GOVERNMENT LAW

PATRICIA PARUCH†

I. INTRODUCTION

This Article will focus on opinions—issued during the *Survey* period—of some significance to the multiple local units of government in Michigan (276 cities, 257 villages, and 1,240 townships), rather than counties or state government. This Article will not discuss court decisions in the area of public employee labor law, which followed the enactment of Michigan's right-to-work legislation in 2012, even though those decisions are of significant importance to larger cities and state government.[1] Because almost all local units of government deal regularly with issues involving zoning and land use; finance; and police powers to protect public health, safety, and welfare; this Article will focus on those topics.

A. Zoning and Land Use

The Michigan Supreme Court and the Michigan Court of Appeals together issued three opinions of note during the *Survey* period concerning a local unit of government's power and authority to regulate private land uses through zoning and other ordinances. These three cases involved relatively new interpretations of both constitutional rights as they apply to a particular land use, as well as the authority of a municipality to use its police power to protect the community.

The first of these cases dealt with a persistent public health and safety issue in the context of private property rights. A number of local governments in Michigan—in both rural and urban areas—struggle to

† Shareholder, Kemp Klein Law Firm. B.A., 1972, *summa cum laude*, University of Detroit; J.D., 1992, Wayne State University.

1. *See, e.g.*, UAW v. Green, 302 Mich. App. 246, 284, 839 N.W.2d 1, 21 (2013) (holding that the new right-to-work statute applies to state employees).

eliminate blight.[2] Most municipalities have ordinances that provide local officials with the power and authority to order a building razed if it is deemed unsafe.[3] In 2013, the Michigan Legislature amended the Home Rule Cities Act[4] to give larger municipalities more enforcement tools to fight blight, such as new civil and criminal penalties.[5]

In *Bonner v. City of Brighton*,[6] the owners of a blighted property sued the City of Brighton when it ordered the demolition of the owners' deteriorating buildings.[7] Under the Brighton ordinance, the city may order a building demolished if a city inspection determines that the cost to repair exceeds 100% of the true cash value of the building before it deteriorated.[8] The ordinance specifically contains an "unreasonable-to-repair" presumption that permits the city to order the building demolished "without option on the part of the owner to repair."[9]

In January 2009, city officials inspected the plaintiffs' buildings and determined that the cost of repairs would exceed 100% of the taxable value.[10] The city sent a notice to the owners asserting that the cost to repair would exceed 100% of the value and ordering that the buildings be demolished within sixty days.[11] The owners requested a review of the building official's determination by the city council as well as a hearing as provided by the ordinance.[12] When the council deliberations were stayed to allow further inspections, the owners denied city inspectors access to the building interior.[13] After obtaining warrants, the city inspected the buildings again in May and found over forty-five unsafe conditions.[14] The city held a hearing on the matter in June, agreed that the cost of repairs exceeded 100% of the value, and in July 2009 ordered demolition within sixty days.[15] Rather than appealing the city's decision

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2. Emily Lawler, *12 Michigan Cities to Get Federal Assistance Fighting Blight*, MLIVE (Dec. 16, 2014, 2:36 PM), http://www.mlive.com/lansing-news/index.ssf/2014/12/12_michigan_cities_to_get_fede.html.

3. *See, e.g.*, BATTLE CREEK, MICH., CODIFIED ORDINANCES ch. 1454 (2015); BIRCH RUN, MICH., CODE OF ORDINANCES ch. 152 (2013); CLINTON TWP., MICH., CODIFIED ORDINANCES ch. 1468 (2013).

4. MICH. COMP. LAWS ANN. §§ 117.1–117.38 (West 2015).

5. 2013 Mich. Pub. Acts 188–192.

6. 495 Mich. 209, 848 N.W.2d 380 (2013).

7. *Id.* at 214–15, 848 N.W.2d at 384–85.

8. BRIGHTON, MICH., CODE OF ORDINANCES § 18-59 (2014).

9. *Id.*

10. *Bonner*, 495 Mich. at 215, 848 N.W.2d at 384–85.

11. *Id.* at 216, 848 N.W.2d at 385.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 216–17, 848 N.W.2d at 386.

to the circuit court, the owners sued, claiming various constitutional violations.[16]

The owners claimed that the unreasonable-to-repair presumption violated both substantive and procedural due processes by permitting demolition without giving the owners an opportunity to repair as a matter of right.[17] Both the circuit court and the court of appeals agreed that the ordinance violated substantive due process by permitting the city to order demolition without providing the owner with an option to repair, even when the cost to repair exceeded the taxable value of the buildings.[18]

The supreme court reversed, holding that the unreasonable-to-repair presumption did not violate either substantive or procedural due process.[19] As for substantive due process, the court first explained that "[w]here the right asserted is not fundamental, the government's interference with that right need only be reasonably related to a legitimate governmental interest."[20] The court concluded that the right to repair has never been granted by any court when the property "has fallen into such disrepair as to create a risk to the health and safety of the public," so the right to repair is not a fundamental right.[21] The court further held that the unreasonable-to-repair presumption bears a reasonable relationship to the governmental interest of protecting the public health, safety, and welfare.[22] The court suggested that a property owner can satisfy the reasonableness requirement by showing that the cost of repair will not exceed 100% of the taxable value, or that the structure has "some sort of cultural, historical, familial, or artistic value."[23] The court did not offer any analysis, nor relevant citations, to explain its choice of these four subjective "values."

As to the procedural due process claims, the court stated that all that is necessary for the procedures to be constitutionally appropriate is that they are "tailored to 'the capacities and circumstances of those who are to be heard' to ensure that they are given a meaningful opportunity to present their case" before they are "permanently deprived" of their property.[24] The court concluded that the city's procedures afforded to the owners were "sufficient" to allow the property owner an opportunity to

16. *Id.* at 218, 848 N.W.2d at 386.
17. *Id.*
18. *Id.* at 218–19, 848 N.W.2d at 387.
19. *Id.* at 241, 848 N.W.2d at 398–99.
20. *Id.* at 227, 848 N.W.2d at 391.
21. *Id.* at 228, 848 N.W.2d at 392.
22. *Id.* at 230–31, 848 N.W.2d at 393.
23. *Id.* at 233, 848 N.W.2d at 394.
24. *Id.* at 238–39, 848 N.W.2d at 397 (quoting Goldberg v. Kelly, 397 U.S. 254, 268–69 (1969)).

rebut the ordinance's unreasonable-to-repair presumption.[25] The court rejected the court of appeals' reliance on cases from other jurisdictions that found similar ordinances to be unconstitutional.[26] In those cases, the court noted, demolition was required.[27] Under the Brighton ordinance, demolition orders by local officials are permissive, not mandatory.[28] City officials "may" order demolition, but are not required to issue that order.[29] The court concluded that the city's processes provided the owners with adequate opportunity to present their case before a final demolition order was issued.[30]

In the year since the *Bonner* decision was issued, commentators have criticized the decision for departing from "longstanding precedents in Michigan and across the country protecting due process rights."[31] In holding that the Brighton ordinance violated the building owners' due process rights, both the trial court and the *Bonner* court of appeals panel relied in part on cases from other jurisdictions, treatises, and the earlier Michigan Supreme Court decision in *Commissioner of State Police v. Anderson*,[32] which stated that "something less than destruction of the entire building should be ordered where such will eliminate the danger or hazard."[33] The *Bonner* Supreme Court opinion did not mention the *Anderson* case.[34]

In a similar vein, Michigan municipalities have frequently turned to restrictive or even exclusionary zoning practices to limit or completely eliminate a proposed property use that they believe may negatively impact the health, safety, and welfare of the community. Such unpopular uses have included mobile home parks, billboards, mineral mines, and state licensed residential facilities.[35] Michigan courts have consistently held that most of these specific exclusionary zoning practices are unconstitutional,[36] and the Michigan Legislature has amended the Zoning

25. *Id.* at 239, 848 N.W.2d at 397–98.
26. *Id.* at 231 n.52, 848 N.W.2d at 394 n.52.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 241, 848 N.W.2d at 399.
31. Norman Hyman, *Bonner v. City of Brighton: A Critique of the Michigan Supreme Court's Decision on How to Abate a Public Nuisance*, 41 MICH. REAL PROP. REV. (forthcoming 2015) (manuscript at 1).
32. 344 Mich. 90, 73 N.W.2d 280 (1955).
33. *Id.* at 95–96, 73 N.W.2d at 282–83.
34. *See Bonner*, 495 Mich. 209, 848 N.W.2d 380 (2013).
35. *See infra* note 36.
36. *See* Landon Holdings, Inc. v. Grattan Twp., 257 Mich. App. 154, 667 N.W.2d 93 (2003) (mobile home parks); Outdoor Sys. Inc. v. City of Clawson, 262 Mich. App. 716,

Enabling Act (ZEA)[37] to prohibit the exclusion of any particular land use within the municipality if there is a demonstrated need for the use.[38]

Occasionally the Michigan Legislature will further regulate the types of zoning restrictions that can be placed on a particular use. For example, in 2012 the Legislature adopted amendments to the ZEA to regulate the siting and operation of mineral mines, including gravel pits.[39] The amendments allow a prospective mineral developer to overcome a local zoning prohibition on mine development by demonstrating that the property at issue contains valuable mineral deposits, a public need exists for such minerals, and no very serious consequences would result from the proposed mineral extraction process.[40]

The City of Wyoming adopted a zoning ordinance that was similarly restrictive in order to prevent marijuana use in the community.[41] A provision in the federal Controlled Substances Act (CSA)[42] classifies marijuana as a Schedule I controlled substance and largely prohibits its manufacture, distribution, or possession.[43] In 2008, Michigan voters approved the Michigan Medical Marihuana Act (MMMA), which immunizes certain patients from "penalty in any manner" for MMMA-compliant medical marijuana use.[44] Two years later, the City of Wyoming amended its zoning ordinance to include the provision: "[U]ses not expressly permitted under this article are prohibited in all districts. Uses that are contrary to federal law, state law or local ordinance are prohibited."[45]

The plaintiff in the subsequent lawsuit, a City of Wyoming resident, is a qualifying patient under the MMMA and possesses a state-issued marijuana registry identification card.[46] The plaintiff sought a declaratory judgment from the circuit court that the MMMA preempts the ordinance and sought a preliminary injunction prohibiting ordinance enforcement.[47] The circuit court held that the MMMA is preempted by the CSA.[48] The court of appeals reversed, holding that the ordinance is preempted by the

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686 N.W.2d 815 (2006) (billboards); Kyser v. Kasson Twp., 278 Mich. App. 743, 755 N.W.2d 190 (2008), *rev'd*, 486 Mich. 514, 786 N.W.2d 543 (2010) (mining).

37. MICH. COMP. LAWS ANN. §§ 125.3101–125.3702 (West 2015).
38. *Id.* § 125.3207.
39. 2012 Mich. Pub. Acts 389.
40. MICH. COMP. LAWS ANN. § 125.3205.
41. WYOMING, MICH., CODE OF ORDINANCES § 90-66 (1997).
42. Controlled Substances Act, 21 U.S.C.A. §§ 801–971 (West 2014).
43. *Id.* § 812(c)(c)(10).
44. MICH. COMP. LAWS ANN. § 333.26424(a).
45. WYOMING, MICH., CODE OF ORDINANCES § 90-66 (1997).
46. Ter Beek v. City of Wyoming, 495 Mich. 1, 6, 846 N.W.2d 531, 534 (2014).
47. *Id.* at 6–7, 846 N.W.2d at 534.
48. *Id.* at 7, 846 N.W.2d at 534.

MMMA's grant of immunity from penalties for medical marijuana use.[49] The appeals court further held that the state-law immunity for medical marijuana use is not a barrier to federal regulation of the drug, or federal enforcement of its use.[50]

The Michigan Supreme Court affirmed the court of appeals.[51] The supreme court first concluded that the CSA does not preempt the MMMA. The court argued that the "relevant inquiry" in a preemption claim involving the CSA is:

> whether there is a "positive conflict" between the two statutes such that they "cannot consistently stand together." Such a conflict can arise when it is impossible to comply with both federal and state requirements, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[52]

The court stated that the MMMA does not prohibit federal prosecution under the CSA and only provides a limited state-law immunity from arrest, prosecution, or penalty.[53] Such an immunity does not "frustrate the CSA's operation nor refuse its provisions their natural effect, such that its purpose cannot otherwise be accomplished."[54] The court noted that the plaintiff could certainly be prosecuted under federal law if federal officials chose to do so.[55]

The Michigan Supreme Court further agreed with the court of appeals that the Wyoming ordinance is preempted by the MMMA.[56] A city has the power to enact ordinances to protect the public health, safety, and welfare, but that ordinance power is precluded if the ordinance is in direct conflict with the state statutory scheme, or if the state statutory scheme "occup[ies] the field of regulation" even when there is no direct conflict.[57] The supreme court concluded that the Wyoming ordinance "directly conflicts with the MMMA by permitting what the MMMA expressly prohibits—the imposition of a 'penalty'" on a registered qualifying patient whose marijuana use falls within the MMMA's scope

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49. *Id.* at 7, 846 N.W.2d at 534–535.
50. *Id.*
51. *Id.* at 25, 846 N.W.2d at 544.
52. *Id.* at 11–12, 846 N.W.2d at 537 (citations omitted).
53. *Id.* at 12–13, 845 N.W.2d at 537–38.
54. *Id.* at 15, 845 N.W.2d at 539.
55. *Id.* at 17, 846 N.W.2d at 540.
56. *Id.* at 19, 846 N.W.2d at 541.
57. *Id.* at 19–20, 846 N.W.2d at 541 (citing People v. Llewellyn, 401 Mich. 314, 322, 257 N.W.2d 902, 904 (1977)).

of immunity.[58] By enjoining a patient from engaging in MMMA-compliant conduct, the ordinance proscribes such a prohibited penalty and is preempted by the MMMA's grant of immunity.[59]

In another case involving whether a local ordinance is preempted by state law, a local gasoline service station with an attached convenience store in Bloomfield Township applied to the Michigan Liquor Control Commission (LCC) for a license to sell beer and wine for off-premises consumption.[60] Under state law, the LLC cannot prohibit an applicant for such a license from owning fuel pumps as long as the pumps are at least fifty feet from where the customers purchase alcohol.[61] In this case, the pumps were forty-seven feet from the cash registers, and the township denied the request for a license.[62] During the litigation which followed, the township amended its zoning ordinance to include the following standards: (1) alcohol sales must be at least fifty feet from the pumps; (2) no drive-through operations; (3) minimum floor area and lot size requirements; (4) the store must have frontage on a major thoroughfare and not be adjacent to a residentially zoned area; (5) no vehicle service with customer waiting areas are allowed; and (6) the store must either be in a shopping center or maintain a certain amount of inventory.[63] The trial court granted the township's motion for summary disposition based on the amended ordinance.[64]

The plaintiff-service station owner argued that state law gives the LCC exclusive control over the sale of alcoholic beverages, and therefore, the state law preempts the township's zoning regulations.[65] The court of appeals disagreed.[66] The court reasoned that state law preempts a local regulation if (1) the local regulation directly conflicts with a state statute, or (2) the state statute completely occupies the field of regulation.[67] In arguing that state law completely occupies the field of alcohol regulation, the plaintiff relied on a Michigan Supreme Court opinion from 1986, which held that a local ordinance that required an applicant to obtain both a state license and a local license to sell alcohol at outdoor dancing events was preempted because the court could find no

58. *Id.* at 20, 846 N.W.2d at 541.

59. *Id.*

60. Maple BPA, Inc. v. Bloomfield Charter Twp., 302 Mich. App. 505, 508, 838 N.W.2d 915, 918 (2013).

61. MICH. COMP. LAWS ANN. § 436.1541(1)(b) (West 2015).

62. *Maple BPA*, 302 Mich. App. at 509, 838 N.W.2d at 919.

63. BLOOMFIELD TWP., MICH., CODE OF ORDINANCES § 42-4.23 (2014).

64. *Maple BPA*, 302 Mich. App. at 510, 838 N.W.2d at 919.

65. *Id.* at 511, 838 N.W.2d at 920.

66. *Id.* at 511, 838 N.W.2d at 919.

67. *Id.*

provision in state law that would allow a municipality to regulate the sale of alcohol at outdoor dancing events.[68]

The court of appeals distinguished the *Sherman Bowling* decision by reasoning that unlike the ordinance in *Sherman Bowling*, the Bloomfield Township ordinance is a zoning ordinance, and LCC regulations specifically require that all applicants meet zoning ordinance requirements.[69] The court cited a later case that concluded that the Legislature did not intend to preempt the field of liquor control and that local units of government have "extremely broad powers" to regulate alcohol traffic within their communities as an exercise of their police power.[70]

The court of appeals further held that the Bloomfield Township ordinance did not directly conflict with state law.[71] The legal standard cited by the court of appeals was that a "direct conflict exists . . . when the local regulation permits what the state statute prohibits or prohibits what the statute permits."[72] The court of appeals noted that the state law is silent on the issues of drive-through windows, minimum building area, or the number of parking spaces needed.[73] "To the extent that the Legislature has expressly spoken on this issue, Bloomfield Township's zoning ordinance is not more restrictive."[74] As such, the amended ordinance did not conflict with state law.[75]

A fourth land use case concerns the authority of a municipality to classify certain lands under a zoning ordinance's classification scheme and the constitutional limitations on that authority. The plaintiff landowners in *Grand/Sakwa of Northfield, LLC v. Northfield Township*[76] owned 220 acres of farmland zoned "AR" (Agriculture District).[77] Developer and co-plaintiff Grand/Sakwa executed an agreement to purchase the property for a development of 450 homes and petitioned the township to rezone the property to a single-family residential classification (SR-1), which would allow four dwellings per acre.[78] The

68. *Id.* at 512, 838 N.W.2d at 920 (citing Sherman Bowling v. Roosevelt Park, 154 Mich. App. 576, 584–85, 397 N.W.2d 839, 843 (1986)).

69. *Id.* at 512, 838 N.W.2d at 920–21.

70. *Id.* at 513, 838 N.W.2d at 921 (citing Jott, Inc. v. Charter Twp. of Clinton, 224 Mich. App. 513, 544, 569 N.W.2d 841, 854 (1997)).

71. *Id.* at 514, 838 N.W.2d at 921.

72. *Id.* at 514, 838 N.W.2d at 921 (citing McNeil v. Charlevoix Cnty., 275 Mich. App. 686, 697, 741 N.W.2d 27, 34 (2007)).

73. *Id.* at 514, 838 N.W.2d at 922.

74. *Id.* at 514–15, 838 N.W.2d at 922.

75. *Id.* at 515, 838 N.W.2d at 922.

76. 304 Mich. App. 137, 851 N.W.2d 574 (2014).

77. *Id.* at 139, 851 N.W.2d at 577.

78. *Id.* at 139–40, 851 N.W.2d at 577.

township rezoned the property, but township residents organized a successful referendum that overruled the township's rezoning, leaving the property zoned AR.[79] The zoning board of appeals subsequently denied plaintiffs' requests for use or dimensional variances.[80] Plaintiffs sued, alleging that the "application of any zoning classification more restrictive than SR-1 constituted a regulatory taking."[81] A new township board took office shortly thereafter and rezoned the property as a low-density residential district (LR), allowing only one home for every two acres.[82]

The preliminary issue facing the trial court in determining whether a regulatory taking had occurred was which ordinance should be evaluated—the AR classification that existed when the lawsuit was filed, or the LR zoning that was in place at the time of the trial.[83] The trial court ruled that the challenge was to the LR classification that was in place when it made its decision.[84] The court of appeals agreed, stating that generally, "the law to be applied is that which was in effect at the time of the decision [by the trial court]."[85] The court of appeals noted that there are two exceptions to this general rule: an amendment to a zoning ordinance should not be applied if it would destroy a vested property interest or if it was "enacted in bad faith and with unjustified delay."[86] The court of appeals agreed with the trial court that the first exception did not apply in this case because there was "no vested property interest at issue. At the time of the sale, the property was zoned AR . . . ."[87] The referendum reversed the rezoning to SR-1, so there was never any property interest that had vested except the right to develop the property under the AR classification.[88]

The court of appeals reasoned that the second exception applies if the newer classification was enacted "simply to manufacture a defense."[89] The court noted that in order to establish bad faith on the part of the municipality, the court has to find more than just evidence that the

79. *Id.* at 140, 851 N.W.2d at 577.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 140, 851 N.W.2d at 577–78.

84. *Id.* at 141, 851 N.W.2d at 577–78.

85. *Id.* at 141, 851 N.W.2d at 578 (alteration in original) (quoting Klyman v. City of Troy, 40 Mich. App. 273, 277–78, 198 N.W.2d 822, 824 (1972)).

86. *Id.* (quoting Lockwood v. City of Southfield, 93 Mich. App. 206, 211, 286 N.W.2d 87, 89 (1979)).

87. *Id.* at 141–42, 851 N.W.2d at 578.

88. *Id.* at 142, 851 N.W.2d at 578.

89. *Id.* (citing Landon Holdings, Inc. v. Grattan Twp., 257 Mich. App. 154, 161, 667 N.W.2d 93, 98 (2003)).

change strengthens the municipality's litigation posture.[90] "The factual determination that must control is whether the *predominant* motivation for the ordinance change was improvement of the municipality's litigation position."[91] The trial court concluded, and the court of appeals agreed, that the rezoning to LR was not done solely to improve defendant's position at trial.[92] The township has adopted a master plan creating the LR classification, which allowed some residential development "while preserving significant areas of agriculture, open space, and natural features."[93] The court of appeals concluded that the events can fairly be read as demonstrating recognition by both the zoning board, which had recommended rezoning the property SR-1, and the township board, which later rezoned the property to LR, that "development was in order, though they disagreed on the degree of that development."[94] The court concluded that because the evidence did not demonstrate that obtaining a litigation advantage was the predominate reason for the ordinance change, the "trial court did not clearly err by applying LR zoning as the law of the case."[95]

The court of appeals then considered whether the rezoning of the property to LR was a regulatory taking on the basis of the balancing test in the landmark takings case *Penn Central Transportation Co. v. New York City*.[96] The *Penn Central* test requires consideration of three factors in determining whether a local regulation "takes" private property rights: "the character of the government's action, the economic effect of the regulation on the property, and the extent by which the regulation has interfered with distinct, investment-backed expectations."[97] As to the first factor, the court of appeals quoted one of the conclusions of the *Penn Central* Court—that the "government may execute laws or programs that adversely affect recognized economic values" and that a land use limitation can promote the general welfare even if it destroys or adversely affects recognized property interests.[98] The township land use plan did not prohibit residential development, the court of appeals noted,

90. *Id.* at 143–44, 851 N.W.2d at 579.
91. *Id.* at 143–44, 851 N.W.2d at 579.
92. *Id.* at 145, 851 N.W.2d at 580.
93. *Id.* at 144–45, 851 N.W.2d at 579–80.
94. *Id.* at 145, 851 N.W.2d at 580.
95. *Id.*
96. 438 U.S. 104 (1978).
97. *Grand/Sakwa*, 304 Mich. App. at 146, 851 N.W.2d at 580–81 (citing *Penn Cent.*, 438 U.S. at 124).
98. *Id.* at 146, 851 N.W.2d at 581 (citing *Penn Cent.*, 438 U.S. at 124–25).

but limited the density in order to promote the general welfare of the township.[99]

As to the second *Penn Central* factor, the trial court concluded that the plaintiff was not denied "*all* use of those pre-existing [property] rights."[100] The only preexisting rights to development were those that existed under the AR zoning classification, the classification that was in place at the time the developer bought the land.[101] By changing the zoning to LR, the township actually expanded those rights.[102]

The court of appeals noted that, as to the third *Penn Central* factor—interference with distinct investment-backed expectations, "[a] claimant who purchases land that is subject to zoning limitations with the intent to seek a modification of those limitations accepts the business risk that the limitations will remain in place or be only partially modified."[103] In this case, plaintiffs admitted that they knew that the zoning change to SR-1 was going to be challenged by the referendum and that the reclassification would not take effect at all if the referendum was successful.[104] The court of appeals concluded that since they knew the referendum effort was underway, they could not argue that their expenditure of development funds and expectation that the development would be built while the referendum was pending was reasonable.[105] Because all three *Penn Central* factors weighed in the township's favor, the court of appeals agreed with the trial court that the rezoning to LR did not constitute a regulatory taking.[106]

B. Municipal Finance

As the financial health of a number of Michigan municipalities has declined due to state funding reductions and slow growth in property tax revenues, a number of jurisdictions have expanded the use of user fees to fund certain services.[107] This practice has increased after Michigan voters approved the amendment to the Michigan Constitution, known as the

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99. *Id.* at 147, 851 N.W.2d at 581.

100. *Id.* at 148, 851 N.W.2d at 582 (alteration in original) (citing *Penn Cent.*, 438 U.S. at 115–17, 137).

101. *Id.*

102. *Id.*

103. *Id.* at 151, 851 N.W.2d at 583.

104. *Id.* at 152, 851 N.W.2d at 583–84.

105. *Id.* at 152, 851 N.W.2d at 584.

106. *Id.* at 152–53, 851 N.W.2d at 584.

107. SEMCOG, STATE AND LOCAL GOVERNMENT FINANCING OF ESSENTIAL SERVICES WITH USER FEES (2005), *available at* http://library.semcog.org/InmagicGenie/DocumentFolder/Financing%20Govt%20Services%20with%20Fees.pdf.

Headlee Amendment, which prohibits a local unit of government from levying any new property tax or increasing an existing tax above authorized rates without voter approval.[108] "However, a charge that is a user fee 'is not affected by the Headlee Amendment.'"[109]

Michigan courts have agreed that "[t]here is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment."[110] In most cases, "a fee is exchanged for a service rendered or a benefit conferred," such as a building inspection fee or a sewer hook-up fee, and there is "some reasonable relationship" between the "amount of the fee and the value of the service or benefit. A tax, on the other hand, is designed to raise revenue."[111] Michigan courts, for example, have upheld the imposition of user fees for garbage collection when the amount of the fee imposed on each property owner is calculated based upon the type of container used and the amount of garbage collected.[112] Additionally, almost all water and sanitary sewer systems rely upon revenue from user fees whose variable rates are based upon the measured water consumption by each individual property owner.[113]

Faced with declining revenues following the 2008 recession, the City of Jackson adopted a "Storm Water Utility Ordinance" to establish a new utility to operate and maintain the city's storm water management program.[114] As created by the new ordinance, the "Storm Water Utility" assumed the task of maintaining storm water drains, as well as leaf pickup, mulching, street cleaning, and catch basin maintenance throughout the city—tasks which had previously been accomplished by the city's Department of Public Works.[115] Funding for the utility would come from an annual storm water system management charge imposed on each parcel in the city, including undeveloped parcels.[116] The specific amount of the charge would be based on an estimation of the amount of storm water runoff from each parcel computed by an analysis of the

108. MICH. CONST. art. IX, § 31.

109. Jackson Cnty. v. City of Jackson, 302 Mich. 90, 99, 836 N.W.2d 903, 908 (2013) (quoting Bolt v. City of Lansing, 459 Mich. 152, 158, 587 N.W.2d 264, 268 (1998)).

110. *Bolt*, 459 Mich. App. at 160, 587 N.W.2d at 268.

111. *Id.* at 161, 587 N.W.2d at 269 (quoting Cnty. of Saginaw v. John Sexton Corp. of Mich., 232 Mich. App. 202, 210, 591 N.W.2d 52, 56 (1998)).

112. *See* Iroquois Props. v. City of East Lansing, 160 Mich. App. 544, 408 N.W.2d 495 (1987).

113. *Bolt*, 459 Mich. at 159, 587 N.W.2d at 268.

114. JACKSON, MICH., CODE OF ORDINANCES art. VI (2011).

115. Jackson Cnty. v. City of Jackson, 302 Mich. App. 90, 93, 836 N.W.2d 903, 905 (2013).

116. *Id.* at 95, 836 N.W.2d at 906.

amount of impervious and pervious areas of each parcel.[117] All residential parcels of two acres or less, however, were attributed the same proportion and were assessed the exact same fee.[118]

Property owners, as well as the County of Jackson, filed actions alleging that the Jackson ordinance and the imposition of the storm water fees violated the Headlee Amendment.[119] The court of appeals agreed and ordered that the city cease collecting the fees.[120] The court based its conclusion upon a comparison of the Jackson scheme to the storm water fee program created by the City of Lansing that was held unconstitutional five years earlier.[121] The *Bolt* court concluded that the Lansing fee system violated the Headlee Amendment after comparing the characteristics of fees and taxes and by establishing the three primary criteria of a fee: "(1) a fee serves a regulatory purpose, (2) a fee is proportionate to the necessary costs of the service, and (3) a fee is voluntary."[122]

In applying the three *Bolt* factors to the Jackson ordinance, the court of appeals concluded that the Jackson scheme failed the *Bolt* test in a manner almost identical to the Lansing storm water program struck down in *Bolt*.[123] The court recognized that the management charge imposed on all Jackson property owners "serves a dual purpose" of regulating the amount of pollutants that flow into adjacent waterways such as the Grand River as required by state and federal water quality mandates, and a "general revenue-raising purpose by shifting the funding of certain preexisting government activities from the city's declining general and street fund revenues to a charge-based method of revenue generation."[124] Because these purposes are competing, "the question becomes which purpose outweighs the other."[125]

The court of appeals concluded that the Jackson ordinance served only a "minimal regulatory purpose" and that the management charge is "convincingly outweighed" by the revenue-raising purpose.[126] The court noted that the ordinance "fails to require either the city or the property

117. *Id.* at 96, 836 N.W.2d at 907.

118. *Id.*

119. *Id.* at 98, 836 N.W.2d at 908.

120. *Id.* at 112, 836 N.W.2d at 915–16.

121. *Id.* at 99–103, 836 N.W.2d at 908–11.

122. *Id.* at 101, 836 N.W.2d at 910 (citing Bolt v. City of Lansing, 459 Mich. 152, 161–62, 587 N.W.2d 264, 269–70 (1998)).

123. *Id.* at 106, 836 N.W.2d at 912–13.

124. *Id.* at 105, 836 N.W.2d at 912.

125. *Id.* at 106, 836 N.W.2d at 912 (citing *Bolt*, 459 Mich. at 165–67, 169, 587 N.W.2d at 271–72).

126. *Id.* at 106, 836 N.W.2d at 912.

owner to identify, monitor, and treat contaminated storm and surface water runoff and allows untreated storm water to be discharged [directly] into the Grand River."[127] Documents submitted by the city further demonstrated that the "impetus for creating the storm water utility and for imposing the charges was the need to generate new revenue to alleviate the budgetary pressures associated with the city's declining general fund and street fund revenues."[128]

The court further concluded that there was a "lack of a correspondence between the charge imposed" on each property owner and the particularized benefit upon "the particular person on whom it is imposed" (rather than the general public).[129] The court agreed with the city that a well-maintained storm water system benefits each property owner but also noted that the utility system benefits "everyone in the city in roughly equal measure, as well as everyone who operates a motor vehicle on a Jackson city street" and anyone in the Grand River watershed who relies on the river for clean water.[130] Because the benefits of such a system are not particularized, the court concluded that the management fee is actually a tax.[131]

Another local government utilized a different financing mechanism to augment property tax revenues for funding municipal services. In 2010, voters in Williamstown Township approved a proposal to create a special assessment district to raise money for police protection.[132] 1951 Public Act 33 specifically allows townships, incorporated villages, and certain "qualified cities" to create a special assessment district to fund "maintenance and operation of police and fire departments."[133] The geographic area of the special assessment district can extend over "all of the lands and premises in the district that are to be especially benefited by the police and fire protection, according to benefits received . . . to defray the expenses of police and fire protection."[134] In practice, the district can cover the entire township, and the Williamstown voters chose to do so.

The trustees in Williamstown Township established a uniform special assessment fee of $150 on residential property and $250 on

127. *Id.* at 106, 836 N.W.2d at 912–13.
128. *Id.* at 106–07, 836 N.W.2d at 913.
129. *Id.* at 108, 836 N.W.2d at 913.
130. *Id.* at 108–09, 836 N.W.2d at 914.
131. *Id.* at 109, 836 N.W.2d at 914.
132. WILLIAMSTOWN TWP., MICH., res. 2010-96 (2010).
133. MICH. COMP. LAWS ANN. § 41.801(4) (West 2015).
134. *Id.*

commercial property.[135] This special assessment fee appears on its face to be very similar to the storm water utility fees proposed in Jackson, both in the dollar amount of the fees and the uniform application in both municipalities. However, the special assessment fee in Williamstown is specifically authorized by Public Act 33.[136]

The plaintiff property owner did not challenge the authority of the township to levy the special assessment for police services. Rather, the plaintiff appealed the dollar amount of the special assessment on his properties to the Michigan Tax Tribunal (MTT), arguing that based upon the language in the statute, the assessments cannot be uniform, but must be based upon "each property's taxable value."[137] The hearing referee disagreed, but the full MTT concluded on appeal that the "special assessment in the present case should be calculated based on the taxable value of Petitioner's parcel, as required by the applicable statute."[138]

The court of appeals disagreed with the MTT and held that the township could levy a uniform assessment on all applicable properties.[139] The court reasoned that the "salient portion" of this section of the statute "requires the township . . . 'to spread the assessment levy on the taxable value of all of the lands . . . *according to benefits received* . . . .'"[140] Thus, "if a township determines that the properties in the district will all benefit equally, then those properties will need to be assessed equal amounts as a matter of law."[141] The petitioner argued that "because the assessment[] must be levied 'on the taxable value of all of the lands,' any such assessment[] must be ad valorem and not uniform."[142] The court of appeals disagreed, noting that "*spreading* the assessment levied on taxable value" as required by the statute is not the same as "*basing* the assessment on taxable value."[143] The court further noted that any assessment that is determined for a particular parcel of land on the basis of the benefits received must "be conveyed as a corresponding millage rate to be applied to a property's taxable value."[144] If the township assesses a uniform fee of $150 on each residential property, then each

135. Kane v. Williamstown Twp., 301 Mich. App. 582, 584, 836 N.W.2d 868, 869 (2013).

136. *Id.*

137. *Id.* at 584, 836 N.W.2d at 869.

138. *Id.* at 584–85, 836 N.W.2d at 870.

139. *Id.* at 586, 836 N.W.2d at 870.

140. *Id.* at 588, 836 N.W.2d at 871 (quoting MICH. COMP. LAWS ANN. § 41.801(4) (West 2015)).

141. *Id.* at 588, 836 N.W.2d at 871–72.

142. *Id.* at 588, 836 N.W.2d at 872.

143. *Id.*

144. *Id.*

property should be assessed using whatever individual millage rate will result in $150 being collected from that property.[145]

C. Local Ordinance Preemption by State Law

The decision in the *Maple BPA* case discussed above was based upon the court of appeal's analysis of whether a local zoning ordinance regulating the sale of alcohol at service stations was preempted by state law. In another case involving the issue of preemption, the court of appeals was faced with the question of whether state law preempted a local general ordinance, not a zoning ordinance.[146] The preemption analysis in the *Associated Builders* opinion, however, was almost identical to the analysis in the *Maple BPA* decision.[147]

The City of Lansing enacted a prevailing wage ordinance which requires that in all construction contracts for city projects, all contractors and subcontractors must provide proof that wages paid to mechanics, laborers, and truck drivers meet or exceed the current prevailing wage and fringe benefits for corresponding classes of workers as established by the U.S. Department of Labor.[148] A contractors' association challenged the ordinance as unconstitutional and ultra vires.[149] The trial court agreed, holding that it was bound by a 1923 Michigan Supreme Court opinion that held that state law preempted the City of Detroit from enacting a prevailing wage ordinance very similar to the Lansing ordinance.[150]

The court of appeals reversed.[151] The court held that the decision in the 1923 *Lennane* case relied on by the trial court was "inapplicable to the case at bar."[152] The court noted that the 1908 state constitution in effect when the *Lennane* case was decided provided that "the electors of each city and village shall have the power . . . to pass all laws and ordinances relating to its municipal concerns, subject to the Constitution and general laws of this state."[153] The *Lennane* court concluded that neither the Michigan Constitution nor the then-current version of the

145. *Id.*

146. Associated Builders & Contractors v. City of Lansing, 305 Mich. App. 395, 853 N.W.2d 433 (2014).

147. *See generally* Maple BPA, Inc. v. Bloomfield Charter Twp., 302 Mich. App. 505, 838 N.W.2d 915 (2013).

148. *Associated Builders*, 305 Mich. App. at 398–99, 853 N.W.2d at 435.

149. *Id.*

150. *Id.* at 399, 853 N.W.2d at 435 (citing Att'y Gen. v. City of Detroit, 225 Mich. 631, 196 N.W.2d 391 (1923)).

151. *Id.* at 398, 853 N.W.2d at 435.

152. *Id.* at 405, 853 N.W.2d at 439.

153. *Id.* at 403, 853 N.W.2d at 437 (citing MICH. CONST. art. 8, § 21 (1908)).

Home Rule Cities Act gave cities police powers that they could exercise broadly.[154] Instead, the *Lennane* court held that cities possessed only a very narrow scope of inherent police powers and only those other powers that are "expressly delegated by the Constitution or legislature of the state."[155] Because neither the Home Rule Cities Act nor the 1908 Constitution gave cities the specific authority to adopt ordinances governing wages and benefits, the *Lennane* court concluded that the City of Detroit had no authority to approve a prevailing wage ordinance.[156]

The *Lennane* court also suggested that a city may adopt a public policy on matters of "local and municipal" concern, but not matters "of state concern."[157] In commenting on this decision, the court of appeals panel in *Associated Builders* noted that:

> absent from the Court's decision was any discussion as to why the setting of wage rates was a matter of state concern. Further, the Court provided little analysis and cited no authority for its conclusion that the setting of wage rates was a matter of state concern into which the city could not intrude.[158]

Almost eighty years later, the court of appeals concluded that the *Lennane* holding was inapplicable to the Lansing ordinance because "the reasoning employed in *Lennane* has subsequently been rejected by amendments to our Michigan Constitution and by changes in our caselaw."[159] The court of appeals noted that the Michigan Constitution adopted in 1963 "is much more liberal" in its interpretation of the authority granted to cities.[160] Specifically, the 1963 Constitution states that "[n]o enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section."[161] Relying on this language and citing numerous cases, the court of appeals noted that Michigan courts have "consistently recognized the broad grant of authority given to cities"[162] and that this

154. *Id.* at 403, 853 N.W.2d at 437.

155. *Id.* at 403, 853 N.W.2d at 438 (citing *Lennane*, 225 Mich. at 639–40, 196 N.W. at 393).

156. *Id.* at 404, 853 N.W.2d at 438.

157. *Id.* at 403, 853 N.W.2d at 438 (citing *Lennane*, 225 Mich. at 636, 641, 196 N.W. at 392, 394).

158. *Id.* at 405, 853 N.W.2d at 438–39.

159. *Id.* at 405, 853 N.W.2d at 439.

160. *Id.*

161. *Id.* at 406, 853 N.W.2d at 439 (citing MICH. CONST. art. VII, § 22).

162. *Id.* at 406, 853 N.W.2d at 439–40.

expanded power includes the authority to enact ordinances pertaining to wages.[163]

Michigan has enacted statutes regulating both minimum wages ("MWL")[164] and prevailing wages ("PWA")[165] (including minimum wages for state construction contracts) in the years since the supreme court issued the *Lennane* decision. The court of appeals analyzed whether these newer statutory enactments preempt the Lansing ordinance.[166] The court of appeals concluded that the Lansing ordinance does not directly conflict with these two statutes because neither the MWL nor the PWA prohibits cities from setting prevailing wage rates for city construction contracts.[167] The court also noted that the state statutes' "regulatory scheme is not so pervasive as to inhibit a city from establishing a prevailing wage for contracts for construction involving a city."[168] Applying the same four field preemption factors as applied in *Maple BPA*, the court held that: neither the MWL nor the PWA expressly provide that the statute is the exclusive authority to regulate wages, preemption cannot be inferred from either statute's legislative history, the statutes' regulatory scheme is not so pervasive as to preclude local ordinances, and the nature of the subject matter does not demand exclusive state regulation to achieve the uniformity necessary to achieve the state's purpose.[169]

163. *Id.* at 408, 853 N.W.2d at 442.

164. 1964 Mich. Pub. Acts 154, *repealed*, 2014 Mich. Pub. Acts 138. PA 138 replaced PA 154 with a new minimum wage law entitled the "Workforce Opportunity Wage Act," codified at MICH. COMP. LAWS ANN. §§ 408.411–408.424 (West 2015).

165. 1965 Mich. Pub. Acts 166 (codified at MICH. COMP. LAWS ANN. §§ 408.551–408.558).

166. *Associated Builders*, 305 Mich. App. at 413–14, 853 N.W.2d at 443.

167. *Id.* at 414, 853 N.W.2d at 444.

168. *Id.* at 417, 853 N.W.2d at 445.

169. *Id.* at 414–19, 853 N.W.2d at 444–46.