Township Law *E-Letter*

Township Law Legal Update: Recent Decisions Impacting Zoning and Planning (Part II)

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Further exploring the topic of recent zoning and planning decisions discussed in our June 2019 E-Letter (available here), the Michigan Court of Appeals issued other decisions that Townships should read. This month's E-letter further explores additional court decisions from both the Michigan Supreme Court and Michigan Court of Appeals that impact final decisions of the Zoning Board of Appeals, zoning ordinance provisions that address agricultural activity, zoning application fees, and zoning enforcement.

ZONING BOARDS OF APPEAL MUST STATE SPECIFIC FINDINGS AND RELY UPON INFORMATION AND DOCUMENTS TO SUPPORT THEIR CONCLUSIONS.

Zoning Boards of Appeal ("ZBA" or "ZBAs") serve an important function in the zoning scheme. The ZBA grants variances (a function often sought by property owners), interprets the meaning of the Zoning Ordinance, classifies uses, and hears appeals from decisions by the zoning administrator and Planning Commission. The decisions issued by ZBAs are often the final decisions within the Township administrative zoning process. An aggrieved party that remains in disagreement with the ZBA may then appeal to the Circuit Court for the county in which the property is located. But, access to the ZBA is much more cost effective and expedient than Circuit Court. Moreover, costs incurred by Townships to defend appeals in the Circuit Court can be expensive. Accordingly, it is important that ZBAs support their decisions with specific findings and rely upon information and documents to support their conclusions.

If the ZBA is appealed, the Circuit Court reviews the ZBA's decision to ensure, among other things, that the decision "is supported by competent, material, and substantial evidence on the record." "Substantial evidence is evidence that a reasonable person would accept as sufficient to support a conclusion." *Edw C Levy*, 293 Mich App at 340 (quotation marks omitted). It may be substantially less than a preponderance of the evidence but requires more than a scintilla of evidence. *Id.* at 340-341. This is not a high threshold.

In a recent Court of Appeals case, the plaintiffs and the defendants were neighbors, and the plaintiffs were distressed by the defendants constructing a full living quarters located above their garage (hereafter the "garage addition"") to be used as a temporary residence while building a new, larger two-story home at the site that would be attached to the garage addition. As such, the plaintiffs challenged the ZBA's decision authorizing the construction of the garage addition. The Court agreed with plaintiffs and remanded the case to the ZBA to again review its decision.

Among one of the five issues analyzed by the Court, the ZBA found the garage to be attached, but the Court remanded the decision to the ZBA because it "fail[ed] ***entirely*** to state why it determined that the

garage addition [was] attached to the house." The Court ordered the ZBA to "reexamine the issue of whether the buildings [were] attached or detached, enunciate criteria to be employed in assessing the issue, and to make particular findings of fact in support of its ultimate decision." The Court similarly found that the ZBA acted "absent elaboration and in a conclusory fashion" for three other zoning deliberations made by the ZBA related to the garage addition and, thus, subsequently remanded on those grounds as well.

To avoid appellate review and remand, ZBAs should ensure they do not make zoning decisions absent elaboration and in a conclusory fashion. So as to assist any review by a Court and further tip the scales in favor of upholding the ZBA decision, ZBAs should provide citation to specific sections of the Zoning Ordinance when making zoning decisions, as well as explain the basis for any determination and set forth the specific reasons for a ZBA action on the record. This will bulletproof Township ZBA decisions and avoid unnecessary appeals and litigation costs. *Hiser v Village of Mackinaw*, Michigan Court of Appeals 2018 (unpublished).

CLAIMING ITEMS ARE FOR FARMING DOES NOT PREVENT ENFORCEMENT OF TOWNSHIP ZONING ORDINANCES.

A violation of a zoning ordinance typically constitutes a nuisance per se; however, activities that fall within the purview of the Right to Farm Act ("RTFA") cannot be barred by a local zoning ordinance. In order to be protected under the RTFA, the individual claiming protection must prove by a preponderance of the evidence that the activity alleged to constitute a zoning ordinance violation is a "farm" or "farm operation" within the meaning of the RTFA and conforms to accepted agricultural practices. It is not enough to show that the property is being used as a farm or farm operation; the landowner must show that the activity being challenged by the zoning ordinance ***is being used to further the farm operations***. If the zoning ordinance violation is ***not "necessary for a farm,"*** the municipality may enforce its zoning ordinance provision regulating the activity.

In a recent Court of Appeals decision, a Township alleged that a landowner was violating its Zoning Ordinance by unlawfully storing and staging commercial trucks, equipment, and landscape materials on a lot, zoned as an AG-1 District, which did not authorize such uses absent a special use permit. In response, the landowner claimed they were conducting a tree farm and nursery on the property and that all equipment and vehicles were being used to prepare the land for the tree farm and to conduct tree farming operations. The Court noted that if the landowners were ***actually using*** the machinery and equipment in the commercial production of farm products, the RTFA would have likely protected against enforcement of the Township's Zoning Ordinance. The Court instead found that landowners were not protected by the RTFA, and therefore were subject to the Township's Zoning Ordinance, ***because the landowners were merely attempting to portray their activities as a farm or farm operation as part of an attempt to cover for an illegal gravel pit operation***. *Lima Township v Bateson*, Michigan Court of Appeals 2018 (unpublished).

In another case before the Court of Appeals, property owners of a ranch had constructed a barn with 26 stalls and a riding arena in the lower level, with an apartment above the riding arena on the second floor of the building. The Township alleged the apartment in the barn was a violation of a provision in its Zoning Ordinance that disallowed second dwellings. The landowners argued the apartment fell within the protections of the RTFA and therefore not subject to the ordinance. The Court noted that while the barn itself was not in violation of the Zoning Ordinance and was within the definition of a "farm" under the RTFA, the apartment in the barn was not "necessary" for the farm. Significantly, the fact that the landowners had the tenant perform nightly checks on the stables did not convince the Court that the

apartment was necessary to farming operations. Accordingly, the Court found that renting the apartment in the barn was not a type of activity protected under the RTFA and the Township's zoning ordinance was applicable. *Williamstown v Sandalwood Ranch*, Michigan Court of Appeals 2018 (unpublished).

These are both important cases in light of continuous attempts to expand the RTFA. Townships should keep in mind that the RTFA does provide a defense to legitimate commercial farm activities, but it does not afford a defense for landowners fabricating facts to evade compliance with local zoning ordinances.

TOWNSHIPS MAY CHARGE "REASONABLE FEES" FOR ZONING APPLICATIONS, REVIEW COSTS, AND APPROVALS.

The Michigan Zoning Enabling Act (MZEA) allows a municipality to charge "reasonable fees" to those seeking zoning permits. See MCL 125.3406. Those fees are often established per application. In order for those fees to be reasonable, the fees should relate to the costs of the Township in providing the zoning review for a respective permit. In other words, permitting fees should not be used to address budget shortfalls unrelated to the permit and should not be used to create a surplus in the Township's general fund.

The Michigan Supreme Court recently explained in detail the limits of a municipality's right to collect reasonable fees in the permitting process (although in the context of building permit fees). The City of Troy had retained up to 25% of the fees charged to applicants and had created a surplus in the fund of the Building Department of nearly $250,000 every year. Those funds were then used, in part, to satisfy the deficit that had accumulated in the Building Department for years where lower fees were charged.

The Court noted that the retention of a surplus from permitting fees does not automatically make the fees unreasonable. But, the Court went on to mention that when fees ***consistently*** generate revenue beyond the costs incurred for the service, those fees would be treated with skepticism by a reviewing court. Additionally, the use of fees in excess of the municipality's costs to satisfy a historical deficit makes the fees unreasonable. Using permitting fees to address budget shortfalls goes beyond a municipality's power to charge fees and creates unreasonable fees. *Michigan Association of Home Builders v City of Troy*, Michigan Supreme Court (July 11, 2019).

The Michigan Court of Appeals has also recently addressed rates charged by municipal utilities in a pair of cases. Although the context is not the same as zoning, Townships can consider using similar principles in establishing appropriate zoning fees. The Court reiterated that the rates need not be a mathematical certainty and that the accumulation of surplus funds within itself was not an indication of unreasonable fees, but consistent revenue generation would be reviewed with skepticism. Moreover, the revenue can cover administrative overhead in operating the department. This may include fees for the Township attorney, Township engineer, general equipment, and other administrative labor.

Bohn v City of Taylor, Michigan Court of Appeals (2019) (unpublished); *Deerhurst Condominium Owners Assoc., Inc. v. City of Westland*, Michigan Court of Appeals (2019) (unpublished).

While the contexts of these cases vary, what ties them all together is the idea that municipalities are to charge fees for services in proportion to the costs incurred by the municipality in delivering those services to its residents. The same is true in the context of zoning and other permitting decisions. Michigan Townships should charge fees that are reasonable and that are in line with the costs incurred by the Township in reviewing applications, undertaking inspections, and granting or denying permits.

TOWNSHIP ENFORCEMENT OFFICERS MUST AVOID WARRANTLESS SEARCHES.

Township officials and officers are subject to the limitations on government action included in the Michigan and United States Constitutions. It is especially important that Township Ordinance Enforcement Officers remain mindful of the protections afforded by the Fourth Amendment. The Fourth Amendment prohibits "unreasonable searches and seizures" of individuals and their property. In general, that means that government officials may not search private property without a warrant to do so.

However, as the federal Sixth Circuit Court of Appeals recently reiterated, Fourth Amendment protections are not limitless. The City of Saginaw required an owner of vacant property to register with the city clerk. That registration form required the owner of the vacant property to agree to allow the City to enter and inspect the premises to ensure compliance with the City's Dangerous Building Ordinance. Several owners of vacant property refused to register the property on the grounds that the agreement to allow inspection was a violation of Fourth Amendment rights. The City fined them and the owners sued.

The Sixth Circuit recently explained that while a search of private property without a warrant is presumptively a Fourth Amendment violation, numerous exceptions to that rule exist. One such exception is that a warrant is not required where the primary purpose of the search is unrelated to crime control. This is typically true of must zoning ordinance enforcement cases. This also supports another reason to pursue violations through civil infractions—not misdemeanor prosecution which are criminal in nature.

The exception also includes "administrative searches designed to assure compliance with building codes, including codes designed to prevent buildings from becoming dangerous to tenants or neighbors." In other words, warrantless inspections of private property to ensure compliance with zoning or dangerous buildings ordinances are not violations of the Fourth Amendment.

The Court also noted that there are some procedures that a municipality must have in place before conducting warrantless inspections in search of ordinance violations. A municipality must give a property owner the right to challenge a warrantless inspection before a fine for failing to do so can be levied. *Benjamin et al. v. Stemple et al.*, Sixth Circuit Court of Appeals (February 12, 2019).

This case serves as a reminder that Township officials are required to respect the constitutional rights when enforcing zoning ordinances. Township officials are not always required to obtain an administrative search warrant, but Townships should consult their Township attorney before proceeding forward.

-- Chris Patterson, Chad Karsten, and Kendall O'Connor

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