

**Fahey Schultz  
Burzych Rhodes**

EXPERT COUNSEL



REAL SOLUTIONS

# January 2023 Caselaw Update

ATTORNEY CHRISTOPHER S. PATTERSON

FEBRUARY 14, 2023



# TOPICS FOR DISCUSSION

## **The Importance of Robust, Unambiguous Ordinances**

- *Detroit Media Group v Detroit Board of Zoning Appeals*
- *Outfront Media LLC v City of Grand Rapids*
- *Alosachi v City of Detroit*

## **Interpreting Ambiguous Ordinance Provisions: Historical Interpretation**

- *Anscomb v Township of Frankenmuth ZBA*
- *Tullio v Attica Township*

## **Tricky Zoning Issues: Subtle Distinctions**

- *Sandstone Creek Solar v Township of Benton*
- *Connell v Lima Township*

## **Conflict Between State and Local Law: Veterans and Food Trucks**

- *Padecky v Muskegon Charter Township*

## **Marihuana Permit Competitive Review and the Open Meetings Act**

- *Yellow Tail Ventures Inc v City of Berkley*

# THE IMPORTANCE OF DETAILED AND CLEAR ORDINANCE PROVISIONS

- Courts are more likely uphold a municipality's decision if the ordinance provisions are comprehensive and unambiguous.
- If a municipality's decision adheres to the plain language of an ordinance, a clear and comprehensive ordinance will provide a basis to defend a municipality's decision in court.
- On the other hand, if a municipality's decision is contrary to clear and unambiguous ordinance provisions, the court will enforce those provisions at the municipality's detriment.
- Also, a comprehensive and robust ordinance allows the municipality to specifically tailor its provisions to achieve specific goals and outcomes, such as desirable sign policies, more control over non-conforming uses, and clearly defined zoning lots.



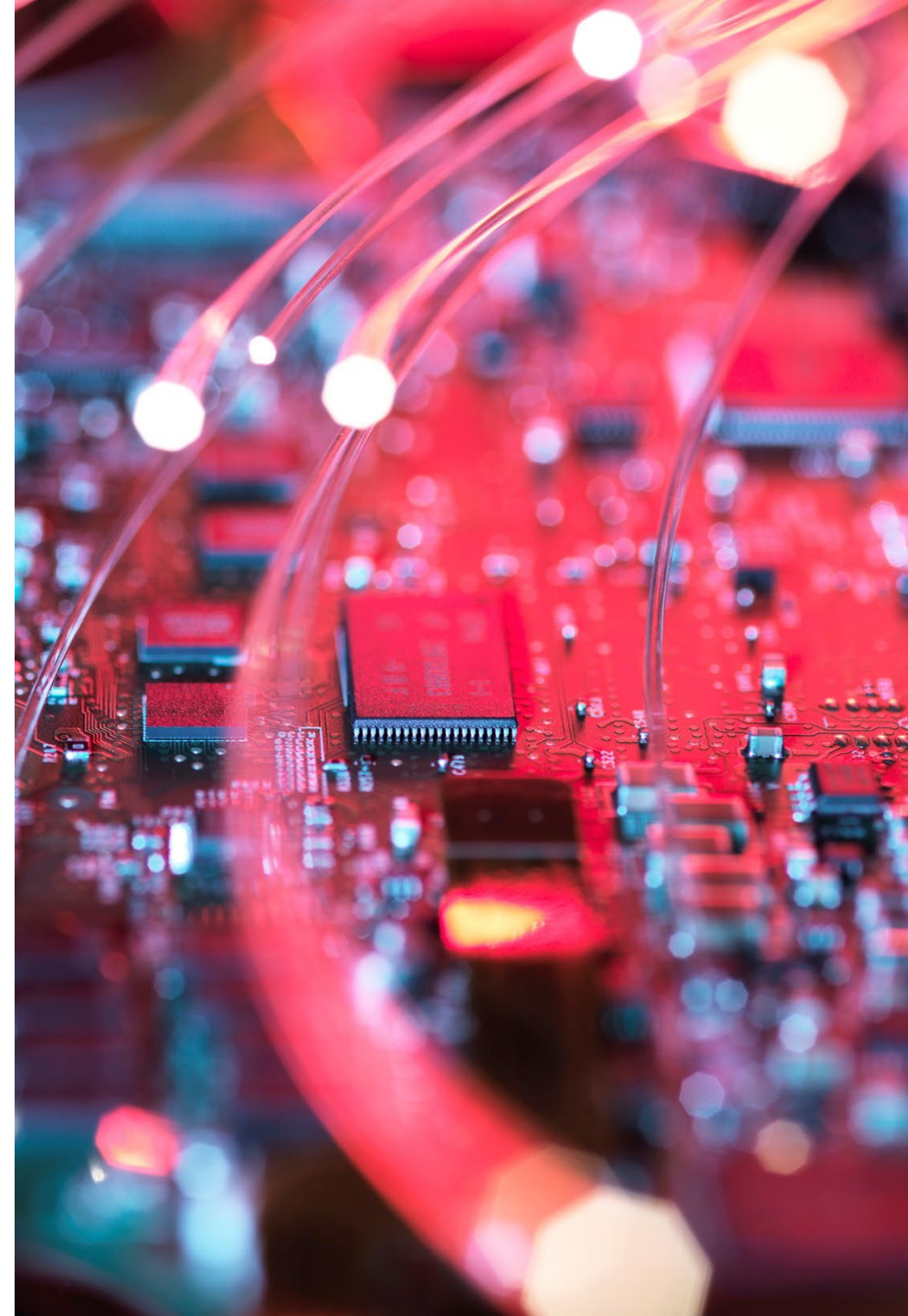


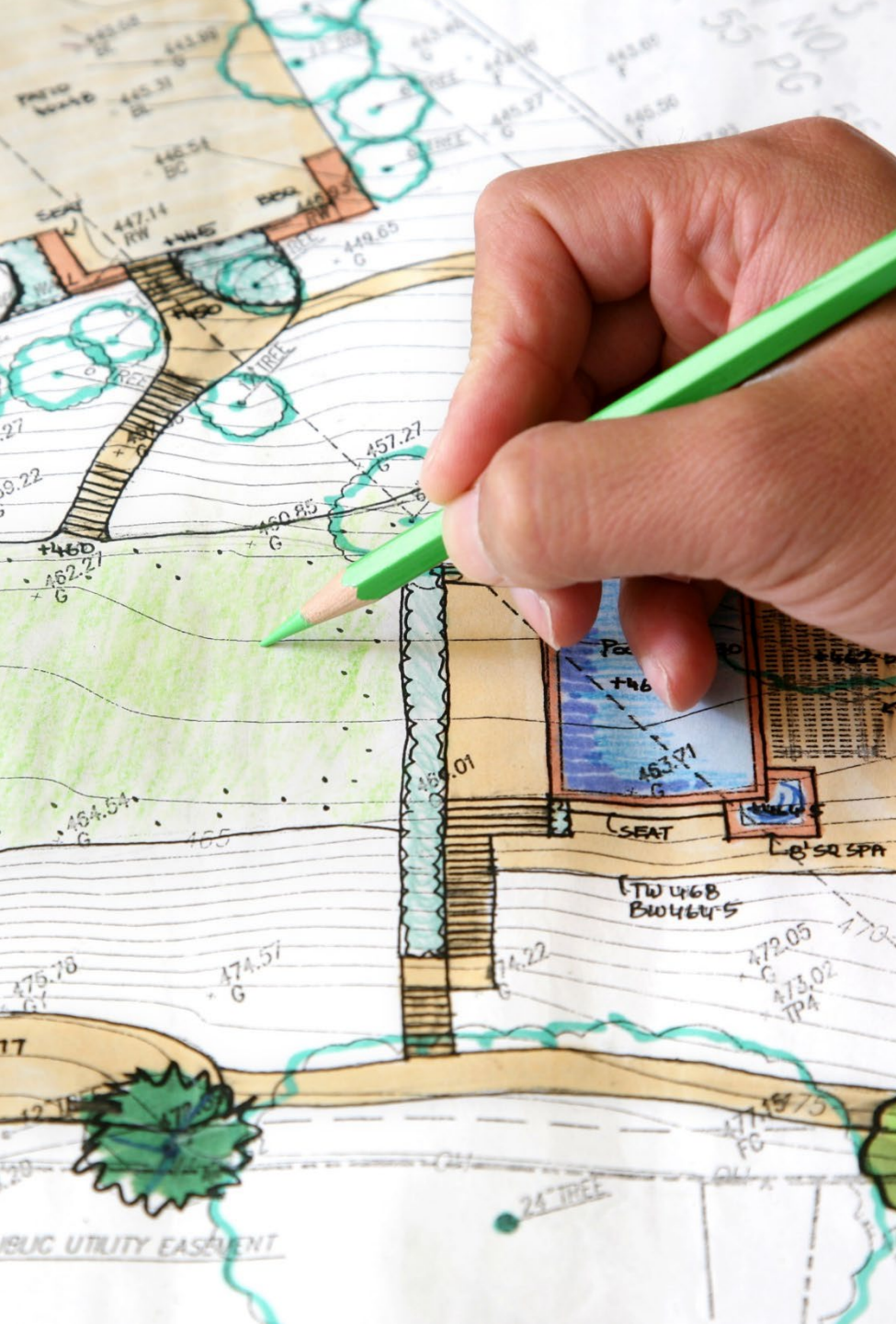
# DETROIT MEDIA GROUP V DETROIT BOARD OF ZONING APPEALS

- Detroit Media Group leased a portion of a building and obtained a zoning variance from the City of Detroit, which allowed it to display advertisement signs on the leased property.
- Eventually, a new landowner bought the building and Detroit Media Group agreed to temporarily stop displaying its advertisements to allow for building renovations.
- After the renovations were complete, Detroit Media Group asked the City for approval for a “change in advertisement.” But, the City (ZBA) claimed that the land use and lease had been abandoned.
- The City had very clear and comprehensive ordinance provisions about abandonment and the presumption of abandonment.
- The Court held that the ordinance was clear that “owner” in this context also includes a leaseholder. Thus, the leaseholder’s conduct overcame the presumption of abandonment, and the court reversed the City’s decision.
- **TAKEAWAY: A court will enforce the plain language of an unambiguous ordinance provision, even if the result reverses the municipality’s decision. Therefore, it is important to follow the plain language of an ordinance when making decisions.**

# OUTFRONT MEDIA LLC V CITY OF GRAND RAPIDS

- In a similar case involving the City of Grand Rapids, the Court of Appeals upheld a ZBA's denial of electronic sign permits because the clear language of the ordinance unambiguously states that electronic signs are not permitted in any of the relevant zoning districts where Plaintiff's proposed electronic signs were located.
- The ordinance also made it clear that changing a sign from conventional to electronic is not a permissible change to a non-conforming use.
- The City had a robust overlay or zoning ordinances and police power ordinances that addressed the permissible use of billboards and signs, both conventional and electronic.
- **TAKEAWAY: This robust overlay of local law provided a basis for the court to analyze the Plaintiff's challenge and provides the City with many rational justifications to defend their decision to deny electronic sign permits.**





# A LOSACHI V CITY OF DETROIT

- Another case involving the City of Detroit illustrates how robust and clear ordinance provisions can allow a municipality to implement creative solutions to local land use issues.
- In this case, the City's ordinance had a very specific definition of "zoning lot" that in specific situations allowed an entire tract of land, rather than a single parcel, to be a zoning lot.
- Also, the ordinance did not allow marijuana facilities to be located within 1,000 feet of the "zoning lot" of a school.
- Here, the proposed marijuana facility was technically more than 1,000 feet from the school, but it was only about 870 feet away from the "zoning lot" of the school.
- **TAKEAWAY:** Clear and comprehensive ordinance provisions can allow for creative solutions to local land use problems, such as keeping certain land uses out of sensitive areas.

# THE PROCESS FOR INTERPRETING AMBIGUITY WITHIN AN ORDINANCE

---

- If a court finds that an ordinance provision is truly ambiguous, a municipality's historical interpretation could persuade a court that the historical interpretation of the provision is the interpretation that should be used to resolve the ambiguity within the ordinance.
- The Court of Appeals notes that the municipality's historical interpretation of its own ordinance will be used to resolve the ambiguity, so long as the historical interpretation is reasonable. Therefore, a municipality's historical interpretation of an ordinance provision should be consistent, reasonable, and equitable.
- If the municipality's historical interpretation of an ambiguous ordinance provision contradicts the decision being challenged, the court will use the historical interpretation to resolve the ambiguous to the municipality's detriment, resulting in a reversal.
- **TIP: It is important to understand how your ordinances have historically been implemented and to take advantage of the zoning tools at your disposal, such as requesting an interpretation of an ordinance provision ahead of an enforcement action to avoid inconsistent applications of that ordinance provision.**





# ANSCOMB V TOWNSHIP OF FRANKENMUTH ZBA

- The Court of Appeals affirmed the decision of the circuit court and reversed the Township of Frankenmuth ZBA's decision to deny a building permit.
- Here, the Plaintiff purchases an unconventional shaped property (33 feet wide at the front, but over 1,300 feet wide throughout most of the parcel). The question was whether the lot was buildable.
- The court determined that the ordinance was not ambiguous as to the methodology for measuring the "front building line. Therefore, the historical method used by the Township to measure frontage was moot, and the plain language of the ordinance controls the measurement of buildable frontage.
- However, another issue pertained to whether the 10-day ZBA appeal deadline was jurisdictional (i.e. missing the deadline precludes an appeal). As a result, the Township's reasonable historical interpretation that the deadline was not jurisdictional controlled the analysis.

**TAKEAWAY:** Notably, the Township tried to argue that the deadline was jurisdictional. Using a municipality's historical analysis to resolve ambiguities can cut both ways, so it is important to be familiar with those historical interpretations and apply them consistently.



# TULLIO V ATTICA TOWNSHIP

- Here, there was a mulch manufacturing operation in an agriculturally zoned district that was being challenged by an adjacent landowner. The dispute turned on whether the mulch manufacturing operation was an agribusiness, which was allowed in the zoning district with special land use approval.
- Both the ZBA and the circuit court determined that the operation was an agribusiness.
- A court is more likely to uphold a municipality's decision if the public body making the decision arrives at its determination independently and provides a well-articulated justification for the decision.

**TAKEAWAY:** Again, the court shows a lot of deference to a municipality's decision, granting a large degree of discretion to the Township's determinations in the face of a challenge so long as robust, reasonable, and well-defined ordinance provisions are followed in a non-arbitrary manner.



# THE COURT EXPLAINS SUBTLE DISTINCTIONS AND TRICKY ISSUES IN THE ZONING CONTEXT



---

## *Sandstone Creek Solar v Township of Benton*

- **Interim Zoning Ordinance vs. Initial Zoning Ordinance**
  - There was opposition to the solar project within the Township, which resulted in the Board passing a moratorium (pursuant to the Michigan Zoning Enabling Act) that precluded the issuance of solar permits for one year or until a solar ordinance was adopted.
  - Later in the year, the Township approved an “interim zoning ordinance” that pertained to solar energy land uses.
  - The Plaintiff was seeking to challenge the interim zoning ordinance via referendum petition, but the Township denied the referendum petition, taking the position that that there was no right of referendum to challenge an interim zoning ordinance.
- **The court agreed with the Township, holding under the MZEA, “Township citizens have the right to seek referendum of a permanent zoning ordinance if one is adopted. No such right exists with respect to an interim zoning ordinance.”**



# THE COURT EXPLAINS SUBTLE DISTINCTIONS AND TRICKY ISSUES IN THE ZONING CONTEXT

---

## *Connell v Lima Township*

- **Administrative vs. Legislative Decisions**

- Lima Township Board granted a conditional rezoning, from Rural Residential (RR) to Light Industrial (LI), for a parcel that was an abandoned factory for over 30 years. The decision to approval conditional rezoning was challenged.
- The court explains that the adoption of a zoning ordinance is a legislative act, and the rezoning of a single parcel from one zoning district to another is an amendment of the zoning ordinance and is also a legislative act. In contrast, site plan reviews and approval of special land use permits are administrative decisions.
- Under the MZEA and the Township's Ordinance, the ZBA has the authority to hear appeals for and remedy administrative decisions, but not legislative decisions.

**TAKEAWAY:** When a party is challenging a zoning decision by a municipality, if the zoning decision is legislative, the challenger may not be required to exhaust administrative remedies by appealing to the Zoning Board of Appeals; rather, the circuit court can hear the zoning challenge.

**TIP:** Legislative decisions generally are prospective, policy decisions, whereas administrative decisions are generally on a case-by-case basis.



# CONFLICT BETWEEN STATE AND LOCAL LAW: VETERAN'S RIGHTS AND REGULATING FOOD TRUCKS

## *Padecky v Muskegon Charter Township*

- The Court of Appeals decided a case pertaining to a State statute that provides veterans with an affirmative statutory entitlement to operate a food truck and municipal regulations on food trucks that required a food truck owner to obtain a permit and operate within a specific zoning district.
- The Plaintiff was a veteran who was challenging the Township's zoning ordinance, claiming that it entirely prohibit food trucks within the Township, which would conflict with—and be preempted by—state law.
- Pursuant to MCL 35.441(1), “A veteran may sell his or her own goods within this state if the proceeds from the sale of the goods are to be used for his or her direct personal benefit or gain.” Further, the Act provides that a veteran must obtain a license to sell goods, and such a license is to be issued at no cost by the clerk of a county in which the veteran resides. MCL 35.441(2); MCL 35.442(1).

# CONFLICT BETWEEN STATE AND LOCAL LAW: VETERAN'S RIGHTS AND REGULATING FOOD TRUCKS

## *Padecky v Muskegon Charter Township*

- The Court of Appeals held that under State law, the Township may not charge the Plaintiff a fee for seeking a special use permit, so the application fee must be waived.
- Also, the Township may use the special use permit process for the limited purpose of ensuring that the Plaintiff carries on his sale of goods in an appropriate location and manner, but no more. In other words, granting the special use permit must be an ultimately foregone conclusion because pursuant to the Act, plaintiff has a right to conduct sales of goods in the Township.
- However, the Township *may* validly enact a zoning ordinance restricting food trucks to a single zoning district.

**TAKEAWAY:** There are special considerations that must be addressed when dealing with veterans that wish to sell goods within your municipality. To avoid state law preemption of local regulations, veterans must be allowed to sell goods, the application fee for special land use approval must be waived, and special land use approval must be granted. However, a municipality is allowed to restrict food trucks or other mobile vendors to a single zoning district.

**CAUTION:** But the court states “it is the Township’s obligation to ensure the existence of some property that might be appropriate for a mobile food stand—if necessary, by *sua sponte* [of one's own accord, voluntarily] rezoning some other zoned property.”

# THE RELATIONSHIP BETWEEN MARIHUANA PERMIT COMPETITIVE REVIEW AND THE OPEN MEETINGS ACT

## *Yellow Tail Ventures Inc v City of Berkley*

- City of Berkley allowed for three adult-use marihuana facility permits, but it received more than three applicants, which triggers the competitive review process that is set forth in the Michigan Taxation and Regulation of Marihuana Act (MRTMA).
- The unsuccessful applicants challenged the City's competitive review criteria, claiming that the criteria used by the City violated the MRTMA. Specifically, Plaintiffs alleged that the City's criteria violated the MRTMA because they allowed the City to score applications based on factors that were not relevant to the operation of a marijuana establishment.
- In affirming the City's criteria as compliant with MRTMA, the court endorses certain competitive review criteria, stating that these criteria are consistent with MRTMA. As the court explains, the statute does include the qualifier "within the municipality," and the court reads this qualifier as permitting a municipality to craft criteria suited to its own local concerns.
- In fact, the court states that local regulations on marihuana facilities will be permissible if the regulation: "(1) is not unreasonably impracticable, (2) does not directly conflict with the MRTMA or promulgated rules, and (3) regulates the time, place, and manner of operation of a marijuana establishment."

**TAKEAWAY: The court endorses competitive review criteria that includes concerns specific to that community, including green infrastructure, sustainability, aesthetics, and economic goals.**

# THE RELATIONSHIP BETWEEN MARIHUANA PERMIT COMPETITIVE REVIEW AND THE OPEN MEETINGS ACT

## *Yellow Tail Ventures Inc v City of Berkley*

- As for the Open Meetings Act (OMA), Plaintiffs also alleged that the scoring of the applications by the City manager violated the OMA because it was not done in a public forum.
- In reversing the trial court and ruling for the City, the court explains that the City did not create a “Scoring Committee.” Instead, the City’s ordinance stated that the City manager would review the applications, but the applications were sent to City council for the ultimate approval. Despite the City manager being aided by other officials and staff, there was no delegation of decision-making duties.
- Accordingly, the City manager reviewing the applications does not involve the work of a “public body” for the purposes of the OMA because “an individual person is not included in the definition of a public body for the purposes of the OMA.” See MCL 15.262(a).

**TAKEAWAY: The City manager’s review of the applications was not required to be conducted in a public hearing. The ultimate decision on which applications were approved was made by the City council in accordance with the OMA.**

# Questions?

---



Attorney Christopher Patterson  
FAHEY SCHULTZ BURZYCH RHODES PLC  
4151 Okemos Rd., Okemos, MI 48864

Tel: 517-381-0100

[cpatterson@fsbirlaw.com](mailto:cpatterson@fsbirlaw.com)

[www.fsbirlaw.com](http://www.fsbirlaw.com)

