Vugterveen Sys., Inc. v. Olde Millpond Corp.* it was required to vacate the award of costs and attorney fees and remand with instructions to reinstate the award if defendant prevails on remand. Reversed and remanded. (Source: State Bar of Michigan e-Journal Number: 56972, May 20, 2014)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2014/042214/56972.pdf

Land Divisions & Condominiums

Condominium Surety

Court: Michigan Court of Appeals (Unpublished No. 308758, June 4, 2013)

Case Name: *Clarkston Holdings, Ltd. v. Avington Park Condo. Ass'n, Inc.*

Since the defendant/third-party plaintiff-Avington Park Condominium Association (APCA) argued in the trial court that no funds were escrowed to assure completion of "must be built" roads in the development, and the court declined "to allow it to change tactics for purposes of appeal," the court held that its appellate argument centered upon MCL 559.203b(5) was untenable. Likewise, its argument based on the Escrow agreement (EA) between plaintiff-Clarkston and third-party defendant-PRS was untenable.

Thus, the court affirmed the trial court's order denying APCA's summary disposition motion and granting summary disposition to PRS. Clarkston, a real estate developer, sued APCA claiming that APCA wrongfully recorded liens against condo units owned by Clarkston. APCA's amended third-party complaint asserted that PRS entered into an EA with Clarkston and that APCA was a third-party beneficiary of the EA. APCA raised a breach of the Condominium Act count and a breach of contract count against PRS. It asserted, *inter alia*, that PRS "did not retain any amounts in escrow upon the closing of units at the Condominium" and "failed to obtain evidence of adequate security to assure the completion of 'must be built' roads in the Condominium before it released escrowed funds to [Clarkston] in violation of" the Act.

The trial court concluded that PRS was entitled to summary disposition because APCA failed to explain how PRS could be liable for retaining escrowed funds when Clarkston did not deposit any such funds. APCA argued on appeal that the trial court erred in determining that PRS never had funds in escrow because APCA attached copies of the purchase agreements and copies of documents showing that PRS received deposits under the purchase agreements to its summary disposition motion. APCA argued that it conceded below only that no funds were placed in escrow upon closings. Thus, it contended that PRS did have funds in escrow and violated MCL 559.203b.

The Appeals Court concluded that it was clear that APCA's "strategy below was to argue that proper funds had not in fact been escrowed and that PRS was liable

because it failed to make a proper determination of other adequate security." Thus, the court rejected APCA's argument that the trial court's ruling as to the lack of escrow funds was erroneous because of the existence of the deposits paid by the purchasers. The trial court based its ruling on APCA's argument that funds were not in fact escrowed and that PRS should have made a proper determination regarding other security. The court would not allow APCA "to use a 'bait-and-switch' tactic in order to try to obtain appellate relief." If no escrowed funds were at issue, as APCA conceded below, there could be no liability on the part of PRS under the Act for a failure to properly judge the adequacy of any alternate security. Since the EA mirrored the relevant statutory provisions, there also could be no liability on the part of PRS under the EA. (Source: State Bar of Michigan e-Journal Number: 54768, June 17, 2013)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2013/060413/54768.pdf

Zoning Administrator/Inspector, Immunity, and Enforcement Issues

Permissible accessory use

Court: Michigan Court of Appeals (Unpublished No. 303595, October 3, 2013)

Case Name: *Ida Twp. v. Southeast MI Motorsports, LLC*

Holding that the trial court did not err in ruling that the defendants' use of their property for riding motocross vehicles and the construction of motocross tracks constituted a public nuisance and a nuisance *per se*, the court concluded that it did not err in granting the plaintiff-township injunctive relief restricting defendants' use of the property. The trial court also did not err in granting plaintiff summary disposition on defendants' constitutional claims.

Thus, the Appeals Court affirmed the trial court's orders. Defendants unsuccessfully applied for a special use permit to construct a motocross park on the property, a 95-acre parcel zoned AG-2 (agricultural). After the request was denied, a neighbor flew over the property, took aerial photos, and forwarded them to plaintiff. At trial, defendant-Mudge agreed that the photos depicted a motocross track. After receiving the photos and complaints about riding activity on the property, plaintiff sued for declaratory and injunctive relief. Defendants filed a counterclaim alleging that plaintiff violated their procedural and substantive due process rights and their right to equal protection. They also asserted that plaintiff's Ida Township Zoning Ordinance was void for vagueness and that plaintiff's conduct constituted a regulatory taking.

The court held that

> in order to qualify as an accessory use that is customarily incidental to a primary use under the ordinance, defendants' riding of motocross vehicles on tracks constructed for that purpose must be subordinate to the primary use, it must be dependent on or pertain to the primary use, and it must enhance or further the primary use of the property.

However, there was no evidence to support that their "motocross riding and the construction of tracks for that purpose was 'subordinate to' any other primary use of their property." The court concluded that the planned use testified to by Mudge "would have overwhelmed the minimal farming activities that occurred on the property such that it could not have been considered 'subordinate to' farming."

Further, and more importantly, defendants did not (and could not) show "that motocross riding and construction of tracks for that purpose is in any way dependent upon or pertains to farming." None of them farmed the property - an independent farmer farmed it. "Defendants' motocross riding did not depend on or pertain to that farmer's cultivation of corn and soybeans. Nor did such conduct further or enhance the farming activity."

The court also held that they failed to create a question of fact as to whether they were similarly situated to their comparators, or as to whether they were denied procedural or substantive due process during the special use application process.

Further, the trial court did not err in ruling that the zoning ordinance was constitutional on its face, and applying the *Penn Cent. Transp. Co. v. New York City* balancing test showed that there was no issue of fact as to their claim that plaintiff's denial of their special use application constituted a regulatory taking. (Source: State Bar of Michigan e-Journal Number: 55489, October 11, 2013)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2013/100313/55489.pdf

Adequate notices prior to government removing blight from property

Court: Michigan Court of Appeals (Unpublished, No. 313011)

Case Name: *DiCarlo v. City of Monroe*

Holding that the DiCarlo-plaintiffs' due process rights were not violated by the City of Monroe-defendants' removal of "blight" materials from their property without a prior district court hearing, the court affirmed the trial court's order granting the defendants summary disposition on plaintiffs' conversion and trespass claims.

Plaintiffs were issued citations for violating the defendant-city's blight ordinance due to improperly parked motor vehicles and debris on their property. "After issuing the citations and plaintiffs failure to abate the conditions, defendants removed the improper items." The court concluded that plaintiffs "were provided with multiple 'notices' of a municipal civil infraction." The back of each notice stated that if they wished to deny responsibility and have a hearing, they must contact the city treasurer's office on or before the date specified on the front of the ticket. "Only then would a municipal civil infraction citation be issued and filed with the district court, giving plaintiffs the right to either an informal or formal hearing before either a magistrate or a judge."

The parties did not dispute that plaintiffs had a property interest in the materials taken from their yard and their interest in these items was interfered with by the city. The issue centered "on 'whether the procedures attendant upon the deprivation were constitutionally sufficient.'"

The court concluded that DiCarlo-plaintiffs received sufficient notice from defendants-city. Defendants twice sent them a notice of violation and an accompanying letter explaining the defects on their property. "In the letters, a city employee explained that if the blighted conditions were not remedied, defendants would remove the noncompliant vehicles and the blight from plaintiffs' property." The notices also informed them of the nature of the action - a civil infraction, and explained the steps they should take if they wished to have a hearing.

Plaintiffs argued that their due process rights were violated because they did not have an opportunity to plead their case in front of the district court judge before defendants removed their property. While "due process requires a meaningful opportunity to be heard by an impartial decision-maker," it "does not always require a prior hearing or adversarial proceeding before the deprivation of a property interest . . . ." Plaintiffs were "provided the opportunity to contest the notice, as long as they contacted the city treasurer within the time period allotted on the notice." Their failure to contact the treasurer essentially waived their right to a hearing. "Once the notice period ended, defendants were empowered to enter upon plaintiffs' land and remedy the blighted condition." (Source: State Bar of Michigan e-Journal Number: 56711, April 8, 2014)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2014/032514/56711.pdf

Government Immunity for Inspector not Automatic

Court: Michigan Court of Appeals (Unpublished No. 313294, March 25, 2014)

Case Name: *FJN, LLC v. Parakh*

The court held that the trial court did not err in granting the defendant-township's motion for summary disposition, or in denying the defendant-building inspector's motion for summary disposition, both of which were based on governmental immunity.

The plaintiffs-business owners sued defendants for libel and slander based on the inspector's allegedly defamatory statements about plaintiffs and their business, and seeking a certificate of occupancy. Defendants moved for summary disposition on the libel and slander claims on the basis of governmental immunity. The trial court granted the township's motion, but held that the inspector was not entitled to immunity because there was a genuine issue of fact as to whether his conduct amounted to gross negligence that proximately caused plaintiffs' damages.

On appeal, the court rejected the inspector's claim that the trial court erred in denying him summary disposition based on governmental immunity. It found that, even though the trial court mistakenly analyzed his request for immunity under the test for a negligent tort rather than the test for an intentional tort, it still reached the right result, albeit for the wrong reason.

> Plaintiffs alleged in their complaint that defendant [he] made statements he knew were false with the intent to destroy plaintiffs' business, and [he] did not offer any evidence to support the truth of any of the statements except the lack of occupancy certificate and the advertised grand opening party. As the trial court recognized, [his] report included numerous allegations of dangerous conditions that went well beyond opening without an occupancy certificate.

Thus, the appeals court found there was an issue of fact as to whether the inspector acted in good faith and without malice.

The Appeals Court also rejected plaintiffs' argument

on cross-appeal that the trial court erred by granting summary disposition to the township, noting that although the trial court did not provide a clear analysis of the applicable law, it correctly ruled that, as a matter of law, the township was not liable for the inspector's alleged libel and slander.

> The facts indicate that [the inspector] was either acting in bad faith outside the scope of his authority, in which case the township is not vicariously liable, or he was acting within the scope of his authority and carrying out a governmental function, in which case immunity applies to the township.

Finally, the Appeals Court rejected plaintiffs' argument that the trial court erred by granting partial summary disposition for the inspector, finding that it was not improper for the trial court to limit plaintiffs' claims for libel and slander to his statements unrelated to the use of the facility without a certificate of occupancy for plaintiffs' remodel.

> The facts indicate that it was one of [the inspector's] job responsibilities to ensure that plaintiffs were not using [the remodel] without a certificate of occupancy. However, as the trial court correctly noted, [his] report contained statements that went beyond the issue of whether a violation occurred, and it is these statements that create a question of fact whether [he] acted in good faith and without malice.

Affirmed. (Source: State Bar of Michigan e-Journal Number: 56718, April 16, 2014)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2014/032514/56718.pdf

Public Water, Sewer, and Transit

Consent judgement requiring public funding, voided if funding does not happen

Court: Michigan Court of Appeals (Unpublished No. 307242)

Case Name: *Grand/Sakwa Props., Inc. v. City of Troy*

The trial court held that the defendant-City did not establish a genuine issue of material fact that it complied with the funding requirement in the consent judgment or deed. Under any of the commonly-understood definitions of the term, the planned transportation center was not "funded" and thus, title to the disputed property reverted to the plaintiff-Grand/Sakwa once the June 2, 2010 deadline passed, and plaintiff was entitled to judgment as a matter of law.

Plaintiff owns approximately 77 acres in Troy. In 1999, plaintiff sought to develop the parcel as a shopping mall and condo complex, but the property was zoned for light industrial use. Plaintiff sued Troy to compel the necessary rezoning and permission to develop the parcel. The parties settled that litigation via a consent judgment dated June 2, 2000. Under the terms of the consent judgment, plaintiff could construct a "mixed use development" according to a plan. In exchange, plaintiff agreed to pay for improvements to adjacent roads and to deed 2.7 acres of the parcel to Troy on the condition that Troy would develop the land for use as a transportation center, which the parties anticipated would include a 24,000 square foot building. Paragraph 12 of the consent judgment stated, "If the Transportation Center is not funded by the City within ten (10) years from entry of this Amended Judgment, or the City elects not to purchase the area," title in the property designated as the transportation center "shall revert to Plaintiff. . . ."

Plaintiff transferred title to 2.7 acres to Troy through a warranty deed recorded on June 22, 2001. The deed expressly stated that "the Property shall automatically revert to Grantor for its own use if the transportation center is not funded by Grantee by" June 2, 2010 "pursuant to and in accordance with the Consent Judgment." Neither the consent judgment nor the warranty deed provided a definition of the word "funded."

In 2007, Troy asked plaintiff to grant it more time to finance the transportation center. Plaintiff did not agree to the extension of time. Eventually, plaintiff asked Troy to quitclaim the parcel back to it, which Troy did not do. Plaintiff sued asking the trial court to enforce the consent judgment arguing that the parcel reverted back to plaintiff because Troy did not fund the project as required by the consent judgment and deed. Plaintiff filed a motion for summary disposition and to force reversion of the deed.

The trial court denied the motion and granted a judgment in favor of Troy. The court discussed the interpretation of "fund."

The appeals court held that plaintiff presented ample evidence to show that the transportation center was not "funded" as of June 2, 2010, and that Troy failed to establish a genuine issue of material fact that the transportation center was "funded" as of that date.

> The trial court, without analysis, defined the term "funded" and, with no consideration of the

> evidence presented, ruled in a conclusory statement, that the transportation center was funded. This was clearly contrary to the court's obligation

under MCR 2.116(C)(10) to review the evidence submitted and determine where there is a genuine issue of material fact for trial. Reversed. (Source: State Bar of Michigan e-Journal Number: 54535, May 9, 2013)

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2013/050213/54535.pdf

Other Unpublished Cases

Medical Marihuana: No actual controversy (it is spelled "marijuana")

Court: Michigan Court of Appeals (Unpublished No. 307692, February 6, 2014)

Case Name: *Lott v. City of Birmingham*

The court held that although the trial court erred in finding that there was no actual controversy for it to decide, the error was harmless because the underlying issues have since been decided in *Ter Beek v. City of Wyoming* (page 1, above).

Plaintiffs sought a declaratory judgment that the defendant-city's ordinances were partially invalid

> because they conflicted with the MMMA [Michigan Medical Marihuana Act (MMMA) (MCL 333.26421 *et seq.*)] by, in effect, prohibiting and penalizing activity that is contrary to federal law, thereby making it illegal for them to use medical marijuana[3] in their home.
>
> – Brackets and footnote added.

The trial court denied any declaratory relief based on its determination that there was no actual controversy for it to decide.

On appeal, the Appeals Court concluded that the trial court erred in finding that the impact of the ordinances on plaintiffs would be hypothetical because the MMMA provides sufficient guidance to allow them to determine whether their medical marijuana use complies with the MMMA, and that the MMMA would not shield plaintiffs from a federal prosecution.

> Because the trial court failed to consider the penalties established by [the ordinance] for a violation of [defendant's] code of ordinances, and failed to address whether the penalty provision presented an actual controversy, despite the parties' dispute whether it could be enforced in light of the parties' differing preemption arguments, the trial court erred in determining that there was no actual controversy.

It noted that plaintiff-R "had pleaded and established an adverse interest necessitating the sharpening of the issue raised," and it was not necessary for him to wait for an actual arrest for violating the ordinance to seek declaratory relief. However, the court rejected R's argument that the merits of his request for declaratory relief should be decided on appeal, noting that the issues underlying the controversy have since been addressed in *Ter Beek*. The decision in *Ter Beek* should provide adequate guidance for plaintiff['s] future conduct with respect to [defendant's] ability to enforce its ordinance's penalty provision, thus, the trial court's erroneous determination that there was no actual controversy is harmless.

– Brackets added.

Affirmed. (Source: State Bar of Michigan e-Journal Number: 56404, March 6, 2014).

Full Text Opinion:
http://www.michbar.org/opinions/appeals/2014/020614/56404.pdf

[3] Although the complaint and the MMMA use the spelling "marihuana," the more common spelling "marijuana" is used in this opinion. See *Ter Beek v City of Wyoming*, 297 Mich App 446, 450 n 1; 823 NW2d 864 (2012), lv gtd 493 Mich 957 (2013) (page 1, above) (likewise using the more common spelling "marijuana").

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'.

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'.

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.

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://tinyurl.com/msuelanduse

To find other expertise in MSU Extension see: http://expert.msue.msu.edu/.

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