

**OTSEGO COUNTY
PLANNING COMMISSION**

September 19, 2016

6:00 PM

MEETING WILL BE IN THE PLANNING AND ZONING MEETING ROOM LOCATED AT 1322 HAYES ROAD

1. CALL TO ORDER
2. ROLL CALL
3. PLEDGE OF ALLEGIANCE
4. APPROVAL OF MINUTES: From August 15, 2016 meeting
5. CONSENT AGENDA
6. OTHER
7. PUBLIC PARTICIPATION FOR ITEMS NOT ON THE AGENDA:
(Please identify yourself for the record. All comments will be limited to two (2) minutes)
8. PUBLIC HEARING:
 - 1) *ARTICLE 14 HX HIGHWAY INTERCHANGE ZONING DISTRICT
SECTION 14.2 PERMITTED USES SUBJECT TO SPECIAL CONDITIONS*
A proposed addition to the above section allowing above ground storage of hazardous material
9. ADVERTISED CASE:
 - 1) *ARTICLE 14 HX HIGHWAY INTERCHANGE ZONING DISTRICT
SECTION 14.2 PERMITTED USES SUBJECT TO SPECIAL CONDITIONS*
A proposed addition to the above section allowing above ground storage of hazardous material
10. UNFINISHED COMMISSION BUSINESS
11. NEW BUSINESS:
 1. PSUP15-003 DTE Special Use Permit Extension request
 2. Personal Wireless Communications/Site Plan requirements
12. REPORTS AND COMMISSION MEMBER'S COMMENTS:
 1. Otsego County Parks & Recreation report/Judy Jarecki
 2. Selected Planning and Zoning Decisions 2011 Part II/Zoning Information
13. ADJOURNMENT

Otsego County Planning Commission

Proposed Minutes for August 15, 2016

Call to Order: 6:00pm by Chairperson Hartmann

Pledge of Allegiance

Roll Call:

Present: Chairperson Hartmann, Vice-Chairperson Jarecki, Secretary Arndt, Mr. Borton, Mr. Hilgendorf, Mr. Brown, Ms. Nowak, Mr. Klee, Mr. Bauman, Ms. Corfis

Absent: Mr. Caverson

Staff Present: Mr. Schlaud, Ms. Boyak-Wohlfeil

Public Present: Duane Hoffman, Elmira Township Planning Commission, Ken Bradstreet, Wolverine Power, Brian Wagner, Wolverine Power, Gloria Torello, John Arevalo, Pete & Cindy McCutcheon, Alice & Scott McPherson, Michael & Marguerite Craft, Ray Kihn, Barbara Konsek, Todd March, Les & Jackie Brown, Bob & Sue Kenny, Rex Clute, Bob & Valerie Hart, Linda & Art Cosner, Randy Stults

Chairperson Hartmann welcomed Livingston Township's new representative, Steve Bauman to the Otsego County Planning Commission.

Approval of minutes from: June 20, 2016

Motion made to approve minutes as presented by Mr. Brown; Seconded by Mr. Arndt

Motion approved unanimously.

Consent Agenda: None

Other: Elmira residents and Wolverine Power Cooperative representatives will discuss noise issues relating to the Alpine Power Plant

Gloria Torella and John Arevalo, Elmira Township residents, read aloud statements concerning the Alpine Power Plant and requested compliance of the special use permit issued to Wolverine Power and the enforcement of that permit by the Planning Commission.

Ken Bradstreet, Wolverine Power representative, read aloud a statement explaining the testing process thus far and upcoming improvements in the months ahead. An invitation was extended to the Planning Commission members to tour the plant in the near future.

Other Elmira residents (Mr. & Mrs. McPherson, Mr. & Mrs. Craft, Mr. & Mrs. Hart, Mr. & Mrs. Kenny, Mr. Kihn) raised their concerns on the noise levels from the plant as well. It was suggested that the County initiate a separate sound test for compliance.

Brian Warner, Wolverine Power VP of Environmental Planning, stated he believed they were in compliance with the conditions placed on the special use permit but would address any problems with reasonable solutions so as to remain a good neighbor. He also assured the residents the final sound testing would be done in the fall, well before the one hundred eighty (180) day timeline.

Chairperson Hartmann thanked everyone for coming.

(STATEMENTS / PICTURES IN LUS FILE)

Public participation for items not on the agenda: None

Otsego County Planning Commission

Proposed Minutes for August 15, 2016

Public Hearing:

- 1) SECTION 21.46 WIRELESS COMMUNICATIONS/PERSONAL WIRELESS COMMUNICATIONS

A proposed amendment to sections of the Otsego County Zoning Ordinance to include Personal Wireless Communication towers.

Chairperson Hartmann stated the case before them and opened the public hearing.

Public Hearing open: 6:54pm

Chairperson Hartmann explained the amendment to the Wireless Communications' section stating it would allow the addition of smaller towers on leased property in more rural areas for increased internet services within a three (3) to five (5) mile radius.

Chairperson Hartmann closed the public hearing.

Public Hearing closed: 6:57pm

Advertised Case:

- 1) SECTION 21.46 WIRELESS COMMUNICATIONS

A proposed amendment to sections of the Otsego County Zoning Ordinance to include Personal Wireless Communication towers.

Motion made by Mr. Klee to recommend to the Otsego County Board of Commissioners the addition of the proposed language for *Personal Wireless Communications*; Seconded by Ms. Nowak.

Motion approved unanimously. (SEE ATTACHMENT #1)

Public Hearing:

- 2) ARTICLE 15 MUZ MULTIPLE USE ZONING DISTRICT

A proposed zoning district addition to the Otsego County Zoning Ordinance to include the Schedule of Dimensions and Zoning Map

Chairperson Hartmann stated the case before them and opened the public hearing.

Public Hearing open: 6:59pm

Duane Hoffman, Elmira Township Planning Commission chairperson, explained the process the Township had undertaken to reach the current stage and explained the differences in the new MUZ Zoning District opposed to the current zoning districts. He stated the district strived to allow building on smaller lots with smaller setbacks and for a more walkable community with sidewalks and front porches.

Elmira Township residents questioned topics concerning property taxes, sidewalks and building materials.

It was stated property taxes could possibly increase, sidewalks would be the responsibility of the property owner and building materials would be restricted to new construction and upgrades. Any new construction in the Main Street District would have to include commercial and residential.

Chairperson Hartmann stated the response from Livingston Township suggested the addition of the phrase *'whichever is less'* to prevent confusion pertaining to a recessed front façade in Section 15.3.2.2 and to also clarify the definition for *'Park'* concerning the type of ownership/management.

After discussion it was decided to revise Section 15.3.2.2 with the suggested addition and to eliminate the *'Park'* definition entirely as it was currently in the zoning ordinance and undefined without problem.

Otsego County Planning Commission

Proposed Minutes for August 15, 2016

Chairperson Hartmann closed the public hearing.

Public Hearing closed: 7:35pm

Advertised Case:

2) ARTICLE 15 MUZ MULTIPLE USE ZONING DISTRICT

A proposed zoning district addition to the Otsego County Zoning Ordinance to include the Schedule of Dimensions and Zoning Map

Motion made by Mr. Hilgendorf to recommend to the Otsego County Board of Commissioners the addition of the proposed MUZ Multiple Use Zoning District with revisions; Seconded by Mr. Klee.

Motion approved unanimously. (SEE ATTACHMENT #2)

Public Hearing:

3) OTSEGO COUNTY CAPITAL IMPROVEMENT PROGRAM 2017-2022

Chairperson Hartmann stated the case before them and opened the public hearing.

Public Hearing open: 7:46pm

Chairperson Hartmann explained the additions to the 2017-2022 Capital Improvement Program and revisions the CIP Committee requested concerning the priority of the library.

Chairperson Hartmann closed the public hearing.

Public Hearing closed: 7:54pm

Advertised Case:

3) OTSEGO COUNTY CAPITAL IMPROVEMENT PROGRAM 2017-2022

Motion made by Mr. Hilgendorf to recommend the Capital Improvement Program 2017-2022 with Committee members revisions to the Otsego County Board of Commissioners; Seconded by Mr. Brown.

Motion approved unanimously. (SEE ATTACHMENT #3)

Unfinished Commission Business: None

New Business: None

Reports and Commission Member's Comments:

1. Otsego County Parks & Recreation report

Mrs. Jarecki stated the County Park was very busy; the Community Center tennis courts were under construction and the basketball and pickle ball courts were well used; a proposed fence was discussed for Wah Wah Soo with a survey to be done to establish property lines; the park millage was passed and Mr. Ryan had presented an equipment list entailing the condition of the items along with the possibility of purchasing some new; the Groen Nature Preserve was open again and they continued to work on the County Recreation Plan.

Mr. Brown stated Charlton Township's Master Plan would be completed around the first of the year.

Ms. Corfis stated Otsego Lake Township's Master Plan would also be completed around the first of the year and they were waiting for the language addition to the HX Zoning District so Johnson's could move forward with their request.

Mr. Hartmann stated the County would be at Elmira's meeting on August 23rd to discuss the Township's inclusion in the Recreation Plan.

Otsego County Planning Commission

Proposed Minutes for August 15, 2016

Mr. Arndt stated Bagley was working on their Master Plan as well and they would be hearing a case at their next meeting.

Mr. Borton stated the Veteran's Memorial was completed and there would be new members on the Board of Commissioners for the coming year.

2. Selected Planning and Zoning Decisions 2011 Part I/Zoning Information

Chairperson Hartmann adjourned the meeting.

Adjournment: 8:00pm by Chairperson Hartmann

Ken Arndt; Secretary

Christine Boyak-Wohlfeil; Recording Secretary

PROPOSED

Otsego County Planning Commission

Proposed Minutes for August 15, 2016

ATTACHMENT #1:

* Proposed Language for Personal Wireless Telecommunications

- **BLACK:** All text in **black** is current language
- **BLUE:** All text in **blue** is new or revised language.
- **ORANGE:** New subsections

SECTION 2.2 DEFINITIONS...

CLIMBING BARRIER: Material attached to the lowest eight feet (8') of a lattice tower for the prevention of using structural cross members as a ladder; a safety feature to discourage climbing by unauthorized individuals

PERSONAL WIRELESS SERVICES TELECOMMUNICATIONS TOWERS AND FACILITIES: Self-supporting or guyed towers of one hundred fifty feet (150') or less that provide data and internet access within a three to five (3-5) mile radius. These low wattage towers are a Permitted Use Subject to Special Conditions. (Section 21.46)

Section 322(c)(7) of the Federal Communications Act uses the following definitions:

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services.

SECTION 21.46 WIRELESS COMMUNICATIONS:

Reference the Telecommunication Act (Act 104 of 1996 as amended) and the Michigan Zoning and Enabling Act (Act 110 of 2006 as amended including Act 143 of 2012). These set forth provisions concerning placement, location and construction of towers and related facilities for wireless services, provide rules for changes to existing towers and set time frames for municipality action. The purpose of this Section is to establish general guidelines for the sighting of wireless communications towers and antennas. The goals of the section are to:

- (1) Protect residential zoning districts from potential adverse impacts of towers and antennas;
- (2) Encourage the location of towers in non-residential areas;
- (3) Minimize the total number of towers throughout the county;
- (4) Strongly encourage the joint use of new and existing tower sites as a primary option rather than construction of additional single-use towers;
- (5) Encourage users of towers and antennas to locate them, to the extent possible, in areas where the adverse impact on aesthetics in this tourism based county is minimal;
- (6) Encourage users of towers and antennas to configure them in a way that minimizes the adverse visual impact of the towers and antennas through careful design, sighting, landscape screening, and innovative camouflaging techniques;
- (7) Enhance the ability of providers of telecommunication services to provide such services to the county quickly, effectively, and efficiently;
- (8) Consider the public health and safety of communication towers; and

Otsego County Planning Commission

Proposed Minutes for August 15, 2016

- (9) Avoid potential damage to adjacent properties from tower failure through engineering and careful sighting of tower structures. In furtherance of these goals, due consideration shall be given to the Otsego County master plan, zoning map, existing land uses, and environmentally sensitive areas in approving sites for the location of towers and antennas.

Wireless and cellular phone service are specially determined to not be essential services, nor to be public utilities as such terms are used in this Ordinance.

It is not the intent to create "antennae farms" with a number of monopoles and antennae in a small area. Also, it is not the intent to regulate ham radio antennae under this section, or to regulate towers installed at single family dwellings for personal television reception.

SECTION 21.46.1 DEFINITIONS:

As used in this section, the following terms shall have the meanings set forth below:

1. Antenna means any exterior transmitting or receiving device mounted on a tower, building structure and used in communications that radiate or capture electromagnetic waves, digital signals, analog signals, radio frequencies (excluding radar signals), wireless telecommunications signals or other communication signals.
2. Height means, when referring to a tower or other structure, the distance measured from the finished grade of the parcel to the highest point on the tower or other structure, including the base pad and any antenna.
3. Tower means any structure that is designed and constructed primarily for the purpose of supporting one or more antennas for telephone, radio and similar communication purposes, including self-supporting (lattice) towers, guyed towers, or monopole towers (including telephone poles). The term includes radio and television transmission towers, microwave towers, common carrier towers, cellular telephone towers, alternative tower structures, and the like. The term includes the structure and any support thereto.
4. Co-location shall mean the location by two (2) or more communication providers of wireless communication facilities on a common structure, tower or building, with the view toward reducing the overall number of structures required to support wireless communication antennas within the County.

SECTION 21.46.2 WIRELESS COMMUNICATIONS TOWERS OF ONE HUNDRED NINETY (190) FEET OR LESS AND RELATED FACILITIES:

Construction of Wireless Telecommunication Antenna Towers of one hundred ninety (190) feet or less and Equipment Shelter Buildings are allowed in Otsego County subject to the following provisions:

21.46.2.1 Prior to approval of any new tower to be located within one (1) mile of an existing tower or other structure of equal or greater height than the proposed tower, applicant shall contact owner(s) of all said towers or structures and request permission to locate or co-locate in lieu of construction of a new tower. No new tower request shall be granted until proof of contact(s) has been provided to the zoning administrator.

21.46.2.1.1 As an alternative to contacting owners of all towers or structures, as described in the above paragraph, location or co-location on existing towers or structures shall be approved by the Zoning Administrator under applicable provisions, including [21.46.2.7.1](#).

An accessory equipment shelter building shall meet all normal requirements of accessory buildings. Any location or co-location shall not result in a height of more than twice the height of the existing structure.

21.46.2.2 Wireless Telecommunication Antenna Towers and Equipment Shelter Buildings shall not be placed in any road right-of-way or in any easement for road purposes.

21.46.2.3 Such towers and facilities shall be placed on parcels (whether the land is owned or leased by the tower owner) that have an area no less than the minimum parcel size for the district, as listed in [Article 17](#). No variances shall be granted to reduce this size limit.

21.46.2.4 All setbacks for the zoning district shall be met and in addition, no tower shall be placed closer than one hundred percent (100%) of the tower's height from any property line or any residence.

Otsego County Planning Commission

Proposed Minutes for August 15, 2016

- 21.46.2.5 A tower proposal of more than thirty-five (35) feet shall be submitted to the Otsego County Airport Manager and FAA for review and approval prior to issuance of a zoning permit.
- 21.46.2.6 The tower itself must be of monopole design. Guyed and self-supporting towers may be considered by the Planning Commission and require a special use permit. ([Section 19.7](#))
- 21.46.2.6.1 Maximum height of guyed and self-supporting towers to be one hundred fifty feet (150').
- 21.46.2.6.2 Guyed towers must have a clear area radius of one hundred twenty percent (120%) of their height to protect surrounding properties/structures should a tower collapse.
- 21.46.2.6.3 Eight (8) foot climbing barriers are required on guyed towers.
- 21.46.2.7 All such tower location proposals shall be submitted with a site plan ([Section 23.2](#)).
- 21.46.2.7.1 The following conditions are required for approval of an application.
- Antennas may or may not be mounted on existing structures. The tower and antenna are painted or screened as to blend into the background.
- The service building shall be constructed of material such as wood, brick, or stucco, and shall be designed to blend into the natural setting and surrounding buildings. In no case will metal exteriors be allowed for service buildings.
- Unless technically impossible, all connecting wires from towers to accessory buildings shall be underground.
- Unless technically impossible, all electrical and other service wires to the facility shall be underground.
- The service building shall be no larger than necessary to house the equipment and shall meet all setback requirements of this Ordinance.
- 21.46.2.8 Lighting shall be designed in accordance with [Section 21.19](#) in addition to the following:
- Lights shall not be permitted on the tower or antennae unless FAA regulations require them.
- Light poles and fixtures shall be located as low as practical; a greater number of low "area" lights are favored over higher lights. Incandescent lights are favored over sodium or mercury-type street lighting.
- 21.46.2.9 The tower and its accessory buildings shall be fenced with no less than a six-foot (6') safety fence with a locked gate. For towers with guy wires, anchor points must have individual six foot (6') fencing or yellow guy protection "sleeves" for high visibility. The Planning Commission will determine which of the two (2) will be required based upon the site chosen for the tower. Signage must be installed on the six foot (6') fence with locked gate stating the owner's name and contact information, including an emergency telephone number.
- 21.46.2.10 The application shall include a description of security. Security shall be posted at the time of receiving a building permit to ensure removal of the facility when it has been abandoned for more than twelve (12) months or is no longer needed. In this regard, the security shall, at the selection of the applicant, be in the form of cash or letter of credit to remove the tower in a timely manner as required under [Section 21.46.4](#), with the further provision that the applicant and owner shall be responsible for the payment of any costs and attorneys' fees incurred by the county in securing removal. The amount of the security bond or letter of credit is to be determined by the Planning Commission. ([Section 25.6](#))
- 21.46.2.11 Professional sealed documents are required for all Wireless Communications Towers ([Section 23.2.2](#))
- 21.46.2.12 For projects involving less than twenty (20) square feet of soil disruption, soil samples and water flow analysis will not be required.

Otsego County Planning Commission

Proposed Minutes for August 15, 2016

ARTICLE 4 R1 RESIDENTIAL DISTRICT

SECTION 4.2 PERMITTED USES SUBJECT TO SPECIAL CONDITIONS

4.2.8 Personal Wireless Services Telecommunications Towers and Facilities one hundred fifty (150) feet or less in height, self-supporting (lattice) or guyed [Permit criteria includes [Article 21.46](#)]

ARTICLE 5 R2 GENERAL RESIDENTIAL DISTRICT

SECTION 5.2 PERMITTED USES SUBJECT TO SPECIAL CONDITIONS

5.2.7 Personal Wireless Services Telecommunications Towers and Facilities one hundred fifty (150) feet or less in height, self-supporting (lattice) or guyed [Permit criteria includes [Article 21.46](#)]

ARTICLE 6 R3 RESIDENTIAL ESTATES DISTRICT

SECTION 6.2 PERMITTED USES SUBJECT TO SPECIAL CONDITIONS

6.2.6 Personal Wireless Services Telecommunications Towers and Facilities one hundred fifty (150) feet or less in height, self-supporting (lattice) or guyed [Permit criteria includes [Article 21.46](#)]

ARTICLE 7 RR RECREATION RESIDENTIAL DISTRICT

SECTION 7.2 PERMITTED USES SUBJECT TO SPECIAL CONDITIONS

7.2.9 Personal Wireless Services Telecommunications Towers and Facilities one hundred fifty (150) feet or less in height, self-supporting (lattice) or guyed [Permit criteria includes [Article 21.46](#)]

ARTICLE 8 FR FORESTRY RECREATION DISTRICT

SECTION 8.2 PERMITTED USES SUBJECT TO SPECIAL CONDITIONS

8.2.22 Personal Wireless Services Telecommunications Towers and Facilities one hundred fifty (150) feet or less in height, self-supporting (lattice) or guyed [Permit criteria includes [Article 21.46](#)]

ARTICLE 9 AR AGRICULTURAL RESOURCE DISTRICT

SECTION 9.2 PERMITTED USES SUBJECT TO SPECIAL CONDITIONS

9.2.25 Personal Wireless Services Telecommunications Towers and Facilities one hundred fifty (150) feet or less in height, self-supporting (lattice) or guyed [Permit criteria includes [Article 21.46](#)]

ARTICLE 10 B1 LOCAL BUSINESS DISTRICT

SECTION 10.2 PERMITTED USES SUBJECT TO SPECIAL CONDITIONS

10.2.11 Personal Wireless Services Telecommunications Towers and Facilities one hundred fifty (150) feet or less in height, self-supporting (lattice) or guyed [Permit criteria includes [Article 21.46](#)]

ARTICLE 11 B2 GENERAL BUSINESS DISTRICT

SECTION 11.2 PERMITTED USES SUBJECT TO SPECIAL CONDITIONS

11.2.15 Personal Wireless Services Telecommunications Towers and Facilities one hundred fifty (150) feet or less in height, self-supporting (lattice) or guyed [Permit criteria includes [Article 21.46](#)]

ARTICLE 12 B3 BUSINESS, LIGHT MANUFACTURING DISTRICT

SECTION 12.2 PERMITTED USES SUBJECT TO SPECIAL CONDITIONS

12.2.15 Personal Wireless Services Telecommunications Towers and Facilities one hundred fifty (150) feet or less in height, self-supporting (lattice) or guyed [Permit criteria includes [Article 21.46](#)]

ARTICLE 13 I INDUSTRIAL DISTRICT

SECTION 13.2 PERMITTED USES SUBJECT TO SPECIAL CONDITIONS

13.2.20 Personal Wireless Services Telecommunications Towers and Facilities one hundred fifty (150) feet or less in height, self-supporting (lattice) or guyed [Permit criteria includes [Article 21.46](#)]

Otsego County Planning Commission

Proposed Minutes for August 15, 2016

ATTACHMENT #2:

Proposed New Zoning District

ARTICLE 15 MUZ MULTIPLE USE ZONING DISTRICT

MUZ MAIN STREET MULTIPLE USE ZONING

INTENT:

Main Street Multiple Use Zoning (MUZ) is established for the purpose of accommodating the highest concentration of retail and service establishments. It is designed with the intent to promote a pedestrian-oriented and accessible, central commercial service district where a variety of mutually supporting retail, office, commercial, civic and limited residential uses are permitted. Collectively, the uses permitted in this district are intended to provide a convenient and attractive retail and service center for the community, its rural trade area and tourist traffic. A prime characteristic of this district is the offering of a variety of goods and comparison shopping opportunities directed primarily at the pedestrian shopper.

Each use shall be complementary to the stated function and purpose of the district and shall not have adverse impact upon street capacity, safety and utilities. In an effort to encourage this type of character and provide for the health, welfare and safety of the pedestrian in the area, drive-in and drive-through operations are excluded from this district.

The Main Street MUZ is further designed and intended to:

- A. Encourage innovative, traditional and neo-traditional commercial and mixed use developments
- B. Encourage a lively social environment and economically viable downtown with a wide variety of uses in a pedestrian-oriented setting, with on-street customer parking
- C. Extend greater opportunities for traditional community living, working, housing and recreation to all citizens, residents and visitors of the community
- D. Encourage a more efficient use of land and public services and to reflect changes in technology of land development by directing new development in a traditional, compact and consolidated pattern of mixed use
- E. Promote a walkable community and blend land uses to minimize traffic congestion
- F. Prohibit the development of drive-in and drive-through facilities which contribute to traffic congestion and pose a threat to the pedestrian environment
- G. Promote the creation of community places which are oriented to the pedestrian, thereby promoting citizen security and social interaction
- H. Promote structures that are harmonious in overall design and development pattern
- I. Encourage development of a community "Main Street" with mixed land uses, on-street customer parking and a continuous series of building façades and store fronts, which not only serves the needs of the immediate neighborhood but also the surrounding areas

Otsego County Planning Commission

Proposed Minutes for August 15, 2016

SECTION 15.1 PRINCIPAL USES PERMITTED

No building or land shall be used and no building shall be erected, except for one (1) or more of the following specific uses:

- 15.1.1 Art galleries
- 15.1.2 Business establishments which perform services on premises such as, but not limited to, banks, savings and loans and credit unions, pedestrian oriented automated teller machine facilities
- 15.1.3 Dry cleaning establishments or pick-up stations dealing directly with the consumer, limited to two thousand (2,000) square feet of floor area; Central dry cleaning plants serving more than two (2) retail outlets shall be prohibited.
- 15.1.4 Hotels, bed and breakfast inns and bed and breakfast houses with more than four (4) rooms must meet off street parking requirements of Article 21.18.6.4.
- 15.1.5 Professional offices: Office for medical, dental, legal, engineering, architectural, accounting services, brokerage houses, insurance, real estate or travel agencies with a footprint of up to seven thousand (7,000) square feet
- 15.1.6 Mixed-use buildings with business, commercial or service uses on the ground floor and residential or office uses on upper floors. Where there is mixed business/office and residential use in a building, there shall be provided a separate, private pedestrian entranceway for the residential uses.
- 15.1.7 Newspaper offices and publishers and commercial printers with a footprint of up to seven thousand (7,000) square feet
- 15.1.8 Restaurants, including those with outdoor eating areas, carry-out and open front restaurants, subject to the following site design standards:
 - 15.1.8.1 Outdoor eating areas may be on a public right-of-way, on a building roof top, as part of a patio or deck or within the boundaries of a parcel or lot.
 - 15.1.8.2. A minimum of four (4) feet of public sidewalk along the entire eating area and leading to the entrance of the establishment shall be maintained free of tables and other encumbrances. The pedestrian area shall also be free from benches, waste receptacles, fire hydrants and similar structures. If the sidewalk is not wide enough to allow for a four (4) foot wide clearance for circulation, the outdoor eating area shall not be permitted on a public sidewalk.
 - 15.1.8.3 The outdoor eating area shall be kept clean, litter-free within and immediately adjacent to the area of the tables and chairs. Additionally, all waste generated on site shall be contained by the owner, which may require outdoor waste receptacles. Owners are responsible for all wastes so generated. Written procedures for cleaning and waste containment and removal responsibilities must be included with all applications.
 - 15.1.8.4 Tables, chairs, planters, waste receptacles and other elements of street furniture shall be compatible with the architectural character of the adjacent buildings. If table umbrellas will be used, they shall complement building colors. All tables, chairs, umbrellas and other furniture and fixtures must be stored inside the building or in an alternate location other than a public sidewalk, except thirty (30) minutes prior to opening until sixty (60) minutes after closing.

Otsego County Planning Commission

Proposed Minutes for August 15, 2016

- 15.1.8.5 Such areas are permitted seasonally between April 1st and October 31st; The hours of operation for the outdoor eating area shall be established and noted with the application.
- 15.1.8.6 The owner of an outdoor eating area may apply for two (2) event permits outside of the normal season of not more than ten (10) days combined; All other outdoor eating area requirements apply.
- 15.1.8.7 The issuance of a permit for an outdoor eating area does not constitute a separate business.
- 15.1.9 Personal service establishments within a completely enclosed building, provided each occupies a total usable floor area of not more than seven thousand (7,000) square feet, including but not limited to such uses as: repair shops (watches, radio, television, shoes, etc.), tailor and dressmaking shops, beauty parlors and styling salons, barber shops, photographic studios, film processing outlets, copy centers, interior decorators, postal centers and computer services
- 15.1.10 Public, quasi-public and institutional uses such as, but not limited to, municipal buildings and offices, court houses, public off-street parking facilities, libraries, museums, public safety facilities, parks and playgrounds, post offices and civic centers and schools but excluding storage yards
- 15.1.11 Retail businesses which supply commodities on the premise with a footprint of up to seven thousand (7,000) square feet, such as but not limited to: groceries, meats, fruits and produce, dairy products, baked goods, candies, wine (specialty wine shops only) and other specialty food products (such products can be produced on the premises as an accessory use provided they are sold on the site at retail prices); and stores selling drugs, dry goods, flowers, clothing, notions, books and magazines, toys, sporting goods, shoes, tobacco products, musical instruments, recorded music, video rentals and sales, gifts and souvenirs, antiques, furniture and hardware
- 15.1.12 Retail sales with a footprint of up to seven thousand (7,000) square feet in which both a workshop and retail outlet or showroom are required, such as plumbing, electrical, interior decorating, upholstering, printing, photographic-reproducing, radio, and home appliance and similar establishments of similar character subject to the provision that not more than eighty percent (80%) of the total useable floor area of the establishment shall be used for servicing, repairing or processing activities and further provided that such retail outlet or showroom activities area shall be provided in that portion of the building where the customer entrance is located
- 15.1.13 Cocktail lounges, bars, taverns (pubs) and brewpubs (excluding drive-in restaurants and those with drive-through facilities), where the patrons are served within the building occupied by such establishment
- 15.1.14 Studios for art, music, dance or theatrical instruction or fitness centers with footprint of up to seven thousand (7,000) square feet
- 15.1.15 The following in-home uses provided no more than twenty-five percent (25%) of floor area is used for such purpose:
 - 15.1.15.1 Offices and home occupations when operated within the confines of a single family dwelling as an accessory to living quarters Permit criteria for these uses include Article 4 R1 Residential District.
- 15.1.16 Existing Residences

Otsego County Planning Commission

Proposed Minutes for August 15, 2016

SECTION 15.2 PERMITTED USES SUBJECT TO SPECIAL CONDITIONS

The following uses may be permitted subject to the conditions herein imposed for each use, the review standards of [Article 4.2](#) and only after the review and approval of the site plan by the Otsego County Planning Commission. See [Article 21](#) for applicable Specific Requirements for Certain Uses, if any, and [Article 23](#) for site plan requirements.

- 15.2.1 Indoor recreational centers, including the following: bowling alleys, roller and ice skating rinks, pool or billiard halls, pinball and mechanical amusement device arcades and other general indoor recreation facilities, with a footprint of up to seven thousand (7,000) square feet
- 15.2.2 Hardware, equipment rental and building supplies where the size is limited to seven thousand (7,000) square feet total, of which less than two thousand (2,000) square feet is outdoor storage; The Otsego County Planning Commission may permit outdoor storage for such uses provided it determines the design, placement and screening of such outdoor storage complies with the requirements of this ordinance.
- 15.2.3 Mortuaries and funeral homes with a footprint of up to seven thousand (7,000) square feet
- 15.2.4 Party stores (convenience stores) with a footprint of up to seven thousand (7,000) square feet
- 15.2.5 Senior housing, assisted living facilities or assisted day care facilities with a footprint of up to seven thousand (7,000) square feet
- 15.2.6 Accessory buildings with a footprint not greater than eight hundred (800) square feet
- 15.2.7 Utilities: All utilities and service structures when their operating requirements necessitate locating the facilities within the district in order to serve the immediate vicinity (storage yards excluded), shall be located underground except where above ground equipment such as transformers, control panels, service connections and meters are required. All above ground equipment shall be located at the rear of the building. Permit criteria includes [Article 21.10](#) regarding screening and fence
- 15.2.8 Wireless telecommunications towers and facilities one hundred fifty (150) feet or less in height. Permit criteria included in [Article 21.46](#)
- 15.2.9 Unlisted property uses if authorized under [Article 21.44](#)

SECTION 15.3 DEVELOPMENT REQUIREMENTS

Buildings in the Main Street MUZ should possess architectural variety and must enhance the overall cohesiveness of the Main Street MUZ character and appearance as determined and described herein. Except as otherwise noted, buildings and uses in the Main Street MUZ shall comply with the following requirements:

- 15.3.1 The ground floor use shall be considered the main use of the building.
- 15.3.2 Building Placement: Buildings shall be built so that the front building line is within the Build-to-Area. The Otsego County Planning Commission may require greater setbacks if such space, in their determination, is needed for other requirements.
 - 15.3.2.1 Buildings shall have the greatest portion of front coverage along the primary street(s).
 - 15.3.2.2 Buildings may have up to forty percent (40%) or forty (40) feet, whichever is less, of front façade recessed from the Build-to-Area to allow for courtyards and plazas.

Otsego County Planning Commission

Proposed Minutes for August 15, 2016

- 15.3.2.3 Cantilevered or self-supporting awnings, signs or lights may extend into the setback area; however, they must be a minimum of four (4) feet away from curbs and shall not be within eight (8) feet of the side property lines.
- 15.3.3 Building Height: New buildings shall contain at least two (2) stories unless the Otsego County Planning Commission determines a single story will not detract from the character and appearance of the Main Street MUZ.
- 15.3.4 Not more than forty percent (40%) of any given floor other than the basement, may be used for bathrooms, closets, halls, utility or storage spaces and only where incidental to the primary use. All of the basement (100%) may be used for these incidental uses. Storage areas shall be in the rear one-half (1/2) of the building.
- 15.3.5 Façade Design: All visible building façades from a public right-of-way or public land shall conform to the following design criteria:
 - 15.3.5.1 Architectural Features: Building façades greater than thirty-three (33) feet in length shall contain architectural features, details and ornaments. Elements such as wall clocks, decorative light fixtures and door or window canopies are recommended. Blank, windowless walls are prohibited.
- 15.3.6 All non-residential buildings must have interior downspout and gutter systems. Exterior downspouts and gutters are not permitted for non-residential buildings, except for those originally constructed for single-family residential purposes.
- 15.3.7 Fenestration: All façades visible from the street must contain glazed glass windows. Spaces between windows shall be formed by columns, mullions or material found elsewhere on the façade. Clear window glass is recommended; green, blue, bronze or smoke tints are permitted.
 - 15.3.7.1 Glazing on the first floor shall occupy a minimum twenty-five percent (25%) of the façade; No glazing on first floor shall be placed less than two (2) feet six (6) inches above the sidewalk.
 - 15.3.7.2 Glazing on the second or higher floors shall be a minimum of twenty percent (20%).
- 15.3.8 Building Materials: Building materials must be consistent with the surrounding neighborhood character. Building materials on the front façade or any façade visible from a public right-of-way must be primarily of natural materials (brick, stone, wood, cast stone or other approved material). Each front façade, any façade visible from a public right-of-way and any façade with a dedicated public entrance into the building, should contain at least sixty percent (60%) of the recommended materials listed below, excluding window areas:
 - 15.3.8.1 Recommended Materials: Brick, stone, wood and cast stone
 - 15.3.8.2 Acceptable Materials: Split face, scored or ground face block; beveled wood siding (lap, board and batten, shake); exterior finish insulation systems (EIFS)
 - 15.3.8.3 Other synthetic or highly-reflective materials should not be used, except for decorative or accent features and limited to a maximum of ten percent (10%) of any face of a story
 - 15.3.8.4 The following materials are prohibited within ten (10) feet of the building grade: Smooth faced block, smooth concrete, vinyl or metal siding
 - 15.3.8.5 The following materials are prohibited: Opaque and reflective glass, T-111 panels, metal siding including aluminum siding and standing seam panels

Otsego County Planning Commission

Proposed Minutes for August 15, 2016

- 15.3.9 Side or Rear Façade Design: All sides of a building shall be similar in design and material to present a cohesive appearance to neighboring properties. Wherever a side or rear façade is visible from a public right-of-way or if parking is located at the side or rear of a building, the façade shall be designed to create a pleasing appearance or as described within this Article.
- 15.3.10 Building Entrances: All buildings shall have at least one (1) primary public customer entrance that faces a public street unless a building does not face a public street. Rear entrances are permitted only if there is a primary entrance from a public street.
- 15.3.11 Mechanical Equipment: All units and appliances for central air conditioning, high voltage electrical (HVAC) systems, exhaust pipes or stacks, elevator housing and satellite dishes or other telecommunications receiving devices shall be thoroughly screened from view from the public right-of-way and from adjacent properties by using walls, fences, roofline elements, penthouse-type screening devices or landscaping. Outdoor burning equipment is prohibited.
- 15.3.11.1 Fire escapes shall not be permitted on a building's front façade. In buildings requiring a second means of egress pursuant to the local building codes, internal stairs or other routes of egress shall be used.
- 15.3.11.2 Solid metal security gates or solid roll-down metal windows shall be prohibited. Link or grill type security devices shall be permitted only if installed from inside, within the window or door frames; or if installed on the outside, if the coil box is recessed and concealed behind the building wall. Security grills shall be recessed and concealed during normal business hours.
- 15.3.12 Service Access: A designated loading space shall be reserved at the rear of the building. Loading from secondary streets may be permitted by the Otsego County Planning Commission upon demonstration by the applicant that through traffic flow and access to neighboring uses will not be disrupted.
- 15.3.13 Landscaping: Landscaping is an integral part of this district and shall compliment this district and surrounding uses. Landscaping shall comply with the provisions elsewhere in this ordinance.
- 15.3.14 Courtyards and Plazas: Exterior public and semi-public spaces, such as courtyards or plazas, shall be designed for function, enhance surrounding buildings and provide amenities for users in the form of textured paving, landscaping, lighting, trees, benches, trash receptacles and other items of street furniture as appropriate. Courtyards shall have recognizable edges defined on at least three (3) sides by buildings, walls, elements of landscaping and elements of street furniture in order to create a strong sense of enclosure.
- 15.3.15 Sidewalks: Sidewalks shall be provided, maintained, repaired and/or replaced by the property owner. Sidewalks shall conform to placement and level of adjacent neighborhood sidewalks or be located one (1) foot inside of the street right-of-way along all streets abutting the property. Sidewalks shall be a minimum of forty-eight (48) inches wide or the width of adjoining sidewalks as approved during site plan review. Greater width may be required during site plan review. Sidewalk sections shall be maintained, repaired or replaced when they are deemed hazardous. Such maintenance, repair or replacement shall be completed within forty-five (45) days of written notice by Otsego County Building and Zoning.
- 15.3.16 Utilities: All utilities and service structures when their operating requirements necessitate locating the facilities within the district in order to serve the immediate vicinity (storage yards excluded), shall be located underground except where above ground equipment such

Otsego County Planning Commission

Proposed Minutes for August 15, 2016

as transformers, control panels, service connections and meters are required. All above ground equipment shall be located at the rear of the building. Permit criteria includes Articles 21.10, 21.18.5 and 21.18.6 regarding screening and fencing.

15.3.17 Enclosed Buildings: Within the Main Street MUZ, all activities, unless specifically provided for herein, shall be conducted entirely within an enclosed building.

15.3.18 Parking Requirements: Parking in this district, except for hotels and bed and breakfast inns with more than four (4) rental rooms, is not subject to the parking requirements elsewhere in this ordinance for land uses that comply with the requirements of this district. On-street parking is encouraged in this district. Off-street parking may be provided to the rear of a building or in publicly owned designated lots.

MUZ TOWN CENTER MULTIPLE USE ZONING

INTENT:

Town Center Multiple Use Zoning (MUZ) is established for the purpose of accommodating moderately heavy residential density with some retail and service business. Collectively the uses permitted in this district are intended to provide a convenient and attractive living community. It is designed and intended to be walkable, thus enhancing the Main Street MUZ and providing a transition from the Main Street MUZ to other land uses. It is further intended to be residential in appearance and character with primarily off street parking. Streets are intended to have sidewalks.

SECTION 15.4 PRINCIPAL USES PERMITTED

No building or land shall be used and no building shall be erected except for one (1) or more of the following specified uses:

- 15.4.1 Single-family and duplex dwellings: These shall be built to the Build-to-Lines in a traditional residential style.
- 15.4.2 Apartment buildings: Apartment buildings may contain up to eight (8) units per building.
- 15.4.3 Churches: Churches, temples and similar places of worship, limited to a footprint of thirty-five hundred (3,500) square feet
- 15.4.4 Utilities: All utilities and service structures when their operating requirements necessitate locating the facilities within the district in order to serve the immediate vicinity (storage yards excluded), shall be located underground except where above ground equipment such as transformers, control panels, service connections and meters are required. All above ground equipment shall be located at the rear of the building. Permit criteria includes Articles 21.10, 21.18.5 and 21.18.6 screening and fence.
- 15.4.5 Laundromats (self-service or coin operated) up to a footprint of one thousand (1,000) square feet
- 15.4.6 Parks
- 15.4.7 Community centers or similar places of assembly when conducted completely with enclosed buildings with a footprint of up to seven thousand (7,000) square feet
- 15.4.8 Senior housing, licensed residential care facilities with a footprint of up to seven thousand (7,000) square feet
- 15.4.9 The following in-home uses provided no more than twenty-five (25%) of the floor area is used for such a purpose:

Otsego County Planning Commission

Proposed Minutes for August 15, 2016

- 15.4.9.1 Offices and home occupations when operated within the confines of a single family dwelling as an accessory to living quarters Permit criteria for these uses include Article 4 R1 Residential District.

SECTION 15.5 PERMITTED USES SUBJECT TO SPECIAL CONDITIONS

The following uses may be permitted subject to the conditions herein imposed for each use, the review standards of Article 4.2 and only after the review and approval of the site plan by the Otsego County Planning Commission. See Article 21 for applicable Specific Requirements for Certain Uses, if any, and Article 23 for site plan requirements.

- 15.5.1 Apartment buildings with greater than eight (8) units per building
- 15.5.2 Transitional Shelters: Temporary shelters, overnight shelters and temporary residences
- 15.5.2.1 A minimum of one hundred twenty (120) square feet of area per individual occupant shall be provided
- 15.5.2.2 Up to six (6) non-related occupants may be allowed
- 15.5.2.3 Unlisted property uses if authorized under Article 21.44

SECTION 15.6 DEVELOPMENT REQUIREMENTS

Buildings in the Town Center MUZ shall possess residential style architectural variety but must enhance the overall cohesiveness of the Town Center MUZ's character and appearance as determined and described herein. Except as otherwise noted, buildings and uses in the Town Center MUZ shall comply with the following requirements:

- 15.6.1 Building placement: Buildings shall be built so that the front building line is within the Build-to-Area. The Otsego County Planning Commission may require greater setbacks if such space, in their determination, is needed for other requirements.
- 15.6.2 Building Design: Buildings shall be of traditional residential home architecture and style.
- 15.6.2.1 A porch at the main floor level shall be on the front street façade measuring one hundred twenty (120) square feet or ten percent (10%) of the main floor area, whichever is greater.
- 15.6.2.2 Main floor level shall be elevated thirty-two (32) inches to forty-eight (48) inches above the grade at the Build-to-Line.
- 15.6.3 Building Materials: Building materials that produce the traditional style look are required. The following materials are prohibited on the exterior walls: Exposed concrete or cement blocks above the foundation, asbestos siding, tar or felt paper, T-111 panels and standing seam panels.
- 15.6.4 Sidewalks: Sidewalks shall be provided, maintained, repaired and/or replaced by the property owner. Sidewalks shall conform to placement and level of adjacent neighborhood sidewalks or be located one (1) foot inside of the street right of way along all streets abutting the property. Sidewalks shall be a minimum of forty-eight (48) inches wide or the width of adjoining sidewalks or as approved during site plan review. Greater width may be required during site plan review. Sidewalk sections shall be maintained, repaired or replaced when they are deemed hazardous. Such maintenance, repair or replacement shall be completed within forty-five (45) days of written notice by Otsego County Building and Zoning.

Otsego County Planning Commission

Proposed Minutes for August 15, 2016

- 15.6.5 Mechanical Equipment: All mechanical equipment and appliances for central air conditioning, telecommunications and other such devices shall be located in the rear of the building. Outdoor burning units (stoves/furnaces) are prohibited.
- 15.6.6 Landscaping: Landscaping is an integral part of this district and shall compliment the district and surrounding uses. Permit criteria are included in Article 21.18
- 15.6.7 Utilities: All utilities and service structures shall be located underground except such equipment as transformers, control panels, service connections and meters. All above ground equipment shall be located at the rear of the building. Permit criteria includes Article 21.10 regarding screening and fence
- 15.6.8 Shared driveways: Sharing of driveways is allowed with a written agreement that is recorded at Otsego County on all applicable deeds. Permit criteria includes Article 25

Otsego County Planning Commission

Proposed Minutes for August 15, 2016 ARTICLE 17 SCHEDULE OF DIMENSIONS

17.1 Table 1 - LIMITING HEIGHT, DENSITY, AND AREA BY ZONING DISTRICTS (See also [Article 21.1 Accessory Buildings](#) and [Article 22 General Exceptions for Area, Height, and Use](#))

Zoning District	R1 & R2	R3	RR	FR & AR	Reserved for future use	Reserved for future use
Min. Lot Area (Sq. feet)	20,000 .46 acre	40,000 .92 acre	20,000 .46 acre	88,000 2.02 acre		
Min. Front Setback (b)(j)	25 ft	25 ft	25 ft	50 ft		
Max. Front Setback	NA	NA	NA	NA		
Min. Side Setback	10 ft	10 ft	10 ft	20 ft		
Min. Rear Setback	30 ft (a, h)	30ft (a, h)	30 ft (a, h)	40 ft (a)		
Min. Lot width (k)	100 ft 150 ft Duplex	100 ft	100 ft	150 ft AR 300 ft Duplex		
Max. % lot coverage	25%	25%	25%	30%		
Max. Building height (l)	35 ft (g)	35 ft (g)	35 ft (g)	35 ft (g)		
Min. Ground Floor area of principal structure (Square feet)	720 (i)	720 (i)	720 (i)	720 (i)		
Min. Width of principal structure	20 ft (i)	11ft (i)	20 ft (i)	11 ft (i)		

Zoning District	B1	B2	B3	I	HX	MUZ	
						MAIN ST	TOWN CENTER
Min. Lot Area (Square feet)	10,000	10,000	20,000	40,000	10,000	8,000	8,000
Min. Front Setback	30 ft (e)	Build-to-Area	Build-to-Area				
Max. Front Setback	NA	NA	NA	NA	NA	NA	NA
Min. Side Setback	10 ft (c)	5 ft	5 ft				
Min. Rear Setback	20 ft (a, d, f)	10 ft	10 ft				
Min. Lot width (k)	100 ft	100 ft	100 ft	150 ft	150 ft	60 ft	60 ft
Max. % lot coverage	NA	NA	NA	NA	NA	NA	NA
Max. Building height (l)	35 ft (g)	35 ft	35 ft				
Min. Ground Floor area principal structure (Square feet)	NA	NA	NA	NA	NA	NA	NA
Min. Width of principal structure	NA	NA	NA	NA	NA	NA	NA

Minimum front, side and rear setbacks, and maximum lot coverage modifications of up to twenty-five percent (25%) may be approved by the Zoning Administrator for nonconforming lots, as described in [Article 21.26.1](#) and [21.26.2](#).

Otsego County Planning Commission

Proposed Minutes for August 15, 2016

ARTICLE 2 CONSTRUCTION OF LANGUAGE AND DEFINITIONS

SECTION 2.2 DEFINITIONS...

BUILD-TO-AREA: The space within the Build-to-Line and the Lot Line Sides. The Build-to-Area may vary a distance on either side of the Build-to-Line. The distance is determined by measuring the number of feet between the Build-to-Line and the public right-of-way and multiplying the number of feet by ten percent (10%).

BUILD-TO-LINE: The line of vertical plane formed by the planned building façade that is parallel to the road right-of-way and extends to and coincides with the plane of the front façade of existing or planned buildings along the same right-of-way.

COURTYARD: An unroofed area that is completely or mostly enclosed by the walls of a large building.

FENESTRATION: The arrangement of windows and doors on the elevations of a building.

GLAZING: Furnishing or fitting with glass all surfaces on a fenestration.

NEO-TRADITIONAL: Reviving traditional methods; combining tradition with newer elements.

PLAZA: A public square in a city or town; an open area usually located near urban buildings and often featuring walkways, trees and shrubs, places to sit and sometimes shops.

PARK: An area of land, usually in a largely natural state, for the enjoyment of the public, having facilities for rest and recreation, often owned, set apart and managed by a city, state or nation.

Otsego County Planning Commission

Proposed Minutes for August 15, 2016

ATTACHMENT #3:

Schedule: The Library is planning to put a bond issue before the voters on the November 2016 ballot; if successful, construction could begin in 2017.

Estimated Cost: \$2,727,000 plus F & E of up to \$250,000

Basis of Cost Estimate: Architect's opinion of probable building cost ; Director estimate of F & E

Alternative Financing:

\$548,362 from the Designated Building Fund
\$100,000 from the Library's Maintenance Fund
\$ 45,501 from the Library's Technology Fund
\$ 93,650 from the Otsego County Community Foundation/Library Fund

Potential funding sources for remainder:

Locally voted millage

Local capital campaign

Michigan Council for the Arts and Cultural Affairs Capital Improvement Program

Private foundation grants

Agency Reported Priority: Urgent

Planning Commission Reported Priority: Urgent



Otsego County Planning Commission

Proposed Minutes for August 15, 2016

Otsego County Six Year Capital Improvement Plan - Appendix A

Project Name	Agency	Project Type	Funding Source(s)	Estimated Cost	% C. Priority	2017	2018	2019	2020	2021	2022
Gaylord Regional Airport - Asphalt Extension	Otsego County	New Construction	50% Federal; 50% State; 5% Local	\$370,000	Important	\$370,000					
Gaylord Regional Airport - Box Hanger	Otsego County	New Construction	45.48% Federal; 4.71% State; 9.35% Local	\$437,931	Important	\$437,931					
North Central State Trail / Iron Belle Trail Extension	Otsego County	New Construction	Various	\$2,300,000	Important	\$2,300,000					
North Central State Trailhead	Otsego County	New Construction	Various	\$732,180	Important	\$732,180					
Otsego County Jail	Otsego County	New Construction	Various	\$7,890,000	Important	\$7,890,000					\$5,200,000
Otsego County Library Expansion	Otsego County Library	Facility Expansion	Various	\$2,177,000	Urgent	\$2,177,000					
Otsego County Road Commission Road Projects	OC Road Commission										
Spurr Road Project	OC Road Commission	Major Renovation	Federal STP 80%; Local 20%	\$572,000	Important	\$572,000					
Veridian Line Road Project 1	OC Road Commission	Major Renovation	Federal STP 80%; Local 20%	\$532,500	Urgent	\$532,500					
Seymore Road and Kullava Road Project	OC Road Commission	Major Renovation	Federal STP 80%; Local 20%	\$935,000	Important	\$935,000					
Veridian Line Road Project 2	OC Road Commission	Major Renovation	Federal STP 80%; Local 20%	\$943,250	Important	\$943,250					
Total Costs by Year:				\$17,337,810		\$6,441,000	\$1,067,180	\$941,250	\$437,931	\$0	\$5,800,000

APPENDIX A

**OTSEGO COUNTY
PLANNING COMMISSION**

PUBLIC HEARING NOTICE
September 19, 2016

The Otsego County Planning Commission will hold a public hearing on Monday, September 19, 2016 at 6:00 pm in the Planning and Zoning Meeting room located at 1322 Hayes Rd Gaylord, Michigan.

The purpose of the public hearing will be to obtain citizen comment on the following:

1. ARTICLE 14 HX HIGHWAY INTERCHANGE ZONING DISTRICT
SECTION 14.2 PERMITTED USES SUBJECT TO SPECIAL CONDITIONS

Proposed addition to the Otsego County Zoning Ordinance pertaining to the above ground storage of hazardous material

All citizens are welcome to attend the meeting or provide written comment. If written comments are provided the comments must be received at the Otsego County Land Use Services Office by noon (12:00 pm) the day of the meeting.

Any citizen who has questions regarding this application or needs assistance to attend this meeting should contact the Director of Land Use Services at 989.731.7400.

- **BLUE:** All text in **blue** is proposed language.
- **BLACK:** All text in **black** is current language

CURRENT LANGUAGE FOR HX/HIGHWAY INTERCHANGE ZONING DISTRICT:

ARTICLE 14 HX HIGHWAY INTERCHANGE COMMERCIAL DISTRICT

INTENT:

The Highway Interchange Commercial land use category includes areas designated for commercial development, which are primarily Interstate access dependent. This district primarily serves thru traffic and tourist needs. Uses that are consistent with these areas include, but are not limited to, gasoline stations, lodging facilities, entertainment facilities, restaurant facilities and similar tourist related developments, as well as warehouses, storage buildings, wholesale facilities and other similar uses. This district is intended to serve traffic entering or leaving the Interstate. These areas may require municipal water and sewer services and/or other comparable forms of water and sewer services with approval by the municipality and District Health Department.

PERMITTED USES SUBJECT TO SPECIAL CONDITIONS in the zoning district only when access is from a service road. Access shall not be off Marlette Road in Otsego Lake Township and Mill Street in Corwith Township.

- 14.2.5 Retail uses over one hundred thousand (100,000) square feet
- 14.2.6 Offices and showrooms of plumbers, electricians, decorators or similar trades, with outdoor storage
- 14.2.7 Rental shops with outdoor storage
- 14.2.8 Nursery sales and garden supply centers with outdoor display areas
- 14.2.9 Lumber yards, building material suppliers, and home improvement centers, with outdoor storage
- 14.2.10 Rifle or pistol ranges when within a completely enclosed building as an accessory use
- 14.2.11 Auto repair garages or auto body shop, including wrecker service, provided that outdoor storage of vehicles under repair be confined to the rear yard and screened from view
- 14.2.12 Sales, rental, and service centers for mobile home, modular home, manufactured homes, or farm equipment provided:
 - 14.2.12.1 Ingress and egress to the use shall be at least sixty (60) feet from the intersection of any two streets.
 - 14.2.12.2 The arrangement of vehicles stored in the open shall be uniform, following the patterns established for off street parking lots.
 - 14.2.12.3 No sales or display shall occupy any public street or road right-of-way; and, further, must be set back at least twenty (20) feet from the front property

PROPOSED LANGUAGE FOR HX/HIGHWAY INTERCHANGE ZONING DISTRICT:

ARTICLE 14 HX HIGHWAY INTERCHANGE COMMERCIAL DISTRICT

INTENT:

The Highway Interchange Commercial land use category includes areas designated for commercial development, which are primarily Interstate access dependent. This district primarily serves thru traffic and tourist needs. Uses that are consistent with these areas include, but are not limited to, gasoline stations, lodging facilities, entertainment facilities, restaurant facilities and similar tourist related developments, as well as warehouses, storage buildings, wholesale facilities and other similar uses. This district is intended to serve traffic entering or leaving the Interstate. These areas may require municipal water and sewer services and/or other comparable forms of water and sewer services with approval by the municipality and District Health Department...

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 - 14.2.12.1 Ingress and egress to the use shall be at least sixty (60) feet from the intersection of any two streets.
 - 14.2.12.2 The arrangement of vehicles stored in the open shall be uniform, following the patterns established for off street parking lots.
 - 14.2.12.3 No sales or display shall occupy any public street or road right-of-way; and, further, must be set back at least twenty (20) feet from the front property

14.2.13 Above-ground storage of flammable or hazardous material provided:

- 14.2.13.1 Aggregate storage above 5000 gallons up to 20,001 gallons shall be in a single tank**
- 14.2.13.2 Signage on the tank shall be limited to that which is statutorily required by law. Advertising signage of any type will be prohibited on the tank.**
- 14.2.13.3 Tank location is to be a minimum of fifty (50) feet from the traffic pattern on the site**

CHARLTON TOWNSHIP
OTSEGO COUNTY

P.O. Box 367 • Johannesburg, Michigan 49751 • Phone: (989) 731-1920 • Fax (989) 731-1070

To: Vern Schlaud, Director
Otsego County Land Use Services

9 August 2016

From: Ivan H. Maschke, Clerk

Dear Vern,

At the regular August meeting of the Charlton Township Board there was discussion regards to an Amendment to Article 14 HX/Highway Interchange Zoning District.

The Charlton Township Planning Commission reviewed the Amendment and made a recommendation to the township board.

After discussion, a motion was passed to recommend approval to the Otsego County Land Use Services for an Amendment to Article 14 HX/Highway Interchange Zoning District.

Thank you for your time and consideration.

Sincerely,



Ivan H. Maschke, Clerk
Charlton Township

Cc: Charlton Township Planning Commission
File

Diane Franckowiak,
Supervisor
P.O. Box 117
Elmira, MI 49730
231-546-3241

Susan Shaedig, Clerk
7252 Alba Road
Gaylord, MI 49735
989-732-2920



Township of Elmira

Leonard Skop, Trustee • Dale Holzschu, Trustee

Diane Purgiel, Treasurer
1404 N. Townline Road
Gaylord, MI 49735
989-732-4446
989-732-9702 Fax

D & D Assessing
P.O. Box 117
Elmira, MI 49730
989-732-1099

DEPARTMENT OF
LAND USE SERVICES
1322 HAYES RD
GAYLORD, MI 49735

August 11, 2016

Dear Vern:

RE: Elmira Township response on Highway Interchange 14.2.13 revised language.

As we currently do not have any areas where this land use is applicable we have no objections as proposed. Limiting to 20,001 gallons in a congested area seems reasonable, not having tanks become billboards also seems prudent, and maintaining 50 foot set off from normal traffic patterns should provide adequate distance to prevent accidental damage to tanks. We appreciate a chance to comment and the Elmira Township Board recommends adoption.

Sincerely,


Susan Schaedig, Clerk

Christine Boyak-Wohlfeil

From: Vern Schlaud
Sent: Monday, August 15, 2016 7:54 AM
To: Christine Boyak-Wohlfeil
Subject: FW: Proposed Changes to Zoning Ordinance

From: nora corfis [<mailto:noraholly@sbcglobal.net>]
Sent: Sunday, August 14, 2016 11:49 AM
To: Vern Schlaud
Subject: Proposed Changes to Zoning Ordinance

Dear Vern,

At its August 4, 2016 meeting, the Otsego Lake Township Planning Commission supported the proposed changes to the Otsego County Zoning Ordinance which permit above ground storage of propane in the Highway Interchange Zoning District.

Sincerely,
Nora Corfis, Secretary

Tom Dahlman
DTE Gas Company
609 Bjornson.s.
Big Rapids, MI 49307
DahlmanT@DTEenergy.com
616 260-2035



DTE Energy

DTE Gas Company

September 2, 2016

Mr. Vern Schlaud
Otsego County Planning & Zoning
1322 Hayes Road
Gaylord, Michigan 49735

**Re: Special Use Parmit
PSUP-15-003**

Dear Mr. Schlaud

On September 21, 2015, the Otsego County Planning and Zoning Board approved DTE Gas Company's Special Use Permit(PSUP 15-003) request for a meter and regulator site. Internally within DTE Gas Company's transmission pipeline operations, system constraints prevented the subject facility being built in 2016.

DTE respectfully requests a one year extension with such permit expiring, September 21, 2017.

Feel free to contact the undersigned should you have questions.

Sincerely

A handwritten signature in black ink, appearing to read "Tom Dahlman", written in a cursive style.

Tom Dahlman

ENVIRONMENTAL NEWS

LECANIUM SCALES - AFFECTING OAK AND MAPLE TREES - ARE THICK IN CRAWFORD, OTSEGO, ROSCOMMON COUNTIES

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Agency: Natural Resources

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Michigan Department of Natural Resources field offices have received a number of calls from concerned residents in Crawford, Otsego and Roscommon counties regarding Lecanium scale infestations and resulting "honeydew," a sugary substance secreted by the pests as they feed on trees and plants. The Lecanium scale also may be active in other areas of both the Upper and Lower peninsulas.

Lecanium scales are small, spherical insects often found on trees' small branches and twigs. Infestations first are detected in the spring and early summer as eggs hatch and immature scales called "crawlers" seek feeding sites on the undersides of leaves.



Repeated heavy Lecanium scale infestations can cause branch mortality or crown dieback in trees. Honeydew often is mistaken for tree sap as it covers cars and buildings under infested trees. Accumulation of honeydew also can lead to the growth of black, sooty mold.

Both oak and maple trees are affected. Lecanium scales rarely kill mature trees, but they can be harmful to young trees.

TAKING PRECAUTIONS

Infestations often go unnoticed until either tree symptoms are present or people wonder why their oaks and maples are dripping so much sap (e.g., honeydew). Ants crawling up and down trees are also a sign of a Lecanium scale infestation. Ants feed on the sweet honeydew. Watering infested trees during periods of drought will help maintain tree vigor.

CONTROLLING SCALE INFESTATIONS

Scale populations usually are kept below damaging numbers by natural enemies, especially lady beetles and tiny parasitic wasps. However, there may be times when biological control is not sufficient and scale numbers become abundant, requiring management. Many entomologists suggest pesticide treatments be avoided unless absolutely necessary, in order to allow for the buildup of predators and parasites.

The best time to treat scales is when the crawlers are feeding on the leaves, as they are now in many areas. Once the crawlers return to the twigs and branches and become shell-like adults (see picture) they are difficult to control.

Many garden variety insecticides are labeled for scales. Systemic insecticides also can be effective. However, if using systemic insecticides, wait until after the tree flowers to protect bees.

For folks who want to remove the honeydew coating their cars, according to the **University of Minnesota Extension**, honeydew can be removed from vehicles with a wax and grease remover. Other options include rubbing alcohol or WD-40.

For more information on Lecanium scales and the condition of Michigan's forests, visit www.michigan.gov/foreshealth and click on the **2015 Forest Health Highlights Report**.

The Michigan Department of Natural Resources is committed to the conservation, protection, management, use and enjoyment of the state's natural and cultural resources for current and future generations. For more information, go to www.michigan.gov/dnr.



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reversed the trial court's order granting the DEQ summary disposition and remanded for entry of an order of summary disposition in favor of defendant. (Source:

State Bar of Michigan *e-Journal* Number: 46611, August 19, 2010).
Full Text Opinion:
<http://www.michbar.org/opinions/appeals/2010/081710/46611.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*.⁹ 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

See also *DF Land Dev., LLC v. Charter Twp. of Ann Arbor* on page 21.

Compel a developer to improve an off-site roadway

Court: Michigan Court of Appeals (Unpublished No. 292948, November 18, 2010)

Case Name: *City/Village of Douglas v. Von Der Heide*

The trial court properly upheld the plaintiff-city's grant of a planned unit development (PUD) application contingent on Von Der Heide-defendants' constructing a roadway, part of which fronted the PUD.

Defendants submitted a proposal to the city to construct two, two-unit condos on a parcel of property fronting Park Drive. At the time, Park Drive was an unimproved dirt road public right of way and there were no other finished residences fronting it. The city council approved defendants' PUD proposal in June 2002, on the condition that defendants improve Park Drive by constructing an asphalt road in accordance with the county road commission's standards. Defendants built one of the two-unit condos and constructed a gravel road on the Park Drive right of way that did not conform to road commission standards.

In 2008, the city filed this case to compel defendants

to complete the asphalt roadway. Defendants contended, *inter alia*, that the city had no authority to compel a single developer to improve an off-site roadway according to *Arrowhead Dev. Co. v. Livingston County Rd. Comm'n*. The Appeals Court disagreed that *Arrowhead* was controlling in this case. Instead, the proper inquiry here involved determining whether the city acted within its authority under the Michigan Zoning Enabling Act (MZEA) and the local zoning ordinance. Defendants argued that the city did not have authority under the MZEA to require the Park Drive roadwork. At the time defendants submitted their PUD application, Park Drive was a dirt two-track road located in an isolated part of the platted subdivision. There were no other completed developments nearby at the time. Defendants proposed a two-phase project with plans to construct two, two-unit condos for a total of four residences. Although defendants did not complete the second phase, the city approved the PUD based on the understanding that there would eventually be four residences on the property.

An improved road was necessary to ensure that the residents would have appropriate access to the property and to accommodate the wear and tear caused by vehicle traffic associated with four residences.

Further, the required improvement to Park Drive was

⁹*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.

also necessary to ensure the city could access the development to provide essential public services such as fire and police protection, emergency medical services, garbage removal, and snow plowing. The improved road was also necessary to prevent other negative externalities such as dust. The road commission provided standards to ensure proper water runoff, the placement of culverts, and the appropriate surface and subsurface materials.

The court also noted that defendants were not required to pave a substantial distance (415 feet), and the cost was not unreasonable given the total cost of the project. In sum, the court agreed with the trial court that the city's requirement regarding the road construction was "reasonable." The court also concluded the reasonable conditions the city imposed for approval of the PUD related to - (1) the protection of natural resources, health, safety, and welfare, and the social and economic well-being of those who use the land, the neighboring landowners and residents, and the community as a whole, (2) the valid exercise of the police powers and purposes which are affected by the proposed use, and (3) the necessity to meet the intent and purpose of the zoning requirements and insuring compliance with the standards established in the zoning ordinance. Further, the court found that the city did not exceed its authority under its zoning ordinance. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 47395, December 2, 2010).

Full Text Opinion
<http://www.michbar.org/opinions/appeals/2010/111810/47395.pdf>

RLUIPA

Court: Michigan Court of Appeals (Unpublished No. 296370, April 28, 2011)

Case Name: *Great Lakes Soc'y v. Georgetown Charter Twp.*

The court held that the trial court properly granted the defendants' motion for summary disposition of plaintiff's claims under the RLUIPA and denied its motion for reconsideration.

Plaintiff-Great Lakes Society (GLS)

is a Michigan ecclesiastical corporation and an IRS-recognized religious organization . . . and describes itself as ministering to persons having varying degrees of chemical sensitivities to common environmental pollutants.

It sought to

construct a two-story building, about 9,700 square feet in size, for worship services and supporting ministries, on a six-acre parcel of property owned

by GLS pastor John Cheetham . . . , located in defendant Georgetown Charter Township

The property was "zoned low-density residential . . ." The township's zoning ordinance permit construction of churches in a residential district with a special use permit (SUP). Plaintiff filed applications for a SUP, which the defendant-township' zoning board of appeals (ZBA) denied. The issue was before the ZBA concerning if the applicant was a church or not. While the SUP application was pending the township board approved an amendment of § 20.4(E) of the ordinance relating to the street frontage requirements for churches built in residential districts. Plaintiff's property did not meet the amended street-frontage requirements and it applied for a variance, which was also denied. Plaintiff appealed the township's denial of a SUP and request for variance to the trial court "by way of two separate complaints," which also asserted claims under the Religious Land Use & Institutionalized Persons Act (RLUIPA) (43 USC § 2000cc(b)) and constitutional claims.

The trial court ruled, *inter alia*, that the decision of the ZBA that the proposed building was not a church for zoning purposes "was supported by competent, material, and substantial evidence on the record . . ." The trial court's opinion did not address the RLUIPA issues or constitutional claims and stated they would be tried later. The parties filed cross-motions for summary disposition. The trial court granted defendants' motion.

Plaintiff appealed the trial court's opinion and order affirming the ZBA's denial of its request for a SUP and variance and defendants appealed the trial court's opinion and order granting plaintiff partial summary disposition on its RLUIPA and constitutional claims. The Appeals Court in a published opinion affirmed in part, held that defendant did not violate the RLUIPA, and rejected the constitutional claims. The court also reversed in part and remanded.

Plaintiff now appealed the trial court's order granting defendants summary disposition on the RLUIPA claims and the trial court's denial of plaintiff's motion for reconsideration. The court held that the trial properly granted summary disposition of plaintiff's RLUIPA claims under § 2000cc(b)(1), (2), and (3), and since plaintiff's motion for reconsideration was not timely, the trial court did not abuse its discretion in denying the motion. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 48719, May 31, 2011)

Full text opinion:

Takings

See also *City/Village of Douglas v. Von Der Heide* on page 16.

Delays in a development project from voter referendum is not a taking

Court: Michigan Court of Appeals (Unpublished Nos. 292811 & 294122, November 18, 2010)

Case Name: *Petoskey Inv. Group, LLC v. Bear Creek Twp.*

Whether under a theory of breach of consent judgment, violation of procedural or substantive due process, violation of equal protection, or an unconstitutional taking, the court held that plaintiffs had no sustainable claim related to and based on the referendum arising from a consent judgment rezoning. The court found no basis in the record or in law to place liability for damages on the defendant-township for any delay in the development attributable to the referendum process, because the necessary element of causation was lacking as a matter of law, regardless of the cause of action.

The case arose from the development of Petoskey Investment Group-plaintiffs' property for mixed retail, commercial, and residential purposes. Plaintiffs' suit was primarily fueled by Bear Creek Township-defendants' conduct as to the referendum and the sanitary sewer connection, which plaintiffs claimed delayed the development of their property and gave rise to civil liability on the defendants' part. Plaintiffs were ultimately able to complete the development project. Their claims were based on the underlying theory that they were entitled to *timely* completion of the project and this did not occur due to delays caused by the referendum and by sewer connection problems attributable to defendants.

A township resident, an attorney, sought publication of the consent-judgment rezoning in order to be able to initiate the referendum process. The resident threatened a mandamus action against the township if publication did not occur. Plaintiffs' counsel vigorously voiced his opposition to any publication and referendum. The township informed plaintiffs' counsel that, after review of the law, it thought it appropriate to publish the notice as demanded by the citizen, just as if the zoning change had been accomplished through the normal zoning process and not via a consent judgment.

During the referendum process, plaintiff-Petoskey

Investment went to the trial court to challenge the referendum and to enforce the consent judgment, claiming the referendum was unlawful. The township did not take any position in the trial court. The trial court ruled that the consent judgment constituted rezoning and was subject to a referendum under the former Township Zoning Act (MCL 125.282).¹⁰ The township took a position in favor of the referendum on the appeal to the court, but did not file the application for leave to appeal in the Supreme Court. The application was pursued by the intervening township citizen.

The Michigan Supreme Court found that the appeal was rendered moot due to a settlement agreement embodied in a separate federal consent judgment. The court concluded that even had the township refused to publish the notice of the consent-judgment rezoning and argued against the referendum in the trial court, the court, and the Supreme Court, the events would still have transpired much like they did and thus, a delay in the development would have occurred regardless of the township's conduct. The citizen who demanded publication was set to file a mandamus action had the township failed to publish notice of the consent-judgment rezoning, and the trial court agreed that publication was necessary and that the referendum process could go forward. Even absent the township's voluntary decision to publish, the matter would have come to the trial court's attention, a notice would have been published by court order, and the referendum would have occurred.

It was illogical to believe that the trial court would have ruled differently had the township argued against the referendum instead of taking no position. Also, under MCL 125.282, once the petition process seeking a referendum was underway, the statute did not provide any mechanism for the township to unilaterally halt the process, although the township clerk did have to make a finding that the petition was sufficient.

The issue of petition sufficiency had nothing to do with whether a referendum was lawful under the circumstances, and any attempt to stall or halt the process by the township would have been

¹⁰M.C.L. 125.282 was part of the former Township Zoning Act. 2006 PA 110 repealed that act and other zoning statutes and replaced them with the Michigan Zoning Enabling Act, M.C.L. 125.3101 *et seq.*, effective July 1, 2006. MCL 125.3702(1). The Township Zoning Act, however, applies to this case. Similar language exists in the Michigan Zoning Enabling Act at M.C.L. 125.3403.

greeted unfavorably by the trial court, given the trial court's position. Further, any delays in developing the property caused by the appellate process as to the referendum question were not the township's fault. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 47392, December 1, 2010).

Full Text Opinion
<http://www.michbar.org/opinions/appeals/2010/111810/47392.pdf>

Land Divisions & Condominiums

Verbal approval by elected official carries no weight: still need written permit/approval

Court: Michigan Court of Appeals (Unpublished No. 289141, May 27, 2010)

Case Name: *Estate of Buchanan v. Deerfield Twp.*

The trial court properly granted summary disposition in the defendant-township's favor in this zoning dispute because there was no genuine issue of fact exceptional circumstances were not present and the defendant should not be estopped from enforcing its zoning ordinance.

The case arose after a prior lawsuit between plaintiff and neighboring landowners, the Hs, related to a three acre parcel of real property (Parcel B) the two parties owned jointly after plaintiff's brother sold his interest in the parcel and the neighboring one (Parcel C) to the Hs in 1989. Parcel B is contiguous with Parcel C and plaintiff's remaining three-acre parcel (Parcel A). After the Hs sued plaintiff to enjoin his mining/excavation activities, plaintiff and the Hs entered into a settlement and agreed to equally divide parcel B. The parties agreed the Hs' portion of Parcel B was to be combined with their adjoining parcel. The parties' initial settlement was contingent on plaintiff's portion of Parcel B remaining a separate piece of property, retaining its original tax identification number and "having been determined to be a buildable lot." Plaintiff obtained the signature of defendant's then-supervisor on a document entitled "consent order," which summarized those terms.

When plaintiff-Estate of Buchanan tried to execute this agreement, the township's tax assessor noted there was a problem with the tax identification numbers referenced in the request, and indicated her belief each one and one half-acre parcel should be joined with each party's existing parcel. Plaintiff later filed this case against defendant requesting his part of Parcel B be deemed a separate and buildable lot.

In granting defendant's summary disposition motion, the trial court noted plaintiff could not have

reasonably relied on the supervisor's "approval" when he had notice the proposed lot split was contrary to local ordinances and the Land Division Act (LDA). Plaintiff argued defendant should be estopped from enforcing its zoning ordinance, given the exceptional circumstances presented in the case.

The appeals court disagreed. The court did not dispute plaintiff's statement there was no indication of collusion between himself and township officials, and recognized lack of collusion was one factor the court considered in *Pittsfield Twp. v. Malcolm*. However, plaintiff lacked the additional factors present in *Malcolm*. Perhaps most striking was the fact plaintiff received notice well before he applied for an address or zoning approval to construct the storage building, the division of Parcel B could only be accomplished if each one and one half-acre section were added to the respective adjoining parcels. Also, while plaintiff may have expended a significant amount of money to build the pole barn on the property, the building remained useful even if a residence was not constructed, especially given this portion of the lot was adjacent to his current residence. The court also rejected plaintiff's argument defendant should be bound by its supervisor's "agreement" to the proposed land division. Defendant's land division ordinance required prior review and written approval of the township assessor before land can be divided. Thus, plaintiff was charged with the knowledge the supervisor lacked the authority to approve a lot split. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 45954, June 9, 2010).

Full Text Opinion:
<http://www.michbar.org/opinions/appeals/2010/052710/45954.pdf>

Substantive Due Process

Rezoning, zoning ordinance constitutionality

Court: Michigan Court of Appeals (Unpublished No. 294696, April 28, 2011)

Case Name: *Whitmore Lake 23/LLC v. Ann Arbor Charter Twp.*

The court held, *inter alia*, that under the *Kyser v. Kasson Twp.* standard the trial court properly dismissed the plaintiffs' constitutional claims in this zoning dispute. The court also held that plaintiffs' appeal of the trial court's decision affirming the ZBA decision was untimely and dismissed that part of their appeal for lack of jurisdiction.

The six individual plaintiffs purchased the property at issue (166 acres in the township). Part of the

property was zoned A-1 and the other part was zoned R-2. Plaintiffs entered into an agreement with plaintiff-Whitmore Lake granting it an option to purchase the property. The option was amended several times, finally expiring during the trial court proceedings. Plaintiffs and Whitmore Lake wished to develop the property by building single-family residences on ½ acre lots.

Whitmore Lake filed an application with the township's planning commission seeking to rezone the property to accommodate their plans. The township board denied the request. Plaintiffs sued asserting claims of violation of substantive due process, exclusionary zoning, denial of equal protection, inverse condemnation, and an appeal of the Zoning Board of Appeal's (ZBA) denial of their requests for variances.

The trial court entered an order affirming the ZBA's denial of the variance requests. The case proceeded to trial and later the trial court dismissed plaintiffs' remaining claims that the zoning ordinance violated their substantive due process and equal protection rights, holding that defendant's zoning scheme was rationally related to legitimate government interests and plaintiffs' evidence did not overcome the presumption the ordinance was constitutional.

The Appeals Court held that the plaintiffs' evidence regarding the zoning ordinance fell far short of overcoming the presumption of validity. As applied to plaintiffs' property, township-defendant's zoning ordinance was rationally related to advancing several legitimate governmental interests. Plaintiffs' evidence related to the wisdom of the zoning, but the wisdom of defendant's zoning choices did not affect the constitutionality of the ordinance. The rational basis test applied in a substantive due process claim, not involving a heightened scrutiny applicable to a suspect classification, as stated in *Muskegon Area Rental Ass'n v. Muskegon*, was derived from *Crego v. Coleman*. The court noted that *Scots Ventures, Inc. v. Hayes Twp.* was factually distinguishable from this case. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 48713, May 27, 2011)

Full text opinion:

<http://www.michbar.org/opinions/appeals/2011/042811/48713.pdf>

Due Process and Equal Protection

No breach of contract action out of an implied covenant of good faith and fair dealing

Court: Michigan Court of Appeals (Unpublished No. 292279, October 21, 2010)

Case Name: *United Inv., Inc. v. City of Mount Pleasant*

Since the court found no clear error in the trial court's findings of fact or in its legal conclusions that plaintiff failed to prove any of its claims at trial and thus, had no cause of action against the defendant-city, the court affirmed the trial court's order ruling that plaintiff-United Inv., Inc. had no cause of action for either breach of contract or constitutional violations arising from plaintiff's effort to modify a Planned Residential Development (PRD) agreement that defendant entered into with plaintiff's predecessor in interest.

In 2005, plaintiff requested the RPD agreement, which permitted construction of M-1 apartments (no more than 2 unrelated persons per dwelling), be amended to allow instead for construction of M-2 apartments (more than 2 unrelated persons per dwelling). Plaintiff sought the modification because changes in the state building code made constructing M-1 buildings much more expensive and because of "significant modifications" in the market. The court concluded that nothing defendant did precluded plaintiff from developing the property at issue in accordance with the original PRD agreement. While the agreement contemplated that the developer might seek to amend the agreement the future, it also provided that a request to make substantial changes in the agreement would return the parties to their positions before adopting agreement. The amended agreement would need approval as if it was a new agreement. It could not be seriously argued that plaintiff's proposal to shift from building M-1 units to building M-2 units as part of an open space community overlay project was not a substantial change in the approved PRD plans.

Thus, plaintiff's request to amend the PRD agreement returned the parties to the negotiation stage of forming a new contract, and mutual assent was required to form a new contract. The relevant contract and ordinance provisions were consistent with general contract law. Whether the parties could agree on a new contract was not controlled by the PRD agreement, but rather by plaintiff's compliance or not with city-defendant's zoning ordinance, and in particular, the M-2 density requirements of §154.052A. Plaintiff conceded no part of the PRD agreement controlled the interpretation of §154.052A. Defendant was enforcing its ordinance in accordance with its understanding of the intent expressed in §154.052A. When the pertinent density provisions in §154.052A were discovered to be ambiguous, defendant adopted an ordinance to clarify the intent consistent with defendant's preexisting

understanding. Nothing in the PRD agreement controlled the meaning of defendant's ordinance, so clarifying ambiguous terms in the ordinance could not possibly breach the agreement.

"Further, what the parties were doing was not enforcing or performing the PRD agreement, they were negotiating a new contract." The court also held that plaintiff could not create a breach of contract action out of an implied covenant of good faith and fair dealing. By seeking to modify the PRD agreement, plaintiff was negotiating with defendant to form a new contract that would permit construction of M-2 dwelling units. Also, "Michigan does not recognize a claim for breach of an implied covenant of good faith and fair dealing" Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 47159, November 10, 2010).

Full Text Opinion:
<http://www.michbar.org/opinions/appeals/2010/102110/47159.pdf>

Court, Ripeness for Court's Jurisdiction, Aggrieved Party

Not exclusionary zoning with adequate commercial/retail land use and no demonstrated need

Court: Michigan Court of Appeals (Unpublished No. 291362, July 13, 2010)

Case Name: *DF Land Dev., LLC v. Charter Twp. of Ann Arbor*

The court held the DF Land Dev., LLC-plaintiff's facial exclusionary zoning issue was ripe for judicial review and the trial court properly granted summary disposition in favor of the defendant-township finding there was no total exclusion of commercial/retail land use and the plaintiff failed to satisfy its burden of showing a demonstrated need for commercial/retail land use in the township.

The case arose from the plaintiff's ownership of a parcel of real property located within the township's borders. The property is zoned a combination of R2 (single-family suburban residential) and RD (research and development), but plaintiff wanted to develop it for commercial/retail uses, which would require it to be zoned C1. However, C1 zoning for the property would be inconsistent the *General Development Plan*, which defendant has a policy of following. Further, the *Plan* stated the township had no need for commercial services or commercial centers.

Plaintiff contended there was no C1 zoning anywhere within the township, although it appeared to the court the Township Zoning Map upon which

plaintiff relied did include two small areas zoned C1, in areas completely surrounded by the City of Ann Arbor. The court held plaintiff made out a facial challenge to defendant's zoning ordinance. Plaintiff alleged defendant's zoning scheme had the effect of totally prohibiting commercial/retail uses anywhere in the township, there was a demonstrated need for commercial/retail land uses in the township, and commercial/retail uses were appropriate for plaintiff's property.

It was undisputed plaintiff's proposed use was lawful. Defendant complained plaintiff discussed facts specific to plaintiff's property, but this was expected, given plaintiff's need to demonstrate that commercial/retail uses would be appropriate on its particular property. Defendant was not given the opportunity to decide whether to consider permitting plaintiff's proposed land use. However, the record as a whole suggested absolutely no indication defendant would have granted one here. Further, the fact that a plaintiff could seek a variance or a special permit does not necessarily cure a facially defective zoning ordinance. The record indicated that any attempt by plaintiff to seek an administrative remedy from defendant would have been futile. However, the real inquiry as to the total-prohibition requirement "is not technicalities, but whether the *practical effect* of a township's zoning ordinance results in the functional unavailability of a land use." The evidence supported the trial court's conclusion there was "ample commercial/retail land use 'within close geographical proximity' of everywhere within the township by virtue of the township's unusual shape wrapped around the City of Ann Arbor." For similar reasons, the court also agreed with the trial court that plaintiff failed to show a "demonstrated need." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 46303, July 23, 2010).

Full Text Opinion:
<http://www.michbar.org/opinions/appeals/2010/071310/46303.pdf>

Superintending control exceeded trial court authority

Court: Michigan Court of Appeals (Unpublished No. 291473, October 26, 2010)

Case Name: *Camp and others v. City of Charlevoix and Anderson*

The trial court erred in issuing an order of superintending control where it appeared that the order allowed an appeal to the defendant-City of Charlevoix's zoning board of appeals (ZBA) that was time barred by the applicable ordinance and the ZBA did not fail to

perform a clear legal duty.

The appeal related to a zoning permit issued by the City's zoning administrator on March 26, 2007 to the Anderson-defendants authorizing construction of a single-family home with an attached boathouse. On May 14, 2007, plaintiff-Johnson, a neighbor of the Andersons, filed an application to appeal the issuance of the zoning permit with the ZBA and also requested the interpretation of several provisions of the City zoning ordinance relevant to the issuance of the permit. The ZBA held a hearing on July 18, 2007 and determined that the appeal could not be addressed because it was brought more than 30 days after the zoning administrator's initial decision was made and thus, was beyond the jurisdictional deadline in the zoning ordinance.

Johnson unsuccessfully appealed. Meanwhile, the other plaintiffs, also neighbors of the Andersons, filed the complaint in this case. This case was removed to federal district court, which issued an opinion staying Camp-plaintiffs' federal claims and remanding the case to the state trial court.

The Charlevoix Circuit Court issued an order for superintending control, requiring the ZBA to review the issuance of the zoning permit. The ZBA held a hearing and found that the majority of plaintiffs' arguments as to zoning ordinance violations lacked merit, but revoked the permit because some features of the boathouse violated the ordinance.

On appeal, the Andersons argued that the trial court exceeded its authority in remanding the case to the ZBA under the power of superintending control. The Michigan Supreme Court noted in *Public Health Dep't v. Rivergate Manor* that the remedy of superintending control is not available "as a substitute for an appeal or to evade a statutory prohibition of an appeal." The ordinance specifically precluded the ZBA from hearing an appeal related to the issuance of a zoning permit after more than 30 days had passed. The ZBA's decision after remand from the trial court showed that the ZBA only considered plaintiffs' claims that the permit was erroneously issued because it would result in several zoning violations. "These claims were the same claims previously considered time barred by the Ordinance." Also, superintending control will not lie unless there is a showing of a failure to perform a clear legal duty and the absence of an adequate legal remedy. The parties agreed that when there is no variance necessary on the face of a permit, no notice as to the zoning permit is required. The zoning permit at issue did not reference

any required variances. Further, the plaintiffs failed to show that their right to appeal within 30 days was an inadequate remedy. Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 47190, November 16, 2010).

Full Text Opinion:
<http://www.michbar.org/opinions/appeals/2010/102610/47190.pdf>

Open Meetings Act, Freedom of Information Act

Exempt from disclosure under FOIA

Court: Michigan Court of Appeals (Unpublished No. 290437, June 29, 2010)

Case Name: *Beaty v. Ganges Twp.*

The trial court erred in granting the defendants' summary disposition motion on the basis the information plaintiff-Keag requested was exempt from disclosure pursuant to Michigan Freedom of Information Act (MCL 15.243(1)(v))¹¹ where the requested materials were not from the actual record generated by his dealings with the defendant-planning commission or his appeal of the denial of his PUD application and it was likely portions of the information he sought had no bearing on his underlying case.

After the planning commission denied their PUD application, Keag and plaintiff-Beaty sued the township and the planning commission seeking an order of superintending control compelling the defendants to approve the site plan and asserting a claim of appeal from an administrative agency. Keag initially filed four requests for information under the Freedom of Information Act (FOIA), including, *inter alia*, certain tape recordings, copies of proposed zoning and PUD ordinance changes, and correspondence and e-mails exchanged by planning commission members related to the changes. He later filed three more requests, including for a copy of a site plan submitted by a non-party and approved by the planning commission, information related to another non-party's special use permit application, and all communications between the planning commission and a company dealing with reports and ordinance changes, dating back to when the company was retained.

The trial court concluded the materials, which it did not examine in camera before ruling, "related" to the

¹¹M.C.L. 15.243(1)(v) reads: "(1) A public body may exempt from disclosure as a public record under this act any of the following: . . . (v) Records or information relating to a civil action in which the requesting party and the public body are parties "

underlying case because Keag might be able to use them in some way for comparison purposes in pursuing his appeal of the planning commission's decision.

However, the Appeals Court concluded notwithstanding this possibility, the trial court erred in making a general conclusion all the information Keag requested was exempt from disclosure. He requested various types of information - e-mails, tape recordings, drafts and final copies of ordinances, applications and plans submitted by other persons, etc. - "and the trial court simply made a blanket determination that all the information was exempt under MCL 15.243(1)(v)." The court held the "trial court was required to sort through the requests and make a particularized determination regarding each piece of information sought under the requests." Reversed and remanded. (Source: State Bar of Michigan *e-Journal* Number: 46216, July 9, 2010).

Full Text Opinion:
<http://www.michbar.org/opinions/appeals/2010/062910/46216.pdf>

Interview of Building Inspector and Zoning Administrator job candidates under OMA

Court: Michigan Court of Appeals (Unpublished No. 291025, November 9, 2010)

Case Name: *Brown v. Plainfield Twp.*

The trial court properly granted defendants' motion for summary disposition on the basis that there was no delegation of authority from the defendant-township's Board to the defendant-township Supervisor to interview candidates for the Zoning Administrator position in this action for alleged violations of the Open Meetings Act (OMA) (MCL 15.261 *et seq.*).

The Supervisor determined that the position of Township Building Inspector and Zoning Administrator should be divided into two part-time positions. The Board voted to allow the Supervisor to advertise for a part-time Zoning Administrator. H (who held the position), O, and one other candidate applied for the position. After interviewing the three candidates, the Supervisor recommended to the Board that O be hired. At a special meeting, the Board voted three to two to do so. Plaintiffs voted against O's hiring.

Plaintiffs, trustees on the Board, alleged that the three individual defendants met before the special meeting and conducted interviews for the Zoning Administrator position. Plaintiffs contended that this gathering of a quorum constituted a meeting of a "committee" that was subject to the provisions of the OMA, and that because the meeting was not noticed and was not conducted in a meeting open to the public,

it constituted a violation of MCL 15.263(1), (2), and (3) and MCL 15.265(1). Plaintiffs contended that the Supervisor appointed himself a "committee of one" and he thus, constituted a "public body" subject to the OMA.

However, "an individual acting in his official capacity is not a 'public body' for the purposes of the OMA." Like the plaintiff in *Herald Co. v. Bay City*, plaintiffs in this case cited *Booth Newspapers, Inc. v. University of MI Bd. of Regents* for the proposition that the Supervisor individually constituted a public body. Although the Supreme Court in *Booth Newspapers* rejected the defendant's assertion that a "one-man committee" could not be considered a "public body," in *Herald* the Supreme Court held that the decision in that case was distinguishable because it "precluded an attempt by a public body to evade the OMA (and thus circumvent legislative intent)" by improperly delegating its authority to the committee chairman and to subquorum groups that had no independent authority to select a president. As opposed to the circumstances of *Booth Newspapers* where.

[t]he board effectively sought to delegate its authority as a body subject to the OMA to various bodies of its own creation that it believed were not subject to the OMA, for the express purpose of avoiding the requirements of the OMA,

in this case, there was no delegation of authority or evasive effort by the Board.

The evidence submitted by defendants established that the Supervisor, of his own volition and without assistance, interviewed the three candidates for the part-time Zoning Administrator position. The affidavits of the three individual defendants, as well as the Township's personnel manual, showed that the Supervisor acted pursuant to the apparently long-standing internal policy that the Building Inspector and Zoning Administrator positions were employees within the Supervisor's Department, and that he had the authority to hire and direct those employees. Although plaintiffs argued that the Supervisor had no actual authority under statute or otherwise to hire a Zoning Administrator, this did not change the fact that there was no delegation of authority by the Board, whose members apparently believed that the Supervisor did have such authority. Further, regardless whether the Supervisor actually had authority to make a hiring decision or to convey a recommendation to the Board, the fact remained that

the Board itself hired O. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 47295, November 18, 2010).

Full Text Opinion:
<http://www.michbar.org/opinions/appeals/2010/110910/47295.pdf>

Zoning Administrator/Inspector, Immunity, and Enforcement Issues

See also *Brown v. Plainfield Twp.*, page 23; *Charter Twp. of Chesterfield v. Burton*, page 26.

Enforce a zoning ordinance, if a municipality can be estopped from enforcing a zoning ordinance

Court: Michigan Court of Appeals (Unpublished No. 290639, June 22, 2010)

Case Name: *Kawkawlin Twp. v. Sallmen*

Since there were questions of fact whether the defendants-Sallmens acted in good faith in erecting the addition to their home precluding application of the doctrine of equitable estoppel, the court held the trial court erred in granting their motion for summary disposition and reversed and remanded for further proceedings.

The Sallmens hired a builder to construct a two-story addition to their home. The builder prepared an application for a building permit and submitted it to the plaintiff-Township. The drawing submitted indicated the new addition would be located seven feet from the line of a fence between the Sallmens' house and the intervening plaintiffs' (Kuschs) house and also showed the addition would occupy the same space as an existing 12-foot by 12-foot deck. The drawing did not show whether the fence was on the property line and did not show where it was. Under the applicable zoning ordinance, the township required at least 10 feet of clearance between the side property lines and any structures on the property. The township accepted payment from the builder for the permit application and later apparently approved the application. After the builder started working on the addition, the Kuschs became concerned the addition violated the setback requirements and filed a formal complaint with the township.

(Jeff Kusch averred previously the Sallmens approached him about building the deck, he told them of the 10-foot setback requirement, and helped them measure the distance so the deck would conform to the requirement. The Sallmens did not approach him about the new addition, which he said had a larger "footprint"

than the deck and encroached on the setback by more than two feet.)

Later Sallmen requested a variance to the setback requirement. The township zoning board (*sic.*) denied the request after a hearing. The township sued the Sallmens alleging the addition violated the setback under its zoning ordinance, asked the court to determine the addition violated the ordinance and was a nuisance *per se*, and asked the trial court to order the Sallmens to abate the nuisance by removing the encroachment. The trial court stayed the suit and asked the township to hold a new hearing on the issue with a sufficient record for it to review. The zoning board again denied the Sallmens' request for a variance.

Later, Sallmens moved for a permanent injunction claiming they relied on the township's approval of their building permit application, building inspections, and discussions with township personnel who did not tell them the project violated the side setback ordinance, and no one ordered them to stop the project, which cost \$35,000. They argued the township should be estopped from enforcing the ordinance. The Kuschs intervened, the trial court granted the Sallmens summary disposition based on estoppel based on "exceptional circumstances," and dismissed the Kusch's complaint with prejudice.

The Appeals Court held viewing the evidence in the light most favorable to the Sallmens, a reasonable fact-finder could conclude they knew the proposed addition violated the zoning ordinance and proceeded in defiance of it. If the facts supported a fact-finder's conclusion, it would militate strongly against the use of equitable estoppel to insulate the Sallmens from the enforcement of the setback. (Source: State Bar of Michigan *e-Journal* Number: 46157, June 29, 2010).

Full Text Opinion:
<http://www.michbar.org/opinions/appeals/2010/062210/46157.pdf>

Governmental immunity

Court: Michigan Court of Appeals (Unpublished No. 293084, November 30, 2010)

Case Name: *Gordon v. Jim Lippens Constr., Inc.*

Since defendant-Gaul's (township building inspector) conduct was not "the" proximate cause of plaintiffs' injuries, he was entitled to governmental immunity and the trial court erred by denying his motion for summary disposition. Thus, the court reversed and remanded for entry of an order granting summary disposition in defendant's favor.

Plaintiffs contracted to have a single-family residence built. Defendant inspected the framing of

plaintiffs' home as it was being built, and approved the framing in early 2004. He issued a certificate of occupancy for the home in January 2005. In early 2006, plaintiffs noticed a deflection in the slope of their roof. They retained consultants, who advised that the home, particularly the framing and structure of the roof, had not been built in accordance with the architectural plans or the applicable building code, and was not constructed in a workmanlike manner.

Defendant contended that he was entitled to governmental immunity pursuant to MCL 691.1407(2) because he was not "the" proximate cause of plaintiffs' injuries. Similar to *Rakowski v. Sarb*, plaintiffs' claim of injury was the faulty construction of their home, which arose directly and most substantially from the work done by the construction company. The risk of harm was created by the construction company. The allegation against defendant was essentially that he failed to find the defects and deficiencies after they already existed. The damages were the result of the poor construction, not the result of the failure to discover the poor construction.

Had defendant discovered the alleged roof defects upon inspection, the defects would have needed to be corrected upon discovery rather than at a later point in time. In any event, the roof would have needed additional work performed regardless of the defendant's findings. At most, his actions may have contributed to an increased cost of repair. Further, if the faulty workmanship had not been in existence, due to the actions of the construction company, there would have been no tort to which defendant could have contributed. Thus, "the one most immediate, efficient, and direct cause" of the damages was the poor workmanship of the construction company. Although defendant's conduct may have been a proximate cause, it was not the proximate cause of plaintiffs' injuries. (Source: State Bar of Michigan *e-Journal* Number: 47473, December 6, 2010).

Full Text Opinion:
<http://www.michbar.org/opinions/appeals/2010/113010/47473.pdf>

Ownership

Court: Michigan Court of Appeals (Unpublished No. 297530, April 28, 2011)

Case Name: *City of Saugatuck v. Breen*

The court held that the trial court properly ruled that, when viewed in a light most favorable to the defendants, there was no genuine issue of material fact as to whether defendant-John Breen either owned or had a controlling interest in defendant-San Marino Holding, Inc. such that he could be held responsible for

the violation of the zoning ordinance. Thus, the court affirmed the trial court's grant of summary disposition in favor of the plaintiff-City in this zoning enforcement case arising from a zoning violation.

The case involved property and a residence located on P Street. The gist of plaintiff's complaint was that the property, which was zoned for single family use, was being used as a multifamily dwelling by defendants. The complaint alleged that John was an owner or has an ownership interest in the property and that San Marino Holding was a company that owns or has an ownership interest in the property. The complaint alleged that defendants rented out the upper levels of the home on the property to persons who are not family of Margaret Breen (who is John's mother), while Margaret occupied the lower level of the home. The complaint alleged that defendant-Lakeshore Lodging was the rental agency that facilitated the rental of the home. Plaintiff's complaint sought, in relevant part, a declaration that defendants' maintenance and use of the single family dwelling for more than one family was in violation of the zoning ordinance and that violation of the zoning ordinance constituted a nuisance *per se*.

John argued that the trial court erred by finding that there was no genuine issue of material fact as to whether he owned or controlled the property. Plaintiff presented an abundance of documentary evidence to support its allegation that John either owned or controlled San Marino Holdings, and thus, that he controlled the property in question. The only evidence presented by John was his own affidavit stating that he "does not have an operating or controlling interest in any entity or organization that does [have an operating or controlling interest]" and that "He has never dealt with Lakeshore Lodging, as a representative of San Marino, Inc. nor in a personal capacity in his own behalf."

Aside from the documentary evidence suggesting otherwise, counsel for both John and San Marino Holding acknowledged at the hearing on the motion for summary disposition that counsel was the authorized agent for San Marino Holding, Inc., that he had no idea "who this San Marino Holding Company consists of," that John indicated to him that he was not a part of it, but that John was the only person he ever had contact with in regard to San Marino Holding. Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 48721, May 19, 2011).

Full Text Opinion:
<http://www.michbar.org/opinions/appeals/2011/042811/48721.pdf>

Solid Waste (Landfills, recycling, hazardous waste, Junk, etc.)

Prohibiting improperly stored junk or rubbish

Court: Michigan Court of Appeals (Unpublished No. 290927, May 6, 2010)

Case Name: *Village of Montgomery v. Robey*

The trial court did not err in continuing with the case despite defendant's jurisdictional objections and properly required him to "remove all junk and rubbish" from his property in the plaintiff-village, and "either make all necessary repairs . . . to bring it into compliance with Plaintiff's ordinance and with all other applicable building codes or . . . demolish the residence and remove all debris . . ."

Defendant challenged the trial court's subject-matter jurisdiction to decide the case, and argued it should have assisted his litigation efforts through "curative notations" and opportunities to file additional or alternative pleadings or motions. The trial court appeared to show some willingness to treat defendant's motion to abate the complaint as a motion to set aside the default, but concluded his submission was "unintelligible," "legal mumbo jumbo," and failed to "make any legal sense whatsoever." Defendant on appeal attacked the ordinances under which plaintiff proceeded on procedural grounds, and also plaintiff's status as a municipality entitled to promulgate and enforce ordinances. However, those attacks went not to subject-matter jurisdiction, but rather to whether there was an underlying legal basis for the trial court's exercise of jurisdiction. "In casting his challenges under the rubric of jurisdiction," defendant seemed to have been misled by the "loose practice . . . of saying that a court had no 'jurisdiction' to take certain legal action when what is actually meant is that the court had no legal 'right' to take the action, that it was in error."

The trial court's right as the Hillsdale Circuit Court to adjudicate a claim for equitable relief in connection with a parcel of real property in Hillsdale County was hardly in dispute. "Defendant's attack on the validity of the ordinances under which plaintiff acted on procedural grounds is an attack on those textual authorities. His attack on plaintiff's status as a municipality entitled to create and enforce ordinances is an attack on plaintiff's standing." Those attacks were not properly characterized as an attack on the trial court's jurisdiction in the matter. Rather, those challenges were attacks on the propriety of the trial

court's deciding in plaintiff's favor. Because defendant defaulted by failing to answer, and failed to show the trial court lacked subject-matter jurisdiction over the controversy, he forfeited all other defenses as to the merits of plaintiff's cause of action but for contesting the question of remedies. When invited to do so, however, defendant merely referred the trial court to his motion to abate the complaint, which the trial court had concluded was "unintelligible . . . mumbo jumbo." Affirmed. (Source: State Bar of Michigan *e-Journal* Number: 45735, May, 2010).

Full Text Opinion:

<http://www.michbar.org/opinions/appeals/2010/050610/45735.pdf>

Statute of limitations relative to enforcement of blight ordinance and setbacks

Court: Michigan Court of Appeals (Unpublished No. 293795, December 7, 2010)

Case Name: *Charter Twp. of Chesterfield v. Burton*

The trial court had jurisdiction over the plaintiff-Township's claims, properly denied the defendants-Burton and Kent's motion for judgment *non obstante veredicto* or, in the alternative, a new trial, and entered an order granting the Township's request for injunctive relief in this dispute concerning a shed located on defendants' property.

The Township filed a three-count complaint in May 2008. Counts I and II essentially claimed that defendants owned property on which the shed was located and that the shed violated the Township Zoning Code in several ways. Count III asserted that defendants used their property for the outdoor storage of unregistered vehicles, junk cars, old fuel tanks, an old tractor, and tarps. The Township noted that it had issued a citation for blight, yet they still failed to remove the blight. The Township asserted that their use of the property constituted blight and was a nuisance *per se* pursuant to MCL 125.3601. The Township argued it had no adequate remedy at law to require defendants to remove the blight and thus, only an injunctive order could cause the abatement of the nuisance *per se*.

In May 2009, the trial court entered an order granting the Township's request for injunctive relief. Defendants argued, *inter alia*, that the trial court lacked jurisdiction over the Township's claims. They argued that the Township could have moved in the trial court to transfer the case to the proper jurisdiction if it believed that its allegations constituted a nuisance *per se*, but it chose not to. They also contended that the

Township could have appealed Burton's prior district court misdemeanor conviction and \$100 fine but again, chose not to. Further, they asserted that the district court adjudicated the Township's causes of action in a prior case that was closed in 2005, but otherwise the district court retained jurisdiction. They also argued that pursuant to ordinance violation provisions of the General Law Village Act (MCL 66.6), an action alleging a code violation must be filed in district court and must be commenced not more than two years after the commission of the offense and thus, the Township's claims in the trial court were untimely. In 2005, the district court convicted Burton of a misdemeanor for constructing a shed that violated the Township Zoning Code. However, the district court did not issue an injunction, and defendants' shed remained standing, in violation of the ordinance. Rather than issue a citation for every day that they were in violation of the ordinance, however, the Township chose to seek abatement of the nuisance and filed a case in trial court in order to obtain injunctive relief. Although the sections for violations section of the Township Ordinances Act (MCL 41.183(6)) and District Court section of the Revised Judicature Act (MCL 600.8311) required that the Township institute its action for violation of the township zoning code in the district court, its suit for injunctive relief in the trial court was proper, and the trial court had jurisdiction. Pursuant to the nuisance abatement circuit court injunction section of the Revised Judicature Act (MCL 600.2940(1)), all claims based on or to abate nuisances may be brought in the circuit court, which may grant injunctions to stay and prevent nuisance. Defendants further contended that the Township's claims violated the statute of limitations and were not properly before the trial court. The six-year period of limitations in other personal actions section of the Revised Judicature Act (MCL 600.5813) governed the Township's claim seeking injunctive relief to abate a public nuisance.

It was undisputed that defendants' shed was still standing on May 30, 2008 – the date the Township filed its complaint. Thus, there was no violation of the statute of limitations, and the issue was properly before the trial court. The court also held that the trial court did not clearly err in finding that the defendants violated the blight ordinance and the front yard setback ordinance. **Affirmed.** (Source: State Bar of Michigan *e-Journal* Number: 47545, December 14, 2010).

Full Text Opinion:
<http://www.michbar.org/opinions/appeals/2010/120710/47545.pdf>

NR&EPA does not preempt local recycling ordinance

Court: Michigan Court of Appeals (Unpublished No. 292611, December 16, 2010)

Case Name: *Rondigo, LLC v. Township of Casco*

The court held that Part 115 (Solid Waste Management) of the Natural Resources & Environmental Protection Act (NREPA) (MCL 324.11521) does not expressly preempt local ordinances, and the legislative history indicated that the Legislature did not intend to preempt local regulations concerning recycling operations. Further, the court found nothing in the pervasiveness of the statutory scheme or in the nature of the subject matter being regulated (the composting of yard clippings) that warranted a finding of preemption.

Thus, the court affirmed the trial court's order denying the Rondigo, LLC-plaintiff's request for a declaratory judgment that MCL 324.11521 preempted the parts of the defendant-township's zoning ordinance regulating composting operations.

Plaintiff purchased a 42-acre parcel in the township in 2003. The parcel was zoned industrial and plaintiff intended to use it for commercial composting operations. Defendant enacted new zoning ordinance provisions in December 2004 regulating commercial composting operations in the township. Defendant's zoning ordinance allows for yard waste composting activities in industrial zones, but only under a special use permit subject to a series of locally-imposed requirements. The Legislature amended part 115 of the NREPA in 2007 to add regulations related to composting operations. Plaintiff asserted that it took the necessary steps to become a "registered composting facility" under MCL 324.11521 and thus, it was entitled to begin composting activities on the property without further approvals or restrictions imposed by defendant. After defendant rejected plaintiff's site plans for a composting facility on the property, plaintiff filed this case.

On appeal, plaintiff argued that the trial court erred in holding that the parts of the zoning ordinance addressing composting were not preempted by MCL 324.11521. The appeals court disagreed. While defendant's ordinance addressed concerns similar to those addressed by the statute as to the location and manner of composting, and the maintenance of appropriate site drainage, the ordinance also contained several additional requirements not present in the statute. The court concluded that

the plain language of the statute does not indicate that the Legislature intended the statutory requirements to be the only requirements for establishing and operating a composting facility of the nature intended by plaintiff.

Rather,

the statute establishes the minimum requirements for such facilities, and thus, defendant is permitted to impose additional, non-conflicting requirements upon the construction and

operation of such facilities.

Since there was no indication that MCL 324.11521 and the local ordinance provisions regulating composting operations could not coexist, the court held that there was no direct conflict between the ordinance and the statute. (Source: State Bar of Michigan *e-Journal* Number: 47618, January 12, 2011).

Full Text Opinion:

<http://www.michbar.org/opinions/appeals/2010/121610/47618.pdf>

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 *cortil* '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'.

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

CL6: 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

CL6: 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://www.msue.msu.edu/portal/module_detach.cfm?module_column_map_id=553147&portal_id=25643.

To find other expertise in MSU Extension see: <http://people.msue.msu.edu/>.

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