GOVERNMENT LAW

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I. INTRODUCTION

Michigan courts published fewer opinions in the government law area during the 2008-2009 *Survey* period than prior years. The Michigan Supreme Court issued no landmark opinions that heralded significant or historic changes in governmental immunity or in the legal relationships among public corporations, but did issue some noteworthy zoning and land use opinions. Both the supreme court and the court of appeals are still exploring the boundaries of the exemptions from disclosure in the Michigan Freedom of Information Act,[1] but the newest interpretations are modest changes. The few reported opinions in governmental immunity reflect the severe limitations that the Michigan Supreme Court has imposed on litigable claims over the past decade. Unlike prior election years and with no significant legislative changes to election law, the courts issued no major opinions concerning voting rights or procedures. Political activity in the City of Detroit generated a usual number of court rulings, but none of the reported cases created new legal rules applicable to Michigan municipalities in general.

II. PUBLIC CORPORATIONS

Michigan law permits township residents to elect a township park commission.[2] Township voters first must approve the creation of the commission, and then must elect individual commissioners.[3] The

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1. MICH. COMP. LAWS ANN. §§ 15.231-.246 (West 2006).
2. MICH. COMP. LAWS ANN. §§ 41.421-.429 (West 2006).
3. MICH. COMP. LAWS ANN. § 41.426 (West 2006).

commission "shall have the authority to acquire, maintain, manage, and control township parks and places of recreation, including bathing beaches, and shall have the authority, in the name of the township, to condemn land for those purposes."[4] A parks commission elected under this statute has much more legal authority and independence than the parks and recreation advisory boards appointed by most townships.[5] Less than three dozen of the 1,240 Michigan townships have elected park commissions.[6]

Lincoln Charter Township citizens elected a park commission in 1972 but "eventually became disillusioned" with the concept.[7] In 2006, township electors filed a petition to dissolve the commission and transfer control of the parks back to the township trustees.[8] Mimicking the statutory petition/election procedure which created the commission, the Lincoln Township trustees chose to submit the dissolution question to township voters.[9]

Two months prior to the election, a group of citizens opposing the dissolution asked the Michigan attorney general to intervene.[10] The Attorney General declined.[11] The citizens then filed a quo warranto action in Berrien County Trial Court,[12] alleging that defendant trustees were "wrongfully usurping, intruding into and claiming the right to exercise the responsibilities of and the offices of Lincoln Charter Township Park Commissioner."[13] Plaintiffs argued township electors had no legal authority to dissolve the park commission and "that the proposed ballot question was nothing more that [sic] an improper recall effort."[14] Plaintiffs cited an earlier Michigan Attorney General opinion concluding that a township board resolution or an election cannot

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4. MICH. COMP. LAWS ANN. § 41.426a (West 2009).

5. 1981-1982 Mich. Op. Att'y Gen. 163, at *1-2 (1981).

6. What is a Township?, http://www.michigantownships.org/whatisatwp.asp (last visited Mar. 25, 2009).

7. Risk v. Lincoln Charter Twp. Bd. of Trustees, 279 Mich. App. 389, 391, 760 N.W.2d 510, 511 (2008).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. Michigan law allows a person who requests the Michigan Attorney General to initiate a *quo warranto* action but is turned away to "bring the action upon leave of court." MICH. COMP. LAWS ANN. § 600.4501 (West 2000). If the plaintiff is alleging election error or fraud, a prior request to the Attorney General to intervene is not required. *Risk*, 279 Mich. App. at 393 n.2, 760 N.W.2d at 512 n.2 (citing MICH. COMP. LAWS ANN. § 600.4545 (West 2000)).

13. *Risk*, 279 Mich. App. at 392, 760 N.W.2d at 511.

14. *Id.* at 392, 760 N.W.2d at 512.

dissolve a voter-established parks commission.[15] Defendant trustees argued that since the statute allows township voters to establish a park commission after filing petitions and an election, the statute allows "by implication" the dissolution of the commission by the same method.[16] In November 2007, before the trial court ruled on the validity of the election, township electors voted to dissolve the parks commission.[17]

After the election, plaintiffs filed a *quo warranto* action.[18] The trial court ruled from the bench that the election was valid.[19] The court concluded that OAG 7039, cited by the plaintiffs was "incorrect."[20] The trial court added that "the political power to dissolve the Parks Commission remains in the people of Lincoln Township," subject to Article 1, Section 1 of the Michigan Constitution which says that all "political power is inherent in the people."[21] The plaintiffs appealed.[22]

The court of appeals reversed the trial court and held that the trial court erred by validating the election results.[23] The court quoted favorably OAG 7039, which the trial court had repudiated.[24] OAG 7039 noted that the township parks statute and the charter township act are both silent as to whether or by what means a township board or the electors may dissolve a township parks commission.[25] The court also noted that OAG 7039 quoted a very early case which opined that municipal corporations "exist only by legislative sanction, so they cannot be dissolved or cease to exist except by legislative consent or pursuant to legislative provision."[26] The court agreed with the defendants that "provisions of law concerning counties, townships, cities and villages 'shall be liberally construed in their favor.'"[27] The court of appeals noted, however, that while other statutes explicitly provide for both the establishment and dissolution of various commissions by vote, the parks statute is silent on this.[28] The court opined that since the Legislature

15. *Id.* at 392, 760 N.W.2d at 511 (citing 1999 Op. Att'y. Gen. 7039).
16. *Id.* at 393, 760 N.W.2d at 512.
17. *Id.* at 392, 760 N.W.2d at 512.
18. *Id.* at 392, 760 N.W.2d at 511.
19. *Risk,* 279 Mich. App. at 396, 760 N.W.2d at 513-14.
20. *Id.* at 395, 769 N.W.2d at 513.
21. *Id.*
22. *Id.* at 390-91, 769 N.W.2d at 511.
23. *Id.* at 396, 769 N.W.2d at 514.
24. *Id.* at 399, 760 N.W.2d at 515.
25. *Risk,* 279 Mich. App. at 397-98, 760 N.W.2d at 514 (citing 1999 Op. Att'y. Gen. 7039, at 80).
26. *Id.* at 398, 760 N.W. at 515 (citing Cain v. Brown, 111 Mich. 657, 661, 70 N.W.2d 337, 339 (1897)).
27. *Id.* at 399, 760 N.W.2d at 515.
28. *Id.* at 400, 760 N.W.2d at 516.

apparently knows how to provide for the creation and dissolution of various bodies, "we must view as intentional the Legislature's failure to provide for the dissolution of township park commissions."[29]

The court concluded that the Lincoln Township trustees had no authority to place the dissolution question before the voters.[30] The court further held that since the election did not "conform" to the various recall requirements, the dissolution election did not recall the individual parks commissioners.[31] The court of appeals ordered the trial court to reinstate the parks commission as it would have existed on the date of the dissolution election.[32] The court also ordered adjustments to commission membership due to upcoming election filing deadlines.[33] The Michigan Supreme Court subsequently accepted the parties' stipulation to dismiss defendants' appeal.[34]

A court of appeals opinion interpreted another little-known Michigan statute pertaining to public corporations and authority.[35] Public Act 34 of 1917, as amended by 1957 PA 53, regulates rates for water sold by a municipality to extra-territorial customers.[36] In 1980, the City of Grand Ledge and neighboring Oneida Township approved a long-term water agreement.[37] Grand Ledge supplies water and sanitary sewer services to some Oneida residents.[38] Oneida owns the water facilities which transport the water to the residents, but Grand Ledge maintains and operates these facilities.[39] Grand Ledge delivers water directly to each customer and bills on the basis of consumption.[40] Oneida is the contracting party under the 1980 agreement, but the township does not receive and is not billed for any water services.[41]

In 1980, the statute provided that municipal corporations had the authority to sell water outside of their territorial limits "but the price charged shall not be less than nor more than double that paid by customers within their own territory."[42] The 1980 agreement between

29. *Id.* at 404, 760 N.W.2d at 518.
30. *Id.* at 404-05, 760 N.W.2d at 518.
31. *Risk*, 279 Mich. App. at 405, 760 N.W.2d at 519.
32. *Id.* at 406, 760 N.W.2d at 519.
33. *Id.*
34. Risk v. Lincoln Charter Twp. Bd. Of Trustees, 759 N.W.2d 405, 405 (2009).
35. Oneida Charter Twp. v. City of Grand Ledge, 282 Mich. App. 435, 766 N.W.2d 291 (2009), *rev'd*, 485 Mich. 859, 771 N.W.2d 785 (2009).
36. MICH. COMP. LAWS ANN. § 123.141 (West 2006).
37. *Oneida Charter Twp.*, 282 Mich. App. at 437, 766 N.W.2d at 292.
38. *Id.*
39. *Id.* at 437-38, 766 N.W.2d at 292.
40. *Id.* at 437.
41. *Id.* at 437-38, 766 N.W.2d at 292.
42. *Id.* at 438, 766 N.W.2d at 293.

Oneida and Grand Ledge provided that "TOWNSHIP users shall be required to pay for water service . . . in amounts as may be established by CITY Ordinances . . . [for] which charges shall be at least twice the amount currently being charged CITY users for the same service."[43] From 1980 until the resolution of this case, Oneida water rates were twice the Grand Ledge rates for the same service.[44]

In 1981, just months after the 1980 Oneida/Grand Ledge agreement, the Michigan Legislature amended the 1917 statute and replaced the language quoted above with two new subsections.[45] The new subsection 2 requires that rates charged to customers be based upon the "actual cost of service" but permits existing "contractual minimum or maximum limits" to remain for the "life of the contract."[46] Subsection 2 continues "[t]his subsection shall not apply to a water system that is not a contractual customer of another water department and that serves less than 1% of the population of the state."[47] The amendment also added a new subsection 3 which provides that the "retail rate charged to the inhabitants of a city, village, township, or authority which is a contractual customer as provided in subsection 2 shall not exceed the actual cost of providing the service."[48]

The published opinion of the court of appeals does not explain why it took the residents of Oneida Township over twenty years after the 1981 amendment to assert that they were paying too much for water service. Nonetheless, plaintiff residents of Oneida sued Grand Ledge in 2005 seeking an adjustment to their water rates to reflect the "actual cost" of service under M.C.L.A. section 123.141.[49] The trial court conceded that the amended statute is "at best, confusing."[50] After an analysis of the legislative history and statutory language, "[t]he trial court found in favor of Grand Ledge."[51] Oneida appealed.[52]

The court of appeals reversed and held that the higher rates charged by Grand Ledge to Oneida customers violated the statute.[53] The court initially conceded that the "plain and unambiguous" language in the statute "may be difficult to apply to the specific factual situation

43. *Oneida Charter Twp.*, 282 Mich App. at 438, 766 N.W.2d at 293.
44. *Id.*
45. *Id.* at 439, 766 N.W.2d at 293.
46. MICH. COMP. LAWS ANN. § 123.141(2) (West 2006).
47. *Id.*
48. *Id.* § 123.141(3).
49. *Oneida Charter Twp.*, 282 Mich. App. at 440, 766 N.W.2d at 294.
50. *Id.* at 441, 766 N.W.2d at 294.
51. *Id.*
52. *Id.* at 441, 776 N.W.2d at 295.
53. *Id.* at 450-51, 766 N.W.2d at 299-300.

presented here."[54] After a lengthy analysis of the statutory language, the court concluded that the exemption language in subsection 2 pertaining to contractual customers "only applies to the pricing scheme of that particular subsection; it does not exempt water departments selling water services from the pricing requirements of the entire statute."[55] The court held that even though Oneida is a contractual customer under the 1980 agreement, Grand Ledge is bound by subsection 3 which requires that rates to extra-territorial customers be based on actual cost.[56] In a footnote, the court of appeals noted that Grand Ledge and the trial court relied heavily on legislative history in interpreting M.C.L. section 123.141.[57] The court dismissed their historical review and concluded that "if the meaning of the statute is plain and unambiguous, there is no reason to inquire into the Legislature's purpose or motives beyond the statute's plain language."[58]

In another rate-setting controversy, the court of appeals upheld new rate surcharges approved by the Michigan Public Service Commission (PSC) for customers of Michigan Consolidated Gas Company (MichCon).[59] This case is discussed here not because the rules apply to other government agencies, but because the case provides rare insight into utility rate-setting procedures. In December, 2006, the PSC issued an order authorizing MichCon to add uncollectible expense true-up mechanism (UETM) surcharges to natural gas rates.[60] An "uncollectable expense" is the amount of unpaid utility bills remaining after the company has exhausted collection efforts with customers who do not fully pay their bills.[61] Under the UETM rate-setting procedure, the PSC estimates an amount of "uncollectable expense" to include in rates for a calendar year.[62] At the end of the calendar year, the utility determines the actual uncollectable expense and compares it to the projection. If the actual amount of uncollectible expense exceeds the estimate, "UETM surcharges will be imposed on ratepayers to attempt to collect 90 percent

54. *Id.* at 445, 766 N.W.2d at 296-97.

55. *Oneida Charter Twp.*, 282 Mich. App. at 449, 766 N.W.2d at 299 (West 2000).

56. *Id.* at 451, 766 N.W.2d at 299. The supreme court, in lieu of granting leave to appeal, reversed the court of appeals and remanded the case to the trial court for reinstatement of its order dismissing the case. Oneida Charter Twp. v. City of Grand Ledge, 485 Mich. 859, 771 N.W.2d 785 (2009).

57. *Oneida Charter Twp.*, 282 Mich. App. at 445 n.7, 766 N.W.2d at 297 n.7.

58. *Id.*

59. *In re* Mich. Consol. Gas Co., 281 Mich. App. 545, 547, 761 N.W.2d 482, 484 (2008).

60. *Id.*

61. *Id.* at 546 n.1, 761 N.W.2d at 483 n.1.

62. *Id.* at 546-47, 761 N.W.2d at 483.

of the difference between the actual and the estimated uncollectible expense."[63] If the estimate exceeds the expense, "credits will be applied to attempt to return 90 percent of the difference."[64]

The Michigan Attorney General challenged the PSC order.[65] The Attorney General argued that the UETM is not within the scope of the PSC's statutory authority and is impermissibly retroactive.[66] The court of appeals disagreed.[67] The court reasoned that its opinion *In re Consumers Energy Co.*,[68] issued after the filing of appeal briefs in the *Michigan Consolidated Gas* case, required the rejection of the Attorney General's position.[69]

In *Consumers Energy*, the court upheld the PSC's incorporation of an "equalization mechanism" into regulated rates for pension and other post-employment benefits.[70] The *Consumers Energy* court first argued that rates set by the PSC are presumed, *prima facie*, to be lawful and reasonable.[71] The court then opined that the adjustment of future rates based upon earlier pension and employment-related expenses is not retroactive ratemaking.[72] The court cited with approval an earlier case which held that "when capitalized expenditures are amortized, the amortization becomes a current expense even though it reflects expenditures that were capitalized in the past."[73] The *Consumers Energy* court concluded that there is no "sound basis" for distinguishing between the equalization mechanism and the amortized expenses.[74]

The *Michigan Consolidated Gas* court affirmed the PSC order and concluded that the equalization mechanism for uncollectible invoices was lawful.[75] The court reasoned that in both the *Consumers Energy* and *Michigan Consolidated Gas* cases, the rate-making mechanism involves an initial projection of the relevant costs with the "actual such expense later being compared with that initial amount and a difference between

63. *Id.* at 547, 761 N.W.2d at 483.
64. *Id.*
65. *Mich. Consol. Gas*, 281 Mich. App. at 547, 761 N.W.2d at 483.
66. *Id.* at 547, 761 N.W.2d 484.
67. *Id.*
68. 279 Mich. App. 180, 756 N.W.2d 253 (2008).
69. *Mich. Consol. Gas,* 281 Mich. App. at 548, 761 N.W.2d at 484.
70. *Id.*
71. *Id.* at 549, 761 N.W.2d at 484.
72. *Id.* at 549-50, 761 N.W.2d at 485.
73. *Id.* (citing Ass'n of Business Advocating Tariff Equity (ABATE) v. Pub. Serv. Comm., 208 Mich. App. 248, 261, 527 N.W.2d 533, 541 (1994)) (internal quotation marks omitted).
74. *Id.*
75. *Mich. Consol. Gas*, 281 Mich. App. At 549, 761 N.W.2d at 485.

the two rates being deferred for future recovery."[76] The court stated that the PSC was acting within its authority in adopting the UETM "to ensure that the portion of rates attributable to uncollectable expense would substantially match actual uncollectable expense."[77] The court further opined that the deferral of ninety percent of the difference between the estimated amount and the actual amount to a future year is lawful.[78] The court reasoned that, "because the deferred expense is deemed an expense of the year to which it is deferred and, thus, is recovered on a prospective basis," the new rates are not unlawfully retroactive. [79]

III. FREEDOM OF INFORMATION ACT

The Michigan Supreme Court issued two opinions on the same day interpreting the privacy exemption in the Michigan Freedom of Information Act (FOIA).[80] The FOIA privacy exemption provides that a public body may exempt from disclosure "[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy."[81] The statutory FOIA exemptions also include what has become known as the law enforcement exemption.[82] The law enforcement exemption also includes a privacy component. It provides that a public body may exempt from disclosure "[i]nvestigating records compiled for law enforcement purposes" if the disclosure would "[i]nterfere with law enforcement proceedings . . . [d]eprive a person of the right to a fair trial or impartial administrative adjudication," or "[c]onstitute an unwarranted invasion of personal privacy."[83]

A number of earlier cases interpreting the scope of both the privacy and law enforcement exemptions form the foundation for this year's opinions.[84] In this year's first case, a newspaper submitted a FOIA request to Michigan State University (MSU) for a copy of a police report on a felonious assault in a dorm room.[85] The newspaper requested the

76. *Id.* at 548, 761 N.W.2d at 484.
77. *Id.* at 549, 761 N.W.2d at 484.
78. *Id.*
79. *Id.* at 549-50, 761 N.W.2d at 484.
80. MICH. COMP. LAWS ANN. §§ 15.231-.246 (West 2004 & Supp. 2006).
81. MICH. COMP. LAWS ANN. § 15.243(1)(a).
82. MICH. COMP. LAWS ANN. § 15.243(1)(b)(i) – (iii).
83. *Id.*
84. *See generally* Dep't. of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989); Evening News Ass'n v. City of Troy, 417 Mich. 481, 339 N.W.2d 421 (1983).
85. State News v. Mich. State Univ., 481 Mich. 692, 695-96, 753 N.W.2d 20, 22 (2009).

report one week after the incident and a few days after the same newspaper published a story identifying the alleged assailants.[86] MSU denied the request citing both the privacy and law enforcement exemptions.[87] The MSU president upheld the denial, and the newspaper appealed.[88] The circuit court ruled that the document was exempt under both exemptions.[89] Relying on *Bradley v. Saranac Community Schools*, a 1997 opinion defining "information of a personal nature,"[90] the court of appeals subsequently "held that on remand the circuit court should review the requested information in camera."[91] The court of appeals further held that the court should separate the exempt from the nonexempt material and release the nonexempt material to the newspaper.[92]

The supreme court granted leave to appeal on the limited question of whether the court of appeals erred when it instructed the circuit court to consider "whether the 'personal nature' of such records may be affected by the contemporaneous or later public status of some or all of the information."[93] The court added that "[w]e are not determining in this appeal whether the police incident report ultimately is exempt from disclosure."[94] The court also noted that another case, *Michigan Federation of Teachers v. University of Michigan*,[95] modified the meaning of "information of a personal nature" as defined in *Bradley* while this case was pending.[96] The court instructed that "the modified definition set forth in *Michigan Federation of Teachers* must guide the circuit court's application of the privacy exemption."[97]

On the limited question, the supreme court held "that events that occur after a public body's denial of a FOIA request are not relevant to the judicial review of the decision."[98] The court continued that the "passage of time" and events that immediately followed, such as the publication of the names of the assailants and the initial criminal proceedings, "have no bearing" on whether MSU properly denied the

86. *Id.* at 694, 753 N.W.2d at 22.
87. *Id.*
88. *Id.* at 696, 753 N.W.2d at 22-23.
89. *Id.* at 697, 753 N.W.2d at 23.
90. 455 Mich. 285, 306-07, 565 N.W.2d 650, 659-60 (1997).
91. *State News*, 481 Mich. at 699, 753 N.W.2d at 24 (discussing State News v. Mich. State Univ., 274 Mich. App. 558, 735 N.W.2d 649 (2007)).
92. *Id.*
93. *Id.* at 700, 753 N.W.2d at 25.
94. *Id.* at 701, 753 N.W.2d at 25.
95. 481 Mich. 657, 660, 753 N.W.2d 28, 31 (2008).
96. *State News*, 481 Mich. at 701 n. 21, 753 N.W.2d at 25 n. 21.
97. *Id.*
98. *Id.* at 705, 753 N.W.2d at 27.

FOIA request.[99] The court opined that "[t]he denial of a FOIA request occurs at a definite point in time. The public body relies on the information available to it at that time to make a legal judgment whether the requested public record is fully or partially exempt from disclosure."[100] The court continued that "[t]he determinative legal question for a judicial body reviewing the denial is whether the public body erred because the FOIA exemption applied *when it denied the request.* Subsequent developments are irrelevant."[101] The court noted favorably an observation by the U.S. Supreme Court, quoted in *Michigan Federation of Teachers,* that "[a]n individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form," such as in the reports of criminal proceedings.[102]

The court observed that "the subsequent availability of information as a result of later court proceedings in the criminal justice system may well strengthen or weaken the arguments of the parties to a FOIA dispute regarding the applicability of the privacy exemption and the law-enforcement-purpose exemption."[103] The court did not explain how later proceedings might affect the exemption analysis. The court also noted that the FOIA does not prevent a party from subsequently submitting another FOIA request for the same material "if it believes that, because of changed circumstances, the record can no longer be withheld from disclosure."[104] A public body has no duty, however, "to continue to monitor FOIA requests once they have been denied" if circumstances change.[105]

In the second supreme court opinion issued the same day, the court held that home addresses and telephone numbers of over 16,000 University of Michigan employees are exempt from disclosure.[106] The University initially disclosed over 20,000 home addresses and telephone numbers of other employees who had given the University permission to publish this information in the University's directory.[107] The University refused to disclose the information for the other 16,000 employees who

99. *Id.*

100. *Id.* at 703, 753 N.W.2d at 27.

101. *Id.* at 703-04, 753 N.W.2d at 27.

102. *State News*, 481 Mich. at 701 n.21, 753 N.W.2d at 25 n.21 (internal quotation marks omitted) (citing U.S. Dep't of Defense v. Fed. Labor Relations Auth., 510 U.S. 487, 500 (1994)).

103. *Id.* at 702, 753 N.W2d at 26.

104. *Id.* at 704-05, 753 N.W.2d at 27.

105. *Id.* at 704, 753 N.W.2d at 27.

106. *Mich. Fed'n of Teachers*, 481 Mich. at 660-61, 753 N.W.2d at 30.

107. *Id.* at 661, 753 N.W.2d at 31-32.

had withheld permission.[108] The circuit court upheld the University's refusal.[109]

The court of appeals reversed and held that the withheld details "were not 'information of a personal nature' because they did not reveal intimate or embarrassing details of an individual's private life, even when considered against the 'customs, mores, or ordinary views of the community.'"[110] The court relied on this description of "information of a personal nature," found in the 1997 *Bradley* case.[111] The court also held that no existing case law concludes that home addresses and telephone numbers taken alone are items of personal information.[112] The court of appeals panel acknowledged that certain employees might have legitimate reasons for keeping their addresses and home telephone numbers confidential.[113] One member of the panel also questioned whether the advent of the national do-not-call list and rising nationwide identity theft had "significantly altered the 'customs, mores, or ordinary views of the community' concerning the disclosure of personal identifying information since the Bradley Court decided the issue in 1997."[114]

In reversing the court of appeals, the supreme court delivered a lengthy historical analysis of the privacy exemption and its application to certain requested items.[115] The court concluded that the exemption has two prongs.[116] First, the information must be "of a personal nature," and second, disclosure of the information must "constitute a clearly unwarranted invasion of privacy."[117] In discussing the scope of the first prong, the supreme court held that the *Bradley* description of items of a personal nature as "intimate" or "embarrassing" details is correct but insufficient.[118] The court concluded that a comment in the *Bradley* decision which expanded the definition to also include "private" or "confidential" information "more accurately and fully describes the intended scope of the statutory text as assessed in the first prong of the

108. *Id.*
109. *Id.* at 662, 753 N.W.2d at 32.
110. *Id.* (citing Mich. Fed'n of Teachers v. Univ. of Mich., No. 258666, 2007 WL 861185 (Mich. Ct. App. March 22, 2007)).
111. *Id.*
112. *Mich. Fed'n of Teachers,* 481 Mich. at 662, 753 N.W.2d at 32.
113. *Id.* at 663, 753 N.W.2d at 32.
114. *Id.* at 663, 753 N.W.2d at 32-33.
115. *Id.* at 665-75, 753 N.W.2d at 33-39.
116. *Id.* at 675, 753 N.W.2d at 39.
117. *Id.*
118. *Mich. Fed'n of Teachers,* 481 Mich. at 675-76, 753 N.W.2d at 39.

privacy exemption."[119] The court concluded that this expanded test is now appropriate.[120]

The supreme court applied the "clarified" test to the home addresses and telephone numbers.[121] The court acknowledged that it has a "checkered history of splintered and equally divided decisions attempting to determine whether this type of information is 'of a personal nature.'"[122] The court chose this case to "settle the question" and held that employees' home addresses and telephone numbers "reveal embarrassing, intimate, private, or confidential details about those individuals."[123] The court focused on the potential for harassment and the threat to personal safety that the release of the addresses and telephone numbers might cause.[124] The court acknowledged that this same information might be available through other sources such as telephone directories, but stated that the "disclosure of information of a personal nature into the public sphere in certain instances does not automatically remove the protection of the privacy exemption and subject the information to disclosure in every other circumstance."[125]

As to the second prong of the test, the court held that the disclosure of home addresses and telephone numbers "would constitute a clearly unwarranted invasion of an individual's privacy."[126] The court based its decision on the "core-purpose" test in the *Mager v. Department of State Police* opinion issued in 2000.[127] The *Mager* court identified the "core purpose" of FOIA as "contributing significantly to public understanding of the operations or activities of the government."[128] The Supreme Court concluded that the disclosure of the home addresses and telephone numbers would not "further a core purpose of FOIA by shedding light on whether the University of Michigan is functioning properly and consistently with its statutory and constitutional mandates."[129]

Left unsettled in this opinion is the scope of the holding. The court's definition of "core purpose" is exceptionally broad. A future litigant might successfully argue that an examination of the home addresses of

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119. *Id.* at 676, 753 N.W.2d at 40.
120. *See id.*
121. *Id.*
122. *Id.* at 677 n.58, 753 N.W.2d at 40 n.58.
123. *Id.* at 676, 753 N.W.2d at 40.
124. *Mich. Fed'n of Teachers*, 481 Mich. at 677, 753 N.W.2d at 40.
125. *Id.* at 680, 753 N.W.2d at 42.
126. *Id.* at 682, 753 N.W.2d at 43.
127. *Id.*
128. *Id.* at 672, 753 N.W.2d at 37-38 (internal quotation marks omitted) (citing Mager v. Dep't. of State Police, 460 Mich. 134, 145, 595 N.W.2d 142, 148 (2000)).
129. *Id.* at 683, 753 N.W.2d at 43.

certain public employees is necessary to fully "understand[] the operations or activities" of a public institution.[130]

IV. ZONING AND LAND USE

The courts issued two decisions this term pertaining to the priority of a local zoning ordinance over the authority of another government entity. In a 2003 decision, the Michigan Supreme Court held that the County Commissioners Act (CCA)[131] had priority over the Township Zoning Act (TZA)[132] when a county proposed building a homeless shelter on county-owned land in Pittsfield Township.[133] The court in *Pittsfield* focused on the CCA section which provides that counties have the power to "[d]etermine the site of, remove, or designate a new site for a county building" and to "[e]rect the necessary buildings for jails, clerks' offices, and other county buildings."[134] The court described its task this year as "to gauge the scope of [the CCA] priority, which relates to a county's power to 'site' and 'erect' 'building(s),' by defining the term 'site.'"[135]

In 2005, Berrien County leased a fourteen-acre parcel of land in Coloma Township for a firearms training facility, which included a building, parking areas, and indoor and outdoor shooting ranges.[136] The proposal drew significant local opposition due to the proximity of the outdoor shooting range to nearby homes, schools, and recreation areas.[137] The township objected because the facility is not a permitted land use within agricultural zoning and because shooting ranges require a special land use permit.[138] The township also argued that the gun ranges would violate the township's anti-noise ordinance.[139] When the county proceeded with construction despite the objections, plaintiff property

130. *See Mich. Fed'n of Teachers*, 481 Mich. at 672-3, 753 N.W.2d at 38.

131. MICH. COMP. LAWS ANN. §§ 46.1-.32 (West 2006).

132. MICH. COMP. LAWS ANN. §§ 125.271-.310 (repealed 2006). In 2006, the Michigan Legislature replaced the TZA with the Michigan Zoning Enabling Act, MICH. COMP. LAWS ANN. §§ 125.3101-.3702 (West 2006). The new act provides that all claims that were pending at the time of the replacement are subject to the TZA.

133. Pittsfield Charter Twp. v. Washtenaw County, 468 Mich. 702, 664 N.W.2d 193 (2003).

134. MICH. COMP. LAWS ANN. § 46.11(b) (West 2006).

135. Herman v. Berrien County, 481 Mich. 352, 354, 750 N.W.2d 570, 572 (2008).

136. *Id.* at 354-55, 750 N.W.2d at 572.

137. *Id.* at 357, 750 N.W.2d at 574.

138. *Id.* at 356, 750 N.W.2d at 574.

139. *Id.*

owners sued.[140] The trial court granted summary disposition to the county based upon the *Pittsfield* decision.[141]

The court of appeals affirmed, also relying on *Pittsfield*.[142] The court of appeals also argued that in *Northville Charter Township v. Northville Public Schools*, the Supreme Court held that the Revised School Code gives exclusive authority to the state superintendant over "site plans" for school buildings.[143] The School Code defined a "school building" in a site plan very broadly to include outdoor athletic fields and facilities.[144] Using the language in the School Code as an analogy since "site" is not defined in the CCA, the court of appeals concluded that a county "site" includes the "entire parcel where the buildings will be located" including the shooting range.[145]

The supreme court acknowledged that even though this was a case of first impression, the "broad question" of priority is "one that we have previously encountered."[146] The court discussed the *Northville* holding,[147] as well as its decision to allow the Department of Corrections to construct a half-way house in a nonconforming zoning district in Detroit.[148] The court stated that both "*Dearden* and *Northville* make it clear that whenever the legal question of priority is presented, it must be resolved by thorough analysis of the statute that purportedly gives the government entity priority over local regulations."[149] The court noted that in both cases, the explicit language in the authorizing statutes grants the government entity "exclusive" jurisdiction over certain land use decisions.[150]

The court further acknowledged that, since the *Pittsfield* decision, "it has become accepted that the CCA gives counties priority over local regulations that inhibit a county's power to site and erect county buildings."[151] Both parties in this case accepted *Pittsfield* as good law.[152]

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140. *Id.* at 358, 750 N.W.2d at 574.

141. *Herman*, 481 Mich. at 358, 750 N.W.2d at 575.

142. *Id.* (citing Herman v. Berrien County, 275 Mich. App. 382, 383, 739 N.W.2d 635, 636 (2007)).

143. *Id.* at 360, 750 N.W.2d at 576 (citing Northville Charter Twp. v. Northville Pub. Sch., 469 Mich. 285, 295, 666 N.W.2d 213, 218 (2003)).

144. *Id. See* MICH. COMP. LAWS ANN. § 380.1263(3) (West 2005).

145. *Herman*, 481 Mich. at 364, 750 N.W.2d 578 (citing *Herman*, 275 Mich. App. at 386-87, 739 N.W.2d at 638).

146. *Id.* at 359, 750 N.W.2d at 575.

147. *Id.* at 360, 750 N.W.2d at 576.

148. *Id.* at 359, 750 N.W.2d 575-76 (citing Dearden v. Detroit, 403 Mich. 257, 264, 269 N.W.2d 139, 142 (1978)).

149. *Id.* at 361, 750 N.W.2d at 576.

150. *Id.* at 359-60, 750 N.W.2d at 576.

151. *Herman*. 481 Mich. at 362, 750 N.W.2d at 577.

The court noted, however, that *Pittsfield* does not answer whether the priority of a county to site buildings under the CCA extends to uses that are ancillary to the buildings, such as shooting ranges.[153]

The supreme court held that "land uses that are ancillary to the county building and not indispensable to its normal use are not covered by the CCA's grant of priority over local regulations."[154] The court stated that the CCA is "unambiguous."[155] "A plain reading of [the CCA] leads to the conclusion that the Legislature intended to give counties the power to 'site' and 'erect' 'county buildings,'" not "a county 'activity' or 'county land use.'"[156] The court acknowledged that a building site must include some ancillary uses to be functional, such as sidewalks and lighting, but the ancillary uses must be "indispensable to the building's normal use."[157]

In a rather tortured analysis, the court concluded that the "normal use" of the firearms training facility "is to conduct classroom (or *indoor*) training, which is different from the outdoor firearms training that occurs in the shooting ranges."[158] The court stated "[i]n other words, the normal use of the outdoor shooting ranges is for outdoor shooting practice and training, while the normal use of the building is for indoor classroom training and practice, despite both uses falling under the broad category of firearms training."[159] Since the outdoor ranges do not have to be located "next to the building", the court held that the CCA does not give outdoor shooting ranges priority over local zoning ordinances.[160]

The supreme court effectively decided another case this term involving priority over local zoning ordinances by denying property-owner plaintiffs leave to appeal.[161] In 2004, the Crystal Lake Property Rights Association sued Benzie County to stop the Michigan Department of Natural Resources (DNR) from constructing a public-access boat launch site on Crystal Lake.[162] At the time, Benzie County had zoning

152. *Id.* at 363, 750 N.W.2d at 577.
153. *Id.*
154. *Id.* at 354, 750 N.W.2d at 572.
155. *Id.* at 366, 750 N.W.2d at 579.
156. *Id.*
157. *Herman*, 481 Mich. at 368-69, 750 N.W.2d at 580.
158. *Id.* at 370, 750 N.W.2d at 581.
159. *Id.*
160. *Id.* at 370-71, 750 N.W.2d at 581-82.
161. Crystal Lake Prop. Rights Ass'n. v. Benzie County, 483 Mich. 920, 920, 762 N.W.2d 526, 527 (2009).
162. Crystal Lake Prop. Rights Ass'n v. Benzie County, 280 Mich. App. 603, 604-05, 760 N.W.2d 802, 803 (2008).

authority over the site under the former County Zoning Act.[163] The planned twenty-acre boat launch site would include four launch ramps, one hundred parking spaces, as well as toilets, benches, and bike racks.[164]

The proposed boat launch site abuts land that is subject to a 1996 settlement agreement between property owners and the Michigan Department of Transportation (MDOT).[165] The settlement entitles DNR to a permanent easement over an abandoned rail line for a ten-foot-wide public trail.[166] The settlement provides that the trail is to be "operated and used in a manner that does not disrupt the lives of the adjoining property owners or diminish their opportunity to use and enjoy the waterfront or place unreasonable restrictions on use of the trail by the public."[167] The agreement also provides that public non-resident access to the trail and trail parking areas is limited to two trail-heads not adjacent to the lake on the east and west ends of the trail.[168] DNR anticipated in settlement negotiations that some trail users would use facilities at the boat launch, but argued that DNR staff could police non-boat parking if it occurs.[169]

Both the Benzie County Board of Commissioners and the Benzonia Township Board approved the boat launch development.[170] Plaintiff property owners sued, arguing among other things that Benzie County violated the County Zoning Act by approving the proposed plan.[171] Plaintiffs further argued that the DNR plan violated the earlier settlement agreement.[172] The trial court ruled that the county zoning ordinance did not apply as long as DNR complied with provisions of the Waterways Commission Act,[173] which regulates the location of boat launch areas on public lakes.[174] The trial court also held that the DNR plan did not violate

163. *Id.* at 606, 760 N.W.2d at 804. In 2006 the Michigan Legislature repealed the County Zoning Act, MICH. COMP. LAWS ANN. § 125.201 (repealed 2006), and other zoning acts and replaced them with the Michigan Zoning Enabling Act, MICH. COMP. LAWS ANN. §§ 125.3101-.3702 (West 2009).

164. *Crystal Lake*, 280 Mich. App. at 606, 760 N.W.2d at 804.

165. *Id.* at 605, 760 N.W.2d at 804.

166. *Id.*

167. *Id.*

168. *Id.* at 614-15, 760 N.W.2d at 808-09.

169. *Id.* at 618, 760 N.W.2d at 810.

170. *Crystal Lake*, 280 Mich. App. at 606, 760 N.W.2d at 804.

171. *Id.* at 606-07, 760 N.W.2d at 804.

172. *Id.* at 606-07, 760 N.W.2d at 804-05.

173. MICH. COMP. LAWS ANN. §§ 324.78101-.78117 (West 2010).

174. *Crystal Lake*, 280 Mich. App. at 607, 760 N.W.2d at 805.

the terms of the settlement agreement.[175] The property owners appealed.[176]

The court of appeals held that "[t]here is simply no basis for concluding that the DNR is exempt from local zoning ordinances" even if it complies with the Waterways Commission Act.[177] The court cited *Burt Township v. Department of Natural Resources*[178] which held that DNR was required to comply with local zoning ordinances in locating a boat launch.[179] The Legislature amended the Waterways Commission Act after the *Burt* decision, but the *Crystal Lake* panel noted that there is "nothing in the amendatory act that establishes a clear expression of legislative intent to modify" the *Burt* decision that zoning ordinance compliance is mandatory.[180] The court noted that other statutes use terms such as "exclusive jurisdiction" and other language to allow certain government agencies to bypass local zoning control.[181] The court concluded that "[a] similar situation is not present in the instant case."[182]

The court of appeals also held that the DNR proposal did not violate the terms of the settlement agreement.[183] The court argued that "[b]y "acquiring property that abuts the trail, the DNR became an adjoining property owner under the settlement and is entitled to the same rights as other property owners, because the settlement provides no exception for governmental entities that become landowners."[184] As to plaintiffs' fear that the boat launch area will become another public access point close to private property, the court noted that access areas for trail use must be clearly marked with appropriate signs, and the boat launch parking plan has no such signage.[185] As to the enforcement difficulty of constantly separating boat launch parking from trail parking, the court simply said that "[i]t is presumed that public officers perform their official duties."[186]A panel member wrote separately to opine that while the boat launch is not in violation of the "plain terms" of the settlement agreement, "the end result is disappointing in that it arises from the state

175. *Id.* at 608, 760 N.W.2d at 805.
176. *Id.*
177. *Id.* at 613, 760 N.W.2d at 808.
178. 459 Mich. 659, 593 N.W.2d 534 (1999).
179. *Crystal Lake,* 280 Mich. App. at 609, 760 N.W.2d at 805-06.
180. *Id.* at 611, 760 N.W.2d at 807.
181. *Id.* at 611-12, 760 N.W.2d at 807-08.
182. *Id.* at 613, 760 N.W.2d at 808.
183. *Id.* at 615, 760 N.W.2d at 809.
184. *Id.*
185. *Crystal Lake*, 280 Mich. App. at 616, 760 N.W.2d at 809.
186. *Id.* (citing Glavin v. State Hwy. Dep't., 269 Mich. 672, 675, 257 N.W. 753 (1934)).

agency [DNR] that is to restrict public access to the trail as outlined in the [Special Trail Use and Law Enforcement Plan]."[187]

Two cases this term involve the scope and application of the 2000 federal Religious Land Use and Institutionalized Persons Act (RLUIPA).[188] RLUIPA prohibits a government entity from imposing a land use regulation that places a "substantial burden on the religious exercise of a person, including a religious assembly or institution" if the burden does not further a compelling governmental interest and is not the least restrictive means of furthering that interest.[189] A number of RLUIPA disputes are just now reaching state appellate courts. The two cases this term demonstrate that Michigan courts are reluctant to give greater deference to land uses proposed by religious institutions compared to secular entities. The threshold imposed by the Michigan Supreme Court in 2008 requires the church to show that the local government's decision "coerce[s] individuals into acting contrary to their religious beliefs."[190] This has become a high bar to overcome. As the court in *Greater Bible Way Temple v. City of Jackson* noted, religious institutions "ha[ve] to follow the law like everyone else."[191]

In this term's first case, Ann Arbor Township had denied a zoning variance for a faith-based day care center on the site of a former secular child care facility.[192] Following lengthy court battles, which will not be summarized here, the court of appeals in *Shepherd I* held that the denial of the variance placed a substantial burden on plaintiff's religious exercise contrary to RLUIPA.[193] The court ruled that the township provided no evidence of a compelling governmental interest in the variance denial.[194] The court of appeals also held that the township violated equal protection since it had previously allowed a secular day care center to operate on the same site.[195]

In lieu of granting leave to appeal, the supreme court vacated the judgment of the court of appeals on the RLUIPA claim and remanded the

187. *Id.* at 618, 760 N.W.2d at 810 (Markey, J., concurring).

188. 42 U.S.C.A. § 2000cc (West 2009).

189. 42 U.S.C.A. § 2000cc(a)(1).

190. Greater Bible Way Temple v. City of Jackson, 478 Mich. 373, 401, 733 N.W.2d 734, 750 (2008) (citation omitted).

191. *Id.* at 402, 733 N.W.2d at 750.

192. Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp. (*Shepherd I*), 259 Mich. App. 315, 319, 675 N.W.2d 271, 275-76 (2003).

193. Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp. (*Shepherd II*), 275 Mich. App. 597, 609-10, 739 N.W.2d 664, 672-73 (2007).

194. *Id.* at 611, 739 N.W.2d at 673.

195. *Id.* at 613-14, 739 N.W.2d at 674-75.

case for reconsideration in light of its opinion in *Greater Bible Way*,[196] decided one month after *Shepherd II*.[197] The *Greater Bible Way* opinion held that the denial of a variance for a church to build a multi-family apartment complex in a single-family zone across the street from the church did not impose a "substantial burden" on religious exercise.[198] The supreme court defined "substantial burden" as something that "coerces [individuals] into acting contrary to [their] religious beliefs."[199] The court concluded that if the church wanted to use the property across the street for housing, it could build single-family houses that comply with existing zoning.[200]

Following the supreme court's reasoning in *Greater Bible Way*, the *Shepherd Montessori* panel reached a similar conclusion as to the day care center's RLUIPA claim.[201] The court concluded that the denial of the variance did not "coerce" plaintiff into "acting contrary to its religious beliefs."[202] "Plaintiff did not show that the denial of the variance forces plaintiff to do something that its religion prohibits, or refrain from doing something that its religion requires."[203] The court noted that the evidence suggests that the school *could* be located at another location despite evidence of prohibitive cost and lack of available space.[204]

The court upheld the township's position on the RLUIPA claim, but remanded to the trial court for entry of a judgment in favor of plaintiff on the equal protection claim.[205] The court of appeals held that the township did not precisely tailor the variance denial to achieve a compelling governmental interest.[206] The court noted that despite "several years of litigation," the township failed to explain why it denied the variance when the proposed facility will have "far fewer children in the school" and "fewer traffic and density problems" than the pre-existing secular day care center.[207] The court of appeals remanded the case to the trial

196. Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp., 480 Mich. 1143, 1143, 746 N.W.2d 105, 106 (2008).

197. *Shepherd II*, 259 Mich. App. at 315, 675 N.W.2d at 271.

198. *Greater Bible Way*, 478 Mich. 373, 401-02, 733 N.W.2d at 750.

199. *Id.* at 409, 733 N.W.2d at 754.

200. *Id.* at 401-02, 733 N.W.2d at 750.

201. Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp., 280 Mich. App. 449, 454, 761 N.W.2d 230, 233 (2008), *remanded by* 480 Mich. 1143, 746 N.W.2d 105, *appeal granted*, 280 Mich. 449, 761 N.W.2d 230 (2009).

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 455-56, 761 N.W.2d 233-34.

206. *Id.*

207. *Shepherd Montessori*, 280 Mich. App. at 455, 761 N.W.2d at 233.

court for entry of a judgment in favor of the plaintiff on the equal protection claim.[208]

A different panel of the court of appeals also relied upon the definition of "substantial burden" adopted in *Shepherd Montessori* to uphold another township's denial of a zoning variance.[209] Great Lakes Society (GLS) is a Michigan ecclesiastical corporation and IRS-recognized religious organization that ministers to persons having various chemical sensitivities.[210] GLS proposed building a large two-story facility on six-acres of property zoned residential.[211] GLS would use approximately twenty-five percent of the interior as a sanctuary for worship services including a kitchen, reception area, bathrooms, and special heating/cooling/air filtration systems.[212] Other areas of the building would house ministry training, counseling, "health ministry" programs with access to specialty food items, administration, youth services, and vehicle storage.[213]

The Georgetown Township zoning ordinance permits the construction of a "church" in a residential district with a special use permit (SUP).[214] The ordinance does not define "church."[215] GLS applied for a SUP and amended the application at least once.[216] During the consideration of the SUP, the township amended the zoning ordinance to require longer street-frontages for churches in residential districts.[217] GLS applied for a variance when the street frontage of its property did not meet the amended requirements.[218] The township zoning board of appeals concluded that the building was not a "church" for zoning purposes and denied both the SUP application and the street frontage variance.[219] GLS appealed the decisions and added a claim that the township's actions violated RLUIPA.[220] The trial court agreed that the building was not a church and upheld the zoning board of appeals.[221] In later proceedings, the trial court held that the actions of the zoning board

208. *Id.* at 456, 761 N.W.2d at 234.
209. Great Lakes Soc'y v. Georgetown Charter Twp., 281 Mich. App. 396, 398-99, 761 N.W.2d 371, 375 (2008).
210. *Id.* at 399, 761 N.W.2d at 375.
211. *Id.*
212. *Id.* at 399-400, 761 N.W.2d at 376.
213. *Id.* at 400, 761 N.W.2d at 376.
214. *Id.* at 399, 761 N.W.2d at 375-76.
215. *Great Lakes*, 281 Mich. App. at 403, n.7, 761 N.W.2d at 378 n.7.
216. *Id.* at 399, 761 N.W.2d at 376.
217. *Id.* at 404, 761 N.W.2d at 378.
218. *Id.*
219. *Id.* at 403-04, 761 N.W.2d at 378.
220. *Id.* at 406, 761 N.W.2d at 379.
221. *Great Lakes*, 281 Mich. App. 406, 761 N.W.2d at 379.

of appeals were a "substantial burden on religious exercise," capricious, and not in furtherance of a compelling governmental interest, and, therefore, violated the "substantial burden" provision in RLUIPA.[222] Both sides appealed.

The court of appeals reversed the trial court and held that the proposed building is a church for zoning purposes.[223] The court rejected the trial court's reliance on *Portage Township v. Full Salvation Union*[224] to define the term "church."[225] The *Portage* court held that small "camp meeting" buildings in which no religious services would take place did not fall within the usual definition of "church" for zoning purposes.[226] The *Great Lakes Society* panel stated that the trial court erred when it concluded that the GLS building "is a church only if its *principal* use is public worship."[227] Since the court found "no Michigan precedent addressing that question in the zoning context," the court turned to definitions of "church" adopted by a number of other states.[228] Almost all of these decisions define "church" broadly to include not only accommodations for traditional worship services but also buildings and rooms for activities "reasonably closely related, in substance and in space, to the church's purpose."[229] The court argued that the cases are "consistent with cited zoning treatises and other authorities" and are consistent with earlier Michigan zoning cases for church buildings.[230]

The *Great Lakes Society* panel concluded that the most appropriate test for determining whether a particular use is a "church" is the relationship test articulated by the Ohio Court of Appeals.[231] The Ohio court held that for a building to be a church, "the activity or use must be intended to promote the purposes for which the church is instituted, the most, but not sole, prominent purpose of which is the public worship of God."[232] The Ohio court continued that ancillary activities or uses must be "reasonably closely related, in substance and in space, to the church's purpose."[233] The *Great Lakes Society* panel adopted this definition and

222. *Id.* at 406-07, 761 N.W.2d at 379.
223. *Id.* at 427-28, 761 N.W.2d at 390.
224. 318 Mich. 693, 29 N.W.2d 297 (1947).
225. *Great Lakes Soc'y,* 281 Mich. App. at 409-11, 761 N.W.2d at 380-81.
226. *Id.* at 409, 761 N.W.2d 380-81.
227. *Id.* at 410, 761 N.W.2d at 381.
228. *Id.* at 411-14, 761 N.W.2d at 381-83.
229. *Id.* at 414, 761 N.W.2d at 383 (citing Solid Rock Ministries Int'l v. Monroe Bd. of Zoning App., 740 N.E.2d 320, 326 (Ohio Ct. App. 2000)).
230. *Id.* at 414, 761 N.W.2d at 383.
231. *Great Lakes Soc'y*, 281 Mich. App. at 414 n.13, 761 N.W.2d at 383 n.13.
232. *Solid Rock Ministries*, 740 N.E.2d at 326.
233. *Id.*

concluded that the proposed GLS facility is a church for zoning purposes.[234] The court further held that GLS qualifies for a SUP,[235] but affirmed the denial of the variance from the street frontage requirement.[236]

The court of appeals reversed the trial court's decision that the township violated RLUIPA.[237] The court quoted favorably the conclusion in *Shepherd Montessori* that the plaintiff failed to demonstrate that the property "has religious significance or that plaintiff's faith requires a school at that particular site."[238] The court noted that GLS could locate the church at some other location within the township as long as the property meets the street frontage and other requirements.[239] The court held that "denial of the variance [from the street frontage requirement] does not constitute a substantial burden on plaintiff's religious exercise."[240] Apparently, like the proposed religious day care center in *Shepherd Montessori*, RLUIPA requires religious institutions to comply with most zoning ordinance requirements "like everyone else."[241]

The decision by the court of appeals in *Mason v. City of Menominee*[242] has raised concerns among a number of local governments with large land holdings. As described in the concurring opinion by one of the panel members, the legislative history of adverse possession claims for land held by state and local governments has been on a circuitous path for the last ninety years.[243] Since the late 1800s, both state government and municipalities have been either subject to adverse possession claims, or exempt from them, as the Legislature periodically amended, reorganized, and rewrote the statute.[244] The *Mason* opinion leaves the issue still unsettled for any municipality. A review of the first unpublished court of appeals opinion in that case, issued in 2006, is helpful in understanding the *Mason* panel's analysis.[245]

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234. *Great Lakes*, 281 Mich. App. at 417, 761 N.W.2d at 385.

235. *Id.*

236. *Id.* at 422, 761 N.W.2d at 387.

237. *Id.* at 424, 761 N.W.2d at 389.

238. *Id.* at 424, 761 N.W.2d at 388.

239. *Id.* at 424, 761 N.W.2d at 388-89.

240. *Great Lakes*, 281 Mich. App. at 424, 761 N.W.2d at 388.

241. *Greater Bible Way*, 478 Mich. at 401, 733 N.W.2d at 734.

242. Mason v. City of Menominee (*Mason II*), 282 Mich. App. 525, 766 N.W.2d 888 (2009).

243. *Id.* at 535, 766 N.W.2d at 894-95 (Beckering, J., concurring) (citing Adams Outdoor Advertising, Inc. v. Canton Charter Twp., 269 Mich. App. 365, 711 N.W.2d 391 (2006)).

244. *Id.*

245. *See* Mason v. City of Menominee (*Mason I*), No. 262743, 2006 WL 2613596 (Mich. Ct. App. Sept. 12, 2006).

Two brief subsections of the Revised Judicature Act[246] govern actions for possession of real property owned by state and local governments.[247] Subsection (1) of the statute provides that "[a]ctions for the recovery of any land where the state is a party are not subject to the periods of limitations, or laches."[248] The legislative analysis completed prior to the enactment of this provision in 1988 noted that "the state had too much property to monitor and the public cost was too great when property was lost by adverse possession."[249] Courts and the state government have recognized for years that this subsection prohibits an adverse possession claim for state land no matter how long a private party has been in possession.

Subsection (2) of the statute provides that "[a]ctions brought by any municipal corporations for the recovery of the possession of any public highway, street, alley, or any other public ground are not subject to the periods of limitations."[250] This language dates back to the statute in effect in 1907.[251] When the Legislature amended the two-section statute in 1988 and exempted the state from adverse possession claims in subsection (1), the reported legislative analysis of the amendments did not address whether the Legislature intended to make state protection comparable to or greater than municipality protection.[252] Despite the disparity in the language, Michigan courts have held that subsection (2) "precludes a party from claiming adverse possession against a municipal corporation" as recently as 2006.[253]

The plaintiff in *Mason* brought a quiet title action for a sixty-foot long driveway strip that he and his predecessors in title had used for a driveway for decades.[254] A city park surrounds the plaintiff's parcel on three sides.[255] A prior owner deeded the sixty-foot strip to the city in 1956 for a street, but the city never developed the street or used the strip of land.[256] The homeowner and his successors in title continued to use

246. MICH. COMP. LAWS ANN. §§ 600.101-600-9948 (West 2009).

247. MICH. COMP. LAWS ANN. §§ 600.5821(1) & (2) (West 2009).

248. MICH. COMP. LAWS ANN. § 600.5821(1).

249. *Mason II,* 282 Mich. App. at 535, 766 N.W.2d at 895 (Beckering, J., concurring,) (citing *Adams Outdoor Advertising*, 269 Mich. App. 365 at 372-73, 711 N.W.2d at 391, and Cascade Charter Twp. v. Adams Outdoor Adver., No. 240625, 2004 WL 435382, at *3 (Mich. Ct. App., Mar. 9, 2004)).

250. MICH. COMP. LAWS ANN. § 600.5821(2).

251. *Mason II,* 282 Mich. App. at 535, 766 N.W.2d at 894 (Beckering, J., concurring).

252. *Id.* at 535, 766 N.W.2d at 895.

253. *Id.* at 536, 766 N.W.2d at 895 (citing *Adams Outdoor Adver.*, 269 Mich. App. at 370, 711 N.W.2d at 395 (2006).

254. *Id.* at 527, 766 N.W.2d at 890.

255. *Id.*

256. *Mason I*, 2006 WL 2613596, at *2.

the strip as a driveway.[257] The city also installed the fence that separates the park from the driveway, planted trees along the park side of the fence as an additional buffer, maintained the property only on the park side, and never contested the private property owner's use and improvement of the driveway.[258] In 2005, the owner of the residential property filed an action to quiet title in the sixty-foot strip.

The trial court examined the deeds in the chain of title and ruled that the private owner had granted only an easement to the city for a street right-of-way.[259] The trial court further held that the city had abandoned the western-most forty-eight feet of the right-of-way easement by not building the street, and granted title to the forty-eight-foot strip to the private owner.[260] The court of appeals reversed and held that based upon its analysis of the language in all of the deeds, the prior deed conveyed fee title to the city, not an easement.[261]

On remand, the trial court determined that the private owners had acquired the strip of land under the doctrine of acquiescence.[262] On second remand, the court of appeals agreed.[263] The court of appeals disagreed with the city that the language in the Revised Judicature Act shields municipalities from claims for the possession of property.[264] The court stated that "because the language of MCL 600.5821(2) prevents a private landowner from acquiring property from a municipality by acquiescence only if the municipality brings an action to recover the property, it does not preclude plaintiffs' claim."[265] The court acknowledged that as to state land, the statutory language limiting any claims "where the state is a party" prohibits claims brought by both the state and a private party.[266] The court noted that as to municipalities, however, the Legislature chose not to include the same language.[267] The court found the specific inclusion of the statutory phrase "brought by" a municipality to be definitive in determining that private party claims are permissible.[268] Since "both parties treated the fence as the boundary line"

257. *Mason II*, 282 Mich. App. at 527, 766 N.W.2d at 890.
258. *Mason I*, 2006 WL 2613596, at *4 (Mich. Ct. App. Sept. 12, 2006) (Davis, J., dissenting).
259. *Id.* at *1.
260. *Id.*
261. *Id.* at *3.
262. *Mason II*, 282 Mich. App. at 527, 766 N.W.2d at 890.
263. *Id.* at 530, 766 N.W.2d at 892.
264. *Id.* at 529, 766 N.W.2d at 891.
265. *Id.*
266. *Id.*
267. *Id.*
268. *Mason II*, 282 Mich. App. at 529, 766 N.W.2d at 891.

and the plaintiff satisfied the fifteen-year statutory period, the plaintiff established acquiescence for the requisite period.[269]

Municipalities with large land holdings are justifiably concerned that numerous private landowners may file quiet title claims for park areas and open spaces where a boundary may be in dispute. The City of Menominee filed to appeal.[270] The supreme court denied the application.[271]One other opinion in the zoning and land use area is worth mentioning. The court of appeals upheld the denial of the preliminary site plan by the Almena Township Zoning Board of Appeals for a residential planned unit development (PUD).[272] The court's analysis of the Township Zoning Act (TZA) requirements[273] and the Almena Township zoning ordinance provisions for review and appeal of site plans will not be discussed here. Another issue raised by plaintiffs in that case is common enough among municipalities to mention.

After the zoning board of appeals denied the site plan on appeal from the plan commission, plaintiffs' appeal alleged that the actions of an individual township trustee deprived them of due process.[274] The trustee commented at the public hearings held by both the plan commission and the zoning board of appeals that the proposed plan would constitute "premature development" as defined by the PUD ordinance, would negatively impact sensitive environmental areas, and otherwise failed to conform to the PUD ordinance.[275] Because the township board of trustees appoints both the plan commission and the zoning board of appeals, plaintiffs argued that the trustee's appearances caused both boards to act under "duress."[276] The circuit court agreed and held that the trustee's appearances "created the appearance of a less than impartial and open-minded public official who applied improper pressure on board members whose tenure was in the hands of the official."[277]

The court of appeals disagreed.[278] The court stated that "[d]uress occurs in the land use, administrative context when the decision maker is improperly pressured to serve an interest other than that of 'the voters,

269. *Id.* at 530, 766 N.W.2d at 892.

270. *Id.*

271. Mason v. City of Menominee, 485 Mich. 880, 772 N.W.2d 48 (2009).

272. Hughes v. Almena Twp., 284 Mich. App. 50, 53, 771 N.W.2d 453, 456 (2009).

273. MICH. COMP. LAWS ANN. §§ 125.271-.293 (West 2009). In 2006, the Michigan Legislature repealed the TZA and replaced it with the Michigan Zoning Enabling Act, MICH. COMP. LAWS ANN. §§ 125.3101-.3702.

274. *Hughes*, 284 Mich. App. at 68-69, 771 N.W.2d at 465.

275. *Id.* at 55-57, 771 N.W.2d at 458-59

276. *Id.* at 75-76, 771 N.W.2d at 468-69.

277. *Id.* at 58, 771 N.W.2d at 459.

278. *Id.* at 78, 771 N.W.2d at 469.

taxpayers, members of the general public, justice, and due process.'"[279] The court further argued that to find duress, "the question is whether the officer, by reason of a personal interest in the matter, is placed in a situation of temptation to serve his own purposes to the prejudice of those for whom the law authorizes him to act as a public official."[280] The court found that the appearances of the Almena trustee at the ZBA and plan commission meetings did not constitute duress because the trustee "did not have a personal, pecuniary interest in the outcome of the proceedings."[281]

The court distinguished its holding from two other appellate cases cited by the circuit court.[282] In both *Pollard v. Berrien County Circuit Judge*[283] and *People v. Recorder's Court Judge*,[284] lower court judges objected to circuit orders in criminal matters pending in the lower court by filing motions for superintending control. In both cases, the court of appeal held that the judges were not an "aggrieved party" pursuant to the court rules and had no standing to appeal the circuit court order.[285]

The *Hughes* panel held that the Almena trustee issue was "inapposite" to these two cases.[286] The trustee "did not initiate a cause of action or an appeal" and was not "challenging the decision of an entity with jurisdiction superior to that of the township board."[287] The court concluded that the trustee's action did not constitute duress, and further opined that the circuit court erred by finding that the trustee's actions improper.[288]

V. GOVERNMENTAL IMMUNITY

Michigan law provides broad immunity for governmental agencies engaged in governmental functions.[289] The law provides an exception if a government agency fails to maintain a highway in reasonable repair.[290] In

279. *Id.* at 76, 771 N.W.2d at 469 (citation omitted).

280. *Hughes*, 284 Mich. App. at 76, 771 N.W.2d at 469 (internal quotation marks omitted) (citing Dep't of Transp. v. Kochville Twp., 261 Mich. App. 399, 404, 682 N.W.2d 553, 556 (2004)).

281. *Id.* at 77, 771 N.W.2d at 469.

282. *Id.* at 78-79, 771 N.W.2d at 469.

283. 42 Mich. App. 308, 309, 201 N.W.2d 646, 646-47 (1972).

284. 66 Mich. App. 315, 317, 239 N.W.2d 185, 186 (1975).

285. *Pollard*, 42 Mich. App. at 309, 201 N.W.2d at 647; *Recorder's Court Judge*, 66 Mich. App. at 317, 239 N.W.2d at 186.

286. *Hughes*, 284 Mich. App. at 77, 771 N.W.2d at 469.

287. *Id.*

288. *Id.*

289. MICH. COMP. LAWS ANN. §§ 691.1401- .1419 (West 2009).

290. MICH. COMP. LAWS ANN. § 691.1402 (West 2009).

order to bring a claim for failure to maintain, an injured person must provide notice to the government agency within 120 days of the accident.[291] The purpose of the notice requirement is "to provide the governmental agency with an opportunity to investigate the incident while the evidentiary [trail] is still fresh and, additionally to remedy the defect before other persons are injured."[292]

In *Burise v. City of Pontiac*, the court of appeals held that the government agency received adequate and appropriate notice of a trip-and-fall accident within the requisite 120-day period when the claimant returned the completed claim form sent by the city's insurer.[293] An earlier notice sent by the claimant was deemed "insufficient" and "defective" because it did not include the name of the witness to the accident.[294] After receiving the defective notice, the city's insurance company sent the claimant a form to complete and return.[295] The claimant completed the form and included the witness information within the 120-day period.[296]

The court stated that the statute does not prohibit a notice sent on a form supplied by the government agency, "nor does it require an original format created by a claimant."[297] Because the claimant returned the form within the 120-day period with all of the required information, despite having submitted a defective notice initially, the plaintiff complied with the statutory notice requirements.[298]

291. MICH. COMP. LAWS ANN. § 691.1404 (West 2009).

292. Burise v. City of Pontiac, 282 Mich. App. 646, 652, 766 N.W.2d 311, 315 (internal quotations omitted) (citing Hussey v. Muskegon Hts., 36 Mich. App. 264, 267-68, 193 N.W.2d 421, 423 (1971)).

293. *Id.* at 654-55, 766 N.W.2d at 316.

294. *Id.* at 655, 766 N.W.2d at 316.

295. *Id.* at 648, 766 N.W.2d at 313.

296. *Id.*

297. *Id.* at 654, 766 N.W.2d at 316.

298. *Burise*, 282 Mich. App. at 654-55, 766 N.W.2d at 316.