

Michigan Association of Planning Annual Conference

LEGISLATIVE UPDATE: Overview of Recent Case Law and Proposed and Recently Enacted Legislation

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Case Summary Based on:

*"Selected Planning and Zoning
Decisions: May 2010 – April 2011"*

Compiled by **Kurt H. Schindler**, MSUE
Regional Land Policy Educator, from
summaries published by the Michigan
State Bar, **and** from materials published
in *Planning and Zoning News*.

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MAJOR ISSUE OF LAST YEAR - LOCAL REGULATION OF MINERALS

- APA & MAP deeply involved
- *Kyser v. Kasson Twp.*, MI Supreme Court, July 15, 2010
- Public Act 113 of 2011, July 20, 2011 (immediate effect)
- It probably is not over yet

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Kyser v. Kasson Twp.

488 Mich. 860; 788 N.W.2d 9

- Basic Facts:
 - History of mining conflict in township
 - Twp. hired a minerals inventory, created a separate sand and gravel mining district
 - Denied rezoning of land contiguous to the district as inconsistent with the plan
 - Lost in circuit court and Court of Appeals because of *Silva* rule (*Silva v Ada Twp.* 1982) regarding "very serious consequences"
 - Many amicus briefs before COA and MI SCT

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Kyser v. Kasson Twp.

- “No very serious consequences” rule on extraction of natural resources is not a constitutional requirement – was a court made rule which the MI SCt overturned;
- Ended “preferred use” status for mining
- “No very serious consequences” rule violates separation of powers by giving legislative authority to the judiciary;
 - Shifted the presumption of validity
 - Shifted burden of proof

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Kyser v. Kasson Twp.

- Reasonableness of the zoning enactment is the proper standard for analysis;
- Exclusionary zoning language
- Relationship of zoning to master plan
 - MI Sup Ct upheld township denial of rezoning application; denial based on master plan and special planning study
- The four most conservative justices threw out the Silva rule

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PA 113 of 2011

- Amendment of MZEA to put Silva rule into statutory form
- Municipalities by zoning “shall not prevent the extraction, by mining, of valuable natural resources from any property unless very serious consequences would result...”
- Challenger has burden of showing there are valuable natural resources, there is a need for those resources, and that no VSC would result.

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PA 113 of 2011

- In determining if VSC would result, the standards in Silva shall be applied and all the following factors may be considered:
 - Relationship of extraction to existing land uses
 - Impact on existing land uses
 - Impact on property values in area and along hauling route
 - Impact on pedestrian and traffic safety
 - Impact on other PHSGW interests
 - Overall public interest in the extraction

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PA 113 of 2011

- Municipalities may have reasonable regulation (not in conflict with NREPA) of:
 - Hours of operation
 - Blasting hours
 - Noise levels
 - Dust control measures and traffic
- Must reasonably accommodate "customary mining operations"

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It probably is not over yet

- Process of adoption was incredibly swift
- Issue has already been raised in a Houghton circuit court mining case
- Kasson Twp. moratorium to adjust zoning ordinance to comply with new act, already has a couple requests for rezoning
- Some legislators already called to account
- Legal issue of validity of VSC in statute
- May be possible to mount a local legislative bill to eliminate or further neuter PA 113 of 2011

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What to do if you have minerals?

- Get professional help: attorney and planner
- Engage landowners and industry reps
- Inventory the mineral resources
- Study the trends related to demand
- Study the law
- Plan
- Develop a zoning approach
- Take action (including monitoring court decisions and legislative opportunities)
- Be prepared to litigate

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CASE LAW SUMMARY

Selected Planning & Zoning
Decisions, July 2010 – September
2011

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ZONING AUTHORITY

City/Village of Douglas v. Von Der Heide No. 292948, Court of Appeals, Unpublished, November 18, 2010

- City's conditional approval of PUD (4 units) on grounds that developer pave a gravel public right-of-way did not exceed the City's authority under MZEA
- Paving was reasonable because it would improve emergency access and public services; cost imposed on the developer was reasonable in relation to the entire project given the limited amount of required paving
- Developer's non-completion of a second phase of the development was immaterial because City approved the PUD assuming the second phase (2 units) would be completed

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ZONING AUTHORITY, DUE PROCESS AND EQUAL PROTECTION

Whitman v. Galien Twp. 288 Mich. App. 672; 2010 Mich. App. LEXIS 1042 (2010)

- Zoning ordinance did not comply with MZEA in part because it failed to particularly "specify" the land uses and activities eligible for special use permits
- Zoning ordinance language swept too broadly, making all actions or functions pertaining to commerce, business, trade, manufacture, or industry in general, eligible for special use status within the agricultural zoning district
- Court of Appeals also vacated the granting of the special use permit by the local Zoning Board of Appeals

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COURT RULES AND RIPENESS

Hendee v. Putnam Twp. 486 Mich. 556; 786 N.W.2d 521 (July 15, 2010)

- Plaintiffs alleged that township's refusal to rezone property to allow mobile home development deprived them of equal protection and substantive due process, constituted an unconstitutional taking, and the township's zoning was exclusionary on grounds that the zoning map provided no area for mobile homes
- Claim was not ripe for judicial review—plaintiffs had withdrawn their rezoning application when township indicated it would not process the application while a PUD application for the parcel was pending
- Ripeness requires a final decision by the local authority

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RIPENESS & EXCLUSION

DF Land Dev., LLC v. Charter Twp. of Ann Arbor No. 291362, Court of Appeals, Unpublished, July 13, 2010

- Facial exclusionary zoning challenge to ordinance was ripe because plaintiffs showed that township would deny rezoning application, thus application to the township would have been futile
- But, the Ordinance was not exclusionary; plaintiffs did not make an adequate showing of need for commercial zoning, and such zoning—although limited—existed elsewhere in the township and in the immediate area, though that area was outside the township

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COURT RULES AND RIPENESS

Miles Christi Religious Order v. Township of Northville 629 F.3d 533 (2010)

- Religious order sued township and officials based on a dispute over application of several township zoning ordinances to a house owned by the order, invoking the free-exercise protections of the First and Fourteenth Amendments, RLUIPA, and Michigan Constitution
- Claim was not ripe because the plaintiff could not show that the ZBA had reached a final decision, nor had the plaintiff even approached the ZBA to determine whether it would be required to submit to the township's site plan requirements; potential for plaintiff to receive a variance from the ZBA undermined its case

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RLUIPA

Great Lakes Soc'y v. Georgetown Charter Twp. No. 296370, Court of Appeals, published opinion April 28, 2011

- Plaintiff was denied SUP and variances for 2-story building for worship services and supporting ministries in a residential district
- ZBA decided applicant did not meet definition of 'church' and denied frontage variance
- Trial court upheld ZBA decision, did not address RLUIPA or constitutional claims and granted summary disposition to township
- Court ruled no RLUIPA violation and rejected the constitutional claims and summary disposition complaint

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DUE PROCESS AND EQUAL PROTECTION

Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp. 486 Mich. 311; 783 N.W.2d 695 (2010)

- Denial of religious school's variance request to operate a primary school in an area zoned Office Park (OP) by the township did not violate equal protection—school did not show disparate treatment of similarly situated entities or that the variance was denied because of religious animus
- Religious daycare had previously operated in the OP; primary school was not a substituted use because the ordinance expressly permitted daycare facilities in the OP district but did not allow schools

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DUE PROCESS AND EQUAL PROTECTION

United Inv., Inc. v. City of Mount Pleasant No. 292279, Court of Appeals, Unpublished October 21, 2010

- City did not breach its Planned Residential Development agreement with developer in violation of the implied covenant of good faith and fair dealing; amendment was a new contract, so City could not be in breach
- PRD agreement permitted developer to construct multi-family units, but developer was seeking amendment to increase the density allowance
- Zoning ordinance amendment enacted during negotiations clarifying density requirements effectively disallowed developer's density increase

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DUE PROCESS AND EQUAL PROTECTION

Kyser cited!

Whitmore Lake 23 LLC v Ann Arbor Charter Twp. No. 294696, Court of Appeals, unpublished opinion, April 28, 2011

- Rezoning for SFR on ½ acre lots denied. Plaintiffs sued, claims included allegations of: substantive due process, equal protection, exclusionary zoning, inverse condemnation violations, and appeal of ZBA denial of requests for variances
- Trial court upheld ZBA denials and dismissed remaining claims
- COA upheld trial court saying plaintiff failed to overcome presumption of validity; while wisdom of township's zoning may be questioned, it was not unreasonable.

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DUE PROCESS AND EQUAL PROTECTION

What NOT to do!

Paeth v. Worth Twp. 705 F. Supp. 2d 753 (E.D. Mich. 2010)

- Various permits for renovation of a cottage were revoked and stop-work order issued without notice as a means of retaliation against property owner, violating due process rights in a lengthy zoning dispute
- Township's actions were designed to prevent appeal of township decisions to the ZBA (even though 3 times the ZBA denied variances, and circuit court overruled)
- Court did not find violation of equal treatment, but did find retaliation and procedural due process violations
- Court awarded over \$800,000 in damages to the Paeth's; appeal to Fed. Court of Appeals is pending

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FREE SPEECH

Big Dipper Entertainment, L.L.C. v. City of Warren 2011 U.S. App. LEXIS 7551; 2011 FED App. 0091P (6th Cir. 2011), April 13, 2011

- Restrictions on location and licensing of adult businesses were constitutional
- City made a proper showing that ordinance was aimed at regulating the secondary effects of adult businesses (based on 49 studies) and not the protected speech itself
- Reasonable alternative avenues of expression were available—trial court found that the restrictions would reduce available sites for adult businesses from 39 to 27, thus providing a still-sufficient number of potential sites given limited demand for such businesses

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TAKINGS

Petoskey Inv. Group, LLC v. Bear Creek Twp. Nos. 292811 & 294122, Court of Appeals, Unpublished, November 18, 2010

- Payment of just compensation to developer was not required for the delay imposed by a referendum of a consent judgment rezoning property
- Township was under threat of a mandamus action—even if it had not voluntarily published notice of the rezoning and held the referendum, a court would have ordered such actions
- Project was eventually completed based on a federal court ordered consent agreement

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ENFORCEMENT ISSUES

Hussein v. City of Perrysburg 617 F.3d 828 (6th Cir. 2010)

- City inspector threatening litigation if contractor did not remove asphalt on plaintiff's driveway when site was under a stop work order, did not violate any due process rights of the plaintiff and City officials were subject to qualified immunity
- Inspectors were entitled to qualified immunity because state officials are permitted to inform citizens of the officials' view that a citizen is violating the law or may threaten legal action against a wrongdoer
- The threat did not actually deprive the citizen of property, and the threat acted as notice; the government's prohibition against the driveway was reasonable under the Due Process Clause

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ENFORCEMENT ISSUES

Township of Brooks v Davis, No. 296035, Court of Appeals. Unpublished, May 17, 2011.

- A magistrate hearing a civil infraction ticket at an informal hearing found a property owner in violation of the ordinance, however, never reduced the order to writing.
- A subsequent formal hearing before a circuit court judge and then an appeal to the COA were held improper, as an appeal cannot be taken until a decision is final, and it is not final without a written order.

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ENFORCEMENT ISSUES

City of Saugatuck v John Breen, et al., No. 297530. Court of Appeals. Unpublished, April 28, 2011.

- A dispute over whether appellant was the property owner responsible for illegally renting out part of their home for vacation rentals was decided in favor of the city.
- Because this was a repeated violation, the court ordered an injunction preventing future short term rentals of the property.

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LIABILITY

Gordon v Lippens Construction, Chikaming Twp. et al, No. 293084, Court of Appeals. Unpublished, Nov. 30, 2010.

- Homeowners sued their builder, township and its building inspector for poor workmanship.
- Circuit court held a reasonable jury would find the building inspector was grossly negligent.
- COA reversed holding BI's failure to do his job was not the proximate cause of homeowner's injury, and hence BI was not liable due to governmental immunity.

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RIPARIAN AND WATERFRONT RIGHTS

2000 Baum Family Trust v. Babel 488 Mich. 136; 793 N.W.2d 633 (2010)

- Majority (4-3) overturned COA and ruled front lot owners whose property abuts a public road dedicated in 1911 and running parallel to the lakeshore have riparian rights in the lake (i.e. public street did not sever the riparian rights); backlot owners do not have riparian rights
- Statutory “base fee” for the public right-of-way is not the type of fee title capable of destroying riparian rights; County Road Commission could not exercise riparian rights to the road because such uses were incompatible with the underlying designation as a public passage

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SEWERAGE AND ENVIRONMENTAL LIABILITY

Dept. of Environmental Quality v. Township of Worth 2010 Mich. App. LEXIS 1572 (2010)

- Private septic systems were failing, resulting in discharge of effluent into Lake Huron; DEQ attempted to require the township to create a sanitary sewer system
- Court ruled, the existence of discharge from non-municipal sources does not obligate the township to create sanitary sewer system
- Case is on appeal

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PREEMPTION & SOLID WASTE

Rondigo, LLC v. Township of Casco No. 292611, Court of Appeals, Unpublished, December 16, 2010

- NREPA does not preempt township’s recycling ordinance requiring a special use permit for composting operations in industrial zones
- Plaintiff became a registered composting operation per NREPA, but township rejected plaintiff’s site plan and special use permit applications
- Ordinance and NREPA can coexist, as NREPA does not expressly preempt local ordinances, nor did the legislative history of NREPA suggest intent to preempt local ordinances

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ZBA APPEAL PERIOD

Norma Camp, et al v City of Charlevoix, No. 291473. Unpublished, Oct. 26, 2011.

- A trial court improperly allowed an appeal to a ZBA when a party failed to meet the city’s 30-day time period for appealing the zoning administrator’s issuance of a zoning permit.

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OPEN MEETINGS ACT

Dick Brown, et al v Plainfield Township, et al, No. 291025, Court of Appeals. Unpublished, Nov. 9, 2010.

- Because there was no delegation of authority from the township board to the township supervisor, the supervisor did not constitute a public body for the purposes of the OMA when making a recommendation concerning the appointment of a new zoning administrator.

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INTERLOCAL AGREEMENTS

Charter Township of Haring v City of Cadillac, et al. No 292122, Court of Appeals. Unpublished, Nov. 23, 2010.

- Where an interlocal contract for the provision of wastewater treatment services specifically states that it terminates on a specific date, the city providing the services is not obligated to continue providing such services after that date regardless of the “design life” of the treatment system infrastructure.

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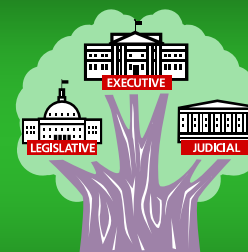
PEDESTRIAN PATHWAYS

Michigan Attorney General Opinion Number 7251, October 21, 2010

- A path for use by pedestrians and bicyclists is a proper use of an easement granted for highway purposes.
- Because it is a proper use within the scope of an easement granted for highway purposes, a county road commission need not obtain the consent of property owners abutting the easement before establishing a pedestrian and bicycle pathway within the right-of-way.
- A pedestrian and bicycle pathway may be established within the right-of-way of a county road built on an easement granted for highway purposes.

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NEW LAWS & PENDING LEGISLATION



See Sept. 2011 *PZN* for a much longer list of pending legislation.

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NEW LAW

- Production of ethanol on farms: **SB 46, now P.A. 97 of 2011**. Small on-farm biofuel production facilities are allowed by right if the farm grows most of the feedstock and uses most of the biofuel produced.
- Production above 100,000 gallons could be subject to special use permit requirements, a 100' setback requirement, and other requirements.

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MEDICAL MARIHUANA

- HB 4397 and SB 17 – Would amend the Public Health Code to prohibit the organization or operation of a marihuana bar or club.
- HB 4661 – Would amend the Michigan Medical Marihuana Act to prohibit cultivation of marihuana within 500 feet of a church or other house of worship or day care center
- 14 other pieces of pending legis. See Oct. **PZN** and Gerald Fisher's session at conf.

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INCLUSIONARY ZONING

- SB 195 – New act that would permit local governments to use inclusionary zoning to increase the availability of affordable dwelling units within its jurisdiction.
- Could permit density bonus to developers that included affordable units as part of a residential development.
- Unit would have to meet affordability tests for at least 10, but not more than 50 years

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ECONOMIC DEVELOPMENT

- SB 111 – Would amend the Michigan Renaissance Zone Act to add new provisions for Entrepreneurial Business Facilities that have as their principal function the research, development, support, manufacturing, or provision of a service for an entrepreneurial business.
- HB 4640 – Would amend the Water Resource Improvement Tax Increment Finance Authority Act to permit use of TIF's for harbor dredging and removal of spoils.

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MUNICIPAL PARTNERSHIP

- SB 8 – Would create the Municipal Partnership Act to permit a wide range of joint endeavors such as service sharing among 2 or more units of government or public agencies.
- Could be used to perform or exercise any function, service, power or privilege that the local government or public agency could each exercise separately.
- Passed Senate, pending in House.

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PUBLIC NOTICE

- SB 163 – Would permit certain legal notices to be published online instead of in a newspaper of general circulation.
- SB 164 – Would amend NREPA to revise publication requirements related to surplus land sales.
- HB 4474 – Would allow townships to post public notices in the office of the clerk and online, instead of a newspaper.

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PARTICULAR LAND USES

- HB 4080 – Would establish new requirements including noise thresholds for oil and gas drilling equipment in residential areas.
- HB 4837 – Would require zoning compliance as a condition of issuance of wastewater permits.
- HB 4887 – Would authorize gardening in residential zones.
- HB 4933 – Would create new act to impose completion date on sidewalk construction in developments.

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SCHOOL SITE PLANS

- SB 48 – Would expand scope of local site plan review of school buildings to those schools which do not provide transportation to the site.

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TRANSPORTATION

- Bridge to Canada: SB – 66, 372, 411, and HB 4636.
- Regional Transportation Authority: SB 443, 444, 445.

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OTHER MATERIALS

- Tomorrow's session on Draft Regional Council Act 3:30 – 4:45 PM
- Special *PZN* issue on Medical Marihuana: Court case summaries and summaries of pending legislation
- New **Sign Guidebook** and Training Programs end of year (sign up sheet)
- Planning Law Books
- Economic Development Law Books

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QUESTIONS & ANSWERS



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