TO: Government Law Section Amicus Committee

FROM: Eric D. Williams

DATE: 06/___/2024

RE: Update on GLS Amicus Committee Actions Since June 2023

MEMORANDUM

GLS was invited or permitted to submit amicus curiae briefs in 5 cases since June 24, 2023. Of those 5 cases, the Government Law Selection approved and completed the submission of 2 amicus briefs jointly with the Michigan Municipal League:

Jostock v Mayfield Township and A2B Properties, in which the Supreme Court invited the MTA, MML, GLS, and the Real Property Law Section to file amicus briefs answering (1) whether MCL 125.3405 allows for uses not otherwise authorized in a particular zone; (2) what mechanism was used to authorize the current use as a dragway, and whether that mechanism is available to authorize or expand the use of the appellant's property; (3) whether operation of the dragway is an authorized use under C-2; and (4) whether the township's conditional rezoning of the appellant's property is valid under MCL 125.3405. GLS answered: (1) No (2) Nonconforming use and Conditional Rezoning Agreement (3) No (4) Yes; validity should be determined by the Township Zoning Board of Appeals. Oral argument was heard on Jostock v Mayfield on April 17th. The Court has not decided on the case yet.

Sakorafos v Lyon Township and Dandy Acres, in which the Supreme Court granted a joint motion filed by GLS and MML to submit an amicus brief supporting neither party, but instead asking the Supreme Court to vacate certain language from the

Court of Appeals' opinion that allows for private citizens to establish standing to bring a public nuisance action by using the aggrieved party status rather than the special damages standard. GLS and MML argued that the Supreme Court should reclarify that private citizens must establish special damages that differ in kind and degree from others in the community in order to have standing to bring a public nuisance action. The amicus brief was accepted for filing by the MSC on April 3, 2024.

GLS may join the MML in authoring an amicus brief in **Midwest Valve & Fitting Company v City of Detroit**, a case revolving around whether certain challenged annual charges billed by the City of Detroit violate: (1) the Headlee Amendment; and/or (2) the Prohibited Taxes by Cities and Villages Act, MCL 141.91. GLS, MML, MTA, and MI Realtors were invited by the Court to file amicus briefs. Appellant's brief was filed on May 19, 2024, Appellee's brief was due June 9 but has not yet been filed; amicus briefs are due 21 days after the Appellee's brief is filed.

GLS has not acted on the Order inviting interested parties to file amicus briefs in **Heos v City of East Lansing,** another case revolving around an alleged Headlee Amendment violation. This case was brought by a citizen of East Lansing, on behalf of all others similarly situated, alleging certain fees on a utility bill to be a tax that was not voted on by the citizens. The Supreme Court has invited interested parties to file amicus briefs addressing: (1) the criteria for determining when a pass-through fee imposed by a local government on a business or utility should be considered a tax paid by a customer; (2) whether, in the context of a utility rate, a utility customer may challenge an improper pass-through fee as an improper rate in an action against the utility; (3) if so, what effect,

if any, the availability of that challenge has on the analysis and governing timelines for a customer pursuing recovery from a local government of an improper fee paid to the utility; (4) what authority provides the plaintiff with standing to pursue recovery of an improper tax under MCL 141.91; and (5) whether there is case law supporting the plaintiff's argument that the six-year period in MCL 600.5813 applies to his MCL 141.91 claims, and if there is any case law supporting a different period of limitations. The MSC ordered supplemental briefs by the parties. Appellant's supplemental brief was filed on June 6, Appellee's brief is due June 27, and amicus briefs are due 21 days after Appellee's brief is filed.

On May 29, 2024, the Michigan Supreme Court invited the Michigan Townships Association and GLS to file amicus briefs in the case of **Village of Kalkaska v Michigan Municipal League Liability and Property Pool**. The Village of Kalkaska implemented a lifetime benefits program for its employees in 1996 and discontinued the program in 2015 by way of a resolution. The employees whose benefits were discontinued sued the Village for breach of contract and the Village sued the MMLLPP for failing to cover the judgment and settlement costs. At issue in this case is (1) whether the insurance policy provides coverage for the claims at issue that arose from the appellee's 2014 Resolution Discontinuing Trust and Agency Fund and Retirees' Health Insurance; and (2) whether the Court of Appeals correctly reversed and remanded for entry of judgment for the appellee. Supplemental briefs were requested by the MSC on May 29, 2024 but neither party has filed a supplemental brief yet.

Copies of the Supreme Court Orders and the GLS amicus briefs are attached.

GLS authorized an amicus brief in **Pinewood Circle v City of Romulus**, an appeal from the MTT, but GLS's participation was not relayed to the author and GLS was not included as an amici. The amicus brief was filed jointly by the MTA and the MML on March 13th.

Cullen Harkness, Albion City Attorney and member of the MAMA listserv, mentioned **Mars Herbs LLC et al v Leoni Township** as a potential amicus brief that will address whether the Right to Farm Act preempts a Township's Zoning Ordinance under the MMFLA and MRTMA. The Court has not issued an Order for briefs in this case.

GLS Meetings:

March 2, 2024 – GLS authorized participation in Pinewood Circle amicus brief

February 9, 2024 – GLS authorized participation in Sakorafos amicus brief

January 6, 2024 – GLS authorized participation in Jostock amicus brief

Guidelines and case selection criteria
for requests for amicus curiae briefs
to the Government Law Section

In reviewing a request or invitation to file an amicus curiae brief, the Government Law Section Council and its Amicus Committee should consider the following questions and criteria.

1. Review the written request or application for an amicus curiae brief, and request a telephone appearance by a representative of the requesting party or agency.

2. Identify the government law issue involved in the case, and evaluate the significance of the government law issue to the Government Law Section.

3. Evaluate the statewide impacts of a government law case that may
   (a) resolve a conflict in case law
   (b) decide a matter of first impression
   (c) overrule established precedent
   (d) modify or extend existing law
   (e) construe a significant government law statute
   (f) construe a section of the Michigan Constitution that establishes or affects government law, or local governmental units or agencies

4. What is the potential risk of a decision that will have broad negative ramifications or consequences to the affected government law or governmental units, and will the litigants adequately inform the court of the potential negative ramifications or consequences?

5. Who is requesting an amicus brief from the GLS, such as the Michigan Supreme Court, a litigant, an agency or association like the Michigan Township Association, the Michigan Municipal league, or another section of the State Bar?

6. Will the briefs of the parties or other amici adequately address the government law issues in the case?

7. What are the time constraints on providing an amicus curiae brief?

8. Who is willing and able to write the amicus curiae brief?

9. What is the estimated cost of preparing and filing the amicus curiae brief?

10. Are there opportunities to join with other organizations in preparing an amicus curiae brief, and sharing the cost?

11. Are there government law issues that should be addressed by taking a neutral stance rather than supporting one party or any party? (not yet adopted)

Order

Michigan Supreme Court
Lansing, Michigan

April 25, 2024

165763

JAMES HEOS, Individually and on
Behalf of All Others Similarly Situated,
Plaintiff-Appellant,

v

SC: 165763
COA: 361138
Ingham CC: 20-000199-CZ

CITY OF EAST LANSING,
Defendant-Appellee.

_____/

On order of the Court, the application for leave to appeal the April 13, 2023 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The parties shall file supplemental briefs in accordance with MCR 7.312(E), addressing: (1) the criteria for determining when a pass-through fee imposed by a local government on a business or utility should be considered a tax paid by a customer; (2) whether, in the context of a utility rate, a utility customer may challenge an improper pass-through fee as an improper rate in an action against the utility; (3) if so, what effect, if any, the availability of that challenge has on the analysis and governing timelines for a customer pursuing recovery from a local government of an improper fee paid to the utility; (4) what authority provides the plaintiff with standing to pursue recovery of an improper tax under MCL 141.91; and (5) whether there is case law supporting the plaintiff's argument that the six-year period in MCL 600.5813 applies to his MCL 141.91 claims, and if there is any case law supporting a different period of limitations.

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

CLEMENT, C.J., not participating due to a potential interest in the controversy.

s0320

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 25, 2024

Clerk

STATE OF MICHIGAN

IN THE SUPREME COURT

MSC No. 165770
COA No. 362635
Lapeer CC No. 21-054778-AA

RONALD A. JOSTOCK and SUSAN J. JOSTOCK,
Plaintiffs-Appellees
v

MAYFIELD TOWNSHIP, and MAYFIELD TOWNSHIP BOARD OF TRUSTEES,
Defendants,

and

A2B PROPERTIES, LLC, a Michigan Limited Liability Company,
Defendant-Appellant

AMICUS CURIAE BRIEF SUBMITTED BY THE MICHIGAN MUNICIPAL LEAGUE AND THE GOVERNMENT LAW SECTION PURSUANT TO THE ORDER INVITING AMICUS BRIEFS

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STATEMENT OF BASIS OF JURISDICTION

The Amici Michigan Municipal League (MML) and Government Law Section (GLS) take no position on the basis of jurisdiction of the Supreme Court.

STATEMENT OF AMICUS CURIAE INTEREST[1]

The Michigan Municipal League (MML) is a non-profit Michigan corporation and is an association representing political subdivisions, predominantly cities and villages. MML's purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of approximately 566 Michigan cities and villages, many of which are also members of the Michigan Municipal League Legal Defense Fund. The purpose of the MML-Legal Defense Fund is to represent the member cities and villages in litigation of statewide significance. The Michigan Municipal League operates the Legal Defense Fund through a board of directors, whose membership includes the president and executive director of MML, and the officers and directors of the Michigan Association of Municipal Attorneys: Lauren Trible-Laucht, city attorney, Traverse City; Steven D. Mann, city attorney, Milan; Jill H. Steele, city attorney, Battle Creek; Ebony L. Duff, city attorney, Oak Park; Rhonda Stowers, city attorney, Davidson; Nick Curcio, city attorney, multiple Southwest Michigan municipalities; Thomas R. Schultz, city attorney, Farmington and Novi; Amy Lusk, city attorney,

[1] No party in this case made any monetary contribution to the Michigan Municipal League or the Government Law Section in exchange for authoring this brief. Neither the Appellees nor the Appellant or any other party involved in this case made a monetary contribution to the MML or GLS. MCR 7.312(H)(2).

Saginaw; Suzanne Curry Larsen, city attorney, Marquette; Laurie Schmidt, city attorney, Saint Joseph; Christopher Johnson, general counsel of the MML; Robert Clark, mayor, Monroe, president of MML; and Daniel P. Gilmartin, CEO and executive director of MML.

The Government Law Section of the State Bar of Michigan (GLS) is a voluntary membership section of the State Bar of Michigan, comprising in excess of 1,000 attorneys who generally represent the interests of government corporations, including cities, villages, townships and counties, board and commissions, and special authorities. Although the Section is open to all members of the State Bar, its focus is centered on the laws, regulations, and procedures relating to public law. The Government Law Section provides education, information, and analysis about issues of concern to its membership and the public through meetings, seminars, the State Bar of Michigan website, public service programs, and publications. The Government Law Section is committed to promoting the fair and just administration of public law. In furtherance of this purpose, the Government Law Section participates in cases that are significant to governmental entities throughout the State of Michigan. The Section has filed numerous *amicus curiae* briefs in state and federal courts. The position expressed in this *amicus curiae* brief is that of the Government Law Section only and is not the position of the State Bar of Michigan.

The governing bodies of the MML and GLS have authorized the attorneys appearing on this brief to file an *amicus curiae* brief in response to the invitation by the Supreme Court expressed in its Order granting the Application for Leave to Appeal dated October 18, 2023, and the Order Granting the Joint Motion of the GLS and MML to File

an Amicus Curiae Brief, dated February 7, 2024. The Section Council of the GLS voted 17-0 at a regular meeting on January 6, 2024, to authorize the amicus curiae brief, with Gerald Fisher and Eric Williams abstaining.

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER MCL 125.3405 ALLOWS FOR THE CONDITIONAL REZONING APPROVAL OF USES NOT OTHERWISE AUTHORIZED IN A PARTICULAR ZONE?

TRIAL COURT SAID:	"NO"
COURT OF APPEALS SAID:	"NO"
APPELLEES SAY:	"NO"
APPELLANT A2B SAYS:	"YES"
AMICI MML AND GLS SAY:	"NO"

II. WHAT MECHANISM WAS USED TO AUTHORIZE THE CURRENT [LONG-EXISTING] USE AS A DRAGWAY?

TRIAL COURT SAID:	"NONCONFORMING USE AND CONDITIONAL REZONING AGREEMENT"
COURT OF APPEALS SAID:	"NONCONFORMING USE AND CONDITIONAL REZONING AGREEMENT"
APPELLEES SAY:	"NONCONFORMING USE AND CONDITIONAL REZONING AGREEMENT"
APPELLANT A2B SAYS:	"NONCONFORMING USE AND CONDITIONAL REZONING AGREEMENT"
AMICI MML AND GLS SAYS:	"NONCONFORMING USE AND CONDITIONAL REZONING AGREEMENT"

WHETHER THAT MECHANISM IS AVAILABLE TO AUTHORIZE OR EXPAND THE USE OF THE APPELLANT'S PROPERTY?

TRIAL COURT SAID: "NO"

COURT OF APPEALS SAID: "NO"

APPELLEES SAY: "NO"

APPELLANT A2B SAYS: "YES"

AMICI MML AND GLS SAY: "NO"

III. **WHETHER OPERATION OF A DRAGWAY IS AN AUTHORIZED USE UNDER C-2, OR IF THE EXISTING C-2 DISTRICT REGULATIONS WERE INTERPRETED BY MAYFIELD TOWNSHIP TO AUTHORIZE THE DRAGWAY USE?**

TRIAL COURT SAID: "NO"
[THE CONDITIONAL REZONING IS INVALID]

COURT OF APPEALS SAID: "NO"
[THE CONDITIONAL REZONING IS INVALID]

APPELLEES SAY: "NO"
[THE CONDITIONAL REZONING IS INVALID]

APPELLANT A2B SAYS: "YES"
[THE CONDITIONAL REZONING IS VALID]

AMICI MML AND GLS SAY: "YES"
[VALIDITY SHOULD BE DETERMINED BY THE TOWNSHIP ZONING BOARD OF APPEALS]

IV. WHETHER THE TOWNSHIP'S CONDITIONAL REZONING OF THE APPELLANT'S PROPERTY IS VALID UNDER MCL 125.3405 TO PERMIT THE PROPOSED NEW DRAGWAY?

TRIAL COURT SAID:	"NO"
COURT OF APPEALS SAID:	"NO"
APPELLEES SAY:	"NO"
APPELLANT A2B SAYS:	"YES"
AMICI MML AND GLS SAY: (subject to Issue III)	"NO"

INTRODUCTION

The Amici Michigan Municipal League and Government Law Section accepted the Court's invitation to file an amicus brief in this case to address the issues outlined by the Court in its October 18, 2024 Order granting leave to appeal. In general terms, Amici have focused on the importance of construing section MCL 125.3405 in the context of the MZEA as a whole, and to attempt a clarification on the operation of the this statutory section for the benefit of property owners, developers, planners, and local governmental officials, as well as the bench and bar.

If MCL 125.3405 is construed to permit the local unit of government to authorize by condition a use not otherwise permitted in the zoning district, the effect would be to authorize a second and materially different means of amending important terms or map designations in the zoning ordinance – with no requirement for planning commission or public involvement. Such a construction creates a serious tension with the extensive and long-effective procedure for enacting and amending a zoning ordinance, and a serious conflict between MCL 125.3405 and the traditional zoning process for rezoning which is detailed in the numerous sections of the MZEA.

STATEMENT OF FACTS

The amici MML and GLS accept the "Statement of Facts" presented by the Plaintiffs-Appellees.

ARGUMENT

I. MCL 125.3405 DOES NOT ALLOW FOR THE CONDITIONAL REZONING APPROVAL OF USES NOT OTHERWISE AUTHORIZED IN A PARTICULAR ZONE.

Standard of Review

The Court reviews de novo questions of statutory interpretation.[2]

A. Introduction

Subsection (1) of MCL 125.3405, authorizes the approval of a certain use and development of the land as a *condition* to a rezoning of the land or an amendment to a zoning map. The first issue presented in this case is whether the legislature intended to enable a "condition" to a rezoning or zoning ordinance amendment to change the zoning ordinance by permitting a use of land not otherwise authorized in the relevant zoning district; or, did the legislature intend the "condition" to be solely a *limitation* or *restriction* on the uses and development already authorized in the zoning district.

This issue must be resolved by an exercise of statutory construction, an exercise having as its frequently clarified goal of ascertaining legislative intent.[3] The rules of construction dictate that, if legislative intent can be gleaned by reading the words of the statute, the analysis ends there. Unfortunately, in spite of urgings to the contrary by some in this case, it is the view of the Amici that there is insufficient clarity in the language

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[2] *Fraser Township v Haney*, 509 Mich 18, 23, 983 NW2d 309 (2022).
[3] *People v Koonce*, 466 Mich 515, 518, 648 NW2d 153 (2002).

employed in the statute to discern a clear meaning on whether a "condition" may include the authorization of a use of land not otherwise permitted in the relevant zoning district.

With insufficient clarity in the statute, the cavalry must be summoned to employ the *rules of statutory construction,* to be applied for the purpose of ascertaining legislative intent. In carrying out its traditional function of attempting to assist the Court in cases such as this, the Amici will offer several considerations that apply in this zoning context, and recommend that the "condition" referenced in MCL 125.3405 should be interpreted to permit the property owner and local unit of government to agree on a *limitation* or *restriction* on the uses and development already authorized in the zoning district, but not to permit an agreement on an expansion of the uses and development authorized in the district.

B. Reading MCL 125.3405 in the Context of the Michigan Zoning Enabling Act as a Whole

Reading one section of a legislative act in the context of the *act as a whole* is an important and recognized methodology for gleaning the meaning of an otherwise unclear statute.[4] MCL 125.3405 is by no means a statutory island. Rather, it is a relatively terse part of the lengthy and complex Michigan Zoning Enabling Act, MCL 125.3101, *et seq,* ("MZEA"), which is one of the most powerful state land use laws, adopted approximately one hundred years ago as part of a national effort to grant local governments the authority to establish and maintain land-use order and protect the public health, safety,

[4] *Honigman v City of Detroit,* 505 Mich 284, 295, 952 NW2d 358 (2020).

and welfare.[5] The MZEA, along with the Michigan Planning Enabling Act, MCL 125.3801, *et seq* ("Planning Act"), provide numerous provisions which seek to establish and maintain good planning and methodical land-use organization in communities.[6]

These two comprehensive zoning and planning acts make provision for, among many other things: the creation of a "planning commission" in the local government,[7] the adoption of a "master plan" to guide development throughout the community,[8] the detailed process, including public hearing, for the planning commission to prepare and recommend a zoning ordinance, complete with text and maps, to establish and amend the permitted uses of private land within the community,[9] and for the local legislative

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[5] *See Village of Euclid v Ambler Realty Co*, 272 US 365, 386-387, 47 S Ct 114, 54 ALR 1016, 71 LEd 303 (1926). (Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities.); parenthetical language cited in *Cady v City of Detroit*, 289 Mich 499, 286 NW 805 (1939).

[6] For example, MCL 125.3201(1) provides: A local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of 1 or more districts within its zoning jurisdiction which regulate the use of land and structures to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land, to ensure that use of the land is situated in appropriate locations and relationships, to limit the inappropriate overcrowding of land and congestion of population, transportation systems, and other public facilities, to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility requirements, and to promote public health, safety, and welfare.

[7] Planning Commission creation, MCL 125.3811, et seq.

[8] Adoption of Master Plan, MCL 125.3831, et seq.

[9] Preparation of Zoning Ordinance and amendments, MCL 125.3305, et seq.

body of the community (such as the township board or city council) to adopt the zoning ordinance and amendments.[10]

The lengthy and deliberative process of zoning ordinance and map adoption and amendment is mandated to be well publicized, and provide property owners with considerable opportunity to study the zoning map(s) and ordinance provisions, and to be heard before both the planning commission and legislative body before the zoning ordinance and amendments are adopted. Changes in zoning regulations applicable to individual properties may be initiated by a property owner, and are processed by employing the same detailed and deliberative process described above.

This planning and adoption procedure was utilized for the better part of the twentieth century, and continues to govern into the twenty-first century. In 2006, the Michigan Legislature enacted Act 110 of that year which comprehensively reorganized zoning regulations in Michigan, with only a few substantive amendments. Until 2006, zoning enabling regulations had been provided in three separate zoning acts for cities and villages, townships, and counties. The 2006 comprehensive act unified the regulations for all of these local governments, and in the process created MCL 125.3405, which is the subject of this case.

MCL 125.3405 does not apply to the initial creation of a zoning ordinance or map within a community, or for the establishment of the regulations applicable within and across the several zoning districts. Nor is it applicable when the local government itself

[10] Enactment of Zoning Ordinance and amendments, MCL 125.3401, et seq.

initiates a change of zoning. Rather, it becomes relevant only when *a property owner* seeks a rezoning or amendment to the zoning map. It is in the latter process that the property owner may "voluntarily offer in writing, and the local unit of government may approve, certain use and development of the land as a condition to a rezoning of the land or an amendment to a zoning map." MCL 125.3405(1).

In light of the long-established and utilized deliberative procedure for establishing and amending new zoning provisions, if a "condition" approved under MCL 125.3405 could authorize a use of land *not otherwise permitted* in the zoning district, this would create *two separate procedures for amending the uses and developments under a zoning ordinance* for a particular property: **(1)** The traditional procedure established and utilized for establishing and amending the zoning ordinance, with a planning commission public hearing and recommendation to the legislative body, public notice and participation in the process, and ultimate enactment by the legislative body; and **(2)** The single-step procedure referenced in MCL 125.3405, in which "[a]n owner of land may voluntarily offer in writing, and the local unit of government may approve, certain use and development of the land as a condition to a rezoning of the land or an amendment to a zoning map."

The MZEA makes no mention of two procedures for amending a zoning ordinance to authorize a *new* land use permissible on a property. For such purposes, the only *clearly expressed* authorization is meticulously organized and detailed in several sections of both the MZEA and Planning Act for amending the zoning ordinance to authorize a land use

within a district.[11] Again, these two acts mandate a lengthy process of planning commission hearing and recommendation, public notice, public participation, and legislative body adoption.

This traditional, lengthy process *requires* a recommendation of the planning commission, and notice and an opportunity for public participation, yet the process under MCL 125.3405 *requires* neither. In other words, if it were determined that a new land use could be approved as part of the process under MCL 125.3405, not only would it create a *duplicative process* for rezoning, it would serve as a means for an *end around* the deliberative and very transparent planning and zoning process otherwise required under the MZEA and Planning Act. This would allow abrupt decision making without the necessity of employing all of the safeguards for the public, and without the careful deliberation of the planning commission. An example of the potential for such an abrupt process is illustrated in the hypothetical stated below.

This hypothetical demonstrates the shortcomings that could befall the property rights of neighbors, and undermine planning in the community at large. It is not suggested that the facts presented in this hypothetical precisely track the Mayfield Township conditional rezoning. However, it contains facts that may well unfold under the terms of MCL 125.3405 – facts similar to procedures which are likely to have already occurred since 2006 in the absence of appropriate guardrails stated in the statute.

> Assume there are two residential zoning districts in Clarkston Township: R-1, which restricts properties to single family homes, and R-2, which allows multi-family residential buildings. R-2 is the only zoning district in

[11] See generally, MCL 125.3306 through MCL 125.3403.

Clarkston that permits structures to exceed two stories in height, allowing apartment buildings to be as high as 5 stories.

Brent owns a 15-acre parcel on the edge of an R-1 zoning district., This parcel abuts an R-2 district. Brent's 15 acres is full of trees and wetlands, and has a pristine stream running through it.

Brent desires to use the 15 acres to construct three five-story apartment buildings. Since his property is located in the R-1 zoning district, such development is not permitted. So Brent has filed an application to rezone his property to the R-2 classification. The zoning application is scheduled for hearing before the Clarkston Planning Commission, and 300 nearby residents from the R-1 and R-2 districts appear and fervently object to the development of Brent's property with three five-story apartments, objecting to the height as well as the anticipated destruction and impairment of the trees, wetlands, and stream, particularly considering the extensive paved parking lots that would be needed to serve the apartments. The Planning Commission then studies the likely impact of the proposed development on the natural resources, utilizing the services of an expert. At the conclusion of the hearing, the Planning Commission votes to recommend to the Township Board a denial of the rezoning, citing the impact on the natural resources.

Consideration by the Township Board does not require a public hearing under MZEA, but all of the residents are satisfied with the Planning Commission's recommendation.

In the next thirty days, Brent meets with the Township Supervisor and two other influential Township Board members (less than a quorum of the seven-member board, and thus not an open meetings act violation), and suggests as a compromise a development that would allow only a single, 15-story apartment building to be built on his property. This would significantly reduce the area of land that would be disturbed. The three Board members agree that this would be a good compromise, and would preserve considerable natural resources. A consensus is reached that Brent should offer a *conditional rezoning* proposal under MCL 125.3405 with the single 15-story apartment, to be considered by the Township Board along with the traditional rezoning application to change the 15 acres to an R-2 zoning classification.

Upon receiving Brent's conditional rezoning proposal, believing that a good compromise has been worked out, the Supervisor places the rezoning proposal on the agenda of the Township Board with no notice to local

> residents. None of the residents from the two zoning districts attend the meeting at which this agenda item involving Brent's proposal is scheduled. At the meeting, the Supervisor carefully explains to the rest of the Board that a rezoning of Brent's property to permit three five-story apartment buildings would be totally unacceptable, but that Brent has submitted a proposed compromise under MCL 125.3405 which the Board is able to immediately approve. After the Supervisor explains the proposal for a 15-story building that would preserve natural resources, with no further fanfare, one of the three Board members who had met with Brent makes a motion to approve the rezoning in accordance with the conditional rezoning proposal, and the motion is seconded by the other Board member who had attended the meeting with Brent. The Supervisor then calls for a vote, and the motion is approved on a 4-3 vote.

Of course, this hypothetical presents a scenario with details which would not frequently occur. However, as a practical matter, the property owner seeking a rezoning may be become aware of public dissatisfaction with a proposed rezoning, and an adverse planning commission reaction – thus giving rise to the thought of a conditional rezoning proposal under MCL 125.3405 – until after the planning commission conducts a public hearing and makes its recommendation to the legislative body. Certainly, conditional rezoning under MCL 125.3405 could be undertaken in accordance with all of the substantive and procedural requirements in the MZEA for rezoning property and amending the zoning ordinance. However, conditional rezoning under MCL 125.3405, on its own, does not *require* compliance with all of the notice and hearing rules in the MZEA, even where, as in the present case, a conditional rezoning of property was approved to authorize a use not otherwise permitted in the zoning District.

There is little evidence that the legislature had any intent to permit an amendment of the zoning ordinance or map by conditional rezoning under MCL 125.3405. Also, compliance with the detailed and transparent process as traditionally required has been

deemed to be important "Indeed, this Court has consistently held that the procedures outlined in the Zoning Enabling Act must be strictly adhered to."[12] Conditional rezoning under MCL 125.3405 should not be construed to obviate, and essentially create a conflict with, the detailed rules in the MZEA traditionally applicable to a "rezoning" of property.

If conditional rezoning under MCL 125.3405 is construed to include and authorize the approval of a use or development not otherwise permitted in the zoning district, such new use or development could be approved in the absence of a full planning commission process and public participation. MCL 125.3405 creates the concept of 'offer and acceptance' with regard to the certain use or development being proposed by the property owner. In other words, as it was treated by the Court of Appeals, MCL 125.3405 calls for the creation of an "agreement."[13] This is critical because the "rezoning" can be *procedurally isolated* from the "agreement" portion of the overall process. Thus, although the agreement must be approved as part of a traditional "rezoning" under the MZEA, analyzing the requirements for entering into the "agreement," there is no requirement on the *timing* of the offer made by the property owner. If the offer is made to the township board after planning commission review and recommendation, and after the required public hearing on the traditional rezoning, as in the hypothetical above, MCL 125.3405 permits the offer and acceptance process *without the protections mandated as part of the traditional rezoning component of the process*. Thus, there is nothing in MCL 125.3405 that triggers new planning commission review and recommendation on the "agreement"

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[12] *Korash v. City of Livonia*, 388 Mich. 737, 746, 202 N.W.2d 803 (1972).
[13] E.g., Court of Appeals Slip Opinion, p 6.

component, or triggers a new public hearing at which the public could be educated and have input, and there is no prohibition on adding the "agreement" at the eleventh hour of the local government's consideration – after the traditional rezoning process has been conducted on a conventional application for rezoning. Of course, the Court is not able to amend the statute to require these protections, so the statute must be scrutinized and construed as the legislature enacted and intended it.

In construing the statute, it is appropriate to consider the history of the MZEA, with an eye toward maintaining a practice consistent with common sense.[14] Examining the application of MCL 125.3405 in the context of the MZEA as a whole, the absence of an express statement of a legislative intent to create a second, *duplicative,* but potentially *untransparent*, process for creating a new use authorization in a zoning district, and the conflict between the traditional ordinance amendment process and the conditional rezoning approval process, would suggest the absence of legislative intent to permit the authorization of a new use of land as a "condition" to a rezoning or zoning map amendment.

All of these considerations lead to the conclusion that the appropriate construction of MCL 125.3405 in the context of the MZEA as a whole, consistent with gleaned legislative intent, is that this statute authorizes a local unit of government to impose a *limitation* or *restriction* on the use and development of property permitted in the district

[14] *Honigman v City of Detroit,* 505 Mich 284, 295, 952 NW2d 358 (2020).

as part of a rezoning, but does not authorized the approval of a new use not otherwise permitted in the zoning district.

C. Discerning the Purpose for the Relatively Recent Addition of MCL 125.3405 to the MZEA.

The Mayfield Township's Professional Planner provided an insight on the scope of the land use authorization when a property is rezoned without condition to a particular classification - characterized by the Planner as a "straight rezoning." Explaining her general practice, the Planner pointed out that:

> Straight rezoning to C-2, if granted, opens the site up to all uses allowed in the C-2 district, such as a boarding house, restaurant, and adult uses, even if the applicant promises a different use. I advise municipal clients who are entertaining a straight rezoning request not to consider if the particular proposed use makes sense at that location, but whether any of the uses in that zoning district make sense, because once property is rezoned, the owner can use it for any of the uses allowed in that district.[15]

This insight is critical, and parallels other available evidence on the purpose for which MCL 125.3405 was enacted. The caution expressed by the Mayfield Professional Planner was confirmed in the 2009 edition of the text on Michigan Zoning, Planning, and Land Use, published three years following the enactment of MCL 125.3405 by the Institute of Continuing Legal Education ("ICLE").[16] Tracking the same point expressed in the quoted affidavit of the Township's Planner, above, the ICLE text states that, ". . .

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[15] Affidavit of Carmine Avantini, Defendant-Appellant's Appendix, Tab 12, p 55, ¶ 5. Planner Avantini also expressed her opinion that "Conditional rezoning potentially allows a use that might not otherwise be allowed in the current zoning district . . .". Id, at p 55, ¶ 8.

[16] Michigan Zoning, Planning, and Land Use, 2009 Edition, Chapter 4, §4.8, Conditional Rezoning, attached to this brief as Exhibit A. This chapter was written by one of the co-authors of this Amicus brief, obviously long before the present case arose.

leading up to the enactment of what is now MCL 125.3405, communities in recent years, barring exceptional circumstances, generally took the conservative view that, if granted, a rezoning entitled a property owner to all uses permitted in the zoning classification . . . This circumstance proved frustrating in many instances, particularly where both the property owner and the community were in full agreement that, if the development could be *restricted* to only specified uses or particular improvements, perhaps with a site plan, the rezoning would be in the public interest . . . The permission granted in MCL 125.3405 represents one means of attempting to avoid some of the frustration caused by the total void of authority to create binding conditions upon a rezoning."[17] The ICLE text on this subject ends by clarifying that the short time following the statute's enactment had not yet allowed judicial guidance on the issue, but it would appear that:

> [T]he conditional rezoning provisions are intended to allow the imposition of a *restriction* upon the uses and development to be permitted, and not intended to authorize uses or development not otherwise permitted. (Emphasis in original text).[18]

Clearly, the ICLE text does not represent binding precedent. However, coupled with the opinion of the Township's Professional Planner, quoted above, this text provides a rational explanation that the legislature's motivation and intent in enacting MCL 125.3405 was solely to allow the establishment of a condition on a rezoning that would *limit* or *restrict* development to a certain approved use already permitted in the zoning district.

D. <u>Achieving Internal Harmony Between MCL 125.3405 and the MZEA.</u>

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[17] Id, at pp 124-125. (Emphasis supplied).
[18] Id.

An important rule of construction is attempting to harmonize the language of a statutory section with balance of the Act in which it appears. "[P]rovisions of a statute that could be in conflict must, if possible, be read harmoniously."[19] Stated in other words, "[w]e construe an act as a whole to harmonize its provisions and carry out the purpose of the Legislature."[20]

If MCL 125.3405 is construed to permit the local unit of government to authorize by condition a use not otherwise permitted in the zoning district, the effect would be to authorize a second and materially different means of amending important terms or map designations in the zoning ordinance – with no requirement for planning commission or public involvement. Such a construction creates a serious tension with the extensive and long-effective procedure for enacting and amending a zoning ordinance, and a serious conflict between MCL 125.3405 and the traditional zoning process for rezoning which is detailed in the numerous sections of the MZEA.

The most straightforward measure for harmonizing MCL 125.3405 with the MZEA is to construe the conditional zoning section in a manner that makes it clear that a "condition" may only establish a *limitation* or *restriction* on the use or development of land being rezoned, and may not authorize a use or development which is not otherwise permitted in the zoning district.

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[19] *Nowell v Titan Ins Co*, 466 Mich 478, 482, 648 NW2d 157 (2002). The Court went on to state that, "In . . . case of tension, or even conflict, between sections of a statute, it is our duty to, if reasonably possible, construe them both so as to give meaning to each; that is, to harmonize them. Id, at 483.

[20] *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159, 627 NW2d 247 (2001).

E. Examining the Potential Adverse Impact on Rights Traditionally Relied on by Property Owners.

In the purchase of property, consumers materially rely on zoning, both in terms of value and quality of life. They assume a stable continuation of the existence of the zoning restrictions on *neighboring properties*. This point was recognized in an often-quoted dissenting opinion of Justice William Rehnquist, written in a case alleging that a zoning regulation amounted to a taking of private property without just compensation. The important insight provided by Justice Rehnquist was stated as follows:

> [t]ypical zoning restrictions may, it is true, so limit the prospective uses of a piece of property as to diminish the value of that property in the abstract because it may not be used for the forbidden purposes. But any such abstract decrease in value will more than likely be at least partially offset by ***an increase in value which flows from similar restrictions as to use on neighboring properties.*** All property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole but also for the common benefit of one another.[21]

The essential point is that individuals seriously rely on stable zoning regulation to justify their acquiescence to restrictions on their own properties, and to otherwise protect their property interests. They are willing to be restricted in the use of their property based on the assumption of a reciprocal obligation of neighbors to be subject to the same restrictions. All owners benefit on a reciprocal basis.

Traditional zoning is, of course, subject to change. However, such change is rare and, for present purposes, is guarded by important protective mechanisms, including involvement of the community's planning commission, as well as the obligation of the

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[21] *Penn Central Transp Co v New York City*, 438 US 104, 139-140, 98 S Ct 2646, 57 LEd2d 631 (1978) (Rehnquist, J., dissenting). (Emphasis supplied).

community to provide notice to, and allow participation of, members of the public in any consideration of a change of a zoning regulation. These important protections are not required as part of the process of conditional rezoning under MCL 125.3405. Citing a national municipal law treatise, the Court has had the opportunity to consider zoning as a stabilizing force which should not be changed without due care:

> Amendment or repeal of zoning laws should be just as carefully considered and prepared, perhaps more so, since private arrangements, property purchases and uses, the location of business in commercial or industrial zones, and the making of homes in residential districts, occur with reasonable anticipation of the stability of existing zones. Consequently, procedure in the amendment of zoning ordinances ordinarily embraces safeguards similar to or greater than those of the original zoning, against unreasonable, capricious, needless and harmful rezoning or changes of use classification, including petitions, notices, protests, hearings, study by commissions or committees, and initiative and referendum of amending measures. *** Since the purpose of zoning is stabilization of existing conditions subject to an orderly development and improvement of a zoned area and since property may be purchased and uses undertaken in reliance on an existing zoning ordinance, an amendatory, subsequent or repealing zoning ordinance must clearly be related to the accomplishment of a proper purpose within the police power. Amendments should be made with utmost caution and only when required by changing conditions; otherwise, the very purpose of zoning will be destroyed. In short, a zoning ordinance can be amended only to subserve the public interest.[22]

In some cases, a conditional zoning agreement will be processed concurrent with the traditional zoning request, and due care, deliberation, and transparency may be afforded. However, as the hypothetical presented in Part B of this Argument reveals, there is no requirement in MCL 125.3405 to process a conditional rezoning request in a manner that includes all of these safeguards. Indeed, MCL 125.3405 should be construed

[22] *Raabe v City of Walker*, 383 Mich 165, 177-178, 174 NW2d 789 (1970).

to *require*, rather than *avoid*, compliance with all of the statutorily prescribed procedures in the MZEA for rezoning property and amending a zoning ordinance. By not including these protections in MCL 125.3405, the legislature implicitly expressed its intent that this section of the statute should be employed for the establishment of limitations and restrictions, and not as a shortcut to authorize new land uses otherwise prohibited in the zoning district. The plain language of MCL 125.3405(1) authorizes a local unit of government to "approve certain use and development of the land as a condition to a rezoning of the land or an amendment to a zoning map" without any express modification of the MZEA provisions on rezoning land or amending a zoning map.

Clearly, permitting the authorization of a certain land use and development not otherwise permitted in the zoning district under MCL 125.3405 creates an important tension, indeed the potential for a significant conflict with, and undermining of, the safeguards, including planning commission recommendation and public participation, mandated as part of traditional rezoning. The most appropriate means of resolving this tension and conflict is to construe MCL 125.3405 as being intended by the legislature to authorize the local governmental body to conditionally rezone property by imposing a *limitation* or *restriction*, and not an *expansion*, of the use or development otherwise permitted in the district.

II. THE MECHANISM USED TO AUTHORIZE THE CURRENT [LONG-EXISTING] USE AS A DRAGWAY WAS THE RECOGNITION OF A PRIOR NONCONFORMING USE, WHICH CANNOT BE EXPANDED

The mechanism used to authorize the current use as a dragway "since 1968" was

"a nonconforming use permit" which the appellant "attempted to expand" without success. Mayfield Township considered the expansion "an unlawful enlargement of the permitted nonconforming use."[23]

> An existing nonconforming use is a vested right in the use of particular property that does not conform to zoning restrictions, but is protected because it lawfully existed before the zoning regulation's effective date.[24]

However, "[n]onconforming uses may not generally be expanded, and one of the goals of local zoning is the gradual elimination of nonconforming uses."[25]

These principles are stated in the MZEA and the Mayfield Township Zoning Ordinance. "If the [dragway] use of a dwelling, building, or structure of the land is lawful at the time of the enactment of a zoning ordinance or as amendment to a zoning ordinance, then that [dragway] use may be continued although the use does not conform to the zoning ordinance or amendment."[26] "Except as otherwise provided in the Section, any nonconforming lot, use, sign, or structure lawfully existing on the effective date of the Ordinance or subsequent amendment thereto may be continued so long as it remains otherwise lawful."[27]

"The elimination of nonconforming uses and structures in a zoning district is declared to be for a public purpose and for a public use."[28] "It is necessary and consistent

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[23] Court of Appeals Slip Opinion, p 2.
[24] *Edw C Levy Co v Marine City Zoning Bd of Appeals*, 293 Mich App 333, 341-342, 810 NW2d 621 (2011).
[25] Id.
[26] MCL 125.3208(1).
[27] Mayfield Township Zoning Ordinance, Section 1502(2); See attached Exhibit B.
[28] MCL 125.3208(4).

with the regulations prescribed by this Ordinance that those nonconformities which adversely affect orderly development and the value of nearby property not be permitted to continue without restriction."[29]

"The continued existence of nonconformities is frequently inconsistent with the purposes of which such regulations are established, and thus the gradual elimination of such nonconformities is generally desirable."[30] "No [nonconforming] structure or use shall be changed unless the new structure or use conforms to the regulations for the district in which such structure or use is located."[31] "No nonconforming use or structure shall be enlarged upon, expanded, or extended, including extension of hours of operation."[32]

The Mayfield Township Zoning Ordinance prohibition against enlarging or expanding a nonconforming use, "including the extension of hours of operation," follows well settled Michigan zoning law.

> Expansion of a nonconforming use is severely restricted. One of the goals of zoning is the eventual elimination of nonconforming uses, so the growth and development sought by ordinance can be achieved. Generally speaking, therefore, nonconforming uses may not expand. The policy of the law is against the extension or enlargement of nonconforming uses, and zoning regulation should be strictly construed with respect to expansion. The continuation of a nonconforming use must be substantially of the same size and the same essential nature as the use existing at the time of passage of a valid zoning ordinance.[33]

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[29] Mayfield Township Zoning Ordinance, Section 1502(1). See Exhibit B.
[30] Id.
[31] Id, Section 1502(3)(b). See attached Exhibit B.
[32] Id, Section 1502(d)(1). See attached Exhibit B.
[33] *Norton Shores v Carr*, 81 Mich App 715, 720, 265 NW2d 802 (1978).

"It is the law of Michigan that the continuation of a nonconforming use must be substantially of the same size and same essential nature as the use existing at the time of passage of a valid zoning ordinance."[34]

The proposed dragway use described in the conditional rezoning would have to be substantially the same size and essential nature as the dragway use in 1968 for Mayfield Township to approve it as a continuation or "resumption, restoration, reconstruction, extension, or substitution of nonconforming uses or structures upon terms and conditions provided in the zoning ordinance."[35]

Attempts to expand nonconforming uses contrary to the public policy against nonconforming uses do not fare well in the courts because there is no countervailing public policy that favors or authorizes the expansion, enlargement, or governmental authorization of an otherwise illegal and unauthorized commercial land use in a [residential] zoning district.

The very small legal window of opportunity in MCL 125.3208(2) to extend or substitute a nonconforming use according to a local zoning ordinance is closed by the terms of the Mayfield Township Zoning Ordinance, Section 1502(3)(d)(1).

d. Enlarging a Nonconforming Use

(1) No nonconforming use or structure shall be enlarged upon, expanded, or extended, including hours of operation.

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[34] *White Lake Twp v Lustig*, 10 Mich App 665, 673 (1968).
[35] MCL 125.3208(2).

This explicit restriction on the expansion or enlargement of a nonconforming use is not unique to Mayfield Township. In 1979 the Court of Appeals found that the extension of hours of a grocery store constituted an expansion of the nonconforming use that could be restricted by the township.[36]

In *Norton Shores v Carr*,[37] the Court of Appeals ruled against a junkyard operation that expanded its prior nonconforming use that existed in 1955, holding that the property owner "had no right to expand that nonconforming use beyond its 1955 scope."

The prior nonconforming use permit for the dragway is limited by law and fact to the continuation of substantially the same size and nature as the dragway use that existed in 1968. Apart from amending or interpreting the zoning ordinance to permit the "dragway" use, there is no legal mechanism by which Mayfield Township can authorize the expansion or enlargement of the prior nonconforming dragway use.[38]

III. MAYFIELD TOWNSHIP'S APPROVAL OF THE "DRAGWAY" USE BY CONDITIONAL REZONING COULD BE VALID IF THE EXISTING C-2 DISTRICT REGULATIONS ARE INTERPRETED TO PERMIT THE DRAGWAY USE

It is the position of the Amici that the intent of the legislature in MCL 125.3405 is to permit a party seeking a rezoning of property or an amendment to a zoning map to offer, and for the local unit of government to approve, a specific use that represents a

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[36] *Garb-Ko v Carrollton Twp*, 86 Mich App 350, 272 NW2d 654 (1978)).

[37] *Norton Shores v Carr*, 81 Mich App 715, NW2d 802 (1978)

[38] Conditional rezoning under MCL 125.3405 is not an alternative procedure for granting a variance, which must be obtained from the Zoning Board of Appeals, not the legislative body.

limitation or *restriction* upon the uses and development permitted in the zoning district; and it is not the intent of the legislature to permit an *expansion* beyond the uses or developments authorized and otherwise permitted in the district. [See discussion in Argument I].

In this case, the property owner sought to rezone its property to a C-2 District. However, consistent with the opinion expressed by its Professional Planning Consultant in her affidavit filed in this case, the Township was unwilling to approve a broad rezoning that would authorize all uses listed in the C-2 District.

The Township was willing to approve a conditional rezoning to permit the dragway use requested by the applicant, which would authorize only that singular use. In order to achieve that result, and remain within the parameter that a conditional rezoning under MCL 125.3405 permits only the uses or developments already permitted in the C-2 District, the Township could conceivably authorize the "dragway" use requested by the property owner if the C-2 District regulations were interpreted by the Township to *already permit the "dragway" use.*

A. <u>Uses Authorized in the C-2 District</u>

A dragway is not listed in the Mayfield Township Zoning Ordinance as an expressly permitted use. Whether the dragway is a use permitted in the C-2 district because it is "similar to the above uses" is a matter for Mayfield Township to decide in the first instance by administrative order or a ZBA decision at the request of the property

owner. This type of interpretation of the zoning ordinance should be decided by the Mayfield Township Zoning Board of Appeals.[39]

Determining whether the "dragway" use was already included among the permitted uses in the C-2 District requires an interpretation of the use authorizations in the C-2 District. The District authorizes Principal Uses Permitted as stated in Section 1101[40], as well as the Principal Uses Permitted stated in Section 1001 of the C-1 District which are incorporated by reference as part of the C-2 District:

ARTICLE XI
C-2, GENERAL COMMERCIAL DISTRICT

SECTION 1100. INTENT.

The C-2, General Commercial District is designed to provide sites for more diversified business types which would often be incompatible with the pedestrian movement in a central business district and which are oriented to serving the needs of "passer-by" traffic and locations for planned shopping centers. Many of the business types permitted also generate greater volumes of traffic and activities which must be specially considered to minimize adverse effects on adjacent properties.

SECTION 1101. PRINCIPAL USES PERMITTED.

In a General Commercial District, no building or land shall be used and no building shall be erected except for one or more of the following uses unless otherwise provided in this Ordinance:

1. All uses in the C-1, Local Commercial District as permitted and regulated under Section 1001.
2. Bowling alley, billiard hall, indoor archery range, indoor tennis courts, indoor skating rink, or similar forms of indoor commercial recreation

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[39] MCL 125.3603(1).
[40] Section 1101 of the Mayfield Twp Zoning Ordinance, Exhibit H, and p 76 of Appellee's Appendix.

when located at least one hundred (100) feet from any front, rear or side yard of any residential lot in an adjacent residential district.

3. Plant material nursery, including greenhouses, and other open-air business uses.
4. Automotive service facilities providing: tire (but not recapping), battery, muffler, undercoating, auto glass, reupholstering, wheel balancing, shock absorbers, wheel alignments, and minor motor tune-ups only.
5. Veterinary hospitals and clinics having interior boarding facilities.
6. Veterinary clinics (animal hospitals) and Kennels.
7. Boarding house.
8. Other uses similar to the above uses.
9. Accessory structures and uses customarily incidental to the above permitted uses.

ARTICLE X
C-1, LOCAL COMMERCIAL DISTRICT

SECTION 1001. PRINCIPAL USES PERMITTED.

No building or structure, or part thereof shall be erected, altered, or used, and no land shall be used except for one or more of the following:

1. All Uses Permitted as a matter of right in the OS-1 District.
2. Generally recognized retail businesses which supply commodities on the premises, such as but not limited to: groceries, meats, dairy products, baked goods or other foods, drugs, dry goods, clothing and notions or hardware.
3. Personal service establishments which perform services on the premises, such as but not limited to: repair shops (watches, radio, television, shoe and etc.), tailor shops, beauty parlors or barber shops, photographic studios, and self-service laundries and dry cleaners.
4. Dry cleaning establishments, or pick-up stations, dealing directly with the consumer. Central dry cleaning plants serving more than one retail outlet shall be prohibited.
5. Eating and drinking establishments (standard restaurant), except for drive-in/drive-through restaurants.
6. Other uses similar to the above uses.

7. Accessory structures and uses customarily incidental to the above permitted uses.[41]

It is plain that the C-2 District does not specifically and expressly authorize "dragway" use. Yet, the C-2 District does authorize certain *automotive-related uses*, and subsection 8 of Section 1101 also permits "other uses similar to those" expressly permitted in the Section.

B. Is the C-2 District Sufficiently Ambiguous to Be Amenable to Interpretation?

Based on a reading of the C-2 District regulations, the Court could conclude that the ordinance is sufficiently clear to find that the C-2 District does *not* include an authorization for "dragway" use. Such a conclusion would, *as a matter of ordinance interpretation*,[42] end the case with an affirmance of the lower courts.

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[41] Zoning regulations taken from Township ordinance online. http://www.mayfieldtownship.com/Forms_and_Publications/Mayfield%20Township%20Zoning%20Ordinance.pdf (Accessed 2-17-2024).

[42] The Court of Appeal held the following: "When the agreed rezoning anticipates a use excluded by the zoning district in question, it is fatal to the operation of the conditional zoning agreement. Thus, the conditional zoning agreement was void according to Mayfield Ordinance § 1101, and as the trial court held, 'there is no reasonable governmental interest being advanced' by the agreement." This conclusion by the Court of Appeals implicitly represents a *constitutional determination that applies to zoning ordinances* found to violate substantive due process. *See Kropf v City of Sterling Heights*, 391 Mich 139, 158, 215 NW2d 179 (1974). ("A plaintiff citizen may be denied substantive due process by the City or municipality by the enactment of legislation, in this case a zoning ordinance, which has, in the final analysis, no reasonable basis for its very existence . . . In looking at [the] 'reasonableness' requirement for a zoning ordinance, this Court will bear in mind that a challenge on due process grounds contains a two-fold argument; first, that there is *no reasonable governmental interest being advanced* by the present zoning classification itself, here a single family residential classification . . .").

However, while "dragway" use is not expressly permitted, a review of the use authorization in the C-2 District could lead the Court to the conclusion that this ordinance provision is *ambiguous* on whether it permits the automotive-related "dragway" use, thus requiring a determination of the *intent of the ordinance*.

C. <u>The MZEA and the Township Zoning Ordinance Provide for Interpretation</u>

The MZEA makes provision for circumstances calling for an interpretation of a zoning ordinance: "The zoning board of appeals shall hear and decide questions that arise in the administration of the zoning ordinance," MCL 125.3603(1), and "[if] the zoning board of appeals receives a written request seeking an interpretation of the zoning ordinance or an appeal of an administrative decision, the zoning board of appeals shall conduct a public hearing on the request." MCL 125.3604(5). Consistent with this statutory direction, the Mayfield Township Zoning Ordinance, Section 1707.2(a), confers upon the zoning board of appeals the power to hear and decide "Appeals for the interpretation of the provisions of the Ordinance."[43]

Clearly, the zoning board of appeals may not arbitrarily or whimsically decide what uses are permitted in a zoning district. However, if and to the extent the Court concludes that the ordinance is *ambiguous* on whether a dragway is permitted in the C-2 District, the Court could hold that the decision of the Court of Appeals is affirmed on the ground that that the intent of the legislature in MCL 125.3405 is to permit a party seeking a rezoning of property or an amendment to a zoning map to offer, and for the local unit

[43] See attached Exhibit C.

of government to approve, a specific use that represents a *limitation* or *restriction* upon the uses and development already permitted in the zoning district; and that it is not the intent of that statute to permit an *expansion* of the use or development authorization otherwise permitted in the district.[44] This holding could be made with the *proviso* that, if the Township determines, based on the process authorized in the MZEA and Township Zoning Ordinance, that the C-2 District permits a "dragway" use, then the conditional rezoning granted by Mayfield Township would not be overturned, and the result reached by the Court of Appeals would be reversed.

IV. THE TOWNSHIP'S CONDITIONAL REZONING OF THE APPELLANT'S PROPERTY AS DESCRIBED IN THE RECORD WAS NOT VALID TO PERMIT THE NEW DRAGWAY.[45]

In this case the property owner offered a "certain use and development of the land" and the Township Board accepted the offer as reflected in the Conditional Rezoning Agreement.[46] This part of the Amicus brief will serve as a *summary* in response to part IV of the Court's four-part direction in its Order of October 18, 2023 to address whether the Township's action in approving appellant's proposed conditional zoning was valid.

A. The Conditional Rezoning Exceeded the Authority Granted Under MCL 125.3405.

For the reasons outlined in part I of this Amicus Brief, appellant's attempt to propose a "certain use and development of the land," and the Township's approval of

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[44] See footnote 36, above.

[45] Invalidity is subject to whether there is a subsequent determination under the process referenced in Part III of this Amicus Brief.

[46] Exhibit G of Appellee's Appendix; and see attached Exhibit D.

that proposal, involved a significant increase and expansion of the use and development permitted in the C-2 District, and therefore exceeded the authority granted under MCL 125.3405.

B. The Valid Nonconforming Use Could Not Be Expanded By the Action Taken.

The dragway use approved by the Township amounted to a significant increase and expansion of the valid nonconforming use on the property. While MCL 125.3208(2) enables a zoning ordinance to provide for the completion, resumption, restoration, reconstruction, extension, or substitution of nonconforming uses or structures upon terms and conditions provided in the zoning ordinance," the Mayfield Township Zoning Ordinance does contain a relevant application of such enabling authority. Accordingly, there is no basis under statute, Township Ordinance, or under the extensive case law outlined in part II of this Amicus Brief, to permit the expansion of the nonconforming dragway at issue.

C. The Record Does Not Reflect an Amendment of the Zoning Ordinance to Authorize the Proposed Dragway.

Because the record does not reflect that Mayfield Township adopted and published an amendment of the C-2 District of the Zoning Ordinance under the traditional procedure provided in the MZEA to allow the expanded dragway, no legislative action of the Township has been enacted to permit the Appellant's expanded dragway use of the property. An agreement to enact or amend an ordinance in the future is not the legal equivalent of a legislative act, and no currently existing amendment is reflected in the record of this case.

D. Conclusion

An analysis of all the actions which appear to have been taken in this case leads to the conclusion that the conditional rezoning of appellant's property under MCL 125.3405 was not valid to authorize the expanded dragway.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, Amici Michigan Municipal League and State Bar Government Law Section pray the Court will conclude the following:

A. MCL 123.3405 authorizes the owner of property to propose a "condition" incidental to an application for a rezoning, and the local unit of government may approve such condition, if it represents a limitation or restriction on the use of the property which is already permitted in the zoning district to which the property is rezoned, and does not authorize a land use which is not otherwise permitted in the district.

B. Within the parameters stated in 'A,' if the use authorization in a zoning district is ambiguous, the local unit of government may apply the process authorized in the MZEA to determine whether the condition proposed by a property owner incidental to a rezoning or amendment of the zoning map represents a limitation or restriction on a use otherwise permitted in the district to which the property is to be classified, and would thus amount to a valid operation of MCL 125.3405.

C. Michigan permits a nonconforming use to be continued in the face of a new zoning regulation which does permit such use, however, apart from an amendment of the zoning ordinance, the State does not permit the expansion of a prior nonconforming use.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in MCR 7.212. I certify that this document contains 9,118 countable words (including footnotes) as calculated by the word process program used in its creation. The document is set in Book Antiqua, and the text is 12-point 2.0 spaced type.

Dated: February 26, 2024

INDEX OF EXHIBITS

EXHIBIT A

Michigan Zoning, Planning, and Land Use, ICLE, 2009 Edition
Chapter 4, §4.8, Conditional Rezoning.

Michigan Zoning, Planning, and Land Use

April 2009 Update

BY

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THE INSTITUTE OF CONTINUING LEGAL EDUCATION

ANN ARBOR, MI

4
Flexible Land Use Approvals

Gerald A. Fisher

I. Planned Unit Development

A. In General

§4.1 *Planned unit development* (PUD) is defined in the Zoning Enabling Act (ZEA) to include "such terms as cluster zoning, planned development, community unit plan, and planned residential development and other terminology denoting zoning requirements designed to ... achieve integration of the proposed land development project with the characteristics of the project area." MCL 125.3503(1). For Michigan property owners and local governments who seek land use creativity and desire to pursue and authorize uses and improvements that deviate from the customary requirements of the zoning ordinance (even in the absence of unnecessary hardship or practical difficulties), the statutory permission for PUD is an essential resource. There is, however, a caveat with regard to the practical application of this resource. While there is no question that PUD is extremely valuable and effective in its provision of authority for development that is creative, enhancing, and in the public interest, as a practical matter, application of PUD has been limited. Due in good part to its unique and flexible nature, ordinance provisions enabling PUD generally require extensive planning and engi-

B. Conditional Rezoning

§4.8 Of the several tools available to achieve flexible land use approvals, the authorization for conditional rezoning is the most recent addition to the ZEA. This authorization became effective in January of 2005 and is now set forth in MCL 125.3405. This provision provides permissible authority for community approval of a rezoning that permits development subject to specified conditions concerning the "use and development of the land." MCL 125.3405(1). This authority is activated only if an owner of land makes a voluntary offer in writing and the community determines as a matter of policy to be receptive to such offers.

In the years prior to the enactment of this conditional rezoning authorization, property owners would submit rezoning petitions and often accompany them with drawings or plans reflecting particular developments of the properties proposed to be rezoned. Such drawings and plans were frequently brandished at the public hearings held on the rezoning petitions. The purpose of submitting such drawings and plans varied. In some instances, the property owner would express an intent to improve the land consistent with the drawing or plan if the rezoning were granted; in other cases, the drawing or plan merely reflected what would be feasible if the rezoning were granted.

In 1959 (long before the enactment of the conditional zoning authorization), the Michigan Supreme Court's opinion in *McClain v Hazel Park*, 357 Mich 459, 460, 98 NW2d 560 (1959), reports that the circuit court refused to prevent the enforcement of the terms and conditions contained in the following rezoning motion:

> "That the area between John R and West End streets and between Eight Mile (Baseline) road and West Muir street, be rezoned from residence district 'B' and 'C' to business 'D', with the provision that 30 feet next to Muir street be reserved and required to be beautified and landscaped."

On appeal, the property owner questioned whether the circuit judge should have allowed such a provision to be enforced. Considering the facts of the particular case, but not undertaking an analysis of conditional rezoning, the supreme court's reaction was: "We believe he should have." *Id.* at 461. *See also Genesee Land Corp v Leon Allen & Assocs*, 50 Mich App 296, 298–299, 213 NW2d 283 (1973) (rezoning "restricted, however, to construction of and use as a warehouse for wholesale grocery purposes" was treated as void on the parties' stipulation (emphasis omitted)).

Astute legal counsel for zoning petitioners, over the years, sought to avoid the uncertainties of conditional rezoning by making use-restricting arrangements with surrounding property owners. If the community was satisfied with such an arrangement, direct confrontation with regard to the validity of conditional zoning was unnecessary. However, this type of side arrangement has also been subjected to the uncertainties of litigation. *See, e.g., Larson v Foster*, 346 Mich 1, 77 NW2d 356 (1956).

In all events, leading up to the enactment of what is now MCL 125.3405, communities in recent years, barring exceptional circumstances, generally took the

conservative view that, if granted, a rezoning entitled a property owner to all uses permitted in the zoning classification, regardless of the presentation of drawings or plans during the rezoning process. That is, even if a property owner had presented such a drawing or plan and had every good intention of developing the property accordingly, that owner or a successor owner would not be bound by the drawing or plan. The rezoning would either be granted or denied with the recognition that, if granted, all development permitted in the new district classification would be authorized.

This circumstance proved frustrating in many instances, particularly where both the property owner and the community were in full agreement that, if the development could be restricted to specified uses or particular improvements only, perhaps with a site plan, the rezoning would be in the public interest. The frustration arose due to the fact that, in the absence of the ability to restrict the development, many communities were unwilling to grant the rezonings and take the risk that other uses or developments permitted in the proposed zoning districts—deemed unacceptable to planning officials or legislative bodies—would become a reality. The permission granted in MCL 125.3405 represents one means of attempting to avoid some of the frustration caused by the total void of authority to create binding conditions upon a rezoning. As noted, however, this tool remains somewhat limited, taking into consideration that only the property owner is permitted to offer and dictate the terms of a conditional rezoning. The community is prohibited from initiating, altering, or adding to a proposal for a condition to a rezoning, MCL 125.3405(3), and caution must be very carefully exercised in this regard during proceedings initiated under this statute.

The language of this provision of the ZEA, like the PUD provisions, reflects an intent on the part of the legislature to leave it to the property owner (in determining whether to offer) and community (in determining whether to exercise this authority in general and, if so, whether to approve) to establish parameters on the details of the application of this authorization for "certain use and development of the land as a condition to a rezoning." MCL 125.3405(1). Depending on the nature and complexity of the particular offer made by a property owner, an approval of conditions could consist of something as simple as a specification of one or more uses that would be permitted—or not permitted—if the rezoning were granted. Likewise, an approval may merely specify such things as a minimum setback or a maximum building height that might be deemed necessary to ensure compatibility with adjoining property. On the other extreme, the offer and approval might encompass a detailed site plan accompanied by a comprehensive set of use restrictions.

Although it is too early to have judicial guidance on this issue, it would appear that the conditional rezoning authorization is intended to allow the conditional approval of a use or development that is permitted in the zoning district. That is, the conditional rezoning provisions are intended to allow the imposition of a *restriction* on the uses and development permitted in the district and not intended to authorize uses or development not otherwise permitted.

Nor has it been settled whether it would be in the best interest of a community to provide regulations for conditional rezoning in its zoning ordinance. Many would take the position that the statute, on its face, is clearly self-executing and no reference in the statute would suggest the need for an ordinance for any purpose. On the other hand, some are of the view that the requirements of due process and equal protection are always applicable and that, in the absence of standards provided by ordinance, the decision whether to grant or deny each of a succession of "offers" made under this statute would be arbitrary, perhaps contradictory, and, therefore, potentially unconstitutional. In addition to providing standards for review and approval, there are other objectives that might be achieved by an ordinance to implement this statute, including the following:

- Establishing a process for application and review
- Clarifying whether the approval of a condition would supersede the grant of special land use or variance approval that might otherwise be required
- Providing a mechanism to clarify that, upon approval, the property owner concurs that the conditions established were voluntarily offered by the property owner
- Specifying whether and how the community will document the terms of the conditional rezoning on the zoning map, at the register of deeds, or otherwise in order to provide notice to all interested parties
- Specifying the period of effectiveness of an approved conditional rezoning and the terms under which an extension may be granted
- Making provision for the event that the property is not developed or the conditions imposed have not been satisfied within the period of effectiveness (MCL 125.3405(2) states that if the conditions are not satisfied, "the land shall revert to its former zoning classification"; does this require that legislative action be taken by the community?)
- Making provision for a mutually agreeable means of terminating a conditional rezoning

Until the courts have addressed whether zoning ordinance standards or other ordinance provisions are needed within this context, each community must decide on its own whether to enact, and how to take actions under, such provisions.

C. Contract Zoning

§4.9 Contract zoning has been described as bilateral in nature, rather than having terms unilaterally "offered" by the property owner, as provided in Michigan's conditional rezoning statute, MCL 125.3405 (see §4.8), or terms unilaterally imposed by the community upon approval of a rezoning. Daniel R. Mandelker, *Land Use Law* §6.62 (5th ed 2003). In this type of arrangement, the property owner and the community execute a bilateral contract in which the community promises to rezone in return for the property owner's promise to record a document that contains the restrictions the municipality requires. *Id.*

EXHIBIT B

Mayfield Township Zoning Ordinance,
Section 1502. Nonconforming Uses and Buildings.

5. One Lot, One Building

In all single-family districts, only one (1) dwelling shall be placed on a single lot of record.

SECTION 1502. NONCONFORMING USES AND BUILDINGS.

1. Intent

It is the intent of this Section to provide for the regulation of legally nonconforming structures, lots of record, uses and signs, and to specify those circumstances and conditions under which such nonconformities shall be permitted to continue. It is necessary and consistent with the regulations prescribed by this Ordinance that those nonconformities which adversely affect orderly development and the value of nearby property not be permitted to continue without restriction.

The zoning regulations established by this Ordinance are designed to guide the future use of land by encouraging appropriate groupings of compatible and related uses and thus to promote and protect the public health, safety, and general welfare. The continued existence of nonconformities is frequently inconsistent with the purposes of which such regulations are established, and thus the gradual elimination of such nonconformities is generally desirable. The regulations of this Section permit such nonconformities to continue without specific limitation of time but are intended to restrict further investments which would make them more permanent.

2. Authority to Continue

Except as otherwise provided in this Section, any nonconforming lot, use, sign, or structure lawfully existing on the effective date of this Ordinance or subsequent amendment thereto may be continued so long as it remains otherwise lawful. There may be a change of tenancy, ownership, or management of any existing nonconforming uses of land, structure and land in combination.

All nonconformities shall be encouraged to convert to conformity wherever possible and shall be required to convert to conforming status as required by this Section.

3. Nonconforming Uses or Structures

A nonconforming use or structure is considered to be any nonresidential use or structure in a residential district, industrial use in a commercial/business district, or any residential use in a nonresidential district.

a. Termination by Damage or Destruction

In the event a nonconforming structure or use is destroyed by any means to the extent of more than fifty (50) percent of the cost of replacement of such structure or use as determined by the Zoning Administrator, same shall not be rebuilt, restored, or reoccupied for any use unless it shall thereafter conform to all regulations of this Ordinance. When such a nonconforming structure or use is damaged or destroyed to the extent of fifty (50) percent or less of the replacement cost, no repairs or rebuilding shall be permitted except in conformity with Section 1502, 2 above and other applicable regulations of this Ordinance.

b. Changing Nonconforming Uses

No structure or use shall be changed unless the new structure or use conforms to the regulations for the district in which such structure or use is located.

c. Discontinuance of Use

When a nonconforming use of a structure or structures and land in combination, is discontinued or ceases to exist for six (6) consecutive months, or for eighteen (18) months during any three year period, the structure, or structures and land in combination, shall not thereafter be used except in conformance with the regulations of the district in which it is located.

d. Enlarging a Nonconforming Use

(1) No nonconforming use or structure shall be enlarged upon, expanded, or extended, including extension of hours of operation. Normal maintenance and incidental repair of a nonconforming use shall be permitted, provided that this does not violate any other section of this Ordinance.

(2) A nonconforming residence may construct an accessory building in accordance with Section 1503, Accessory Buildings.

(3) Nothing in this Section shall be deemed to prevent an extension for the exclusive purpose of providing required off-street parking or loading spaces in accordance with other applicable provisions, and involving no structural alteration or enlargement of such structure.

(4) No nonconforming use or structure shall be moved in whole or in part, for any distance whatsoever, to any other location on the same or any other lot unless the entire structure shall thereafter conform to the regulations of the zoning district in which it is located after being moved.

(5) Notwithstanding any other provision of this Section to the contrary, no use, structure, or sign which is accessory to a principal nonconforming use or structure shall continue after such principal use or structure shall have ceased or terminated, unless it shall thereafter conform to all regulations of the Ordinance.

4. Nonconforming Lots

In any district in which single-family dwellings are permitted, notwithstanding limitations imposed by other provisions of this Ordinance, a single-family dwelling and customary accessory buildings may be erected on any single lot of record at the effective date of adoption or amendment of this Ordinance provided the width, depth, and area is not less than sixty-six and two-thirds (66 2/3) percent of that required by this Ordinance. Yard requirement variances may be requested of the Board of Zoning Appeals.

5. Nonconforming Site Requirements

Where a lawful structure exists at the effective date of adoption or amendment of this Ordinance that could not be built under the terms of this Ordinance by reason of restrictions on lot area, lot coverage, height, yards, or other characteristics of the structure or its location on the lot, such structure may be continued so long as it remains otherwise lawful, subject to the following provisions:

a. Expansion

No such structure may be enlarged or altered in a way which increases its nonconformity. Such structures may be enlarged or altered in a way which does not increase its nonconformity.

b. Termination

Should such structure be destroyed by any means to an extent of more than fifty (50) percent of its replacement costs, exclusive of the foundation, it shall be reconstructed in the absence of a prior variance only in conformity with the provisions of this Ordinance and with the requirements of the prevailing structural building codes.

c. Relocation

Should such structure be moved for any reason for any distance whatever, it shall thereafter conform to the regulations for the district in which it is located after it is moved.

6. Conditional Use Interpretation

Any conditional use as provided for in this Ordinance shall not be deemed a nonconforming use, but shall, without further action, be deemed a conforming use in such district.

SECTION 1503. ACCESSORY BUILDINGS AND STRUCTURES.

Accessory buildings or structures, except as otherwise permitted in this Ordinance, shall be subject to the following regulations:

1. Where the accessory building is structurally attached to a main building, it shall be subject to, and must conform to, all regulations of this Ordinance applicable to the main building.

2. Accessory buildings and structures shall not be erected in any front yard.

4. An accessory building shall not occupy more than twenty-five (25) percent of a required rear yard.

4. No detached accessory building shall be located closer than three (3) feet to any side or rear lot line. No detached accessory building shall be located closer than ten (10) feet to any main building except for garages upon meeting the following conditions.

(a) The foundation shall not be less than the minimum required by local Building Code for frost protection (42 inches); and,

(b) On those portions of garages located within ten (10) feet of the main building, a fire separation of not less than 1 hour fire resistance rating shall be provided on the garage building side.

5. No detached accessory building in the R-2, RT, and RM Districts shall exceed one (1) story or fifteen (15) feet in height.

Accessory buildings in all other districts may be constructed to equal the permitted maximum height of structure in said districts.

EXHIBIT C

Mayfield Township Zoning Ordinance,
Section 1707. Nonconforming Uses and Buildings.

ARTICLE XVII

BOARD OF APPEALS

* * *

SECTION 1707. POWERS AND DUTIES.

The ZBA shall have the following specified powers and duties:

1. Administrative Review

To hear and decide appeals where it is alleged by the appellant that there is an error in any order, requirement, permit, decision, or refusal made by the Building Official or any other administrative official in carrying out, or enforcing, any provisions of this Ordinance.

2. Interpretation

To hear and decide in accordance with the provisions of this Ordinance:

a. Appeals for the interpretation of the provisions of the Ordinance.

c. Requests to determine the precise location of the boundary lines between the zoning districts as they are displayed on the Zoning Map, when there is dissatisfaction with the decision on such subject.

EXHIBIT D

Conditional Rezoning Agreement
Between Mayfield Township and Appellant, A2B Propeties, LLC..

Voluntarily Proposed May 12, 2021
CONDITIONAL REZONING AGREEMENT

THIS AGREEMENT made this 11e day of ~~May~~ June, 2021, by and between **Mayfield Township** ("Township"), a Michigan Municipal Corporation, whose offices are located at 1900 N. Saginaw Road, Lapeer, MI 48446 and **A2B Properties, LLC**, a Michigan Limited Liability Company ("A2B"), whose address is 459 Maple Grove Road, Lapeer, Michigan 48446.

WITNESSETH:

WHEREAS, A2B is the fee title holder of certain real property ("Property") located at 2691 Roods Lake Road, Lapeer, MI 48446 with a Parcel Number of 014-015-009-00 in Mayfield Township, State of Michigan with the following Legal Description:

LEGAL DESCRIPTION

PART OF THE S ½ OF SEC 15 & SEC 16 T8NR10E DESC AS BEG AT A PT ON THE N-S ¼ LINE THAT IS N 0DEG 14'16" E 1307.74 FT FROM THE S ¼ COR OF SEC 15 TH S 75DEG 45'40" W 1792.86 FT TH N 0DEG 01'20" W 200 FT TH S 71DEG 00'45" W 2333.32 FT THN 300 FT TH N 71 DEG 0'45" E 2609.8 FT TH N 17 DEG 39'02" W 219.2 FT TH N 81 DEG 26'52" E 235.4 FT TH N 0DEG 01'20" W 599.09 FT TH S 89DEG 54'47" E 1314.44 FT TO THEN-S ¼ LINE TH S 0DEG 14'16" W 990 FT ALONG THE N-S ¼ LINE TO THE POB. 56.09 A.

WHEREAS, A2B submitted an application to rezone the Property from the zoning classification of R-1 to C-2 pursuant to the Mayfield Township Zoning Ordinance; and

WHEREAS, A2B voluntarily, and by its choice and discretion, offered to limit its use of the Property as a condition of the rezoning; and

WHEREAS, on 6-10, 2021, the Mayfield Township Planning Commission voted to recommend approval of A2B's request to rezone the Property and to accept A2B's proposed limitations on the use of the Property as more specifically set forth in this Conditional Rezoning Agreement ("Agreement"); and

WHEREAS, on 6-16-21 the Mayfield Township Board of Trustees considered and reviewed the recommendation of the Planning Commission and voted to approve A2B's requested rezoning, accept A2B's proposed limitations on the use of the Property and approve the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, Mayfield Township and A2B agree as follows:

1. **Conditional Rezoning**

Pursuant to Section 405 of the Michigan Zoning Enabling Act, MCL 125.3405, A2B agrees to limit the use of the Property as set forth in this Agreement. Upon Execution of this Agreement by the parties, Mayfield Township shall effectuate the rezoning of the Property from zoning classification R-1 to C-2 and this Agreement shall be recorded against the Property and shall run with the Property for all legal purposes.

2. **Rezoning Conditions**

A2B agrees that the development of the Property will proceed in accordance with the following conditions which have been voluntarily offered by A2B as a condition of rezoning the Property:

a) A2B's use of the Property shall be limited to those uses identified on **Exhibit 1** which is attached hereto and incorporated fully herein by reference. The Property shall not be used for other permitted or special land uses otherwise allowed in the C-2 zoning category.

b) The existing structures will remain and be used in accordance with **Exhibit 1**.

c) Development of the Property shall be in strict compliance with the site plan and specifications contained in **Exhibit 2** attached hereto and incorporated by reference. The parties agree that minor revisions to **Exhibit 2** that do not significantly modify the development plans may be considered and approved by the Mayfield Township administratively and without the

necessity of approval by the Township Board and/or without amendment to this Agreement.

d) Development of the Property shall otherwise comply with all applicable Mayfield Township Ordinances and regulations, including all permitting and inspection processes.

3. **Future Development**

The rezoning conditions set forth in Paragraph 2 above shall apply only to the development of the Property. All future development of the Property shall be in strict compliance with all applicable Township Ordinances and regulations.

4. **Entire Agreement**

This Agreement constitutes the entire understanding between the parties with respect to the subject matter hereof, and all prior or contemporaneous agreements or understandings with respect hereto shall be deemed merged into this Agreement.

5. **No Oral Amendments or Modifications**

No amendments, waivers or modifications hereof shall be made or deemed to have been made unless in writing and executed by the parties hereto.

6. **Severability**

If any provision of this Agreement shall be declared invalid, illegal, or unenforceable by a court of competent jurisdiction, the remainder of this Agreement shall not be affected thereby and this Agreement shall be construed as if those provisions were not contained in this Agreement.

7. **Applicable Law**

This Agreement shall be interpreted and enforced according to the laws of the State of Michigan.

8. **Recordation**

This Agreement shall be deemed to be in recordable form and shall be recorded with the Lapeer County Register of Deeds immediately after execution.

9. **Violation and Enforcement**

The failure of any party to complain or enforce any act or omission on the part of another party, no matter how long the same may continue, shall not be deemed to be an acquiescence or wavier by such party of any of its rights hereunder. No waiver by any party at any time, express or implied, or any breach of any provision of this Agreement shall be deemed a waiver of a breach of any other provision of this Agreement or any consent to any subsequent breach of the same or any other provision of this Agreement. If any action by any party shall require the consent or approval of another party, such consent or approval of such action shall not be deemed a consent to or approval of any other provision of this Agreement.

10. **Violation of Zoning Ordinance**

Any failure by A2B to comply with the terms and conditions of this Agreement shall constitute a violation of the Mayfield Township Zoning Ordinance and subject A2B to the applicable penalties and remedies provided by law, including equitable relief.

11. **Binding Effect; Assignment**

This Agreement shall bind and inure to the benefit of the Township and the successors and assigns of A2B.

12. **Effective date.**

The conditional rezoning approved by the Township Board shall be effective upon the date after the enactment by the Township of an amendment to the Zoning Ordinance and Zoning Map, rezoning the Property from R-1 to C-2, and the expiration of the time period within which

EXHIBIT 1
PROPERTY USES

Monday: 8:00 a.m. to 8:00 p.m.

Track Rental.
Vehicle Testing.
Test and Tune.

Tuesday: 8:00 a.m. to 8:00 p.m.

Track Rental.
Vehicle Testing.
Test and Tune.

Wednesday: 8:00 a.m. to 10:00 p.m.

Track Rental.
Vehicle Testing.
Test and Tune.

Thursday: 8:00 a.m. to 10:00 p.m.

Track Rental.
Vehicle Testing.
Test and Tune.

Friday: 10:00 a.m. to Midnight

Track Rental.
Vehicle Testing.
Test and Tune.
Organized Racing Events.

Saturday: 10:00 a.m. to Midnight

Track Rental.
Vehicle Testing.
Test and Tune.
Organized Racing Events

Sunday: 10:00 a.m. to 8:00 p.m.

Organized Racing Events.

EXHIBIT 1
PROPERTY USES CONTINUED

Lighting: No lighting shall be directed off of the Property or off of the Property uses.

Sound: Decibel measurements at the Property line shall not exceed 85 which is a level consistent with heavy city traffic.

Site Plan: The Property shall be developed consistent with the Site Plan attached as Exhibit 2 to the Agreement.

Miscellaneous Events: These events shall include concerts, fireworks, car shows, car swaps and weddings. These events shall comply with any and all special event permit processes.

A2B Properties, LLC

Dated: _____ By: _____

William Jennings

Its: Member and Authorized Representative

STATE OF MICHIGAN)
COUNTY of LAPEER)

On this _____ day of May, 2021, before me a Notary Public in and for the County, personally appeared **William Jennings**, to me personally known, who, being by me duly sworn, did say that he is a Member of A2B Properties, LLC and that he signed this Agreement on behalf of A2B Properties, LLC by authority of its members; and acknowledged the instrument to be the free act and deed of A2B Properties, LLC, a Michigan Limited Liability Company.

_____
Notary public,
_____County, State of Michigan

Acting in _____County, Michigan

My commission expires: _____

referendum on the Zoning Ordinance amendment may be petitioned for under the Michigan Zoning Enabling Act has expired without a referendum petition having been filed, or, if a referendum election is held on the Zoning Ordinance amendment, the date after which such amendment has been certified as having been approved by the electors.

The rezoning shall be a conditional rezoning and subject to the terms and conditions set forth in this Agreement. In the event A2B fails to meet the conditions of this Agreement, then the approval of the site plan for the proposed developments shall terminate. In such an event, A2B may thereafter develop the Property only in accordance with a site plan that is approved by the Planning Commission and complies with all Township zoning, engineering, building and fire codes, as well as Ordinances in effect that time.

Mayfield Township

Dated: JULY 9TH, 2021

By: _____
Dan Engelman

Its: Supervisor following a vote of the Mayfield Township Board
On the 16TH day of JUNE, 2021.

STATE OF MICHIGAN)
COUNTY of LAPEER)

On this 9 day of ~~May~~ July, 2021, before me a Notary Public in and for the County, personally appeared **Dan Engelman**, to me personally known, who, being by me duly sworn, did say that he is the Supervisor of Mayfield Township and that he signed this Agreement on behalf of the municipal corporation by authority of its Board of Trustees; and acknowledged the instrument to be the free act and deed of Mayfield Township, a Michigan Municipal Corporation.

_____
Notary public,
Lapeer County, State of Michigan

Acting in Lapeer County, Michigan

My commission expires: 8-2-25

JULIE A. SCHLAUD
NOTARY PUBLIC, STATE OF MI
COUNTY OF LAPEER
MY COMMISSION EXPIRES Aug 2, 2025
ACTING IN COUNTY OF Lapeer

EXHIBIT 1
PROPERTY USES

Monday: 8:00 a.m. to 8:00 p.m.

Track Rental.
Vehicle Testing.
Test and Tune.

Tuesday: 8:00 a.m. to 8:00 p.m.

Track Rental.
Vehicle Testing.
Test and Tune.

Wednesday: 8:00 a.m. to 10:00 p.m.

Track Rental.
Vehicle Testing.
Test and Tune.

Thursday: 8:00 a.m. to 10:00 p.m.

Track Rental.
Vehicle Testing.
Test and Tune.

Friday: 10:00 a.m. to Midnight

Track Rental.
Vehicle Testing.
Test and Tune.
Organized Racing Events.

Saturday: 10:00 a.m. to Midnight

Track Rental.
Vehicle Testing.
Test and Tune.
Organized Racing Events

Sunday: 10:00 a.m. to 8:00 p.m.

Organized Racing Events.

APPROVED
MAYFIELD TOWNSHIP
PLANNING COMMISSION
BY [signature]
DATE 6-10-21

Order

Michigan Supreme Court
Lansing, Michigan

October 18, 2023

165770

RONALD A. JOSTOCK and SUSAN J. JOSTOCK,
Plaintiffs-Appellees,

v

SC: 165770
COA: 362635
Lapeer CC: 21-054778-AA

MAYFIELD TOWNSHIP and MAYFIELD TOWNSHIP BOARD OF TRUSTEES,
Defendants,

and

A2B PROPERTIES, LLC,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the June 1, 2023 judgment of the Court of Appeals is considered, and it is GRANTED. The parties shall address: (1) whether MCL 125.3405 allows for uses not otherwise authorized in a particular zone; (2) what mechanism was used to authorize the current use as a dragway, and whether that mechanism is available to authorize or expand the use of the appellant's property; (3) whether operation of a dragway is an authorized use under C-2; and (4) whether the township's conditional rezoning of the appellant's property is valid under MCL 125.3405. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The Michigan Townships Association, the Michigan Municipal League, the Government Law Section of the State Bar of Michigan, and the Real Property Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

b1011

Order

Michigan Supreme Court
Lansing, Michigan

May 29, 2024

166213

VILLAGE OF KALKASKA,
Plaintiff-Appellee,

v

SC: 166213
COA: 359267
Kalkaska CC: 20-013389-CK

MICHIGAN MUNICIPAL LEAGUE
LIABILITY AND PROPERTY POOL,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the August 31, 2023 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The parties shall file supplemental briefs in accordance with MCR 7.312(E), addressing: (1) whether the insurance policy provides coverage for the claims at issue that arose from the appellee's 2014 Resolution Discontinuing Trust and Agency Fund and Retirees' Health Insurance; and (2) whether the Court of Appeals correctly reversed and remanded for entry of judgment for the appellee.

The Michigan Townships Association and the Government Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Order

Michigan Supreme Court
Lansing, Michigan

April 12, 2024

165726

MIDWEST VALVE & FITTING COMPANY,
and all others similarly situated,
Plaintiff-Appellant,

v

SC: 165726
COA: 358868
Wayne CC: 18-014337-CZ

CITY OF DETROIT,
Defendant-Appellee.

_____/

On order of the Court, the application for leave to appeal the June 1, 2023 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(H)(1). The parties shall file supplemental briefs in accordance with MCR 7.312(E), addressing whether the challenged annual charges violate: (1) the Headlee Amendment, Const 1963, art 9, § 31; and/or (2) the Prohibited Taxes by Cities and Villages Act, MCL 141.91.

The Michigan Municipal League, the Michigan Township Association, the Government Law Section of the State Bar of Michigan, and Michigan Realtors are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

EXHIBIT A

STATE OF MICHIGAN
IN THE SUPREME COURT

FRANK SAKORAFOS and ELAINE TSAPATORIS,

Plaintiffs-Appellees,

v

CHARTER TOWNSHIP OF LYON, THE BOARD OF TRUSTEES OF THE CHARTER TOWNSHIP OF LYON, and JOHN DOLAN,

Defendants-Appellees,

and

56560 LLC, DANDY ACRES SMALL ANIMAL HOSPITAL PLLC d/b/a The Dog Lodge, THERESA McCARTHY, and TERRENCE "TERRY" McCARTHY,

Defendants-Appellants.

Supreme Court Case No. 166511

Appeal from:
Michigan Court of Appeals, Case No. 362192; and
Oakland County Circuit Court, Case No. 21-189644-CH

AMICUS CURIAE[1] BRIEF ON BEHALF OF THE GOVERNMENT LAW SECTION OF THE STATE BAR OF MICHIGAN AND THE MICHIGAN MUNICIPAL LEAGUE IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

*****ORAL ARGUMENT NOT REQUESTED*****

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[1] No counsel for a party to this appeal authored this brief in whole or in part. No counsel or party to this appeal made a monetary contribution towards the preparation of this brief. MCR 7.312(H)(5).

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STATEMENT OF JURISDICTION

The Government Law Section of the State Bar of Michigan and the Michigan Municipal League (collectively, "*Amici*") adopt the Statement Identifying Order Appealed From as set forth by Defendants-Appellants ("Defendants") in their Application for Leave to Appeal which Plaintiffs-Appellees ("Plaintiffs") do not dispute and adopt as their Statement of Jurisdiction.

STATEMENT OF QUESTIONS PRESENTED

1. Whether pursuant to MCR 7.305(H)(1) this Court should vacate the incorrect analysis and conclusions provided by the Court of Appeals in remanding the case to the trial court to determine whether Plaintiffs can prove peculiar damages that are different both in degree and in kind?

   Appellants' answer: Yes.
   Appellees' answer: No.
   Amici answer: Yes.

2. Alternatively, whether pursuant to MCR 7.305(B) there are grounds for this Court to grant review when the relevant issues relate to what a private individual must prove to bring an action to enforce an alleged violation of a zoning ordinance under MCL 125.3407?

   Appellants' answer: Yes.
   Appellees' answer: Unknown.
   Amici answer: Yes.

STATEMENT OF INTEREST OF *AMICI*

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration. Its membership is comprised of approximately 516 Michigan cities, townships, and villages. The Michigan Municipal League operates a Legal Defense Fund that is intended to represent its member cities, townships, and villages in litigation of statewide significance.

The Government Law Section of the State Bar of Michigan is a voluntary membership section of the State Bar of Michigan that is comprised of approximately 1,186 attorneys who generally represent the interests of government corporations, including cities, townships, and villages throughout the state. The focus of the Government Law Section of the State Bar of Michigan is centered on the laws, regulations, and procedures that impact local governmental units. The position expressed by the Government Law Section of the State Bar of Michigan in this *amicus curiae* brief is not the position of the State Bar of Michigan.

Amici have a specific interest in this case because it addresses who has standing to petition the Court for public nuisance claims that are based upon alleged violations of a zoning ordinance adopted under the Michigan Zoning Enabling Act ("MZEA"). Local governments have a significant interest in ensuring that private individuals can only bring public nuisance actions for zoning ordinance violations in the narrow manner this State's jurisprudence permits. This maintains the MZEA's complex and complete regulatory framework so as to not usurp the authority and responsibility of local zoning administrators, planning commissions, zoning boards of appeal, and legislative bodies. An expansion of standing in the manner contemplated would erode the discretion that has been afforded to local governments. *Amici* believe the Court of Appeals erred in its analysis and conclusions of the appropriate standard for private individuals to

bring public nuisance claims based upon alleged zoning violations by including analysis inconsistent with standing for public nuisances.

Amici write in support of neither party on the merits of the appeal and request this Court correct the errors of the Michigan Court of Appeals.

INTRODUCTION

Michigan public nuisance law allows private individuals to bring lawsuits for violations of zoning ordinances only if they are able to prove peculiar damages that differ "not only in degree, but in kind, from that which must be deemed common to all." *Board of Water Comm'rs v Detroit*, 117 Mich 458, 463 (1898). This well-established doctrine of standing has allowed private individuals to bring actions for public nuisances arising from alleged zoning violations in exceptional circumstances, and provided a mechanism for trial courts to gatekeep private individuals from complaining of generalized grievances. The Court of Appeals' published opinion in this case provided incorrect analysis and conclusions as to how the test should be applied based on the disputed facts of the case.

The dispute in this case is between homeowners and a veterinary clinic that operates a dog kennel. The homeowners purchased property located adjacent to the veterinary clinic and quickly became frustrated with the barking, noise, and amount of activity that comes from the commercial property. The veterinary clinic has been a longstanding land use in the community for many years and was overwhelmed with complaints by the new homeowners. Lyon Charter Township thoroughly reviewed complaints by the homeowners and concluded: (1) the noise emanating from the veterinary clinic was insufficient to constitute a violation of any ordinances; and (2) the veterinary clinic was a lawful nonconforming use under the Lyon Charter Township Zoning Ordinance (the "Zoning Ordinance"). The Township further explained that even if the land use

were in some way unlawful, it would be barred from taking enforcement actions against the dog kennel because of the amount of time that has passed.

Plaintiffs disagreed with the perspective of the Township and chose to file suit alleging a public nuisance, pursuant to MCL 125.3407, for an alleged violation of the Zoning Ordinance. To establish standing, however, Plaintiffs were required to prove peculiar damages that were different in degree and in kind. The trial court dismissed the public nuisance claims made by Plaintiffs under MCL 125.3407 for a lack of standing.

The Court of Appeals explained the trial court applied the incorrect test by applying the aggrieved party test this Court announced in *Saugatuck Dunes Costal Alliance v Saugatuck Township*, 509 Mich 561 (2022). The case was remanded by the Court of Appeals for the trial court to apply the correct test for standing in the context of private individuals seeking to bring public nuisance actions. In the process, however, the Court of Appeals chose to include analysis on how to apply the test to the facts of this case:

> Under the test for standing, an adjoining landowner is likely to be determined to be affected by the nuisance created by a zoning violation in a manner distinct from the general public.
>
> …
>
> Thus, a plaintiff's injury need not be unique in the community to confer standing to abate a nuisance per se.
>
> …
>
> Plaintiffs' damages need not be singular to confer standing to bring a nuisance claim; the fact that other nearby residents also may have suffered ill effects from the dog kennel does not defeat plaintiffs' standing to bring a suit alleging nuisance.
>
> …
>
> Moreover, plaintiffs' status as an adjacent property owner lends support to the finding that plaintiffs have demonstrated special damages different from injury suffered by others in the community generally. [COA Op, p 14-16.]

The analysis the Court of Appeals provided—in a published opinion—is without support in Michigan law and liberalizes the standing test. ***The analysis implies adjoining landowners who***

face similar harm to many in the local community may have standing to bring claims under MCL 125.3407. That is wrong.

Amici believe the errors of the Court of Appeals are properly resolved by this Court vacating the language of the Court of Appeals providing incorrect analysis and conclusions on remand. Alternatively, *Amici* request this Court to grant leave to appeal and review the decision of the Court of Appeals.

STATEMENT OF FACTS AND PROCEEDINGS[2]

The facts of this case are not of particular importance to the main point *Amici* address in this brief, which is that the Court of Appeals erred in providing analysis related to the application of the standing doctrine. The facts of this case, however, are relevant to explaining the concerns of *Amici* in broadening the standing doctrine for private individuals seeking to bring public nuisance claims for violations of zoning ordinances. The facts most relevant to this concern are those presented by the Township to the Court of Appeals. *Amici* restate those facts here, modified as necessary to place them in context in front of this Court.

In the early 2010s, Plaintiffs moved into a home in the Township that is located near a veterinary clinic that has been operating since the 1970s. Plaintiffs believe that their veterinary clinic neighbor is operating a dog kennel in violation of the Zoning Ordinance. Around 2014, Plaintiffs began to complain to the Township about a variety of things—noise, lighting, zoning—and the Township repeatedly told Plaintiffs that the Township disagrees, and that there is no noise code violation, no lighting code violation, and no zoning ordinance violation to successfully enforce against Defendants. To clarify the history of veterinary operations on the property, a

[2] Citations to the appendix are not included. These, however, are the facts presented to the trial court below by the Township and all citations to documentation is included in that filing.

veterinary clinic has been operated since 1975 and animal boarding has been ongoing since 1976. Defendants have continued this land use since its acquisition of the property in 2003; the Zoning Ordinance's definition of "veterinary clinic" included "overnight boarding of animals."

Faced with continuing complaints from Plaintiffs, the Township conducted a thorough review of the property and land use. Plaintiffs received a letter from the Township Attorney on February 12, 2018, and again on June 12, 2020, responding to the Plaintiffs' complaints. The letter explained that the Township considered the Defendants' boarding of animals as a lawful non-conforming use. Dissatisfied with the Township's decision, Plaintiffs decided to sue everyone.

On August 20, 2021, Plaintiffs filed this lawsuit in the Oakland County Circuit Court alleging claims of (Count I) Abatement of Nuisance Per Se – MCL 125.3407; (Count II) Nuisance Per Se – Damages; (Count III) Civil Conspiracy; (Count IV) Deprivation of Civil Rights; (Count V) Mandamus; and (Count VI) Motion for Appointment of Oakland County Prosecutor or Michigan Attorney General to Prosecute the Abatement of the Nuisance.

Plaintiffs' complaint alleges that in early 2003 or early 2004, Dr. Theresa McCarthy and her entity purchased the veterinary practice doing business as "Dandy Acres." In July 2013, Dr. Theresa McCarthy formed 56560 PLLC to purchase the property. In 2013, Defendants began operating a kennel on the property. In January 2014, Defendants advertised its Dog Lodge at Dandy Acres kennel operation on Facebook. Plaintiffs allege that in 2015, the Township received complaints about Dandy Acres operating as a kennel and that the Township investigated such complaints.

Plaintiffs claimed to have suffered damages since "later 2013 or early 2014" in the form of being exposed to dogs barking. Plaintiffs also assert that their injuries are the same or similar to complaints of other members of the public, including allegations of:

- "noise complaints from neighbors";

- "many noise complaints from residents";

- The relief sought by Plaintiffs "is essential to … the Plaintiffs' and the Township's citizens";

- Plaintiffs seeking enforcement of the Township Zoning Ordinance as the Plaintiffs interpret it to "protect adjacent and nearby properties occupants' rights to the quite enjoyment of their homes";

- Plaintiffs asserting that the Township Zoning Ordinance provisions are to provide for "notice to nearby residents. . .that a hearing is scheduled" and "at such hearings, residents and interested persons may address the board …"; and

- Plaintiffs claiming the Township's position with respect to its Zoning Ordinance is "an abandonment of its own residents."

Soon after answering the complaint, Defendants moved to dismiss all of the Plaintiffs' claims against them under MCR 2.116(C)(5) (lack of standing), MCR 2.116(C)(7) (governmental immunity), and MCR 2.116(C)(8) (failure to state a claim upon which relief can be granted).

The trial court issued a 14-page Opinion and Order, granting summary disposition of all claims in favor of Defendants. An appeal followed. The Court of Appeals affirmed the trial court in all aspects except for Plaintiffs' claims related to a public nuisance. The Court of Appeals explained the trial court applied the wrong standard in determining whether Plaintiffs have standing to bring a public nuisance action and remanded to the trial court. Defendants filed an Application for Leave to Appeal in this Court on January 2, 2024.

STANDARD OF REVIEW

The question of whether this Court should accept this case for review is governed by MCR 7.305(B). The issues involved in this case are related to decisions on motions for summary disposition, which are reviewed de novo by this Court. *American Federation of State, Co and Muni Employees v Detroit*, 468 Mich 388, 398 (2003).

ARGUMENT

I. THIS COURT SHOULD VACATE THE COURT OF APPEALS' INCORRECT ANALYSIS RELATED TO THE APPLICATION OF THE TEST FOR STANDING OF PRIVATE INDIVIDUALS SEEKING TO BRING PUBLIC NUISANCE CLAIMS UNDER MCL 125.3407.

The Court of Appeals in this case recognized the trial court erred by not applying the well-established special damages test under Michigan public nuisance law:

> The trial court granted defendants' motions for summary disposition with respect to Counts I - III of plaintiffs' complaint, holding that plaintiffs had not demonstrated special damages and therefore did not have standing to bring the action. In reaching this conclusion, however, the trial court applied the aggrieved party test applicable to a party seeking to appeal a zoning decision under MCL 125.3605. The trial court concluded that because plaintiffs had not demonstrated unique damages as described in the aggrieved party test, they lacked standing to initiate suit for nuisance. In doing so, the trial court clearly erred. The correct standard is whether plaintiffs "can show damages of a special character distinct and different from the injury suffered by the public generally." [COA Op, p 15-16.]

The case was remanded by the Court of Appeals to the trial court to evaluate standing through the application of the correct test:

> The portion of the trial court's order granting the Dandy Acres defendants summary disposition of plaintiffs' nuisance claim is vacated, and this matter is remanded to the trial court for reconsideration of the motion, applying the correct test for standing … [COA Op, p 24.]

That was all that was required to correct the errors below and remand the case to the trial court. The Court of Appeals, however, went further and provided ***incorrect*** analysis and conclusions when reviewing the disputed facts of the case.

The Court of Appeals' analysis wrongly signals that Plaintiffs are likely to have suffered special damages because they are adjoining landowners, and it is inconsequential that others in the community complain of the same harm:

> Under the test for standing, an adjoining landowner is likely to be determined to be affected by the nuisance created by a zoning violation in a manner distinct from the general public.

> …
> Thus, a plaintiff's injury need not be unique in the community to confer standing to abate a nuisance per se.
> …
> Plaintiffs' damages need not be singular to confer standing to bring a nuisance claim; the fact that other nearby residents also may have suffered ill effects from the dog kennel does not defeat plaintiffs' standing to bring a suit alleging nuisance.
> …
> Moreover, plaintiffs' status as an adjacent property owner lends support to the finding that plaintiffs have demonstrated special damages different from injury suffered by others in the community generally. [COA Op, p 14-16.]

The crux of *Amici's* position is that this analysis by the Court of Appeals—in a published opinion—is inconsistent with the historical standing test applied to private individuals seeking to bring public nuisance actions under MCL 125.3407. *Amici* seek this Court to vacate that portion the Court of Appeals' decision set forth above related to any analysis applying the facts of the case to the standing test.[3]

A. The Court of Appeals' Decision Misguides the Trial Court Related to Standing for Private Individuals Bringing Public Nuisance Claims Under MCL 125.3407.

This Court first recognized the right of private individuals to bring actions for public nuisances in the late-1800s:

> It is true, a public nuisance may at the same time be a private nuisance, and an individual who suffers peculiar damages – ***that is damages peculiar to himself*** – may have his action; but, before such action can be maintained, it must be shown that the damage which the complainant suffers differs ***not only in degree, but in kind***, from that which must be deemed common to all. [*Board of Water Comm'rs of Detroit v Detroit*, 117 Mich 458, 461-62 (1898) (emphasis supplied).]

[3] This Court has the authority to vacate parts of the Court of Appeals' decision pursuant to MCR 7.305(H)(1). *See, e.g., Dep't of Licensing & Regulatory Affairs v Jankowski (In re Jankowski)*, 507 Mich 1013 (2021) ("we VACATE that part of the Court of Appeals' judgment relying on its case law to hold …").

This Court later recognized this right extends to private individuals bringing actions to abate public nuisance arising from the violation of a zoning ordinance. *Morse v Liquor Control Com*, 319 Mich 52 (1947). The application of the test has always focused on whether complaining individuals can prove ***peculiar*** harm that is different both ***in degree*** and ***in kind*** from the community.[4] *See Towne v Harr*, 185 Mich App 230 (1990); *Ansell v Delta Planning Comm'n*, 332 Mich App 451 (2020).

The Court of Appeals' opinion, in contrast, implies the primary focus is placed on the neighbor's proximity to the alleged zoning violation:

> Under the test for standing, an adjoining landowner is likely to be determined to be affected by the nuisance created by a zoning violation in a manner distinct from the general public.
>
> …
>
> Moreover, plaintiffs' status as an adjacent property owner lends support to the finding that plaintiffs have demonstrated special damages different from injury suffered by others in the community generally. [COA Op, p 14, 16.]

These conclusions place form over substance. It distracts from the relevant inquiry, *i.e.,* whether a complaining party has suffered peculiar harm that is different in degree and in kind, and instead emphasizes whether Plaintiffs are near an alleged zoning ordinance violation.

It is crucial for this Court to correct this erroneous guidance provided by the Court of Appeals because the mere fact one adjoins a piece of land allegedly in violation of a zoning ordinance does not indicate they have suffered peculiar damages; the focus must be on the actual injuries being alleged and then determine whether they differ in degree and in kind from the community generally. In the view of *Amici*, allowing nearby property owners to establish standing based on proximity to the alleged zoning ordinance violation will diminish the significant

[4] Note, any complaining property owner is required to meet the threshold requirements of standing established otherwise, including suffering a sufficient injury-in-fact to invoke the power of the trial court. *See Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349 (2010).

requirement that private individuals have had to satisfy to bring a public nuisance action under Michigan law for over a century. *Board of Water*, 117 Mich 458; *Ansell*, 332 Mich App 451.

The Court of Appeals' decision further provided analysis related to evaluating what it means if others in the community suffered a similar harm:

> Thus, a plaintiff's injury need not be unique in the community to confer standing to abate a nuisance per se.
> …
> Plaintiffs' damages need not be singular to confer standing to bring a nuisance claim; the fact that other nearby residents also may have suffered ill effects from the dog kennel does not defeat plaintiffs' standing to bring a suit alleging nuisance. [COA Op, p 15-16.]

The problem with this language is it wrongly implies that a commonly shared injury can be a basis for standing. *Board of Water*, 117 Mich at 463 (damages must not be those "deemed common to all"). To the contrary, complaining of generalized grievances has routinely been a basis for Michigan courts to dismiss for a lack of standing. *Towne*, 185 Mich App 230; *Ansell*, 332 Mich App at 461.

In *Ansell*, for example, the Court of Appeals held neighbors near wind turbines could not maintain an action for public nuisances because they could not "specify who among them will clearly experience such noise or flicker above ordinances levels in connection with a particular proposed turbine." *Id.* at 461. The result made sense because the neighbors were plainly complaining of harm that all in the nearby community suffered from—essentially the definition of a public grievance. The injuries were those that were common to all in the community. Under the view the Court of Appeals expressed in this case, however, a landowner particularly close to a wind turbine could explain that as an adjoining landowner they are "likely to be determined to be affected by the nuisance" differently than others, and "the fact other nearby residents also may have suffered" from the wind turbines does not defeat their claims. Allegations that the wind

turbines make it difficult for the landowners to enjoy their backyard, like Plaintiffs in this case, would support standing.

Contrary to the analysis of the Court of Appeals, the fact that others in the community complain of the same injuries is a relevant factor to consider on remand. To the extent the complaints are so numerous that the trial court determines they are an injury that is "common to all," Plaintiffs' claims would be correctly dismissed for a lack of standing. *Board of Water*, 117 Mich at 462.[5]

The bottom line is the Court of Appeals' analysis is not in line with the historical test at common law for public nuisance claims brought by private individuals for zoning ordinance violations. It implies adjoining landowners who face similar harm to many in the local community have standing to bring claims under MCL 125.3407. The language in the decision will completely misdirect courts, counsel, and litigants in analyzing what is required to prove special damages to bring public nuisance claims under MCL 125.3407. Litigants will point to their proximity to the alleged zoning ordinance violation and argue that their proximity alone is necessary and sufficient to establish special damages. The Court of Appeals' statements in its decision are the error that must be corrected.

Vacating the incorrect analysis and conclusions would not change the judgment of the Court of Appeals. The case would be remanded to the trial court to apply the correct standard. To

[5] This is not to say Plaintiffs would have no recourse under the law. Plaintiffs could pursue a private nuisance action, *Adkins v Thoms Solvent Co*, 440 Mich 293, 302 (1992) ("A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land" that has "evolved as a doctrine to resolve conflicts between neighboring land uses"), or seek recourse at the ballot box, *Towne*, 185 Mich App at 233 ("Although it is seemingly unjust to deny the plaintiffs standing to seek abatement of the instant nuisance, we note that plaintiffs are not without recourse. However, plaintiffs' recourse must be achieved through their township officials …").

the extent an appeal then ensues, the Court of Appeals can at that time appropriately address the facts—as evaluated by the trial court in the first instance—to the legal standard.

* * *

The Court of Appeals provided incorrect analysis and conclusions to the trial court when remanding this case. *Amici* seek this Court to vacate any analysis provided by the Court of Appeals related to applying the test to the disputed facts of case, specifically including vacating the following four sentences of the Court of Appeals' decision:

> Under the test for standing, an adjoining landowner is likely to be determined to be affected by the nuisance created by a zoning violation in a manner distinct from the general public.
> …
> Thus, a plaintiff's injury need not be unique in the community to confer standing to abate a nuisance per se.
> …
> Plaintiffs' damages need not be singular to confer standing to bring a nuisance claim; the fact that other nearby residents also may have suffered ill effects from the dog kennel does not defeat plaintiffs' standing to bring a suit alleging nuisance.
> …
> Moreover, plaintiffs' status as an adjacent property owner lends support to the finding that plaintiffs have demonstrated special damages different from injury suffered by others in the community generally. [COA Op, p 14-16.]

II. ALTERNATIVELY, THIS COURT SHOULD GRANT REVIEW BASED ON THERE BEING FOUR GROUNDS PURSUANT TO MCR 7.305.

The Michigan Court Rules provide that this Court may grant review of a case when the appropriate grounds are presented. MCR 7.305(B). This case presents four grounds and *Amici* urge this Court to grant review in the event it chooses not to vacate the incorrect analysis and conclusions provided by the Court of Appeals. The four grounds that warrant this Court granting review are discussed immediately below.

A. MCR 7.305(B)(2): Local Units with Zoning Authority Have a Significant Public Interest in this Court of Appeals' Published Decision.

The main issue in this case—what must private individuals prove to bring public nuisance actions for alleged violations of zoning ordinances—is of significant public interest to *Amici*. This is because *Amici* seek to ensure that only those who are able to prove peculiar damages that differ in degree and in kind are able to bring public nuisance actions for alleged violations of zoning ordinances. Allowing adjoining landowners—merely based on that status alone—would depart from this well-established test under Michigan law and open the floodgates to litigation between neighbors. These concerns from a public interest perspective are straightforward. The typical role of a municipality is to enact, interpret, and enforce its zoning ordinance. Broad standing for private individuals to bring these types of claims would allow private individuals to step into the shoes of a zoning administrator and seek to adjudicate zoning ordinance violations themselves. This would usurp the function and discretion of municipalities and turn the doctrine of public nuisances on its head by allowing for public nuisance claims to be resolved largely between private litigants.

B. MCR 7.305(B)(3): The Standing Test for Public Nuisance Claims Under MCL 125.3407 Includes Zoning and Standing Principles of Major Significance to this State's Public Nuisance Jurisprudence.

This case involves this State's public nuisance jurisprudence as it relates to violations of zoning ordinances. In a different but somewhat similar context, this State's zoning jurisprudence was recently altered by this Court's decision in *Saugatuck Dunes*. This Court addressed in *Saugatuck Dunes Coastal Alliance v Saugatuck Township*, 509 Mich 561 (2022) "what it means to be aggrieved for purposes of appealing certain land-use decisions to a zoning board of appeals" under MCL 125.3604(1), 125.3605, and 125.3606. *Id.* at 568. That decision has been wrongly applied to this State's public nuisance jurisprudence, especially in the context of private

individuals seeking to bring public nuisance actions for violations of zoning ordinances. That much was recognized by the Court of Appeals in this very case (COA Op, p 15 ("[T]he trial court in this case conflated the test for standing with that of aggrieved party status")). The error by the trial court, however, is not isolated. *See e.g., Pigeon v Ashkay Island* (Docket No. 366537) (appealing a trial court's determination that plaintiff did not have a specific harm required to assert a public nuisance claim).

In *Ashkay Island*, the plaintiff appealing the trial court's decision was straightforwardly arguing *Saugatuck Dunes* applies:

> The trial court took an overly restrictive view of standing—contrary to the Supreme Court's direction in *Saugatuck Dunes*—by hinging its ruling upon a supposed lack of "actual harm" to Plaintiff. [Appellant Br, p 26.]

The defendant recognized the difference in the aggrieved party standard and standing for asserting a public nuisance claim, but the plaintiff responded by stating even though there was a distinction, the requirements are functionally the same:

> Defendant takes issue with Mr. Pigeon's reliance on *Saugatuck Dunes* because it addresses "aggrieved party" standing for purposes of challenging a zoning board of appeals decision, but that inquiry is functionally the same as it is for evaluating the existence of "special damages" for purposes of standing to assert a nuisance per se claim based on an ordinance violation. In both scenarios, the requirement is to show harm distinct from the public at large. [Appellant Reply Br, n 5.]

The plaintiff in *Ashkay Island* noted *Teets v T-Mobile Century, LLC*, __ F Supp 3d __; 2023 WL 4735301 (ED Mich 2023), is making the argument *Saugatuck Dunes* applies to the analysis of standing in public nuisance actions. In that case, a federal district court was considering whether removal to federal court was appropriate. *Id.* at 2. It noted that *Saugatuck Dunes* established the "special damages" standard for standing in public nuisance actions. *Id.* at 16-17. After *Saugatuck Dunes*, this issue can become more commonplace as trial courts are faced with attempting to apply

the special damage requirement developed at common law for public nuisance actions, including and especially those under MCL 125.3407.

This case consequently is of great significance in this State's jurisprudence because it represents the intersection of public nuisance law and zoning law. *Amici* believe that this case presents an opportunity for this Court to clarify the application of *Saugatuck Dunes* in the context of public nuisance law.

C. MCR 7.305(B)(5)(a): The Court of Appeals' Decision Includes Clearly Erroneous Analysis and Will Cause a Material Injustice as Binding Authority to Trial Courts.

The Court of Appeals in this case clearly erred, as explained. The errors relate to the incorrect analysis and conclusions provided by the Court of Appeals related to what factors to consider when private individuals are attempting to prove they have standing to bring a public nuisance claim for an alleged violation of a zoning ordinance. The focus must be on the actual injury—not the proximity of the landowner to the alleged violation. Allowing Plaintiffs to establish standing merely based on the proximity to the alleged zoning ordinance violation would result in a material injustice by allowing a claim to proceed in contrast to well-established precedent that demands a different analysis that focuses on the harm suffered. It will also create a material injustice through a multiplicity of actions in trial courts by adjoining landowners who believe they have suffered special damages entitling them to bring a public nuisance action.

D. MCR 7.305(B)(5)(b): The Court of Appeals' Decision Conflicts with *Ansell*, and Other Cases that Have Established the Standing Doctrine Under MCL 125.3407.

The decision of the Court of Appeals conflicts with the well-established test for private individuals seeking to bring public nuisance actions for violations of zoning ordinances because it

focuses on the status of the complaining individuals and not the actual injury. Furthermore, the language used by the Court of Appeals in this case creates confusion when compared to recent cases under the standing doctrine. As explained, the Court of Appeals in *Ansell* stated that adjoining landowners to a wind turbine alleged to be in violation of a zoning ordinance were only presenting general grievances. *Ansell,* 332 Mich App at 461. In contrast, the Court of Appeals in this case stated that adjoining landowners to a dog kennel alleged to be in violation of a zoning ordinance are likely suffering special damages. The Court of Appeals' decision in this case condones adjacent property owners, with little additional application of the special damage requirements, to bring public nuisance claims for zoning ordinance violations. It is difficult to square the two cases, both of which were recently decided by the Court of Appeals.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals erred by providing incorrect analysis and conclusions in this case related to what is required for a private individual to bring a public nuisance claim under MCL 125.3407. This Court should correct the errors of the Court of Appeals pursuant to MCR 7.305(H)(1) by vacating all parts of the Court of Appeals' opinion that provide analysis and conclusions to the trial court related to the disputed facts of the case, including the following four sentences:

> Under the test for standing, an adjoining landowner is likely to be determined to be affected by the nuisance created by a zoning violation in a manner distinct from the general public.
>
> …
>
> Thus, a plaintiff's injury need not be unique in the community to confer standing to abate a nuisance per se.
>
> …
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> Plaintiffs' damages need not be singular to confer standing to bring a nuisance claim; the fact that other nearby residents also may have suffered ill effects from the dog kennel does not defeat plaintiffs' standing to bring a suit alleging nuisance.
>
> …

> Moreover, plaintiffs' status as an adjacent property owner lends support to the finding that plaintiffs have demonstrated special damages different from injury suffered by others in the community generally. [COA Op, p 14-16.]

Alternatively, this Court should grant review of the case for the grounds presented consistent with MCR 7.305(B).

Respectfully submitted,

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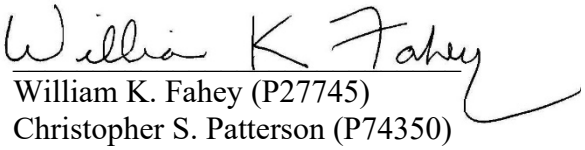
Dated: April 2, 2024



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CERTIFICATE OF COMPLIANCE

1. This brief complies with the volume limitations of MCR 7.212(B) because, excluding the parts of the brief exempted by MCR 7.212(B)(2), this brief contains no more than 16,000 words. This brief contains 5,235 words.

2. This brief complies with the style requirements of MCR 7.212(B)(5) because this brief has been prepared in at least 1.5 line-spaced text, except for quotations and footnotes, using Microsoft Word in 12-point Times New Roman font with one-inch margins.

Respectfully submitted,

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Dated: April 2, 2024

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

PINEWOOD CIRCLE, LLC,

Petitioner-Appellant,

v.

CITY OF ROMULUS,

Respondent-Appellee.
_____/

Court of Appeals No. 367182

MOAHR Docket No. 21-002697

JOINT BRIEF AMICI CURIAE OF THE MICHIGAN MUNICIPAL LEAGUE AND THE MICHIGAN TOWSNHIPS ASSOCIATION IN SUPPORT OF RESPONDENT—APPELLEE

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QUESTIONS PRESENTED AND STATEMENT OF JURISDICTION

The Michigan Municipal League and the Michigan Townships Association concur with the jurisdictional statements of both the City of Romulus (the "City") and Pinewood Circle LLC ("Petitioner").

They further incorporate and defer to the Counter-statement of Questions Presented set forth by the City in its Brief on Appeal, and would answer each question in the same manner as the City.

I. INTEREST OF AMICI CURIAE

The Michigan Municipal League (the "League") is a non-profit Michigan corporation, the purpose of which is the improvement of municipal government and administration through cooperative effort. Its membership comprises 524 Michigan local governments, of which 478 are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates its Legal Defense Fund through a board of directors. The purpose of this Legal Defense fund is to represent the member local governments in litigation of statewide significance. This Brief is authorized by the Legal Defense Fund's Board of Directors.[1]

The Michigan Townships Association (the "Association") is a Michigan non-profit corporation whose membership consists of more than 1,235 townships within the State of Michigan (including both general law and charter townships) joined together for the purposes of exchanging information and providing education and guidance to and among township officials to enhance the administration of township government services in Michigan. The Association, established in 1953, is widely recognized for its expertise with regard to municipal issues. Through its legal defense fund, the Association has participated as amicus curiae in numerous state and federal

[1] The Board of Directors' membership includes: MML President, Barbara Ziarko; MML Executive Director, Daniel P. Gilmartin; MML General Counsel, Christopher Johnson; and the officers and directors of the Michigan Association of Municipal Attorneys; Nick Curcio, City Attorney, South Haven, New Buffalo, and Allegan; Rhonda Stowers, City Attorney, Davison; Suzanne Curry Larsen, City Attorney, Marquette; Jill H. Steele, City Attorney, Battle Creek; Thomas R. Schultz, City Attorney, Farmington and Novi; Lauren Trible-Laucht, City Attorney, Traverse City; Ebony L. Duff, City Attorney, Oak Park; Steven D. Mann, City Attorney, Milan; Amy Lusk, City Attorney, Saginaw; and Laurie Schmidt, City Attorney, St. Joseph.

cases presenting issues of statewide significance to Michigan townships. This Brief is authorized by the Association.

The members of both the League and the Association have strong interests in this Court's disposition of the issues presented by Petitioner's appeal. Assessors are officials selected and employed by the members of the League and the Association. The efficient and accurate work of assessors is essential to support the core operations of, and to pay for the services provided by, municipal government.

The issues raised by Petitioner's appeal are not unique to multi-tenant commercial properties. Petitioner's challenge, if successful, could have implications for *all real and personal property* taxed in the State of Michigan across each of the League and Township's member jurisdictions. Through local and state government, all citizens and visitors to the State of Michigan benefit from the *ad valorem* taxes on property.

The amici support the position of the City, and desire foremost to assure adherence to the core requirement under Michigan law that assessments should be accurate. Assessors must not be afraid of preparing the most accurate possible assessments in uncapping years lest they face claims that they are "chasing sales" by reflecting an assessment that is too close to a recent sale value. *Under-assessment* of a property means that citizens receive fewer services and benefits, and that those other citizens with accurate assessments shoulder more than their fair share of the burden for those services and benefits.

II. SUMMARY OF ARGUMENT

True cash value means *true* cash value. It does not mean previous cash value.

Michigan property must be uniformly assessed based on its *true* cash value. This is commanded by the Constitution: "The legislature shall provide for … the proportion of true cash value at which … property shall be uniformly assessed." Const 1963, art 9, § 3. And it is commanded by state law, which establishes this uniform assessment level at 50% of true cash value. MCL 211.27a(1). Uniformity of assessment *starts* with an accurate determination of true cash value.

The General Property Tax Act ("GPTA") does not say that a property's true cash value cannot equal its sale price. It says that a property's sale price shall not be its "presumptive" true cash value, and that assessors must use the "same valuation method" to value the property as used for other properties in the same classification. MCL 211.27(6). If sale price and true cash value are the same after these valuation methods are applied, this does not offend GPTA.

The undisputed evidence, as reflected in the record cards submitted and relied upon by both parties, shows that for the 2021 tax year the City's assessor applied the same valuation method to all 32 properties in the subject property's ECF neighborhood. They show that each property was reviewed as part of the establishment of a new ECF neighborhood ("COM-APARTMENTS"), including both the properties in that neighborhood that sold, and those that did not sell.

The assessor estimated a higher true cash value for Petitioner's property as compared to the prior year in that process. The Tribunal held that there was no

violation of § 27(6) by that correction. The same valuation method (the cost approach), the same software, and the same market information was used for each property in the class. Reviewing the record cards to confirm the assessor reviewed each property and applied a common valuation method as required by § 27(6) does not require any credibility determination, and there was no genuine issue of material fact remaining that should allow Petitioner's claim to survive.

Petitioner does not challenge that the true cash value is correct. It complains, in fact, *because* the value is correct. It does not want to pay taxes on the correct, higher true cash value. It wants the old, incorrect lower value.

That remedy is not available. The assessor and the Tribunal are not required to restore an incorrect value or to turn a blind eye to factors influencing property values in uncapping years by § 27(6) of GPTA. Doing so would create *dis*-uniformity in favor of transferred properties, in violation of the Constitution.

The Tribunal's granting of summary disposition in favor of the City should be upheld.

III. STATEMENT OF FACTS AND PROCEEDINGS AND STANDARD OF REVIEW

The League and Association incorporate and defer to the Counterstatement of Facts and Proceedings and Standard of Review set forth by the City in its Brief on Appeal.

IV. ARGUMENT

A. Section 27(6) forecloses only a presumption that the sale price is the true cash value; it does not foreclose the two values from being the same.

There is a reason Petitioner cites no published authority even suggesting that an assessment that approximates sale value in an uncapping year is improper. There is no such authority.

Without citing to any supporting case law, legislative history, or other authorities that actually disclose legislative intent on these issues, Petitioner repeatedly claims that allowing assessors to "chase sales" is against legislative intent. (See Appellant Br., p. 11, 18.) It correctly notes that the "words expressed in the statute" are the best indicators of legislative intent,[2] but then it ignores those words: Neither the Michigan Constitution nor the General Property Tax Act anywhere includes the phrase "chasing sales." The City aptly points out that the phrase is not present in § 27(6) of GPTA, which is the statute on which Petitioner's entire claim is premised. (See Appellee Br., p. 11.)

[2] See Appellant Br., p. 18 (citing *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 70-71; 894 NW2d 535 (2017)).

Section 27(6) of GPTA instead states that "the purchase price paid in a transfer of property is not *the presumptive true cash value* of the property transferred." MCL 211.27(6) (emphasis added). It also requires that "an assessing officer shall assess that property using the same valuation method used to value all other property of that same classification in the assessing jurisdiction." MCL 211.27(6).

Under any plain and reasonable reading of Section 27(6), the purchase price of a property can be considered—it just cannot be *presumed* to establish true cash value. The purchase price paid for a property is plainly market evidence of a property's value; the rule against its presumptive use is not designed to protect new purchasers from undue attention as Petitioner claims, but to recognize the limitations inherent in relying on a single point of market evidence to the exclusion of others. See *Antisdale v Galesburg*, 420 Mich 265, 278; 362 NW2d 632 (1984) (explaining that the reason for the rule against presumption is that "the ultimate sale price of the property, as a result of many factors, personal to the parties or otherwise, might not be its 'usual' price").

While not addressed in published authority, the Court of Appeals has addressed § 27(6) in unpublished decisions and confirmed this interpretation. As detailed in a decision issued *subsequent* to the STC's equally non-binding 2005 STC Directive on which Petitioner repeatedly relies,[3] "although the sale or purchase price

[3] The 2005 STC Directive relied on by Petitioner does not counsel otherwise—it does not, e.g., suggest that there is anything improper in an assessed value being reached that approximates the sale value, provided traditional review and appraisal methods have been employed.

is not *conclusive* evidence of the true cash value …, Michigan law does not prohibit the Tax Tribunal from relying on a property's sale or purchase price to establish the true cash value." *Golf Course Properties, LLC v Tyrone Tp,* unpublished opinion *per curiam* of the Court of Appeals, issued June 12, 2008 (Case No. 274923), 2008 WL 2389482, * 2.[4] Citing § 27(6) and explaining further, the court there stated: "Michigan law simply does not *presume* that the sale or purchase price of a property is the true cash value of the property." *Id.* (emphasis added). The Court of Appeals in that instance affirmed the Tribunal, holding that it committed no error in relying on sale price as a "last resort" after the Tribunal reviewed and found other appraisal evidence and testimony inconsistent or incredible. *Id.*[5]

In theory, a property's true cash value is an objective reality—ascertainable not only by the assessor but by anyone willing to compile and review the evidence. It should not, then, be surprising or give rise to suspicion one whit when an assessor, applying traditional valuation methods, reaches similar conclusions of value as a sophisticated buyer who has recently performed diligence on what a property is worth. Indeed, that is precisely the point of estimating "true cash value."

[4] See Amici Appendix, at p. MML App 1.

[5] See also *Patru v City of Wayne,* unpublished opinion *per curiam* of the Court of Appeals, issued February 18, 2020 (Case No. 346894), 2020 WL 815784, *5 (finding Tribunal committed no error of law where it "*considered* … evidence of the 2015 purchase price for the property," but also "gave greater weight to the evidence" presented in the taxing unit's sales-comparison approach to valuation) (emphasis added). See Amici Appendix, at p. MML App 4.

All that the first sentence of § 27(6) precludes is the situation in which an assessor *skips* other traditional methods of valuation applied to other similarly classified properties in preparing a record card and directly adopts the sale value as her value. Reading § 27(6) in this manner does not render it a *nullity* as Petitioner suggests—the statute still requires that assessors "show their work" in applying the same valuation method as applied to other properties in the same classification. (See Appellant's Br., p. 18.) Here, as shown by the record cards relied upon by both parties and ultimately by the Tribunal in granting summary disposition, the assessor *skipped nothing*.

The Tribunal explains that it reached its determination to award summary disposition to the City once it realized that the parties each planned to rely on their commonly submitted *record cards.* (MTT Dkt. # 63, Tribunal Final Opinion and Judgment, pp. 21-22.) It finds: "Respondent created a new ECF for use in adjusting the cost of the depreciated improvements for all such properties for the 2021 tax year, which required a review of all such properties, including the subject and the other property that sold, that resulted in changes to the subject as well as the other non-sold properties in the new ECF neighborhood." *Id.* Each of these points is ascertainable from the *record cards,* which show that each of the ECF neighborhood properties was reviewed and annually re-assessed to the exclusion of *none*. This requires no credibility determination because the record cards *show the work*.

The Tribunal was right in finding there was no genuine issue of material fact to support a violation of MCL 211.27(6), and summary judgment should be affirmed.

B. The Constitution is satisfied when properties are assessed at 50% of their true cash value as determined by uniform method.

1. A property's True Cash Value is not impacted by whether it has undergone an uncapping event.

Before proceeding with a discussion of uniformity requirements, some discussion of the meaning of "true cash value" and how it is determined is helpful.

"True cash value" has a specific meaning that does not change based on whether a property is in an uncapping year or not. By statute, "true cash value" is "the usual selling price …, being the price that could be obtained for the property at private sale, and not an auction sale [except as otherwise stated by statute] … or at a forced sale." MCL 211.27(1). It is to be determined annually and retrospectively as of the prior December 31 ("tax day"). MCL 211.2(2), MCL 211.10. The assessor *shall* annually consider a variety of statutorily identified factors (e.g., "existing use," "location," "present economic income of structures") and must use their professional judgment and experience to weigh and consider other factors: "No single factor is intended to be conclusive as to value," and there are multiple factors within that must be considered for each specific property." *Safran Printing Co v City of Detroit,* 88 Mich App 376, 380; 276 NW2d 602 (1979). "Basically, all related factors are to be considered." *Id.*

Each property's true cash value should reflect "the "approach that most accurately reflects the value of the property." *Forest Hills Co-Operative v City of Ann Arbor,* 305 Mich App 572, 593; 854 NW2d 172 (2014). Ultimately, each property must be valued in such a manner as to "provide the most accurate valuation *under*

the individual circumstances," and the "final estimate of true cash value must represent the physical real estate and all the interests, benefits, and rights inherent in ownership of the subject real property." *Meadownlanes Ltd Dividend Housing Ass'n v City of Holland,* 437 Mich 473, 502; 473 NW2d 636 (1991) (emphasis added).

2. Petitioner has presented no evidence of dis-uniform assessment.

Without any evidence that Petitioner's property—*or any other property in the ECF neighborhood*—is actually being assessed at anything other than 50% of true cash value, Petitioner insists that it is entitled to relief in the form of a reduced true cash value conclusion reached by neither the Tribunal nor the assessor. The basis for its claims is that the assessor violated "constitutionally required uniformity principles" by nefariously "manipulating" characterizations for Petitioner's property but not others. (Appellant Br., pp. iv, 3.) It asserts the constitutional uniformity principles that afford it relief in such circumstances are embodied in § 27(6). (*Id.*)

But to read Section 27(6) in the manner Petitioner suggests would *hinder*, rather than promote, the Constitution's uniformity requirements. In Petitioner's formulation, an assessor should be discouraged or even wholly barred from re-characterizing uncapped properties and uncapped properties *alone*. Such a rule will naturally result in *dis*-uniformity. Perversely, it would make under-assed properties *more valuable* in the marketplace if the assessor was discouraged from correcting roll values in uncapping years lest they face a "chasing sales" challenge. Sophisticated buyers recognizing the true value of a property would *pay more* for properties where the assessor was known to have erred. Far from "protecting" purchasers of bona fide value as Petitioner claims, the model advanced by Petitioner would harm fellow

taxpayers and give unfair advantages to the owners and purchasers of under-assessed properties.

Uniformity, as a constitutional requirement, must be understood in the context of the other key requirement set forth in the Constitution's property tax provision: that property be assessed based on its *true cash value*. Const 1963, art 3, § 9. This pre-eminent concern with *true cash value* reflects the underpinnings of *ad valorem* taxation, which literally means to tax *to the value* of the property. The Michigan Constitution compels "uniform general ad valorem taxation," *starting* with a determination of true cash value: "The legislature shall provide for the determination of true cash value of such property" and "the proportion of true cash value at which such property *shall be uniformly* assessed, which shall not, after January 1, 1966, exceed 50 percent …." Const 1963, art 9, § 3 (emphasis added). The legislature, in turn, provides for uniformity by requiring assessments at 50% of true cash value, equalized by class. MCL 211.27a(1) (property is to be assessed at 50% of its true cash value); MCL 205.737(1) (same); MCL 211.34 and 211.34c (property is to be equalized by class).

The Michigan Constitution requires equal treatment of similarly situated taxpayers,[6] but no taxpayers are truly the same in all respects: each parcel of real property is unique.[7] The only way to assure similar treatment is to assure that each

[6] See *Armco Steel Corp v Dep't of Treasury*, 419 Mich 582, 592; 358 NW2d 839 (1984).

[7] See *In re Smith Trust*, 480 Mich 19, 26-27; 745 NW2d 754 (2008) ("Land is presumed to have a unique and peculiar value, and contracts involving the sale of land are generally subject to specific performance.")

factor that adds value is considered *and reconsidered annually* to assure that a property's valuation is accurate based on developments in the market and comparisons to other similar properties.

It thus bears repeating that Petitioner has not presented evidence that the assessor's estimate of true cash value for the subject or other properties in the same ECF neighborhood are in any way *incorrect*. Petitioner is entitled to a *uniform* assessment based on true cash value under Const 1963, art 9, § 3—not to an assessment based on values determined in prior years or determined using only partial information for the subject.

The Tribunal, seeing no evidence of *dis*-uniform assessment based on true cash values, made the proper determination in granting summary disposition to the City.

3. Uniformity in the *method* of assessment does not require an assessor to turn a blind eye to incorrect characterizations or to give each property the same amount of attention.

Petitioner cites to *Titus v State Tax Commission*, 374 Mich 476, 480; 132 NW2d 647 (1965) and *Edward Rose Bldg Co v Independence Twp*, 463 Mich 620, 639-640; 462 NW2d 325 (1990) for the proposition that "[t]he constitutional rule of uniformity has been correctly interpreted to mean not only uniformity in the rate of taxation, but also uniformity in the mode of assessment." (Appellant's Br., p. 11 (citing 374 Mich 476, 480; 132 NW2d 647 (1965).)

But neither of these cases compels the reading of §27(6) urged by Petitioner. In *Titus,*[8] the appraiser split the City of Lansing into five regions, re-assessing one fifth of the City annually using updated mass appraisal techniques without conducting *any* review of other properties. This "one-fifth at a time" approach was the crux of the uniformity violation at issue. 374 Mich App 476, 477-480.

Similarly, in *Edward Rose*, the assessor variously valued vacant property lots based on who owned them—applying one valuation based on a theory that commonly owned lots would sell in a "mass sale" market and that other lots would sell individually for more. 463 Mich at 639-640.

There is no claim that the assessor here did not conduct an annual review of each property (as was the case in *Titus*)—Petitioner's claim, which is unsupported in the record card evidence in any event, is that its property received *more* annual reconsideration than other properties. No case, statute, or Constitutional provision supports a claim in these circumstances. Otherwise, every homeowner whose assessor spent twenty minutes inspecting their porch and pole barn would have a uniformity claim with respect to those properties where the assessor spent only five minutes.

[8] Three years after *Titus*, in a case not mentioned by Petitioner, the Supreme Court specifically noted that "a uniform approach to valuation does not always result in uniform assessment." *Fischer-New Center Co v Michigan State Tax Commission*, 380 Mich 340, 369-370; 157 NW2d 271 (1968). It advised that "[w]hile uniform approach may be desirable, it is not the ultimate goal of valuation"—instead, "the ultimate goal is uniform *true cash values*." *Id.* The Court thus countenanced the use of multiple valuation methods with greater flexibility "depending on the nature of the particular property." *Id.*

There is also no claim here as in *Edward Rose* that the assessor relied on two different market sets in establishing her assessment—Petitioner does not contest that the market information came from the same single Marshall Swift Valuation Service data contained in the STC's assessing manual.

Given the lack of evidence of actual *dis*-uniformity in method of the types observed in *Titus* and *Edward Rose,* as well as the lack of any claim by Petitioner that its property has been assessed at anything other than its true cash value, summary disposition was appropriate in favor of the City, and the Tribunal's summary disposition for the City should be affirmed.

C. Petitioner is not entitled to an assessment based on an incorrect true cash value.

The non-binding, potentially defunct[9] 2005 STC Directive on which Petitioner principally relies for its claim does not support Petitioner's request for relief. That is, even in circumstances where the STC believes that an assessor has improperly "single[d] out … sale properties in general … while disregarding properties which have sold," the STC does not state that it will ever require an assessor to revert to a lower true cash value conclusion. (Appellant's Appx, p. 31a.) The STC advises that an assessor may face licensing consequences for such conduct, but it does not state that the value conclusions reached by an assessor in such circumstances are to be disregarded or reversed. *Id.*

[9] The STC does not rescind directives when superseded or abandoned.

The Directive is ultimately non-binding on both this Court and the Tribunal. *Lockhart v Ontanagon Tp,* 341 Mich App 588, 592; 991 NW2d 261 (2022).[10] The Tribunal found the Directive "does not conflict" with state law, but if the Directive had required an assessor to turn a blind eye to factors influencing value in an uncapping year—or had it required the STC or the Tribunal to adhere to an incomplete and idiosyncratic value as a remedy for a perceived violation of "sale chasing"—the Tribunal would have had every reason to reach a different conclusion. (See Tribunal Final Opinion and Judgment, p. 19.)

Ultimately, the 2005 STC Directive states a "concern" with "the practice of singling out sale properties *for inspection* to determine whether there is some error in the assessment … while *disregarding* properties which have not sold." (Appellant Appx, p. 30a. (emphasis added)) The assessor did not single out the subject for inspection in 2020. (The property was not even inspected in 2020.) And the assessor did not disregard other properties—each was reviewed as part of establishing the new ECF neighborhood. The Directive further does not address the situation where an assessor, having already inspected a property in a year prior, now feels differently about the property's characteristics after reviewing a multitude of other properties in the same market.

The Constitution is satisfied when local assessors *first* determine each property's true cash value (MCL 211.27), then assess each property at a uniform

10 Further, only the Tribunal, and not the STC, is the final agency for the administration of property tax laws. MCL 205.735(1).

proportion of that value (50%) (MCL 211.27a(1)). That is precisely what happened here. It would not be present where Petitioner, putting forth no evidence that its property's true cash value is wrong, obtains a remedy that reverts the value to some lower figure based on a selective and partial review not applied to other properties in the same ECF neighborhood.

V. CONCLUSION

If Petitioner disagrees with the results of the assessor's methods or characterizations, it has a plain remedy available to it—one equally available to every property owner, lessee, and other person with sufficient standing in relation to a property: to initiate a valuation appeal.[11]

In a valuation appeal, the Petitioner's property would be subject to an independent determination of value by the Tribunal. See MCL 205.735(1). The Tribunal, in determining the true cash value used for assessment, would be free to consider multiple valuation methods and market information going far beyond the Marshall and Swift Valuation information used by the assessor.[12] The Tribunal's independent determination of value does not offend uniformity: the Tribunal's

[11] In a valuation appeal, the assessor's determination is *also* not afforded presumptive validity. MCL 211.27(1). Like an assessor with a sale price, however, the Tribunal can reach the same conclusion as the assessor when the evidence supports doing so. *Pontiac Country Club v Waterford Tp,* 299 Mich App 427, 435-436; 830 NW2d 785 (2013).

[12] Under the cost approach, each property's assessed value must reflect *that* property, "not a mechanical" or rote calculation "but a critical analysis of the property in its market on the appraisal date to determine whether cost should be adjusted upward or downward to take account of market conditions." *Meijer Inc v City of Midland*, 240 Mich App 1, 10; 610 NW2d 242 (2000).

valuation determination assures merely that the property will be uniformly assessed at 50% of its true cash value as required by the Constitution. See MCL 211.27a(1).

Ultimately, Petitioner does not want uniformly assessed *ad valorem* taxes. It wants a remedy that would restore a prior year's under-assessment (at least until the taxable value of its property is once again capped).

The Tribunal was right to reject Petitioner's uniformity claims. The amici support the City's position and request for relief seeking affirmance of the Tribunal's granting of summary disposition to the City.

Submitted Respectfully,

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Dated: March 13, 2024

CERTIFICATE OF COMPLIANCE

I certify that this Joint Brief Amici Curiae of the Michigan Municipal League and the Michigan Townships Association in Support of Respondent-Appellees complies with the type-volume limitation set forth in MCR 7.212(b). This brief uses a 12-point proportional font (Century), and the word count, based on the word-count of the word-processing system used to produce this document is 4,345.

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Dated: March 13, 2024

Court of Appeals, State of Michigan

ORDER

PINEWOOD CIRCLE LLC V CITY OF ROMULUS

Docket No. **367182**

LC No. **21-002697-TT**

Christopher M. Murray, Judge, acting under MCR 7.211(E)(2), orders:

The motion to file an amicus curiae brief on behalf of Michigan Municipal League and Michigan Townships Association is GRANTED. The brief that was received on March 13, 2024, is accepted for filing.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

April 3, 2024
Date

Chief Clerk

Order

Michigan Supreme Court
Lansing, Michigan

April 3, 2024

166511 (41)

FRANK SAKORAFOS and ELAINE TSAPATORIS,
Plaintiffs-Appellees,

v

CHARTER TOWNSHIP OF LYON, BOARD OF TRUSTEES OF THE CHARTER TOWNSHIP OF LYON, and JOHN DOLAN,
Defendants-Appellees,
and

56560, LLC, DANDY ACRES SMALL ANIMAL HOSPITAL, PLLC, doing business as THE DOG LODGE, THERESA McCARTHY, and TERRENCE McCARTHY, also known as TERRY McCARTHY,
Defendants-Appellants.
_____/

SC: 166511
COA: 362192
Oakland CC: 2021-189644-CH

On order of the Chief Justice, the motion of the Government Law Section of the State Bar of Michigan and the Michigan Municipal League to file a brief amicus curiae is GRANTED. The amicus brief submitted on April 2, 2024, is accepted for filing.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 3, 2024

Clerk