STATE OF MICHIGAN
IN THE 44TH CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

HOWELL-MASON, LLC,
a Michigan Limited Liability Company,

Plaintiff,

v

HOWELL TOWNSHIP,
a Michigan General Law Township,

Defendant.
_____/

Case No. 24-32242-CZ

HON. SUSAN LONGSWORTH

HOWELL TOWNSHIP'S RESPONSE BRIEF OPPOSING HOWELL-MASON'S MOTION FOR SUMMARY DISPOSITION

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HOWELL TOWNSHIP'S RESPONSE BRIEF OPPOSING HOWELL-MASON'S MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

This case is, at bottom, simple. Howell-Mason wanted to build and operate a gas station within a wellhead protection area and sought a special land use permit to do so. The Howell Township Board reviewed Howell-Mason's special land application and denied it. The denial was required because the proposed use failed four separate requirements of the Zoning Ordinance, any one of which independently required denial. Howell-Mason appealed that decision. Judge McGivney agreed the denial was lawful and *affirmed* it. Howell-Mason sought review—to the Michigan Court of Appeals, and then to the Michigan Supreme Court—and both left the decision untouched. In other words, every court to consider the question reached the same answer: the Township acted lawfully in denying the special land use permit.

That should have ended the matter. It did not. Instead, Howell-Mason has continued to pursue this collateral action and now—with discovery closed—moves for summary disposition on its own claims, asking this Court to send the case to a jury to recover damages for not being able to engage in a land use that their own zoning consultant knew was appropriately denied. The Township has moved for dismissal on all of Howell-Mason's claims through two separate briefs: one directed at Counts I, II, III, and IX, and a second directed at Counts V and VI. These competing motions are presently pending before the Court.

The contrast between them could not be sharper and the reason why is fundamental—Howell-Mason's arguments never reckon with what has already happened. It does not mention Judge McGivney's ruling. It does not mention the appeals. It briefs these claims as though no court has analyzed and decided them—when, in truth, the central claims have already been litigated and have been repeatedly lost. Nor does Howell-Mason confront the defect at the heart of its own

theory: it attacks only one of the four grounds for the denial, leaving three independent and unchallenged grounds that compelled denial no matter what becomes of the provision it disputes. Stripped of that history and that defect, what remains is an extraordinary request—that this Court reverse a judgment three courts, including the State's highest, have already let stand. Res judicata and collateral estoppel exist to forbid precisely that.

Those doctrines resolve the bulk of this motion, and the Township will not burden the Court by repeating at length what it has already briefed. It incorporates by reference the arguments in its two summary disposition motions, which independently entitle it to judgment as a matter of law. It writes separately here only to answer the specific arguments Howell-Mason does raise—and to show that each one, far from advancing Howell-Mason's motion, confirms that judgment should instead enter for the Township under MCR 2.116(I)(2).

STATEMENT OF FACTS/PROCEDURAL HISTORY

The Township's relevant factual and procedural background of this matter is set forth in detail in the Township's Brief in Support of Its Motion for Summary Disposition Pursuant to MCR 2.116(C)(7) and (C)(10), and in the Township's Brief in Support of Its Motion for Summary Disposition on Counts V and VI Pursuant to MCR 2.116(C)(10), and is incorporated by reference as though fully restated herein. To avoid burdening the Court with redundant presentation of the same information, the Township does not repeat that background here.

STANDARD OF REVIEW

Pursuant to MCR 2.116(C)(10), summary disposition is appropriate when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." The motion is appropriately granted when a party is entitled to judgment as a matter of law. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). MCR 2.116(I)(2) additionally provides that if "it appears to the court that the opposing

party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

ARGUMENT

I. COUNTS I, II, III, AND IX ARE BARRED BY RES JUDICATA AND COLLATERAL ESTOPPEL UNDER MCR 2.116(C)(7) AND, IN ANY EVENT, FAIL AS A MATTER OF LAW UNDER MCR 2.116(C)(10).

Through a September 16, 2024 Opinion and Order (Exhibit A), Judge Matthew McGivney considered every argument Howell-Mason now recycles as to Counts I, II, III, and IX—substantive due process, procedural due process, equal protection, and preemption—rejected each on the merits, and affirmed the Township Board's denial of the special land use permit. Howell-Mason appealed that decision, but the Michigan Court of Appeals and the Michigan Supreme Court each declined to disturb that decision (Exhibit B, 4/11/2025 MI Court of Appeals Order; Exhibit C, 8/29/2025 MI Supreme Court Order). The judgment is final.

Shockingly, Howell-Mason's twenty-one-page brief[1] never once mentions that it has already litigated and lost on many of the claims on which it seeks summary disposition. The omission by Howell-Mason is brazen, and the ultimate request to "reverse" the judgment Judge McGivney already affirmed is legally incorrect. Howell-Mason Br, p 14. A circuit court cannot reverse a judgment that three tribunals, including the State's highest court, have left standing. The doctrines of res judicata and collateral estoppel exist precisely to forbid that type of collateral attack. *Duncan v State*, 300 Mich App 176, 194; 832 NW2d 761 (2013) (res judicata); *People v Gates*, 434 Mich 146, 154; 452 NW2d 627 (1990) (collateral estoppel).

[1] Howell-Mason's brief plainly violates MCR 2.119(A)(2)(a): "except as permitted by the court, the combined length of any motion and brief … may not exceed 20 pages double spaced[.]"

To avoid burdening the Court with redundant briefing, the Township incorporates by reference its arguments in the Township's Brief in Support of Its Motion for Summary Disposition Pursuant to MCR 2.116(C)(7) and (C)(10).[2] Those arguments establish that (1) these counts are barred by res judicata and collateral estoppel under MCR 2.116(C)(7) because each was actually litigated and necessarily decided in the zoning appeal affirmed through the Michigan Supreme Court; and (2) in the alternative, each fails as a matter of law under MCR 2.116(C)(10) because, with discovery closed and the material facts undisputed, Howell-Mason cannot prove the essential elements of any of them. However, Howell-Mason advances several arguments that warrant a direct response here and further support summary disposition pursuant to MCR 2.116(I)(2).

A. Howell-Mason Identifies no Legal Authority that Individualized Notice was Required When Considering a Legislative Amendment to Its Zoning Ordinance.

In an attempt to advance a procedural due process claim, Howell-Mason claims that its procedural due process rights were violated because it was not provided notice of meetings on March 20, 2023, and May 8, 2023, at which the Township Board declined to amend Section 16.11 and voted to forward a proposed wellhead protection ordinance to the Planning Commission. Howell-Mason Br, pp 3, 18 ("Failure to notify Plaintiff and provide an opportunity to be heard constitutes a procedural due process violation."). Howell-Mason's bare argument here warrants some further explanation because Howell-Mason is now claiming lack of notice for two specific meetings somehow violates the constitution.[3]

[2] The specific arguments that are being incorporated are those on pages 10-19 of the Township's Brief in Support of Its Motion for Summary Disposition Pursuant to MCR 2.116(C)(7) and (C)(10).

[3] To the extent that the lack of individualized notice is made with respect to Howell-Mason's Open Meetings Act claim, the Township points out that Howell-Mason has identified no specific violation of the Open Meetings Act.

The decision whether to amend a zoning ordinance—or even to rezone a specific parcel—is a legislative decision. *Paragon Props Co v City of Novi*, 452 Mich 568, 580; 550 NW2d 772 (1996). The March 20 and May 8, 2023 meetings concerned exactly that—whether to amend the language of Section 16.11 and whether to advance a proposed wellhead protection ordinance for further consideration (Exhibit D – Meeting Minutes). Those are legislative measures of general application; they did not adjudicate Howell-Mason's rights. There is no basis in the law—and Howell-Mason has provided absolutely none—for an individual property owner to demand specialized, personal notice before a legislative body may consider whether to amend an ordinance of general application.

A similar claim was resolved by the United States Supreme Court more than a century ago. In that case, the plaintiff landowner challenged a Colorado board's order increasing the valuation of all taxable property in Denver, arguing it had been denied due process because it received no notice and no opportunity to be heard before the order was adopted. *Bi-Metallic Investment Co v State Bd of Equalization*, 239 US 441, 443–445 (1915). The Court rejected the claim. As Justice Holmes explained, "[w]here a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption." *Id.* at 445. The holding squarely forecloses Howell-Mason's theory: a party has no constitutional right to personal notice and a personal hearing before a legislative body adopts—or here, merely considers—a measure of general application.

It is precisely because Howell-Mason claims an unidentified right to particularized notice for a legislative act that its argument fails. The Township was required to provide the general public notice that the law prescribes for the consideration of zoning ordinance amendments, and Howell-Mason does not contend that notice was not given; indeed, it has admitted that the

Township's public meeting schedule is publicly available (Exhibit E, Howell Mason's Answer to Requests to Admit, pp 3-4). There is absolutely no recognized legal theory that will allow Howell-Mason to proceed with its procedural due process claim, and it has provided none because none exists.

B. Howell-Mason's Due Process and Equal Protection Claims Rest on a False Premise that Section 16.11(C)(8) was the Only Reason for the Denial.

Howell-Mason's motion with respect to its due process and equal protection claims focuses on a single provision in the Zoning Ordinance: Section 16.11(C)(8), which contains the prohibition on gasoline service stations within 300 feet of a wellhead protection area. The argument by Howell-Mason is that "the Township relied ***only*** upon the [alleged] unconstitutional and otherwise preempted gas station ban … in denying" the special land use permit. Howell-Mason Br, p 19 (emphasis supplied). That premise is misleading and wrong for two reasons.

First, Judge McGivney already passed on the constitutionality of Section 16.11(C)(8) (Exhibit A 9/16/2024 Opinion and Order, p 15 "Zoning Ordinance Section 16.11(C)(8) was not arbitrary or capricious. It did not violate any due process rights of [Howell-Mason]."). There is no denying that Section 16.11(C)(8) is constitutional.

Second, even assuming Section 16.11(C)(8) were unconstitutional, the Township relied on three other independent reasons in denying the special use permit. To explain this point, the Zoning Ordinance does not condition approval on a single standard. Instead, a proposed special land use must satisfy the general discretionary standards of Sections 16.06(A)–(F)—addressing compatibility with surrounding land uses, impacts on public health, safety, and welfare, and effects on the natural environment and resources—and, for gasoline service stations, the use-specific requirements of Section 16.11, which apply in addition to all applicable regulations in effect in the district. Zoning Ordinance §§16.06(A)–(F), 16.11. The Township Board may not approve a special

land use unless *every* applicable standard is met. Failure to satisfy any one of them independently compels denial. Zoning Ordinance §§16.06, 16.11.

That is precisely what happened here. The Township Board denied Howell-Mason's application on ***four*** independent and mandatory grounds: 1) that the proposed use was not harmonious with the surrounding area; 2) that it would be hazardous or disturbing to existing and future neighboring uses; 3) that it would adversely impact natural resources and the environment; and, 4) that it was prohibited by the Property's location within 300 feet of a designated wellhead protection area. Zoning Ordinance §§16.06(A), 16.06(D), 16.06(F), 16.11(C)(8). Section 16.11(C)(8) is one of four legally valid reasons to deny Howell-Mason's application. Each of the other three stands entirely apart from it.

So even if Howell-Mason were right that Section 16.11(C)(8) is invalid—and it is not—three separate, unchallenged grounds for denial would remain, and the denial would still stand. Howell-Mason's all-or-nothing premise collapses its own arguments.

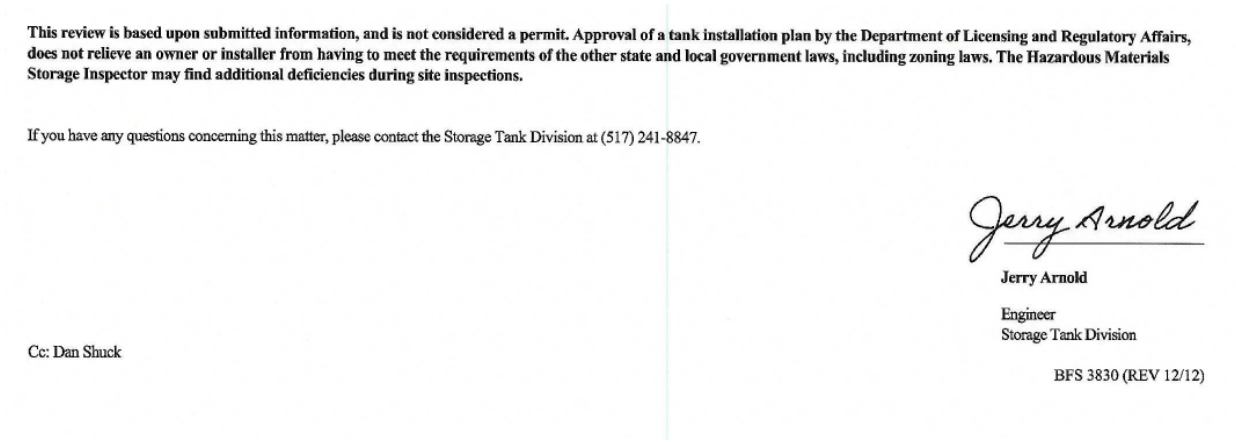
C. Howell-Mason's Arguments that the State Regulation of Underground Storage Tanks and Wellhead Protection Areas Preempt Local Zoning Regulations for the Siting of Gas Stations is Contradicted by Their Own Source Materials.

Howell-Mason argues that state regulations governing the placement of underground storage tanks, and those governing the location of wellhead protection areas, preempt local zoning that determines where gas stations may be sited. Judge McGivney already analyzed and rejected that precise argument. Applying the four-factor preemption test of *People v Llewellyn*, 401 Mich 314; 257 NW2d 902 (1977), he explained that Howell-Mason "selectively defines the field of regulation to be those areas of State law that regulate drinking water and wellhead protection," when in fact "[t]he Zoning Ordinance does not seek to regulate" those fields at all (Exhibit A, 9/16/2024 Opinion and Order p 9). As Judge McGivney put it, Howell-Mason's "unwritten

underlying premise—that any municipal regulation that arises from a concern for environmental protection is itself an environmental regulation—is fundamentally flawed, and it renders their entire analysis faulty" (Exhibit A 9/16/2024 Opinion and Order, p 9). That conclusion was left undisturbed on appeal. As explained at the outset, Howell-Mason may not relitigate it due to the application of the res judicata and collateral estoppel doctrines.

Howell-Mason nonetheless repackages the same preemption theory for this Court, this time by pointing to background descriptions of the state regulatory schemes. The Township takes this opportunity to make a narrow but telling point: Howell-Mason's own source documents refute the very preemption it asserts. Each confirms that the state approvals Howell-Mason touts do not displace local zoning—they expressly preserve it.

Begin with the approval Howell-Mason claims it obtained for its proposed underground storage tanks. By its own terms, that approval "does not relieve an owner … from having to meet the requirements of the other state and local government laws, ***including zoning laws***"::[4]



This review is based upon submitted information, and is not considered a permit. Approval of a tank installation plan by the Department of Licensing and Regulatory Affairs, does not relieve an owner or installer from having to meet the requirements of the other state and local government laws, including zoning laws. The Hazardous Materials Storage Inspector may find additional deficiencies during site inspections.

If you have any questions concerning this matter, please contact the Storage Tank Division at (517) 241-8847.

Jerry Arnold

Jerry Arnold

Engineer
Storage Tank Division

Cc: Dan Shuck

BFS 3830 (REV 12/12)

A document that expressly conditions the approved activity on continued compliance with local zoning cannot support an argument that local zoning has been preempted.

[4] This can be found as an attachment to Howell-Mason's Exhibit T.

The EGLE materials Howell-Mason submitted say the same. Exhibit X to Howell-Mason's filing is an EGLE publication titled "The Michigan Wellhead Protection Program Guide" from March 2020. Rather than claiming exclusive state authority over the field, the document encourages communities to act at the local level to protect their drinking water, specifically endorsing management strategies that include "site plan review, zoning, ordinances, land use planning, and … wellhead protection" plans to "insure the future quality of [the] drinking water supply." Howell-Mason, Exhibit X. In other words, the very agency Howell-Mason says has occupied this field treats local zoning not as something preempted, but as a crucial tool for safeguarding drinking water.

The Township raises these source materials only to further demonstrate why Howell-Mason's preemption claim, already foreclosed, also fails on the very materials Howell-Mason chose to put before the Court. It should be dismissed.

II. COUNT V FAILS AS A MATTER OF LAW UNDER MCR 2.116(C)(10) BECAUSE NO GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO HOWELL-MASON'S OPEN MEETINGS ACT CLAIM.

Howell-Mason devotes barely three paragraphs to its contention that the Township violated the Michigan Open Meetings Act(OMA) by reaching a "predetermined" vote and by failing to provide some unspecified "required notice." Howell-Mason Br, pp 19–20. The Township explained in its Brief in Support of Its Motion for Summary Disposition on Counts V and VI Pursuant to MCR 2.116(C)(10) why this claim fails: three of the four remedies the OMA provides are foreclosed here as a matter of law, and the undisputed record establishes that the Township considered and decided Howell-Mason's application in duly noticed, open public meetings, with no evidence whatsoever that any decision was made outside of a public meeting. Those arguments are incorporated here and independently entitle the Township to judgment under MCR

2.116(I)(2).[5] The Township writes separately only to address the supposed "evidence" Howell-Mason now marshals because that evidence, on inspection, proves nothing it claims and in places refutes its own theory.

Start with the assertion that the vote was "predetermined" which Howell-Mason supports by citing Exhibit Y. Howell-Mason Br, pp 19-20. Exhibit Y consists of undated, untimestamped Facebook posts from a single Township Board member, Trustee Bob Wilson, which on their face appear to have been made ***after*** the special land use permit was denied. The OMA governs how a public body deliberates and decides as a body; the after-the-fact views of a single trustee are not the act of the Township Board and do not show that the Board deliberated or decided anything outside an open meeting. How any of this violates the OMA, Howell-Mason never explains.

Howell-Mason also asserts—in conclusory fashion—that the Township "colluded" with MHOG to vote against the project, and cites its Exhibits E and F. Exhibit E are the meeting minutes of the March 20, 2023 Township Board meeting; Exhibit F is the minutes of the May 8, 2023 Township Board meeting. Minutes of duly noticed, open meetings are not evidence of secret coordination; they are the documentary record that the Township's business was conducted in public, in the open, exactly as the OMA requires. Howell-Mason's own exhibits thus undercut the very claim they are offered to support. It is left entirely unexplained how meeting minutes establish that the Township colluded with anyone, and Howell-Mason—having taken no discovery of its own on this claim—offers nothing else.

[5] The specific argument that are being incorporated are those on pages 6-10 of the Township's Brief in Support of Its Motion for Summary Disposition Pursuant to MCR 2.116(C)(10).

Count V should be dismissed for each of the reasons set out in the Township's companion motion, and the "evidence" Howell-Mason now advances only confirms how insubstantial the claim has always been.

III. COUNT VI FAILS AS A MATTER OF LAW UNDER MCR 2.116(C)(10) BECAUSE NO GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO HOWELL-MASON'S REGULATORY TAKINGS CLAIM.

Howell-Mason pled a "takings" claim in its Count VI. The Township explained at length in its companion motion why this claim fails as a matter of law, and those arguments are incorporated here and independently entitle the Township to judgment under MCR 2.116(I)(2).[6] In short, Howell-Mason cannot establish a regulatory taking under either theory Michigan law recognizes—that the regulation failed to advance a legitimate governmental interest, or that it denied Howell-Mason all economically viable use of its land—because the undisputed record, including the testimony of Howell-Mason's own experts, defeats both. The Township responds here only to the framing Howell-Mason advances in its motion.

The framing by Howell-Mason is that the Township relied on an "unconstitutional, preempted, arbitrary and capricious ordinance banning gas stations" and that resulted in a deprivation of property. Howell-Mason Br, p 21. Of course, that premise is wrong for at least two obvious reasons. First, Judge McGivney—along with the Court of Appeals and Michigan Supreme Court—denied the idea the Township somehow wrongly denied the sought after special land use. Second, the Township relied on three ***unchallenged*** independent grounds under its Zoning Ordinance to deny the special land use, as explained above. The arguments are just belied by the record.

[6] The specific arguments that are being incorporated are those on pages 10-18 of the Township's Brief in Support of Its Motion for Summary Disposition Pursuant to MCR 2.116(C)(10).

Howell-Mason also points this Court to a block quote from Penn Central discussing what it calls a "similar" case: *Pennsylvania Coal Company, v Mahon*, 260 US 393 (1922). *Pennsylvania Coal* turned on the destruction of a vested property right the owner already held. The coal company had deeded away the surface while expressly reserving the right to mine all of the coal beneath it—a separate and, as the Court put it, "very valuable estate" recognized as such under Pennsylvania law. *Id* at 414. The challenged statute then forbade mining that would cause subsidence, which made it commercially impracticable to extract coal the company already owned the right to mine—an effect the Court equated, for constitutional purposes, with appropriating or destroying that estate outright. *Id* at 414–415. It was in that setting—a regulation that wiped out an existing, legally recognized property interest—that Justice Holmes announced the very rule Howell-Mason quotes: "if regulation goes too far it will be recognized as a taking." *Id* at 415.

Howell-Mason holds no analogous interest. It never possessed any right—vested, reserved, or otherwise—to operate a gas station within 300 feet of a wellhead protection area. That use was prohibited on the face of the Zoning Ordinance and, elsewhere in the district, available only by discretionary special land use permit. The point is there was no preexisting legal interest for the Township's decision to destroy, because the asserted right was not a property right Howell-Mason even held. The contrast is also one of degree: the statute in *Pennsylvania Coal* left the coal company with no profitable use of the very estate it had reserved, whereas here the Property retains multiple economically viable uses as of right—uses Howell-Mason has simply declined to pursue.

Because Howell-Mason cannot establish a taking under any recognized theory—it held no protected interest the Township could take, the denial rested on independent grounds it does not challenge, and the Property retains economically viable uses it has chosen not to pursue—no

genuine issue of material fact remains, and the Township is entitled to summary disposition on Count VI under MCR 2.116(C)(10).

CONCLUSION

For all of these reasons, the Township respectfully requests that the Court deny Howell-Mason's motion for summary disposition in its entirety and, pursuant to MCR 2.116(I)(2), enter judgment in the Township's favor on all of Howell-Mason's claims.

Respectfully submitted,

Fahey Schultz Burzych Rhodes PLC
Attorneys for Defendant



Dated: May 27, 2026

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STATE OF MICHIGAN
IN THE 44TH CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

HOWELL-MASON, LLC,
a Michigan Limited Liability Company,

Plaintiff,

v

HOWELL TOWNSHIP,
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Defendant.
_____/

Case No. 24-32242-CZ

HON. SUSAN LONGSWORTH

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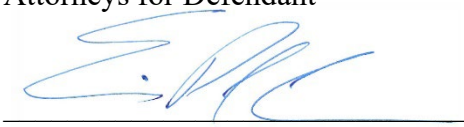
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INDEX OF EXHIBITS

EXHIBIT LETTER	DESCRIPTION
EXHIBIT A	09/16/2024 Opinion and Order on Appeal
EXHIBIT B	04/11/2025 MI Court of Appeals Order
EXHIBIT C	08/29/2025 MI Supreme Court Order
EXHIBIT D	03/20/2023 and 05/08/2023 Meeting Minutes
EXHIBIT E	02/26/2025 Plaintiff's Responses to Defendant's First Request to Admit to Plaintiff

Respectfully submitted,

Fahey Schultz Burzych Rhodes PLC
Attorneys for Defendant



Dated: May 27, 2026

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EXHIBIT A

STATE OF MICHIGAN 44TH CIRCUIT COURT JUDICIAL CIRCUIT LIVINGSTON	PROOF OF SERVICE FOR PARTY NOTIFICATION	CASE NO. 2024 0000000350-AA

204 S HIGHLANDER, STE 4
HOWELL, MI 48843

(517)546-9816

Judge: MATTHEW J. MCGIVNEY

Date: TUESDAY SEPTEMBER 17, 2024

Plaintiff/Petitioner	v	Defendant/Respondent
HOWELL-MASON		HOWELL TOWNSHIP,,

OPINION AND ORDER ON APPEAL

CERTIFICATE OF MAILING

The following parties were served by e-mail (MCR 2.107(C)(4)):

Name	Complete address of service
CHRISTOPHER SCOTT PATTERSON	cpatterson@fsbrlaw.com
PAUL E. BURNS	burns@peblaw.net
NIK LULGJURAJ	NIK@NIKLAW.COM

09/17/2024
Date

KELLEY LINDQUIST
Clerk

STATE OF MICHIGAN
IN THE 44TH CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

HOWELL-MASON LLC,

Appellant,

v.

Case No. 2024-350-AA
Hon. Matthew J. McGivney

HOWELL TOWNSHIP,

Appellee.
_____/

OPINION AND ORDER ON APPEAL

At a session of said Court held in the Courthouse,
City of Howell, County of Livingston,
State of Michigan, on the 16th day of September, 2024.

PRESENT: HONORABLE MATTHEW J. McGIVNEY
CHIEF CIRCUIT COURT JUDGE

THIS MATTER HAVING COME BEFORE THE COURT on August 15, 2024 for oral arguments on Appellant's claim of appeal, and the parties having appeared by and through their respective counsel, and the parties having presented their respective oral arguments, and the Court having reviewed the filings and having thoroughly reviewed the record from the lower tribunal, and the Court being otherwise fully advised in the premises, the Court now issues this Opinion and Order AFFIRMING the lower tribunal for the reasons set forth in detail below.

I. BACKGROUND

Appellant owns three parcels in Howell Township, out at the corner of Burkhart and Mason Rd. Two are zoned Neighborhood Services Commercial (NSC). The third parcel is not at issue in this case.

In 2017, Appellant bought up these lots, intending to build a Mugg & Bopp's gas station, convenience store, and drive-thru fast-food restaurant on the two lots zoned NSC (with the third parcel being used for the in/out ramp and accessory structures). However, while the Howell Township Ordinance allows convenience stores by right in the NSC District, the gas station and the drive-thru are only allowed by special permit. In addition, the lots are located within 300 feet of the Marion Howell Oceola Genoa Township (hereinafter "MHOG") wellhead protection area, and the Zoning Ordinance does not permit gas stations within 300 feet of the wellhead protection area.

Appellant argues that in 2020, Appellant had some initial talks with the Township about putting

the gas station/convenience store/drive thru at that location, and that some unidentified person told them verbally it could be done, but Appellant would need a use variance. Appellant applied for the use variance, but the use variance was denied. Appellant asked for the Zoning Ordinance to be amended to allow gas stations in the wellhead protected area with MHOG's approval, but the Township denied the request.

The Township later sent a proposed amended ordinance drafted by MHOG (patterned on Marion Township's ordinance) to the Planning Commission, but the record does not show if it was adopted or not.

Appellant tried again in June 2023, submitting a special land use permit (hereinafter "SLUP") to the Planning Commission. It was bare bones, consisting of two or three pages, so Appellant hired counsel and sent in a hefty supplement in mid-October 2023. Back in February 2023, MHOG had approved of the application with numerous conditions, but then in May 2023, it retracted its approval. On November 15, 2023, MHOG also held a public meeting and determined that the SLUP/site plan proposed by Appellant was inappropriate.

On November 21, 2023, the Planning Commission held a public meeting on the SLUP application, and the Planning Commission found itself faced with significant community opposition at the meeting. The citizens of the township and surrounding area also made their opposition known to the Planning Commission by submitting emails and letters prior to the meeting, beseeching the Commission to deny the SLUP application. The Planning Commission recommended denial of the application based on several findings, on the MHOG report, on public comment, on documentary evidence submitted by Appellant, and considering the prohibition in the Ordinance for gas stations within 300 feet of a protected wellhead area.

On December 11, 2023, the Township Board of Trustees (hereinafter "the Board" or "the Township Board") held a meeting and voted to deny the SLUP application and site plan proposal.

On December 16, 2023, Appellant submitted an appeal to the ZBA to make sure it met the finality requirements to appeal to this Court. However, the ZBA lacked authority to grant the use variance, and the ZBA eventually returned the application fee.

The Township Board certified the minutes of the December 11, 2023 meeting on January 8, 2024. Appellant timely filed this appeal on January 26, 2024.

On March 27, 2024, Appellant also filed an Original Complaint in Case No 24-32242-CZ, which involves substantially the same nucleus of operative facts and questions of law as the above-captioned appeal (plus a regulatory takings claim). A summary disposition motion has been filed by Howell-Mason LLC, and the hearing is pending October 3, 2024.

II. ARGUMENTS

Plaintiff raises five main arguments on which to reverse the Township Board's denial of the SLUP application, summarized as follows:

I. The denial of the SLUP application was based primarily on Ordinance 16.11(C)(8), which completely bans gas stations within 300 feet of a protected wellhead area, and that Section is unconstitutional as applied to Appellant's application because there was ample evidence in the record that the proposed gas station was safe and would not impact the environment/water quality of the community, and the other agencies had approved of the proposal, but there was no evidence in the record to support that the gas station was unsafe or would have a detrimental impact on the environment, but the Township applied a total ban of that type of business anyway (without factual support).

II. The denial of the SLUP application is not supported by substantial, material, and competent evidence in the record --- the Appellant provided a plethora of supporting documents from hired experts to say the gas station proposal was safe and the experts also presented at the meeting, but the public did not appear at the Township Board meeting to oppose the SLUP (only at the Planning Commission meeting) and the public's fears were not based on documentary support.

III. The Township Ordinance is preempted (field/implied preemption) or otherwise in direct conflict with State Regulations, and is therefore invalid

> The Safe Drinking Water Act and the Wellhead Protection Program administered by the Michigan Department of Environment, Great Lakes, and Energy (hereinafter "EGLE") provides comprehensive regulation that addresses all the concerns that might be underlying the Zoning Ordinance's prohibition on gas stations within 300 feet of a wellhead protection area, so the field is preempted and there is no room for a local Ordinance to ban the gas station.
>
> Similarly, the regulations under the Natural Resources and Environmental Protection Act (hereinafter "NREPA") regarding underground storage tanks provide robust regulation of gas station storage and prevention of wellhead contamination, and where the State would allow Appellant's SLUP, the Township cannot pass a conflicting Ordinance to prohibit it.

IV. Ordinance 16.11(C)(8) is facially unconstitutional because it completely bans one type of industry from the wellhead protection area, and not other industries that carry contamination risk, and the ban is not reasonably / rationally related to a legitimate government interest.

V. Appellant was denied equal protection because

> A. the gas station industry was totally banned from the wellhead protection area and similarly situated industries were not banned
>
> B. the Planning Commission and the Township Board never had authority to issue the SLUP but they required Appellant to attend hearings and pay application and review fees anyway.

Appellee responds with five arguments, but defines the questions before the Court in a slightly different manner, summarized as follows:

I.A-B. the Michigan Zoning Enabling Act (hereinafter "MZEA") allows the Township to pass ordinances governing the special use land permit application process, and the Township's ordinance (16.02) sets forth six criteria for the Township to evaluate whether the proposed SLUP should be granted --- and in this case, the Appellant's SLUP application failed four of the six

criteria, and there was sufficient evidence in the record to support the Board's findings on the four factors where the SLUP failed, including extensive public opposition to the gas station and MHOG's opinion that the gas station could be a hazard to the wellhead protected area.

> The Township also raises the argument that Appellant only addressed one of the factors on appeal, and so it has waived appeal of the Board's findings on the other factors.

I.C.1.a. State Law does not preempt the Zoning Ordinance, where the field of zoning is delegated to the municipal governments by the MZEA, and there is no comprehensive state legislation or regulation that governs gas station location in relation to wellhead protection areas --- the Safe Drinking Water Act, NREPA, and the Wellhead Protection Program regulate other things (related things) but do not occupy the same field as the Zoning Ordinance.

I.C.1.b. The Zoning Ordinance does not conflict with State Law --- just because a State Agency finds that the gas station would satisfy its regulations, the Township is not prevented from passing Zoning Ordinances that add some requirements.

I.C.2.a-b. Appellant does not have any protected property interest in having its SLUP granted because the gas station use was always only by special permit in that zoning district, and whether to grant a SLUP is discretionary --- ergo, Appellant cannot maintain any due process or equal protection claim. Even if Appellant had a protected property interest in the SLUP application, the Zoning Ordinance is rationally related to a legitimate government interest: maintaining the welfare of the community and ensuring compatible land uses near each other. The Appellant's expert reports that the gas station is low risk only makes the wisdom of Township's policy fairly debatable, and when that is the case, the policy should not be disturbed by the Court.

I.C.2.c. Appellant was afforded due process because the MZEA allows the municipal government to set forth the process for SLUP application, and the Zoning Ordinance 16.05-16.06 describing the process applicable here entitles an applicant to a hearing before the Planning Commission and a hearing before the Township Board. Appellant received both of those hearings and was given ample opportunity to present its experts and documentary support and answer questions at both hearings.

III. APPLICABLE LAW – Standard of Review

Appeals from determinations made by the Zoning Board of Appeals (hereinafter "ZBA") are governed by MCR 7.122. Subsection A(1) states:

> (1) This rule governs appeals to the circuit court from a determination under a zoning ordinance by any officer, agency, board, commission, or zoning board of appeals, and by any legislative body of a city, village, township, or county authorized to enact zoning ordinances.

All parties in this appeal agree that this is the applicable rule. While there was a pre-suit dispute about whether an appeal to the ZBA was required to meet the ripeness requirements, the ZBA later refunded Appellant the appeal fee, essentially admitting the ZBA did not have authority over the appeal from the Township Board's decision. All parties agree that the appeal is properly before this Court and there are no ripeness or finality issues that would preclude the Court hearing the appeal without a ZBA decision.

A local government's decision granting or denying a variance from the zoning ordinance is considered "administrative" in nature and subject to appeal in the circuit court. MCL 125.3606; *see also Sun Communities v Leroy Twp*, 241 Mich App 665, 669 (2000); *Carleton Sportsman's Club v Exeter Twp*, 217 Mich App 195, 201 (1996). An appeal of an administrative decision is limited to the record made before the municipal body and nothing else. MCL 125.3606(1). New proofs will not be permitted on appeal. MCL 125.3606(2). In reviewing the record, the court does not review the evidence *de novo*, make credibility determinations, or weigh the evidence. *Brainard v Secretary of Health & Human Servs*, 889 F2d 679, 681 (6th Cir 1989).

Const 1963, art 6, § 28 provides in pertinent part:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.

Therefore, the proper standard of review to be applied in the circuit court is whether the Planning Commission's decision was authorized by law and the findings were supported by competent, material, and substantial evidence on the whole record.

Whether a decision was "authorized by law" under the constitutional standard has been interpreted by this Court to mean "allowed, permitted, or empowered by law." *Northwestern Nat'l Cas Co v. Comm'r of Ins*, 231 Mich App 483, 488 (1998). An agency decision that is in violation of a statute or the constitution, is in excess of the statutory authority or jurisdiction of the agency, is made upon unlawful procedures resulting in material prejudice, or is arbitrary and capricious is a decision that is not authorized by law. *Northwestern Nat'l Cas, supra* at 488.

The meaning of "supported by competent, material, and substantial evidence on the whole record is discussed *infra.*

IV. ANALYSIS

A. General Authority and Requirements for Zoning Ordinances

The power of Michigan municipalities to exercise zoning authority is conferred exclusively by state zoning enabling legislation. *See, e.g., Sun Cmtys v Leroy Twp*, 241 Mich App 665, 669 (2000). The MZEA grants municipal governments broad authority to create master plans and zoning districts, with restrictions on development and land use in each. The legitimate zoning objectives as set forth in the MZEA include:

- regulate the use of land and structures to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land,
- to ensure that use of the land is situated in appropriate locations and relationships,
- to limit the inappropriate overcrowding of land and congestion of population, transportation systems, and other public facilities,

- to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility requirements, and
- to promote public health, safety, and welfare.

See MCL 125.3201(1).

There is substantial discretion on the part of local governments in the establishment of the zoning ordinance. *Kyser v Kasson Twp*, 486 Mich 514, 541 (2010), emphasizes this point, saying that the MZEA provisions "empower localities to plan for, and regulate, a broad array of land uses, taking into consideration the full range of planning concerns that affect the public health, safety, and welfare of the community." This discretion includes, without limitation, important decisions involving:

- the nature, size, number, and location of use districts established as part of the zoning map;
- the uses permitted as of right in each district;
- the uses in each district authorized as special land uses, i.e., uses permitted subject to review and approval of standards specified in the ordinance, MCL 125.3502, and
- whether to authorize planned unit developments (PUDs) and, if so, the types of uses and/or combinations of uses permitted in such developments and the procedure and regulations applicable for their review and approval

See MCL 125.3503.

The MZEA allows the legislative body to provide for these uses as special land uses in a zoning district. MCL 125.3502(1). The ordinance must specify what standards must be met to qualify for the special use. MCL 125.3502. All special use standards, both specific and general, must be met if a permit is to be approved. *Florka v Detroit*, 369 Mich 568 (1963); *see also Whittaker & Gooding Co v Scio Twp,* 122 Mich App 538 (1983).

The standards contained in the zoning ordinance for special land uses must be consistent with and promote the intent and purpose of the zoning ordinance and ensure that the land use or activity authorized is compatible with adjacent uses of land, the natural environment, and the capacities of public services and facilities affected by the land use. The standards must also ensure that the land use or activity is consistent with the public health, safety, and welfare of the local unit of government. *See* MCL 125.3504(2).

B. Unconstitutional as Applied

Appellant first argues that the prohibition on gas stations within 300 feet of the wellhead protected area contained in Section 16.11(C)(8) is unconstitutional as applied. Appellant asserts that the evidence in the record before the Board demonstrated the gas station was safe to install in the wellhead protected area, but the ordinance zoned them out based on no evidence. Therefore, the ordinance is arbitrary and capricious.

A party may establish that a land use regulation is unconstitutional, either on its face or "as applied," by demonstrating "(1) that there is no reasonable governmental interest being advanced by the present zoning classification or (2) that an ordinance is unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of other types of legitimate land use from the area in question." *Frericks v Highland Twp.*, 228 Mich App 575, 594 (1998). A challenge to a zoning

ordinance as unconstitutional as applied, to be distinguished from a facial challenge, alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution of government action. *See Bonner v City of Brighton, infra.*

As discussed in Section IV.E., *infra*, the record evidence is clear that there are numerous other gas stations in the surrounding area that service the community. In addition, the plain language of the Ordinance allows gas stations by special use permit in the NSC District, just not within 300 feet of the wellhead protection area. Since there is no reasonable dispute based on the record that the business of gas stations is not totally banned in the Township or even in that District, any as applied challenge arising from a claim of exclusion zoning must fail. *See Houdek v Centerville Twp*, 276 Mich App 568 (2007) (holding that when the owner of a septage facility was denied several special use permits to establish more septage facility sites in the township, his claim of exclusionary zoning automatically failed because there were other septage facilities in the Township that had been established by either SLUP or grandfathered in, and further the business owner had failed to demonstrate any community need for another septage facility).

To the extent Appellant's challenge is based on a claim that there was no record evidence to support the limitation on gas stations contained in Section 16.11(C)(8), that argument is addressed in Section IV.C., *infra.*

To the extent that Appellant's challenge is based on a claim that the ordinance is arbitrary and not rationally related to a government purpose, that is essentially a due process claim. Substantive due process requires that an ordinance "be rationally related to a legitimate governmental interest." *Landon Holdings, Inc. v Grattan Twp.*, 257 Mich App 154, 173, 177 (2003). "The essence of a claim of violation of substantive due process is that the government may not deprive a person of liberty or property by an arbitrary exercise of power." *Id.* at 173.

In *Conlin v Scio Twp*, 262 Mich App 379 (2004), the Court of Appeals cited *TIG Ins., Inc. v. Dep't of Treasury*, 464 Mich. 548, 557–558 (2001), to explain what constitutes arbitrary restriction on property use, stating:

> Rational basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with 'mathematical nicety,' or even whether it results in some inequity when put into practice." *Crego v. Coleman*, 463 Mich. 248, 260 (2000). Rather, it tests only whether the legislation is reasonably related to a legitimate governmental purpose. The legislation will pass "constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." *Id.* at 259–260.

The *Houdek v Centerville Twp* Court readily identified protecting the health, safety, and welfare of the community as a legitimate government interest, and viable basis for a zoning ordinance. In that particular case, the Court of Appeals found that the local ordinance regarding septage facilities was rationally related to a legitimate government interest of protecting human health and the environment.

This case is much the same. Section 16.11(C)(8) is rationally related to protecting human health and the environment – including the drinking water in the community aquifer, as well as preventing noise and light pollution, and great traffic jams. The record supports that these were the concerns underlying Section 16.11(C)(8) --- see TWP000327-330, TWP000253-265. MHOG's May 19, 2023 report also supports that the maintenance of health in the community was a concern in this particular SLUP application. TWP000331-332. Like in *Houdek*, the regulation of placement of gas stations is rationally related to the legitimate government interest of protecting the community's health, and there were facts in this particular SLUP application that were presented to the Board that supported the ordinance. Therefore, 16.11(C)(8) was not arbitrary or capricious. It did not violate any due process rights of Appellant. Section 16.11(C)(8) is not unconstitutional as applied.

C. Not Supported by Material, Competent, and Substantial Evidence on the Whole Record

The standard of review in appeals from a township zoning decision requires that the decision be supported by competent, material, and substantial evidence on the record as a whole. *Carleton Sportsman's Club v Exeter Twp*, 217 Mich App 195 (1996). Substantial evidence is evidence that a reasonable person would accept as sufficient to support a conclusion. It is "more than a scintilla" but can be substantially less than a preponderance. *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 72 (1998).

On appeal, the factual findings of the lower tribunal are to be accorded deference. *Great Lakes Society v. Georgetown Charter Twp.*, 281 Mich App 396, 408 (2008); *see also Norman Corp. v. East Tawas*, 263 Mich App 194, 198 (2004). When there is substantial evidence in the record to support the lower tribunal's decision, the Circuit Court may not substitute its discretion for that of the administrative agency. *See e.g., Black v. Dep't of Social Services*, 195 Mich App 27, 30 (1992). The court should not "set aside findings merely because alternative findings also could have been supported by substantial evidence on the record." *In re Payne*, 444 Mich 679, 692 (1994).

It is true that the Appellant did all they could to place into the record below evidence from their hired experts opining that the gas station was safe and posed no risk to the aquifer. Appellant offered, *inter alia,* the report of its hydrogeology expert from Mannik Smith Group. See TWP000394-402. Appellant also submitted a letter from PLB Planning Group, opining that the gas station prohibition in Section 16.11(C)(8) was unreasonable. TWP000368-69. Appellant brought experts to the Board meeting to present about the technical aspects of the underground storage tanks and the hydrogeological conditions of the area. TWP000788-807. The Board had a large amount of evidence before it that the proposed gas station would not negatively impact the wellhead or water safety.

However, the Board was also presented with some twenty-five letters from members of the community opposing the gas station --- citing a plethora of concerns for water safety, as well as light and noise pollution, and increased traffic at an already high-traffic location. See TWP000342-357, 361-365. Many members of the public appeared at the Planning Commission meeting and spoke out against the gas station. TWP000708-725, 741-745, 747-748. One member of the community even cited to a gas leak that occurred at a Mugg & Bopp's gas station in the last few years, leaking some 1000 gallons of gas into the ground. MHOG also submitted a report that disapproved of the gas station, citing potential hazards to the aquifer and citing potential negative impact of an additional wellhead site in the reserve area. See TWP000331-332. The Planner's Report from 8/16/23 and the Engineer Report form 8/14/23 were also considered by the Planning

Commission and included in the recommendation the Planning Commission made to the Board.

Looking at the entire record, there was clearly evidence in the record in support of the Board's findings that the gas station was not harmonious with the future use of the District and not harmonious with the surrounding community. There is also record evidence that granting the SLUP application would be hazardous or would adversely impact the surrounding community. There is evidence that weighs in favor of the opposite conclusion as well. But the Court does not review the factual findings of the Board *de novo*, and the Court may not substitute its own judgment based on its own weighing of the evidence. The record contains far more than a scintilla of evidence supporting the Board's findings. Substantial, material, and competent evidence appears in the record to support the findings of the Board. Therefore, the Court must affirm the lower tribunal.

D. Preempted by State Law / Conflicting with State Law

Appellant challenges Section 16.11(C)(8) as being preempted by State Law or in conflict with State Law, but then selectively defines the field of regulation to be those areas of State Law that regulate drinking water and wellhead protection --- areas of law in which are notoriously comprehensively regulated by the State. Appellant's definition of the "field" is erroneous at best or deliberately misleading at worst. The Zoning Ordinance does not seek to regulate water safety standards. It does not seek to regulate where wellhead protection areas are established or how they are protected. The Zoning Ordinance seeks to regulate where certain commercial uses can be operated in the Districts. Appellant's unwritten underlying premise – that any municipal regulation that arises from a concern for environmental protection is itself an environmental regulation – is fundamentally flawed, and it renders their entire analysis faulty.

A municipality is precluded from enacting an ordinance if 1) the ordinance is in direct conflict with the state statutory scheme, or 2) if the state statutory scheme preempts the ordinance by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation. *People v Llewellyn*, 401 Mich 314 (1977). *See also Addison Twp v Gout*, 435 Mich 809 (1990) (holding that the DEQ's Supervisor of Wells did not have exclusive authority over the entire oil and gas production process, just the drilling, completion, and operation of oil and gas wells, and so the Township's ordinance about where the company that operated the gas line could build its pipeline was not preempted by the state regulations).

The *Llewellyn* Court looked at four factors to determine whether local government action is preempted:

> First, where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is preempted.
>
> Second, preemption of a field of regulation may be implied upon an examination of legislative history.
>
> Third, the pervasiveness of the state regulatory scheme may support a finding of preemption. While the pervasiveness of the state regulatory scheme is not generally

> sufficient by itself to infer preemption, it is a factor which should be considered as evidence of preemption.
>
> Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest.
>
> As to this last point, examination of relevant Michigan cases indicates that where the nature of the regulated subject matter calls for regulation adapted to local conditions, and the local regulation does not interfere with the state regulatory scheme, supplementary local regulation has generally been upheld.
>
> However, where the Court has found that the nature of the subject matter regulated called for a uniform state regulatory scheme, supplementary local regulation has been held preempted.

Here, the Safe Drinking Water Act, NREPA, and the Wellhead Protection Program do not explicitly provide that the State's authority to regulate land use is exclusive. Indeed, the MZEA entrusts land use regulation to the municipalities.

No legislative history has been provided or argued.

The Safe Drinking Water Act specifies that the EGLE must "promulgate and enforce rules to carry out this act pursuant to the administrative procedures act of 1969, 1969 PA 306, [MCL 24.201–.328]. The rules, at a minimum, shall include … [s]tate drinking water standards and associated monitoring requirements, the attainment and maintenance of which are necessary to protect the public health." MCL 325.1005(1)(b).

NREPA is an aggressively extensive statute with even more extensive regulations promulgated by EGLE. NREPA includes standards of conduct for environmental issues ranging from underground tanks (Parts 211 and 213) to air emissions (Part 55) to wetlands filling and dredging, development in and certain uses of inland lakes, MCL 324.30101 *et seq.*; the use and preservation of wetlands, MCL 324.30301 *et seq.*; point source pollution control relating to water resources, MCL 324.3101 *et seq.*; construction and operation of facilities for the disposal of solid waste, MCL 324.11115 *et seq.;* generation, disposal, storage, treatment, and transportation of hazardous waste, MCL 324.11101 *et seq.*; and sand dune protection and management, MCL 324.35301 *et seq*. While the Safe Drinking Water Act and NREPA have extensive regulations promulgated and administered by the agency, the Acts do not regulate land use so pervasively that it dominates the field. *See also Houdek, supra*, which upheld a local government land use regulation of an industry that was pervasively regulated by the MDEQ (and the MDEQ had approved the application in Houdek as well); *see also Divergilio v Charter Twp v West Bloomfield*, unpublished per curiam opinion of the Court of Appeals, issued November 2, 2006 (Docket No. 261766) (holding that NREPA did not preempt a local ordinance regarding filling of wetlands). While *Divergilio* is an unpublished opinion and thus not binding on this Court, the Court does find that the Court of Appeals' reasoning about NREPA not preempting the field to be persuasive.

As to the fourth factor, in the *Llewellyn* case, the Court found that the regulation of what constitutes indecent behavior or obscene material for purposes of criminal penalties was the type of regulation that called for uniformity across the state, so local ordinances were preempted. However, in this case, the land use regulations are meant to be, and demand to be, tailored to the local conditions. *See City of Detroit v Qualls*, 434 Mich 340 (1990) (holding the local ordinance fireworks regulation were not preempted by the state law, even though the state law was pervasive, when the location and number of retailers of fireworks was a local concern that required local tailoring of conditions). Hence MZEA leaving that zone of authority to the local governments. Therefore, none of the *Llewellyn* factors support a finding of preemption.

***1. Fonda Island & Briggs Lake Joint Water Authority v Green Oak Twp*, unpublished per curiam opinion of the Court of Appeals, issued January 4, 2005 (Docket Nos. 248592 and 248621)**

Appellant argues under Section D (preemption/conflict with state law) that *Fonda Island & Briggs Lake Joint Water Authority v Green Oak Twp* is right on point, and it provides the "perfect outline for how the court should analyze this case."

Appellant would struggle to be more incorrect. In *Fonda Island*, the planning commission approved the SLUP for a gas station right across the street from the water authority and their wellhead, over the water authority's vehement objection. But it's only the type of land use that was being requested and the proximity to the wellhead that are similar to this case.

All the legal analysis is completely distinguishable from this case.

The primary issue in the *Fonda Island* case was whether the water authority was denied due process because it was not noticed for the initial planning commission hearing, and it was not allowed to present its case again to new members of the commission at a subsequent hearing. The Court of Appeals found the water authority was not entitled to the initial notice and was not entitled to have equal time to speak as other presenters at the planning commission hearing, so the water authority was not denied due process.

The water authority also challenged that the planning commission granting the SLUP violated regulations under the Safe Drinking Water Act and the Underground Storage Tank regulations. The Court of Appeals declined to decide the substantive issue, instead finding the water authority did not have standing to bring challenges to violations of the regs. In a footnote, the Court of Appeals found that the planning commission's approval of the SLUP did not violate the regs, but still preemption was never addressed.

Finally, the Court of Appeals found that the planning commission's decision was supported by substantial evidence on the whole record, giving a cursory summary of the evidence presented and finding it was sufficient.

The legal analysis in *Fonda Island* has nothing to do with the challenges Appellant raises in this appeal. *Fonda Island* is an unpublished case, so it is not binding, and because it is so wildly distinguishable in terms of the legal issues raised and the analysis conducted, it

is not persuasive in the least.

E. Facially Unconstitutional

Appellant tries to frame this argument in terms of exclusionary zoning. The MZEA prohibits a municipality from enacting an ordinance or making a zoning decision that has the effect of totally prohibiting a lawful land use where there is a demonstrated need for the use in the municipality or its surrounding area, unless there is no appropriate location for the use in the community. MCL 125.3207. *See also English v Augusta Twp*, 204 Mich App 33 (1994) (excluding mobile home parks in practical effect even in if not letter of the ordinance).

While exclusionary zoning is unconstitutional on its face, the Zoning Ordinance at issue in this case does not completely ban gas stations from the Township. It does not even ban gas stations from the Neighborhood Services Commercial District. It only carves out an area around the wellhead where gas stations cannot be built. Since the Zoning Ordinance does not completely exclude gas stations, it cannot be facially unconstitutional for exclusionary zoning.

The landowner in an exclusionary zoning case must establish the specific public need for the particular land use in the area. Need may be negated if the use is available in the surrounding area (not merely within the specific municipality). And the landowner must also establish that the particular parcel is suitable for the use. *See Adams Outdoor Adver, Inc v City of Holland*, 234 Mich App 681, 698 (1999), aff'd, 463 Mich 675 (2001) clarified that need is not the landowner's desire for a particular use, but instead a "public need." *See also Outdoor Sys, Inc v Oakland Circuit Court Clawson*, 262 Mich App 716, 721 (2004).

The record supports that there are several other gas stations in the surrounding area. Indeed, there are two Mugg & Bopp's locations within driving distance of the Appellant's parcels at Burkhart and Mason. Since there are other gas stations in the community – indeed other Mugg & Bopp's locations in the community – the Appellant cannot sustain its implied claim that there is a public need for a gas station and drive thru within 300 feet of the wellhead.

Stripped of its thin veneer of exclusionary zoning, Appellant's argument is just a facial challenge to Section 16.11(C)(8), which leaves Appellant with a heavy burden to carry. When faced with several challenges to an ordinance, the trial courts have been cautioned by the Michigan Supreme Court to steer away from overturning the ordinance on grounds of it being facially unconstitutional unless the particular facts of the render that decision necessary. *See Bonner v City of Brighton*, 495 Mich 209, 221 (2014). Similarly, every reasonable presumption of constitutional validity should be applied, and the ordinance should only be invalidated where there is no reasonable doubt it is unconstitutional in every situation. *Id.*

A party challenging the facial constitutionality of an ordinance "faces an extremely rigorous standard." *Judicial Attorneys Ass'n v Michigan,* 459 Mich 291, 310 (1998). To prevail, plaintiffs must establish that " 'no set of circumstances exists under which the [ordinance] would be valid' " and " '[t]he fact that the ... [ordinance] might operate unconstitutionally under some conceivable set of circumstances is insufficient' " to render it invalid. *Council of Orgs & Others for Ed. About Parochiaid Inc v Governor*, 455 Mich 557, 568 (1997). Indeed, " 'if any state of facts reasonably

can be conceived that would sustain [the ordinance], the existence of the state of facts at the time the law was enacted must be assumed' " and the ordinance upheld. *Id* at 568-69.

Here in this case, Howell Township has a legitimate interest in protecting the general welfare of the community and in locating land uses in compatible locations to other land uses. That legitimate interest of the municipal government is enshrined in the MZEA itself. MCL 125.3201(1). The regulation of the location of gas stations, which involve gasoline run off and gasoline storage tanks, in relation to the community groundwater aquifer is reasonably related to the MZEA's stated goal of allowing municipalities to establish zoning ordinances to protect the general public safety, health, and welfare. Appellant even seems to acknowledge this in its brief. Furthermore, the record supports that the Board had before it a report from MHOG disapproving of Appellant's proposal, citing potential hazards to the aquifer and a possible other wellhead site in the reserve area. Since the government interest the Township acted under in denying the SLUP application was a legitimate government interest, and the record supports that there was some connection between the interest sought to be protected and the ban on gas stations in the wellhead reserve area, the ordinance cannot be facially unconstitutional.

A party raising a facially unconstitutional argument to a zoning ordinance bears a heavy burden to show the ordinance should be invalidated. Here, Appellant has certainly not carried that burden. In fact, Appellant has only made broad sweeping statements that the ordinance is unconstitutional, and the Court should overturn it because the particular expert report the Appellant presented to the Board was more persuasive than the other evidence presented to the Board. Appellant has been unable to show that the ordinance is not rationally related to a legitimate government interest in every scenario. This challenge must be rejected.

F. Equal Protection and Due Process

Appellant's claim that it was denied equal protection under the law and was not afforded due process also fails. Appellee is exactly correct that in order to sustain a claim for violation of the 14th Amendment or for other deprivation of due process, the Appellant must demonstrate that the Appellant has some property right or liberty interest that is protected by the 14th Amendment. *See Mettler Walloon LLC v Melrose Township*, 281 Mich App 184 (2008); *see also Kyser v Township*, 486 Mich 514 (2010). Without that threshold showing of a constitutionally protected right held by the party, the claim that deprivation of the interest violates some constitutional mandate evaporates.

Here, Appellant cannot show that it had a protected property or liberty interest that was curtailed or impugned by the Board's decision to deny the SLUP application exactly because it was a SLUP application. A property owner does not have any protected property right to have a discretionary application of land use variance or special permit granted. *See Mettler Walloon LLC supra; see also Triomphe Investors v City of Northwood*, 49 F3d 198 (1995); *see also Silver v Franklin Twp Bd of Zoning Appeals*, 966 F2d 1031 (1992); *see also GM Engineers and Associates Inc v West Bloomfield Twp*, 922 F2d 328 (1990). The plain language of the Zoning Ordinance makes the granting of a SLUP application discretionary.

In *Green Genie Inc v City of Detroit*, 599 F. Supp 3d 544 (2022), the US District Court for the

Eastern District of Michigan held:

> First, the plaintiffs had no protected property interest in obtaining a special land use permit, because it is clear from the undisputed record that they never had any legitimate entitlement to such a use, which expressly is prohibited by the City's zoning ordinance. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire" and "more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Town of Castle Rock, Colo. v. Gonzales,* 545 U.S. 748, 756, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005) "[A] pending application for a building permit does not create a property interest where the zoning authorities have discretion to deny the application or limit the use of property." *Tuscola Wind III, LLC v. Almer Charter Twp.*, 327 F. Supp. 3d 1028, 1042 (E.D. Mich. 2018). "[A] protectible property right exists only if a plaintiff has a legitimate claim of entitlement or a justifiable expectation in the approval of his [p]lan" for use of the property, and the Court "must look to state zoning laws to determine whether a legitimate claim of entitlement or a justifiable expectation exists." *Andreano v. City of Westlake*, 136 F. App'x 865, 871 (6th Cir. 2005). "Such a property interest would exist [ ] if the board's discretion were so circumscribed that approval of the plaintiff's proposed use of the property became mandatory once he complied with the minimal requirements imposed on him." *Brown v. City of Ecorse*, 322 F. App'x 443, 445-46 (6th Cir. 2009).

The District Court went on to hold that the applicant was seeking a special use permit to build and operate a marijuana dispensary site on his parcel, but his parcel was within 1000 feet of a school. The application zoning ordinance specifically forbade marijuana dispensaries within 1000 feet of a school, so not only did the applicant not have a justifiable expectation that his application for special permit would be granted, he in fact could never have had any reasonable expectation it would have been granted. The ordinance mandated the denial of the application.

While federal District Court opinions are not binding precedent on this Court, the *Green Genie Inc* decision is highly persuasive because the facts are so analogous to the case now before this Court. Here, the use that Appellant sought to have granted by the SLUP was specifically prohibited by the Ordinance where the Appellant's property is located. Applying the same reasoning, Appellant could have never had any reasonable expectation that the SLUP would be granted.

In *Bosscher v Township of Algoma*, 246 F Supp 2d 791 (2003), the federal court held that the property owner had no justifiable expectation that his special use permit for a 180-foot tall radio tower would be granted, when the ordinance gave discretion to the planning commission to grant or deny requests from property owners seeking a 50+ foot tall radio tower. That discretionary standard remained even when the applicant met all the specific conditions in the ordinance, because the ordinance contained general conditions as well. Because he had no justifiable expectation or claim of entitlement to have his special permit granted (because the ordinance contained a discretionary standard), he could not maintain either his substantive, nor his procedural due process claim.

Looking at the established law, and the persuasive law, and the record below, there is no other

conclusion that can be reached than that Appellant did not have a justifiable expectation that the SLUP application would be granted. Since Appellant lacks any legitimate entitlement to develop the parcels into a gas station, when such use is only permitted by special permit and the standard in 16.02 remains discretionary, Appellant's claims of lack of due process and lack of equal protection under the law are without merit.

V. CONCLUSION

For all the reasons set forth above, and after review of the filings by both parties, and review of the entire record from the lower tribunal, and after hearing oral arguments, and the Court being fully advised in the premises, the Court concludes the following:

1. Zoning Ordinance Section 16.11(C)(8) was not arbitrary or capricious. It did not violate any due process rights of Appellant. Section 16.11(C)(8) is not unconstitutional as applied. The decision was authorized by law, and was supported by material, competent, and substantial evidence on the whole record.
2. There was sufficient evidence in the record in support of the Board's findings that the gas station was not harmonious with the future use of the District and not harmonious with the surrounding community. There is also sufficient record evidence that granting the SLUP application would be hazardous or would adversely impact the surrounding community. Substantial, material, and competent evidence appears in the whole record to support the findings of the Board.
3. The Howell Township Zoning Ordinance is not preempted by State Law and the Zoning Ordinance is not in conflict with the State Law.
4. Appellant has failed to carry the heavy burden of showing a zoning ordinance is facially unconstitutional. Appellant has been unable to show that the ordinance is not rationally related to a legitimate government interest in every scenario. The challenge to the Zoning Ordinance Section 16.11(C)(8) that it is facially unconstitutional is rejected as without merit.
5. Appellant did not have a justifiable expectation that the SLUP application would be granted. Since Appellant lacks any legitimate entitlement to develop the parcels into a gas station, Appellant's claims of lack of due process and lack of equal protection are rejected without merit.

Therefore, the arguments on appeal are rejected. The decision of the Township Board is AFFIRMED.

This Court does not retain jurisdiction. *This is a final order that closes the case.*

IT IS SO ORDERED.

9-16-2024

Hon. Matthew J. McGivney (P63325)
Chief Circuit Court Judge

EXHIBIT B

Court of Appeals, State of Michigan

ORDER

HOWELL-MASON L.L.C. V HOWELL TOWNSHIP

Docket No. 372773

LC No. 24-000350-AA

Stephen L. Borrello
Presiding Judge

Colleen A. O'Brien

Christopher P. Yates
Judges

The motion to file a late answer is GRANTED and the answer filed on November 25, 2024, is accepted.

The delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

April 11, 2025
Date

Chief Clerk

EXHIBIT C

Order

Michigan Supreme Court
Lansing, Michigan

August 29, 2025

168460

Megan K. Cavanagh,
Chief Justice

Brian K. Zahra
Richard H. Bernstein
Elizabeth M. Welch
Kyra H. Bolden
Kimberly A. Thomas
Noah P. Hood,
Justices

HOWELL-MASON, LLC,
Plaintiff-Appellant,

v

SC: 168460
COA: 372773
Livingston CC: 24-000350-AA

HOWELL TOWNSHIP,
Defendant-Appellee.

_____/

On order of the Court, the application for leave to appeal the April 11, 2025 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

b0825

I, Elizabeth Kingston-Miller, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

August 29, 2025

Clerk

EXHIBIT D

HOWELL TOWNSHIP REGULAR BOARD
MEETING MINUTES
3525 Byron Road Howell, MI 48855
March 20, 2023
6:30 P.M.

MEMBERS PRESENT:		MEMBERS ABSENT:
Mike Coddington	Supervisor	
Jean Graham	Clerk	
Jonathan Hohenstein	Treasurer	
Matthew Counts	Trustee	
Jeff Smith	Trustee	
Harold Melton	Trustee	
Bob Wilson	Trustee	

Supervisor Coddington called the meeting to order at 6:30 p.m. The roll was called. There were 9 people in the audience. All rose for the Pledge of Allegiance.

APPROVAL OF THE AGENDA:
March 20, 2023
MOTION by Melton, **SECOND** by Counts, **"TO APPROVE THE MARCH 20, 2023 AGENDA AS PRESENTED."** Discussion followed. Motion carried.

APPROVAL OF BOARD MEETING MINUTES:
February 13, 2023
A) REGULAR BOARD MEETING MINUTES
MOTION by Hohenstein, **SECOND** by Melton, **"TO APPROVE THE FEBRUARY 13, 2023 REGULAR MEETING MINUTES WITH AMENDMENTS."** Discussion followed. Motion carried.

CORRESPONDENCE:
No additions. No questions.

CALL TO THE PUBLIC:
Katy Michalski introduced herself to the Board and stated she is the new Field Representative for Representative Elissa Slotkin 7th District of Michigan.

UNFINISHED BUSINESS:
A. 2023-2024 Bids for lawn Service & Snow Plowing
Board members discussed the bids for lawn and snow removal services. **MOTION** by Wilson, **SECOND** by Hohenstein, **"TO ACCEPT THE BID FOR SHARPE'S OUTDOOR SERVICES FOR LAWN CARE SERVICES, WITHOUT FERTILIZER, AS PRESENTED."** Discussion followed. Motion carried.
MOTION by Hohenstein, **SECOND** by Smith, **"TO ACCEPT THE BID FOR SHARPE'S OUTDOOR SERVICES FOR SNOW REMOVAL AS PRESENTED."** Discussion followed. Motion carried.

NEW BUSINESS:
A. Waste Water Treatment Plant

Greg Tatara, was present to discuss the Wastewater Treatment Plant Meeting and the current needs for the Plant. He further discussed a resident who had a sewer backup from the main in Amber Oaks subdivision. This led to waste water damaging the carpet of their basement. He indicated they worked as diligently as possible to sanitize it as soon as possible. He discussed Public Act 222 of 2002 and the involvement of the government agency in which the resident resides. **MOTION** by Counts, **SECOND** by Hohenstein, **"TO APPROVE THE CLAMP-ON METER FROM UIS AS PRESENTED."** Discussion followed. Motion carried. **MOTION** by Counts, **SECOND** by Melton, **"TO APPROVE THE MHOG BUDGET ALLOCATION PERCENTAGE AS PRESENTED."** Discussion followed. Motion carried. **MOTION** by Hohenstein, **SECOND** by Counts, **"TO APPROVE THE MHOG 2024 BUDGET AS PRESENTED."** Discussion followed. Motion carried. **MOTION** by Hohenstein, **SECOND** by Melton, **"TO APPROVE REIMBURSEMENT FOR RESIDENT, MRS. LE, FOR 50% OF THE CARPET DAMAGES AS PRESENTED NOT TO EXCEED $2,500.00 UPON AGREEMENT TO RELEASE ."** Discussion followed. Motion carried.

B. Wellhead Protection Area Discussion

Treasurer Hohenstein indicated that a business owner is interested in installing a gas station on the northeast corner of Mason and Burkhart Roads. The current Township ordinance does not allow a gas station within three hundred (300) feet of a wellhead protection area. The business owner has agreed to meet all the conditions imposed from MHOG. He is requesting to change the ordinance language to read "No gasoline service station shall be permitted within three hundred (300) feet of a wellhead protection area **unless it receives approval from MHOG."** Extensive discussion ensued. **MOTION** by Melton, **SECOND** by Hohenstein **"THAT WE DON'T OVERRIDE THE ORDINANCE AS WRITTEN."** Discussion followed. Motion carried.

C. Planning Commission Appointment

The Board gave brief interviews to the two candidates who applied for the Planning Commission position. The candidates spoke to their backgrounds and interests in the position. **MOTION** by Smith, **SECOND** by Hohenstein, **"TO APPROVE CANDIDATE MIKE NEWSTEAD TO THE PLANNING COMMISSION TERM ENDING 12/31/2025."** A roll-call vote was taken: Hohenstein – yes, Counts – yes, Wilson – No, Smith – yes, Graham – No, Coddington – yes, Melton – No. Motion carried (4-3).

REPORTS:

A. SUPERVISOR:

Supervisor Coddington gave a brief update on meeting with the code enforcement officer from the Sheriff's department and a meeting regarding Mugg & Bopps.

B. TREASURER:

Treasurer Hohenstein discussed the road chloride bid and price increases. He sought clarification from the Board regarding using Permazyme instead of chloride and the number of applications being utilized in the future. **MOTION** by Counts, **SECOND** by Melton **"TO APPROVE THE BID FROM CHLORIDE SOLUTIONS AS PRESENTED WITH THE EXCEPTION OF THE 15 DAY NOTICE SHOULD BE 30 DAYS NOTICE."** Discussion followed. Motion carried. He further discussed having a company mark the natural gas line to the Township hall regarding the septic line. In the process they noticed our filter was plugged and in the future the Township will have more regular septic tank checks. He indicated writing a letter to Comcast in support of them seeking a ROBIN Grant for the northwest corner of the Township.

C. CLERK:

Clerk Graham shared the information given at the 2023 Capital Conference. She also noted Deputy Clerk Guillen achieved her Michigan Professional Municipal Clerk designation by attending the Michigan

Association of Municipal Clerks Institute for three consecutive years and received her certificate. She discussed the challenges with getting bids to remove the cabinets from the election room to another part of the Township. Deputy Clerk Guillen explained everything being housed in one central location as the need for cabinet removal to make additional room for all election related equipment. There was discussion to move the cabinets to the basement. She further discussed additional needs for election equipment and budgeting. She requested approval from the Board regarding sending Deputy Clerk Guillen to the three day MAMC Annual Conference 2023 in Detroit. **MOTION** by Counts, **SECOND** by Melton, **"TO APPROVE SENDING THE DEPUTY CLERK TO THE 3 DAY MAMC ANNUAL CONFERENCE IN DETROIT AS PRESENTED."** Discussion followed. Motion carried.

D. ZONING:
(See Zoning Administrator Daus's prepared written report) Member Counts inquired about reporting.

E. ASSESSING:
(See Assessor Kilpela's prepared written report)

F. FIRE AUTHORITY:
Supervisor Coddington reported on the Fire Authority Meeting. He discussed the challenges with purchasing a new fire truck.

G. MHOG:
Trustee Counts discussed in detail reporting on two MHOG Meetings.

H. PLANNING COMMISSION:
Trustee Counts stated there was no Planning Commission Meeting in February.

I. ZONING BOARD OF APPEALS (ZBA):
Trustee Smith reported on the Zoning Meeting.

J. WWTP:
Nothing additional.

K. HAPRA
Clerk Graham indicated the report was in the packet.

L. PROPERTY COMMITTEE
Treasurer Hohenstein reported on the Property Committee. He explained the challenges with the lack of communication from Pineview Village HOA or Developer Furnari. He updated the Board regarding the Oak Grove Road parcels. He further explained the consistent challenges regarding the North Burkhart Road property and the easement. He discussed the obstacles associated with the easement and sought direction from the Board for a resolution.

CALL TO THE PUBLIC:
There were no comments.

DISBURSEMENTS: REGULAR AND CHECK REGISTER:

MOTION by Hohenstein, **SECOND** by Melton, **"TO APPROVE THE REGULAR DISBURSEMENTS AS PRESENTED, ALSO ANY CUSTOMARY AND NORMAL PAYMENTS FOR THE MONTH."** Discussion followed. Motion carried.

ADJOURNMENT: MOTION by Counts, **SECOND** by Hohenstein, "**TO ADJOURN.**" Motion carried. The meeting was adjourned at 8:36pm.

Howell Township Clerk
Jean Graham

Mike Coddington
Howell Township Supervisor

Angie Guillen, Recording Secretary

HOWELL TOWNSHIP REGULAR BOARD
MEETING MINUTES
3525 Byron Road Howell, MI 48855
May 8, 2023
6:30 P.M.

MEMBERS PRESENT:		**MEMBERS ABSENT:**
Mike Coddington	Supervisor	
Jean Graham	Clerk	
Jonathan Hohenstein	Treasurer	
Matthew Counts	Trustee	
Jeff Smith	Trustee	
Harold Melton	Trustee	
Bob Wilson	Trustee	

Supervisor Coddington called the meeting to order at 6:30 p.m. The roll was called. There were 10 people in the audience. All rose for the Pledge of Allegiance.

APPROVAL OF THE AGENDA:
May 8, 2023
MOTION by Counts, **SECOND** by Melton, **"TO APPROVE THE MAY 8, 2023 AGENDA AS PRESENTED."** Discussion followed. Motion carried.

APPROVAL OF BOARD MEETING MINUTES:
April 10, 2023
A) REGULAR BOARD MEETING MINUTES
MOTION by Hohenstein, **SECOND** by Melton, **"TO APPROVE THE APRIL 10, 2023 REGULAR MEETING MINUTES AS PRESENTED."** Discussion followed. Motion carried.

CORRESPONDENCE:
No additions. No questions.

CALL TO THE PUBLIC:
There was no public comment.

NEW BUSINESS:
A. Howell Township Budget 2023/2024
MOTION by Graham, **SECOND** by Counts **"TO APPROVE THE HOWELL TOWNSHIP BUDGET 2023/2024 AS PRESENTED."** Discussion followed. Motion Carried.

B. Financial Update
Deputy Supervisor Kilpela provided the Board with a budget update. Revenue and Expenditure Report period ending 4/30/2023 and Cash Flow Report using budgeted revenue was reviewed. He fielded questions and comments from the Board. Discussion followed. Kilpela proposed two budget amendments to the General Fund to increase the Treasurer legal expense by $4,000.00 to account for legal fees incurred from personal property tax collection and to increase the snow removal expense by $12,000.00 for the walking paths. **MOTION** by Graham, **SECOND** by Melton. **"TO APPROVE THE 2022/2023 PROPOSED BUDGET**

AMENDMENTS FOR THE TREASURER AND THE TOWNSHIP HALL." Discussion followed. Motion carried. The Board thanked Kilpela for the great job he does with the budget.

C. WWTP

Deputy Supervisor Kilpela explained in detail the upcoming Waste Water Treatment Plant Projects. **MOTION** by Counts, **SECOND** by Melton, **"TO APPROVE TO REBUILD ONE PUMP OF STATION 73 NOT TO EXCEED $40,000.00."** Discussion followed. Motion carried. **MOTION** by Counts, **SECOND** by Graham, **"TO APPROVE THE QUOTES FROM ADVANCED REHABILITATION TECHNOLOGY AND MACALLISTER RENTALS FOR THE JUNCTION CHAMBER AND INFLUENT CHANNEL LINING NOT TO EXCEED $47,000.00."** Discussion followed. Motion carried.

D. Howell Township v John Mills

As requested by the Board, Treasurer Hohenstein summarized the issue with Mr. John Mills and his disc golf course and the conclusion at the ZBA. Mr. Mills was present and discussed the issues presented. He reviewed along with his Attorney Kenneth V. Zichi the violations against his property. Extensive discussion followed.

E. Wellhead Protection Ordinance

Treasurer Hohenstein explained during the March 20, 2023 Howell Township Board meeting the Board discussed a request to change the wording of our ordinance to allow a gas station to be sited inside MHOG's wellhead protection area. The Board rejected the request to change the current wording in the ordinance therefore denying the gas station at the proposed site. After that meeting, he had discussions with Greg Tatara, Director of MHOG, regarding their wellhead protection area. Greg has been working with the municipalities that are in the wellhead protection area to try to get similar wellhead protection ordinances in place. Marion Township has passed the attached draft wellhead protection ordinance; the City of Howell is still working on theirs. He recommends approval to send the attached draft wellhead protection ordinance to the Planning Commission for consideration as a zoning ordinance for Howell Township. Discussion followed. **MOTION** by Graham, **SECOND** by Melton, **"TO APPROVE SENDING THE ATTACHED WELLHEAD PROTECTION ORDINANCE TO THE PLANNING COMMISSION FOR CONSIDERATION AS A ZONING ORDINANCE FOR HOWELL TOWNSHIP WITH PETROLEUM TO BE ADDED TO THE ORDINANCE."** Discussion followed. Motion carried.

F. Subcommittee Compensation

Clerk Graham explained she received the Subcommittee Compensation letter to approve compensation for the subcommittee's investigation report. **MOTION** by Hohenstein, **SECOND** by Melton, **"TO APPROVE TO PAY THE SUBCOMMITTEE $80.00 PER MEETING, PER PERSON."** Discussion followed. Motion carried.

G. Howell Township Recreation Plan Proposal

Treasurer Hohenstein indicated the Park and Recreation 5 year Plan is coming to an end. In order to request grants, the Township needs to have a current plan in place. Included in the packet are the projected costs from the Planner for the Park and Recreation Plan update. Planning Commission Chair Martha Haglund suggested direction for the plan and a way to be fiscally responsible regarding the quote for the Howell Township Recreation Plan Update. She suggested the subcommittee work with Carlisle Wortman for a resolution regarding the work plan, timeline and fees. Discussion ensued. The Board tabled the discussion until June 12, 2023 Meeting.

H. Bids: Election Security

Clerk Graham explained the impact on elections with the passage of Proposal 22-2 which greatly affects elections going forward. She indicated to be successful we need to make sure we have the tools and resources to keep the security and integrity of our elections intact and she is asking for approval on the 5 items listed in her memo. **MOTION** by Counts, **SECOND** by Graham, **"TO APPROVE MICROWORKS COMPUTING, INC QUOTE AS PRESENTED."** Discussion followed. Motion carried. **MOTION** by Counts, **SECOND** by Hohenstein, **"TO APPROVE THE QUOTE FROM TWO MEN AND A TRUCK AS PRESENTED TO MOVE FILING CABINETS OUT OF THE ELECTION ROOM TO THE BASEMENT."** Discussion followed. Motion carried. **MOTION** by Counts, **SECOND** by Smith, **"TO APPROVE FINLEY CONSTRUCTION TO INSTALL THE BALLOT BOX AS PRESENTED."** Discussion followed. Motion carried. **MOTION** by Smith, **SECOND** by Hohenstein, **"TO APPROVE S.E.I. CONSTRUCTION CO. BID NOT TO EXCEED $750.00 FOR THE INSIDE WALL, DOOR WALL REPAIR AND DRYWALL AS PRESENTED."** Discussion followed. Motion carried. **MOTION** by Counts, **SECOND** by Melton, **"TO APPROVE SHELVING FOR ELECTION STORAGE NOT TO EXCEED $500.00 AS PRESENTED."** Discussion followed. Motion carried.

9. **CALL TO THE PUBLIC:**

Joe Farkus asked for clarification on where to find the Board packets for future Board Meetings.

Tim Boal addressed the Board regarding a recent accident at Mason and Santa Rosa Drive. He asked for an update to the mediation for the corner of these crossroads.

REPORTS:

A. SUPERVISOR:

Supervisor Coddington indicated he fielded calls from residents, he attended a budget meeting and a board meeting at HAPRA regarding a possible millage to support the facility as opposed to being funded through the municipalities.

B. TREASURER:

Treasurer Hohenstein indicated they are moving towards the BS & A cloud software. He included a quote for four scanners to process payments with the intention of purchasing one now and if it works well to purchase up to three additional scanners. **MOTION** by Graham, **SECOND** by Melton **"TO APPROVE THE PURCHASE OF 4 HONEYWELL SCANNERS NOT TO EXCEED $1,000.00 AS PRESENTED."** Discussion followed. Motion carried. He further reported on finishing the ARPA reporting with Deputy Supervisor Kilpela which was a difficult task, receiving the lawsuit from Burkhart Ridge and submitted it to the insurance company and awaiting insurance counsel, and working on the Brewer Road drainage issue and it is slow moving and will take some time to complete.

C. CLERK:

Clerk Graham indicated she met with Spicer Engineering and Bowman Construction regarding the cemetery tile drainage project and there will be some reconfiguration coming without additional costs. She brought the Spring Clean Up volunteer sign-up sheet to the meeting. She discussed how many workers would be in attendance and providing lunch for the event. All the vendors have been confirmed to attend the event.

D. ZONING:

(See Zoning Administrator Daus's prepared written report)

E. ASSESSING:

(See Assessor Kilpela's prepared written report)

F. FIRE AUTHORITY:
Supervisor Coddington indicated they purchased an aerial ladder truck and noted a presentation they had at the prior meeting regarding the truck. They approved the budget and he indicated the Chairman is retiring.

G. MHOG:
Trustee Counts reported on the MHOG meeting.

H. PLANNING COMMISSION:
Trustee Counts reported on the Planning Commission Meeting.

I. ZONING BOARD OF APPEALS (ZBA):
Trustee Smith reported on the Zoning Board of Appeals Meeting. He indicated budgeting for training for the Zoning Board of Appeals and Planning Commission in the future.

J. WWTP:
This item was addressed earlier in the meeting by Deputy Supervisor Kilpela.

K. HAPRA
Clerk Graham indicated the report was in the packet.

L. PROPERTY COMMITTEE
Treasurer Hohenstein indicated they are close to closing on the North Burkhart Road property and are working to complete it.

M. P & R COMMITTEE
Treasurer Hohenstein indicated the Spark grant has opened and the Engineer is reviewing the information that was provided as to the application of the grant.

DISBURSEMENTS: REGULAR AND CHECK REGISTER:
MOTION by Hohenstein, **SECOND** by Melton, **"TO APPROVE THE REGULAR DISBURSEMENTS AS PRESENTED, ALSO ANY NORMAL AND CUSTOMARY PAYMENTS FOR THE MONTH."** Discussion followed. Motion carried.

ADJOURNMENT: MOTION by Melton, **SECOND** by Hohenstein, **"TO ADJOURN."** Motion carried. The meeting was adjourned at 8:36pm.

Howell Township Clerk
Jean Graham

Mike Coddington
Howell Township Supervisor

Angie Guillen, Recording Secretary

EXHIBIT E

STATE OF MICHIGAN
IN THE 44th CIRCUIT COURT
FOR THE COUNTY OF LIVINGSTON

HOWELL-MASON, LLC,
A Michigan Limited Liability Company,

Plaintiff,

v.

HOWELL TOWNSHIP,
A Michigan General Law Township,

Defendant.

Case No. 24-32242-CZ

Hon. Matthew J. McGivney

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PLAINTIFF'S RESPONSES
TO DEFENDANT'S FIRST REQUEST TO ADMIT TO PLAINTIFF

DEFINITIONS

1. The terms "You," "Your," or "Plaintiff(s)" shall mean Howell-Mason, LLC, including all predecessors, successors, parents, subsidiaries, divisions, affiliates, and their respective

current and former officers, directors, members, employees, agents, representatives, attorneys, and all other persons acting or purporting to act on their behalf.

2. The term "Any" shall include the collective, as well as the singular, and shall mean "each," "all," and "every," and these terms shall be interchangeable.
3. The term "Person" means any natural person, corporation, partnership, proprietorship, association, joint venture, government entity, or other form of legal entity, including all present and former agents, employees, representatives, and all other persons acting on behalf of the person.
4. The terms "and" and "or" shall be construed both conjunctively and disjunctively to bring within the scope of these discovery requests all information that might otherwise be excluded.
5. The term "Complaint" means the initial Complaint filed in this action and any amendments thereto, including all exhibits and documents referenced therein.
6. The term "Property" means the parcels of real property that are the subject of this litigation, including all improvements, easements, rights and interests therein.
7. "Township" means Howell Township, including all departments, elected officials, employees, board members, planning commissioners, agents, and representatives acting on its behalf.

REQUESTS FOR ADMISSION

1. Admit that gasoline service stations are permitted by special land use permits in areas of the Township's Neighborhood Services Commercial District that are not within 300 feet of a wellhead protection area.

   ANSWER: Denied. Plaintiff contends that §16.11(8) is unlawful, and thus unenforceable, as set forth in Plaintiff's Complaint and other filings herein. Furthermore, Plaintiff objects as this question requests a legal conclusion.

2. Admit that you have not been completely excluded from operating a gasoline service station within Howell Township.

   ANSWER: Denied. For all intents and purposes Plaintiff has been excluded. Plaintiff objects as this request to admit is irrelevant and immaterial to the issues involved herein and calls for speculation.

3. Admit that you have gasoline service stations within Howell Township.

   ANSWER Admitted.

4. Admit that you received notice of and attended the November 21, 2023, Planning Commission meeting.

   ANSWER: Admitted.

5. Admit that you were allowed to present evidence at the November 21, 2023, Planning Commission meeting.

   ANSWER: Admitted that we were present at the meeting and a transcript of the meeting is part of the record. However, for the reasons set forth in Plaintiff's Complaint and every other pleading and brief filed with the Court in this matter and the companion appeal (Case No. 24-350-AA), and the appeal therefrom, Plaintiff contends that § 16.11(C)(8) of the Howell Township Zoning Ordinance is unlawful and unenforceable. At the outset of the hearing, the Planning Commission stated that it had no authority to grant any request being made by Plaintiff at the meeting given the existence of § 16.11(C)(8) of the Howell Township Zoning Ordinance. This statement was made at the outset of the hearing prior to Plaintiff being able to address the Commission, rendering any request and/or presentation made by Plaintiff futile. In making this statement, and in choosing to apply § 16.11(C)(8) over the objection of Plaintiff, and despite evidence of the ordinance's multifaceted unlawfulness, the Planning Commission unlawfully withheld approval to which Plaintiff was entitled. By way of further answer, Defendant held multiple meetings that involved substantive rights of the Plaintiff without giving notice to Plaintiff, including but not limited Monday, February 10, 2025. Additionally, the

Defendant withheld material information from Plaintiff, including, but not limited to, the May 19, 2023, MHOG letter, and November 15, 2023, MHOG resolution. The issue was pre-decided and therefore Plaintiff was denied due process.

6. Admit that you received notice of and attended the December 11, 2023, Township Board meeting.

ANSWER: Admitted.

7. Admit that you were allowed to present evidence at the December 11, 2023, Township Board meeting.

ANSWER: Admitted that we were present at the meeting and a transcript of the meeting is part of the record. However, Plaintiff was denied due process as the Howell Township Board Chairman's verbal statement immediately prior to the Plaintiff's presentation, demonstrated the Boards decision was pre-decided. For the reasons set forth in Plaintiff's Complaint and every other pleading filed with the Court in this matter and the companion appeal (Case No. 24-350-AA), and the appeal therefrom, Plaintiff contends that § 16.11(C)(8) of the Howell Township Zoning Ordinance is unlawful and unenforceable. In choosing to rely on § 16.11(C)(8) over the objection of Plaintiff and despite evidence of its multifaceted unlawfulness, the Township Board unlawfully withheld approval to which Plaintiff was entitled. By way of further answer, Defendant held multiple meetings that involved substantive rights of the Plaintiff without giving notice to Plaintiff, including but not limited Monday, February 10, 2025. Additionally, the Defendant has withheld material information from Plaintiff, including, but not limited to, the Mary 19, 2023 MHOG letter, and November 15, 2023, MHOG resolution.

8. Admit that the Township's public meeting schedule is publicly available.

ANSWER: Admitted.

9. Admit that you cannot identify any gasoline service stations that have been permitted to operate in Howell Township within 300 feet of a wellhead protection area since Section 16.11(C)(8) was enacted.

ANSWER: Denied. Plaintiff objects as this requests to admit is irrelevant and immaterial to the issues involved herein. However, once more, this lawsuit contends that said ordinance is unlawful and unenforceable.

10. Admit that you applied for a variance request from Section 16.11(C)(8) in or around 2021.

ANSWER: Admitted. On Aug 7, 2019, Plaintiff was told by Howell Township zoning department to obtain MHOG water authority approval then request a use variance..

11. Admit that you were denied a variance request from Section 16.11(C)(8) in or around 2021.

ANSWER: Admitted. However, by its own admission in a letter dated January 31, 2024, the Township Zoning Board of Appeals has no authority to grant use variances. See attached letter.

12. Admit that you took no actions to appeal the decision denying you a variance request from Section 16.11(C)(8) in or around 2021.

ANSWER: Denied. The Township unilaterally required a fictitious procedure in which the ZBA had no authority to grant any request and thus no viable appeal was available. See attached letter from Township Zoning Administrator.

13. Admit that the Township has not granted any variances from Section 16.11(C)(8) to other applicants.

ANSWER: This question is objectively outside of the Plaintiff's knowledge and fully within the knowledge of Defendant. As a result, Plaintiff objects to request to admit no. 13 as overbroad and unduly burdensome, and irrelevant. The only way for Plaintiff to know this information is to review all ZBA minutes since § 16.11(C)(8) was adopted. What's more, the ZBA has no authority to grant use variances. Therefore, Defendant should not have granted any use variance. To the extent any use variances have been granted, by Defendant's own admission those variances are unlawful.

14. Admit that you can still develop the Property for any by-right use permitted in the Neighborhood Services Commercial District.

ANSWER: Admitted., assuming the Township does not rely upon unlawful ordinances and/or findings of fact without evidence to deny said requests. The ordinance speaks for itself.

15. Admit that the Property can be used for other special land uses permitted in the Neighborhood Services Commercial District.

ANSWER: Admitted, assuming that the Township does not rely upon unlawful ordinances or findings of fact without evidence to deny said requests.

16. Admit that there are other commercially viable uses for the Property besides a gasoline service station.

ANSWER: Denied. It is not commercially viable for Plaintiff to operate a business other than its primary business. Plaintiff objects to request to admit No. 16 as overbroad and unduly burdensome. Plaintiff has no way of knowing the commercial viability of business pursuits in which it does not operate at this or any other location.

17. Admit that you conducted due diligence regarding the zoning restrictions on the Property before purchasing it.

ANSWER: Admitted that due diligence was conducted. The Howell Township zoning department told Plaintiff in 2017 the subject parcel could be used for a gasoline facility prior to the purchase of the original parcel. Upon further review, the zoning restrictions were and are unlawful.

18. Admit that you knew the zoning restrictions applicable to the Property when you purchased it.

ANSWER: Admitted. The zoning restrictions were reviewed. Prior to the 2017 purchase, Plaintiff was told by the Howell Township zoning department we could operate a gasoline facility. On August 7, 2019, the Howell Township Zoning Department told us with MHOG approval, we would be granted the right to use the property for a gasoline facility. Upon further review, the zoning restrictions were and are unlawful.

19. Admit that you knew the Township's Master Plan identified the Property as being zoned "Commercial-Local" on the future land use map.

ANSWER: Denied.

20. Admit that you knew the zoning restrictions applicable to the Property when you sought amendment of the Township's zoning regulations in 2021.

ANSWER: Denied. Plaintiff made no application for revision of the zoning regulations.

21. Admit that you knew the zoning restrictions applicable to the Property when you invested

in using the Property for a gasoline service station.

ANSWER: Admitted. Verbal discussions did take place with Howell Township Zoning officials prior to and after investment that outlined a path forward to approval. Said zoning restrictions were and are unlawful.

22. Admit that you do not have a constitutionally protected property interest in special land use

on the Property.

ANSWER: Denied for the reason that EGLE and the Department of Licensing and Regulatory Affairs, which have full regulatory control over drinking water quality and underground storage tanks, conditionally approved Appellant's proposed gas station on the Subject Property. The Township lacks regulatory authority in these areas. As such, Appellant has a constitutionally protected property interest in the conditional approvals granted by the State.

23. Admit that you took no legal action to challenge the Township's zoning regulations prior to investing in the Property for the operation of a special land use.

ANSWER: Admitted that there was no legal action but there is no legal duty to take any such action. As Plaintiff did not own property in Howell Township prior to purchasing the Subject Property, Plaintiff lacked standing to challenge the zoning ordinance, and more practically had no concern with Howell Township's ordinances.

24. Admit that you operate businesses other than gasoline service stations throughout the State of Michigan.

ANSWER: Denied. Plaintiff currently operates one (1) convenience store on land being developed for primary use as a gasoline services station, which is Plaintiff's primary business. Said business would not have been purchased but for the redevelopment into gasoline service station-ancillary uses. Plaintiff objects to relevance.

25. Admit that you invested in the Property to operate a gasoline service station before the Township granted you any approvals for a special land use permit.

ANSWER: Admitted. Verbal discussions did take place with Howell Township Zoning officials prior to investment.

[Signatures to follow]

HOWELL-MASON, LLC
Plaintiff

BY: _____
TODD J. LEKANDER, II
Member

STATE OF MICHIGAN)
COUNTY OF LIVINGSTON)

Sworn to and signed in my presence by TODD J. LEKANDER, II, in his capacity as Member of HOWELL-MASON, LLC, on February 26, 2025.

Mary Macdonald

Mary Macdonald, Notary Public
Livingston County, Michigan
My Commission expires: 12/02/2026
Acting in the County of Livingston

Mary Macdonald
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF Livingston
My Commission Expires 12/02/2026
Acting in the County of Livingston

As to objections, only:

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Dated: February 26, 2025

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Dated: February 26, 2025

BY: _____
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Dated: February 26, 2025

STATE OF MICHIGAN
IN THE 44th CIRCUIT COURT
FOR THE COUNTY OF LIVINGSTON

HOWELL-MASON, LLC,
A Michigan Limited Liability Company,

Plaintiff,

Case No. 24-32242-CZ

HON. SUSAN LONGSWORTH

v.

HOWELL TOWNSHIP,
A Michigan General Law Township,

Defendant.

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HOWELL-MASON, LLC'S RESPONSE TO HOWELL TOWNSHIP'S MOTION FOR SUMMARY DISPOSITION

Plaintiff, Howell Mason, LLC, by and through its attorneys, for its response to Howell Township's motion for summary disposition on counts I, II, III, and IX, states:

I. FACTS

Plaintiff, HOWELL-MASON, LLC, is a Michigan Limited Liability Company with a principal place of business in Howell, Livingston County, Michigan. Plaintiff is in the business of developing and operating gasoline service stations with attached restaurants. Defendant, HOWELL TOWNSHIP, is a Michigan General Law Township with offices located at 3525 Byon Road, Howell, Livingston County, Michigan 48855.

Plaintiff owns three contiguous parcels of real property located at and near the corner of Mason Road and Burkart Road in Howell Township (the "Property"). Exhibit A.[1] The Property includes two parcels (Tax ID Nos. 4706-33-300-001 and 4706-33-300-108) that are currently zoned Neighborhood Service Commercial (NSC), in which gasoline service stations are permitted as a special land use. The third parcel is currently zoned residential, master planned commercial, and is not at issue in this matter. All three of Plaintiff's parcels are master planned for commercial use and sit within the commercial corridor contemplated by the Defendant's master plan. The immediate vicinity of the Property has been tapped as an area of significant development in the township, with approximately one thousand (1,000) residential homes approved to be built across the street from the commercial corridor in which the Property is located. Plaintiff purchased the Property specifically because of the current and future zoning designations, as well as the significant residential and commercial development in the area.

The Property is located at the far edge of a large wellhead protection area and Section 16.11(C)(8) of the Howell Township Zoning Ordinance states: "No gasoline service station shall be permitted within three hundred (300) feet of a wellhead protection area". Exhibit B, pp 5-6.

[1] All references to Exhibits are to the Exhibits attached to Plaintiff's Motion for Summary Disposition unless otherwise stated as "attached hereto".

On August 7, 2019, Plaintiff met with Joe Daus, Howell Township Zoning Administrator to discuss seeking a variance to develop a gasoline service station and drive through restaurant on the Property. Plaintiff was advised that if he could get the approval of "Greg" at the Marion, Oceola, Genoa Water Authority (MHOG) Defendant would approve a variance. Plaintiff later learned Greg was Greg Tatara. Exhibit C. At the meeting, Mr. Daus then told Plaintiff that once he had MHOG's approval, to submit the request for variance to the Zoning Board of Appeals, then to the Planning Commission, then to the Township Board of Trustees. Exhibit C.

Plaintiff contacted Mr. Tatara, provided the plans for the gasoline service station, and on February 1, 2021 and February 23, 2023, MHOG issued two separate letters to Plaintiff approving the proposed project with conditions. Exhibit D. On March 16, 2021, the Howell Township ZBA then held a hearing and denied Plaintiff's use variance application. Exhibit E1, March 16, 2021 ZBA Denial. Next, Plaintiff requested Defendant amend §16.11 of its zoning ordinance to allow for gasoline service stations within the wellhead protection as long as the plans are approved by MHOG. Without giving Plaintiff notice, the Howell Township Board of Trustees held two public meetings, on March 20, 2023 and May 8, 2023, at which Plaintiff's proposed zoning ordinance amendment, Plaintiff's property, and Plaintiff's SLUP application, were discussed. Exhibits E2 and F. Defendant ultimately denied Plaintiff's request to change the language of Ordinance 16.11 and approved submission of a new wellhead protection ordinance to go to Township Planning Committee, specifically requesting a complete prohibition of gasoline service stations. Exhibit G, p. 3 and Exhibit H, p. 2.

Plaintiff regrouped, applied, and received permits and approvals for the project from the State of Michigan Department of Licensing and Regulatory Affairs Bureau of Fire Services (BFS);

Department of Environment, Great Lakes, and Environment ("EGLE"); (3) State of Michigan Fire Marshal; and (4) local fire Marshal.

On or around June 26, 2023, Plaintiff submitted a special land use permit application (SLUP) and site plan to develop a new gasoline service station and drive-through restaurant on land owned by Plaintiff in Howell Township, currently zoned Neighborhood Service Commercial (NSC), in which gasoline service stations are permitted as a special land use. The application was supplemented on or around October 17, 2023. Exhibit I.

In conjunction with Plaintiff's SLUP application and site plan submission, the Township required Plaintiff to sign an agreement to reimburse the Township for "all expenses at actual cost for professional services related to the application required by the Township for the issuance of any permits, approvals, reviews, and attendance at meetings, by the Township's Planner, Landscape Architects, Legal Counsel, Engineering and Administrative Staff, over and above the fees listed in the Howell Township Fee Schedule." Exhibit I, p. 5-6. Unbeknownst to Plaintiff, MHOG director Tatara drafted a third letter on May 19, 2023, revoking MHOG's prior approval of the site plan and openly objecting to Plaintiff's plan to build a gasoline service center at the Property and on November 19, 2023, the MHOG Board resolved to submit a formal objection to the Township Trustees. Exhibits M and N. Plaintiff was not given notice of the MHOG public meeting and was not provided a copy of the resolution by MHOG nor Defendant.

On November 21, 2023, the Howell Township Planning Commission conducted a public hearing on Plaintiff's SLUP application. Exhibits J and K. At the outset of the meeting, the Planning Commission stated that it lacks authority to grant the application.

> MR. WILLIAMS:· Just so I understand you correctly, Paul, that we don't have the authority to approve a gas station that violates that ordinance of not being within 300 feet of a wellhead protection area.

MR. MONTAGNO: That is correct

Exhibit K, p. 56, lines 14 – 19.

The Howell Township Planning Commission voted unanimously to recommend denial of the SLUP based on the prohibitive language in §16.11(C)(8) of its Zoning Ordinance. Exhibit K, pp. 97-98. On December 11, 2023, the Howell Township Board of Trustees held a regular meeting at which they voted to deny the SLUP. Exhibit L, pp 2, 18-19.

Following the Township Board's denial of Plaintiff's SLUP application, Plaintiff submitted its application to the Zoning Board of Appeals to appeal the Board decision and to request dimensional and use variances. The appeal was denied. Plaintiff filed a circuit court claim of appeal of the December 11, 2023, Board denial on January 23, 2024, which was assigned to Judge McGivney as Case No. 24-350-AA. This lawsuit followed.

II. STANDARD OF REVIEW

A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual basis for a plaintiff's claim. *Skinner v Square D Co*., 445 Mich 153, 161, 516 NW2d 475 (1994). Summary disposition under this rule is available when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." *Haliw v City of Sterling Heights*, 464 Mich 297 627 NW2d 581 (2001). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Attorney Ge. v Power Pick Players' Club of Michigan, LLC*, 287 Mich App 13, 26-27, 783 NW2d 515 (2010).

A motion for summary disposition under MCR 2.116(C)(7) is appropriate when entry of judgment, dismissal of the action, or other relief is appropriate because of release, payment, prior

judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate or to litigate in a different forum, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.

III. LAW AND ANALYSIS

A. NEITHER RES JUDICATA NOR COLLATERAL ESTOPPEL APPLY TO COUNTS I, II, III, AND IX BECAUSE EVEN IF AN APPELLATE COURT CONSIDERS AND RULES UPON CONSTITUTIONAL QUESTIONS ON APPEAL FROM A ZBA DECISION, THOSE RULINGS ARE INVALID FOR WANT OF JURISDICTION.

Contrary to Defendant's contention, Counts I, II, III, and IX of Plaintiff's Complaint are not barred by the doctrine of res judicata or collateral estoppel:

> [A] ZBA lacks jurisdiction to consider constitutional claims, and … because a circuit court reviewing a ZBA's decision is confined to the record and decision of the ZBA, the circuit court is similarly barred from ruling on constitutional issues presented in an appeal from a ZBA's decision". Thus, res judicata does not apply to a plaintiff's constitutional claims arising from the same facts. The court issued this ruling despite the fact that the plaintiff had argued its constitutional claims before the ZBA and the circuit court.

Houdini Properties, LLC v. City of Romulus, 480 Mich. 1022, 743 N.W.2d 198, 199 (2008).

This is not a quote taken out of context, it is well established Michigan law. Even if an appellate court considers and rules upon constitutional questions on appeal from a ZBA decision, those rulings are invalid for want of jurisdiction. *See also Zelasko v. Charter Twp. Of Bloomfield*, 347 Mich. App. 141, 161–62, 14 N.W.3d 441, 453 (2023); *Jon Jon's Inc. v. City of Warren*, 534 F. App'x 541, 544 (6th Cir. 2013); *Get Back Up, Inc. v. City of Detroit*, 878 F. Supp. 2d 794, 806 (E.D. Mich. 2012).

B. PLAINTIFF WAS DENIED PROCEDURAL DUE PROCESS IN CONNECTION WITH ITS SPECIAL LAND USE PERMIT APPLICATION BECAUSE PLAINTIFF'S APPLICATION WAS DENIED AS A RESULT OF DEFENDANT'S IRREGULAR, PARTIAL, ADMINISTRATION OF PUBLIC REGULATIONS.

Defendant, in its motion for summary disposition, raises due process concerns related to the handling of Plaintiff's special land use application governed by Howell Township ordinances 16.02 – 16.06, that is, whether Plaintiff was afforded the typical processes afforded to special land use applicants throughout the state. Plaintiff's Brief in Support, p. 13. With respect to the constitutionality of ordinance 16.11, Plaintiff relies on its own Brief in Support of its Motion for Summary Disposition.

Initially, Defendants argue that Plaintiff's procedural due process claims fail because Plaintiff does not have a constitutionally protected property or liberty interest—a requirement of both substantive and procedural due process.

> Liberty and property interests are intricately related in our system of political economy, a system based on free choice of careers and occupations, private property, and the right to compete. A complex of rights and duties characterizes any particular liberty or property interest. Generally speaking, freedom to choose and pursue a career, to engage in any of the common occupations of life, qualifies as a liberty interest which may not be arbitrarily denied by the State. When governmental institutions regulate careers or occupations in the public interest through the licensing process, their definitions of rights in a license or other statutory entitlement may give rise to competition rights and constraints that define property interests.

Wilkerson v. Johnson, 699 F.2d 325, 328 (6th Cir. 1983)(internal citations omitted).

Plaintiff has the protected liberty interest of its right to pursue its livelihood which cannot be denied by arbitrary regulations or the irregular, partial, administration of public regulations. *Id*. The Supreme Court has held repeatedly that the property interest in a person's means of livelihood is one of the most significant that an individual can possess. *Ramsey v. Bd. of Educ. of Whitley Cnty.*, 844 F.2d 1268, 1273 (6th Cir. 1988)(internal citations omitted).

With respect to Plaintiff's SLUP application, governed by Howell Township ordinance 16.02 -16.06, Defendant contends Plaintiff was afforded the typical processes afforded to special land use applicants throughout the state. "A fundamental requirement of [procedural] due process is the opportunity to be heard. It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *United Pet Supply*, 768 F.3d at 485 (internal quotation marks omitted) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)). Plaintiff was not afforded the opportunity to be heard, neither at a meaningful time nor in a meaningful manner. Plaintiff's application for a SLUP was interfered with and inhibited by the political motivations of at least two individuals in control of the process.

> The regular and impartial administration of public rules governing these interests, as required by due process, prohibits the subtle distortions of prejudice and bias as well as … the punishment of political and economic enemies through the administrative process.

Ramsey v. Bd. of Educ. of Whitley Cnty., 844 F.2d 1268, 1273 (6th Cir. 1988).

Bob Wilson, a member of the Howell Township Board of Trustees, who voted to deny Plaintiff's special use land permit application, actively pursued a boycott against Plaintiff's entire business based on personal animus.



Bob Wilson

On a serious note. if we can pull together as a community and boycott mugg and bopps, he will feel it. More calls need to be made to him. His name is Todd. I got to ask him in a meeting at the twp hall why he sets gas prices to high in our county. He told me to ask Kroger. He is using that extra money to keep on buying gas stations and trying to build new ones. Just wait till he owns them all then see how much gas will be. I personally have not bought a thing from mugg and bopps in over 10yrs. And yes, it did feel good to call him out in a twp board meeting. I wanted to see what kind of a man he was. I have no desire to be friends with or support a person with the attitude he has over the gas prices. More should follow. Maybe everyone should start calling him?

3h **Like** **Reply** 2

In addition to Mr. Wilson's boycott campaign, Greg Tatara, utility director of the Marion, Oceola, Genoa Water Authority (MHOG) initially supported Plaintiff's request for a SLUP, but later changed his position "because of the whole negative aspect that the public was addressing regarding this gas station, and I was thinking it's going to make me, in particular, look really bad if I have these letters out here saying we don't object". Exhibit S, p. 116, lines 6-10.

In early 2021, Mr. Tatara, reviewed Plaintiff's site plan and proposal for installing a gasoline station service center within the 10-year capture zone of the wellhead. Exhibit S, p. 60, lines 14-16. On February 1, 2021, MHOG issued its opinion in support of the Plaintiff as long as Plaintiff followed certain protective measures. Exhibit D. Plaintiff and MHOG engaged in two years of discussion regarding Plaintiff's request for approval of a special land use permit. On February 23, 2023, MHOG issued a second letter to Plaintiff approving the proposed project with conditions. Exhibit M. Specifically, MHOG stated "[p]rovided the above conditions are met, MHOG would not object to the construction of the fueling station". Exhibit S, p. 64, lines 5-6. Plaintiff met all of MHOG's required conditions.

Unbeknownst to Plaintiff, Mr. Tatara then drafted a third letter dated May 19, 2023, revoking MHOG's prior approval of the site plan and objecting to Plaintiff's plan to build a gasoline station service center at the Property. Mr. Tatara testified during his deposition that he wrote the letter on his own without prompting from the township trustees or any other individual.

Q.· ·On that letter -- it looks like the prior two letters were directed to our clients.· This letter went to -- the 23rd letter -- I'm sorry -- who is it directed to?

A.· ·Howell Township Board.

·Q.· ·Did you mail this letter to Howell-Mason?

A.· ·No.

Q.· ·So in that three-month period, for lack of a better phrase, you changed your mind –

A.· ·Yes.

Q.· ·-- fair?

A.· ·Fair.

Q.· ·And despite having written two letters previous to that -- to the May 2023 letter where Howell-Mason agreed to all your conditions, you write a third letter and you don't copy them on it; is that correct?

A.· ·Correct.

Q.· ·Why didn't you copy them on that letter?

A.· ·Because they were going through the site plan approval process, so the previous two letters were requested -- Howell-Mason, LLC, specifically requested that I write a letter

Q.· ·Okay.

A.· ·-- to them.· Not to the township, but to them.· They were already, to the best of my knowledge, going through the site plan approval process, because now I wanted to make sure that as part of the approval process this information was provided to the township so they made the best decision that they could.

Q.· ·Did it occur to you that it might be wise to include Howell-Mason on a copy of that letter?

A.· ·Did not, no.

Q.· ·Did someone from the township request that letter?

A.· ·No.

Q.· ·You did that on your own initiative?

A.· ·Yes.

Q.· ·Nobody requested it?

A.· ·No.

Q.· ·Well, do you know whether or not Howell Township was aware of your two previous letters?

A.· ·Yes.

Q.· ·How were you aware of that?· How did you know that?

A.· ·How did I -- because -- because they were in their site plan approval packet, as far as I know.

Q.· ·And how do you know that?· Did you review the site plan approval packet?

A.· ·No.

Q.· ·Then how would you know that?· I'm just trying to understand.· I'm not trying to give you a hard time. How would you know that?

A.· ·Because Howell-Mason, LLC, requested those letters of me so they could include them in their site plan approval packet to Howell Township.

Q.· ·I understand that.· But how do you know that they were in the packet or not in the packet?

A.· ·Because Howell-Mason, LLC, requested that I provide them a letter that they could put in their site plan approval packet.

Exhibit S, pp. 81, line 14 – p. 83, line 20.

Despite Mr. Tatara's consistent denial that he conversed with the Trustees regarding the wellhead protection area and his prior letters approving the gasoline service station, the meeting minutes from the May 8, 2023, Board of Trustees meeting, just 11 days prior to Tatara writing his letter, clearly state Treasurer Hohenstein had discussions with Mr. Tatara regarding the wellhead protection area:

> Treasurer Hohenstein explained during the March 20, 2023 Howell Township Board meeting the Board discussed a request to change the wording of our ordinance to allow a gas station to be sited inside MHOG's wellhead protection area. The Board rejected the request to change the current wording in the ordinance therefore denying the gas station at the proposed site. After that meeting, he had discussions with Greg Tatara, Director of MHOG, regarding their wellhead protection area. Greg has been working with the municipalities that are in the wellhead protection area to try to get similar wellhead protection ordinances in place. Marion Township has passed the attached draft wellhead

> protection ordinance; the City of Howell is still working on theirs. He recommends approval to send the attached draft wellhead protection ordinance to the Planning Commission for consideration as a zoning ordinance for Howell Township.

See attached Exhibit Z, p. 2.

It is evident that Mr. Hohenstein had communication with MHOG director Tatara influencing him to write the May 19, 2023, letter to the Board of Trustees revoking MHOG's prior approval. Significantly, after the Board reviewed Tatara's proposed wellhead protection ordinance, the Trustees saw fit to modify Tatara's draft to specifically exclude petroleum from the wellhead protection area:

> Discussion followed. MOTION by Graham, SECOND by Melton, "TO APPROVE SENDING THE ATTACHED WELLHEAD PROTECTION ORDINANCE TO THE PLANNING COMMISSION FOR CONSIDERATION AS A ZONING ORDINANCE FOR HOWELL TOWNSHIP WITH PETROLEUM TO BE ADDED TO THE ORDINANCE." Discussion followed. Motion carried.

See attached Exhibit Z, p. 2 (emphasis added).

On November 19, 2023, as a result of Mr. Tatara's letter, the MHOG Board resolved to submit a formal objection to the Howell Township Trustees. MHOG resolved:

> 1. The siting of a fueling station at the intersection of Mason and Burkhart Roads is inconsistent with the Goals of the Wellhead Protection Plan most recently updated in August of 2023 and also potentially jeopardizes the approval of well installation in MHOG Reserve Wellfield Area (Parcel 4706-32-400-014)
>
> 2. Should the township of Howell approve the sitting of a gas station we request that all conditions set within previous correspondence dated February of 2021 and February of 2023 as described above be a condition of approval to provide maximum protection of the ground water resources.

Exhibit O.

Plaintiff was neither given a copy of the May 23, 2023, letter, notice of the MHOG public meeting, nor was Plaintiff provided a copy of the November 15, 2023 MHOG resolution. For all of the reasons set forth above and the reasons in Plaintiff's Motion for Summary Disposition, Plaintiff has been denied substantive and procedural due process.

C. PLAINTIFF WAS DENIED EQUAL PROTECTION UNDER THE LAW

1. §16.11(C)(8) facially violates the equal protection clause.

The total ban of gas stations facially violates the equal protection clause.

> To prevail on an equal protection claim, the plaintiffs must show that "the government treated [them] 'disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis.

Center for Bio-Ethical Reform, Inc. v. Napolitano, 648 F.3d 365, 379 (6th Cir. 2011).

> Where, as here, a plaintiff does not contend that a municipality's actions burden any fundamental right and has not suggested that he is a member of any suspect class, then the plaintiff still may proceed as a "class of one," but to do so he must put forth evidence that he "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."

Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000).

Where the purpose of the ordinance at issue is described as protecting drinking water or protecting the wellhead from potential contaminants, a ban of gasoline service stations from the area while still allowing multiple other businesses that use and store contaminants above ground and underground "has no foundation in reason and is a mere arbitrary or irrational exercise of power". *Paterek v. Vill. of Armada, Michigan*, 801 F.3d 630, 648 (6th Cir. 2015). Here, one singular industry was banned without any rationale for disparate treatment under the law. Ordinance 16.11 does not apply uniformly to all property uses that pose a risk of contamination to the wellhead and it does not apply evenly to those uses which traditionally store contaminants in underground storage or that pose a threat of surface run off, such as automotive repair centers and drycleaners. It only applies to gasoline service stations. Exhibit Q, p. 24, line 4 – p. 25, line 24.

To the extent Defendant argues that the Michigan Supreme Court recently reiterated that there is not a "fundamental right to continue a particular business model free from government

regulation" or that "Michigan's zoning laws permit categorical restrictions on land uses", any such regulation or law must be constitutional—it must not violate due process or equal protection under the law.

For the reasons set forth herein and in Plaintiff's Motion for Summary Disposition, Plaintiff has been denied equal protection under the law and ordinance 16.11 is unconstitutional facially and as applied.

D. SECTION 16.11(C)(8) OF THE TOWNSHIP'S ZONING ORDINANCE IS IN DIRECT CONFLICT WITH, AND PREEMPTED BY, STATE STATUTORY AND REGULATORY SCHEMES FULLY ADMINISTERED BY STATE AGENCIES.

State law preempts a municipal ordinance where the ordinance directly conflicts with a state statute or where the statute completely occupies the field that the ordinance attempts to regulate. *Rental Prop Owners Ass'n of Kent Co. v. Grand Rapids,* 455 Mich. 246, 257, 566 N.W.2d 514 (1997). A direct conflict exists when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits. *People v. Llewellyn (City of East Detroit v. Llewellyn),* 401 Mich. 314, 322 n. 4, 257 N.W.2d 902 (1977).

1. Regulation of Underground Storage Tanks.

In 1994, Governor John Engler created the underground storage tank division within the department of natural resources for, among other reasons, "activities related to the underground storage tank programs can be performed more efficiently by one agency". Exhibit V, Executive Reorganization Order 1994-4, p. 1; codified at MCL 299.901. The underground storage tank division is divided between Environment, Great Lakes, and Energy ("EGLE") successor of the Department of Environmental Quality ("DEQ"), and the Department of Licensing and Regulatory Affairs Bureau of Fire Services ("BFS"). Together, EGLE and BFS regulate the licensing, inspection, and installation of active underground storage tanks as well as the cleanup

and closure of leaking underground storage tanks. The design, construction, installation and maintenance of underground storage tanks that store regulated substances are licensed under Part 211, Underground Storage Tank Regulations ("USTR"), of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA).

The USTR governs, among other things, the minimum safe distances of USTs to wells, to reduce the risk of contamination, and provides a framework for the licensing, inspection, and installation of active underground storage tanks. MCL 324.21102 states:

> A person that is the owner of an underground storage tank system shall register the underground storage tank system with the department prior to bringing the underground storage tank system into use. Additionally, an installation registration form containing the information required by the department shall be submitted to the department at least 45 days prior to the installation of the underground storage tank system.

Buttressing Governor Engler's Executive Order and in conformity with the federal equivalent, Michigan's legislature saw fit to prohibit local municipalities from enacting legislation inconsistent with NREPA and the USTR while establishing a process whereby a municipality can propose and BFS may approve a plan implementing heightened safety measures with respect to USTs. The specific section of PA 451 of 1994, preempting local municipalities from legislating in the area of Underground Storage Tanks is MCL 324.21109, which states**:**

(1) The department may, upon resolution of the governing body of a local unit of government in whose jurisdiction an underground storage tank system is being installed, require additional safeguards, other than those specified in rules, when the public health, safety, or welfare, or the environment is endangered.

(2) A local unit of government shall not enact or enforce a provision of an ordinance that is inconsistent with this part or rules promulgated under this part.

(3) A local unit of government shall not enact or enforce a provision of an ordinance that requires a permit, license, approval, inspection, or the payment of a fee or tax for the installation, use, closure, or removal of an underground storage tank system.

Further evidence of the legislative intent behind MCL 324.21109 is found in the March 10, 2017, State Budget Office Regulatory Impact Statement. Exhibit W. The State Budget Office, Office of Regulatory Reinvention, pursuant to the authority of the Administrative Procedures Act, issued a Regulatory Impact Statement to the BFS Storage Tank Division which provides insight into the legislature's intent:

> Identify any laws, rules, and other legal requirements that may duplicate, overlap, or conflict with the proposed rule(s). Explain how the rule has been coordinated, to the extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter. This section should include a discussion of the efforts undertaken by the agency to avoid or minimize duplication.

Exhibit W, March 10, 2017, SBO Regulatory Impact Statement, p. 3.

The BFS responded:

> These rules adopt 2015 federal rules regulating all underground storage tank facilities storing and/or handling flammable and combustible liquids. PA 451 of 1994 states that the regulated authority over these facilities is with the State, and notes that local units of government cannot be more restrictive than State regulations.

Exhibit W, March 10, 2017, SBO Regulatory Impact Statement, p. 3.

2. Regulation of Wellhead Protection Areas.

The State of Michigan Wellhead Protection Program was created following amendments to the Federal Safe Drinking Water Act adopted in 1986 to regulate wellhead protection areas. Under the State Wellhead Protection Program ("WHPP"), EGLE has instituted certain rules that provide, among other things, a municipality may propose a wellhead protection area ("WHPA") with heightened protections for EGLE to review. The rules provide that EGLE may approve the proposed WHPA in a process similar to that regarding USTs, outlined in MCL 324.2119, discussed *Supra*. Important to the present case, the WHPP makes it clear that no business or activity may be excluded from operating in the WHPA:

> The WHPA is determined and is submitted to the Michigan Department of

> Environment, Great Lakes, and Energy (EGLE) for approval. Once approved, the WHPA receives a higher level of environmental monitoring at the state level for certain activities which are permitted through the state. For example, an underground storage tank must have an extra layer of protection around the tank (secondary containment), or businesses with groundwater discharge permits may need to perform more frequent monitoring. **As stated previously, the WHPP does not exclude any businesses or activities from your WHPA .**

Exhibit X, p. 7 (**emphasis added)**

Michigan Courts have repeatedly recognized that

> [t]he Legislature vested in the DEQ, the important job of preserving our state's valuable water supply with the imperative that the DEQ control the pollution of *all* the waters of the state and the Great Lakes…[including] ground waters, lakes, rivers and streams and all other watercourses and waters within the jurisdiction of this state.

City of Brighton v. Twp. of Hamburg, 260 Mich. App. 345, 355–56, 677 N.W.2d 349, 355 (2004); MCL 324.3103.[2]

> Consistently with the fact that our state's waters are connected and flow through many and varied localities, the Legislature invested in one agency, the DEQ, the public trust of protecting "all " our state's waters, which protection can only be accomplished by a statewide, consistent, and coherent uniform policy.
>
> …
>
> The subject matter of the regulation, the control of pollution entering the state's inter-connected waterways, clearly calls for a statewide, uniform system of regulation. The state's ability to control water pollution statewide would be substantially undermined by a Balkanized patchwork of inconsistent local regulations

City of Brighton v. Twp. of Hamburg, at 355–56; MCL 324.3106.

Moreover, any person, including a city or township, that is aggrieved by the DEQ's issuance of a permit may, as here, request and have a contested hearing under the APA. MCL 324.3112(3). This procedure for local input by way of contested hearings and the ultimate

[2] See also See also, *Southeastern Oakland Co. Incinerator Auth. v. Avon Twp.,* 144 Mich.App. 39, 372 N.W.2d 678 (1985) and *Cascade Twp. v. Cascade Resource Recovery, Inc.,* 118 Mich.App. 580, 325 N.W.2d 500 (1982).

adoption or rejection by the head of the DEQ ensures uniformity and coherence of a statewide policy to protect our state's water resources. *Id.* EGLE replaced the DEQ on April 22, 2019.

Importantly, the entities that do regulate the State's waterways and underground storage tanks, EGLE and BFS, both agree Plaintiff's proposed gasoline service station is safe and has implemented sufficient safeguards to meet their requirements. Plaintiff's expert, Gregory Buhovecky, "there is an extremely low to no chance of risk" to the health, safety, and welfare of MHOG's existing and proposed wells. Exhibit U, p. 120, lines 1-10 and *See also* Exhibit T. For what it is worth, MHOG also agreed until Mr. Tatara was pressured to change his position.

WHEREFORE, Plaintiff respectfully requests this court enter an order denying Defendant's Motion for Summary Disposition, granting Plaintiff's motion for summary disposition on all counts, setting trial for a determination of damages, awarding Plaintiff its reasonable attorney fees, and granting such other relief as this Court deems just and equitable.

Respectfully submitted.

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Dated: May 28, 2026

EXHIBIT Z

HOWELL TOWNSHIP REGULAR BOARD
MEETING MINUTES
3525 Byron Road Howell, MI 48855
May 8, 2023
6:30 P.M.

MEMBERS PRESENT:		**MEMBERS ABSENT:**
Mike Coddington	Supervisor	
Jean Graham	Clerk	
Jonathan Hohenstein	Treasurer	
Matthew Counts	Trustee	
Jeff Smith	Trustee	
Harold Melton	Trustee	
Bob Wilson	Trustee	

Supervisor Coddington called the meeting to order at 6:30 p.m. The roll was called. There were 10 people in the audience. All rose for the Pledge of Allegiance.

APPROVAL OF THE AGENDA:
May 8, 2023
MOTION by Counts, **SECOND** by Melton, **"TO APPROVE THE MAY 8, 2023 AGENDA AS PRESENTED."** Discussion followed. Motion carried.

APPROVAL OF BOARD MEETING MINUTES:
April 10, 2023
A) REGULAR BOARD MEETING MINUTES
MOTION by Hohenstein, **SECOND** by Melton, **"TO APPROVE THE APRIL 10, 2023 REGULAR MEETING MINUTES AS PRESENTED."** Discussion followed. Motion carried.

CORRESPONDENCE:
No additions. No questions.

CALL TO THE PUBLIC:
There was no public comment.

NEW BUSINESS:
A. Howell Township Budget 2023/2024
MOTION by Graham, **SECOND** by Counts **"TO APPROVE THE HOWELL TOWNSHIP BUDGET 2023/2024 AS PRESENTED."** Discussion followed. Motion Carried.

B. Financial Update
Deputy Supervisor Kilpela provided the Board with a budget update. Revenue and Expenditure Report period ending 4/30/2023 and Cash Flow Report using budgeted revenue was reviewed. He fielded questions and comments from the Board. Discussion followed. Kilpela proposed two budget amendments to the General Fund to increase the Treasurer legal expense by $4,000.00 to account for legal fees incurred from personal property tax collection and to increase the snow removal expense by $12,000.00 for the walking paths. **MOTION** by Graham, **SECOND** by Melton. **"TO APPROVE THE 2022/2023 PROPOSED BUDGET**

AMENDMENTS FOR THE TREASURER AND THE TOWNSHIP HALL." Discussion followed. Motion carried. The Board thanked Kilpela for the great job he does with the budget.

C. WWTP

Deputy Supervisor Kilpela explained in detail the upcoming Waste Water Treatment Plant Projects. **MOTION** by Counts, **SECOND** by Melton, **"TO APPROVE TO REBUILD ONE PUMP OF STATION 73 NOT TO EXCEED $40,000.00."** Discussion followed. Motion carried. **MOTION** by Counts, **SECOND** by Graham, **"TO APPROVE THE QUOTES FROM ADVANCED REHABILITATION TECHNOLOGY AND MACALLISTER RENTALS FOR THE JUNCTION CHAMBER AND INFLUENT CHANNEL LINING NOT TO EXCEED $47,000.00."** Discussion followed. Motion carried.

D. Howell Township v John Mills

As requested by the Board, Treasurer Hohenstein summarized the issue with Mr. John Mills and his disc golf course and the conclusion at the ZBA. Mr. Mills was present and discussed the issues presented. He reviewed along with his Attorney Kenneth V. Zichi the violations against his property. Extensive discussion followed.

E. Wellhead Protection Ordinance

Treasurer Hohenstein explained during the March 20, 2023 Howell Township Board meeting the Board discussed a request to change the wording of our ordinance to allow a gas station to be sited inside MHOG's wellhead protection area. The Board rejected the request to change the current wording in the ordinance therefore denying the gas station at the proposed site. After that meeting, he had discussions with Greg Tatara, Director of MHOG, regarding their wellhead protection area. Greg has been working with the municipalities that are in the wellhead protection area to try to get similar wellhead protection ordinances in place. Marion Township has passed the attached draft wellhead protection ordinance; the City of Howell is still working on theirs. He recommends approval to send the attached draft wellhead protection ordinance to the Planning Commission for consideration as a zoning ordinance for Howell Township. Discussion followed. **MOTION** by Graham, **SECOND** by Melton, **"TO APPROVE SENDING THE ATTACHED WELLHEAD PROTECTION ORDINANCE TO THE PLANNING COMMISSION FOR CONSIDERATION AS A ZONING ORDINANCE FOR HOWELL TOWNSHIP WITH PETROLEUM TO BE ADDED TO THE ORDINANCE."** Discussion followed. Motion carried.

F. Subcommittee Compensation

Clerk Graham explained she received the Subcommittee Compensation letter to approve compensation for the subcommittee's investigation report. **MOTION** by Hohenstein, **SECOND** by Melton, **"TO APPROVE TO PAY THE SUBCOMMITTEE $80.00 PER MEETING, PER PERSON."** Discussion followed. Motion carried.

G. Howell Township Recreation Plan Proposal

Treasurer Hohenstein indicated the Park and Recreation 5 year Plan is coming to an end. In order to request grants, the Township needs to have a current plan in place. Included in the packet are the projected costs from the Planner for the Park and Recreation Plan update. Planning Commission Chair Martha Haglund suggested direction for the plan and a way to be fiscally responsible regarding the quote for the Howell Township Recreation Plan Update. She suggested the subcommittee work with Carlisle Wortman for a resolution regarding the work plan, timeline and fees. Discussion ensued. The Board tabled the discussion until June 12, 2023 Meeting.

H. Bids: Election Security

Clerk Graham explained the impact on elections with the passage of Proposal 22-2 which greatly affects elections going forward. She indicated to be successful we need to make sure we have the tools and resources to keep the security and integrity of our elections intact and she is asking for approval on the 5 items listed in her memo. **MOTION** by Counts, **SECOND** by Graham, **"TO APPROVE MICROWORKS COMPUTING, INC QUOTE AS PRESENTED."** Discussion followed. Motion carried. **MOTION** by Counts, **SECOND** by Hohenstein, **"TO APPROVE THE QUOTE FROM TWO MEN AND A TRUCK AS PRESENTED TO MOVE FILING CABINETS OUT OF THE ELECTION ROOM TO THE BASEMENT."** Discussion followed. Motion carried. **MOTION** by Counts, **SECOND** by Smith, **"TO APPROVE FINLEY CONSTRUCTION TO INSTALL THE BALLOT BOX AS PRESENTED."** Discussion followed. Motion carried. **MOTION** by Smith, **SECOND** by Hohenstein, **"TO APPROVE S.E.I. CONSTRUCTION CO. BID NOT TO EXCEED $750.00 FOR THE INSIDE WALL, DOOR WALL REPAIR AND DRYWALL AS PRESENTED."** Discussion followed. Motion carried. **MOTION** by Counts, **SECOND** by Melton, **"TO APPROVE SHELVING FOR ELECTION STORAGE NOT TO EXCEED $500.00 AS PRESENTED."** Discussion followed. Motion carried.

9. **CALL TO THE PUBLIC:**

Joe Farkus asked for clarification on where to find the Board packets for future Board Meetings.

Tim Boal addressed the Board regarding a recent accident at Mason and Santa Rosa Drive. He asked for an update to the mediation for the corner of these crossroads.

REPORTS:

A. SUPERVISOR:

Supervisor Coddington indicated he fielded calls from residents, he attended a budget meeting and a board meeting at HAPRA regarding a possible millage to support the facility as opposed to being funded through the municipalities.

B. TREASURER:

Treasurer Hohenstein indicated they are moving towards the BS & A cloud software. He included a quote for four scanners to process payments with the intention of purchasing one now and if it works well to purchase up to three additional scanners. **MOTION** by Graham, **SECOND** by Melton **"TO APPROVE THE PURCHASE OF 4 HONEYWELL SCANNERS NOT TO EXCEED $1,000.00 AS PRESENTED."** Discussion followed. Motion carried. He further reported on finishing the ARPA reporting with Deputy Supervisor Kilpela which was a difficult task, receiving the lawsuit from Burkhart Ridge and submitted it to the insurance company and awaiting insurance counsel, and working on the Brewer Road drainage issue and it is slow moving and will take some time to complete.

C. CLERK:

Clerk Graham indicated she met with Spicer Engineering and Bowman Construction regarding the cemetery tile drainage project and there will be some reconfiguration coming without additional costs. She brought the Spring Clean Up volunteer sign-up sheet to the meeting. She discussed how many workers would be in attendance and providing lunch for the event. All the vendors have been confirmed to attend the event.

D. ZONING:

(See Zoning Administrator Daus's prepared written report)

E. ASSESSING:

(See Assessor Kilpela's prepared written report)

F. FIRE AUTHORITY:
Supervisor Coddington indicated they purchased an aerial ladder truck and noted a presentation they had at the prior meeting regarding the truck. They approved the budget and he indicated the Chairman is retiring.

G. MHOG:
Trustee Counts reported on the MHOG meeting.

H. PLANNING COMMISSION:
Trustee Counts reported on the Planning Commission Meeting.

I. ZONING BOARD OF APPEALS (ZBA):
Trustee Smith reported on the Zoning Board of Appeals Meeting. He indicated budgeting for training for the Zoning Board of Appeals and Planning Commission in the future.

J. WWTP:
This item was addressed earlier in the meeting by Deputy Supervisor Kilpela.

K. HAPRA
Clerk Graham indicated the report was in the packet.

L. PROPERTY COMMITTEE
Treasurer Hohenstein indicated they are close to closing on the North Burkhart Road property and are working to complete it.

M. P & R COMMITTEE
Treasurer Hohenstein indicated the Spark grant has opened and the Engineer is reviewing the information that was provided as to the application of the grant.

DISBURSEMENTS: REGULAR AND CHECK REGISTER:
MOTION by Hohenstein, **SECOND** by Melton, **"TO APPROVE THE REGULAR DISBURSEMENTS AS PRESENTED, ALSO ANY NORMAL AND CUSTOMARY PAYMENTS FOR THE MONTH."** Discussion followed. Motion carried.

ADJOURNMENT: MOTION by Melton, **SECOND** by Hohenstein, **"TO ADJOURN."** Motion carried. The meeting was adjourned at 8:36pm.

Howell Township Clerk
Jean Graham

Mike Coddington
Howell Township Supervisor

Angie Guillen, Recording Secretary

STATE OF MICHIGAN
IN THE 44th CIRCUIT COURT
FOR THE COUNTY OF LIVINGSTON

HOWELL-MASON, LLC,
A Michigan Limited Liability Company,

Plaintiff,

Case No. 24-32242-CZ

HON. SUSAN LONGSWORTH

v.

HOWELL TOWNSHIP,
A Michigan General Law Township,

Defendant.

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HOWELL-MASON, LLC'S RESPONSE TO HOWELL TOWNSHIP'S MOTION FOR SUMMARY DISPOSITION AS TO COUNTS V AND VI

Plaintiff, Howell Mason, LLC, by and through its attorneys, for its response to Howell Township's motion for summary disposition on counts V and VI, states:

I. FACTS

Plaintiff incorporates the statement of facts set forth in its Response to Defendant's Brief in Support of its Motion for Summary Disposition as to Counts I, II, III, and IX, as though fully set forth herein.

II. STANDARD OF REVIEW

A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual basis for a plaintiff's claim. *Skinner v Square D Co*., 445 Mich 153, 161, 516 NW2d 475 (1994). Summary disposition under this rule is available when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." *Haliw v City of Sterling Heights*, 464 Mich 297 627 NW2d 581 (2001). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Attorney Ge. v Power Pick Players' Club of Michigan, LLC*, 287 Mich App 13, 26-27, 783 NW2d 515 (2010).

III. LAW AND ANALYSIS

A. THE TOWNSHIP HAS REPEATEDLY VIOLATED THE OPEN MEETINGS ACT.

Howell Township Board of Trustees is a public body and is subject to Michigan's Open Meetings Act, Act 267 of 1976, MCL 15.261, *et. seq*. Marion, Oceola, Genoa Water Authority (MHOG) is a public body created under the Michigan Sewage and Water Supply Systems Act, Michigan Public Act 233 of 1955, MCL 124.281, *et. seq.*, and is also subject to Michigan's Open Meetings Act, Act 267 of 1976, MCL 15.261, *et. seq.* The Open Meetings Act provides that all meetings of a public body must be open to the public and must be held in a place available to the

general public. MCL 15.263. Although there are some exceptions, none apply to the present case. MCL 15.267.

Plaintiff, in its complaint, seeks the following relief under count V, Open Meetings Act Violation:

> WHEREFORE, Plaintiff HOWELL-MASON, LLC respectfully requests that this Honorable Court:
>
> A. Declare Defendant to have violated the OMA;
>
> B. Enjoin Defendant from further OMA violations;
>
> C. Award Plaintiff actual and reasonable attorney fees and costs; and
>
> D. Grant any further relief deemed just and equitable by the court.

Without giving Plaintiff notice and an opportunity to be heard, the Howell Township Board of Trustees held two public meetings, on March 20, 2023, and May 8, 2023, at which Plaintiff's proposed zoning ordinance amendment, Plaintiff's property, and Plaintiff's SLUP application, were discussed and voted against. Exhibits E2 and F.[1] Plaintiff seeks to invalidate the March 20, 2023 and May 8, 2023, decisions of the Howell Township Board of Trustees and to enjoin further violations of the Open Meetings Act.

Evidence of Board member's improper communication regarding Plaintiff's request for a special use land permit is present in Bob Wilson's online postings in the Facebook page Howell MI Happenings. Exhibit Y. Bob Wilson, a member of the Howell Township Board of Trustees, who voted to deny Plaintiff's special use land permit application, actively pursued a boycott against Plaintiff's entire business based on personal animus.

[1] All references to Exhibits are to the Exhibits attached to Plaintiff's Motion for Summary Disposition unless otherwise stated as "attached hereto".



Bob Wilson

On a serious note. if we can pull together as a community and boycott mugg and bopps, he will feel it. More calls need to be made to him. His name is Todd. I got to ask him in a meeting at the twp hall why he sets gas prices to high in our county. He told me to ask Kroger. He is using that extra money to keep on buying gas stations and trying to build new ones. Just wait till he owns them all then see how much gas will be. I personally have not bought a thing from mugg and bopps in over 10yrs. And yes, it did feel good to call him out in a twp board meeting. I wanted to see what kind of a man he was. I have no desire to be friends with or support a person with the attitude he has over the gas prices. More should follow. Maybe everyone should start calling him?

3h **Like** **Reply** 2

Exhibit Y.

In addition to Mr. Wilson's boycott campaign and Defendant's failure to provide the required notice of public hearings, Greg Tatara, utility director of the Marion, Oceola, Genoa

Water Authority (MHOG), initially supported Plaintiff's request for a SLUP, but later changed his position "because of the whole negative aspect that the public was addressing regarding this gas station, and I was thinking it's going to make me, in particular, look really bad if I have these letters out here saying we don't object". Exhibit S, p. 116, lines 6-10.

In early 2021, Mr. Tatara, reviewed Plaintiff's site plan and proposal for installing a gasoline station service center within the 10-year capture zone of the wellhead. Exhibit S, p. 60, lines 14-16. On February 1, 2021, MHOG issued its opinion in support of the Plaintiff as long as Plaintiff followed certain protective measures. Exhibit D. Plaintiff and MHOG engaged in two years of discussion regarding Plaintiff's request for approval of a special land use permit. On February 23, 2023, MHOG issued a second letter to Plaintiff approving the proposed project with conditions. Exhibit M. Specifically, MHOG stated "[p]rovided the above conditions are met, MHOG would not object to the construction of the fueling station". Exhibit S, p. 64, lines 5-6. Plaintiff met all of MHOG's required conditions.

In accordance with his political motivations, Mr. Tatara then drafted a third letter dated May 19, 2023, revoking MHOG's prior approval of the site plan and objecting to Plaintiff's plan to build a gasoline station service center at the Property. Mr. Tatara testified during his deposition that he wrote the letter on his own without prompting from the township trustees or any other individual.

Q.· ·On that letter -- it looks like the prior two letters were directed to our clients.· This letter went to -- the 23rd letter -- I'm sorry -- who is it directed to?

A.· ·Howell Township Board.

·Q.· ·Did you mail this letter to Howell-Mason?

A.· ·No.

Q.· ·So in that three-month period, for lack of a better phrase, you changed your mind –

A.· ·Yes.

Q.· ·-- fair?

A.· ·Fair.

Q.· ·And despite having written two letters previous to that -- to the May 2023 letter where Howell-Mason agreed to all your conditions, you write a third letter and you don't copy them on it; is that correct?

A.· ·Correct.

Q.· ·Why didn't you copy them on that letter?

A.· ·Because they were going through the site plan approval process, so the previous two letters were requested -- Howell-Mason, LLC, specifically requested that I write a letter

Q.· ·Okay.

A.· ·-- to them.· Not to the township, but to them.· They were already, to the best of my knowledge, going through the site plan approval process, because now I wanted to make sure that as part of the approval process this information was provided to the township so they made the best decision that they could.

Q.· ·Did it occur to you that it might be wise to include Howell-Mason on a copy of that letter?

A.· ·Did not, no.

Q.· ·Did someone from the township request that letter?

A.· ·No.

Q.· ·You did that on your own initiative?

A.· ·Yes.

Q.· ·Nobody requested it?

A.· ·No.

Q.· ·Well, do you know whether or not Howell Township was aware of your two previous letters?

A.· ·Yes.

Q.· ·How were you aware of that?· How did you know that?

A.· ·How did I -- because -- because they were in their site plan approval packet, as far as I know.

Q.· ·And how do you know that?· Did you review the site plan approval packet?

A.· ·No.

Q.· ·Then how would you know that?· I'm just trying to understand.· I'm not trying to give you a hard time. How would you know that?

A.· ·Because Howell-Mason, LLC, requested those letters of me so they could include them in their site plan approval packet to Howell Township.

Q.· ·I understand that.· But how do you know that they were in the packet or not in the packet?

A.· ·Because Howell-Mason, LLC, requested that I provide them a letter that they could put in their site plan approval packet.

Exhibit S, pp. 81, line 14 – p. 83, line 20. Despite Mr. Tatara's consistent denial that he conversed with the Trustees regarding the wellhead protection area and his prior letters approving the gasoline service station, the meeting minutes from the May 8, 2023, Board of Trustees meeting, just 11 days prior to Tatara writing his letter, clearly state Treasurer Hohenstein had discussions with Mr. Tatara regarding the wellhead protection area:

> Treasurer Hohenstein explained during the March 20, 2023 Howell Township Board meeting the Board discussed a request to change the wording of our ordinance to allow a gas station to be sited inside MHOG's wellhead protection area. The Board rejected the request to change the current wording in the ordinance therefore denying the gas station at the proposed site. After that meeting, he had discussions with Greg Tatara, Director of MHOG, regarding their wellhead protection area. Greg has been working with the municipalities that are in the wellhead protection area to try to get similar wellhead protection ordinances in place. Marion Township has passed the attached draft wellhead protection ordinance; the City of Howell is still working on theirs. He recommends approval to send the attached draft wellhead protection ordinance to the Planning

Commission for consideration as a zoning ordinance for Howell Township.

See attached Exhibit Z, p. 2.

It is evident that Jonathan Hohenstein had communication with MHOG director Tatara influencing him to write the May 19, 2023 letter to the Board of Trustees revoking MHOG's prior approval.

Significantly, after the Board reviewed Tatara's proposed wellhead protection ordinance, the Trustees saw fit to modify Tatara's draft to specifically exclude petroleum from the wellhead protection area:

> Discussion followed. MOTION by Graham, SECOND by Melton, "TO APPROVE SENDING THE ATTACHED WELLHEAD PROTECTION ORDINANCE TO THE PLANNING COMMISSION FOR CONSIDERATION AS A ZONING ORDINANCE FOR HOWELL TOWNSHIP WITH PETROLEUM TO BE ADDED TO THE ORDINANCE." Discussion followed. Motion carried.

See attached Exhibit Z, p. 2 (emphasis added).

Subsequently, on November 19, 2023, in advance of the December 11, 2023, Board of Trustees' meeting on Plaintiff's SLUP application and as a direct result of Mr. Tatara's letter, the MHOG Board resolved to submit a formal objection to the Howell Township Trustees. MHOG resolved:

> 1. The siting of a fueling station at the intersection of Mason and Burkhart Roads is inconsistent with the Goals of the Wellhead Protection Plan most recently updated in August of 2023 and also potentially jeopardizes the approval of well installation in MHOG Reserve Wellfield Area (Parcel 4706-32-400-014)
>
> 2. Should the township of Howell approve the sitting of a gas station we request that all conditions set within previous correspondence dated February of 2021 and February of 2023 as described above be a condition of approval to provide maximum protection of the ground water resources.

Exhibit O.

Plaintiff was neither given a copy of the May 23, 2023, letter, notice of the MHOG public meeting, nor was Plaintiff provided a copy of the November 15, 2023, MHOG resolution.

Defendant's in support of their contention that Board members did not violate the open meetings act, rely on the affidavit of Jonathan Hohenstein. In his affidavit, Mr. Hohenstein attests:

> Any discussions in which I participated regarding Howell-Mason's application occurred during properly noticed public meetings of the Township Board or in circumstances expressly permitted by the Michigan Open Meetings Act.
>
> I did not engage in any regular pattern or practice of deliberating Township Board business outside of public meetings, nor am I aware of any such conduct by the Howell Township Board.
>
> I listened to and considered all evidence, testimony, and materials presented to the Township Board regarding Howell-Mason's application during properly noticed public meetings, including materials submitted by Howell-Mason and comments from members of the public.
>
> …
>
> All votes and decisions of the Howell Township Board concerning Howell-Mason's application were made during open public meetings.

See Defendant's Brief in Support of its Motion for Summary Disposition as to Counts V and VI, Exhibit F.

Mr. Hohenstein's attestations are in direct contradiction to the meeting minutes of the May 9, 2023, Board of Trustees meeting indicating Mr. Hohenstein had been in discussions with Mr. Tatara outside of a public meeting and the text messages showing Mr. Wilson's boycott campaign against Plaintiff. "A party or a witness may not create a factual dispute by submitting an affidavit that contradicts his own prior conduct." *Palazzola v. Karmazin Products Corp.,* 223 Mich.App. 141, 155, 565 N.W.2d 868 (1997); *Aetna Casualty & Sur. Co. v. Ralph Wilson Plastics Co.,* 202 Mich.App. 540, 548, 509 N.W.2d 520 (1993).

For all of the reasons set forth above and the reasons in Plaintiff's Motion for Summary Disposition, Defendant has violated the open meetings act, its decisions should be invalidated,

Defendant should be enjoined from further violations, and Plaintiff is entitled to its actual attorney fees and costs.

B. THE TOWNSHIP'S UNREASONABLE AND UNLAWFUL DENIAL OF PLAINTIFF'S SLUP APPLICATION RESULTS IN A REGULATORY TAKING.

"The United States Supreme Court has created a dichotomy in regulatory takings. *Lucas*[2] applies where the regulation has deprived the property of all economic value, and *Penn Cent.* applies where the regulation deprives the property of less than all economic value." *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St. 3d 1, 8, 780 N.E.2d 998, 1006 (2002). Under *Penn Central*, applicable here, "a taking may be found based on "a complex of factors," including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action". *Palazzolo v. Rhode Island,* 533 U.S. 606, 617, 121 S.Ct. 2448, 150 L.Ed.2d 592 (citing *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631).

"The term 'taking' can encompass governmental interference with rights to both tangible and intangible property." *AFT Mich. V. State*, 497 Mich. 197, 218, 866 N.W.2d 782, 794 (2015). "A business owner's right to engage in and continue their business has long been recognized as a property right." *Dept of Transp v Gilling*, 289 Mich App 219, 240; 796 NW2d 476 (2010). "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Murr v. Wisconsin*, 582 U.S. 383, 393, 137 S. Ct. 1933, 1942, 198 L. Ed. 2d 497 (2017)

[2] *Lucas,* 505 U.S. at 1019, 112 S.Ct. 2886, 120 L.Ed.2d 798

Here, Plaintiffs purchased the property based on its current zoning and master plan. Plaintiff then applied to and received approvals for the project from the State of Michigan Department of Licensing and Regulatory Affairs Bureau of Fire Services (BFS), Department of Environment, Great Lakes, and Environment ("EGLE"), State of Michigan Fire Marshal, the local fire Marshal, and MHOG (subsequently reversed under political pressure) to develop a combined gasoline service station and restaurant on the Property. The Township, despite the clear record demonstrating Plaintiff's proposal was environmentally safe, denied Plaintiff's application almost entirely on the basis of an unconstitutional, preempted, arbitrary and capricious ordinance banning gas stations within 300-feet of a wellhead protection area.

Defendant contends, among other things, that Plaintiff's takings claim is barred because Plaintiff had knowledge of the ordinance at the time it purchased the property. Contrary to Defendant's contention, the Supreme Court of the United States in *Palazzolo, Supra,* held that notice of the existence of the regulation prior to making a purchase is not fatal to a takings claim. "A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken. *Palazzolo v. Rhode Island*, at 609.

In *Palazzolo*, the Plaintiff ("Palazzolo") was the owner of 18 acres of coastal wetland made up of salt marshes. In 1971, Rhode Island created the Rhode Island Coastal Resources Management Council (Council) and charged it with protecting the State's coastal properties. The Council's regulations, known as the Rhode Island Coastal Resources Management Program (CRMP), designated salt marshes like those on Palazzolo's property as protected "coastal wetlands" on which development is greatly limited. In 1978, Palazzolo became the owner of the property as a result of the dissolution of his company, SGI. Palazzolo submitted a special land

use application to the Council seeking permission to turn 11 of the 18 acres into a private beach club; however, the Council rejected his application on the basis that the property had been designated as protected coastal wetlands under the CMRP. Palazzolo filed suit in the state court alleging a taking had occurred. The trial court held and the Rhode Island Supreme Court upheld, among other things, Plaintiff had no right to challenge regulations predating 1978, when he succeeded to legal ownership of the property. *Id*. at 607.

The United States Supreme Court disagreed and reversed the Rhode Island Supreme Court, and remanded for further proceedings, holding that "A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken". *Palazzolo v. Rhode Island*, 533 U.S. 606, 628, 121 S. Ct. 2448, 2465, 150 L. Ed. 2d 592 (2001).

In this case, the *Penn Central* factors weigh in favor of granting Plaintiff's takings claim. Plaintiff purchased this property for the purpose of expanding its current business, building gasoline service centers combined with a restaurant, and the effect of Defendant's illegal ban on gasoline stations makes this property unsuitable, thereby diminishing its value to Plaintiff. Plaintiff was told by the Howell Township Zoning Supervisor, Joe Daus, that if Plaintiff received approval of its plans from MHOG, it could obtain a variance that would allow Plaintiff to build its gasoline station service center. Exhibit C. Plaintiff obtained MHOG's approval on February 1, 2021, but the Zoning Board of Appeals denied its request for a variance on March 16, 2021. Where the Howell Township Supervisor believed Plaintiff could obtain a variance, Plaintiff's belief that he could obtain a variance was justified and Plaintiff had reasonable investment backed expectations in purchasing the property to expand its business.

Given that the character of Defendant's ordinance is unconstitutional, arbitrary, and preempted by State regulations, each of the *Penn Central* factors weigh in favor of granting Plaintiff's takings claim.

As a result of Defendant's unconstitutional taking of Plaintiff's property, Plaintiff lost the value of his initial investment in purchasing the property and his expected profits over time, in excess of one million dollars.

WHEREFORE, Plaintiff respectfully requests this court enter an order denying Defendant's motion for summary disposition, granting Plaintiff's motion for summary disposition on all counts, setting trial for a determination of damages, awarding Plaintiff its reasonable attorney fees, and granting such other relief as this Court deems just and equitable.

Respectfully submitted.

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Dated: May 28, 2026

EXHIBIT Z

HOWELL TOWNSHIP REGULAR BOARD
MEETING MINUTES
3525 Byron Road Howell, MI 48855
May 8, 2023
6:30 P.M.

MEMBERS PRESENT:		**MEMBERS ABSENT:**
Mike Coddington	Supervisor	
Jean Graham	Clerk	
Jonathan Hohenstein	Treasurer	
Matthew Counts	Trustee	
Jeff Smith	Trustee	
Harold Melton	Trustee	
Bob Wilson	Trustee	

Supervisor Coddington called the meeting to order at 6:30 p.m. The roll was called. There were 10 people in the audience. All rose for the Pledge of Allegiance.

APPROVAL OF THE AGENDA:
May 8, 2023
MOTION by Counts, **SECOND** by Melton, **"TO APPROVE THE MAY 8, 2023 AGENDA AS PRESENTED."** Discussion followed. Motion carried.

APPROVAL OF BOARD MEETING MINUTES:
April 10, 2023
A) REGULAR BOARD MEETING MINUTES
MOTION by Hohenstein, **SECOND** by Melton, **"TO APPROVE THE APRIL 10, 2023 REGULAR MEETING MINUTES AS PRESENTED."** Discussion followed. Motion carried.

CORRESPONDENCE:
No additions. No questions.

CALL TO THE PUBLIC:
There was no public comment.

NEW BUSINESS:
A. Howell Township Budget 2023/2024
MOTION by Graham, **SECOND** by Counts **"TO APPROVE THE HOWELL TOWNSHIP BUDGET 2023/2024 AS PRESENTED."** Discussion followed. Motion Carried.

B. Financial Update
Deputy Supervisor Kilpela provided the Board with a budget update. Revenue and Expenditure Report period ending 4/30/2023 and Cash Flow Report using budgeted revenue was reviewed. He fielded questions and comments from the Board. Discussion followed. Kilpela proposed two budget amendments to the General Fund to increase the Treasurer legal expense by $4,000.00 to account for legal fees incurred from personal property tax collection and to increase the snow removal expense by $12,000.00 for the walking paths. **MOTION** by Graham, **SECOND** by Melton. **"TO APPROVE THE 2022/2023 PROPOSED BUDGET**

AMENDMENTS FOR THE TREASURER AND THE TOWNSHIP HALL." Discussion followed. Motion carried. The Board thanked Kilpela for the great job he does with the budget.

C. WWTP

Deputy Supervisor Kilpela explained in detail the upcoming Waste Water Treatment Plant Projects. **MOTION** by Counts, **SECOND** by Melton, **"TO APPROVE TO REBUILD ONE PUMP OF STATION 73 NOT TO EXCEED $40,000.00."** Discussion followed. Motion carried. **MOTION** by Counts, **SECOND** by Graham, **"TO APPROVE THE QUOTES FROM ADVANCED REHABILITATION TECHNOLOGY AND MACALLISTER RENTALS FOR THE JUNCTION CHAMBER AND INFLUENT CHANNEL LINING NOT TO EXCEED $47,000.00."** Discussion followed. Motion carried.

D. Howell Township v John Mills

As requested by the Board, Treasurer Hohenstein summarized the issue with Mr. John Mills and his disc golf course and the conclusion at the ZBA. Mr. Mills was present and discussed the issues presented. He reviewed along with his Attorney Kenneth V. Zichi the violations against his property. Extensive discussion followed.

E. Wellhead Protection Ordinance

Treasurer Hohenstein explained during the March 20, 2023 Howell Township Board meeting the Board discussed a request to change the wording of our ordinance to allow a gas station to be sited inside MHOG's wellhead protection area. The Board rejected the request to change the current wording in the ordinance therefore denying the gas station at the proposed site. After that meeting, he had discussions with Greg Tatara, Director of MHOG, regarding their wellhead protection area. Greg has been working with the municipalities that are in the wellhead protection area to try to get similar wellhead protection ordinances in place. Marion Township has passed the attached draft wellhead protection ordinance; the City of Howell is still working on theirs. He recommends approval to send the attached draft wellhead protection ordinance to the Planning Commission for consideration as a zoning ordinance for Howell Township. Discussion followed. **MOTION** by Graham, **SECOND** by Melton, **"TO APPROVE SENDING THE ATTACHED WELLHEAD PROTECTION ORDINANCE TO THE PLANNING COMMISSION FOR CONSIDERATION AS A ZONING ORDINANCE FOR HOWELL TOWNSHIP WITH PETROLEUM TO BE ADDED TO THE ORDINANCE."** Discussion followed. Motion carried.

F. Subcommittee Compensation

Clerk Graham explained she received the Subcommittee Compensation letter to approve compensation for the subcommittee's investigation report. **MOTION** by Hohenstein, **SECOND** by Melton, **"TO APPROVE TO PAY THE SUBCOMMITTEE $80.00 PER MEETING, PER PERSON."** Discussion followed. Motion carried.

G. Howell Township Recreation Plan Proposal

Treasurer Hohenstein indicated the Park and Recreation 5 year Plan is coming to an end. In order to request grants, the Township needs to have a current plan in place. Included in the packet are the projected costs from the Planner for the Park and Recreation Plan update. Planning Commission Chair Martha Haglund suggested direction for the plan and a way to be fiscally responsible regarding the quote for the Howell Township Recreation Plan Update. She suggested the subcommittee work with Carlisle Wortman for a resolution regarding the work plan, timeline and fees. Discussion ensued. The Board tabled the discussion until June 12, 2023 Meeting.

H. Bids: Election Security

Clerk Graham explained the impact on elections with the passage of Proposal 22-2 which greatly affects elections going forward. She indicated to be successful we need to make sure we have the tools and resources to keep the security and integrity of our elections intact and she is asking for approval on the 5 items listed in her memo. **MOTION** by Counts, **SECOND** by Graham, **"TO APPROVE MICROWORKS COMPUTING, INC QUOTE AS PRESENTED."** Discussion followed. Motion carried. **MOTION** by Counts, **SECOND** by Hohenstein, **"TO APPROVE THE QUOTE FROM TWO MEN AND A TRUCK AS PRESENTED TO MOVE FILING CABINETS OUT OF THE ELECTION ROOM TO THE BASEMENT."** Discussion followed. Motion carried. **MOTION** by Counts, **SECOND** by Smith, **"TO APPROVE FINLEY CONSTRUCTION TO INSTALL THE BALLOT BOX AS PRESENTED."** Discussion followed. Motion carried. **MOTION** by Smith, **SECOND** by Hohenstein, **"TO APPROVE S.E.I. CONSTRUCTION CO. BID NOT TO EXCEED $750.00 FOR THE INSIDE WALL, DOOR WALL REPAIR AND DRYWALL AS PRESENTED."** Discussion followed. Motion carried. **MOTION** by Counts, **SECOND** by Melton, **"TO APPROVE SHELVING FOR ELECTION STORAGE NOT TO EXCEED $500.00 AS PRESENTED."** Discussion followed. Motion carried.

9. **CALL TO THE PUBLIC:**

Joe Farkus asked for clarification on where to find the Board packets for future Board Meetings.

Tim Boal addressed the Board regarding a recent accident at Mason and Santa Rosa Drive. He asked for an update to the mediation for the corner of these crossroads.

REPORTS:

A. SUPERVISOR:

Supervisor Coddington indicated he fielded calls from residents, he attended a budget meeting and a board meeting at HAPRA regarding a possible millage to support the facility as opposed to being funded through the municipalities.

B. TREASURER:

Treasurer Hohenstein indicated they are moving towards the BS & A cloud software. He included a quote for four scanners to process payments with the intention of purchasing one now and if it works well to purchase up to three additional scanners. **MOTION** by Graham, **SECOND** by Melton **"TO APPROVE THE PURCHASE OF 4 HONEYWELL SCANNERS NOT TO EXCEED $1,000.00 AS PRESENTED."** Discussion followed. Motion carried. He further reported on finishing the ARPA reporting with Deputy Supervisor Kilpela which was a difficult task, receiving the lawsuit from Burkhart Ridge and submitted it to the insurance company and awaiting insurance counsel, and working on the Brewer Road drainage issue and it is slow moving and will take some time to complete.

C. CLERK:

Clerk Graham indicated she met with Spicer Engineering and Bowman Construction regarding the cemetery tile drainage project and there will be some reconfiguration coming without additional costs. She brought the Spring Clean Up volunteer sign-up sheet to the meeting. She discussed how many workers would be in attendance and providing lunch for the event. All the vendors have been confirmed to attend the event.

D. ZONING:

(See Zoning Administrator Daus's prepared written report)

E. ASSESSING:

(See Assessor Kilpela's prepared written report)

F. FIRE AUTHORITY:
Supervisor Coddington indicated they purchased an aerial ladder truck and noted a presentation they had at the prior meeting regarding the truck. They approved the budget and he indicated the Chairman is retiring.

G. MHOG:
Trustee Counts reported on the MHOG meeting.

H. PLANNING COMMISSION:
Trustee Counts reported on the Planning Commission Meeting.

I. ZONING BOARD OF APPEALS (ZBA):
Trustee Smith reported on the Zoning Board of Appeals Meeting. He indicated budgeting for training for the Zoning Board of Appeals and Planning Commission in the future.

J. WWTP:
This item was addressed earlier in the meeting by Deputy Supervisor Kilpela.

K. HAPRA
Clerk Graham indicated the report was in the packet.

L. PROPERTY COMMITTEE
Treasurer Hohenstein indicated they are close to closing on the North Burkhart Road property and are working to complete it.

M. P & R COMMITTEE
Treasurer Hohenstein indicated the Spark grant has opened and the Engineer is reviewing the information that was provided as to the application of the grant.

DISBURSEMENTS: REGULAR AND CHECK REGISTER:
MOTION by Hohenstein, **SECOND** by Melton, **"TO APPROVE THE REGULAR DISBURSEMENTS AS PRESENTED, ALSO ANY NORMAL AND CUSTOMARY PAYMENTS FOR THE MONTH."** Discussion followed. Motion carried.

ADJOURNMENT: MOTION by Melton, **SECOND** by Hohenstein, **"TO ADJOURN."** Motion carried. The meeting was adjourned at 8:36pm.

Howell Township Clerk
Jean Graham

Mike Coddington
Howell Township Supervisor

Angie Guillen, Recording Secretary

STATE OF MICHIGAN
IN THE 44th CIRCUIT COURT
FOR THE COUNTY OF LIVINGSTON

HOWELL-MASON, LLC,
A Michigan Limited Liability Company,

Plaintiff,

Case No. 24-32242-CZ

HON. SUSAN LONGSWORTH

v.

HOWELL TOWNSHIP,
A Michigan General Law Township,

Defendant.

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HOWELL-MASON, LLC'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

Plaintiff, Howell Mason, LLC, by and through its attorneys, for its Reply Brief, states:

For its Reply Brief, Plaintiff largely relies on the facts, law, and arguments presented in its Motion for Summary Disposition and Response Brief to Defendant's Motion for Summary Disposition. Defendant in its Response Brief to Plaintiff's Motion for Summary Disposition makes the argument that even if the ordinance is found to be unconstitutional, there are multiple other reasons not addressed in Plaintiff's Motion for Summary Disposition that would be detrimental to Plaintiff's special land use permit; including:

1. The proposed use violates section 16.06(a) as an establishment of a gas station in the area would not be harmonious with the general objectives, purpose, and intent of the zoning ordinance as the dispensing of gasoline could create noise, smoke, fumes, and odors, which can negatively impact persons and the general welfare of the surrounding area.

The Master Plan for this commercial district anticipates this property being part of a large commercial corridor:

> the commercial districts that correspond with what the Master Plan designation was, or is, would allow pretty much anything from Walmart or a Home Depot to drive-in restaurants, more gas stations, to office buildings and everything in between. So any impact, perceived or otherwise, that might be generated by the proposed gas station use would be negligible, not even noticeable, at the point where the Master Plan recommendations are fulfilled, and that corridor becomes a commercial corridor.

Lines 7-17.

Not only is Plaintiff's proposed special use harmonious with general objectives, purpose, and intent of the zoning ordinance and Master Plan, it is an expected and anticipated use.

2. The proposed use violates section 16.06(d) and (f) of the zoning ordinance as the state has designated the area in which the gas station is located as a Wellhead Protection Area. Because a Wellhead Protection Area constitutes an area in which supplies public water deemed by EGLE placing a gas station within that area has the potential to be hazardous to existing or future neighboring uses and have a substantial adverse impact on natural resources in the area, including wells and watershed.

This issue has already been briefed by Plaintiff however, it bears repeating, EGLE had already approved Plaintiff's proposed installation of a gasoline service station at the proposed location.

3. Putting in a gas station in the Wellhead Protection Area does not conform with the master plan which seeks to protect the existing natural resources and preserve the quality of the township's water resources.

The Master Plan for this commercial district anticipates this property being part of a large commercial corridor:

> the commercial districts that correspond with what the Master Plan designation was, or is, would allow pretty much anything from Walmart or a Home Depot to drive-in restaurants, more gas stations, to office buildings and everything in between. So any impact, perceived or otherwise, that might be generated by the proposed gas station use would be negligible, not even noticeable, at the point where the Master Plan recommendations are fulfilled, and that corridor becomes a commercial corridor.

Lines 7-17.

Not only is Plaintiff's proposed special use harmonious with general objectives, purpose, and intent of the zoning ordinance and Master Plan, it is an expected and anticipated use. Moreover, preserving the townships natural resources must be accomplished through constitutional means..

4. Comments from the public.

The comments from the public, concerning increased traffic, noise, and lights, must be taken with a grain of salt as the public was ready to accept and in fact seemed eager to obtain a convenience store and Duncan Donuts drive thru restaurant at the location.

> Okay.· But if it can't be approved, is there still going to be a convenience store put there and a Duncan Donuts

Exhibit K to Plaintiff's Motion for Summary Disposition, pp. 80-81.

Defendant's rejection of the gasoline service station is based on personal animus and an unconstitutional ordinance banning all gasoline service stations.

WHEREFORE, for the reasons set forth herein, in Plaintiffs Motion for Summary Disposition, and in Plaintiff's Response Brief to Defendant's Moton for Summary Disposition, Plaintiff respectfully request this court enter an Order granting Plaintiff's Motion for Summary

Disposition, Denying Defendant's Motion for Summary Disposition, on all counts, setting trial for a determination of damages, awarding Plaintiff its reasonable attorney fees, and granting such other relief as this Court deems just and equitable.

Respectfully submitted.

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Dated: June 4, 2026

STATE OF MICHIGAN
IN THE 44TH CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

HOWELL-MASON, LLC,
a Michigan Limited Liability Company,

Plaintiff,

v

HOWELL TOWNSHIP,
a Michigan General Law Township,

Defendant.
_____/

Case No. 24-32242-CZ

HON. SUSAN LONGSWORTH

HOWELL TOWNSHIP'S REPLY IN SUPPORT OF IT'S MOTION FOR SUMMARY DISPOSITION ON COUNTS I, II, III, AND IX

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HOWELL TOWNSHIP'S REPLY IN SUPPORT OF IT'S MOTION FOR SUMMARY DISPOSITION ON COUNTS I, II, III, AND IX

ARGUMENT

I. THIS COURT HAD AUTHORITY AND JURISDICTION IN THE APPEAL TO MAKE RULINGS ON COUNTS I, II, III, AND IX.

This Court's rulings in the Appeal are **not** invalid in this Original Action for want of jurisdiction. Judge McGivney, in response to Howell-Mason's motion for reconsideration in this original action addressed this very issue:

> Plaintiff's argument that this Court lacked jurisdiction to decide those issues in the Appeal (see pages 12-19 of the Response Brief to the dispositive motion), constitutes the most flamboyant manufactured appellate parachute this Court has ever seen. Plaintiff raised those constitutional arguments in the Appeal case. Plaintiff briefed and argued those matters in the filings and at the time of oral arguments. Plaintiff could have, as Plaintiff now claims, pleaded those claims out of an abundance of caution in the Appeal case, and then, once the original action was also filed and was proceeding towards summary disposition (in July 2024), dismissed or withdrawn the constitutional arguments from the Appeal case. Plaintiff could have even argued at the Appeal hearing that this Court lacked jurisdiction over those claims, and to please dismiss them without prejudice for lack of jurisdiction, **Plaintiff did none of those things.** Plaintiff put those claims before the Court and asked the Court to render a decision on them. **Now when Plaintiff does not like the result on those claims, Plaintiff claims it was error for this Court to give Plaintiff exactly what it asked for: a decision on issues Plaintiff raised.** [(emphasis added) (Township's BIS of MSD, Exhibit S, p 7).]

Howell-Mason's response relies on a single quote from *Houdini Properties, LLC v City of Romulus*, 480 Mich 1022; 743 NW2d 198 (2008) to challenge this Court's ability to adjudicate the constitutional claims in the Appeal. However, *Houdini*'s holding is extremely narrow and can be distinguished from this case in four ways.

First, *Houdini* dealt with a different standard of review; the case concerned a decision of a zoning board of appeals—not a legislative body like the Township Board. Second, the Michigan Supreme Court in *Houdini* narrowly held that it was improper to resolve a constitutional taking claim when there was an insufficient record to do so—it did not hold that it would be improper to

consider constitutional challenges to zoning regulations. Third, Howell-Mason's claims were all able to be resolved by this Court based on the record in the Appeal, making this case factually distinguishable from *Houdini*. See *Zelasko v Bloomfield*, 347 Mich App 141, 161-163 (2023) (explaining that *Houdini* is factually distinguishable from *Krohn v City of Saginaw*, 175 Mich App 193; 437 NW2d 260 (1988) as *Houdini* resulted in a remand because the record was insufficient to resolve the takings issue); see also *Stanislaw v Thetford Twp*, unpublished opinion of the Sixth Circuit, issued January 17, 2025 (Case No. 23-1756), p 10 (Attached as Exhibit T) (stating "unlike *Houdini Properties*, in the case before us, the Michigan court *did* treat 'Plaintiffs' case as involving an appeal and a separate civil counterclaim,'" which is a crucial distinction when analyzing res judicata and its effect on constitutional claims).[1] Fourth, *Houdini* does not stand for the proposition that the Court lacks jurisdiction when a party literally submits to it. Howell-Mason fairly litigated all of these claims before this Court, which should waive their jurisdictional arguments.[2]

The Michigan Constitution broadly provides that this Court has "appellate jurisdiction from all inferior courts and tribunals except as provided by law." Const 1963, art 6, § 13. It is firmly established that "where a township zoning ordinance does not provide for review of a request for a special land use permit by a zoning board of appeals, the township board's decision is final and subject to appellate review by the circuit court pursuant to Const 1963, art 6, § 28."

[1] This Court previously addressed Howell-Mason's reliance on *Houdini* in its Opinion and Order on Howell-Mason's Motion for Reconsideration stating that Howell-Mason is using *Houdini* to "extrapolate" and argue it is "entitled to a second bite at the proverbial apple now in this Original Action, raising the same claims again and seeking a different disposition." (Township's BIS of MSD, Exhibit S, p 3, fn 1).

[2] As addressed below, Howell-Mason *voluntarily* litigated these claims before the Court, and only after it lost did it attempt to pull the proverbial jurisdictional rug out from under the Court to pursue them again in this Original Action. This conduct should be barred by judicial estoppel.

Carleton Sportsman's Club v Exeter Twp, 217 Mich App 195, 200 (1996). This constitutional standard of review **establishes a floor—not a ceiling—for judicial review**:

> This review shall include, **as a minimum**, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. [Const 1963, art 6, § 28.][3]

Howell-Mason incorrectly asserts that this Court did not have authority to reach a decision on the merits for the constitutional claims, meaning res judicata and collateral estoppel apply to the claims Howell-Mason raised and litigated.

II. THE COURT OF APPEALS' DECISION FURTHER SUPPORTS THIS COURT'S JURISDICTION AND AUTHORITY TO MAKE A DECISION ON THE MERITS.

On April 11, 2025, the Court of Appeals denied Howell-Mason's delayed application for leave to appeal "for lack of merit in the grounds presented." (Township's BIS of MSD, Exhibit M) When the Court of Appeals denies "an application from a noninterlocutory order for lack of merit in the grounds presented, the order means what it says—it is on the merits of the case." *Pioneer State Mut Ins Co v Michalek*, 330 Mich App 138, 144; 946 NW2d 812 (2019). Importantly, Howell-Mason in its Reply Brief to the Court of Appeals argued extensively that this Court did not have jurisdiction to resolve Howell-Mason's constitutional claims. (attached as Exhibit U, pp 6-8). **The Court of Appeals subsequently denied the application for leave *on the merits***, meaning res judicata and collateral estoppel apply and dismissal is warranted.

[3] See also *Lakeview Vineyards, LLC v Oronoko Charter Twp*, unpublished per curiam decision of the Michigan Court of Appeals, issued June 13, 2024 (Case No 364347) (explaining that the constitutional review standard creates a minimum as to what is required) (attached as Exhibit V).

III. JUDICIAL ESTOPPEL BARS HOWELL-MASON FROM NOW ARGUING THIS COURT DID NOT HAVE JURISDICTION.

Howell-Mason is barred from re-litigating these claims because it successfully prevailed when it obtained this Court's jurisdiction over the Appeal. Under the doctrine of judicial estoppel, "a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding." *Opland v Kiesgan*, 234 Mich App 352, 362; 594 NW2d 505 (1999) (external citations omitted). There "must be some indication that the court in the earlier proceeding accepted that party's position as true" and "the claims must be wholly inconsistent." *Id*. Judicial estoppel is properly applied to prevent a party from acting in a way that otherwise would result in a miscarriage of justice. *Id*. at 364. In *City of Detroit v City of Highland Park*, unpublished per curiam opinion of the Court of Appeals, issued August 18, 2022 (Docket No. 357040), p 30 (attached as Exhibit W), the court found that Highland Park's actions (arguing there was a final order to obtain appellate jurisdiction as of right) then after an unsuccessful appeal changing course to claim that the order it had appealed was not final, warranted judicial estoppel precluding Highland Park from taking wholly consistent positions.

Like *Highland Park*, Howell-Mason's actions before this court, (presenting and litigating its constitutional claims and asking the Court to consider them) should be met by the full force of the doctrine of judicial estoppel and preclude Howell-Mason from relitigating these claims today. Howell-Mason succeeded in getting this Court's jurisdiction in the Appeal, and simply because it disagrees with that decision, it should not be given an opportunity to relitigate those issues. Therefore, as the court did in *Highland Park*, Howell-Mason should be barred from raising any jurisdictional defense.

IV. IN THE ALTERNATIVE, COUNTS I, II, III, AND IX FAIL AS A MATTER OF LAW UNDER MCR 2.116(C)(10).

A. Howell-Mason was not denied procedural or substantive due process.

Howell-Mason interestingly writes in its Response that it purchased this property specifically "because of the current and future zoning designations." (Response Br, p 2). By this statement Howell-Mason admits that the property interest in the land (not in any specific zoned use) was subject to a discretionary zoning review that had an applicable standard prohibiting their now alleged purpose of being within the wellhead protection area—something Howell-Mason's own expert confirmed. (Township's BIS of MSD, Exhibit A, pp 34-35, 41).

B. Howell-Mason was not denied equal protection.

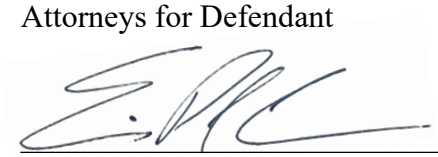
Howell-Mason's Response states a "total ban of gas stations facially violates the equal protection clause." (Response Br, p 14) But the Township does not have a total ban on gas stations. Under the Township's Zoning Ordinance, the ban on gas stations is limited to those within 300 feet of a wellhead protection area. Howell-Mason **has not identified anyone who is similarly situated to support this claim**—even though this case has been litigated for more than two years and discovery is complete.

C. Howell-Mason's preemption claim fails under MCR 2.116(C)(10).

Howell-Mason's arguments contradict their own exhibits. In support of this claim, Howell-Mason attached an EGLE publication, when EGLE is one of many State agencies that requires compliance with zoning ordinances. Further, this Court has already held that Howell-Mason's definition of "field" for purposes of preemption is "erroneous at best or deliberately misleading at worst." (Township's BIS of MSD, Exhibit L, p 9). This Court went on to analyze the four *Llewellyn* preemption factors, finding no support for Howell-Mason claims. Count IX fails as a matter of law under MCR 2.116(C)(10).

Respectfully submitted,

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Dated: June 4, 2026

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EXHIBIT T

Stanislaw v. Thetford Twp.

United States Court of Appeals for the Sixth Circuit

January 17, 2025, Filed

File Name: 25a0023n.06

Case No. 23-1756

Reporter
2025 U.S. App. LEXIS 1202 *; 2025 LX 194405; 2025 FED App. 0023N (6th Cir.); 2025 WL 233215

JOSEPH P. STANISLAW; LARRAINE M. STANISLAW, Plaintiffs - Appellants, v. THETFORD TOWNSHIP, MICHIGAN; DENNIS BLOSS; STUART WORTHING; ROBERT SWARTWOOD; MARC ANGUS, Defendants - Appellees.

Notice: CONSULT *6TH CIR. R. 32.1* FOR CITATION OF UNPUBLISHED OPINIONS AND DECISIONS.

Prior History: [*1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

Stanislaw v. Thetford Twp., 2023 U.S. Dist. LEXIS 134241, 2023 WL 4933931 (E.D. Mich., Aug. 2, 2023)

Counsel: For JOSEPH P. STANISLAW, LARRAINE M. STANISLAW, Plaintiffs - Appellants: Daniel Ginzburg, The Ginzburg Law Firm, P.C., Freehold, NJ.

For THETFORD TOWNSHIP, MI, DENNIS BLOSS, STUART WORTHING, ROBERT SWARTWOOD, MARC ANGUS, Defendants - Appellees: Thomas D. Landa, McGraw Morris, Troy, MI.

Judges: Before: GIBBONS, WHITE, and MURPHY, Circuit Judges. HELENE N. WHITE, Circuit Judge, dissenting.

Opinion by: JULIA SMITH GIBBONS

Opinion

JULIA SMITH GIBBONS, Circuit Judge. Joseph and Larraine Stanislaw are owners of an automobile-related business in Thetford Township, Michigan. The Stanislaws have been living—and attempting to operate their business—on the same parcel of land in the Township since 1983. From 2005 to 2018, after receiving citizen complaints about the state of the Stanislaws' property, the Township denied the Stanislaws licenses to operate their business. The Stanislaws assert an equal protection class of one claim, arguing that the Township and its officials intentionally discriminated against the Stanislaws in comparison to other similarly situated businesses with no rational basis for the differential treatment. **[*2]** Because the Stanislaws have failed to carry their heavy burden, we affirm the judgment of the district court for the Township and its officials.

I.

These parties are before the Sixth Circuit for a third time, presenting a factual and procedural history that spans forty years. The Stanislaws purchased a property in Thetford Township in May 1983. That same year, the Township Supervisor authorized the Stanislaws to conduct automobile sales on the property. As a part of this process, the Stanislaws filed a petition for site plan review with the Thetford Township Planning Commission; the site plan contemplated that the property would be used for a residence and for used automobile sales and servicing. In 1984, the Stanislaws added a fence to the outside storage area, as required by the ordinance in effect at the time,

Ordinance No. 3. But in 1989, the Township replaced Ordinance No. 3 with Ordinance No. 78, which "vastly changed the conditions and requirements of zoning in the Township, including on" the Stanislaws' property. DE 62-2, Decl., Page ID 923. Via Ordinance No. 78, the Stanislaws' property was zoned as General Commercial.

In 1993, the Stanislaws were licensed for three types of **[*3]** business activity on their property: Class B, "Used Vehicle Dealer," which allowed them to "buy and sell used vehicles"; Class C, "Used Vehicle Parts Dealer," which allowed them to "buy and dismantle vehicles to sell parts and remaining scrap" and also to "buy and sell used late model major component parts"; and Class E, "Distressed Vehicle Transporter," which allowed them to "buy vehicles only for resale to Class 'C' or Class 'F' dealers." DE 62-2, Ex. 4, Page ID 1117-18. The Stanislaws' last full year in operation was 2001; they did not operate their business from 2002 through 2005 due to Mr. Stanislaw's health issues. The Stanislaws continued to use the property as their residence.

Notably, Ordinance No. 78 does not permit junk yards in areas zoned as General Commercial. Per Ordinance No. 78, "junk" is "[a]ny *motor vehicles*, machinery, appliances, products or merchandise *with parts missing* or *other scrap materials that are damaged, deteriorated*, or are in a condition which prevents their use for the purpose of which the product was manufactured," and a "junk yard" is an "area where waste [and] used or second hand materials . . . including but not limited *to junk, scrap iron and other* ***[*4]*** *metals*, paper, rags, *rubber tires* and bottles" are bought, sold, exchanged, disassembled, or stored. DE 62-2, Ordinance No. 78, Page ID 966. The Ordinance goes on to state that "[a] junk yard includes automobile wrecking yards and includes any open area of more than two hundred (200) square feet for storage, keeping, or abandonment of junk." *Id.*

In September 2005, neighboring property owners of the Stanislaws, Daniel and Marsha Case and Lillian Sheppard, complained to the Township that the Stanislaws were operating "a Junk Yard" and that their business had "become an eyesore and possibly a nuisance." DE 62-2, Ex. 16, Page ID 1174. The neighbors urged the Township to "investigat[e]." *Id.* A few months later, in December 2005, the Stanislaws applied for two business licenses—Class B, Used Vehicle Dealer, and Class E, Distressed Vehicle Transporter. After inspecting the property, Township building inspector Marc Angus disapproved the Stanislaws' application. On the disapproval form, Angus wrote that the Stanislaws' property was not properly zoned for a Class E license, that it required a fence for outside storage, that the partial fence on the property was in disrepair, and that the Stanislaws **[*5]** were operating an automobile graveyard.

"Without first appealing to the [Township Zoning Board of Appeals (ZBA)] or the Michigan state courts," the Stanislaws in 2009 initiated an action in federal court challenging the 2005 denial. *Stanislaw v. Thetford Twp., 515 F. App'x 501, 502-03 (6th Cir. 2013)* (*Stanislaw I*). While this action was pending, the Stanislaws in 2011 again applied for licenses—this time, Class B, Used Vehicle Dealer, and Class C, Used Vehicle Parts Dealer—and were denied. The Stanislaws appealed this 2011 denial to the ZBA, which affirmed the denial. In its determination, the ZBA emphasized that the Stanislaws' property "is properly zoned for a Class B license" and that if the Stanislaws "submit a Zoning Approval for only a Class B license, the Zoning Approval form must be approved." DE 60-5, ZBA Meeting Minutes July 27, 2011, Page ID 593.

Instead of filing for a Class B license, the Stanislaws appealed the ZBA's decision to the Genesee County Circuit Court. After a hearing, the Genesee County Circuit Court affirmed the ZBA's decision to uphold the 2011 denial of the licenses. The circuit court found no abuse of discretion by the ZBA. (***Id.***) The Stanislaws did not appeal this decision.

In 2013, this court affirmed the district court's **[*6]** grant of summary judgment to the Township on the Stanislaws' claims arising from the 2005 denial. *Stanislaw I, 515 F. App'x at 507*. Following that, in 2015, the Stanislaws appeared before the Thetford Township Planning Commission to "ascertain the fencing requirements for their property." DE 1-1, Compl., Page ID 14; DE 60-10, Thetford Twp. Planning Commission Mtg. Minutes, Page ID 653-54. At this meeting, Daniel Bloss, a member of the Planning Commission, and Stuart Worthing, the Township building inspector after Marc Angus, told the Stanislaws they could not have a business and a residence on the same property. The Stanislaws appealed to the ZBA the determination that their plot should be treated as residentially zoned. In July 2016, the ZBA affirmed the determination to treat the plot, despite being in the General

Commercial district, as residentially zoned. The Stanislaws appealed this decision to the Genesee County Circuit Court, and the circuit court reversed and remanded back to the ZBA. Following this, in 2017, the ZBA reversed itself and acknowledged that the Stanislaws could operate a business and maintain a residence on the same plot. The next year, in 2018, the Stanislaws applied for a Class B license **[*7]** and were approved.[1]

Also in 2018, the Stanislaws initiated this action in Michigan state court, alleging, among other claims, discriminatory treatment by the Township, Marc Angus, Daniel Bloss, and Stuart Worthing in violation of the *Equal Protection Clause of the Fourteenth Amendment*. Following removal to federal court, a panel of this court in 2021 held that, while "claims or issues solely based on the events of 2005 to 2009" were precluded by the *Stanislaw I* litigation, the Stanislaws could continue to press forward on their claims of discriminatory treatment post-2009. *Stanislaw v. Thetford Twp. Mich., et al., No. 20-1660, 2021 U.S. App. LEXIS 21407, 2021 WL 3027195, at *5 (6th Cir. July 19, 2021)* (*Stanislaw II*). After discovery, the district court granted summary judgment for the Township and the Township officials on the Stanislaws' equal protection class of one claim. The district court declined to exercise supplemental jurisdiction over the Stanislaws' state law claims. The Stanislaws timely appealed.

II.

We review the district court's grant of summary judgment de novo. *Jones v. Producers Serv. Corp., 95 F.4th 445, 449 (6th Cir. 2024)*. Summary judgment is appropriate only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; ***see*** *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. To survive the defendants' motion for summary judgment, the Stanislaws "must establish that there is a genuine issue of material **[*8]** fact" on their equal protection class of one claim. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. At this stage, we view all facts and make all inferences in the light most favorable to the Stanislaws, the non-moving party. ***See*** *id. at 587*.

We begin with a few preliminary matters. We found the Stanislaws' briefing difficult to follow as to what actions they were now challenging, so we asked about this issue at oral argument. First, given the prior litigation between these parties, counsel for the Stanislaws acknowledged that this appeal does not challenge Angus's 2005 denial. Oral Argument at 1:23-:45, ***Stanislaw v. Thetford Twp., Mich., et al.*** (No. 23-1756). The prior litigation has already addressed any claims arising out of the 2005 denial. ***See*** *Stanislaw I, 515 F. App'x at 503-04*; *Stanislaw II, 2021 U.S. App. LEXIS 21407, 2021 WL 3027195, at *5*. Second, counsel for the Stanislaws conceded at oral argument that the Stanislaws were not challenging Angus's 2011 denial. ***See*** Oral Arg. at 4:06-:20. This concession effectively waived our review of any claim tied to the denial of the 2011 applications. ***See*** *United States v. Duval, 742 F.3d 246, 255 (6th Cir. 2014)*; ***cf.*** *Kovalchuk v. City of Decherd, 95 F.4th 1035, 1038-39 (6th Cir. 2024)*. And even if claims based on the 2011 denial were not waived because counsel misspoke as the dissent notes, they are still precluded. The Genesee County Circuit Court affirmed Angus's 2011 denial (and the ZBA's 2011 decision upholding **[*9]** that denial), finding that "the law has been followed, proper procedure has [been] followed, [and] there's competent material and substantial evidence on the record," leading the court to conclude that "the ZBA . . . exercised its discretion" and that there was "[n]o abuse of discretion on the record before the ZBA." DE 60-7, Genesee County Circuit Court Hr'g Tr., Page ID 638-39, 641. The Stanislaws did not appeal this judgment. Res judicata applies to the Genesee County Circuit Court's final judgment, thus precluding our review of Angus's 2011 denial or the ZBA's 2011 resolution affirming that denial.[2] ***See*** *Westwood Chem. Co. v. Kulick, 656 F.2d 1224, 1227 (6th Cir. 1981)*.

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[1] During the pendency of this litigation, the Stanislaws in 2022 were granted Class B, Class C, and Class E licenses.

[2] The dissent frames our decision to raise the issue of res judicata as error because it was ***sua sponte*** citing a quote out of context from *Hutcherson v. Lauderdale County, 326 F.3d 747, 757 (6th Cir. 2003)*. ***See*** Dissent at 19. The full context of that quote notes that the Supreme Court and this circuit have held that courts may take the initiative to assert the res judicata defense sua sponte to conserve judicial resources, prevent unnecessary judicial waste, and protect litigants from multiple lawsuits among many other reasons. *Hutcherson, 326 F.3d at 757*. This case—given its long-running litigation and multiple state

The dissent claims that Michigan's state circuit court decisions do not have res judicata effect as to their constitutional claims. *See* Dissent at 22. The decision the dissent cites for that proposition, *Houdini Properties, LLC v. City of Romulus*, declined to apply res judicata to constitutional claims on a plaintiff's appeal of a ZBA board decision. *480 Mich. 1022, 743 N.W.2d 198, 198-99 (Mich. 2008)*. But as our circuit later noted in discussing that case, res judicata did not apply in *Houdini Properties* because the Michigan circuit court was reviewing the ZBA board decision "solely as an appeal [of the ZBA Board] and review[ing] it as such." *Jon Jon's, Inc. v. City of Warren, 534 F. App'x 541, 544 (6th Cir. 2013)* (emphasis omitted). **[*10]** Here, the Michigan circuit court explicitly considered the equal protection argument and rejected it. So, unlike *Houdini Properties*, in the case before us, the Michigan court *did* treat "Plaintiffs' case as involving an appeal and a separate civil counterclaim[,]" which would "indeed . . . be a crucial distinction [from *Houdini Properties*]." *Jon Jon's Inc., 534 F. App'x at 544-45*. Therefore, the analysis the dissent proffers concerning where res judicata would not apply to the Stanislaws.

Given the preclusive effect of the prior litigation, counsel's waiver, and the Genesee County Circuit Court's final judgment, the Stanislaws are left with an equal protection class of one challenge to differential treatment between themselves and similarly situated businesses between 2013 and 2018.[3] As discussed below, the Stanislaws cannot carry their heavy burden to prove either (1) the existence of similarly situated businesses in all material respects or (2) the absence of a rational basis for any differential treatment.

III.

On appeal, the Stanislaws assert an equal protection class of one claim: They argue that (1) the Township and its officials "intentionally treated" them "differently from others similarly **[*11]** situated" in all material respects, and (2) "that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000)*; *Bench Billboard Co. v. City of Cincinnati, 675 F.3d 974, 987 (6th Cir. 2012)*. The Stanislaws cannot carry their burden to establish a genuine issue of material fact on either prong. We have previously emphasized that courts should review class of one claims "skeptically" as they have the potential to "effectively provide a federal cause of action for review of almost every executive and administrative decision made by state actors." *Loesel v. City of Frankenmuth, 692 F.3d 452, 461-62 (6th Cir. 2012)* (quoting *Jennings v. City of Stillwater, 383 F.3d 1199, 1211 (10th Cir. 2004)*). The Stanislaws cannot overcome their "heavy burden." *Id. at 462* (internal citation omitted).

A.

We begin with the Township. The Stanislaws argue that Thetford Township violated the *Equal Protection Clause of the Fourteenth Amendment* under their class of one theory. But they overlook an important step. The Stanislaws are proceeding under *42 U.S.C. § 1983*, the vehicle by which they may bring a federal claim against the Township. While municipalities are "persons" for purposes of *§ 1983*, ***see*** *Monell v. Dep't of Soc. Servs. of the City of N.Y.,*

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and federal court decisions—may be the quintessential candidate for consideration of a res judicata claim sua sponte. ***See generally*** *Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)* (describing res judicata as having "the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation").

[3] The dissent rightly notes that in *Stanislaw II*, the court did not hold that the events in *Stanislaw I* could be entirely disregarded. *See* Dissent at 20-22. The reason for that, however, is that the "factual allegations . . . [were] materially distinct from the claim that was pled in *Stanislaw I*[.]" *Stanislaw II, 2021 U.S. App. LEXIS 21407, 2021 WL 3027195, at *3*. As noted, the panel also held that the Stanislaws could not relitigate any issues or claims based solely on the events of 2005 or 2009 as those were subject to res judicata. *2021 U.S. App. LEXIS 21407, [WL] at *5*. In this current dispute, any equal protection class of one claims could have been brought in the prior litigation based on the alleged prior actions of the Township where the Stanislaws were alleged to have been "intentionally treated differently from others similarly situated and [where] there [was] no rational basis for the difference in treatment." *Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000)*. Thus, those prior actions are precluded from consideration now. Ultimately, under the dissent's theory of res judicata there would be a *Stanislaw IV*, a *Stanislaw V*, and so on whereby the Stanislaws could keep challenging and relitigating the *past* actions of the Township so long as they can supplement with a new action. We cannot endorse such a scenario.

436 U.S. 658, 690, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), a municipality cannot be held liable under a theory of respondeat superior. *See* id. at 691; City of Canton v. Harris, 489 U.S. 378, 385, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989). Instead, the Stanislaws must identify a municipal "policy," "custom," or "practice." Thomas v. City of Chattanooga, 398 F.3d 426, 429, 432 (6th Cir. 2005). While their complaint and counsel's Rule 28(j) letter attempt to tie the § 1983 claim to the actions of the ZBA, the Stanislaws' briefing before this **[*12]** court never cites *Monell*, nor does it identify any municipal policy, practice, or specific ZBA action.[4] This would indicate the Stanislaws have abandoned any claim against the Township. *See* Hardrick v. City of Detroit, 876 F.3d 238, 243-44 (6th Cir. 2017) (explaining that *Monell* claims are generally forfeited when not raised in the appellant's opening brief). The dissent frames the Stanislaws' failure to pursue a *Monell* claim as merely a "missed citation to [a] legal authority." Dissent at 17 (quoting United States v. Charles, 843 F.3d 1142, 1147 (6th Cir. 2016). But a *Monell* claim is not a mere case citation, it *is* the argument with *Monell* and its progeny setting out a very specific way in which plaintiffs are to establish municipal liability under § 1983.[5] Thus a failure to even raise the *Monell argument* of course can constitute a waiver of the *Monell argument*. But, even if the Stanislaws had properly raised *Monell* liability, they cannot identify any ZBA action during the time period at issue in this appeal that evinced differential treatment from others similarly situated for which there was no rational basis.

Between 2013 and 2018, the only adverse ZBA action on the record before us occurred **[*13]** on July 27, 2016. At that meeting, the Stanislaws were appealing the zoning decision to treat their plot as residential, instead of as a commercially zoned plot. This was after the Stanislaws had halted operation of their business back in 2002, lost their business licenses in 2005, yet lived on the same property continuously before coming before the ZBA in 2016. The ZBA resolved to continue to treat the Stanislaws' plot as residentially zoned. The Stanislaws then appealed this decision to the Genesee County Circuit Court, and that court reversed the ZBA, leading the ZBA to reverse its earlier decision and acknowledge that the Stanislaws could both operate a business and maintain a residence on the plot.

Even if the Stanislaws had properly argued that the July 2016 ZBA action constituted an "action[] taken by officials with final decision-making authority," *see* Thomas, 398 F.3d at 429, the evidence does not create a genuine dispute as to whether the ZBA's action "intentionally treated" the Stanislaws "differently from others similarly situated." Green Genie, Inc. v. City of Detroit, 63 F.4th 521, 527 (6th Cir. 2023) (quoting Olech, 528 U.S. at 564). The key here is the element of intent. "[T]he unequal application of a facially neutral law is not a denial of equal protection unless" the plaintiff **[*14]** can show "an element of intentional or purposeful discrimination." *Id.* (internal citation omitted). Because plaintiffs usually do not have direct evidence of discrimination, they may "demonstrate intentional discrimination through circumstantial evidence." Id. at 528. For a class of one claim, this requires demonstrating "an inference of intentional discrimination arising from the fact that the adverse treatment . . . was such a stark outlier

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[4] In seeking to show alleged municipality actions, the dissent cites an action by a ZBA chairman and a ZBA member. *See* Dissent at 17. But these are not *municipality* actions. *See* City of Canton, 489 U.S. at 385 ("[A] municipality can be found liable under § 1983 only where the municipality *itself* causes the constitutional violation at issue. . . . It is only when the execution of the government's policy or custom . . . inflicts the injury that the municipality may be held liable under § 1983.") (citations omitted). It is not enough to merely the cite the actions of members of a government body with power backed by the ZBA to find a municipality liable as "[d]iscretion to act is not to be confused with policymaking authority; no municipal liability results where an official merely has discretion to act because subjecting a municipality to liability in such a situation would be 'indistinguishable' from *respondeat superior* liability." Feliciano v. City of Cleveland, 988 F.2d 649, 656 (6th Cir. 1993) (quoting City of St. Louis v. Praprotnik, 485 U.S. 112, 126, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988)).

[5] This is why case law explicitly refers to *Monell* in the context of a *Monell* "claim" or *Monell* "liability," which establishes what a plaintiff *must* prove in order to succeed on a *Monell* claim or under *Monell* liability. *See, e.g.*, Hardrick v. City of Detroit, 876 F.3d 238, 243 (6th Cir. 2017) (establishing requirements to succeed on a *Monell* claim); *see also, e.g.*, ***Lockett v. Cnty. of Los Angeles, 977 F.3d 737, 740 (9th Cir. 2020)*** (describing the unique process on how to obtain § 1983 against a municipality as a "*Monell* claim"); Thomas v. Cook Cnty. Sherriff's Dep't, 604 F.3d 293, 303 (7th Cir. 2010) (describing the unique process a plaintiff must satisfy to establish "*Monell* liability").

from an otherwise consistent pattern of favorable treatment in similarly situated cases." *Id.* (internal citation omitted). The Stanislaws cannot show that they were a "stark outlier." *Id.*

True, determining whether a comparator is "similarly situated" in all material respects is typically a question for the jury. *Loesel, 692 F.3d at 463*. But that is not so where the Stanislaws have failed to create a genuine issue of material fact for a jury to consider. There is not enough evidence in the record before us to show any similarly situated businesses (in all material respects) that were treated more favorably. The Stanislaws assert that John Belott & Son, LLC, Hi-Speed Auto, Duquette's Garage, Inc., and Monster Auto are similarly situated businesses. But none of their alleged comparators **[*15]** are similarly situated in all *material* respects. John Belott & Son has only applied for and received a Class B license—it has never applied for a Class C or E license. The same goes for Duquette's Garage—it has only applied for and received a Class B license. While Duquette's does have both a residence and business on the same parcel, it has never sought a Class C or E license, as the Stanislaws have. As for Monster Auto, there is no information in the record about what business licenses it held, and the business closed in 2019. Hi-Speed is the only business on the record that has applied for and received both Class B and C licenses; still, Hi-Speed has never applied for a Class E license. Nor is there any evidence that Hi-Speed has served as both a business and a residence on the same plot. As a general matter, there is a lack of concrete detail in the record about these various businesses—for example, whether they are the same size, whether they border residences, or whether they conduct the same business activities (for example, used car sales versus used parts dealer versus distressed vehicle transporter). And finally, for purposes of the July 2016 ZBA action, there is no evidence **[*16]** that any of the other businesses stopped operating and functioned only as a residence for approximately 14 years before any ZBA action. Contrary to the arguments raised by the dissent, the Stanislaws have simply not placed enough evidence in the record about these businesses to create a genuine issue of material fact.

Nor can the Stanislaws overcome the rational basis prong of the class of one inquiry. The rational basis standard of review is "'a paradigm of judicial restraint,' growing out of recognition that 'equal protection is not a license for courts to judge the wisdom, fairness or logic of legislative choices.'" *TriHealth, Inc. v. Bd. of Comm'rs, 430 F.3d 783, 791 (6th Cir. 2005)* (quoting *FCC v. Beach Communications, 508 U.S. 307, 313-14, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993)*). Indeed, "[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Id.* As a result of this strict standard of review, we must sustain the challenged government action "if *any* conceivable basis rationally supports it." *Id. at 790* (emphasis in original). The Township "has no obligation to produce evidence to sustain the rationality of its action; its **[*17]** choice is presumptively valid and 'may be based on rational speculation unsupported by evidence or empirical data.'" *Id.* (quoting *Beach Cmmc'ns, 508 U.S. at 315*).

The Stanislaws have not refuted every conceivable basis which may have supported the Township's actions here.[6] *See Loesel, 692 F.3d at 465*. Most importantly, multiple neighboring property owners complained to Township officials throughout the years that the Stanislaws were operating a junk yard. *See, e.g.*, DE 62-2, Ex. 15, Page ID 1172 (letter from a district commissioner about neighbor Daniel Case dated July 11, 1990, "request[ing] help in dealing with a problem next door to" Case that "the owner has several junk cars on the lot which under [the Thetford Township] zoning code is not allowed"); DE 62-2, Ex. 16, Page ID 1174 (letter from neighbors Daniel and Marsha Case and Lillian Sheppard, dated September 26, 2005, writing that the Stanislaws are and have been "operating a Junk Yard or Automobile Graveyard," that they "feel the practices of this business have become an eyesore and possibly a nuisance," requesting the Township "review the site plan requirements" and imploring that the Stanislaws' business "comply with the applicable State and Thetford Township Ordinances concerning **[*18]** storage of vehicles[] [and] equipment and the maintenance of fencing and screening of storage areas and the

[6] The dissent argues that the question is not whether there was a rational basis to deny the Stanislaws a license but whether there was a rational basis to treat the Stanislaws differently. *See* Dissent at 29-30. Ultimately, the question of whether there was a rational basis to deny the Stanislaws a license naturally merges with whether there was a rational basis to treat the Stanislaws differently. But putting that aside, for the same reasons there was a rational basis to deny the Stanislaws a license there would inevitably be a rational basis to treat them differently.

correction and prevention of encroachment on our adjoining properties," and finally imploring "an investigation by your offices"); DE 60-14, ZBA Meeting Minutes, Page ID 731-32 (minutes of ZBA meeting at which Rhonda and Lillian Sheppard complained that, as late as August 30, 2017, the Stanislaws had "out door storage" of "rubbish, junk equipment and parts," that the Sheppards had taken photos of the property that day demonstrating the rubbish, that "[t]his has been going on since 1984," that the Stanislaws were operating a "junk yard" and that "[t]here is no way the cars that are parked out front can be runnable," with 30 to 40 cars on the property as well as "stacks and stacks of tires").

These detailed, consistent neighbor complaints create an adequate, rational justification for the Township to investigate and respond to its constituents' concerns. The complaint of multiple neighbors that the Stanislaws were operating a junk yard next door, and in one case that it was encroaching onto the neighbor's property, is a rational reason for the Township to investigate the Stanislaws **[*19]** and suspect a violation of the zoning ordinance. *See* DE 60-4, Angus Statement, Page ID 570 (noting Marc Angus's observation in 2005 based on his inspection that "[t]here were many disabled, salvage or junk vehicles on the property"). Indeed, there is no evidence in the record that any of the other businesses received neighbor complaints. Nor did the other businesses cease operations at any point, function as a residence, yet still maintain 30 to 40 cars on the property. The dissent inappropriately analogizes to *City of Cleburne v. Cleburne Living Center* where the Supreme Court held that mere negative attitudes do not satisfy rational basis review. *See* Dissent at 32-33 (citing *473 U.S. 432, 447-48, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)*). But the "mere negative attitudes" in *Cleburne* were not property nuisances, they were "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding[.]" *Id. at 448*. Considerations of nuisances or eye sores are exactly what is appropriate in a zoning proceeding as opposed to what the Supreme Court made clear was inappropriate in *Cleburne*: the dislike of the mentally disabled. ***Id.; see also*** *id. at 461-62* (Marshall, J., concurring). As a result, we cannot say that the ZBA's actions **[*20]** in this case are "irrational" or completely "unsupported." *Trihealth, 430 F.3d at 790-91*. We therefore affirm the district court's grant of summary judgment for the Township.

B.

We move on to Marc Angus.[7] As discussed above, the Stanislaws have disclaimed that their class of one theory is based on Angus's 2005 or 2011 license denials. Nor could they base their theory on each of these actions—the 2005 denial is precluded from our review by *Stanislaw I*, and the 2011 denial is precluded from our review by the Genesee County Circuit Court's undisturbed final judgment in 2012. The Stanislaws do not assert, and the record does not reveal, any other action taken by Marc Angus. We affirm the district court's order of summary judgment for Marc Angus.

C.

Next, we evaluate Dennis Bloss and Stuart Worthing. Dennis Bloss was a member of the Thetford Township Planning Commission, and Stuart Worthing was the Township's building inspector after Marc Angus. The Stanislaws appear to challenge Bloss and Worthing's inaccurate statements on the requirements of Ordinance No. 78 as applied to the Stanislaws—specifically, that they could not have a business and residence on the same property.

But again, the Stanislaws have failed to show any **[*21]** evidence of these individuals treating other property owners differently. Any inaction with respect to the other businesses cannot support an inference that Bloss or Worthing discriminated against the Stanislaws, especially when none of the other businesses received neighbor

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[7] Plaintiffs cannot hold one official responsible for another's actions under *§ 1983*, so they must allege that each official engaged in unlawful conduct to survive summary judgment. *Ashcroft v. Iqbal, 556 U.S. 662, 676, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*; ***Jane Doe v. Jackson Loc. Sch. Dist. Bd. of Educ., 954 F.3d 925, 934-35 (6th Cir. 2020)***. We note at the outset that the Argument Section of the Stanislaws' brief does not even name any individual defendant, let alone identify specific conduct by that defendant that violated the *Equal Protection Clause*. The Stanislaws thus have not created a genuine dispute of material fact about any individual defendant's conduct. ***Dibrell v. City of Knoxville, 984 F.3d 1156, 1163 (6th Cir. 2021)***.

complaints as the Stanislaws did. Moreover, as discussed above, no other business was similarly situated in all material respects, as no other business had ceased operations yet maintained a residence on the same parcel for approximately 14 years. Ultimately, the Stanislaws must raise some evidence of disparate treatment, and here "there is simply no evidence to weigh." *Green Genie, 63 F.4th at 529*.

IV.

While the Township's rationales for denying the Stanislaws the licenses over the years to operate their business may be concerning, the Stanislaws have mounted one of the most difficult legal challenges—an equal protection class of one claim. Given the strict rational basis standard of review and the Stanislaws' failure to present evidence of materially similarly situated businesses, we affirm the judgment of the district court.

Dissent by: HELENE N. WHITE

Dissent

HELENE N. WHITE, Circuit Judge, dissenting. For over a decade, Thetford Township repeatedly denied the **[*22]** Stanislaws a vehicle dealer license based on shifting and demonstrably false rationales. At the same time, the Township purportedly allowed other similarly situated competitors to operate. The majority determines that there were rational bases to justify the Stanislaws' disparate treatment: neighbors complained about the property, and it allegedly functioned as a junk yard. I disagree with the majority's analysis, and accordingly dissent.

I.

First, the Stanislaws did not abandon their municipal-liability claim. To preserve on appeal a claim the district court rejected, a party need only "assert an argument, however limited, for reversal." *JPMorgan Chase Bank, N.A. v. First American Title Ins. Co., 750 F.3d 573 (6th Cir. 2014)*. Thus, to preserve a municipal-liability claim, a plaintiff must (1) identify an official action for which the municipality can be held liable under *42 U.S.C. § 1983*, and (2) argue that the action caused a constitutional violation. *Hardrick v. City of Detroit, Mich., 876 F.3d 238, 244 (6th Cir. 2017)*. The Stanislaws have done so.

A municipality may be liable under *§ 1983* for the actions of "official[s] with final decision making authority." *Paterek v. Village of Armada, Michigan, 801 F.3d 630, 651-652 (6th Cir. 2015)* (quoting *Meyers v. City of Cincinnati, 14 F.3d 1115, 1117-18 (6th Cir.1994)*). In Michigan, "[t]he ZBA is a policymaking body within the Township, because its decisions are not reviewed by any superior officials." *Paeth v. Worth Twp., 483 F. App'x. 956, 964 (6th Cir. 2012)*. Thus, Thetford Township is liable for ZBA actions that **[*23]** cause constitutional violations. And as this court has previously noted, the ZBA approved the denials of the Stanislaws' license applications in 2005 and 2011. *Stanislaw II, 2021 U.S. App. LEXIS 21407, 2021 WL 3027195, at *1-*2*. The Township can thus be liable for those denials, and the Stanislaws repeatedly argue that "Thetford's denials" caused a constitutional violation. ***See, e.g.***, Appellant's Brief, at 36.

The Stanislaws also identify other ZBA actions that contributed to the unequal treatment they faced. For example, the ZBA chairman told the Stanislaws that they could not keep a business and a residence on the same parcel, but the Township permitted the Stanislaws' competitor to do so. And another ZBA member ordered the Stanislaws to remove vehicles from their property, although competitors kept their properties in a similar condition.[1] These

[1] The majority asserts that individual ZBA members' actions cannot give rise to municipal liability because they "are not *municipality* actions." Majority op. at 9-10 n.4. It is unclear whether that is true here. A municipality may be liable for an individual official's actions where the official has enough "responsibility" that his "acts or edicts may fairly be said to represent official

assertions are sufficient to preserve the Stanislaws' claim for appeal, and it is inaccurate to say the Stanislaws failed to "identify any municipal policy, practice, or specific ZBA action." Majority op. at 9. The majority further faults the Stanislaws for failing to cite *Monell v. Dep't of Soc. Servs. of the City of N.Y., 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)*. But a "missed citation to legal authority does not establish a forfeiture of an ***argument***." *United States v. Charles, 843 F.3d 1142, 1147 (6th Cir. 2016)*.

Indeed, it is important to remember **[*24]** that "the rule requiring all issues be raised in an opening brief is a court-made rule," and "its underlying rationale is to avoid surprise and prevent sandbagging of appellees." *Glennborough Homeowners Assoc. v. U.S. Postal Serv., 21 F.4th 410, 414 (6th Cir. 2021)* (quotations omitted). Here, the Township was not surprised by the municipal-liability claim. In their complaint, the Stanislaws asserted that "[t]he ZBA's decisions are the official policy of the Township, and if its decisions to deny certain zoning approvals violate federal constitutional rights, the Township is accountable under *42 USC [§] 1983*." R. 1-1, PID 22 (citing *Monell, 436 U.S. at 690*, and *Paeth, 483 F. App'x at 964*). The Township has had ample opportunity to argue that it cannot be held liable under *Monell* for the ZBA's actions. But it has never done so—not in its motion for judgment on the pleadings, not in its motion for summary judgment, and not in this appeal. Nor has the Township argued on appeal that the Stanislaws forfeited or abandoned their municipal-liability claim.[2]

Further, after this court discussed the municipal-liability claim at oral argument, the Stanislaws submitted a letter under *Federal Rule of Civil Procedure 28(j)*, explaining that "the ZBA 'is a policymaking body,' and a deliberate discretionary act, including the type the Thetford Township ZBA **[*25]** took, is one to which 'municipal liability pursuant to *Monell* can attach.'" CA6 R. 24, P. 1 (quoting *Paeth, 483 F. App'x. at 964-65*) (brackets omitted). The Township did not respond. In sum, although the Stanislaws' framing of the issue has not been ideal, the Township has known all along that the Stanislaws are claiming municipal liability based on the ZBA's actions, "so there is no surprise to prevent." *Hurst v. Caliber Home Loans, Inc., 44 F.4th 418, 424 (6th Cir. 2022)*; ***see also*** *Hardrick, 876 F.3d at 244* (considering an otherwise-forfeited municipal-liability argument because the defendant-appellee had a "chance to brief" the issue).

I also disagree with the majority's conclusion that, at oral argument, counsel for the Stanislaws waived any claim tied to the Township's 2011 denial. ***See*** Maj. op. at 6. It is true that, during oral argument, counsel said that the Stanislaws were challenging Angus's second denial from 2013. However, Angus's second denial took place in 2011, not 2013, so counsel's statement did not make sense. The Stanislaws' briefs make clear that they are challenging the 2011 denial, and counsel stated repeatedly at oral argument that the Stanislaws were challenging Angus's second denial. Thus, it is likely that the Stanislaws' counsel simply misspoke or misremembered the year of the second **[*26]** denial. Regardless, counsel's statements do not demonstrate a "clear and compelling" waiver of the Stanislaws' challenge to the 2011 denial. ***Id.***

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policy." *Pembaur v. City of Cincinnati, 475 U.S. 469, 480-82, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986)*. The ZBA's actions "are not reviewed by any superior officials," *Paeth, 483 Fed. App'x. at 964*, so it is possible that individual ZBA members have enough "responsibility" that their "acts or edicts may fairly be said to represent" Township policy, *Pembaur, 475 U.S. at 480*. But even if the acts of individual ZBA members do not give rise to municipal liability, the majority does not dispute that the license denials themselves—which were approved by the ZBA as a whole—are official Township actions sufficient for municipal liability under *§ 1983*. By arguing that the Township can be held liable for those denials, the Stanislaws have preserved their municipal-liability claim for appeal.

[2] The Township mentions *Monell* in its brief in a single paragraph. It explains that the District Court held that where there is "no underlying constitutional act," "there can be no *Monell* municipal liability." Appellee Brief at 32. The Township states that the "Plaintiffs do not challenge this ruling on appeal." *Id.* But the Township does not say that the Stanislaws forfeited the argument that where there is an underlying constitutional violation, the Township can be held liable for it. And the Township does not contest the proposition that municipal liability attaches to unconstitutional actions of the ZBA. Nor does it contest the assertion that it can be held liable under *Monell* for the license denials if the denials were unconstitutional. Its only argument is that the denials ***were*** constitutional, and thus, since there is no underlying unconstitutional act, there can be no *Monell* liability.

II.

The majority next holds that res judicata bars this court from considering many of the relevant facts in this case. As the majority sees it, *Stanislaw I*—the suit involving the Stanislaws' prior equal protection claim against Thetford Township—precludes consideration of the Township's actions between 2005 and 2009. Majority op. at 6-8, 15. And the Genesee County Circuit Court's judgment affirming the ZBA's approval of the Township's 2011 license denial precludes consideration of events surrounding that denial. *Id.* The result is a blinkered analysis: In a case with relevant facts stretching back to the 1980s, the majority considers only what occurred "between 2013 and 2018." *Id.* at 8. For several reasons, I disagree with that approach.

To start, the Township appellees have not argued on appeal that res judicata bars any part of the Stanislaws' claim. "[R]es judicata is an affirmative defense that should be raised by the defending party," and "[c]ourts generally lack the ability to raise an affirmative defense sua sponte." *Hutcherson v. Lauderdale Cnty., 326 F.3d 747, 756 (6th Cir. 2003)*. A court may raise **[*27]** res judicata sua sponte only "in special circumstances," *Arizona v. California, 530 U.S. 392, 412, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (2000)*, such as when "[t]he defense was not available to Defendants prior to their filing their motion," *Hutcherson, 326 F.3d at 757*.

The majority asserts that considering the issue sua sponte conserves judicial resources. Majority op. at 7 n.2. It is unclear why that is so. Res judicata was already litigated in this case: When the Stanislaws brought this action, the Township moved for judgment on the pleadings and argued that res judicata precluded the Stanislaws' equal protection claim. R. 25, PID 161. The district court agreed and granted judgment to the Township. R. 30, PID 411-418, 425. The Stanislaws appealed, and this court reversed—explaining in a thorough opinion that res judicata does *not* bar the equal protection claim. *Stanislaw v. Thetford Twp. Mich., et al. (Stanislaw II), No. 20-1660, 2021 U.S. App. LEXIS 21407, 2021 WL 3027195, at *3-*5 (6th Cir. July 19, 2021)*. The Township then declined to raise res judicata at summary judgment and in this appeal. Thus, by raising the issue sua sponte, the majority spends judicial resources re-litigating an issue this court settled in a prior appeal in the very same case—an issue that neither party has asked this court to address. That undermines the majority's efficiency interests. *See* Majority op. at 7 n.2 (expressing an interest in "protecting litigants **[*28]** from the burden of relitigating an identical issue" (quotation omitted)).

On the merits, the majority incorrectly concludes that res judicata precludes the Stanislaws' equal protection claim. In *Stanislaw II*, this court reversed the district court's holding that *Stanislaw I* precluded the Stanislaws' equal protection claim. This court explained that "[r]es judicata is not applicable where a subsequent lawsuit alleges ongoing unlawful conduct, even if it is of the same nature as the conduct giving rise to the prior action, so long as the events giving rise to the subsequent action occurred after the first action was filed." *Stanislaw II, 2021 U.S. App. LEXIS 21407, 2021 WL 3027195, at *4* (citing *Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 324, 327-28, 75 S. Ct. 865, 99 L. Ed. 1122 (1955)* and *Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 601-603, 136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016)*). While *Stanislaw I* involved events between 2005 and 2009, this suit involves "post-2009 misconduct," including "the Township's shifting justifications proffered after 2009 for why the Stanislaws could not operate their dealership business on their property." *Stanislaw II, 2021 U.S. App. LEXIS 21407, 2021 WL 3027195, at *3-*5*.

The majority agrees that *Stanislaw I* does not preclude consideration of *post*-2009 conduct, but it concludes that any events between 2005 and 2009 "are precluded from consideration now." Majority op. at 8 n.3. I disagree. *Stanislaw II* held that the Stanislaws *can* use pre-2009 conduct to support **[*29]** their claim: "[W]hile they cannot relitigate any claims or issues *solely* based on the events of 2005 to 2009," those events "may inform the allegations of a pattern of discriminatory treatment regarding post-2009 misconduct." *Stanislaw II, 2021 U.S. App. LEXIS 21407, 2021 WL 3027195, at *5* (emphasis added) (citing *Bronson v. Board of Education, 687 F.2d 836, 841 (6th Cir. 1982)*). Yet the majority categorically refuses to consider any of the Township's pre-2009 conduct. It does not consider, for example, the Township's 2005 denial of the Stanislaws' licenses, or the Township's concurrent

approval of licenses to the Stanislaws' competitors in 2005 and 2006.[3] Thus, the majority does the opposite of what *Stanislaw II* instructs by refusing to consider "the events of 2005 to 2009" in analyzing the "pattern of discriminatory treatment" the Stanislaws faced. *Stanislaw II, 2021 U.S. App. LEXIS 21407, 2021 WL 3027195, at *5*.

The majority asserts that this logic would permit the Stanislaws to file endless suits against the Township so long as they add a "new" factual allegation to each suit. Majority op. at 8 n.3. But *Stanislaw II* did not hold that any new factual allegation defeats res judicata. Rather, it applied the settled principle that res judicata does not preclude a claim "predicated on new material events postdating the filing of the initial complaint" in the prior **[*30]** suit. *Stanislaw II, 2021 U.S. App. LEXIS 21407, 2021 WL 3027195, at *4* (citing *Whole Woman's Health, 579 U.S. at 601-603*, and Restatement (Second) of Judgments § 24 (1980)). When a party raises such a claim, she may use allegations made in a prior case to "inform" the "pattern of discriminatory treatment" alleged in the current case. *2021 U.S. App. LEXIS 21407, [WL] at *5* (citing *Bronson, 687 F.2d at 841*). Thus, for the Stanislaws to defeat res judicata in a future case, they would need to bring claims "predicated on new material events" not litigated here; it would be insufficient to file a new equal protection claim based on the same license denials with a few new allegations thrown in. *2021 U.S. App. LEXIS 21407, [WL] at *4*.

The majority also wrongly concludes that the Genesee County Circuit Court's 2012 judgment precludes the Stanislaws' claim. "Federal courts must give the same preclusive effect to a state-court judgment as that judgment receives in the rendering state." *Abbott v. Michigan, 474 F.3d 324, 330 (6th Cir. 2007)*. In other words, the Genesee County Circuit Court's judgment is no more or less preclusive in this court than it would be in a Michigan state court. In Michigan, res judicata applies where: (1) "the prior action was decided on the merits," (2) "both actions involve the same parties or their privies," and (3) "the matter in the second case was, or could have been, resolved in the first." *Adair v. State, 470 Mich. 105, 680 N.W.2d 386, 396 (Mich. 2004)*.

Applying those principles, the Michigan Supreme Court has held **[*31]** that where a state circuit court sits in review of a local ZBA, the circuit court's judgment "[i]s not res judicata on [a] plaintiff's constitutional claims" arising from the same set of facts because a ZBA lacks jurisdiction to decide constitutional claims, and "the circuit court's review is confined to the record and decision of the zoning board of appeals." *Houdini Properties, LLC v. City of Romulus, 480 Mich. 1022, 743 N.W.2d 198 (Mich. 2008)*. As this court has explained, "res judicata does not apply to a plaintiff's constitutional claims arising from the same facts" "presented in an appeal from a ZBA's decision." *Jon Jon's Inc. v. City of Warren, 534 F. App'x 541, 544 (6th Cir. 2013)* (citing *Houdini, 743 N.W.2d at 198-199*).

Here, the Genesee County Circuit Court issued its judgment on appeal from the Thetford Township ZBA's approval of the denial of the Stanislaws' license applications. In issuing that approval, the ZBA did not—and could not—consider any constitutional arguments. *See* R. 60, PID 596-600. On appeal, the circuit court was thus itself "barred from ruling on constitutional issues," *Jon Jon's, 534 F. App'x at 544*, which means its judgment "was not res judicata on the [Stanislaws'] constitutional claims," *Houdini, 743 N.W.2d at 198*. Because Michigan courts would not apply res judicata to the circuit court's decision, this court cannot either.

The majority asserts that Michigan courts would apply res judicata **[*32]** to the Genesee County Circuit Court's decision because "the circuit court explicitly considered the equal protection argument and rejected it." Majority op. at 7 (citing R. 60-7, PID 638-39). But in *Houdini*, the circuit court similarly purported to "rule[] on the plaintiff's taking[s] claim" in affirming the ZBA's decision. *743 N.W.2d at 200* (Corrigan, J., dissenting). The Michigan Supreme Court held that the circuit court lacked jurisdiction to "rule on takings issues in the plaintiff's appeal," *even though* the circuit court had purported to decide those issues. *Id. at 199*. In other words, *Houdini* declined to apply res judicata not because the circuit court failed to consider constitutional claims, but because the circuit court lacked the power to rule on the constitutional claims it *had* considered. *Id.* So here, it is irrelevant whether the circuit court purported to "consider[] . . . and reject[]" the equal protection argument, as the majority asserts. Majority op. at 7.

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[3] The majority *does*, however, justify the Township's post-2009 conduct using pre-2009 events, illustrating the relevance of such conduct in analyzing post-2009 events. *See, e.g.*, Majority op. at 14 (citing 2005 neighbor complaints and Angus' 2005 claim that the Stanislaws' kept "junk" on the property).

Either way, the circuit court lacked jurisdiction to rule on the equal protection claim, so its decision cannot preclude that claim here. *Houdini, 743 N.W.2d. at 199*; *see also* Get Back Up, Inc. v. City of Detroit, 878 F.Supp.2d 794, 806-08 (E.D.Mich. 2012) (under *Houdini*, a Michigan circuit court's adjudication of a ZBA appeal cannot preclude later constitutional claims **[*33]** "even if, in deciding that appeal, the state [circuit] court resolved the very federal-law claims now before this Court").[4]

The majority asserts that in Jon Jon's v. City of Warren, 534 F. App'x 541 (6th Cir. 2013), this court read *Houdini* to permit the application of res judicata where a circuit court sitting in review of a ZBA appeal chooses to "separate" the appeal from any constitutional claims the parties raised during litigation. Majority op. at 7-8. In the majority's view, by "consider[ing] the equal protection argument," the Genesee County Circuit Court effectively "separate[d]" that argument from the ZBA appeal—and thus the circuit court's disposition of that issue has res judicata effect here. *Id.*

I disagree with the majority's reading and application of *Jon Jon's*. In *Jon Jon's*, a business sought a zoning variance from a township ZBA. Id. at 542. While the ZBA proceeding was pending, the township filed a parallel civil suit in a Michigan circuit court, seeking a declaratory judgment that the business had lost its zoning status. Id. at 542. The business filed a counterclaim in that civil suit, raising constitutional claims against the township. *Id.* When the ZBA denied the zoning variance, the business amended its counterclaim to include *both* the constitutional **[*34]** claims *and* "an appeal of the ZBA's decision." *Id.* The state circuit court chose to treat the matter "solely as an appeal from the ZBA's decision," and affirmed the ZBA on state-law grounds. Id. at 543-44.

When the business brought the same constitutional claims in federal court, the township argued that res judicata applied. Id. at 544. The township asserted that *Houdini* was distinguishable because "in *Houdini*, the state circuit court was not simultaneously confronted with both an administrative appeal from a ZBA" and a separate lawsuit filed originally in the circuit court that included "separately-pled [constitutional] counterclaims." Id. at 544. This court reasoned that the difference would have mattered if the circuit court had treated the ZBA appeal and the civil suit as "separate" because a state circuit court ordinarily has jurisdiction to decide constitutional claims as part of a typical civil suit—the circuit court is only barred from reaching constitutional issues when it sits in review of a ZBA. *Id.* (citing *Houdini, 743 N.W.2d at 198-99*). So if the circuit court had "separate[d]" the ZBA appeal from the parallel civil suit, it may have been able to address the constitutional issues while adjudicating the civil suit. *Id.* But instead, the circuit court **[*35]** treated the case "solely as an appeal from the ZBA's decision," so "the circuit court was without jurisdiction to consider Plaintiffs' constitutional claims." *Id.* That decision is consistent with a proper reading of *Houdini*.

Here, the constitutional claims were never raised as part of a parallel civil suit—rather, they were raised only as part of the ZBA appeal. Indeed, no parallel civil suit was filed, so the circuit court did not have the option to "separate" the ZBA appeal from some other proceeding. For those reasons, this case is materially identical to *Houdini*: A party raised a constitutional claim as part of a ZBA appeal, the circuit court purported to rule on that claim, and the party later raised the same claim in a separate action. The circuit court's decision is thus "not res judicata on the . . . constitutional claims." *Houdini, 743 N.W.2d at 198*.

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[4] It is also not clear that the Genesee County Circuit Court actually did consider or rule on the Stanislaws' equal protection claim. The circuit court noted that the Stanislaws had "advanc[ed] [an] equal protection argument," but the court stated that the "main issue[] before" it was "whether there's compliance with the constitution of statutes." R. 60-7, PID 638. The court then stated that, "other than" the equal protection argument, "the law has been followed, proper procedure has [been] followed, [and] there's competent material and substantial evidence on the record with respect to the procedures of the Zoning Board of Appeals and Mr. Angus." R. 60-7, PID 639. On that basis alone, the court found that it "ha[d] to affirm [the] ZBA's decision[,] completely understanding there's many issues." Id. at 639. It is unclear what the circuit court meant by the "constitution of statutes." But it appears that the court *declined* to rule on the equal protection argument—rather, it affirmed because the zoning decisions complied with "proper procedures" under state law, while recognizing that the equal protection argument was one of "many issues" that its ruling did not address. *Id.* But even if the circuit court had purported to rule on the equal protection issues, *Houdini* still holds that such a ruling has no res judicata effect on a future equal protection claim.

III.

I disagree as well with the majority's conclusion that the Stanislaws presented no viable comparators. In determining whether the Stanislaws are similarly situated to an alleged comparator, we do not demand an "exact correlation," but instead seek "relevant similarity." *Loesel v. City of Frankenmuth, 692 F.3d 452, 462 (6th Cir. 2012)* (quoting *Bench Billboard v. City of Cincinnati, 675 F.3d 974, 987 (6th Cir. 2012)*). "[T]he degree to which others are viewed as similarly situated depends substantially **[*36]** on the facts and context of the case." *Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 352 (6th Cir. 1998)* (quoting *Jennings v. City of Stillwater, 383 F.3d 1199, 1214 (10th Cir. 2004)*). As a result, determining whether alleged comparators are similarly situated to the plaintiff is "generally a factual issue for the jury." *Loesel, 692 F.3d at 463* (quoting *Eggleston v. Bieluch, 203 Fed. App'x. 257, 264 (11th Cir. 2006)*). Thus, summary judgment on a class-of-one claim should be granted for a defendant only where no jury could "reasonably conclude[]" that an alleged comparator is similarly situated, *id. at 464*—for instance, where the "evidence was one-sided, leaving nothing favoring" the plaintiff, *Green Genie, Inc. v. City of Detroit, 63 F.4th 521 (6th Cir. 2023)*.

In the zoning context, *Loesel* is the best example of the comparator analysis. *See id.* In that case, the Loesels intended to sell their land to Wal-Mart for a new store. *Id. at 459-60*. In response, Frankenmuth created a new zoning type that prohibited retail establishments with greater than 65,000 square feet of retail space. *Id.* The new zoning type applied only to the "Loesels' property and a handful of much smaller parcels in its immediate vicinity." *Id. at 459*. The Loesels brought a class-of-one equal protection claim, citing two alleged comparators: Bronner's Christmas Wonderland and the Bavarian Mall. *Id. at 463*.

Frankenmuth first argued that the comparators were not similarly situated because the Loesels' property was zoned differently than Bronner's **[*37]** and the Bavarian Mall. *Id. at 464*. However, except for the 65,000-foot rule, the two zones were subject to "essentially the same regulations." *Id.* Thus, a jury could conclude that the "difference in 'labels' for these commercially zoned properties is not material." *Id.* The city next argued that the properties were not similarly situated because the Loesels' property was vacant, but the comparators' properties were already developed. *Id.* However, the zoning for all the land allowed development of new commercial properties. *Id.* Accordingly, a "jury could have reasonably concluded that the developed/undeveloped distinction is not material." *Id.* Finally, the city argued that the properties had different traffic capacities. *Id.* At the entrance to Bronner's and the Bavarian Mall, the street had five lanes. *Id.* In contrast, the road in front of the Loesel's property had only three lanes. *Id.* This court held that a reasonable jury could conclude the difference was not material, in part because the Loesels' could theoretically add two lanes to the road abutting their property. *Id. at 465*.

The majority departs from *Loesel* in making judgments that should be left to a jury. For example, the majority asserts that two **[*38]** businesses—Belott & Son and Duquette's Garage—are not similarly situated to the Stanislaws' business because they applied for a Class B license only (which permits the sale of used cars), but the Stanislaws also applied for a Class C license (which permits the sale of used car *parts*). This argument may have been compelling had the Township granted the Stanislaws a Class B license but denied them a Class C license. Instead, however, the Township denied the Stanislaws *all* the licenses they sought, including a Class B license. Thus, a jury could reasonably conclude that this difference is immaterial because the Township still discriminated against the Stanislaws in denying a Class B license.

The majority also dismisses Hi-Speed as a comparator, even though the business had applied for and received Class B and C licenses. To distinguish the two, the majority argues the properties differ because the Stanislaws maintained a residence on the same plot as their business, while Hi-Speed did not. However, this rationale was debunked by the state court and by the ZBA, which acknowledged that the Stanislaws' residence on the property could not serve as a basis to deny the licenses. Thus, given **[*39]** the fact that state proceedings already

established this reason was faulty, a jury could conclude that this distinction is not relevant to the comparator analysis.[5]

Finally, the majority dismisses Monster Auto as a comparator because there is no evidence in the record specifying what licenses the business held. While that may be true, the Stanislaws produced evidence showing that Monster Auto operated as a junk yard. Pictures of the property show piles of tires, wrecked automobiles, and trash strewn across the parking lot. Monster Auto also advertised its scrap business. This would allow a jury to infer that Monster Auto was permitted to operate as a junk yard while the Stanislaws were denied their licenses.

Some differences between a plaintiff and an alleged comparator disqualify the two from being similarly situated, but it is "generally . . . for the jury" to decide whether a "distinction is . . . material." *Id. at 463-65*. A court should not take that decision away from the jury unless the evidence is "one-sided." *Green Genie, 63 F.4th at 529*. Our court applied these principles in *Lousel* when it required a jury to determine whether differences between two properties—e.g., their zoning classification or traffic capacity—were **[*40]** relevant to the comparator inquiry. Because a jury could reasonably conclude that any differences between the Stanislaws and their comparators are irrelevant (and, in the case of Hi-Speed, completely nonexistent), summary judgment was improper.

IV.

Although the "'rational basis' standard is the least demanding test used by the courts to uphold legislative action, it is not 'toothless.'" *Berger v. City of Mayfield Heights, 154 F.3d 621, 625 (6th Cir. 1998)* (quoting *Mathews v. Lucas, 427 U.S. 495, 510, 96 S. Ct. 2755, 49 L. Ed. 2d 651 (1976)*). In our circuit, plaintiffs have repeatedly succeeded on equal-protection claims even where the rational basis test was applied. *See id.* (striking down a lawn-related ordinance that irrationally applied only to a certain subset of properties); *Johnson v. Morales, 946 F.3d 911, 940 (6th Cir. 2020)* (allowing class-ofone claim to proceed where defendant shut down the plaintiff's establishment but not a similarly situated one); *Paterek v. Vill. of Armada, Mich., 801 F.3d 630, 650 (6th Cir. 2015)* (denying summary judgment where plaintiff's business was prohibited from operating despite similarly situated comparators being allowed to stay open); *Loesel, 692 F.3d at 466* (denying summary judgment where city discriminatorily zoned plaintiff's property to prevent construction of a Walmart despite other large retail establishments being allowed to operate). The majority's analysis makes four significant mistakes.

A.

First, the majority misapplies **[*41]** the standard for class-of-one claims. According to the majority, the Township had a rational basis to deny the Stanislaws' application: The Stanislaws had violated municipal rules by operating a junk yard. Maj. op. at 11. However, the question is not whether there was a rational basis to deny the Stanislaws a license in isolation, but whether there was a rational basis to treat the Stanislaws differently than other similarly situated property owners. *See Rondigo, L.L.C. v. Twp. of Richmond, 641 F.3d 673, 681 (6th Cir. 2011)* ("The *Equal Protection Clause* prohibits discrimination by government which . . . intentionally *treats one differently than others similarly situated* without any rational basis for the difference." (emphasis added)). Here, the Stanislaws cite evidence showing that their property was maintained similarly to the comparators. *See, e.g.*, R. 62-2, PID 926 ("Belott did not have fencing then (or now), and at all relevant times also had vehicles in various states of disrepair on its property."); R. 62-2, PID 927 ("Like Grand Auto Plaza and like Belott, Duquette's has never had fencing, and also has vehicles on its property waiting for repair and sale."); R. 62-2, PID 927 ("Due to its parts sales Hi-Speed frequently had vehicles in disrepair on its property and various **[*42]** parts in storage, but has never had any fencing."); R. 62-2, PID 928 ("[Monster Auto] openly dismantled vehicles, displayed auto parts for sale and

[5] The majority also distinguishes the two businesses by arguing that Hi-Speed never applied for a Class E license (which permits the transportation of distressed vehicles, i.e., a towing service). However, the Stanislaws only applied for a Class E license in 2005. In 2011, they applied only for Class B and C licenses, the very same ones sought by Hi-Speed.

advertised auto parts sales.); R. 62-2, PID 1157-61 (photographs of Monster Auto's property showing junk cars, a pile of tires, and other auto parts strewn across the area).

After considering this evidence, a jury could reasonably conclude that, because the alleged comparators operated their businesses in a materially indistinguishable manner to the Stanislaws, the "junk yard" rationale was not a rational basis for the disparate treatment. *See e.g., Morales, 946 F.3d at 940* (allowing a class-of-one claim to proceed where the city shut down the plaintiff's establishment after a shooting took place there but allowed a similarly situated business to continue operating when the same occurred). These disputed issues of material fact should preclude summary judgment for the Township.

B.

The very question whether the Stanislaws illegally operated a junk yard is also in dispute. The majority cites the following evidence in favor of a finding that the Stanislaws illegally operated a junk yard: (1) Angus's letter citing junked vehicles as the reason for denying the Stanislaws' **[*43]** permit, (2) Angus's letter denying the Stanislaws a permit a second time "for the same reason set forth in the . . . 2005 disapproval," (3) the Township's 2013 decision to initiate blight proceedings against the Stanislaws, (4) the subsequent settlement in which the Township agreed to dismiss the proceedings in exchange for the Stanislaws cleaning up their property, (5) complaints from the Stanislaws' neighbors about the state of the property; (6) the city's zoning code, which purportedly prohibited the Stanislaws from storing junked vehicles on their property, and (7) the fact that the Stanislaws' business was potentially on hiatus for several years due to Joseph's health issues.

However, the Stanislaws dispute the allegation, citing an affidavit saying that the cars on the property were not junked because they "were in repairable condition and [Joseph] intended to repair and sell them," R. 62-2, PID 925. For support, the Stanislaws cite a study showing that their business sold an average of forty-five percent of its inventory each year, even taking into account the slower years when Joseph was sick. Further, the Stanislaws argue that because the Township's ordinances placed no restrictions **[*44]** on the types of vehicles that dealers can sell or repair, the mere existence of vehicles in poor condition was not sufficient to meet the definition of a junk yard as long as their business's plan was to repair or sell them. *See* R. 62-2, PID 955 (ordinance defining automobile repair as "general repair, engine rebuilding, rebuilding or reconditioning of motor vehicles; collision service, such as body, frame, or fender straightening and repair; overall painting and undercoating of automobiles.").

The Stanislaws additionally argue that even if their property had junk on it, they complied with the Township's rules. Although the Township generally prohibits junk yards, it has an exemption allowing individuals to store junk vehicles "upon the premises of a properly zoned property, junk buyer, dealer in used auto parts, dealer in second hand goods or junk." R. 62-2, PID 1166. The Stanislaws were licensed auto-parts dealers until they were denied a license in 2005, meaning that they were permitted to openly dismantle vehicles on their property—even under the Township's own rules. Although the Stanislaws were permitted to operate a junk yard at the time, the Township still rejected their 2005 **[*45]** application on that purported basis.

The Stanislaws also note that the Township consistently granted them licenses from 1983 to 2005, and again after 2018, despite no material changes to their property. The Stanislaws argue that the blight proceedings are irrelevant because they began years after their licenses were denied and because their property largely remained in the same condition even after the city's blight complaint was dismissed. For evidence, the Stanislaws cite to the complaints of their neighbors, who continued to complain about the state of the property without regard to whether their licenses were approved or denied. Accordingly, a jury could reasonably conclude that either the Stanislaws were not operating a junk yard or that the rationale does not explain why the Township denied the Stanislaws a permit between 2005 and 2018, but not for the other decades when the business was operating in the same fashion.

C.

Alternatively, the majority concludes that the neighbors' complaints constitute a rational basis to treat the Stanislaws differently from their competitors. However, the Supreme Court has held that neighbor complaints alone—absent any other legitimate government **[*46]** interest—cannot serve as a rational basis for disparate treatment in zoning decisions. In *City of Cleburne, Tex. v. Cleburne Living Center*, a city council required a mental-health facility to obtain a permit to operate, even though it "freely permitted" "other care and multiple-dwelling facilities" to operate permit-free. 473 U.S. 432, 447-48, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). The city argued the disparate treatment was justified by "the negative attitude of the majority of property owners located within 200 feet" of the mental-health facility. Id. at 448. Applying rational-basis review, the Court rejected that argument. "[M]ere negative attitudes," the Court explained, "are not permissible bases" for the disparate treatment of similarly situated properties, especially where those attitudes are "unsubstantiated by factors which are properly cognizable in a zoning proceeding." *Id.* That is because "the law cannot, directly or indirectly, give . . . effect" to "private biases." *Id.* (quoting Palmore v. Sidoti, 466 U.S. 429, 433, 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1984)). Accordingly, the Township may not evade the constraints of the Fourteenth Amendment "by deferring to the wishes or objections of some fraction of the body politic." *Id.; see also id.* ("[T]he electorate as a whole, whether by referendum or otherwise, could not order city action **[*47]** violative of the Equal Protection Clause.").

So too here: The Township cannot treat the Stanislaws differently than their similarly situated competitors based solely on the "negative attitudes" of the Stanislaws' neighbors. *Id.* By allowing the Township to discriminate against the Stanislaws because of "neighbor complaints," the majority permits what *Cleburne* forbids. Maj. op. at 12.

The majority asserts that the Township's treatment of the Stanislaws was not based on "negative attitudes" alone, but also on "[c]onsiderations of nuisances or eye sores." Majority op. at 15. That is just a restatement of the majority's junk-yard rationale. The Township believed the Stanislaws' property was an eye sore and a nuisance only because it allegedly contained car parts and similar "junk." But as explained above, several comparators kept their properties in a similar condition. The real difference, then, is not that the Stanislaws' property was allegedly an eyesore; it is that neighbors *complained* about the Stanislaws, while "there is no evidence in the record that any of the other businesses received neighbor complaints." *Id.* at 14-15. Thus, the rationale that explains the Township's disparate treatment of the Stanislaws **[*48]** is "mere negative attitudes" towards an otherwise permitted use, which the Supreme Court has held cannot provide a rational basis for zoning decisions. Cleburne, 473 U.S. at 448.

In response, the majority argues that *Cleburne* held only that it is "inappropriate" for the government to make zoning decisions based on a "dislike of the mentally disabled." Majority op. at 15. But the opinion contains no such distinction. Indeed, the *Cleburne* plaintiffs' primary argument was that the challenged zoning decision was "invalid on its face" because the government had "discriminated against" the mentally disabled. 473 U.S. at 437. Yet the Court rejected that argument. It held that—unlike "race, alienage, or national origin"—mental disability is *not* a suspect classification subject to heightened scrutiny. Id. at 441, 446-447. The Court then proceeded to evaluate whether the zoning decision had any rational basis; it concluded that "negative attitudes" and the "objections of some fraction of the body politic" were insufficient. Id. at 448. In conducting that rational basis analysis, the Court did not specifically mention dislike for the mentally disabled or limit its holding to "negative attitudes" based on that particular kind of prejudice. Id. at 448. Here, if the Stanislaws **[*49]** and their comparators complied with the zoning ordinances, the neighbors' complaints should have been deemed irrelevant.

The Stanislaws also cite evidence to refute the assertion that the complaints were a "likely" or "conceivable" reason for their license denial. *See* Andrews v. City of Mentor, 11 F.4th 462, 477-78 (6th Cir. 2021) (quoting In re City of Detroit, 841 F.3d 684, 702 (6th Cir. 2016)). The Stanislaws show that their licenses were denied for the first time shortly after Daniel Case, one of the complaining neighbors, joined the Zoning Board of Appeals. From this fact, a jury could reasonably infer that the licenses were denied not due to the neighbors' complaints, but due to the personal grievance of a member on the ZBA. The Stanislaws also cite evidence that the neighbors continued to complain even during the years when they had their licenses granted. *See* R. 62-2, PID 1172 (complaint from 1990); id. at 1174 (complaint from 2005); R. 60-14, PID 731-32 (complaint from 2017); R. 62-1, PID 913-14 (detailing complaints in 2022). For example, the Township's attorney Otis Stout testified in 2022, the same year that the Stanislaws successfully renewed their license, the "complaints keep coming in." R. 62-1, PID 913-14. A jury

could thus reasonably infer that the neighbors' complaints were not a rational basis **[*50]** to deny the Stanislaws' licenses because the timing of the complaints did not correlate with the license denials.

D.

Finally, the majority ignores *Loesel*, a key precedent holding that a jury generally decides whether a defendant had a rational basis to treat the plaintiff differently. *692 F.3d at 466*. In that case, the government proffered numerous rationales for its differential treatment—including, for example, protecting the value of nearby residential property, concerns about the lot's traffic capacity, potential storm-water retention issues, and the goal of making the city's downtown area more friendly to pedestrians. *Id. at 465-66*. But the *Loesel* plaintiffs presented evidence to "contradict[]" and "undercut" the government's explanations, such that a jury could find that the government's proffered rationales were not "conceivable" bases for its actions. *Id.* Here too, the Stanislaws have provided ample evidence to contradict and undercut the government's junk-yard and neighbor-complaint rationales. This case should go to trial too. Accordingly, I dissent.

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EXHIBIT U

STATE OF MICHIGAN
IN THE COURT OF APPEALS

HOWELL-MASON, LLC
A Michigan Limited Liability Company,

Appellant,

v.

HOWELL TOWNSHIP,
A Michigan General Law Township,

Appellee

Court of Appeals No. 372773

Hon. Matthew J. McGivney
Case No. 24-350-AA

REPLY TO APPELLEE HOWELL TOWNSHIP'S RESPONSE TO APPLICATION FOR LEAVE TO APPEAL OR PEREMPTORY REVERSAL

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1. Constitution

2. CourtRules

3. Statute

4. Case Law

B. Claims challenging the legality of the ordinance applied by the municipal board in reaching the decision are properly the subject of an original action, as the appellate body lacks authority to handle them in the context of an appeal.

1. Court rules allow for appeals of decisions of municipal boards to circuit court in conjunction with companion litigation challenging the ordinance on which the decision was based.

2. *Krohn v. Saginaw,* 175 Mich App 193 (1988) and its progeny: original actions challenging on decisions are improper collateral attacks.

3. Claims challenging the validity of an ordinance that only implicate a decision are properly brough in a companion original action.

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I. INTRODUCTION TO REPLY

Appellant will rely on its initial application but wishes to clarify one important issue of law in this Reply. Appellee's response is rife with personal attacks on the ethics and intelligence of Appellant and its counsel which will be ignored as they are irrelevant.

II. SUMMARY OF REPLY

Appellant contends that there is no case law to support Appellant's argument that an appeal from a municipal board concerns the legality of the *decision,* whereas a companion original action challenges the *legality of ordinance* on which the decision is based, Appellee is demonstrably incorrect. All law in this state from the Constitution, statutes, court rules, and case law on down to unpublished court of appeals opinion affirm Appellant's fundamental contention that the subject matter of an appeal from a municipal board is the *decision* of the board, with claims beyond the scope and definition of an appeal being the subject matter of an original action. Furthermore, Appellee cites the *Krohn* case, discussed below, for an argument diametrically opposed not only to the holding of the case, but to the entire body of law on the subject.

III. REPLY

A. The Michigan Constitution, statutes, rules, and case law, clearly indicate that decisions of a municipal board based on the application of an ordinance are the subject of circuit court appeals under the circumstances of this case.

Arguments by Appellant regarding the subject of appeals vs. original actions in the context of an appeal from a municipal board invoke fundamental principles of American jurisprudence.[4] It seems obvious that a decision of a lower court, board or tribunal, is the subject of an appeal. As such, the Constitution of the State of Michigan, statutes, rules, and case law affirms this fundamental principle.

[4] Counsel apologizes in advance to the reader. This material is fundamentally important, but butter knife dull.

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1. Constitution

Article 6, § 28 of the Michigan Constitution of 1963 states that:

> **All final decisions,** findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, **shall be subject to direct review by the courts** as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. (emphasis added).

2. Court rules

MCR §7.102(2), which defines the term "appeal" in the context of an appeal to circuit court, provides in relevant part that an appeal means "judicial review by the circuit court of a judgment, order, or **decision**…"

It follows from the provisions above that MCR §7.122(G)(2), which applies to decisions where, as here, no right to appeal to a zoning board of appeal exists, closely mirrors the constitutional provision above:

> In an appeal from a final determination under a zoning ordinance where no right of appeal to a zoning board of appeals exists, t**he court shall determine whether the decision** was authorized by law and the findings were supported by competent, material, and substantial evidence on the whole record.

3. Statute

Even when an appeal to a zoning board of appeals exists, the *decision* of the ZBA is the subject of an appeal to circuit court and beyond. MCL §125.3606 states in relevant part…

> (1) Any party aggrieved by a **decision** of the zoning board of appeals may appeal to the circuit court for the county in which the property is located. The circuit court shall review the **record and decision** to ensure that the **decision** meets all of the following requirements…

***

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(2) An appeal from a **decision** of a zoning board of appeals shall be filed within whichever of the following deadlines comes first:

(a) Thirty days after the zoning board of appeals issues its **decision** in writing signed by the chairperson, if there is a chairperson, or signed by the members of the zoning board of appeals, if there is no chairperson.

(b) Twenty-one days after the zoning board of appeals approves the minutes of its **decision.**

(3) The court may affirm, reverse, or modify the **decision** of the zoning board of appeals. The court may make other orders as justice requires.

4. Case Law

Case law wisely follows the Constitution, states, and rules. For instance, the Michigan Supreme Court has held that "the circuit court's review [of a ZBA decision] is confined to the **record and decision** of the zoning board of appeals…" *Houdini Props., LLC v. City of Romulus,* 480 Mich 1022, 1023, 743 NW 2d 198, 199 (2008) (referencing MCL §125.585(11), the precursor to MCL §125.3606). The Court of Appeals has held that "[a] party aggrieved by a **decision** in an earlier proceeding may only challenge the **decision** by appeal of the **decision** within the context of that proceeding." *Zelasko v. Bloomfield,* 2023 Mich App LEXIS 3758 (Ct. App. May 25, 2023); *citing In re Ind. Mich. Power Co.,* 329 Mich. App. 397, 406, 942 NW2d 639 (2019).

B. Claims challenging the legality of the ordinance applied by the municipal board in reaching the decision are properly the subject of an original action, as the appellate body lacks authority to handle them in the context of an appeal.

1. Court rules allow for appeals of decisions of municipal boards to circuit court in conjunction with companion litigation challenging the ordinance on which the decision was based.

MCR §7.122 governs appeals to the circuit court from zoning decisions, and states in relevant part that: "This rule does not restrict the right of a party to bring a complaint for relief relating to a determination under a zoning ordinance."

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MCR §2.605 governs actions for declaratory judgments, and states in relevant part that: "The existence of another adequate remedy does not preclude a judgment for declaratory relief in an appropriate case."

Thus, the court rules are clear that an appeal challenging a decision of a municipal board in conjunction with companion original litigation seeking declaratory relief regarding "relating to a determination [i.e. decision] under a zoning ordinance," which includes challenges to the constitutionality of the ordinance on which a decision was based.

2. *Krohn v. Saginaw,* 175 Mich App 193 (1988) and its progeny: original actions challenging decisions are improper collateral attacks.

In *Krohn,* the plaintiffs were owners of properties adjacent to property that was approved for development of an auto parts store and gas station. Instead of filing an appeal, plaintiffs filed an original action in circuit court. However, the lawsuit was dismissed for lack of subject matter jurisdiction. The court reasoned the lawsuit sought to challenge the zoning decision, which constituted an untimely appeal disguised as a separate lawsuit. The twenty-one (21) day appeal period in which to file a claim of appeal is jurisdictional. As plaintiffs failed to file their appeal within the statutory appeal period, the court lacked subject matter jurisdiction to hear it. In the court's own words:

> [W]e believe [plaintiff's] claims raise issues relative to the decision of the planning commission and the procedures employed by the planning commission in reaching that decision. Thus, they do not establish separate causes of action, but merely address alleged defects in the methods employed by the planning commission or the result reached by the commission, Accordingly, those are issues to be raised in an appeal from the decision of the planning commission.

Krohn v. Saginaw, 175 Mich App 193, 198, 437 NW 2d 260, 263 (1988).

The unpublished case of *Zelasko v. Bloomfield*, 2023 Mich. App. LEXIS 3758, follows the same fact pattern as *Krohn* and relies on *Krohn* to dismiss the lawsuit for lack of subject matter

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jurisdiction as merely an untimely appeal styled as an original action. However, *Zelasko* provides better analysis of the principles discussed in *Krohn.* The court reasoned:

> Plaintiffs contend…that their complaint is distinct from an appeal because they seek declaratory, injunctive, and mandamus relief and have alleged violations of due process. It is true that the right to appeal a zoning decision does not restrict the right of a party to bring a separate complaint for relief relating to a zoning determination under certain circumstances. However, when determining the nature of a party's claim a court is not bound by the labels given to the claims by a party but is instead obligated to look beyond the labels and determine the exact nature of the claim. The gravamen of the complaint is determined by reading the complaint as a whole and looking beyond mere procedural labels.
>
> ***
>
> The circuit court correctly concluded that the gravamen of plaintiffs' original action, which is clear on the face of the…complaint, is to overturn the Board's decision…i.e. a de facto appeal of the Board's decision.
>
> ***
>
> Because plaintiff's original action in the circuit court was simply a challenge to the Board's decision outside the appellate process, plaintiffs' complaint was an impermissible collateral attack of the Board's decision. A party aggrieved by a decision in an earlier proceeding may only challenge the decision by appeal of the decision within the context of that proceeding.

Zelasko at 21-22. *See also Stafa v. City of Troy,* 2023 Mich App. LEXIS 2594 (Ct. App. Apr. 13, 2023).

IN SUMMARY, *Krohn* and its progeny stand for the simple proposition that the circuit court lacks subject matter jurisdiction over an original action that simply challenges the decision of the municipal board. In other words, an original action cannot be an appeal of a decision in disguise.

What *Krohn* clearly does not stand for is Appellee's argument that a circuit court appeal is the appropriate forum to challenge the legality of an ordinance on which a decision of a municipal board is based. Appellee's assertion is simply contrary to the entire body of law governing circuit court appeals. In fact, the Michigan Supreme Court has held that a circuit

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court sitting as an appellate body does not have jurisdiction to decide substantive due process and takings claims, and thus those issues were not properly before the court in an appeal. *See Houdini Props, LLC v. Romulus,* 480 Mic 1022, 1022, 743 NW2d 198 (2008). What's more, Appellee's assertion is directly contrary to the definition of an appeal from a municipal decision, which is defined in relevant part as "judicial review by eh circuit court of a judgment, order, or decision…"

3. Claims challenging validity of an ordinance that only implicate a decision are properly brought in a companion original action.

Accordingly, and contrary to Appellee's misleading argument re: *Krohn,* claims that challenge the validity of an ordinance itself are properly brought in a separate original action. For instance, in the matter of *Sun Communities v. Leroy Twp.,* 241 Mich App 665, 617 NW2d 42 (2000), the plaintiff aggrieved by the decision of a municipal board. Rather than filing an appeal, plaintiff filed a complaint alleging takings, equal protection violations, substantive due process violations, other constitutional rights, as well as civil rights and fair housing issues. The circuit court dismissed the suit as an improper collateral attack that should have been filed as an appeal. The Court of Appeals reversed, holding that:

> *Krohn* is factually distinguishable from the present case. Here, plaintiff's lawsuit does not involve a challenge to the administrative activities of a municipal body acting in the capacity of a zoning board of appeals. Instead, it involves numerous constitutional challenges to the legislative actions of the township board…. Neither a city council's decision to rezone land nor a zoning board of appeal's decision to grant a variance is relevant to the constitutionality of an ordinance…

Sun Communities, 241 Mich App at 672; *quoting Paragon Props. Co. v. City of Novi,* 452 Mich, 568, 580, n 15 (1996).

Recently, the Court of Appeals issued an unpublished opinion in the matter of *KI Props. Holdings, LLC v. Ann Arbor Charter Township*, 2020 Mich App LEXIS 865 (Ct. App. Feb 4, 2020). In *KI Props,* the aggrieved party filed a circuit court appeal of a municipal decision which also

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included a complaint seeking damages and other relief. The Court of Appeals followed the rationale of *Sun Communities,* in holding that both the appeal and companion original action were appropriate.[5] In fact, the court noted that the procedure chosen by Appellant in this case (i.e. filing a claim of appeal and a separate original action) was best practice. The court reasoned as follows:

> Because KI Properties…pleaded…claims as independent causes of action in a complaint…and sought relief beyond 'judicial review by the circuit court of a judgment, order, or decision' by the [Municipal board]. *See* MCR 7.102(2) (defining appeal for purposes of appeals to the circuit court.), the circuit court could not resolve those claims in the appeal. Although the better practice might be to file the complaint and the appeal in separate proceedings, the right to appeal a determination under a zoning ordinance does not restrict the right of a party to bring a complaint for relief related to that determination. *See* MCR 7.122(A)(2).
>
> ***
>
> Although KI Properties…alleged facts that implicate the [municipality's] decision, the claims also asked for damages and relief other than that which could be granted in an appeal. That is, the claims are not solely a collateral attack on an administrative decision, as in *Krohn.* As such, KI Properties…were not required to raise those claims in a timely appeal. See, e.g., Sun Communities v Leroy Twp, 241 Mich App 665, 671-672; 617 NW2d 42 (2000) (distinguishing *Krohn* because the claims did not involve a challenge to administrative activities of a zoning board). Indeed, our Supreme Court has since held that a circuit court sitting on appeal of a decision from a zoning board does not have the authority to decide claims involving substantive due process or takings, see *Houdini Props, LLC v Romulus*, 480 Mich 1022, 1022; 743 NW2d 198 (2008), and the court rules similarly provide that the rule governing zoning appeals does not restrict the right to bring a separate complaint for relief relating to a zoning determination, MCR 7.122(A)(2).

KI Props. Holdings, LLC v. Ann Arbor Charter Twp., Nos. 348010, 348167, 2020 Mich. App. LEXIS 865, at *45-46, 51-52 (Ct. App. Feb. 4, 2020).

C. IN SUMMARY

The subject matter of an appeal from a municipal board's application of an ordinance is the *decision* of the municipal board in applying the ordinance to a set of facts and circumstances.

[5] In fact, the court noted that the procedure chosen by Appellant in this case (i.e. filing a claim of appeal and a separate original action) was best practice.

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Claims challenging the legality of the ordinance applied by the municipal board in reaching the decision are the subject matter of an original action.

The court of appeals in *KI Properties* noted that the best practice is to file a claim of appeal and separate lawsuit, as Appellant did in this case.

In ruling on the validity of the application of the ordinance prior to ruling on the legality of the ordinance to be applied, the lower court committed highly prejudicial reversible error in procedure alone.

IV. CONCLUSION

Regarding Appellee's contention that there is no case law to support Appellant's argument that an appeal from a municipal board concerns the legality of the *decision,* whereas an original action challenges the *legality of ordinance* on which the decision is based, Appellee is enormously and demonstrably incorrect. See above.

Respectfully submitted,

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WORD COUNT CERTIFICATION

This document contains less than 3,200 countable words. MCR §7.212(G).

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EXHIBIT V

Lakeview Vineyards, LLC v. Oronoko Charter Twp.

Court of Appeals of Michigan

June 13, 2024, Decided

No. 364347

Reporter
2024 Mich. App. LEXIS 4581 *; 2024 WL 2985593

LAKEVIEW VINEYARDS, LLC, and DANIEL NITZ, Appellees, v ORONOKO CHARTER TOWNSHIP, Appellant.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: **[*1]** Berrien Circuit Court. LC No. 2021-000244-AV.

Lakeview Vineyards LLC v. Oronoko Charter Twp., 2024 Mich. App. LEXIS 3632 (Mich. Ct. App., May 13, 2024)

Counsel: For LAKEVIEW VINEYARDS LLC, Appellee: SCOTT A. DIENES; AARON D. LINDSTROM.

For ORONOKO CHARTER TOWNSHIP, Appellant: CRAIG R. NOLAND.

Judges: Before: RICK, P.J., and JANSEN and LETICA, JJ.

Opinion

PER CURIAM.

In this special land-use zoning action, defendant, Oronoko Charter Township, appeals as of right the circuit court order regarding plaintiffs', Lakeview Vineyards, LLC, and Daniel Nitz (together, Lakeview),[1] special land-use application to add a tasting room to Chill Hill Winery. The circuit court's order affirmed the Township's grant of the special land-use application and struck the hours-of-operation and sound conditions imposed. We affirm.

I. FACTUAL BACKGROUND

This case arises out of Lakeview's special land-use request to open a tasting room at Chill Hill Winery. Throughout the administrative process regarding this request, Jeffery Lemon—a planning commission board member and owner of a winery that is a direct competitor to Lakeview—was involved in meetings and discussions pertaining to the special conditions ultimately imposed. Lemon recused himself before the final meeting and vote; however, after recusal, Lemon submitted a list of similarly situated **[*2]** tasting rooms and their hours of operations indicating that Lakeview's proposed hours of operations were not in line with the Lake Michigan Shore Wine Trail wineries.

The land-use request was ultimately granted by a unanimous vote with a list of conditions—including hours-of-operation and sound conditions. Lakeview appealed the Township's decision to the circuit court, arguing that it deprived Chill Hill of an impartial decision-maker, and was not based on competent, material, and substantial evidence. The circuit court found that the planning commission did not incorporate a statement of findings and conclusions specifying the basis for the conditions imposed, or follow proper procedure. The circuit court affirmed

[1] Nitz is the CEO of Chill Hill Winery, which is presumably part of Lakeview Vineyards.

the Township's grant of the special land-use application and struck the hours-of-operation and sound conditions involved. This appeal followed.

II. STANDARD OF REVIEW

"With respect to this Court's review of the circuit court's examination of agency action, we must determine whether the circuit court applied correct legal principles and whether the circuit court misapprehended or grossly misapplied the substantial-evidence test in relation to the agency's factual findings." **[*3]** *Brang, Inc v Liquor Control Comm, 320 Mich App 652, 660; 910 NW2d 309 (2017)*. The substantial-evidence test is essentially the clear error standard of review. *Id.* "[A] finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made." *Boyd v Civil Serv Comm, 220 Mich App 226, 235; 559 NW2d 342 (1996)*. We give "great deference to a circuit court's review of the factual findings made by an administrative agency, but substantially less deference, if any, is afforded to the circuit court's decisions on matters of law." *Brang, 320 Mich App at 660-661*. "When there is sufficient evidence, a reviewing court may not substitute its discretion for that of the administrative tribunal, even if the court might have reached a different result." *McBride v Pontiac Sch Dist, 218 Mich App 113, 123; 553 NW2d 646 (1996)*.

III. AUTHORIZED BY LAW

The Oronoko Charter Township Zoning Ordinance 18.02(E) states that "[a] decision or condition related to a special use application may not be appealed to the Zoning Board of Appeals." In *Carleton Sportsman's Club v Exeter Twp, 217 Mich App 195, 200; 550 NW2d 867 (1996)*, this Court determined that when "a township zoning ordinance does not provide for review of a request for a special land-use permit by a zoning board of appeals, the township board's decision is final and subject to appellate review by the circuit court pursuant to *Const 1963, Art 6, § 28*." *Article 6, § 28 of the Michigan Constitution* states, in pertinent part:

> All final decisions, findings, rulings **[*4]** and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.

Furthermore, because the Oronoko Charter Township Zoning Ordinance does not provide for review of a request for a special land-use permit by a zoning board of appeals, the decision in this case was also reviewable under *MCR 7.122(G)(2)*. "In an appeal from a final determination under a zoning ordinance where no right of appeal to a zoning board of appeals exists, the court shall determine whether the decision was authorized by law and the findings were supported by competent, material, and substantial evidence on the whole record." *MCR 7.122(G)(2)*.

However, in this case, the circuit court determined that, because *Const 1963, Art 6, § 28* states that "***as a minimum***, the determination whether such final decisions, findings, rulings **[*5]** and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record," it was "not precluded from ensuring the [Township's] decision was based on proper procedure, beyond that consistent with procedural due process, and was a reasonable exercise of discretion under applicable law." (Emphasis added.) Because "[a]n agency decision is not authorized by law if it violates constitutional or statutory provisions, lies beyond the agency's jurisdiction, follows from unlawful procedures resulting in material prejudice, or is arbitrary and capricious," *Dearborn Hts Pharmacy v Dep't of Health & Human Servs, 338 Mich App 555, 559; 980 NW2d 736 (2021)* (quotation marks and citation omitted), we agree that whether the planning commission followed proper procedures while making its decision was a relevant and appropriate consideration for the circuit court—and now this Court—to consider on appeal.

The Township first argues that the planning commission's decision was authorized by law. Before the planning commission's findings may be considered for their substance, it is important to determine whether sufficient findings were even made. MCL 125.3502(4) states:

> The body or official designated to review **[*6]** and approve special land uses may deny, approve, or approve with conditions a request for special land use approval. The decision on a special land use shall be incorporated in a statement of findings and conclusions relative to the special land use which specifies the basis for the decision and any conditions imposed.

In this case, the circuit court found that the planning commission did not comply with MCL 125.3502(4) because "[a]lthough much discussion was had at the hearings on [Lakeview's] application, the evidentiary basis for the hours-of-operation and sound conditions was not specified."

A county board speaks through its official minutes and resolutions. 46th Circuit Trial Court v Crawford Co, 266 Mich App 150, 161; 702 NW2d 588 (2005), rev'd in part on other grounds 476 Mich 131; 719 N.W.2d 553 (2006). However, in Reenders v Parker, 217 Mich App 373, 378-379; 551 NW2d 474 (1996), this Court explained that

> [m]eaningful judicial review of whether there was competent, material, and substantial evidence on the record to support a zoning board decision requires "a knowledge of the facts justifying the board's . . . conclusion." Tireman-Joy-Chicago Improvement Ass'n v Chernick, 361 Mich 211, 219; 105 NW2d 57 (1960). Accordingly, "the board of zoning appeals must state the grounds upon which it justifies the granting of a variance." *Id.* It is insufficient for the zoning board to merely repeat the conclusionary language of the zoning ordinance without specifying **[*7]** the factual findings underlying the determination that the requirements of the ordinance were satisfied in the case at hand.

In this case, the planning commission merely stated that Lakeview "adequately answered the questions," "completed the application (according to Zoning Ordinance 18.02)[,] and paid all fees." Therefore, the planning commission did not make any factual findings underlying its determination that the ordinance was satisfied. See Reenders, 217 Mich App at 379. During the meetings involving the special land-use request, there were discussions regarding why sound and hour conditions should be implemented; however, those discussions consisted of statements made by individuals, not the board as a whole. For example, although noise complaints were mentioned, no specific instances, nor comprehensive data, were introduced on the record to support the sound conditions. Therefore, because the planning commission did not incorporate a statement of findings or conclusions specifying the basis for the conditions imposed, it did not comply with MCL 125.3502(4).

Despite determining that there were insufficient findings made by the planning commission, the circuit court went on to specifically find that there was insufficient **[*8]** evidence of noise complaints to justify the sound conditions imposed, and "the list of similar businesses and their hours provided by Lemon, a competitor of [Lakeview], was, by its nature, selective and incomplete, and so did not constitute substantial and competent evidence."

"When reviewing whether an agency's decision was supported by competent, material, and substantial evidence on the whole record, a court must review the entire record and not just the portions supporting an agency's findings." Huron Behavioral Health v Dep't of Community Health, 293 Mich App 491, 497; 813 NW2d 763 (2011) (quotation marks and citation omitted). "Substantial evidence is that which a reasonable mind would accept as adequate to support a decision, being more than a mere scintilla, but less than a preponderance of the evidence. Evidence is competent, material, and substantial if a reasoning mind would accept it as sufficient to support a conclusion." Lawrence v Mich Unemployment Ins Agency, 320 Mich App 422, 431; 906 NW2d 482 (2017) (quotation marks and citations omitted). "If there is sufficient evidence, the circuit court may not substitute its judgment for that of the agency, even if the court might have reached a different result." VanZandt v State Employees' Retirement Sys, 266 Mich App 579, 584; 701 NW2d 214 (2005).

Because the planning commission failed to make proper findings and conclusions supporting the conditions imposed, there were no findings for **[*9]** the circuit court to appropriately consider. Based on this arbitrary action by

the planning commission, without any analysis as to its reasoning, the circuit court's removal of the conditions was appropriate. Moreover, we cannot conclude that the circuit court clearly erred in its findings that the conditions were not justified based on the record as a whole.

IV. LEMON'S INVOLVEMENT

The Township next argues that the planning commission followed proper procedure. Lakeview argued that it was deprived of an impartial decision-maker because despite having a clear conflict of interest, Lemon participated in multiple meetings and discussions regarding Lakeview's special land-use application. In response, the Township argued that the planning commission complied with the law when Lemon recused himself and abstained from voting.

"The *Fourteenth Amendment to the United States Constitution* and the *Const. 1963, art. 1 § 17* guarantee that no state shall deprive any person of life, liberty or property, without due process of law." *People v Sierb, 456 Mich 519, 522; 581 NW2d 219 (1998)* (quotation marks omitted). Procedural due process ensures that when a "government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner." *United States v Salerno, 481 U.S. 739, 746; 107 S Ct 2095; 95 L Ed 2d 697 (1987)*. "Due process in **[*10]** civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker." *Hinky Dinky Supermarket, Inc v Dep't of Community Health, 261 Mich App 604, 606; 683 NW2d 759 (2004)* (quotation marks and citation omitted).

"The term 'property,' as used in the due process clause, refers to vested rights. It has no reference to mere concessions or privileges which a state or municipality may control, and bestow or withhold at will." *Sherwin v Mackie, 364 Mich 188, 200; 111 NW2d 56 (1961)* (quotation marks and citation omitted). Because this case involves a special land-use request—in which the Township planning commission had discretion in approving—Lakeview does not have a vested property right nor an entitlement to procedural due process. Therefore, Lakeview's argument that it was deprived its due-process right of an impartial decision-maker lacks merit.

The *Michigan Planning Enabling Act, MCL 125.3801 et seq.*, states, in relevant part, that

> [b]efore casting a vote on a matter on which a member may reasonably be considered to have a conflict of interest, the member shall disclose the potential conflict of interest to the planning commission. The member is disqualified from voting on the matter if so provided by the bylaws or by a majority vote of the remaining members of the planning commission. Failure of a member to disclose **[*11]** a potential conflict of interest as required by this subsection constitutes malfeasance in office. [*MCL 125.3815(9)*.]

In this case, Lemon voluntarily recused himself, and did not vote on the special land-use request; therefore, there was no malfeasance under *MCL 125.3815(9)*. However, Lakeview argued, and the circuit court found, that the "Planning Commission did not follow proper procedure in adding the hours and sound condition because Chairman Lemon, a competitor of [Lakeview], was directly involved in generating those conditions."

"An agency decision is not authorized by law if it violates constitutional or statutory provisions, lies beyond the agency's jurisdiction, *follows from unlawful procedures resulting in material prejudice*, or is arbitrary and capricious." *Dearborn Hts Pharmacy, 338 Mich App at 559* (quotation marks and citation omitted; emphasis added). Lemon was associated with Lemon Creek Winery, which was located 2,099 feet from Chill Hill Winery. Lemon was aware that Lemon Creek Winery and Chill Hill Winery were both members of the Lake Michigan Shore Wine Trail. Therefore, as a direct competitor, Lemon had a direct pecuniary interest in Lakeview's special land-use request.

Despite this conflict of interest, Lemon acted as the chair of the **[*12]** July 6, 2021 planning commission meeting, during which Lakeview's special land-use request was first discussed, and a board member recommended that Lakeview "keep noise in mind for the public hearing." Similarly, Lemon acted as the chair of the August 17, 2021 planning commission meeting, during which Lemon participated in discussions about appropriate closing times and noise concerns. At this meeting, other board members mentioned the issues that the Township had regarding noise

complaints and actively questioned Lakeview about its hour and sound concerns. One board member even stated that the planning commission "should be consistent with all tasting rooms hours to treat everyone the same." The circuit court found that Lemon also participated in a subcommittee meeting at which the hour and sound conditions were drafted and proposed; however, there is no direct evidence included in the record indicating whether Lemon attended this subcommittee meeting.

On August 20, 2021, Lemon formally recused himself "from all discussion and decisions" related to Lakeview's special land-use application. However, on August 23, 2021, Lemon sent two board members an e-mail indicating his recusal, stating **[*13]** "I am good with whatever if any conditions the Planning Commission puts on the request." Attached to Lemon's e-mail was a statement that said, "I believe Lakeview Vineyards (Chill Hill's) request for tasting room hours of operation are not in line with the wineries [not legible] Southwest MI nor the [Lake Michigan Shore Wine Trail] wineries," and a list of tasting room hours for current and past Lake Michigan Shore Wine Trail wineries. Lakeview also provided a list of "similar businesses with mixed/beer/wine/spirits" and "wineries" as well as their corresponding business hours.

On October 5, 2021, a continued hearing regarding Lakeview's special land-use request was held. Lemon acted as the chair for this meeting, but before the issue of Lakeview's special land-use request was discussed, Lemon recused himself "[d]ue to a conflict of interest."

When viewing the evidence as a whole, we cannot conclude that Lemon followed proper procedures. He was the owner of a neighboring winery in direct competition with Chill Hill. Lemon was heavily involved in Lakeview's application process before his recusal. And after his recusal, he still sent the list of similar businesses and their corresponding **[*14]** hours and other correspondence. Although Lemon did not take part in the final vote, his involvement before and after his recusal likely materially prejudiced the planning commission's procedures against Lakeview.

Agencies are made up of "local residents who reside in the township and who possess a much more thorough knowledge of local conditions, current land uses, and the manner of future development desirable for those who reside in the township." *Szluha v Avon Charter Twp, 128 Mich App 402, 410; 340 NW2d 105 (1983)*.[2] "Those serving as adjudicators are presumed to act with honesty and integrity in the absence of evidence showing that the circumstances pose 'such a risk of actual bias or prejudgment that the practice must be forbidden . . . .'" *Hughes v Almena Twp, 284 Mich App 50, 72; 771 NW2d 453 (2009)* (citation omitted). Although there is no evidence indicating that the board members were biased or unfairly allowed Lemon Creek Winery any business advantages, we cannot conclude that the circuit court erred when it determined that the planning commission heard and relied on information and opinions provided by Lemon, and "cannot now 'unring the bell.'" Because the planning commission failed to follow proper procedure based on Lemon's improper involvement, the circuit court's decision to strike the hours-of-operation **[*15]** and sound conditions was appropriate.

V. REMEDY

Lastly, the Township argues that if we conclude that the record was inadequate or that the planning commission failed to comply with the law, then the appropriate remedy is to remand to the planning commission. The circuit court found that the planning commission did not incorporate a statement of findings and conclusions specifying the basis for the conditions imposed, or follow proper procedure. Instead of remanding this case to the planning commission, the circuit court affirmed the Township's grant of the special land-use application and struck the hours-of-operation and sound conditions involved.

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[2] Court of Appeals cases decided before November 1, 1990, are not binding. ***MCR 7.215(J)(1)***. Although this Court is not "***strictly required*** to follow uncontradicted opinions from this Court decided before November 1, 1990," those opinions are "nevertheless considered to be precedent and entitled to significantly greater deference than are unpublished cases." *Woodring v Phoenix Ins Co, 325 Mich App 108, 114-115; 923 NW2d 607 (2018)*.

Lakeview argues that MCL 125.3606 allows the circuit court to "affirm, reverse, or *modify* the decision of the zoning board of appeals." (Emphasis added.) However, as previously discussed, because Oronoko Charter Township Zoning Ordinance 18.02(E) does not provide for review of a request for a special land-use permit by a zoning board of appeals, the decision in this case was reviewable by the circuit court under Const 1963, art 6, § 28 and MCR 7.122(G)(2), not MCL 125.3606. See MCR 7.122(G)(1), MCL 125.3606(1), and Carleton Sportsman's Club, 217 Mich App at 200. Both Const 1963, art 6, § 28 and MCR 7.122(G)(2) require the circuit court to determine whether the planning commission decision was authorized **[*16]** by law. An agency's decision is not authorized by law if it violates a statute or follows from unlawful procedure resulting in material prejudice. Dearborn Hts Pharmacy, 338 Mich App at 559. Because the planning commission failed to provide findings and conclusions in violation of MCL 125.3502, and its decision followed unlawful procedure resulting in material prejudice from Lemon's improper involvement, the circuit court properly removed the conditions, and a remand to the planning commission is not necessary.

Affirmed.

/s/ Michelle M. Rick

/s/ Kathleen Jansen

/s/ Anica Letica

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EXHIBIT W

City of Detroit v. City of Highland Park

Court of Appeals of Michigan

August 18, 2022, Decided

No. 357040

Reporter
2022 Mich. App. LEXIS 4949 *; 2022 WL 3567962

CITY OF DETROIT and DETROIT WATER AND SEWERAGE DEPARTMENT, Plaintiffs/Counterdefendants-Appellants, v CITY OF HIGHLAND PARK, Defendant/Counterplaintiff/Third-Party Plaintiff-Appellee, and GREAT LAKES WATER AUTHORITY, Third-Party Defendant-Appellant.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Reconsideration denied by *City of Detroit v. City of Highland Park, **2022** Mich. App. LEXIS 5821 (Mich. Ct. App., Sept. 28, **2022**)*

Leave to appeal denied by *City of Detroit v. City of Highland Park, 2023 Mich. LEXIS 476, 2023 WL 2775908 (Mich., Apr. 4, 2023)*

Prior History: **[*1]** Wayne Circuit Court. LC **No**. 14-001974-CK.

City of Detroit v. City of Highland Park, 2021 Mich. App. LEXIS 3270 (Mich. Ct. App., May 25, 2021)

Counsel: For CITY OF DETROIT, DETROIT WATER AND SEWERAGE DEPARTMENT, Plaintiffs-Counterdefendants-Appellants: MARY MASSARON.

For CITY OF HIGHLAND PARK, Defendant-Counterplaintiff-Third-Party Plaintiff-Appellee: JEFFREY MICHAEL THOMSON.

For GREAT LAKES WATER AUTHORITY, Third-Party Defendant-Appellant: MARY MASSARON.

Judges: Before: GADOLA, P.J., and CAVANAGH and K. F. KELLY, JJ.

Opinion

PER CURIAM.

This case arises out of a long-running dispute between defendant, city of Highland Park (Highland Park) and plaintiffs, city of Detroit and Detroit Water and Sewerage Department (DWSD, and collectively referred to as "Detroit"), and third-party defendant, Great Lakes Water Authority (GLWA), over Highland Park's failure to pay for water and sewer services. In this current matter, Detroit and GLWA appeal as of right, challenging the February 26, 2021 and March 23, 2021 orders entering judgment in favor of Highland Park. We vacate the February 26, 2021 order granting Highland Park's motion for entry of judgment and the March 23, 2021 order of dismissal, and remand for reinstatement—and enforcement—of the April 30, 2015 judgment in favor of Detroit, entered on the trial court's July **[*2]** 31, 2014 opinion and order.

I. INTRODUCTION

For several decades, Detroit has sought to collect payment from Highland Park for water and sewage services. These efforts have given rise to actions in both the federal and state courts. Indeed, in November 2016, this Court affirmed an approximately $20 million judgment in Detroit's favor (the "2015 judgment"). *City of Detroit v City of Highland Park, unpublished per curiam opinion of the Court of Appeals, issued November 15, 2016 (**Docket No**. 327448), 2016 Mich. App. LEXIS 2080*. This prior appeal is inextricably intertwined with the issues in the current appeal. Thus, it is necessary to briefly review the history of water and sewage service transactions between Highland Park and Detroit to properly understand the issues raised in this appeal.

II. FACTUAL BACKGROUND AND PROCEEDINGS

A. THE 2015 JUDGMENT AND PRIOR APPEAL IN **DOCKET NO**. 327448

Detroit, through the DWSD, has provided water and sewage treatment services to the residents of Highland Park since 1926. In the ensuing years, disputes arose related to Highland Park's failure to pay its water and sewer bills. Detroit asserts that, despite a 1996 Settlement Agreement, Highland Park has had a "chronic problem paying its **[*3]** charges for sewage treatment services timely and in full."

On February 18, 2014, Detroit sued Highland Park in the Wayne Circuit Court, seeking to recover millions of dollars in fees allegedly owed for water and sewage treatment services. In its March 3, 2014 amended complaint, Detroit alleged that under the terms of a 1996 settlement agreement, Highland Park agreed to, among other things, keep its sewer bills current. Detroit's complaint further asserted that Highland Park failed to comply with a 1983 Sewage Service Contract, which required that Highland Park "pay the Board for sewage treatment and disposal service at such rates as the Board may establish from time to time." Detroit also alleged that Highland Park failed to comply with a 2009 agreement that was negotiated in an attempt, at that time, to address the then-outstanding debt. Detroit's complaint asserted that because Highland Park failed to comply with its contractual obligations, it had accrued more than $17,000,000 in water bill arrearages. Detroit's amended complaint alleged theories sounding in breach of contract (Count I), breach of implied contract (Count II), quantum meruit (Count III), account stated (Count IV), **[*4]** and conversion (Count V).

On March 11, 2014, in addition to filing its answer, Highland Park filed a countercomplaint for declaratory relief in which it alleged that under the 1996 settlement agreement, its only obligation was to collect money from the users or city property owners at a rate of $22 kcf to pay for sewer services, place into escrow a percentage of the amounts received, and to the extent that money was received, disperse those funds monthly to Detroit. Highland Park alleged that the agreement created a payment obligation secured by sewer user fees and a rate increase covenant, but it did not require Highland Park to guarantee collections. Highland Park asserted that it, as a city, was not responsible for subsidizing the sewer users. Highland Park specifically alleged that "the only source of payment for water and sewer services is the escrow account Detroit [sic] has **no** further recourse, and therefore may not seek judgment against any other funds of the City of Highland Park." By its countercomplaint, Highland Park sought an order declaring "that the parties' respective rights, as contained in the 1996 Settlement Agreement and the Amended Consent Judgment, are in full **[*5]** force and effect." Specifically, Highland Park sought a declaration that its obligations to Detroit were limited to "depositing into said escrow account, on a daily basis, 65% of any and all amounts received by it in payment of bills for water or wastewater treatment services rendered by the City of Detroit and DWSD to its customers, and further that any and all amounts so deposited shall be held in trust solely for the benefit of the City of Detroit and shall be paid over to the City of Detroit through its Detroit Water and Sewerage Department (DWSD), on a monthly basis, on or before the 10th day of each month."

Between March and May of 2014, the parties filed cross-motions for summary disposition. On July 31, 2014, the trial court entered an opinion and order granting in part and denying in part the parties' motions. The court granted summary disposition in Detroit's favor on its breach of contract, breach of implied contract, and account stated claims. The court further concluded that because Detroit stated in writing an outstanding account, and Highland Park failed to object to the account within a reasonable time, Detroit had established a valid claim under an account

stated theory **[*6]** of liability.[1] After making these findings, the court concluded that because Detroit prevailed on the account stated count, judgment would be entered for the amount of the debt outstanding as of the date of the complaint.

Apparently, settlement negotiations transpired after the entry of the court's July 31, 2014 opinion and order, but then broke down. Consequently, on March 30, 2015, eight months after the entry of the court's summary disposition order, Detroit moved, pursuant to MCL 600.6093, for a certified transcript of partial judgment. MCL 600.6093 governs the collection of judgments against townships, villages, cities, or counties, and provides, among other things, that when a party obtains a money judgment against a municipality, the party has the right to take the judgment to the "supervisor" or "assessing officer" of the municipality, who then shall enroll the judgment on the tax assessment rolls for collection from the taxpayers. MCL 600.6093(1). Highland Park objected to Detroit's motion, arguing that because the court's July 31, 2014 order was not a final judgment, Detroit's motion for issuance of a certified transcript was premature. Notably, Highland Park did not take the position that the judgment was not final **[*7]** because of its own allegedly outstanding counterclaim. Instead, it argued that the judgment was not final because the court only granted Detroit judgment on one of its claims. Highland Park noted that Detroit's other theories had yet to be adjudicated.

At a hearing on April 24, 2015, the court considered and granted Detroit's motion for a certified transcript. The court noted that the primary reason for granting summary disposition in Detroit's favor was the validity of the account stated claim. It therefore held that for purposes of finality, Detroit was entitled to the amounts alleged in the complaint. On April 30, 2015, the trial court, sua sponte, entered an order entitled: "Judgment on July 31, 2014 Opinion and Order." By this order, the court incorporated by reference its July 31, 2014 order granting summary disposition in Detroit's favor, and further ordered that judgment now be entered in Detroit's favor in the amount of $19,244,838.53. The court's order also directed that the judgment and its July 31, 2014 order "may be submitted to the Wayne County Clerk as the transcript of the judgment and to be certified pursuant to MCL 600.6093."

After the court entered the April 30, 2015 judgment, **[*8]** Highland Park filed an emergency motion to stay execution on any judgment that might be pursued under MCL 600.6093, until the court heard its motion for judgment relief. Highland Park then addressed one of the issues it had raised in its still-pending motion for relief from judgment, namely, that if MCL 600.6093 required the city assessor to impose an ad valorem tax on the property owners of Highland Park, imposition of such a tax would violate § 204(b) of the Clean Water Act, 33 USC 1284(b). Highland Park's motion for judgment relief was heard and denied on May 15, 2015. Finally, the court found unpersuasive Highland Park's argument that use of the statutory remedy to collect on the judgment by placing it on the tax rolls was improper.

On May 18, 2015, Highland Park filed a claim of appeal in this Court in **Docket No**. 327448. On November 15, 2016, this Court affirmed the April 30, 2015 judgment in favor of Detroit. This Court stated that the only preserved and properly presented issue was whether Detroit could collect its judgment against Highland Park under MCL 600.6093. This Court found that although Highland Park had initially attempted to expand the scope of its appellate issues to include an attack on the validity of the judgment, it abandoned those **[*9]** efforts and only challenged on appeal Detroit's ability to collect on the judgment. *City of Detroit v City of Highland Park*, unpublished per curiam opinion of the Court of Appeals, issued November 15, 2016 (**Docket No** 327448), p 1. This Court then rejected Highland Park's argument that enforcement of Detroit's judgment under MCL 600.6093 would impose an ad valorem tax in violation of provisions of the Clean Water Act, 33 USC 1284. This Court concluded that Highland Park's interpretation of the statute was inconsistent with the statute's plain language. *Id.*, unpub op at 2-4. On January 25, 2017, this Court denied Highland Park's motion for reconsideration. Thereafter, our Supreme Court

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[1] MCL 600.2145 sets forth Michigan's account stated procedures. This statute, in general, permits a plaintiff to file and serve on a defendant an affidavit of the amount due with a copy of the account attached, together with the complaint. This affidavit is then deemed prima facie evidence of the debt unless the defendant files an affidavit denying the indebtedness with its answer.

denied Highland Park's application for leave to appeal and also denied a later motion for reconsideration. *City of Detroit v City of Highland Park, 501 Mich 861; 900 N.W.2d 887*, reh den *501 Mich 930, 903 N.W.2d 569 (2017)*.

B. EVENTS FOLLOWING 2015-2016 APPEAL

In May 2017, while leave was pending in the Supreme Court, Highland Park filed a motion in the trial court seeking summary disposition on its countercomplaint. The trial court deferred ruling on the motion until the appeal process concluded. After the Supreme Court denied leave in the prior appeal, Detroit filed a motion for issuance of a certified transcript of partial judgment. The certified transcript was **[*10]** necessary to enable Detroit to enforce, under *MCL 600.6093*, the court's earlier 2015 judgment. In addition, Detroit argued that because of the passage of time, the judgment should be amended to include all accrued postjudgment interest through October 31, 2017. The trial court granted Detroit's motion and issued an amended judgment for Detroit in an amount of over $21 million. The court's order indicated that the amended judgment could be submitted to the clerk to be certified pursuant to *MCL 600.6093* and if Highland Park failed to act under the statute, Detroit "shall commence a separate action requesting a writ of mandamus."

In the months that followed, Highland Park filed several motions attempting to challenge the 2015 judgment, as amended in December 2017. On December 20, 2017, Highland Park filed a motion for relief from judgment. On January 5, 2018, it filed a motion to set aside the partial summary disposition order dated July 31, 2014, and on January 11, 2018, it filed a motion seeking, in part, to stay execution of the order granting Detroit partial summary disposition pending final judgment. At a hearing on February 12, 2018, the trial court commented on the finality of the 2015 judgment, but acknowledged **[*11]** the possibility that the amounts owed to Detroit could be reduced should Highland Park prevail on any of the claims set forth in its countercomplaint. The court's ensuing order, addressing the three Highland Park motions, essentially stayed execution of the 2015 judgment until litigation concluded on Highland Park's countercomplaint.[2]

On August 23, 2019, Detroit filed a motion requesting that the court hold a scheduling conference, noting that since the appeals had concluded, **no** final scheduling order had been put in place. The trial court granted the motion and further ordered that discovery would be open on Highland Park's countercomplaint until February 15, 2020, and thereafter, the matter would be submitted for case evaluation in March 2020.

On August 11, 2020, the parties participated in case evaluation. The case-evaluation panel issued two awards. In Award #1, the panel awarded $1 million in Highland Park's favor. For Award #2, the panel awarded nothing to Highland Park on its third-party complaint against GLWA. Notably, in the "notes" section of the award, the panel made the following entry: "City of Highland Park (Counter-Plaintiff) v City of Detroit (Counter-Defendant)." The **[*12]** parties have interpreted the nature of these awards differently. Detroit asserts that the case-evaluation panel did not consider or intend to make any modifications to the 2015 judgment in Detroit's favor. Detroit takes the position that the panel's decision simply represented an award of $1 million in favor of Highland Park on its counterclaim that it was overcharged for utility services. By contrast Highland Park asserts that the panel's decision accounted for the 2015 judgment in Detroit's favor, considered Highland Park's counterclaims, and the resulting $1 million award represented what was left after an award for Highland Park was used to set off the $20 million judgment in Detroit's favor.

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[2] On April 19, 2018, Detroit filed an application for leave to appeal the trial court's March 28, 2018 order. Detroit asserted that the trial court erred by staying execution on the 2015 judgment, arguing that Highland Park was precluded, under the doctrine of judicial estoppel, from asserting that the 2015 judgment was not final. It further asserted that there was **no** basis to stay execution of a judgment entered in 2015 and reaffirmed in 2017. In response, Highland Park argued, among other things, that the litigation brought by Detroit never resolved overcharges regarding sewer services. Further, Highland Park asserted that because it never took the position that the previous appeal foreclosed seeking a judgment on its counterclaim, judicial estoppel should not apply. This Court denied Detroit's application for "failure to persuade the Court of the need for immediate appellate review," and our Supreme Court denied leave to appeal on December 4, 2018. *City of Detroit v City of Highland Park*, unpublished order of the Court of Appeals, entered July 19, 2018 (**Docket No**. 343405), lv den 503 Mich 916 (2018).

Highland Park's interpretation of the case-evaluation award is not consistent with affidavits submitted by the case evaluators. All three evaluators signed affidavits attesting that (1) the parties stated in their summaries that the only claims remaining were Highland Park's counterclaim against Detroit and its third-party complaint against GLWA, and (2) Highland Park requested that the case evaluators only evaluate these two claims. The case evaluators stated that they were not convinced that **[*13]** Highland Park could establish that its claims exceeded Detroit's 2015 judgment. Of particular importance, the evaluators indicated that their intent was that the $1 million award, if accepted by both parties, would be an offset to Detroit's "much larger judgment." The evaluators further stated that they had not been asked to evaluate "Detroit's prior monetary judgment." Indeed, the evaluators stated that they had never served on a panel that had been asked to vacate, void, or undo an existing monetary judgment. Finally, the evaluators stated that they did not expect or intend that their award, if accepted by both parties, would invalidate or void the 2015 judgment.[3]

After the case-evaluation award was issued, but apparently before all parties had responded to the award, Detroit filed a motion seeking a declaration that Highland Park's counterclaim and third-party claim operated solely as a setoff against the judgment that was entered in 2015 in Detroit's favor, and later amended in 2017. Detroit asserted that its 2015 judgment could not and was not submitted for case evaluation. It then reasoned that if both sides accepted the case-evaluation **[*14]** results, any judgment in favor of Highland Park would simply be subtracted from the outstanding amount Highland Park owed under the 2015 judgment. Detroit reasoned that the court and all of the parties had been operating under this assumption already. Indeed, in their case-evaluation summaries, both Detroit and Highland Park argued that any award in Highland Park's favor would then be applied to offset the amounts owed under the 2015 Judgment. Highland Park opposed Detroit's motion, arguing that Detroit's claims against Highland Park were submitted for case evaluation. It then reasoned that Detroit's "partial judgment" was not a final judgment, and therefore, was subject to revision. In this regard, Highland Park asserted that the case-evaluation panel must have agreed that Highland Park paid Detroit more than the maximum amount Detroit was permitted to charge Highland Park under the contract and that the panel awarded Highland Park a portion of the $11.5 million refund that Highland Park's counterclaim sought. Highland Park argued that all claims are submitted to case evaluation unless there is a court order specifically and expressly exempting certain equitable claims from case evaluation. **[*15]** Highland Park then asserted that if both it and Detroit accepted the award, then the entire action would be over and a final judgment in the amount of $1 million would be entered in Highland Park's favor. Highland Park asserted that Detroit was simply attempting to rewrite the case-evaluation panel's award.

On September 30, 2020, the trial court entered an order denying Detroit's motion for a declaration that Highland Park's pending claims would operate solely as a setoff against Detroit's 2015 judgment as amended. In its order, the court simply noted that "Highland Park's claims may exceed the prior judgment amount."

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[3] On June 11, 2021, Highland Park filed in this Court a motion to strike Detroit's response to its motion to dismiss. Highland Park asserted that Detroit had included in its response confidential documents related to the case-evaluation proceedings in violation of MCR 2.403, MCR 2.412, and MCL 691.1557. This Court directed the Clerk to seal the case-evaluation documents attached to Detroit's response. *City of Detroit v City of Highland Park*, unpublished order of the Court of Appeals, entered July 27, 2021 (**Docket No. 357040**). However, we conclude that it is permissible for this Court to consider the case-evaluation summaries and the evaluators' affidavits. A court may consider what was discussed in case evaluation to determine whether an issue was decided on the merits. *Amburgey v Sauder, 238 Mich App 228, 247-248; 605 NW2d 84 (1999)*. Further, neither MCR 2.403(J)(4) nor MCL 691.1557 precludes consideration of an evaluator's affidavit. MCR 2.403(J)(4) provides that "statements by the attorneys and the briefs or summaries are not admissible in any court or evidentiary proceeding." This court rule does not specifically prohibit the submission of affidavits like the ones Detroit filed in this case. MCL 691.1557(1) provides that "the work product and case files of a mediator or center and communications relating to the subject matter of the dispute *made during the dispute resolution process* by a party, mediator, or other person are confidential and not subject to disclosure in a judicial or administrative proceeding except for either of the following . . . ." (Emphasis added.) An affidavit generated after the fact does not fall within the provisions of MCL 691.1557. Further, considering the affidavits is not inconsistent with MCR 2.403(J)(5), which provides, in pertinent part: "After the evaluation, the case evaluators need not respond to inquiries by parties or counsel regarding the proceedings or the evaluation." This language provides that case evaluators are not obligated to respond to inquiries after the fact, but does not prohibit them from doing so.

Both Detroit and Highland Park accepted the $1 million case-evaluation award. GLWA did not respond to this award, so it was deemed to have rejected the $1 million award. However, GLWA did accept the award of $0 on Highland Park's third-party complaint against GLWA.

On October 9, 2020, Highland Park filed a motion for entry of judgment in which it argued that after the case-evaluation panel awarded Highland Park $1 million, and both parties accepted the award, this resolved both Detroit's principal case and Highland Park's counterclaim. Relying on *MCR 2.403(M)*, Highland Park asserted **[*16]** that judgment must be entered in its favor and the matter dismissed in its entirety. In their response, Detroit, GLWA, and DWSD requested that the court deny Highland Park's motion. Detroit again argued that the case-evaluation panel did not adjudicate or "net-out" the value of the 2015 judgment because the judgment was **no** longer a "claim" subject to case evaluation. Detroit argued that the panel only evaluated Highland Park's counterclaim. It then reasoned that because both parties accepted this amount, the $1 million would be a setoff against the 2015 judgment, and judgment should be entered accordingly.

On February 26, 2021, the trial court granted Highland Park's motion for entry of judgment. The court held that Detroit's and Highland Park's claims and counterclaims were disposed of by the case-evaluation award and, because both parties accepted the award of $1 million, Highland Park was entitled to entry of judgment in its favor. The court specifically held that "[n]otwithstanding Detroit's assertion that the case-evaluation summary indicates that the evaluation did not include Detroit's claims against Highland Park, this assertion is contrary to law as to *MCR 2.403* and contrary to case **[*17]** law." The court found that "[t]he issue of whether case evaluation resolved all claims between Detroit and Highland Park, including Detroit's original 2014 complaint and Highland Park's countercomplaint was actually argued in case evaluation." Consequently, the court's order, among other things, vacated the 2015 judgment in Detroit's favor and ordered Detroit to pay $1 million to Highland Park.

On March 19, 2021, Detroit filed a motion for reconsideration, relief from judgment, or to set aside the acceptance of the case-evaluation award. Detroit argued that entry of judgment in Highland Park's favor was in error because the court erroneously found that the single case-evaluation award for $1 million on Highland Park's counterclaim against Detroit subsumed Detroit's adjudicated claims and wiped out of existence Detroit's $20 million 2015 judgment against Highland Park. While Detroit's postjudgment motion was pending, the court entered an order of dismissal on March 23, 2021. Thereafter, on April 13, 2021, the court denied Detroit's motion for reconsideration.

On April 30, 2021, Detroit and GLWA filed their claim of appeal. A stay of proceedings was entered by the trial court on July 6, **[*18]** 2021. On May 11, 2021, Highland Park filed in this Court a motion to dismiss for lack of jurisdiction. Highland Park argued that the claim of appeal was not timely filed and, in any event, there was **no** jurisdiction because Detroit was not an aggrieved party since judgment entered after the parties' mutual acceptance of a case-evaluation award. On July 27, 2021, this Court denied Highland Park's motion to dismiss for failure to persuade the Court that it was without jurisdiction, but directed the parties to address the jurisdictional issues in their briefs on appeal. *City of Detroit v City of Highland Park*, unpublished order of the Court of Appeals, entered July 27, 2021 (**Docket No**. **357040**).

III. DISCUSSION OF THE ISSUES

A. JURISDICTION

Before addressing the merits of the appellate arguments of GLWA and Detroit, we must first address Highland Park's challenge to this Court's jurisdiction. "Whether this Court has jurisdiction to hear an appeal is always within the scope of this Court's review." *Chen v Wayne State Univ, 284 Mich App 172, 191; 771 NW2d 820 (2009)*. We review de novo as a question of law whether this Court has jurisdiction. *Id.*

Highland Park argues that this Court lacks jurisdiction to decide this appeal because the claim of appeal of GLWA and Detroit was untimely filed, and further, **[*19]** because they were not "aggrieved" parties. We conclude that Highland Park's jurisdictional challenges are without merit.

This Court has jurisdiction of an appeal as of right filed by an aggrieved party from a "final judgment or final order . . . ." MCR 7.203(A)(1). MCR 7.202(6)(a)(1) defines "final judgment" or "final order" in a civil case as "the *first* judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties . . . ." (Emphasis added.) An appeal by right must be taken within 21 days after entry of "the judgment or order appealed from," MCR 7.204(A)(1)(a), or within 21 days after entry of "an order deciding a post-judgment motion for new trial, rehearing, reconsideration, or other relief from the order or judgment appealed, if the motion was filed within the initial 21-day appeal period or within any further time that the trial court has allowed for good cause during that 21-day period," MCR 7.204(A)(1)(d).

We conclude that the trial court's February 26, 2021 order granting Highland Park's motion for entry of judgment qualifies as the final judgment in this case because it was the *first* order that disposed of all the claims. GLWA and Detroit timely filed a motion for reconsideration of this order **[*20]** on March 19, 2021. See MCR 7.204(A)(1)(d). The trial court entered an order denying this postjudgment motion on April 13, 2021. GLWA and Detroit filed their claim of appeal on April 30, 2021, which was timely filed within 21 days of the trial court's order denying their timely filed motion for reconsideration.

Highland Park asserts that the trial court's March 23, 2021 order of dismissal, not the February 26, 2021 order, constituted the final order in this case. We disagree. While the March 23, 2021 order disposed of all the claims, it was not the *first* order to do so. The March 23, 2021 order was simply a redundant order that had **no** bearing on the finality of the February 26, 2021 order.

A comparison of the two orders illustrates the finality of the February 26, 2021 order and the redundancy of the March 23, 2021 order. The February 26, 2021 order provided:

> IT IS ORDERED that the motion for entry of judgment filed by Defendant/Counter Detroit City of Highland Park is hereby GRANTED.
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> IT IS FURTHER ORDERED that the Court's 2015 judgment, as amended in 2017, is hereby VACATED;
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> IT IS FURTHER ORDERED THAT THE City of Detroit shall pay $1 million ($1,000,000) to the City of Highland Park;
>
> IT IS FURTHER ORDERED **[*21]** that this resolves the City of Detroit's complaint and the City of Highland Park's counter-complaint;
>
> IT IS FURTHER ORDERED that this does not resolve the merits of the City of Highland Park's third-party complaint against third-party Defendant Great Lakes Water Authority. That case will proceed with respect to the substance of the City of Highland Park's third-party complaint against Third-Party Defendant Great Lakes Water Authority;
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> IT IS FURTHER ORDERED the City of Highland Park is directed to submit an order of dismissal without prejudice regarding the third-party complaint. The city of Highland Park shall refile the third-party complaint as a counter claim/complaint in the matter of Great Lakes Water Authority vs City of Highland Park, 20-011589 CK.

By contrast, the March 23, 2021 order provided:

> On February 26, 2021, this Court entered an Opinion and Order Granting Defendant/Counter-Detroit, Highland Park's ("Highland Park"), Motion for Entry of Judgment (the "February 26th Order"). Among other things, the February 26th Order:
>
> (1) "[R]esolve[d] the City of Detroit's complaint and the City of Highland Park's counter-complaint";
>
> (2) Did "not resolve the merits of the City of Highland **[*22]** Park's complaint against Third-Party Defendant Great Lakes Water Authority"; and

> (3) Ordered that "the City of Highland Park is directed to submit an order of dismissal without prejudice regarding the third-party complaint. The City of Highland Park shall refile the third-party complaint as a counter claim/complaint in the matter of Great Lakes Water Authority vs City of Highland Park, 20-011589-CK."
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> On March 17, 2021, Highland Park refiled its third party claims against Third-Party Defendant, Great Lakes Water Authority ("GLWA") in Case **No**. 20-011589-CB.
>
> NOW, THEREFORE, IT IS HEREBY ORDERED that, Highland Park's Third-Party Complaint against GLWA shall be, and hereby is, dismissed without prejudice and without costs to any party.
>
> IT IS SO ORDERED.
>
> This is a final order under *MCR 2.602(B)(1)* that resolves the last pending claim and closes the case.

Both orders disposed of all of the claims in the case, but the February 26, 2021 order was the *first* to do so.

Highland Park contends that the February 26, 2021 order was not the final order because it did not resolve Highland Park's third-party complaint against GLWA. We disagree. The trial court's February 26, 2021 order disposed of the third-party complaint **[*23]** by directing Highland Park to dismiss the third-party complaint and refile it as a counterclaim in another matter. *MCR 7.202(6)(a)(i)* defines "final order" as "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties . . . ." The February 26, 2021 order did just that. After entry of this order, there was nothing left for the trial court to decide and it did not state that it was retaining jurisdiction. See *Rooyakker & Sitz, PLLC v Plante Moran, PLLC, 276 Mich App 146, 148 n 1; 742 NW2d 409 (2007)*. The fact that the court entered a second order on March 23, 2021, noting that Highland Park had actually complied with the court's earlier order related to dismissal of the third-party complaint against GLWA, is of **no** consequence. Accordingly, we reject Highland Park's assertion that Detroit's claim of appeal was not timely filed.

Highland Park alternatively argues that this Court lacks jurisdiction because judgment was entered after the mutual acceptance of a case-evaluation award and, as such, GLWA and Detroit could not be considered aggrieved parties within the meaning of *MCR 7.203(A)*. However, GLWA and Detroit disputed below that the case-evaluation award encompassed or affected the 2015 judgment in Detroit's favor. Moreover, as further discussed **[*24]** in this opinion, the matter was improperly submitted for case evaluation. By this appeal, GLWA and Detroit do not seek to appeal an earlier order that was absorbed into the case-evaluation award under *MCR 2.403(M)*. Instead, GLWA and Detroit appeal an order that addresses the parties' dispute over the interpretation and application of the case-evaluation award. Under these circumstances, GLWA and Detroit are aggrieved parties.

B. ABANDONMENT AND JUDICIAL ESTOPPEL

GLWA and Detroit argued below and argue now on appeal that—after this Court affirmed the 2015 judgment—the trial court erred when it reopened the case, ordered the parties to litigate Highland Park's countercomplaint, submitted the matter for case evaluation, and thereafter entered a judgment both vacating the 2015 judgment in Detroit's favor and ordering Detroit to pay Highland Park $1 million. We agree.

First, we agree that the trial court erred when it reopened the case to litigate Highland Park's counterclaim because the record clearly demonstrates that during the earlier appeal, Highland Park, in order to pursue an appeal as of right, unequivocally abandoned its counterclaim that it was overcharged for water and sewer services. Highland **[*25]** Park filed its claim of appeal in **Docket No**. 327448 on May 18, 2015. At that time, Highland Park represented that it was entitled to an appeal as of right because the April 30, 2015 judgment was a final order that disposed of all the claims and adjudicated the rights and liabilities of all the parties. Indeed, on May 27, 2015, this Court sent a defective holding letter to Highland Park questioning the finality of the order appealed in light of a statement in the trial court's April 30, 2015 judgment that "because a future settlement conference has been scheduled this order does not close the case under *MCR 2.603(A)(2)* [sic]." On June 24, 2015, Highland Park filed a statement with this Court regarding the finality of the April 30, 2015 order. Highland Park explained that the seemingly incongruous language in the court's order was included by the court simply to acknowledge that optional

facilitation might occur, but that the case was closed in the trial court. In support of this representation, Highland Park attached a copy of the Wayne County Register of Actions, which included a **docket** entry that the case was closed and the settlement conference was canceled. Highland Park never referenced a pending **[*26]** counterclaim.

Then, on December 1, 2015, Highland Park filed its brief on appeal in **Docket No**. 327448. The only issue addressed in this brief was related to Highland Park's assertion that if the judgment was permitted to be added to the city's tax rolls, it would amount to an ad valorem tax, which Highland Park asserted would be in violation of the federal *Clean Water Act*. On April 6, 2016, Highland Park filed in this Court a combined motion to amend its appellate brief and a motion to remand to the trial court. Highland Park specifically represented in this motion that the only issue remaining in the trial court involved the recurring charges still accruing. By this motion, however, Highland Park discussed a number of substantive issues that were not raised in its initial brief on appeal. Essentially, Highland Park wished to amend its brief on appeal to include arguments related to its claim that it was overcharged for water and sewer services. First, it argued that summary disposition was improperly granted in Detroit's favor because discovery was still open at the time of the summary disposition hearing. Highland Park asserted that if discovery had been allowed to continue, it would have revealed **[*27]** a "horrendous inaccuracy of the bill DWSD had attributed to Highland Park." Specifically, according to Highland Park, discovery would have allowed the parties to further explore the state's and Wayne County's liability for a portion of Highland Park's outstanding water bill. Highland Park requested that this Court permit it to amend its brief on appeal and that the case be remanded to the trial court. Highland Park reasoned that the judgment could not be allowed to stand because it was simply wrong considering that the largest amount of the judgment entered against Highland Park was rightfully the debt of Detroit's other water customers. In its motion to amend and remand, Highland Park also argued that Detroit did not comply with the billing process set forth in the relevant contract. This allegation, in particular, was directly encompassed by Highland Park's countercomplaint. Highland Park also challenged the trial court's ruling regarding the account stated claim and its finding that Highland Park never refuted the proffered account.

By correspondence dated April 8, 2016, the Clerk of this Court advised Highland Park that its combined motion to amend and motion to remand would only **[*28]** be considered as a motion to remand in light of this Court's policy prohibiting multiple motions in one filing. Highland Park was advised that it could refile, with the necessary filing fee, the other motion, i.e., the motion to amend its appeal brief. Highland Park did not pursue this avenue. That is, it never filed a separate motion to amend its brief on appeal.

The foregoing events demonstrate that in the earlier appeal, Highland Park intentionally and specifically abandoned its counterclaim. In correspondence to this Court and in its motion to amend its brief on appeal, Highland Park asserted that after the entry of the April 30, 2015 judgment in Detroit's favor, **no** claims remained to be litigated. When this Court invited Highland Park to correct defects in its motion to amend that could have permitted raising issues in its brief on appeal challenging the validity of the 2015 judgment, Highland Park declined to accept the Court's invitation to correct the defects. These actions evidence an intent to abandon the counterclaim. Accordingly, the trial court erred when it stayed execution of the 2015 judgment to permit the litigation of a counterclaim that Highland Park had clearly abandoned. **[*29]**

Second, the judicial-estoppel doctrine also supports the conclusion that the trial court erred in March 2018 when it stayed enforcement of the 2015 judgment and compelled the parties to litigate the abandoned counterclaim because:

> [u]nder this doctrine, a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding. Under the "prior success" model, the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather there must be some indication that the court in the earlier proceeding accepted that party's position as true. Further, in order for the doctrine of judicial estoppel to apply, the claims must be wholly inconsistent. [*Opland v Kiesgan, 234 Mich App 352, 362; 594 NW2d 505 (1999)*, quoting ***Paschke v Retool Indus, 445 Mich 502, 509-510; 519 NW2d 441 (1994)*** (quotation marks and citations omitted)].

The purpose of the doctrine of judicial estoppel is to protect the judicial integrity of the courts rather than the rights of the parties. *Opland, 234 Mich App at 363 n 8*. Although the doctrine of judicial estoppel is an extraordinary remedy to be applied with caution, it is appropriate to apply the doctrine when "a party's inconsistent behavior will otherwise result in a miscarriage of justice." *Id. at 363-364* (quotation marks **[*30]** and citation omitted). Further, courts apply judicial estoppel to prevent a party from "abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment." *Id. at 364* (quotation marks and citations omitted).

The judicial-estoppel doctrine should have been applied in this case to preclude litigation of Highland Park's abandoned counterclaim. The requirements of the doctrine have been met. During the appeal in **Docket No**. 327448, Highland Park took a position wholly inconsistent with the position it took after this Court affirmed the judgment and the matter returned to the trial court. While one might argue that in the prior appeal Highland Park did not specifically assert that the 2015 judgment resolved its countercomplaint, this is exactly the position Highland Park took during communications with, and in filings submitted to, this Court. When Highland Park represented to this Court that **no** claims remained in the trial court to litigate, it for all intents and purposes took the position that the counterclaims either were adjudicated by the trial court's 2015 judgment in Detroit's favor or that it was **no** longer **[*31]** pursuing the counterclaims. Highland Park did so to suit an exigency of the moment: to secure an appeal as of right in the prior appeal. This Court adopted this position when it accepted Highland Park's claim that all matters had been resolved in the trial court. Based on Highland Park's representations, this Court exercised jurisdiction under *MCR 7.203(A)(1)*. Then, after Highland Park failed to succeed in this Court, it returned to the trial court and asserted, contrary to its position in this Court, that the order it had just appealed was not a final order. As a consequence, the trial court improperly permitted Highland Park to litigate its abandoned counterclaims. The judicial-estoppel doctrine precluded Highland Park from taking these wholly inconsistent positions.

Third, we also find persuasive the assertion of GLWA and Detroit that the trial court lacked the authority to proceed in the manner in which it did, ultimately modifying—indeed, vacating—the 2015 judgment. When a matter is remanded by an appellate court, the trial court has the authority to take any action which is not inconsistent with the opinion of the appellate court. *Sokel v Nickoli, 356 Mich 460, 464; 97 NW2d 1 (1959)*; *Vanderwall v Midkiff, 186 Mich App 191, 196; 463 NW2d 219 (1990)*. This principle has long been recognized in this state, as **[*32]** evidenced by the decision in *People ex rel Lyon v Ingham Co Circuit Judge, 37 Mich 377, 378; McGrath 915 (1877)*. In that case, the trial court entered a decree of foreclosure, which was affirmed on appeal. After remand for execution of the decree without instruction, the trial court "considered himself at liberty to open the decree for further hearing on the merits." *Id.* The Supreme Court recognized the impropriety of the trial court's action, explaining:

> The policy of the law is that when a case has once been considered and disposed of by the courts before which it may lawfully be brought, it is disposed of for all time, and the conclusion cannot be attacked in any new proceeding except upon certain equitable grounds which are foreign to the present discussion. The court rendering the conclusive judgment may have a discretionary authority to review and revise its own action, but if that court shall have taken the case on appeal, and shall have remanded it after judgment, the court below can have **no** similar authority, because if it could and should exercise it, it would really be reviewing and revising the action of its superior; which would be absurd. All the discretion which the inferior court can have must concern the execution of the judgment or decree which **[*33]** has been sent down to it; if **no** directions have been given as to these it would have the ordinary powers in respect to it, as it would have had if it had been entered by itself. [*Id. at 378-379*.]

Considering the foregoing, it is clear that the trial court in this case violated principles espoused more than 100 years ago by the Michigan Supreme Court.

Despite Highland Park's representations to the contrary in this appeal, the 2015 judgment was a final order. Highland Park abandoned its countercomplaint. In the prior appeal, in affirming the 2015 judgment, this Court stated:

> At the outset, we note that the only issue before this Court is Detroit's ability to collect its judgment against Highland Park pursuant to the provisions of MCL 600.6093. This is the only issue arguably articulated in Highland Park's statement of the issue on appeal and is the only issue properly presented for appellate review. MCR 7.212(C)(5). Highland Park has not preserved or presented any argument challenging the validity of the actual judgment. Although Highland Park initially attempted to expand the scope of its appellate issues, it clearly abandoned this effort. In a combined filing with this Court, Highland Park sought both a remand and leave to amend **[*34]** its appellate brief and raised therein several arguments attacking the actual judgment. This Court informed Highland Park that the filing of multiple motions under one fee was not permitted, and therefore, its motion would be treated as a motion to remand only, and not a motion to amend. At that time, Highland Park was advised that it could refile the motion to amend, if desired, with the necessary motion fee. Thereafter, Highland Park did not refile a motion to amend its brief on appeal. Consequently, having abandoned any issue related to the validity of the judgment, the only issue before this Court is that articulated in Highland Park's original, and only, brief on appeal—Detroit's ability to collect that judgment. [*City of Detroit*, unpub op at 1.]

On appeal, this Court concluded that Highland Park had abandoned any challenge to the actual judgment. Accordingly, this Court affirmed the judgment. In that earlier appeal, Highland Park was required to present all arguments why the trial court erred in entering the 2015 judgment. By choosing not to raise a challenge to the actual judgment, Highland Park abandoned this issue, and simply limited its attack to the manner in which the judgment could be **[*35]** enforced. In essence, Highland Park waived a challenge to the judgment, an issue it could have and should have raised in its initial appeal. See, e.g., Vanderwall, 186 Mich App at 203. Thereafter, the trial court was bound by this Court's affirmance of the judgment. Accordingly, the trial court exceeded its authority when it vacated the 2015 judgment.

The argument by GLWA and Detroit that the trial court lacked the authority to submit the matter for case evaluation is similarly persuasive. Case evaluations are governed by MCR 2.403. This Court has explained that the general purpose behind case evaluation under MCR 2.403 "is to expedite and simplify the final settlement of cases to avoid a trial." Magdich & Assoc, PC v Novi Dev Assoc LLC, 305 Mich. App. 272, 276; 851 N.W.2d 585 (2014) (quotation marks and citation omitted). In Mercantile Bank Mtg Co, LLC v NGPCP/BRYS Centre, LLC, 305 Mich App 215; 852 NW2d 210 (2014), this Court explained the case-evaluation process:

> Case evaluation is a mediation proceeding. During case evaluation, the parties submit and argue a concise summary of their factual and legal positions to a panel of three independent evaluators. The case evaluators must "include a separate award as to each plaintiff's claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action." "[A]ll . . . claims filed by any one party against any **[*36]** other party shall be treated as a single claim." [Id. at 223 (citations omitted).]

From the foregoing, it is clear that parties' "claims" are the subject of consideration in the case-evaluation process. In CAM Constr v Lake Edgewood Condo Ass'n, 465 Mich 549; 640 NW2d 256 (2002), the Court defined "claim" for purposes of MCR 2.403 as:

> 1. The aggregate of operative facts giving rise to a right enforceable by a court . . . . 2. The assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional . . . . 3. A demand for money or property to which one asserts a right . . . . [Id. at 554, quoting Black's Law Dictionary (7th ed.).]

In this case, there were **no** claims available to submit to case evaluation. The claims at issue had been reduced by the trial court to a judgment, and thereafter affirmed by this Court. Accordingly, it was inappropriate for the trial court to submit the matter to case evaluation.

For the reasons set forth above, we vacate the February 26, 2021 order granting Highland Park's motion for entry of judgment and the March 23, 2021 order of dismissal, and remand this case to the trial court for reinstatement of the

April 30, 2015 judgment entered on the July 31, 2014 opinion and order. In light of this disposition, it is unnecessary **[*37]** to consider additional arguments of GLWA and Detroit relating to the validity and effect of the case-evaluation award.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing parties, GLWA and Detroit are entitled to costs. See *MCR 7.219(A)*.

/s/ Michael F. Gadola

/s/ Mark J. Cavanagh

/s/ Kirsten Frank Kelly

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STATE OF MICHIGAN
IN THE 44TH CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

HOWELL-MASON, LLC,
a Michigan Limited Liability Company,

Plaintiff,

v

HOWELL TOWNSHIP,
a Michigan General Law Township,

Defendant.
_____/

Case No. 24-32242-CZ

HON. SUSAN LONGSWORTH

HOWELL TOWNSHIP'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION ON COUNTS V AND VI

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HOWELL TOWNSHIP'S REPLY IN SUPPORT OF IT'S MOTION FOR SUMMARY DISPOSITION ON COUNTS V AND VI

ARGUMENT

I. THE TOWNSHIP DID NOT AND IS NOT VIOLATING THE OPEN MEETINGS ACT.

Howell-Mason's Response Brief does not identify anything to suggest that the Township committed an Open Meetings Act ("OMA") violation or is committing an "ongoing violation" of the OMA. When this Court was previously confronted with a motion for summary disposition on Count V, it found summary disposition premature and allowed for discovery to determine whether any evidence existed to support allegations that were, at best, speculative. Discovery is now closed, and no material question of fact exists as to an OMA violation. Responses to requests to admit confirm the receipt of notice for the relevant meetings and that the Township's meeting schedule is online and publicly available. (Township's BIS of MSD, Exhibit E). Further, Plaintiff's original interrogatory responses relied upon its complaint which provide only conclusory statements (Complaint attached as Exhibit J[1]); after a motion to compel and Court-ordered discovery mediation, Plaintiff offered nothing more to substantiate their claims. (Township's BIS of MSD, Exhibit D). Howell-Mason's Response Brief does nothing to further its cause and create an issue of material fact.

Instead, Howell-Mason's Response explains (again) that it is seeking relief that includes invalidating the decision of the Township Board from two public meetings, March 20, 2023, and May 8, 2023. However, Howell-Mason does not explain how that relief is available to them. Under MCL 15.270(3)(a), Howell-Mason was required to commence any action "within 60 days after the

[1] Howell-Mason's complaint at paragraph 17 identifies meetings on March 20, 2023 and May 8, 2023 as "public meetings" but further complains it was "not given notice of these meetings" which appears to be the "OMA violations" to which its discovery refers. Howell-Mason also refers to the November 21, 2023, Planning Commission meeting as a "public hearing." Howell-Mason has never actually identified an OMA violation, however, in discovery or otherwise.

approved minutes are made available to the public" to request the Court invalidate the decision of the Township Board in an OMA violation case. **Howell-Mason did not do this** and Howell-Mason does not provide any explanation (legal or otherwise) how it continues to assert entitlement to that relief. Thus, the only remedy left for Howell-Mason is to show an ongoing violation of the OMA, which it cannot do.

As a distraction, Howell-Mason's Response includes an undated Facebook post from a single Township Board member (Trustee Bob Wilson) which on its face appears to have been made after the special land use permit was denied. (Response Br, Exhibit Y). Howell-Mason claims this Facebook post evidences "Board member's improper communication." (Response Br, p 3). Howell-Mason is incorrect. The OMA does not broadly prohibit a single township board member from posting on social media. The OMA specifically is concerned with deliberations of a **quorum of board members**. The OMA requires all deliberations of a public body "constituting a quorum of its members must take place at a meeting open to the public." MCL 15.263(3).[2] There is nothing included in the attached Facebook post, or in Howell-Mason's Response, that suggests Mr. Wilson was communicating with other members of the Township Board or was using the comment section to deliberate or make decisions for the Township Board. The after-the-fact view of a single trustee is not an act of a public body, an act of the Township Board, and neither its existence nor content support an OMA violation.

In addition, unlike what Howell-Mason is attempting to lead this Court to believe, it is nowhere near evident nor relevant to claim that Mr. Hohenstein "had communication with MHOG director Tatara influencing him to write the May 19, 2023 letter." (Response Br, p 8). Any

[2] A single official is not a public body. *Herald Co v City of Bay City*, 463 Mich 111, 130; 614 NW2d 873 (2000) (stating under the OMA, the term public body connotes a collective entity). Therefore, neither Mr. Wilson's nor Mr. Hohenstein's alleged statements or conversations could be a quorum of the Township Board.

conversations between Mr. Hohenstein and Mr. Tatara, *the MHOG Utility Director* who is not a member of the Township Board, would not be a non-noticed meeting of the public body. Thus, Howell-Mason's claim fails as pled.

Howell-Mason has continued to make the conclusory statement that the Township has violated the OMA through its meetings on March 20, 2023 and May 8, 2023. However, Howell-Mason cannot point to any evidence that the Township Board made any decisions or deliberations **as a quorum** in violation of the OMA. In fact, the documents Howell-Mason uses in support of its arguments are duly noticed meeting minutes for open public meetings with no evidence to suggest that any decision was made outside of the public meeting.

Howell-Mason had the opportunity to participate in discovery and uncover additional documents that may support its claims. It has failed to do so because no such evidence exists. Count V should be dismissed under MCR 2.116(C)(10).

II. NO REGULATORY TAKING OCCURRED.

Howell-Mason's Response focuses solely on the Township's prohibition of gasoline service stations within 300 feet of a wellhead protection area under Section 16.11(C)(8). However, as further analyzed in the Township's primary motion, the Township's denial of Howell-Mason's SLUP included **three additional and independent grounds.** And what is Howell-Mason's response to this argument by the Township? Complete silence—no cite to its expert planner's deposition, no document or case to contradict the Township's position; Howell-Mason provided this Court absolutely nothing. This argument is therefore unrebutted and dispositive.

Nonetheless, the Township will respond to Howell-Mason's arguments regarding Section 16.11(C)(8) under *Penn Central Transportation Co v New York City*, 438 US 104 (1978) because no regulatory taking is present.

The Township's Zoning Ordinance has not deprived Howell-Mason of all economic value for the Property. Howell-Mason's Response primarily relies on *Palazzolo v Rhode Island*, 533 US 606 (2001) to argue that its regulatory takings claim is not barred despite it having notice of the zoning classification within the Township. Although Howell-Mason correctly quotes *Palazzolo*, it expands the holding in a way that improperly minimizes the role that notice of zoning classification actually has in the analysis.

Even after *Palazzolo*, whether an individual or entity had notice of the zoning classification at issue is considered, and relevant, to determine if an individual's investment backed expectations are reasonable under *Penn Central*. See *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 555; 705 NW2d 365 (2005) (stating a "key factor is notice of the applicable regulatory regime" and "notice of such regulations should nevertheless be taken into account"). Thus, the regulatory scheme when Howell-Mason purchased the Property, i.e., the Property being located within the Township's Neighborhood Services Commercial District and within a wellhead protection area, is relevant to determine if Howell-Mason had *reasonable* investment-backed expectations.[3]

In *K & K Construction, Inc,* the Court rejected plaintiff's claims for regulatory taking because of the following:

> (1) wetland regulations are, much like zoning regulations, comprehensive, universal, and ubiquitous, and provide an 'average reciprocity of advantage' for all property owners, including plaintiffs; (2) plaintiffs have developed and retain the ability to develop a significant amount of their property, and thus plaintiffs' property retains a significant value even after the permit denial; and (3) plaintiffs are experienced commercial land developers who clearly had or were on notice of the wetland regulations promulgated under the WPA and, therefore, plaintiffs' distinct, investment-backed expectations would reasonably have been tempered with the

[3] The economic impact of a regulation concerns whether the plaintiff was denied of all use those "***preexisting property rights***." *Grand/Sakwa of Northfield, LLC v Twp of Northfield*, 304 Mich App 137, 148; 851 NW2d 574 (2014) (emphasis added). Howell-Mason did not have a "preexisting" property right to operate a gasoline service station. Howell-Mason was always subject to approval by the Township Board.

> knowledge that their development of the property would be restricted because of the presence of wetlands. [267 Mich App at 531].

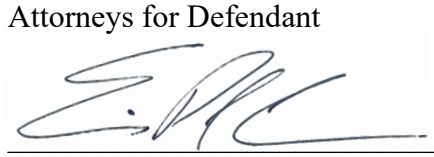
Similarly, the Township's Zoning Ordinance is comprehensive, universal, and ubiquitous and provides average reciprocity for all property owners. The Court of Appeals and Supreme Court on appeal upheld the Township's ordinance, thus foreclosing Howell-Mason from relitigating that point. (Attached as Exhibits K, L). Under the Township's Zoning Ordinance the Property is located in the commercial district, which has other uses allowed by right or special land use. Mr. Leblanc, Howell-Mason's own land use expert, indicated that Howell-Mason has not discussed any of the alternative uses, even though they exist. (Township's BIS of MSD, Exhibit A, p 49). Finally, Howell-Mason is an experienced land developer who was legally charged with actual notice of the zoning ordinance regulations. Therefore, under the *Penn Central* test there is no genuine issue of material fact that the Township did not commit a regulatory taking.

Howell-Mason claims in response that Joe Daus,[4] the Howell Township Zoning Supervisor, told Howell-Mason the application would be approved if Howell-Mason got approval from MHOG. However, even if Mr. Daus made the statement—and he did not—the statement of one official at the Township cannot bind the Township in a takings case. *Nickola v Grand Blanc*, 394 Mich 589, 596 n 1; 232 NW2d 604 (1975). In addition, attached is an affidavit from Mr. Daus confirming that he actually instructed Howell-Mason that gasoline service stations are a special land use in that district of the Township and are not permitted within 300 feet of a wellhead protection area. (Attached as Exhibit M).

[4] Howell-Mason did not identify Joe Daus during discovery and its attempts – after the close of discovery – to refer to him now to create a question of fact is improper and inconsistent with MCR 2.302.

Respectfully submitted,

Fahey Schultz Burzych Rhodes
Attorneys for Defendant



Dated: June 4, 2026

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EXHIBIT

J

STATE OF MICHIGAN
IN THE 44th CIRCUIT COURT
FOR THE COUNTY OF LIVINGSTON

TRUE COPY
44th Circuit Court
County Clerk's Office

HOWELL-MASON, LLC,
A Michigan Limited Liability Company,

Appellant,

v.

HOWELL TOWNSHIP,
A Michigan General Law Township,

Appellee.

Case No. 24-32242-CZ

Hon. JUDGE McGIVNEY
P-63325

VERIFIED COMPLAINT

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A circuit court appeal between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in this Court, given Case No. 24-350-AA and assigned to Hon. Matthew J. McGivney.

VERIFIED COMPLAINT

Plaintiff, HOWELL-MASON, LLC, a Michigan Limited Liability Company, by its attorneys PAUL E. BURNS and JEFFREY D. ALBER of THE LAW OFFICE OF PAUL E. BURNS, and NIK LULGJURAJ, for its Complaint states the following:

THE PARTIES

1. Plaintiff, HOWELL-MASON, LLC, is a Michigan Limited Liability Company with a principal place of business in Howell, Livingston County, Michigan.
2. Plaintiff is in the business of developing and operating gasoline service stations with attached restaurants.
3. Defendant, HOWELL TOWNSHIP, is a Michigan General Law Township with offices located at 3525 Byon Road, Howell, Livingston County, Michigan 48855.

COMMON ALLEGATIONS

4. Plaintiff owns three contiguous parcels of real property located at and near the corner of Mason Road and Burkart Road in Howell Township. **[Exhibit A]**
5. The Subject Property includes two parcels (Tax ID Nos. 4706-33-300-001 and 4706-33-300-108) that are currently zoned Neighborhood Service Commercial (NSC), in which gasoline service stations are permitted as a special land use. The third parcel is currently zoned residential, master planned commercial, and is not at issue in this matter.
6. All three of Plaintiff's parcels are master planned for commercial use and sit within the commercial corridor contemplated by the Defendant's master plan.
7. The immediate vicinity of the Subject Property has been tapped as an area of significant development in the township, with approximately one thousand (1,000) residential homes approved to be built across the street from the commercial corridor in which the Subject Property is located.

8. Plaintiff purchased the Subject Property specifically because of the current and future zoning designations, as well as the significant residential and commercial development in the area.
9. The subject property is located at the far edge of a large wellhead protection area.
10. The Michigan Department of Environment, Great Lakes, and Energy (EGLE) approves and regulates wellhead protection areas.
11. Section 16.11(C)(8) of the Howell Township Zoning Ordinance states: "No gasoline service station shall be permitted within three hundred (300) feet of a wellhead protection area" without any explanation, reasoning, or objective tests for which evidence could be submitted to determine the reasonableness of a proposed service station development on a case-by-case basis.
12. In or around late 2020, Plaintiff approached Defendant about submitting ~~an~~ its application to develop a gasoline service station and drive through restaurant on the Subject Property. The Township advised that Plaintiff had to apply to the Zoning Board of Appeals (ZBA) for a use variance to avoid a general prohibition of gasoline service stations in or near wellhead protection areas in Defendant's zoning ordinance. Plaintiff proceeded as directed. **[Exhibit B].** Additionally, the Township verbally told Plaintiff that gasoline service would likely work in that location and to first obtain approval of the Marion, Oceola, Genoa Water Authority (MHOG).
13. As instructed, Plaintiff approached MHOG to discuss the viability of the proposed gasoline service station project in or near the wellhead protection area.
14. On February 1, 2021, MHOG issued a letter to Plaintiff approving the proposed project with conditions. **[Exhibit C].**

15. On March 16, 2021, the Howell Township ZBA then held a hearing and denied Plaintiff's use variance application. This occurred in spite of the fact that the Howell Township Zoning Ordinance prohibits the ZBA from issuing use variances making this hearing and process wholly unnecessary and inappropriate.

16. Plaintiff then made a request to Defendant that it consider amending §16.11 of its zoning ordinance to allow for gasoline service stations within a wellhead protection area with MHOG's approval.

17. The Howell Township Board of Trustees then proceeded to hold two (2) public meetings on March 20, 2023, and May 8, 2023, at which Plaintiff's proposed zoning ordinance amendment, Plaintiff's property, and Plaintiff's SLUP application, while not explicitly on the agenda, were nevertheless discussed and voted on at the meeting. Plaintiff was not given notice of these meetings or opportunity to be heard. Audio recordings of those meetings were provided to Plaintiff by the Defendant via Freedom of Information Act request, which will be made available to Defendant and the Court. Transcripts of the audio recordings are attached as **Exhibit D**. Meeting Agendas are attached as **Exhibit E**. Relevant documents from the Board's packet are attached as **Exhibit F.** Minutes of these meetings are attached as **Exhibit G.**

18. Upon information and belief, at one of the meetings held secret from Plaintiff, the executive director of MHOG stated that it would be most beneficial for Plaintiff's proposed development to be within the wellhead protection area as MHOG could provide an additional level of oversight. The director of MHOG also stated that MHOG had a large 2,000 gallon above-ground diesel storage tank at its facility which poses substantially more

risk than a modern underground tank system, and because it is located within close proximity to the current MHOG wellhead.

19. The Howell Township Board voted to decline Plaintiff's proposed zoning ordinance amendment, and later voted to send a wellhead protection ordinance drafted by MHOG and adopted by neighboring municipalities to the Planning Commission for consideration with one significant addition – a complete prohibition of gasoline service stations. **[Exhibits F & G].**

20. Subsequently, Plaintiff regrouped, applied, and received permits and/or approvals for the project from all necessary parties, sans Defendant, including but not limited to (1) the State of Michigan Department of Licensing and Regulatory Affairs (LARA); (2), EGLE; (3) State of Michigan Fire Marshal; and (4) local fire Marshal.

21. On or around June 26, 2023, Plaintiff submitted a special land use permit application (SLUP) and site plan to develop a new gasoline service station and drive-through restaurant on land owned by Plaintiff in Howell Township, currently zoned Neighborhood Service Commercial (NSC), in which gasoline service stations are permitted as a special land use. The application was supplemented on or around October 17, 2023. **[Exhibit H]**

22. In conjunction with Plaintiff's SLUP application and site plan submission, the Township required Plaintiff to sign an agreement to reimburse the Township for "all expenses at actual cost for professional services related to the application required by the Township for the issuance of any permits, approvals, reviews, and attendance at meetings, by the Township's Planner, Landscape Architects, Legal Counsel, Engineering and Administrative Staff, over and above the fees listed in the Howell Township Fee Schedule." **[Exhibit H].**

23. The Howell Township Zoning Ordinance does not explicitly specify the reimbursement agreement and procedure.

24. The 2023 SLUP application, as supplemented, included all other permits/approvals received from State, County, and Local authorities, along with expert reports from qualified experts regarding issues including, but not limited to, underground storage tank technology, expert municipal planning considerations, and favorable hydrogeologic conditions of the Subject Property and surrounding area.

25. Based upon data derived directly from the MHOG Wellhead Protection Plan (August 2023), the groundwater is located within a confined aquifer in which the groundwater flow is in a northerly direction, and the current wellhead and potential future wellhead sites are located upgradient generally several thousand feet south of the Subject Property.

26. The natural flow of groundwater travels away from wellfields and toward the Subject Property.

27. Additionally, the MHOG aquifer is confined by thick clay layer and bedrock layers approximately which act as a protective barrier preventing surface water from commingling with the aquifer.

28. On November 21, 2023, the Howell Township Planning Commission conducted a public hearing on Appellant's SLUP application. The meeting was a public free-for-all in which the Commission received inappropriate and incorrect legal advice from its planners, fundamentally misunderstood its role, employed no parliamentary procedure or any cognizable procedure whatsoever, and failed to control members of the public throughout the meeting. The large crowd vowed to appear at all future meetings of any nature regarding Plaintiff's proposed gasoline service station. A copy of the meeting minutes is attached as

Exhibit I. The transcript of the meeting is attached as **Exhibit J**. A video of the meeting will be provided to Defendant and the Court as well.

29. The Planning Commission took no action on Plaintiff's site plan choosing instead to table its review indefinitely.

30. The Howell Township Planning Commission voted unanimously to recommend denial of the SLUP based on the prohibitive language in §16.11(C)(8) of its Zoning Ordinance. The Planning Commission acknowledged its own lack of authority to grant the application at the outset of the hearing.

31. On December 11, 2023, the Howell Township Board of Trustees held a regular meeting at which they voted to deny the SLUP. The Township Board ignored presentations by qualified experts regarding the nature of the local family-owned business by company ownership, the site plan by Boss Engineering, favorable hydrogeological conditions by Mannik & Smith Group, planning issues by PLB Planning Group, and safety of cutting-edge gasoline storage and dispensing technology by Oscar Larson Co. The meeting quickly devolved into anger over the price of gas and the tax code. One Board member explicitly stated that his decision was based solely on his personal aversion to having a gas station near his personal residence in flagrant disregard to the evidence. A copy of the meeting minutes is attached as **Exhibit K.** The transcript of the meeting is attached as **Exhibit L.** A video of the meeting will be provided to Defendant and the Court as well.

32. No members of the public appeared at the December 11, 2023, Board Meeting.

33. Upon information and belief, at least one (1) member of the Howell Township Board interacts with a social media group of citizens opposing Plaintiff's proposed gasoline service station.

34. Consistent with MHOG's statements, on February 1, 2021, and again on February 23, 2023, MHOG issued letters approving Plaintiff's proposed gasoline service station with conditions. **[Exhibits C & M].**

35. Upon information and belief, the Defendant colluded with MHOG, which had previously approved Appellant's project with conditions and preferred that Appellant's station be located within the wellhead protection area, to retract its approval.

36. On May 19, 2023, MHOG issued a letter addressed to Defendant retracting its prior approval. Defendant did not disclose the letter to Plaintiff until August 2, 2023. **[Exhibit N].**

37. The May 19, 2023, MHOG letter, which was hidden from Plaintiff for nearly ninety (90) days, was erroneous in many respects, including but not limited to being based on a review of a previous draft of the site plan rather than the final plan submitted to and considered by the Township.

38. Then, on November 15, 2023, MHOG held a public meeting at which it passed a resolution regarding the inappropriateness of Plaintiff's proposed project, a copy of which was provided to Defendant and was part of its packet for the December 11, 2023, Board meeting and vote. A copy of the covert resolution is attached as **Exhibit O.**

39. Plaintiff was not given notice of the MHOG public meeting and was not provided a copy of the resolution by MHOG nor Defendant.

40. Following the Township Board's denial of Plaintiff's SLUP application, Plaintiff submitted its application to the Zoning Board of Appeals to appeal the Board decision and to request dimensional and use variances.

41. The Howell Township Zoning Board of Appeals lacks jurisdiction to hear appeals of SLUP decisions. Howell Twp. Zoning Ord. § 22.06(C) ("The ZBA may not change the zoning district classification of any property, may not change any of the terms of the Ordinance, and may not take any actions that result in the making of legislative changes to this Ordinance. The ZBA may not hear an appeal from a Township decision regarding a special land use or PUD.").

42. The Howell Township Zoning Board of Appeals lacks jurisdiction to grant use variances. Howell Twp. Zoning Ord. § 22.06(F) ("Under no circumstances shall the Board of Appeals grant a variance to allow a use not permissible under the terms of this Ordinance in the zoning district in which the variance is to be located.").

43. Nevertheless, on December 16, 2023, Plaintiff submitted a ZBA application with an explanatory letter from its counsel out of an abundance of caution specifically to fulfill the finality requirements as required by *Paragon v. City of Novi,* 452 Mich 568, 550 NW2d 772 (1996). Plaintiff's initial ZBA application is attached as **Exhibit P.**

44. The Township attorney responded with a letter feigning confusion over the application's purpose, a copy of which is attached as **Exhibit Q.**

45. Plaintiff then responded with an additional letter further explaining its request and position. **[Exhibit R].**

46. The Township attorney responded with a letter taking the position that "jurisdiction" and "authority" are separate and distinct terms, and as such the ZBA had "jurisdiction" over the Plaintiff's appeal and was thus obligated to hold a hearing. However, despite having "jurisdiction," the ZBA lacked "authority" to grant any relief. **[Exhibit S].**

47. Plaintiff then responded with a detailed letter objecting to the Township's position and submitted a revised ZBA application in case the Township required yet another performative hearing with predetermined outcome. **[Exhibit T].**

48. Plaintiff filed a circuit court claim appeal of the December 11, 2023, Board denial on January 23, 2024, which was assigned to Judge McGivney as Case No. 24-350-AA.

49. On January 31, 2024, the Howell Township Zoning Administrator issued a letter to Plaintiff confirming Plaintiff's position that the ZBA lacked jurisdiction to hear Plaintiff's appeal and variance requests and returned the application and filing fee. **[Exhibit U].**

COUNT I
DENIAL OF SUBSTANTIVE DUE PROCESS
Township Ordinance Facially Unconstitutional and Unconstitutional As Applied

50. Plaintiff incorporates the foregoing paragraphs as if restated herein.

51. Section 16.11(C)(8) of Defendant's Zoning Ordinance, governing gasoline service stations, states in its entirety: "No gasoline service station shall be permitted within three hundred (300) feet of a wellhead protection area."

52. Defendant's zoning ordinance contains no rationale for the sweeping ban found in § 16.11(C)(8).

53. Defendant's zoning ordinance does not contain any objective standards or evidence-based tests to determine the reasonableness of a proposed gasoline service station on a case-by-case-basis, nor any right to appeal.

54. Defendant has exercised its police power through regulation that illegally prohibits an entire industry from development on property for which it is otherwise zoned and for which all scientific data indicates that the project is reasonable.

55. The ordinance is not rationally related to reasonable concerns for the health, safety, or welfare of the people, and is merely a discriminatory, arbitrary, and capricious ban based solely upon personal aversions and incorrect assumptions about gasoline service stations.

56. Defendant's reliance upon Section 16.11(C)(8) of Defendant's zoning ordinance to deny Plaintiff's proposed gasoline service station on appropriately zoned and master planned land on which all hydrogeological data is favorable to the project was unreasonable, arbitrary, confiscatory, illegal, and facially unconstitutional and unconstitutional as applied.

57. The failure of Defendant to approve Plaintiff's proposed gasoline service station on appropriately zoned and master planned land on which all hydrogeological data is favorable to the project is an arbitrary, capricious, unreasonable, confiscatory, illegal, and facially unconstitutional ban on Plaintiff's right to develop its property.

58. In relying upon an unconstitutional ordinance to deny Plaintiff's project, Plaintiff has suffered damages, including but not limited to lost profits, from investing in the Subject Property, and due to significant and unreasonable delay in developing a profitable business.

WHEREFORE, Plaintiff HOWELL-MASON, LLC respectfully requests that this Honorable Court:

A. Issue a declaratory judgment under MCR § 2.605 that § 16.11(C)(8) is facially unconstitutional and/or unconstitutional as applied to Plaintiff;

B. Grant Plaintiff's SLUP;

C. Award Plaintiff damages in an amount in exceeding $25,000.00;

D. Attorney fees and costs incurred; and

E. Grant any further relief deemed just and equitable by the court.

COUNT II
DENIAL OF PROCEDURAL DUE PROCESS
Township Ordinance Unconstitutional as Applied

59. Plaintiff incorporates the foregoing paragraphs as if restated herein.

60. Procedural due process requires that a party be provided notice of the nature of the proceedings and an opportunity to be heard by an impartial decision maker at a meaningful time and in a meaningful manner. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 213–214, 761 NW2d 293 (2008) (internal citations omitted).

61. All hearings conducted by Defendant for which Plaintiff was provided notice and an opportunity to be heard were purely performative with a predetermined outcome.

62. Statements made by members of the Board of Trustees, Planning Commission, and Zoning Board of Appeals indicate that decision makers were biased against Plaintiff.

63. Additionally, Defendant held multiple meetings at which Plaintiff's zoning amendment requests, Plaintiff's project, and Plaintiff's SLUP application were topics of discussion, deliberation, and votes.

64. Defendant failed to give Plaintiff notice of these meetings thus depriving Plaintiff of procedural due process.

65. Plaintiff has suffered damages, including but not limited to significant sums paid to the township for plan reviews, lost profits from investing in the Subject Property, and due to significant and unreasonable delay in developing a profitable business.

66. Defendant's conduct as described throughout this complaint is patently arbitrary and capricious and conscience-shocking, particularly in light of the laws and policies that require above-board political decision-making based on objective, published laws and standards.

WHEREFORE, Plaintiff HOWELL-MASON, LLC respectfully requests that this Honorable Court:

A. Issue a declaratory judgment under MCR § 2.605 that § 16.11(C)(8) is facially unconstitutional and/or unconstitutional as applied to Plaintiff;

B. Grant Plaintiff's SLUP;

C. Award Plaintiff damages in an amount in exceeding $25,000.00;

D. Attorney fees and costs incurred; and

E. Grant any further relief deemed just and equitable by the court.

COUNT III
VIOLATION OF EQUAL PROTECTION
Township Ordinance Facially Unconstitutional and Unconstitutional as Applied

67. Plaintiff incorporates the foregoing paragraphs as if restated herein.

68. Section 16.11(C)(8) completely bans gasoline service stations from being developed within 300 feet of a wellhead protection area.

69. Defendant's zoning ordinance contains to rationale for the sweeping ban found in § 16.11(C)(8).

70. Defendant's zoning ordinance bans no other industries from development in or near wellhead protection areas.

71. The wholesale ban of a singular industry is not rationally related to reasonable concerns for the health, safety, or welfare of the people, and is merely an arbitrary and capricious ban based solely upon personal aversions and incorrect assumptions about gasoline service stations.

72. Plaintiff has suffered damages from investing in the Subject Property, including but not limited to lost profits, and due to significant, intentional, and unreasonable delay in developing a profitable business.

WHEREFORE, Plaintiff HOWELL-MASON, LLC respectfully requests that this Honorable Court:

A. Issue a declaratory judgment under MCR § 2.605 that § 16.11(C)(8) is facially unconstitutional and/or unconstitutional as applied to Plaintiff;

B. Grant Plaintiff's SLUP;

C. Award Plaintiff damages in an amount in exceeding $25,000.00;

D. Attorney fees and costs incurred; and

E. Grant any further relief deemed just and equitable by the court.

COUNTY IV
ZONING ENABLING ACT VIOLATIONS

73. Plaintiff incorporates the foregoing paragraphs as if restated herein.

74. Section 16.11(C)(8) is not rationally related to protecting the health, safety, and welfare of the public, and is thus unconstitutional, illegal, and otherwise inappropriate.

75. Defendant held multiple meetings at which and zoning amendment requests, Plaintiff's property, Plaintiff's proposed project, and Plaintiff's SLUP application were topics of discussion, deliberation, and votes.

76. Defendant failed to give Plaintiff notice of these meetings in violation of the Michigan Zoning Enabling Act.

77. Plaintiff paid significant sums of money to Defendant for professional reviews of its applications for which Defendant later stated it had no authority to grant, and which procedure was not specified in Defendant's zoning ordinance.

78. Plaintiff has suffered damages from investing in the Subject Property, including but not limited to lost profits, and due to significant, intentional, and unreasonable delay in developing a profitable business.

WHEREFORE, Plaintiff HOWELL-MASON, LLC respectfully requests that this Honorable Court:

A. Issue a declaratory judgment under MCR § 2.605 that § 16.11(C)(8) is facially unconstitutional and/or unconstitutional as applied to Plaintiff;

B. Grant Plaintiff's SLUP;

C. Award Plaintiff damages in an amount in exceeding $25,000.00;

D. Attorney fees and costs incurred; and

E. Grant any further relief deemed just and equitable by the court.

COUNT V
OPEN MEETINGS ACT VIOLATION

79. Plaintiff incorporates the foregoing paragraphs as if restated herein.

80. Upon information and belief and considering the totality of the circumstances, the outcome of the December 11, 2023, Township Board Meeting and vote was predetermined by the board outside of a public meeting and communicated to the public in advance of the performative meeting.

81. Upon information and belief, Defendant and/or its agents colluded with and/or goaded MHOG into violating the OMA by taking a vote explicitly against Plaintiff's properties without required notice to Plaintiff.

82. Defendant has demonstrated a pattern of manipulating legal requirements regarding notice and conduct of public meetings, intentionally withholding necessary information from

Plaintiff, and generally acting in bad faith regarding Plaintiff's project, and is likely to continue to do so unless appropriately enjoined.

WHEREFORE, Plaintiff HOWELL-MASON, LLC respectfully requests that this Honorable Court:

A. Declare Defendant to have violated the OMA;

B. Enjoin Defendant from further OMA violations;

C. Award Plaintiff actual and reasonable attorney fees and costs; and

D. Grant any further relief deemed just and equitable by the court.

COUNT VI
REGULATORY TAKING

83. Plaintiff incorporates the foregoing paragraphs as if restated herein.

84. "The term 'taking' can encompass governmental interference with rights to both tangible and intangible property." *AFT Mich. v. State*, 497 Mich. 197, 218, 866 N.W.2d 782, 794 (2015); *citing Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-1004; 104 S Ct 2862; 81 L Ed s2d 815 (1984).

85. "A business owner's right to engage in and continue their business has long been recognized as a property right." *Dept of Transp v Gilling*, 289 Mich App 219, 240; 796 NW2d 476 (2010).

86. Plaintiff has received permits from necessary governmental entity to construct a gasoline service station on the Subject Property, including but not limited to EGLE, which approves and regulates wellhead protection areas.

87. Defendant's unconstitutional proscription of gasoline service stations within wellhead protection areas has had a severe economic impact on Plaintiff as described throughout this complaint due to patently unreasonable delay caused solely by the Defendant's reliance

upon its unconstitutional ordinance. This delay has caused, including but not limited to, the loss of millions of dollars in revenue, lost opportunities for lower financing rates, and materials costs.

88. Plaintiff has invested over a million dollars to date in acquiring the Subject Property and neighboring parcel, applying for permits, procuring engineering and architectural plans, as well as plan reviews and expert hydrogeological analysis and municipal planning opinions.

89. Plaintiff had substantial investment-backed expectations, as described throughout this complaint, that it would be able to develop its property in the Township that were not preeminently reasonable given the totality of the facts and circumstances.

90. But for the clearly unconstitutional ordinance on which Defendant unreasonable and improperly relies, Plaintiff would have an operational business at this time.

91. The Township's actions amount to a regulatory taking in direct violation of art. 10, § 2 of the Michigan Constitution of 1963.

WHEREFORE, Plaintiff HOWELL-MASON, LLC respectfully requests that this Honorable Court:

A. Issue a declaratory judgment that Defendant's unconstitutional ordinance has unconstitutionally taken an investment-backed business expectation from Plaintiff;

B. Grant Plaintiff's SLUP;

C. Award Plaintiff damages in excess of $25,000.00 and/or just compensation for the taking;

D. Award Plaintiff attorney fees and costs incurred; and

E. Grant any further relief deemed just and equitable by the court.

COUNT VII
UNJUST ENRICHMENT

92. Plaintiff incorporates the foregoing paragraphs as if restated herein.

93. Defendant required Plaintiff to sign an agreement to reimburse the Township for "all expenses at actual cost for professional services related to the application required by the Township for the issuance of any permits, approvals, reviews, and attendance at meetings, by the Township's Planner, Landscape Architects, Legal Counsel, Engineering and Administrative Staff, over and above the fees listed in the Howell Township Fee Schedule." **[Exhibit H].**

94. The Howell Township Zoning Ordinance does not explicitly specify the reimbursement agreement and procedure.

95. Defendant later repeatedly claimed that it had no authority to grant the applications submitted by Plaintiff for which Plaintiff paid significant sums to Defendant for review.

96. Contract or no, Defendant received significant monetary benefit from Plaintiff to which it admits it was not entitled.

97. It would be inequitable to allow Defendant to retain this benefit without compensating Plaintiff for the benefit.

98. To avoid an unjust enrichment, Plaintiff should be awarded damages in an amount not less than $8,900.00.

WHEREFORE, Plaintiff HOWELL-MASON, LLC respectfully requests that this Honorable Court:

A. Issue a judgment declaring that Defendant has been unjustly enriched;

B. Award Plaintiff restitution for unjust enrichment in an amount not less than $8,900.00

C. Award Plaintiff attorney fees and costs incurred; and

D. Grant ant further relief deemed just and equitable by the court.

COUNT VIII
INJUNCTIVE RELIEF

99. Plaintiff incorporates the foregoing paragraphs as if restated herein.

100. Pursuant to MCR § 3.310, this court has the authority to issue injunctive relief.

101. A plaintiff is entitled to preliminary injunctive relief when it has shown: (a) a likelihood of success on the merits; (b) that it will suffer irreparable harm in the absence of injunctive relief; (c) that issuance of a preliminary injunction would not cause substantial harm to others; and (d) that no public interests would be disserved by a decision to issue a preliminary injunction.

102. A plaintiff is entitled to permanent injunctive relief when it can demonstrate: (a) that it has suffered an irreparable injury; (b) that the remedies available at law are inadequate; (c) that an equitable remedy is warranted on the balance of the hardships to plaintiff and defendant; and (d) that the public interest would not be disserved by a permanent injunction.

103. Plaintiff, HOWELL-MASON, LLC, has demonstrated a likelihood of succeeding on the merits of its claims, as stated above, that the Defendant Township's denial of its SLUP was unconstitutional and or/otherwise unlawful.

104. Plaintiff, HOWELL-MASON, LLC, will suffer irreparable harm in the absence of a preliminary and permanent injunction in that it will be prohibited from developing land it owns in a manner that it desires, and which accords with all applicable laws and regulations.

105. Mere monetary damages, while warranted, would be inadequate to fully compensate Plaintiff.

106. Enjoining the Defendant Township from violating Plaintiff's constitutional and legal rights, as already permitted by all necessary jurisdictions, including but not limited to the State of Michigan, cannot cause harm – let alone substantial harm – to the Township.

107. The public interest is always served by the enjoinder of unconstitutional and illegal acts, such as the Township's actions and omissions as described herein.

WHEREFORE, Plaintiff HOWELL-MASON, LLC respectfully requests that this Honorable Court enter an injunction that:

A. Finds that Howell-Mason, LLC has demonstrated a likelihood of success on the merits, irreparable harm in the absence of injunctive relief, lack of an adequate remedy at law for Plaintiff, lack of any substantial harm to others arising out of the entry of injunctive relief, and that the public interest would be served by enjoining the Township from acting in an unconstitutional or otherwise illegal manner;

B. Enjoins the Township to grant Plaintiff's SLUP and site plan as proposed;

C. Requires the Township to permit Plaintiff to proceed with development of a gasoline service station and drive through restaurant on the Subject Property as proposed, including a requirement that the Township must issue any necessary building and other permits and take any other action within the Township's power to facilitate Plaintiff's development;

D. Grants any other equitable relief requested in the counts above;

E. Awards Plaintiff its costs and attorney fees pursuant to applicable law; and

F. Grants any further relief deemed just and equitable by the court.

[SIGNAUTRES TO FOLLOW]

I certify under penalty of perjury that the statements herein are true and accurate to the best of my information, knowledge, and belief.

HOWELL-MASON, LLC

BY: _____
TODD J LEKANDER II
Member

Dated: 03/19/2024

STATE OF MICHIGAN)

COUNTY OF LIVINGSTON)

On this 19th day of March, 2024, before me, a Notary Public, in and for said county and state, personally appeared the above-named HOWELL-MASON, LLC, by its Member, TJ LEKANDER, and made oath that he had read the foregoing Verified Complaint, and by his signature indicates that he knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are stated to be upon information and belief, and as to those matters, he believes them to be true.

Mary Macdonald
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF Livingston
My Commission Expires 12/02/2026
Acting in the County of Livingston

Mary Macdonald
Mary Macdonald, Notary Public
Livingston County, Michigan
My commission expires: 12/02/2026
Acting in Livingston County

Respectfully submitted,

LAW OFFICE OF PAUL E. BURNS
Attorneys for Howell-Mason, LLC

BY: _____
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BY _____

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Dated: 3/19/24

NIK LULGJURAJ, PLC
Co-Counsel for Howell-Mason, LLC

BY: _____

NIK LULGJURAJ (P48879)
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Chelsea, Michigan 48118
Ph: (734) 433-0816
nik@niklaw.com

Dated: 3/19/24

EXHIBIT K

Court of Appeals, State of Michigan

ORDER

HOWELL-MASON L.L.C. V HOWELL TOWNSHIP

Docket No. 372773

LC No. 24-000350-AA

Stephen L. Borrello
Presiding Judge

Colleen A. O'Brien

Christopher P. Yates
Judges

The motion to file a late answer is GRANTED and the answer filed on November 25, 2024, is accepted.

The delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

April 11, 2025
Date

Chief Clerk

EXHIBIT L

Order

Michigan Supreme Court
Lansing, Michigan

August 29, 2025

168460

Megan K. Cavanagh,
Chief Justice

Brian K. Zahra
Richard H. Bernstein
Elizabeth M. Welch
Kyra H. Bolden
Kimberly A. Thomas
Noah P. Hood,
Justices

HOWELL-MASON, LLC,
Plaintiff-Appellant,

v

SC: 168460
COA: 372773
Livingston CC: 24-000350-AA

HOWELL TOWNSHIP,
Defendant-Appellee.

_____/

On order of the Court, the application for leave to appeal the April 11, 2025 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

b0825

I, Elizabeth Kingston-Miller, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

August 29, 2025

Clerk

EXHIBIT M

STATE OF MICHIGAN
IN THE 44TH CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

HOWELL-MASON, LLC,
a Michigan Limited Liability Company,

Plaintiff, Case No. 24-32242-CZ

v HON. SUSAN LONGSWORTH

HOWELL TOWNSHIP,
a Michigan General Law Township,

Defendant.
_____/

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Jeffrey D. Alber (P76530)
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Eric P. Conn (P64500)
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econn@fsbrlaw.com
wbeyea@fsbrlaw.com

AFFIDAVIT OF JULIUS DAUS

STATE OF MICHIGAN)
) ss
COUNTY OF LIVINGSTON)

Julius Daus, being first duly sworn and deposed, states under oath as follows:

1. I served as the Zoning Administrator for Howell Township from approximately 2016 to 2024. I am over eighteen (18) years of age and competent to testify to the matters set forth in this affidavit based upon my personal knowledge and experience.
2. As the Township Zoning Administrator, I often receive calls from those who own land or are interested in purchasing land as to what can or cannot be done within the Township.
3. I always freely communicate with those individuals who seek such information—informing them where to get a copy of the Zoning Ordinance, helping them confirm their current zoning land use district, and pointing to some of the relevant sections of the zoning ordinance that help identify what is or is not allowed.
4. During my tenure as Zoning Administrator, I met with representatives of Howell-Mason, LLC regarding their interest in developing a gasoline service station within Howell Township at the property situated in the Township located near the corner of Mason and Burkhart Road.
5. As early as 2019, I informed representatives of Howell-Mason that, under the Howell Township Zoning Ordinance, gasoline service stations are not permitted within three hundred (300) feet of a wellhead protection area.

6. I also informed representatives of Howell-Mason that gasoline service stations are a special land use under the Howell Township Zoning Ordinance and are therefore subject to the special land use approval process even if they are outside the wellhead protection area and its 300-foot buffer.
7. At all times during my tenure as Zoning Administrator, I had no authority to amend the Zoning Ordinance, not apply any provisions of the ordinance, grant variances to a requirement of the ordinance, or to approve special land use applications on behalf of Howell Township. Variance applications are decided by the Zoning Board of Appeals, and special land use applications are decided by the Township Board. The Township Board, with recommendations from the Planning Commission, also addresses any textual changes to the Zoning Ordinance—including the size of the wellhead protection area and related 300-foot buffer.
8. I did not make, and was not authorized to make, any representation to Howell-Mason or any representative of Howell-Mason that a variance, special land use permit, or other approval permitting a gasoline service station within a wellhead protection area would be granted.
9. The facts set forth in this affidavit are true and accurate to the best of my knowledge, information, and belief.

Further Affiant sayeth not.

Julius Daus

Subscribed and sworn to before me by Julius Daus on this 27 day of May 2026, in Livingston County, Michigan.

Rebecca Farr, Notary Public
State of MI, County of Livingston
My Commission Expires: 05-21-2030
Acting in the County of Livingston

REBECCA FARR
Notary Public - State of Michigan
County of Livingston
My Commission Expires May 21, 2030
Acting in the County of Livingston

STATE OF MICHIGAN 44TH CIRCUIT COURT JUDICIAL CIRCUIT LIVINGSTON	PROOF OF SERVICE FOR PARTY NOTIFICATION	CASE NO. 2024 0000032242-CZ

204 S HIGHLANDER, STE 4
HOWELL, MI 48843

(517)546-9816

Judge: SUSAN LONGSWORTH

Date: MONDAY JUNE 29, 2026

Plaintiff/Petitioner
HOWELL-MASON LLC

v

Defendant/Respondent
HOWELL TOWNSHIP

SEE ENCLOSED OPINION AND ORDERS 1-3.

CERTIFICATE OF MAILING

The following parties were served by e-mail (MCR 2.107(C)(4)):

Name	Complete address of service
CHRISTOPHER SCOTT PATTERSON	cpatterson@fsbrlaw.com
ERIC P CONN	ECONN@FSBRLAW.COM
WAYNE ROBERT BEYEA	WBEYEA@FSBRLAW.COM
HANNAH LAUREN STOCKER	hstocker@fsbrlaw.com
PAUL E BURNS	BURNS@PEBLAW.NET
RYAN ALEXANDER SWEENEY	RSWEENEY@CRAMERMINOCK.COM
NIK LULGJURAJ	NIK@NIKLAW.COM

06/29/2026
Date

STATE OF MICHIGAN

IN THE 44TH CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

HOWELL-MASON, LLC,

Plaintiff,

Case No. 24-32242-CZ
Hon. Susan Longsworth

v

HOWELL TOWNSHIP,

Defendant.
_____/

OPINION AND ORDER REGARDING HOWELL-MASON, LLC'S MOTION FOR SUMMARY DISPOSITION

At a session of Court
Held in the City of Brighton, County of Livingston, on

June 25, 2026

This matter is before the Court on the motion for summary disposition of Plaintiff, Howell-Mason, LLC, pursuant to MCR 2.116(C)(10). The Court heard oral argument on June 18, 2026. For the reasons set forth below, the motion is denied.

I. FACTS AND PROCEEDINGS

Plaintiff, Howell-Mason, LLC ("Plaintiff" or "Howell-Mason") owns three contiguous parcels of real property located at and near the corner of Mason Road and Burkart Road in Howell Township (the "Property"). The Property includes two parcels (Tax ID Nos. 4706-33-300-001 and 4706-33-300-108) that are currently zoned Neighborhood Service Commercial (NSC). The third parcel is currently zoned residential, master planned commercial, and is not at issue in this matter.

Plaintiff is in the business of developing and operating gasoline service stations with attached restaurants. Plaintiff purchased the Property in 2017, intending to build a Mugg &

Bopps gas station, convenience store, and drive-thru fast-food restaurant on the two lots zoned NSC. The Howell Township Ordinance allows convenience stores by right in the NSC district; however, a gas station and drive-thru are allowed only by special permit. In addition, the lots are located within 300 feet of the Marion Howell Oceola Genoa Township ("MHOG") wellhead protection area, and the Zoning Ordinance does not permit gas stations within 300 feet of the wellhead protection area.

In 2021, Plaintiff sought a use variance, which was denied. In the Spring of 2023, Plaintiff asked that the Zoning Ordinance be amended to allow gas stations in the wellhead protection area, but Howell Township (the "Township") denied the request.

In June of 2023, Plaintiff submitted to the Township Planning Commission an application for a special land use permit ("SLUP"). The Planning Commission recommended denial of the application, and the Township Board of Trustees voted to deny the SLUP application and site plan proposal in December of 2023. Plaintiff appealed to the Circuit Court (Case No. 24-350-AA), which affirmed the Township Board's decision in September of 2024. The Court of Appeals denied leave to appeal on April 11, 2025. The Supreme Court denied leave on August 29, 2025.

Plaintiff also filed this original action in the Circuit Court in March of 2024. As discussed in more detail below, the Circuit Court dismissed some, but not all, of the claims in January of 2025.

In the instant motion, Plaintiff moves for summary disposition pursuant to MCR 2.116(C)(10). Defendant opposes the motion and moves for judgment in its favor pursuant to MCR 2.116(I)(2).

A. Howell-Mason's Recitation of Facts[1]

Plaintiff, Howell-Mason, LLC, is a Michigan Limited Liability Company with a principal place of business in Howell, Livingston County, Michigan. Plaintiff is in the business of developing and operating gasoline service stations with attached restaurants. Defendant, Howell Township, is a Michigan General Law Township with offices located at 3525 Byon Road, Howell, Livingston County, Michigan 48855.

Plaintiff owns three contiguous parcels of real property located at and near the corner of Mason Road and Burkart Road in Howell Township (the "Property"). The Property includes two parcels (Tax ID Nos. 4706-33-300-001 and 4706-33-300-108) that are currently zoned Neighborhood Service Commercial (NSC), in which gasoline service stations are permitted as a special land use. The third parcel is currently zoned residential, master planned commercial, and is not at issue in this matter. All three of Plaintiff's parcels are master planned for commercial use and sit within the commercial corridor contemplated by the Defendant's master plan. The immediate vicinity of the Property has been tapped as an area of significant development in the township, with approximately one thousand (1,000) residential homes approved to be built across the street from the commercial corridor in which the Property is located. Plaintiff purchased the Property specifically because of the current and future zoning designations, as well as the significant residential and commercial development in the area.

The Property is located at the far edge of a large wellhead protection area and Section 16.11(C)(8) of the Howell Township Zoning Ordinance states: "No gasoline service station shall be permitted within three hundred (300) feet of a wellhead protection area".

On August 7, 2019, Plaintiff met with Joe Daus, Howell Township Zoning Administrator to discuss seeking a variance to develop a gasoline service station and drive through restaurant

[1] Some citations to exhibits have been removed for simplicity.

on the Property. Plaintiff was advised that if Plaintiff could get the approval of "Greg" at the Marion, Oceola, Genoa Water Authority (MHOG), Defendant would approve a variance. Plaintiff later learned Greg was Greg Tatara. At the meeting, Mr. Daus then told Plaintiff that once it had MHOG's approval, to submit the request for variance to the Zoning Board of Appeals, then to the Planning Commission, then to the Township Board of Trustees.

Plaintiff contacted Mr. Tatara, provided the plans for the gasoline service station, and on February 1, 2021 and February 23, 2023, MHOG issued two separate letters to Plaintiff approving the proposed project with conditions. On March 16, 2021, the Howell Township ZBA then held a hearing and denied Plaintiff's use variance application. Next, Plaintiff requested Defendant amend §16.11 of its zoning ordinance to allow for gasoline service stations within the wellhead protection as long as the plans are approved by MHOG. Without giving Plaintiff notice, the Howell Township Board of Trustees held two public meetings, on March 20, 2023 and May 8, 2023, at which Plaintiff's proposed zoning ordinance amendment, Plaintiff's property, and Plaintiff's SLUP application, were discussed. Defendant ultimately denied Plaintiff's request to change the language of Ordinance 16.11 and approved submission of a new wellhead protection ordinance to go to Township Planning Committee, specifically requesting a complete prohibition of gasoline service stations.

Plaintiff regrouped, applied, and received permits and approvals for the project from the State of Michigan Department of Licensing and Regulatory Affairs Bureau of Fire Services (BFS); Department of Environment, Great Lakes, and Environment ("EGLE"); (3) State of Michigan Fire Marshal; and (4) local fire Marshal.

On or around June 26, 2023, Plaintiff submitted a special land use permit application (SLUP) and site plan to develop a new gasoline service station and drive-through restaurant on

land owned by Plaintiff in Howell Township, currently zoned Neighborhood Service Commercial (NSC), in which gasoline service stations are permitted as a special land use. The application was supplemented on or around October 17, 2023.

In conjunction with Plaintiff's SLUP application and site plan submission, the Township required Plaintiff to sign an agreement to reimburse the Township for "all expenses at actual cost for professional services related to the application required by the Township for the issuance of any permits, approvals, reviews, and attendance at meetings, by the Township's Planner, Landscape Architects, Legal Counsel, Engineering and Administrative Staff, over and above the fees listed in the Howell Township Fee Schedule." Unbeknownst to Plaintiff, MHOG director Tatara drafted a third letter on May 19, 2023, revoking MHOG's prior approval of the site plan and openly objecting to Plaintiff's plan to build a gasoline service center at the Property and on November 19, 2023, the MHOG Board resolved to submit a formal objection to the Township Trustees. Plaintiff was not given notice of the MHOG public meeting and was not provided a copy of the resolution by MHOG nor Defendant.

On November 21, 2023, the Howell Township Planning Commission conducted a public hearing on Plaintiff's SLUP application. At the outset of the meeting, the Planning Commission stated that it lacks authority to grant the application.

> MR. WILLIAMS:· Just so I understand you correctly, Paul, that we don't have the authority to approve a gas station that violates that ordinance of not being within 300 feet of a wellhead protection area.
>
> MR. MONTAGNO: That is correct.

The Howell Township Planning Commission voted unanimously to recommend denial of the SLUP based on the prohibitive language in §16.11(C)(8) of its Zoning Ordinance. On

December 11, 2023, the Howell Township Board of Trustees held a regular meeting at which they voted to deny the SLUP.

Following the Township Board's denial of Plaintiff's SLUP application, Plaintiff submitted its application to the Zoning Board of Appeals to appeal the Board decision and to request dimensional and use variances. The appeal was denied. Plaintiff filed a circuit court claim of appeal of the December 11, 2023, Board denial on January 23, 2024, which was assigned to Judge McGivney as Case No. 24-350-AA. This lawsuit followed.

B. The Township's Recitation of Facts.

The Township's relevant factual and procedural background of this matter is set forth in detail in the Township's Brief in Support of Its Motion for Summary Disposition Pursuant to MCR 2.116(C)(7) and (C)(10), and in the Township's Brief in Support of Its Motion for Summary Disposition on Counts V and VI Pursuant to MCR 2.116(C)(10), and is incorporated by reference as though fully restated herein. To avoid burdening the Court with redundant presentation of the same information, the Township does not repeat that background here.

II. SUMMARY DISPOSITION STANDARDS

A. MCR 2.116(C)(10)

A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests whether there is factual support for a claim. Judgment may be entered under this rule when "there is no genuine issue as to any material fact." In evaluating a motion brought under MCR 2.116(C)(10), a reviewing court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. MCR 2.116(G)(5); *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006). Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving

party is entitled to judgment as a matter of law. *Id.*; see also MCR 2.116(C)(10) and MCR 2.116(G)(4).

Initially, the moving party bears the burden of supporting its claim to summary disposition with affidavits, depositions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Once this burden is met, the nonmoving party may not rely on mere allegations or denials in its pleadings, but must establish that a genuine issue of disputed fact exists for trial. *Id.* Affidavits, depositions, and documentary evidence offered in support of, and in opposition to, a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden*, 461 Mich at 120-121.

B. MCR 2.116(I)(2)

Under MCR 2.116(I)(2), a court may grant summary disposition to the opposing party if it determines that the opposing party, rather than the moving party, is entitled to judgment. *Jaguar Trading Ltd Partnership v Presler*, 289 Mich App 319, 322; 808 NW2d 495 (2010).

III. ANALYSIS

A. Howell-Mason's Arguments.

1. Plaintiff was denied substantive due process because Defendant's ordinance banning all gasoline service stations from being permitted within 300 feet of a wellhead protection area is unconstitutional.

Article I §17 of the State of Michigan Constitution guarantees that the state shall not deprive any person of "life, liberty or property, without due process of law." *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219, 221 (1998). Governmental regulation that impacts these rights must be reasonably tailored and non-arbitrary. *West Coast Hotel Co v Parrish*, 300 US 379, 392;

57 S Ct 578; 81 L Ed 703 (1937); see also 16A Am. Jur. 2d Constitutional Law § 403, 812–818, pp 124–128, 967–996.

The Ordinance at issue in this case is Section 16.11(C)(8) of the Howell Township Code of Ordinances, which states "No gasoline service station shall be permitted within three hundred (300) feet of a wellhead protection area."

Plaintiff argues that ordinance 16.11(C)(8)'s ban against gas stations while permitting uses such as automotive repair, drycleaning, junk yards, excavation and mining, within the wellhead protection area is arbitrary and, although it may seek to advance a governmental interest, it does so unreasonably.

(a) Section 16.11(C)(8) facially denies substantive due process.

"A facial challenge alleges that the mere existence and threatened enforcement of the ordinance materially and adversely affects values and curtails opportunities of all property regulated in the market." *Paragon Props Co v City of Novi*, 452 Mich 568, 576; 550 NW2d 772 (1996). "[A] facial challenge must establish that no set of circumstances exists under which the law would be valid or show that the law lacks a plainly legitimate sweep." *Americans for Prosperity Foundation v Bonta*, 594 US 595, 615; 141 S Ct 2373; 210 L Ed 2d 716 (2021) (citations omitted).

In this case, Ordinance 16.11(C)(8) allegedly carries out the compelling governmental interest of protecting the township's wellhead from contaminants; however, on its face the ordinance only protects the wellhead from gasoline service stations. A report prepared by expert land use planner Paul LeBlanc of PLB Planning Group[2] reviewed the zoning ordinance, as well as technical findings from state regulatory agencies, local and state fire marshals, and geological

[2] Paul LeBlanc has served a total of 8 years on the board of two different municipal planning commissions, drafted multiple municipal comprehensive and master plans, and more than a dozen zoning and land development regulations.

professionals. And concluded that where these professionals "find the proposed development to be acceptable in this location, I question what legitimate governmental interest is served by prohibiting this single use from locating within the wellhead protection area plus another 300 feet."

During his deposition, Mr. LeBlanc testified:

Q. If we can go to the second page. In the first paragraph after the numbered paragraphs, there's a line, and I'll quote, where you say I question what legitimate government interest is served by prohibiting this single use from locating within the wellhead protection area, plus another 300 feet?

A. Correct.

Q. What did you mean by question?

A. Well, I didn't see any purpose to it. Again, it goes back to not restricting uses in the wellhead protection district. It was why are you picking on one use when you allow any number of other uses that could be similar to this in terms of potential danger with no justification given?

Q. So, but you use the word question. That's different that saying there is no legitimate government interest, correct?

A. Well, I said I question what that legitimate interest is.

Q. Is protecting drinking water a legitimate government interest?

A. Yes. Sure.

Q. Is maintaining public confidence in the safety of the community's drinking water a legitimate public interest?

A. Sure.

Q. Could those interests be the ones that served that prohibition of gas stations in wellhead protection areas?

A. They could be, but not singling out just one use to serve those purposes. That was my concern.

Q. So in your letter you identified several uses that are permitted in or near wellhead protection areas without the same restrictions that pertain to gas stations, correct?

A. Correct.

Q. You identify vehicle service and repair shops and dry cleaning establishments as uses that are allowed in preparing this, correct?

A. Correct.

Q. What's the basis in which you compared [vehicle service and repair shops] land uses to gas service stations?

A. Well, because vehicle repair, for example, as I said in my memo, it doesn't define what that is. The only limitation is they don't permit body shops as part of vehicle repair. So it could be transmission repairs, engine rebuilding, oil changes, virtually anything that involves repair of a vehicle, which generally means fluids leaking out and storing oils and so on on site. Really no different. In fact, in this case, potentially more dangerous than the service station that was proposed, because they're not doing any repair work. They're just pumping gas. [Deposition of Paul LeBlanc, at pp. 24-25]

Banning gasoline service stations from the area surrounding a wellhead protection area while still allowing multiple other businesses that use and store contaminants above ground and underground "has no foundation in reason and is a mere arbitrary or irrational exercise of power." *Paterek v Village of Armada, Mich*, 801 F3d 630, 648 (CA 6, 2015). The Supreme Court's reasoning in *Bonner v City of Brighton* held facially constitutional a zoning ordinance that disallows homeowners from repairing unsafe structures where the cost of repair exceeds the value of the structure, is instructive:

> The unreasonable-to-repair presumption in BCO § 18–59 is not arbitrary because it does not represent a total prohibition on a property owner's opportunity to repair an unsafe structure, and the ordinance applies ***uniformly*** to all structures that have repair costs in excess of 100 percent of the structure's value before it became unsafe, except those structures that BCO § 18–59 expressly exempts. [*Bonner v City of Brighton*, 495 Mich 209, 233–234; 848 NW2d 380 (2014) (emphasis added)].

Inapposite to the ordinance at issue in *Bonner*, Ordinance 16.11 does not apply uniformly to all property uses that pose a risk of contamination to the wellhead and it does not apply evenly to those uses which traditionally store contaminants in underground storage or that pose a threat of surface run off, such as automotive repair centers and drycleaners. It only applies to gasoline service stations.

(b) Section 16.11(C)(8) facially violates the equal protection clause.

The total ban of gas stations also facially violates the equal protection clause. The Michigan Supreme Court provided a succinct primer on equal protection in *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010):

> The Equal Protection Clause requires that all persons similarly situated be treated alike under the law. When reviewing the validity of state legislation or other official action that is challenged as denying equal protection, the threshold inquiry is whether plaintiff was treated differently from a similarly situated entity....[T]he classification drawn by the legislation is rationally related to a legitimate state interest. Under this deferential standard, "the burden of showing a statute to be unconstitutional is on the challenging party, *not* on the party defending the statute." [emphasis in original]

Here, one singular industry was arbitrarily selected without any rationale for disparate treatment under the law. Thus, there is no application of the ordinance that would not deny an entire industry equal protection of the law, and as such the ordinance is facially unconstitutional.

(c) Ordinance 10.16 is unconstitutional as applied.

"Even if an act does not seem on its face to be unconstitutional, it may be unconstitutional as applied." *In re Advisory Opinion Re Constitutionality of PA 1975 No 301*, 400 Mich 270, 296; 254 NW2d 528, 538 (1977). "An 'as applied' challenge alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution." *Paragon*, 452 Mich at 576.

In the present case, disparate enforcement of the unconstitutional ordinance is not speculative. The Howell Township local airport which is located inside of a provisional wellhead protection area contains multiple underground storage tanks. MHOG which is located in the five-year capture zone of the wellhead protection area, thereby presenting a much higher risk of contamination to the wellhead, stores multiple above ground fuel tanks:

> *Q*. MHOG, you guys have aboveground fuel tanks?
>
> *A*. Yes.
>
> *Q*. And how large is your above ground fuel tank?
>
> *A*. I have a 500 gallon gasoline and a 1,000 gallon diesel and I have a 700 gallon tank that my one big generator sits on. And then I have a couple other, couple other hundred gallon tanks that my generators sit on.
>
> *Q*. All within a – all within the wellhead protection area?
>
> *A*. Yes.
>
> *Q*. All within the five-year capture zone?
>
> *A*. They're within, yes. Yes. [Deposition of Greg Tatara, pp. 87-88][3]

MHOG stores thousands of gallons of gasoline in above ground storage tanks, exposed to the elements, directly at the location of the wellhead. Yet, MHOG publicly opposed Plaintiff's solid fiberglass, anticorrosive, double layered, underground storage tanks, wrapped in a third nonpermeable layer that contains leakage sensors, to be installed 3,800 feet away from the wellhead, and which have already been approved and permitted by the Department of Environment, Great Lakes, and Energy and Department of Licensing and Regulatory Affairs Bureau of Fire Services.

Mich. Admin. Code R. 325.10812 provides "[t]he department [LARA] may require an increase or approve a decrease in the 2,000 foot distance for type I or type IIa public water

[3] The Court notes that Plaintiff's brief refers to the witness as "Doug Tartara."

supplies or the 800 foot distance for type IIb or type III public water supplies based on a study of hydrogeological conditions or other methods approved by the department for identifying the capture zone of a well".

Consistent with the requirements of Section 812 above, Plaintiff retained Mannik & Smith Group to investigate and prepare a report regarding the hydrogeological conditions surrounding the wellhead and the proposed site. The report provides that the Marshall Sandstone aquifer is a confined aquifer surrounded by interbedded layers of sandstone and limestone approximately 160 to 165 feet in thickness with protection provided by the overlying shale layers and depth of the wells (391 to 418 feet) located hydraulically up-gradient (south-southeast), approximately 3,800 feet southeast and 5,800 feet southeast, respectively, of the proposed Howell-Mason LLC site.

The conclusion was that when a well field completed in a confined aquifer is positioned up gradient from the proposed station, the geology acts as a protective barrier, reducing the likelihood of potential pollutants reaching and adversely impacting the aquifer. A gasoline service station[s] typically poses no significant environmental harm to a well field completed in an up-gradient confined aquifer due to its location relative to the aquifer and groundwater flow.

In his deposition, Greg Buhoveckey, an author of the Mannik & Smith Group Hydrogeological report, expanded on the importance of having a confined aquifer, surrounded by shale and limestone. Buhoveckey testified that the aquifer is confined and faces no threat of contamination from the underground storage tank at issue in this case, regardless of the engineering safety measures in place on and about the storage tank; because a confined aquifer is hydraulically separate from and does not interact with surface or shallow underground water.

A. Because that aquifer is confined. And that's the big issue here. And if you look at those cross sections, I mean, just from a natural standpoint, without getting into the engineered controls, which I'm familiar with the engineered controls and what they do out there, and not getting into the technical of how much does it leak or what could possibly happen there.

We were focusing just on the natural conditions of that site, where it is and what's under it. And after reviewing all of that information, we could make these opinions without going to the engineered controls. Now, we did go to the engineered controls, it does mention those in the letter, the multimillion dollar leak detection, double wall, all those things there you'll notice, page three, are listed. And that's in addition to.

But the fact is, is that aquifer, the natural conditions provide enough protection for it that the engineered controls that we're talking about and the rules that govern those are just kind of like the thin layer of frosting on a much larger cake, which is that aquifer is confined.

Q. I'm trying to understand what you're saying. Are you saying it almost doesn't matter if the storage tanks leak because of the aquifer?

A. The natural conditions make it that 90 percent of what we're talking about or a large percentage of the potential for anything to happen to that aquifer hinges on the natural conditions, not necessarily the controls at the site. [Deposition of Gregory Buhoveckey, pp. 34-35]

...

This is a confined aquifer. It's very far below the surface. It does not interact with the surface water in that area. It does not interact with the shallow ground water, which would be the ground water above the confining layer. It's separate. It's hydraulically separate. The definition of a confined aquifer is that it's hydraulically separated from the surface and shallow ground water. [Buhoveckey dep., pp. 35-36]

Buhoveckey testified further that in the event of a leak, its distance from the wellhead becomes important because responders need time to react and remediate before any spill reaches a wellhead. For this specific wellhead, this specific gasoline service station, and these specific USTs, with multimillion-dollar leak protection systems, responders would be put on notice before the leak made it outside the tanks triple layer protection system and then the responders

would have nine hundred (900) years to locate and remediate any contaminants before they could reach the wellhead.

> [t]he double walled, corrosion resistant USTs are also equipped with a nonpermeable third layer of protection containing sensors that alert responders of a leak, so it can be found quickly before the gas can get out and even interact with the shallow ground water. [Exhibit U, p. 77, line 9-18][4]

> It would take "about 20 to 30 years probably to go through three feet" of the clay, limestone, shale, and hardpan that make up the ground layer between the site and the wellhead, but "in the end it doesn't really matter, because we know the aquifer is confined..." [Exhibit U, p. 90, line 8 – p. 91, line 1][5]

> There are 30-40 feet of combined layers of clay, limestone, shale, and hardpan which provides an approximate 900 years before gasoline could make its way from the site to the aquifer. [Exhibit U, p. 93, lines 3-11].[6]

> It is all just a risk assessment. If you want to put a potential pollution source in the time of travel zones, within the wellhead protection area, you need follow regulations, maintain safe distances from certain wells, and obtain a permit. In this case, since the proposal was closer than the codified distance to the well at Angelo's; however, because the Marshall Sandstone is a confined aquifer, the risk assessment supported the variance request and BFS approved the permit. [Exhibit U, p. 114, line 12 – p. 115, line 24].[7]

Consistent with the requirements of Rule 812, Plaintiff provided hydrogeological data to the department and obtained approval for a variance. With the variance in hand, Plaintiff presented undisputed evidence to the Township to demonstrate the installation of the underground storage tanks to be used in connection with the proposed gasoline service stations is safe and appropriate.

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[4] Exhibit U is the transcript of Gregory Buhoveckey's 2/20/2026 deposition. The Court notes that this testimony is not found anywhere on page 77 of the transcript, and in fact, the Court skimmed the entire transcript from page 35 through the end, and could not locate this quoted testimony. *If* Plaintiff was attempting to summarize the witness's testimony, then it should have changed the formatting.

[5] Again, this language does *not* appear in the transcript on the pages cited by Plaintiff.

[6] Again, this language does *not* appear in the transcript on the pages cited by Plaintiff.

[7] Again, this language does *not* appear in the transcript on the pages cited by Plaintiff.

The Ordinance is unconstitutional as applied and the Township's decision must be reversed.

2. Section 16.11(C)(8) of the Township's Zoning Ordinance is in direct conflict with, and preempted by, state statutory and regulatory schemes fully administered by state agencies.

State law preempts a municipal ordinance where the ordinance directly conflicts with a state statute or where the statute completely occupies the field that the ordinance attempts to regulate. *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 257; 566 NW2d 514 (1997). A direct conflict exists when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits. *People v Llewellyn*, 401 Mich 314, 322 n 4; 257 NW2d 902 (1977).

(a) Regulation of underground storage tanks.

In 1994, Governor John Engler created the underground storage tank division within the department of natural resources for, among other reasons, "activities related to the underground storage tank programs can be performed more efficiently by one agency." Executive Reorganization Order 1994-4, p. 1; codified at MCL 299.901. The underground storage tank division is divided between Environment, Great Lakes, and Energy ("EGLE") successor of the Department of Environmental Quality ("DEQ"), and the Department of Licensing and Regulatory Affairs Bureau of Fire Services ("BFS"). Together, EGLE and BFS regulate the licensing, inspection, and installation of active underground storage tanks as well as the cleanup and closure of leaking underground storage tanks. The design, construction, installation and maintenance of underground storage tanks that store regulated substances are licensed under Part 211, Underground Storage Tank Regulations ("USTR"), of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA).

The USTR governs, among other things, the minimum safe distances of USTs to wells, to reduce the risk of contamination, and provides a framework for the licensing, inspection, and installation of active underground storage tanks. MCL 324.21102 states:

> A person that is the owner of an underground storage tank system shall register the underground storage tank system with the department prior to bringing the underground storage tank system into use. Additionally, an installation registration form containing the information required by the department shall be submitted to the department at least 45 days prior to the installation of the underground storage tank system.

Buttressing Governor Engler's Executive Order and in conformity with the federal equivalent, Michigan's legislature saw fit to prohibit local municipalities from enacting legislation inconsistent with NREPA and the USTR while establishing a process whereby a municipality can propose and BFS may approve a plan implementing heightened safety measures with respect to USTs. The specific section of PA 451 of 1994, preempting local municipalities from legislating in the area of Underground Storage Tanks is MCL 324.21109, which states:

> (1) The department may, upon resolution of the governing body of a local unit of government in whose jurisdiction an underground storage tank system is being installed, require additional safeguards, other than those specified in rules, when the public health, safety, or welfare, or the environment is endangered.
>
> (2) A local unit of government shall not enact or enforce a provision of an ordinance that is inconsistent with this part or rules promulgated under this part.
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> (3) A local unit of government shall not enact or enforce a provision of an ordinance that requires a permit, license, approval, inspection, or the payment of a fee or tax for the installation, use, closure, or removal of an underground storage tank system.

Further evidence of the legislative intent behind MCL 324.21109 is found in the attached State Budget Office Regulatory Impact Statement. Exhibit W. The State Budget Office, Office of Regulatory Reinvention, pursuant to the authority of the Administrative Procedures Act, issued a

Regulatory Impact Statement to the BFS Storage Tank Division which provides insight into the legislature's intent:

> Identify any laws, rules, and other legal requirements that may duplicate, overlap, or conflict with the proposed rule(s). Explain how the rule has been coordinated, to the extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter. This section should include a discussion of the efforts undertaken by the agency to avoid or minimize duplication. [March 10, 2017, SBO Regulatory Impact Statement, p. 3].

The BFS responded:

> These rules adopt 2015 federal rules regulating all underground storage tank facilities storing and/or handling flammable and combustible liquids. PA 451 of 1994 states that the regulated authority over these facilities is with the State, and notes that local units of government cannot be more restrictive than State regulations. [March 10, 2017, SBO Regulatory Impact Statement, p. 3].

(c) Regulation of wellhead protection areas.

The State of Michigan Wellhead Protection Program was created following amendments to the Federal Safe Drinking Water Act adopted in 1986 to regulate wellhead protection areas. Under the State Wellhead Protection Program ("WHPP"), EGLE has instituted certain rules that provide, among other things, a municipality may propose a wellhead protection area ("WHPA") with heightened protections for EGLE to review. The rules provide that EGLE may approve the proposed WHPA in a process similar to that regarding USTs, outlined in MCL 324.2119, discussed *Supra*. Important to the present case, the WHPP makes it clear that no business or activity may be excluded from operating in the WHPA:

> The WHPA is determined and is submitted to the Michigan Department of Environment, Great Lakes, and Energy (EGLE) for approval. Once approved, the WHPA receives a higher level of environmental monitoring at the state level for certain activities which are permitted through the state. For example, an underground storage tank must have an extra layer of protection around the tank (secondary containment), or businesses with groundwater discharge permits may need to perform more frequent monitoring. **As stated previously, the WHPP does not exclude any businesses or activities from your WHPA.** [The Michigan Wellhead Protection Program Guide, p. 7 (emphasis added)]

Michigan Courts have repeatedly recognized that

> [t]he Legislature vested in the DEQ, the important job of preserving our state's valuable water supply with the imperative that the DEQ control the pollution of *all* the waters of the state and the Great Lakes...[including] ground waters, lakes, rivers and streams and all other watercourses and waters within the jurisdiction of this state. [*City of Brighton v Twp of Hamburg*, 260 Mich App 345, 355–356; 677 NW2d 349 (2004); MCL 324.3103].[8]
>
> Consistently with the fact that our state's waters are connected and flow through many and varied localities, the Legislature invested in one agency, the DEQ, the public trust of protecting "all " our state's waters, which protection can only be accomplished by a statewide, consistent, and coherent uniform policy.
> ...
> The subject matter of the regulation, the control of pollution entering the state's inter-connected waterways, clearly calls for a statewide, uniform system of regulation. The state's ability to control water pollution statewide would be substantially undermined by a Balkanized patchwork of inconsistent local regulations. [*Id.* at 355–356; MCL 324.3106]

Moreover, any person, including a city or township, that is aggrieved by the DEQ's issuance of a permit may, as here, request and have a contested hearing under the APA. MCL 324.3112(3). This procedure for local input by way of contested hearings and the ultimate adoption or rejection by the head of the DEQ ensures uniformity and coherence of a statewide policy to protect our state's water resources. *Id.* EGLE replaced the DEQ on April 22, 2019.

3. In relying on Section 16.11(C)(8) to deny Plaintiff's SLUP, the Township deprived Plaintiff of procedural due process, causing Plaintiff to incur significant financial damages.

(a) Procedural due process, generally.

"[A]t a minimum, due process of law requires that deprivation of life, liberty or property by adjudication must be preceded by notice and an opportunity to be heard. To comport with these procedural safeguards, the opportunity to be at a hearing must be granted at a meaningful time and in a meaningful manner." *Bonner*, 495 Mich at 235.

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[8] See also *Southeastern Oakland Co Incinerator Auth v Avon Twp*, 144 Mich App 39; 372 NW2d 678 (1985) and *Cascade Twp v Cascade Resource Recovery, Inc*, 118 Mich App 580; 325 NW2d 500 (1982).

In the present case, Defendant conducted several public hearings affecting Plaintiff's Property and the proposed variance without giving Plaintiff notice and an opportunity to be heard; specifically, the March 20, 2023 hearing where the Township voted to deny Plaintiff's request to reform the ordinance language to read "No gasoline service station shall be permitted within three hundred (300) feet of a wellhead protection area unless it receives approval from MHOG"; and the May 8, 2023 hearing when the Trustees voted to submit a wellhead protection area proposal to the Planning Committee for approval, that specifically excluded gasoline service stations from the wellhead protection area. Failure to notify Plaintiff and provide an opportunity to be heard constitutes a procedural due process violation.

(b) EGLE-approved plan for development of a gasoline service station creates a protected property right.

In this case, EGLE, which has full regulatory control over drinking water quality and underground storage tanks, conditionally approved Plaintiff's proposed gas station on the Property. As such, Plaintiff has a constitutionally protected property interest in the conditional approvals.

(c) Plaintiff was not afforded procedural due process where Defendant relied on unconstitutional and preempted Ordinance banning gasoline service stations.

While granting a SLUP is a discretionary act, section 504 of the Zoning Enabling Act states that [i]f the zoning ordinance authorizes the consideration and approval of special land uses...under section 502...or otherwise provides for discretionary decisions, the regulations and standards upon which those decisions are made shall be specified in the zoning ordinance. MCL 125.3504(1). "A request for approval of a land use or activity *shall* be approved if the request is in compliance with the standards stated in the zoning ordinance...." *Id.*

In this case, the Township relied only upon the unconstitutional and otherwise preempted/conflict gas station ban of §16.11(c)(8) and assumptions without support in the record in denying Plaintiff's SLUP application. The Township ignored Plaintiff's permits and approvals from the State, along with Plaintiff's expert hydrogeological, engineering, tank technology, and planning presentations and written materials. As the application met all SLUP standards in the Township Zoning Ordinance, the Township's denial violated Plaintiff's due process rights.

4. The Township has repeatedly violated the Open Meetings Act.

The Open meetings act provides that all meetings of a public body must be open to the public and must be held in a place available to the general public. MCL 15.263. Although there are some exceptions, none apply to the present case. MCL 15.267.

Considering the totality of the circumstances, the outcome of the December 11, 2023, Township Board Meeting and vote was predetermined by the board outside of a public meeting and communicated to the public in advance of the performative meeting.

Defendant and/or its agents colluded with and/or goaded MHOG into violating the OMA by taking a vote explicitly against Plaintiff's Properties without required notice to Plaintiff or the public of the purpose of the meetings on both March 20, 2023 and on May 8, 2023.

5. The Township's unreasonable and unlawful denial of Plaintiff's SLUP application results in a regulatory taking.

The Fifth Amendment's Takings Clause provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V.

The U.S. Supreme Court recognized that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." A taking can be established when, after analysis of (1) the degree to which a regulation disrupts the "reasonable investment-backed expectations," (2) the "economic effect" of the regulation on the landowner, and (3) the

"character of the government action," it is demonstrated that the government is "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central Transp Co v City of New York*, 438 US 104, 124; 98 S Ct 2646; 57 L Ed 2d 631 (1978); *K&K Constr, Inc v Dep't of Natural Resources*, 217 Mich App 56; 551 NW2d 413 (1996).

"The term 'taking' can encompass governmental interference with rights to both tangible and intangible property." *AFT Mich v State*, 497 Mich 197, 218; 866 NW2d 782, 794 (2015). "A business owner's right to engage in and continue their business has long been recognized as a property right." *Dep't of Transp v Gilling*, 289 Mich App 219, 240; 796 NW2d 476 (2010).

Here, Plaintiff purchased the property based on its current zoning and master plan. Plaintiff then applied to and received conditional approval from the State of Michigan to develop a gasoline service station on the Property. The Township denied Plaintiff's application based almost entirely on an unconstitutional, preempted, arbitrary and capricious ordinance banning gas stations within 300-feet of a wellhead protection area inappropriately and illegally purporting to trump State-granted entitlements. Thus, Plaintiff has been deprived of the purchase price along with significant loss of profitability based on an arbitrary *ipse dixit.*

The taking in this case is similar to that in *Pennsylvania Coal.* As described by the Supreme Court of the United States in *Penn Central*, 438 US at 127-128:

> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S Ct 158, 67 L Ed 322 (1922), is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a "taking." There the claimant had sold the surface rights to particular parcels of property, but expressly reserved the right to remove the coal thereunder. A Pennsylvania statute, enacted after the transactions, forbade any mining of coal that caused the subsidence of any house, unless the house was the property of the owner of the underlying coal and was more than 150 feet from the improved property of another. Because the statute made it commercially impracticable to mine the coal, *id.*, at 414, and thus had nearly the same effect as

> the complete destruction of rights claimant had reserved from the owners of the surface land, see *id.*, at 414-415, the Court held that the statute was invalid as effecting a "taking" without just compensation. See also *Armstrong* v. *United States*, 364 U.S. 40 (1960) (Government's complete destruction of a materialman's lien in certain property held a "taking").

In conclusion, Plaintiff respectfully requests this court enter an order granting Plaintiff's motion for summary disposition on all counts, setting trial for a determination of damages, awarding Plaintiff its reasonable attorney fees, and granting such other relief as this Court deems just and equitable.

B. The Township's Arguments.

1. Counts I, II, III, and IX are barred by res judicata and collateral estoppel under MCR 2.116(C)(7) and, in any event, fail as a matter of law under MCR 2.116(C)(10).

Through a September 16, 2024 Opinion and Order, Judge Matthew McGivney considered every argument Howell-Mason now recycles as to Counts I, II, III, and IX—substantive due process, procedural due process, equal protection, and preemption—rejected each on the merits, and affirmed the Township Board's denial of the special land use permit. Howell-Mason appealed that decision, but the Michigan Court of Appeals and the Michigan Supreme Court each declined to disturb that decision. The judgment is final.

Shockingly, Howell-Mason's twenty-one-page brief[9] never once mentions that it has already litigated and lost on many of the claims on which it seeks summary disposition. The omission by Howell-Mason is brazen, and the ultimate request to "reverse" the judgment Judge McGivney already affirmed is legally incorrect. Plaintiff's Brief, p 14. A circuit court cannot reverse a judgment that three tribunals, including the State's highest court, have left standing. The doctrines of res judicata and collateral estoppel exist precisely to forbid that type of

[9] Howell-Mason's brief plainly violates MCR 2.119(A)(2)(a): "except as permitted by the court, the combined length of any motion and brief … may not exceed 20 pages double spaced[.]"

collateral attack. *Duncan v State*, 300 Mich App 176, 194; 832 NW2d 761 (2013) (res judicata); *People v Gates*, 434 Mich 146, 154; 452 NW2d 627 (1990) (collateral estoppel).

To avoid burdening the Court with redundant briefing, the Township incorporates by reference its arguments in the Township's Brief in Support of Its Motion for Summary Disposition Pursuant to MCR 2.116(C)(7) and (C)(10).[10] Those arguments establish that (1) these counts are barred by res judicata and collateral estoppel under MCR 2.116(C)(7) because each was actually litigated and necessarily decided in the zoning appeal affirmed through the Michigan Supreme Court; and (2) in the alternative, each fails as a matter of law under MCR 2.116(C)(10) because, with discovery closed and the material facts undisputed, Howell-Mason cannot prove the essential elements of any of them. However, Howell-Mason advances several arguments that warrant a direct response here and further support summary disposition pursuant to MCR 2.116(I)(2).

(a) Howell-Mason identifies no legal authority that individualized notice was required when considering a legislative amendment to its zoning ordinance.

In an attempt to advance a procedural due process claim, Howell-Mason claims that its procedural due process rights were violated because it was not provided notice of meetings on March 20, 2023, and May 8, 2023, at which the Township Board declined to amend Section 16.11 and voted to forward a proposed wellhead protection ordinance to the Planning Commission. Plaintiff's Brief, pp. 3, 18 ("Failure to notify Plaintiff and provide an opportunity to be heard constitutes a procedural due process violation."). Howell-Mason's bare argument

[10] The specific arguments that are being incorporated are those on pages 10-19 of the Township's Brief in Support of Its Motion for Summary Disposition Pursuant to MCR 2.116(C)(7) and (C)(10).

here warrants some further explanation because Howell-Mason is now claiming lack of notice for two specific meetings somehow violates the constitution.[11]

The decision whether to amend a zoning ordinance—or even to rezone a specific parcel—is a legislative decision. *Paragon Props Co v City of Novi*, 452 Mich 568, 580; 550 NW2d 772 (1996). The March 20 and May 8, 2023 meetings concerned exactly that—whether to amend the language of Section 16.11 and whether to advance a proposed wellhead protection ordinance for further consideration. Those are legislative measures of general application; they did not adjudicate Howell-Mason's rights. There is no basis in the law—and Howell-Mason has provided absolutely none—for an individual property owner to demand specialized, personal notice before a legislative body may consider whether to amend an ordinance of general application.

A similar claim was resolved by the United States Supreme Court more than a century ago. In that case, the plaintiff landowner challenged a Colorado board's order increasing the valuation of all taxable property in Denver, arguing it had been denied due process because it received no notice and no opportunity to be heard before the order was adopted. *Bi-Metallic Investment Co v State Bd of Equalization*, 239 US 441, 443–445; 36 S Ct 141; 60 L Ed 372 (1915). The Court rejected the claim. As Justice Holmes explained, "[w]here a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption." *Id.* at 445. The holding squarely forecloses Howell-Mason's theory: a party has no constitutional right to personal notice and a personal hearing before a legislative body adopts—or here, merely considers—a measure of general application.

[11] To the extent that the lack of individualized notice is made with respect to Howell-Mason's Open Meetings Act claim, the Township points out that Howell-Mason has identified no specific violation of the Open Meetings Act.

It is precisely because Howell-Mason claims an unidentified right to particularized notice for a legislative act that its argument fails. The Township was required to provide the general public notice that the law prescribes for the consideration of zoning ordinance amendments, and Howell-Mason does not contend that notice was not given; indeed, it has admitted that the Township's public meeting schedule is publicly available. There is absolutely no recognized legal theory that will allow Howell-Mason to proceed with its procedural due process claim, and it has provided none because none exists.

(b) Howell-Mason's due process and equal protection claims rest on a false premise that Section 16.11(C)(8) was the only reason for the denial.

Howell-Mason's motion with respect to its due process and equal protection claims focuses on a single provision in the Zoning Ordinance: Section 16.11(C)(8), which contains the prohibition on gasoline service stations within 300 feet of a wellhead protection area. The argument by Howell-Mason is that "the Township relied ***only*** upon the [alleged] unconstitutional and otherwise preempted gas station ban...in denying" the special land use permit. Plaintiff's Brief, p. 19 (emphasis added). That premise is misleading and wrong for two reasons.

First, Judge McGivney already passed on the constitutionality of Section 16.11(C)(8) [9/16/2024 Opinion and Order, p. 15 ("Zoning Ordinance Section 16.11(C)(8) was not arbitrary or capricious. It did not violate any due process rights of [Howell-Mason].")]. There is no denying that Section 16.11(C)(8) is constitutional.

Second, even assuming Section 16.11(C)(8) were unconstitutional, the Township relied on three other independent reasons in denying the special use permit. To explain this point, the Zoning Ordinance does not condition approval on a single standard. Instead, a proposed special land use must satisfy the general discretionary standards of Sections 16.06(A)–(F)—addressing compatibility with surrounding land uses, impacts on public health, safety, and welfare, and

effects on the natural environment and resources—and, for gasoline service stations, the use-specific requirements of Section 16.11, which apply in addition to all applicable regulations in effect in the district. Zoning Ordinance §§16.06(A)–(F), 16.11. The Township Board may not approve a special land use unless *every* applicable standard is met. Failure to satisfy any one of them independently compels denial. Zoning Ordinance §§16.06, 16.11.

That is precisely what happened here. The Township Board denied Howell-Mason's application on ***four*** independent and mandatory grounds: 1) that the proposed use was not harmonious with the surrounding area; 2) that it would be hazardous or disturbing to existing and future neighboring uses; 3) that it would adversely impact natural resources and the environment; and, 4) that it was prohibited by the Property's location within 300 feet of a designated wellhead protection area. Zoning Ordinance §§16.06(A), 16.06(D), 16.06(F), 16.11(C)(8). Section 16.11(C)(8) is one of four legally valid reasons to deny Howell-Mason's application. Each of the other three stands entirely apart from it.

So even if Howell-Mason were right that Section 16.11(C)(8) is invalid—and it is not—three separate, unchallenged grounds for denial would remain, and the denial would still stand. Howell-Mason's all-or-nothing premise collapses its own arguments.[12]

> (c) Howell-Mason's arguments that the State regulation of underground storage tanks and wellhead protection areas preempt local zoning regulations for the siting of gas stations is contradicted by their own source materials.

Howell-Mason argues that state regulations governing the placement of underground storage tanks, and those governing the location of wellhead protection areas, preempt local

[12] The Court notes that in its reply brief, Plaintiff attempts to address the other grounds for denial. However, Plaintiff offers only conclusory statements, e.g., "Not only is Plaintiff's proposed special use harmonious with general objectives, purpose and intent of the zoning ordinance and Master Plan, it is an expected and anticipated use"; "preserving the townships [sic] natural resources must be accomplished through constitutional means"; and "Defendant's rejection of the gasoline service station is based on personal animus and an unconstitutional ordinance banning all gasoline service stations." These conclusory statements are insufficient to show that a genuine issue of fact exists for trial.

zoning that determines where gas stations may be sited. Judge McGivney already analyzed and rejected that precise argument. Applying the four-factor preemption test of *People v Llewellyn*, 401 Mich 314; 257 NW2d 902 (1977), he explained that Howell-Mason "selectively defines the field of regulation to be those areas of State law that regulate drinking water and wellhead protection," when in fact "[t]he Zoning Ordinance does not seek to regulate" those fields at all [9/16/2024 Opinion and Order, p. 9]. As Judge McGivney put it, Howell-Mason's "unwritten underlying premise—that any municipal regulation that arises from a concern for environmental protection is itself an environmental regulation—is fundamentally flawed, and it renders their entire analysis faulty." [9/16/2024 Opinion and Order, p. 9]. That conclusion was left undisturbed on appeal. As explained at the outset, Howell-Mason may not relitigate it due to the application of the res judicata and collateral estoppel doctrines.

Howell-Mason nonetheless repackages the same preemption theory for this Court, this time by pointing to background descriptions of the state regulatory schemes. The Township takes this opportunity to make a narrow but telling point: Howell-Mason's own source documents refute the very preemption it asserts. Each confirms that the state approvals Howell-Mason touts do not displace local zoning—they expressly preserve it.

Begin with the approval Howell-Mason claims it obtained for its proposed underground storage tanks. By its own terms, that approval "does not relieve an owner … from having to meet the requirements of the other state and local government laws, ***including zoning laws***":[13]

[13] This can be found as an attachment to Howell-Mason's Exhibit T.

This review is based upon submitted information, and is not considered a permit. Approval of a tank installation plan by the Department of Licensing and Regulatory Affairs, does not relieve an owner or installer from having to meet the requirements of the other state and local government laws, including zoning laws. The Hazardous Materials Storage Inspector may find additional deficiencies during site inspections.

If you have any questions concerning this matter, please contact the Storage Tank Division at (517) 241-8847.

Jerry Arnold

Jerry Arnold

Engineer
Storage Tank Division

Cc: Dan Shuck

BFS 3830 (REV 12/12)

A document that expressly conditions the approved activity on continued compliance with local zoning cannot support an argument that local zoning has been preempted.

The EGLE materials Howell-Mason submitted say the same. Exhibit X to Howell-Mason's filing is an EGLE publication titled "The Michigan Wellhead Protection Program Guide" from March 2020. Rather than claiming exclusive state authority over the field, the document encourages communities to act at the local level to protect their drinking water, specifically endorsing management strategies that include "site plan review, zoning, ordinances, land use planning, and … wellhead protection" plans to "insure the future quality of [the] drinking water supply." Howell-Mason, Exhibit X. In other words, the very agency Howell-Mason says has occupied this field treats local zoning not as something preempted, but as a crucial tool for safeguarding drinking water.

The Township raises these source materials only to further demonstrate why Howell-Mason's preemption claim, already foreclosed, also fails on the very materials Howell-Mason chose to put before the Court. It should be dismissed.

2. Count V fails as a matter of law under MCR 2.116(C)(10) because no genuine issue of material fact exists as to Howell-Mason's Open Meetings Act claim.

Howell-Mason devotes barely three paragraphs to its contention that the Township violated the Michigan Open Meetings Act (OMA) by reaching a "predetermined" vote and by failing to provide some unspecified "required notice." Plaintiff's Brief, pp. 19–20. The Township explained in its Brief in Support of Its Motion for Summary Disposition on Counts V and VI Pursuant to MCR 2.116(C)(10) why this claim fails: three of the four remedies the OMA provides are foreclosed here as a matter of law, and the undisputed record establishes that the Township considered and decided Howell-Mason's application in duly noticed, open public meetings, with no evidence whatsoever that any decision was made outside of a public meeting. Those arguments are incorporated here and independently entitle the Township to judgment under MCR 2.116(I)(2).[14] The Township writes separately only to address the supposed "evidence" Howell-Mason now marshals because that evidence, on inspection, proves nothing it claims and in places refutes its own theory.

Start with the assertion that the vote was "predetermined" which Howell-Mason supports by citing Exhibit Y. Plaintiff's Brief, pp. 19-20. Exhibit Y consists of undated, untimestamped Facebook posts from a single Township Board member, Trustee Bob Wilson, which on their face appear to have been made ***after*** the special land use permit was denied. The OMA governs how a public body deliberates and decides as a body; the after-the-fact views of a single trustee are not the act of the Township Board and do not show that the Board deliberated or decided anything outside an open meeting. How any of this violates the OMA, Howell-Mason never explains.

Howell-Mason also asserts—in conclusory fashion—that the Township "colluded" with MHOG to vote against the project, and cites its Exhibits E and F. Exhibit E are the meeting

[14] The specific argument that are being incorporated are those on pages 6-10 of the Township's Brief in Support of Its Motion for Summary Disposition Pursuant to MCR 2.116(C)(10).

minutes of the March 20, 2023 Township Board meeting; Exhibit F is the minutes of the May 8, 2023 Township Board meeting. Minutes of duly noticed, open meetings are not evidence of secret coordination; they are the documentary record that the Township's business was conducted in public, in the open, exactly as the OMA requires. Howell-Mason's own exhibits thus undercut the very claim they are offered to support. It is left entirely unexplained how meeting minutes establish that the Township colluded with anyone, and Howell-Mason—having taken no discovery of its own on this claim—offers nothing else.

Count V should be dismissed for each of the reasons set out in the Township's companion motion, and the "evidence" Howell-Mason now advances only confirms how insubstantial the claim has always been.

3. Count VI fails as a matter of law under MCR 2.116(C)(10) because no genuine issue of material fact exists as to Howell-Mason's regulatory takings claim.

Howell-Mason pled a "takings" claim in its Count VI. The Township explained at length in its companion motion why this claim fails as a matter of law, and those arguments are incorporated here and independently entitle the Township to judgment under MCR 2.116(I)(2).[15] In short, Howell-Mason cannot establish a regulatory taking under either theory Michigan law recognizes—that the regulation failed to advance a legitimate governmental interest, or that it denied Howell-Mason all economically viable use of its land—because the undisputed record, including the testimony of Howell-Mason's own experts, defeats both. The Township responds here only to the framing Howell-Mason advances in its motion.

The framing by Howell-Mason is that the Township relied on an "unconstitutional, preempted, arbitrary and capricious ordinance banning gas stations" and that resulted in a deprivation of property. Plaintiff's Brief, p 21. Of course, that premise is wrong for at least two

[15] The specific arguments that are being incorporated are those on pages 10-18 of the Township's Brief in Support of Its Motion for Summary Disposition Pursuant to MCR 2.116(C)(10).

obvious reasons. First, Judge McGivney—along with the Court of Appeals and Michigan Supreme Court—denied the idea the Township somehow wrongly denied the sought after special land use. Second, the Township relied on three ***unchallenged*** independent grounds under its Zoning Ordinance to deny the special land use, as explained above. The arguments are just belied by the record.

Howell-Mason also points this Court to a block quote from *Penn Central* discussing what it calls a "similar" case: *Pennsylvania Coal Co v Mahon*, 260 US 393 (1922). *Pennsylvania Coal* turned on the destruction of a vested property right the owner already held. The coal company had deeded away the surface while expressly reserving the right to mine all of the coal beneath it—a separate and, as the Court put it, "very valuable estate" recognized as such under Pennsylvania law. *Id* at 414. The challenged statute then forbade mining that would cause subsidence, which made it commercially impracticable to extract coal the company already owned the right to mine—an effect the Court equated, for constitutional purposes, with appropriating or destroying that estate outright. *Id* at 414–415. It was in that setting—a regulation that wiped out an existing, legally recognized property interest—that Justice Holmes announced the very rule Howell-Mason quotes: "if regulation goes too far it will be recognized as a taking." *Id* at 415.

Howell-Mason holds no analogous interest. It never possessed any right—vested, reserved, or otherwise—to operate a gas station within 300 feet of a wellhead protection area. That use was prohibited on the face of the Zoning Ordinance and, elsewhere in the district, available only by discretionary special land use permit. The point is there was no preexisting legal interest for the Township's decision to destroy, because the asserted right was not a property right Howell-Mason even held. The contrast is also one of degree: the statute in

Pennsylvania Coal left the coal company with no profitable use of the very estate it had reserved, whereas here the Property retains multiple economically viable uses as of right—uses Howell-Mason has simply declined to pursue.

Because Howell-Mason cannot establish a taking under any recognized theory—it held no protected interest the Township could take, the denial rested on independent grounds it does not challenge, and the Property retains economically viable uses it has chosen not to pursue—no genuine issue of material fact remains, and the Township is entitled to summary disposition on Count VI under MCR 2.116(C)(10).

In conclusion, the Township respectfully requests that the Court deny Howell-Mason's motion for summary disposition in its entirety and, pursuant to MCR 2.116(I)(2), enter judgment in the Township's favor on all of Howell-Mason's claims.

C. The Court's Ruling.[16]

Plaintiff's motion for summary disposition is denied, and the Township is entitled to summary disposition under MCR 2.116(I)(2). Even viewing the evidence in the light most favorable to Plaintiff, there is no genuine issue of material fact and the Township is entitled to judgment as a matter of law.

Regarding Counts I and II (substantive and procedural due process), the claims fail are barred by res judicata and collateral estoppel. In any event, the claims fail for the additional reasons that Plaintiff lacks a protected property interest in a discretionary decision concerning a SLUP; the Township's zoning regulations advance legitimate governmental interests (as conceded by Plaintiff's own land-use expert, Paul LeBlanc); and the application of those regulations is not unconstitutional in every circumstance. Plaintiff asserts in its Response that it

[16] The Court incorporates by reference its opinions regarding the Township's motions for summary disposition, argued this same date.

purchased this property specifically "because of the current and future zoning designations." [Plaintiff's response brief, p. 2]. Thus, Plaintiff concedes that the property interest in the land (not in any specific zoned use) was subject to a discretionary zoning review, and its own expert admitted that the Township could not approve the application as presented; and that even though the application process was "futile," the Township Board provided Plaintiff with due process as required.

Regarding Count III (equal protection), this claim is barred by res judicata and collateral estoppel. The claim fails for the additional reasons that Plaintiff has failed to present any evidence of a similarly situated landowner, and has not asserted a viable "class of one" theory or any other threshold requirement for such a claim. Plaintiff asserts that a "total ban of gas stations facially violates the equal protection clause," Response brief, p. 14, but the Township does *not* have a total ban on gas stations. Rather, the ban on gas stations is limited to those within 300 feet of a wellhead protection area. Howell-Mason has not identified anyone who is similarly situated to support this claim—even though this case has been litigated for more than two years and discovery is complete.

Regarding Count IX (preemption), the claim is barred by res judicata and collateral estoppel, and for the additional reason that the Township's Zoning Ordinance regulates land use – not drinking water or environmental protection – and neither occupies a field preempted by state law nor directly conflicts with any state statute. The exhibits cited by Plaintiff do not create a genuine issue of material fact.

Regarding Count V (Open Meetings Act), the claim fails because there is no evidence of an OMA violation, let alone an *ongoing* violation. There is no dispute that Plaintiff received notice of the relevant meetings, and that the Township's meeting schedule is online and publicly

available. Additionally, Plaintiff is not entitled to the relief it seeks under the OMA. Plaintiff was required to commence any action "within 60 days after the approved minutes are made available to the public" to request the Court invalidate the decision of the Township Board. MCL 15.270(3)(a). Plaintiff did not do this, and it provides no authority that would permit the relief requested.

Thus, in order to recover under the OMA, Plaintiff must show an ongoing violation. Plaintiff makes the conclusory statement that the Township has violated the OMA through its meetings on March 20, 2023 and May 8, 2023. However, Plaintiff has not cited to any evidence that the Township Board made any decisions or deliberations *as a quorum* in violation of the OMA. In fact, the documents Plaintiff cites are duly noticed meeting minutes for open public meetings with no evidence to suggest that any decision was made outside of the public meeting.

The undated Facebook post purportedly made by a Township Board Member (Trustee Bob Wilson) appears to have been made after Plaintiff's SLUP application was denied. In any event, it is not evidence of an OMA violation, because the OMA governs deliberations by a quorum of board members. MCL 15.263(3) (requiring all deliberations of a public body "constituting a quorum of its members must take place at a meeting open to the public"). A single official is not a public body. *Herald Co v City of Bay City*, 463 Mich 111, 130; 614 NW2d 873 (2000). Further, the fact that Mr. Hohenstein communicated with MHOG director Greg Tatara and allegedly influenced Tatara to write the May 19, 2023 letter is not evidence of an OMA violation. Tatara is not a member of the Township Board. Neither Mr. Wilson's nor Mr. Hohenstein's alleged statements or conversations could be a quorum of the Township Board.

Regarding Count VI (regulatory taking), the claim fails because Plaintiff cannot establish a regulatory taking under either theory Michigan law recognizes—that the regulation

failed to advance a legitimate governmental interest, or that it denied Plaintiff all economically viable use of its land. The undisputed record, including the testimony of Plaintiff's own experts, defeats both. Plaintiff's reliance on the discussion of *Pennsylvania Coal Company v Mahon* in the *Penn Central case* is unavailing, because *Pennsylvania Coal* is easily distinguishable on its facts.

WHEREFORE, IT IS HEREBY ORDERED that Plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) is denied, and the Court grants judgment in favor of Defendant pursuant to MCR 2.116(I)(2). The First Amended Complaint is dismissed in its entirety.

This Order resolves the last pending claim and closes the case.

IT IS SO ORDERED.

6/25/2026

Susan Longsworth (P65575)
Circuit Judge

STATE OF MICHIGAN 44TH CIRCUIT COURT JUDICIAL CIRCUIT LIVINGSTON	PROOF OF SERVICE FOR PARTY NOTIFICATION	CASE NO. 2024 0000032242-CZ

204 S HIGHLANDER, STE 4
HOWELL, MI 48843

(517)546-9816

Judge: SUSAN LONGSWORTH

Date: MONDAY JUNE 29, 2026

Plaintiff/Petitioner	v	Defendant/Respondent
HOWELL-MASON LLC		HOWELL TOWNSHIP

SEE ENCLOSED OPINION AND ORDERS 1-3.

CERTIFICATE OF MAILING

The following parties were served by e-mail (MCR 2.107(C)(4)):

Name	Complete address of service
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06/29/2026
Date

STATE OF MICHIGAN

IN THE 44TH CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

HOWELL-MASON, LLC,

Plaintiff,

Case No. 24-32242-CZ
Hon. Susan Longsworth

v

HOWELL TOWNSHIP,

Defendant.
_____/

OPINION AND ORDER REGARDING HOWELL TOWNSHIP'S MOTION FOR SUMMARY DISPOSITION ON COUNTS I, II, III, AND IX

At a session of Court
Held in the City of Brighton, County of Livingston, on

June 25, 2026

This matter is before the Court on the motion for summary disposition of Defendant, Howell Township, on Counts I, II, III, and IX, pursuant to MCR 2.116(C)(7) and (C)(10). The Court heard oral argument on June 18, 2026. For the reasons set forth below, the motion is granted.

I. FACTS AND PROCEEDINGS

Plaintiff, Howell-Mason, LLC ("Plaintiff" or "Howell-Mason") owns three contiguous parcels of real property located at and near the corner of Mason Road and Burkart Road in Howell Township (the "Property"). The Property includes two parcels (Tax ID Nos. 4706-33-300-001 and 4706-33-300-108) that are currently zoned Neighborhood Service Commercial (NSC). The third parcel is currently zoned residential, master planned commercial, and is not at issue in this matter.

Plaintiff is in the business of developing and operating gasoline service stations with attached restaurants. Plaintiff purchased the Property in 2017, intending to build a Mugg & Bopps gas station, convenience store, and drive-thru fast-food restaurant on the two lots zoned NSC. The Howell Township Ordinance allows convenience stores by right in the NSC district; however, a gas station and drive-thru are allowed only by special permit. In addition, the lots are located within 300 feet of the Marion Howell Oceola Genoa Township ("MHOG") wellhead protection area, and the Zoning Ordinance does not permit gas stations within 300 feet of the wellhead protection area.

In 2021, Plaintiff sought a use variance, which was denied. In the Spring of 2023, Plaintiff asked that the Zoning Ordinance be amended to allow gas stations in the wellhead protection area, but Howell Township (the "Township") denied the request.

In June of 2023, Plaintiff submitted to the Township Planning Commission an application for a special land use permit ("SLUP"). The Planning Commission recommended denial of the application, and the Township Board of Trustees voted to deny the SLUP application and site plan proposal in December of 2023. Plaintiff appealed to the Circuit Court (Case No. 24-350-AA), which affirmed the Township Board's decision in September of 2024. The Court of Appeals denied leave to appeal on April 11, 2025. The Supreme Court denied leave on August 29, 2025.

Plaintiff also filed this original action in the Circuit Court in March of 2024. As discussed in more detail below, the Circuit Court dismissed some, but not all, of the claims in January of 2025.

In the instant motion, the Township moves for an order granting summary disposition on Count I (Substantive Due Process), Count II (Procedural Due Process), Count III (Equal

Protection), and Count IX (Preemption) of Plaintiff's First Amended Complaint pursuant to MCR 2.116(C)(7) and (C)(10).

A. The Township's Recitation of Facts[1]

1. Howell-Mason purchases property in Howell Township subject to existing zoning regulations.

Over the course of several years starting in 2017, Howell-Mason purchased three parcels of real property located in Howell Township after conducting due diligence regarding the zoning status and permitted uses of the Property. Howell-Mason has confirmed that it reviewed the applicable zoning regulations before acquisition and specifically bargained to ensure it was comfortable with the zoning designations governing the Property at the time of purchase.

The Property is located within Howell Township's Neighborhood Services Commercial District. Under the Howell Township Zoning Ordinance, that district permits certain commercial uses by right, while other uses—including gasoline service stations and drive-through facilities—are permitted only upon approval of a special land use permit pursuant to Article XVI of the Zoning Ordinance. Zoning Ordinance §16.02.

Special land uses are not permitted as of right. Rather, an applicant bears the burden of demonstrating compliance with each of the mandatory approval standards set forth in the Zoning Ordinance, and approval is vested in the discretion of the Township Board. Zoning Ordinance §§16.02, 16.06. The Zoning Ordinance requires that a proposed special land use satisfy multiple substantive criteria. Those criteria include the general special land use standards set forth in Sections 16.06(A)–(F), which address compatibility with surrounding land uses, impacts on public health, safety, and welfare, and effects on the environment and natural resources. Zoning Ordinance §16.06(A)–(F).

[1] Some citations to exhibits have been removed for simplicity.

In addition to the general standards of Section 16.06, the Zoning Ordinance expressly incorporates use-specific standards applicable to certain other special land uses. For gasoline service stations, those additional requirements are set forth in Section 16.11, which applies "[i]n addition to all applicable regulations in effect in the district in which [the use is] located." Zoning Ordinance §16.11. The Township Board is prohibited from approving a special land use unless all applicable standards—both general and use-specific—are satisfied, and the failure to meet any single required standard independently requires denial. Zoning Ordinance §§16.06, 16.11. This is important because the Property is located within 300 feet of a designated wellhead protection area. At all relevant times, the Zoning Ordinance expressly prohibited gasoline service stations within that buffer. Zoning Ordinance §16.11(C)(8). Howell-Mason does not dispute that this prohibition was in effect when it purchased the Property and that it applied to the Property as zoned.

2. Howell-Mason applies for a special land use permit to operate a gas station with a drive-thru, which the Township Board unanimously denies based on multiple independent standards.

In 2023, Howell-Mason submitted an application for a special land use permit seeking approval to operate a gasoline service station, convenience store, and drive-thru restaurant on the Property. Because the proposed use constituted a special land use, the application was subject to the general special land use standards set forth in Zoning Ordinance §16.06(A)–(F), as well as the use-specific standards applicable to gasoline service stations set forth in Zoning Ordinance §16.11.

The application for a special land use permit proceeded through the review process required by the Zoning Ordinance. The Howell Township Planning Commission conducted a duly noticed public hearing on November 21, 2023, at which Howell-Mason was present and afforded the opportunity to present materials, expert opinions, and arguments in support of its

application. The Planning Commission also received substantial written and oral public comments and considered input from the Marion-Howell-Oceola-Genoa Sewer and Water Authority ("MHOG"). As part of its review, the Planning Commission considered both the general special land use standards of Zoning Ordinance §16.06 and the use-specific standards applicable to gasoline service stations, including the prohibition on gasoline service stations within 300 feet of a wellhead protection area set forth in Zoning Ordinance §16.11(C)(8). Following the public hearing, the Planning Commission recommended denial of the application based on the applicable Zoning Ordinance standards. Zoning Ordinance §§16.02, 16.06, 16.11.

On December 11, 2023, the Township Board held a duly noticed public meeting to consider the application for a special land use permit. Howell-Mason again appeared and was afforded the opportunity to present its position to the Township Board. After reviewing the administrative record, the Planning Commission's recommendation, and the applicable Zoning Ordinance standards, the Township Board unanimously denied the application.

The Township Board determined that Howell-Mason failed to satisfy multiple independent and mandatory approval standards, including findings that the proposed use was not harmonious with the surrounding area, would be hazardous or disturbing to existing or future neighboring uses, would adversely impact natural resources and the environment, and was prohibited due to the Property's location within 300 feet of a designated wellhead protection area. Zoning Ordinance §§16.06(A), 16.06(D), 16.06(F), 16.11(C)(8). Each of these findings independently required denial of the application for a special land use permit under the Zoning Ordinance. Zoning Ordinance §§16.06, 16.11.

3. Howell-Mason appeals the denial, and the Township Board's decision is affirmed at every level of review.

Following the Township Board's unanimous denial of the application for a special land use permit, Howell-Mason pursued appellate review of that decision through the Michigan courts. At each stage of review, Howell-Mason challenged the Township Board's decision because, in its opinion, it was not supported by competent, material, and substantial evidence and was not authorized by law. Howell-Mason also raised constitutional and statutory challenges to the Zoning Ordinance and its application to the Property. Those challenges were fully litigated and rejected at every level of appellate review, as explained immediately below.

(a) The Livingston County Circuit Court affirmed the decision of the Township Board through a 15-page opinion.

Howell-Mason timely filed an appeal of the Township Board's decision to deny its application for a special land use permit. The parties fully briefed the appeal, and the Circuit Court heard extensive oral argument on August 15, 2024, at which both parties appeared through counsel and presented argument on the administrative record. On September 16, 2024, the Honorable Matthew J. McGivney issued a written fifteen-page Opinion and Order affirming the Township Board's decision in all respects. Applying the governing standard of review under Const 1963, art 6, § 28, Judge McGivney emphasized that its role was not to reweigh evidence or substitute its judgment for that of the Township Board, but to determine whether the Township Board's decision was authorized by law and supported by competent, material, and substantial evidence on the whole record. Judge McGivney recognized (as does Howell-Mason's expert) that Howell Township's Zoning Ordinance requires denial of a special land use permit if any mandatory approval standard is not satisfied, and that the Township Board found Howell-Mason failed to satisfy multiple independent standards.

(b) The Michigan Court of Appeals denied leave for "lack of merit in the grounds presented" and the Michigan Supreme Court declines further review.

Following Judge McGivney's September 16, 2024 Opinion and Order affirming the Township Board's decision, Howell-Mason sought appellate review in the Michigan Court of Appeals. Howell-Mason filed an application for leave to appeal, again challenging the Township Board's denial of the application for a special land use permit and Judge McGivney's affirmance of that decision. On April 11, 2025, the Michigan Court of Appeals entered an order denying leave to appeal, expressly concluding that the application should be denied "for lack of merit in the grounds presented."

Howell-Mason sought further review in the Michigan Supreme Court. On August 29, 2025, the Michigan Supreme Court denied the application for leave to appeal, stating that it was "not persuaded that the questions presented should be reviewed by this Court." With the Michigan Supreme Court's denial of leave to appeal, the Township Board's December 11, 2023 decision denying the application for a special land use permit became final.

4. Procedural history of this action.

After Judge McGivney issued his September 16, 2024 Opinion and Order affirming the Township Board's decision in the zoning appeal, the Township moved for summary disposition in this action under MCR 2.116(C)(7), (C)(8), and (C)(10). The Township argued that Howell-Mason failed to state viable claims as a matter of law and that several claims were barred by principles of preclusion. At that time, however, the zoning appeal had not yet reached final resolution through the appellate process, and the Township had not yet amended its affirmative defenses to expressly assert res judicata or collateral estoppel (defenses that were not yet available when the Township answered).

Judge McGivney heard oral argument on the Township's motion on January 16, 2025. That same day, Judge McGivney entered a written order granting the motion in part and denying it in part. Judge McGivney dismissed Counts IV, VII, and VIII with prejudice for failure to state a claim. Judge McGivney denied summary disposition under MCR 2.116(C)(7) without prejudice, characterizing the Township's preclusion arguments as premature at that stage of the case and explaining that those defenses would need to be formally asserted before they could be adjudicated. Judge McGivney also denied the Township's remaining arguments without prejudice while discovery remained open.

The Township thereafter moved for leave to amend its affirmative defenses to expressly assert res judicata and collateral estoppel, explaining that it had not previously asserted those defenses because the zoning appeal had not yet reached final resolution. On February 27, 2025, Judge McGivney granted the Township's motion and allowed the Township to file its amended affirmative defenses, which it did.

Following those rulings, the parties engaged in discovery. The Township served written discovery, including interrogatories, requests to admit, and requests for production, directed at the factual bases for Howell-Mason's remaining claims. Howell-Mason initially asserted wholesale objections to a substantial portion of the Township's written discovery, necessitating Court intervention. The parties addressed the discovery dispute through mediation with retired Judge Michael P. Hatty, as ordered by Judge McGivney.

Discovery in this action has now closed. The Township's amended affirmative defenses remain on file, and the zoning appeal has been fully and finally resolved through denial of leave to appeal by both the Michigan Court of Appeals and the Michigan Supreme Court. The

Township now moves for summary disposition on all remaining claims through two separate filings.

B. Howell-Mason's Recitation of Facts

Plaintiff, Howell-Mason, LLC, is a Michigan Limited Liability Company with a principal place of business in Howell, Livingston County, Michigan. Plaintiff is in the business of developing and operating gasoline service stations with attached restaurants. Defendant, Howell Township, is a Michigan General Law Township with offices located at 3525 Byon Road, Howell, Livingston County, Michigan 48855.

Plaintiff owns three contiguous parcels of real property located at and near the corner of Mason Road and Burkart Road in Howell Township (the "Property"). The Property includes two parcels (Tax ID Nos. 4706-33-300-001 and 4706-33-300-108) that are currently zoned Neighborhood Service Commercial (NSC), in which gasoline service stations are permitted as a special land use. The third parcel is currently zoned residential, master planned commercial, and is not at issue in this matter. All three of Plaintiff's parcels are master planned for commercial use and sit within the commercial corridor contemplated by the Defendant's master plan. The immediate vicinity of the Property has been tapped as an area of significant development in the township, with approximately one thousand (1,000) residential homes approved to be built across the street from the commercial corridor in which the Property is located. Plaintiff purchased the Property specifically because of the current and future zoning designations, as well as the significant residential and commercial development in the area.

The Property is located at the far edge of a large wellhead protection area and Section 16.11(C)(8) of the Howell Township Zoning Ordinance states: "No gasoline service station shall be permitted within three hundred (300) feet of a wellhead protection area".

On August 7, 2019, Plaintiff met with Joe Daus, Howell Township Zoning Administrator to discuss seeking a variance to develop a gasoline service station and drive through restaurant on the Property. Plaintiff was advised that if Plaintiff could get the approval of "Greg" at the Marion, Oceola, Genoa Water Authority (MHOG) Defendant would approve a variance. Plaintiff later learned Greg was Greg Tatara. At the meeting, Mr. Daus then told Plaintiff that once it had MHOG's approval, to submit the request for variance to the Zoning Board of Appeals, then to the Planning Commission, then to the Township Board of Trustees.

Plaintiff contacted Mr. Tatara, provided the plans for the gasoline service station, and on February 1, 2021 and February 23, 2023, MHOG issued two separate letters to Plaintiff approving the proposed project with conditions. On March 16, 2021, the Howell Township ZBA then held a hearing and denied Plaintiff's use variance application. Next, Plaintiff requested Defendant amend §16.11 of its zoning ordinance to allow for gasoline service stations within the wellhead protection as long as the plans are approved by MHOG. Without giving Plaintiff notice, the Howell Township Board of Trustees held two public meetings, on March 20, 2023 and May 8, 2023, at which Plaintiff's proposed zoning ordinance amendment, Plaintiff's property, and Plaintiff's SLUP application, were discussed. Defendant ultimately denied Plaintiff's request to change the language of Ordinance 16.11 and approved submission of a new wellhead protection ordinance to go to Township Planning Committee, specifically requesting a complete prohibition of gasoline service stations.

Plaintiff regrouped, applied, and received permits and approvals for the project from the State of Michigan Department of Licensing and Regulatory Affairs Bureau of Fire Services (BFS); Department of Environment, Great Lakes, and Environment ("EGLE"); (3) State of Michigan Fire Marshal; and (4) local fire Marshal.

On or around June 26, 2023, Plaintiff submitted a special land use permit application (SLUP) and site plan to develop a new gasoline service station and drive-through restaurant on land owned by Plaintiff in Howell Township, currently zoned Neighborhood Service Commercial (NSC), in which gasoline service stations are permitted as a special land use. The application was supplemented on or around October 17, 2023.

In conjunction with Plaintiff's SLUP application and site plan submission, the Township required Plaintiff to sign an agreement to reimburse the Township for "all expenses at actual cost for professional services related to the application required by the Township for the issuance of any permits, approvals, reviews, and attendance at meetings, by the Township's Planner, Landscape Architects, Legal Counsel, Engineering and Administrative Staff, over and above the fees listed in the Howell Township Fee Schedule." Unbeknownst to Plaintiff, MHOG director Tatara drafted a third letter on May 19, 2023, revoking MHOG's prior approval of the site plan and openly objecting to Plaintiff's plan to build a gasoline service center at the Property and on November 19, 2023, the MHOG Board resolved to submit a formal objection to the Township Trustees. Plaintiff was not given notice of the MHOG public meeting and was not provided a copy of the resolution by MHOG nor Defendant.

On November 21, 2023, the Howell Township Planning Commission conducted a public hearing on Plaintiff's SLUP application. At the outset of the meeting, the Planning Commission stated that it lacks authority to grant the application.

> MR. WILLIAMS:· Just so I understand you correctly, Paul, that we don't have the authority to approve a gas station that violates that ordinance of not being within 300 feet of a wellhead protection area.
>
> MR. MONTAGNO: That is correct.

The Howell Township Planning Commission voted unanimously to recommend denial of the SLUP based on the prohibitive language in §16.11(C)(8) of its Zoning Ordinance. On December 11, 2023, the Howell Township Board of Trustees held a regular meeting at which they voted to deny the SLUP.

Following the Township Board's denial of Plaintiff's SLUP application, Plaintiff submitted its application to the Zoning Board of Appeals to appeal the Board decision and to request dimensional and use variances. The appeal was denied. Plaintiff filed a circuit court claim of appeal of the December 11, 2023, Board denial on January 23, 2024, which was assigned to Judge McGivney as Case No. 24-350-AA. This lawsuit followed.

II. SUMMARY DISPOSITION STANDARDS

A. MCR 2.116(C)(7)

Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred by res judicata or collateral estoppel. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007). A motion pursuant to MCR 2.116(C)(7) may be supported by affidavits, depositions, admissions, or other documentary evidence so long as the evidence would be admissible. *Maiden v Rozwood,* 461 Mich 109, 119; 597 NW2d 817 (1999). The allegations set forth in the complaint must be accepted as true unless contradicted by other evidence. *Id.* "[T]he trial court must accept the nonmoving party's well-pleaded allegations as true and construe the allegations in the nonmovant's favor to determine whether any factual development could provide a basis for recovery." *Hoffman v Boonsiri,* 290 Mich App 34, 39; 801 NW2d 385 (2010).

B. MCR 2.116(C)(10)

A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests whether there is factual support for a claim. Judgment may be entered under this rule when "there is no genuine issue as to any material fact." In evaluating a motion brought under MCR 2.116(C)(10), a reviewing court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. MCR 2.116(G)(5); *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006). Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.*; see also MCR 2.116(C)(10) and MCR 2.116(G)(4).

Initially, the moving party bears the burden of supporting its claim to summary disposition with affidavits, depositions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Once this burden is met, the nonmoving party may not rely on mere allegations or denials in its pleadings, but must establish that a genuine issue of disputed fact exists for trial. *Id.* Affidavits, depositions, and documentary evidence offered in support of, and in opposition to, a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden*, 461 Mich at 120-121.

III. ANALYSIS

"The preclusion doctrines of res judicata and collateral estoppel serve an important function in resolving disputes by imposing a state of finality to litigation where the same parties have previously had a full and fair opportunity to adjudicate their claims." *William Beaumont*

Hosp v Wass, 315 Mich App 392, 398; 889 NW2d 745 (2016) (quotation marks and citation omitted).

"The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). Further our courts are to apply the doctrine broadly: res judicata not only bars claims already litigated, but it also bars "every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Id.*

Collateral estoppel limits the relitigation of issues rather than claims. Its elements are: (1) "a question of fact essential to the judgment" that was "actually litigated and determined by a valid and final judgment;" (2) the same parties or their privies "had a full and fair opportunity to litigate" that issue, and (3) the party "taking advantage of the earlier adjudication would have been bound by it, had it gone against him." *Monat v State Farm Ins Co*, 469 Mich 679, 682–685; 677 NW2d 843 (2004) (cleaned up).

A. The Township's Arguments.

1. Counts I, II, III, and IX are barred by res judicata and collateral estoppel under MCR 2.116(C)(7) and, in any event, fail as a matter of law under MCR 2.116(C)(10).

"Michigan employs a broad approach to the doctrine of res judicata." *Duncan v State*, 300 Mich App 176, 194; 832 NW2d 761 (2013). The doctrine "precludes relitigation of a claim when it is predicated on the same underlying transaction that was litigated in a prior case." *Id.* The doctrinal purpose is to "prevent inconsistent decisions, conserve judicial resources, and protect vindicated parties from vexatious litigation." *Id.* There are four elements:

> (1) the prior action was decided on the merits, (2) the prior decision resulted in a final judgment, (3) both actions involved the same parties or those in privity with the parties, and (4) the issues presented in the subsequent case were or could have been decided in the prior case. [*Id.*]

A similar but slightly different doctrine is that of collateral estoppel, which "precludes relitigation of an issue in a subsequent, different cause of action between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was (1) actually litigated, and (2) necessarily determined." *People v Gates*, 434 Mich 146, 154; 452 NW2d 627 (1990); see also *Barrow v Pritchard*, 235 Mich App 478, 480-81; 597 NW2d 853 (1999). Together, these doctrines promote finality and judicial economy by preventing the relitigation of claims and issues that have already been resolved; they serve the fundamental purpose of promoting judicial economy as well. See *Wilcox v Sealey*, 132 Mich App 38; 346 NW2d 889 (1984).

Four of Howell-Mason's remaining claims—Counts I (Substantive Due Process), II (Procedural Due Process), III (Equal Protection), and IX (Preemption)—are foreclosed by settled principles of claim and issue preclusion. Each was raised and litigated in the zoning appeal before this Court. Judge McGivney expressly addressed and rejected Howell-Mason's arguments in the written decision on the merits (Exhibit L). Judge McGivney's legal conclusion that the appeal was devoid of merit was then left undisturbed after Howell-Mason sought relief in the Michigan Court of Appeals and the Michigan Supreme Court.

Alternatively, even if the Court were to conclude that preclusion does not apply, dismissal is still compelled under MCR 2.116(C)(10). Discovery is closed, the material facts are undisputed, and Howell-Mason cannot establish a legally cognizable entitlement to relief on any of these claims. Moreover, even apart from preclusive effect, Judge McGivney's reasoned decision constitutes persuasive authority that this Court may properly adopt in resolving the identical legal issues presented here. *People v Good*, 346 Mich App 275, 284; 12 NW3d 79 (2023).

The subsections that follow address each of these grounds—res judicata, collateral estoppel, and judgment as a matter of law—in turn and explain why each independently requires dismissal of Counts I, II, III, and IX.

(a) Counts I (substantive due process) and II (procedural due process).

"The federal due process provision guarantees that no person shall be deprived of 'life, liberty, or property, without due process of law.'" *Bonner v City of Brighton*, 495 Mich 209, 225; 848 NW2d 380 (2014) (citations omitted). There are "two separate types of protections—substantive and procedural[.]" *Id.* at 226. "The first and most essential" inquiry that must be made by courts reviewing due process challenges is to determine "whether the interest allegedly infringed by the challenged government action...comes within the definition of 'life, liberty, or property.'" *Id.* at 225. "If it does not, the Due Process Clause affords no protection." *Id.* If there is a protected interest, then a challenger can show a regulation is substantively invalid by proving "that there is no reasonable government interest being advanced" or that the regulation is "purely arbitrary [or] capricious." *Id.* at 228. A challenger can also show a regulation is procedurally invalid if there was deprivation of the protected interest without a meaningful opportunity to be heard pursuant to law. *Id.* at 236.

Howell-Mason argued—at length—through the zoning appeal that the zoning regulations were violative of both substantive and procedural due process (both facially and as applied). This Court provided an extensive review of the arguments. The result:

> A challenge to a zoning ordinance as unconstitutional as applied, to be distinguished from a facial challenge, alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution of government action...Since there is no reasonable dispute based on the record that the business of a gas station is not totally banned in the Township or even in the [Neighborhood Commercial Service District], any as applied challenge arising from a claim of exclusionary zoning must fail... **Section 16.11(C)(8) is not unconstitutional as applied.**

...

> Howell Township has a legitimate interest in protecting the general welfare of the community and in locating land uses in compatible locations to other land uses. That legitimate interest of the municipal government is enshrined in the MZEA itself ... [Howell-Mason] has been unable to show that the ordinance is not rationally related to a legitimate government interest in every scenario. **[The facial] challenge must be rejected.** [9/16/24 Opinion and Order on Appeal, pp. 6-8, 13 (emphasis added)]

Howell-Mason may not now use this original action to relitigate those same due process challenges. Res judicata bars the reassertion of claims predicated on the same underlying transaction that were actually litigated in a prior action, as well as claims that could have been litigated. *Duncan*, 300 Mich App at 194; see also *Krohn v Saginaw*, 175 Mich App 193, 198; 437 NW2d 260 (1988). Collateral estoppel independently precludes Howell-Mason from relitigating the same constitutional issues, even if recast under different theories. *Barrow*, 235 Mich App at 480-81.

Apart from preclusion, Howell-Mason's due process claims fail as a matter of law for the same reasons identified in the zoning appeal. Howell-Mason lacks a protected property interest in a discretionary decision concerning a special land use permit; the Township's zoning regulations advance legitimate governmental interests as Howell-Mason's land-use expert conceded; and the application of those regulations is not unconstitutional in every circumstance. *Richardson v Twp of Brady*, 218 F3d 508 (CA 6, 2000) (explaining there can be "no legitimate claim of entitlement to a discretionary decision" of local government); *Mettler Wallon, LLC v Melrose Twp*, 281 Mich App 184; 761 NW2d 293 (2008). Howell-Mason's own land use expert confirmed the Township had the discretion to determine if the applicable standards were satisfied and opined the Township was without authority to grant the special land use application as presented, describing the entire application process by Howell-Mason as "futile":

Q. So is it your opinion that Howell Township had the discretion to determine whether or not this standard was satisfied?

A. They do.

Q. If a standard is not met through the special land use permit application process, does the township board have the authority to grant it?

A. I would say if they find that it's not met, no, they would not grant the special use.

...

Q. So the special land use application was futile?

A. **Yes.** [Deposition of Paul LeBlanc, pp. 34-35, 41 (emphasis added)]

Mr. LeBlanc also testified that the Township provided Howell-Mason with exactly the type of process that Michigan land use law requires:

Q. So you sent a letter to the planning commission?

A. Yes.

Q. There was two public hearings held, one in front of the planning commission, and another in front of the township board, correct?

A. Yes.

Q. You had an opportunity to present?

A. Yes.

Q. And other individuals, as part of Howell-Mason, had an opportunity to present, correct?

A. Correct.

Q. Is that typical with the process that you see afforded to special land use applicants the (sic) throughout the state?

A. I think for any applicant it's typical. I mean, the applicant has the right to present their project, and if they have consultants involved, they're going to explain different aspects of the project, and then the public hearing is opened.

...

> *Q*. Was the process that Howell Township went through reviewing the special land use application, in your view, consistent with what is required under the Michigan Zoning Enabling Act?
>
> *A*. **Yeah. I think so.** [LeBlanc dep., p. 31 (emphasis added)]

In other words, Howell-Mason's own expert conceded that special land use approval is discretionary, that the Township Board lacked authority to approve the application as presented, that the entire application process was "futile," and yet the Township Board provided them with the exact process that is required under Michigan law. Where the applicant's own expert cannot identify a protected property interest or specify an error in the process, the claim is without arguable legal merit.

In summary, Counts I and II are barred by res judicata and must be dismissed under MCR 2.116(C)(7). Alternatively, even if preclusion did not apply, Counts I and II fail as a matter of law and are properly dismissed under MCR 2.116(C)(10) because no genuine issue of material fact exists.

(b) Count III (equal protection).

Michigan law recognizes that "[t]he test to determine whether a statute comports with substantive due process or equal protection principles is essentially the same." *Andary v USAA Cas Ins Co*, 512 Mich 207, 264; 1 NW3d 186 (2023). "For equal protection purposes, when no fundamental right or suspect class is involved, 'a legislative classification must be sustained, if the classification itself is rationally related to a legitimate government interest.'" *Id.* at 265. And the Michigan Supreme Court recently reiterated that there is not a "fundamental right to continue a particular business model free from government regulation." *Id.* at 268.

Howell-Mason pleads an equal protection claim that does not allege the existence of any similarly situated comparators, does not assert a viable "class of one" theory, and does not

implicate a suspect classification or fundamental right. As pled, the claim fails to satisfy the threshold requirements for an equal protection violation. Moreover, because the claim does not involve a suspect class or fundamental right, the governing analysis mirrors the substantive due process analysis addressed above.

Judge McGivney expressly considered and rejected Howell-Mason's equal protection arguments in resolving the zoning appeal:

> [Howell-Mason] cannot show that it had a protected property or liberty interest that was curtailed or impugned by the Board's decision to deny the SLUP application exactly because it was a SLUP application.
> ...
> Since [Howell-Mason] lacks any legitimate entitlement to develop the parcels into a gas station, when such use is only permitted by special permit and the standard in 16.02 remains discretionary, **[Howell-Mason's] claims of lack of due process and lack of equal protection under the law are without merit.** [9/16/24 Opinion and Order on Appeal, pp. 13, 15 (emphasis added)]

Howell-Mason may not relitigate that same equal protection claim in this action where it arises from the same operative facts presented in the zoning appeal. *Duncan*, 300 Mich App at 194. Moreover, collateral estoppel independently bars Howell-Mason from relitigating the same constitutional issues, even if recast under different theories. *Barrow*, 235 Mich App at 480-81.

The equal protection claim also fails as a matter of law under MCR 2.116(C)(10). This is because—now that discovery has closed—Howell-Mason has been completely unable to substantiate the claim. In fact, when asked in interrogatories to "identify all landowners who are similarly situated as to your equal protection claim" Howell-Mason responded with "Unknown" (Exhibit R). A party that, more than two years into litigation, cannot identify any similarly situated comparator cannot sustain an equal protection claim as a matter of law.

Moreover, Mr. LeBlanc explained that under Michigan's permissive zoning framework categorical restrictions on land uses is inherent in every zoning scheme:

Q. Is it common to see categories of land uses not allowed within specific districts?

A. No. Not really, because what's permitted is what's listed in the district. Anything that's not listed is not permitted. So I've never seen or had occasion to prepare an ordinance that says, but you can't do this and this and this, because that's assumed, if it's not permitted.

Q. So under the permissive zoning framework, essentially, in every district there are a ton of categorically prohibited land uses, correct?

A. **Based on what I just said, yes.** [LeBlanc dep., p. 15 (emphasis added)]

In the simplest terms, Howell-Mason cannot claim it was unconstitutionally singled out when its own land use expert confirms that singling out uses is the fundamental mechanism by which all zoning operates.

Count III is barred by res judicata and collateral estoppel and must be dismissed under MCR 2.116(C)(7). Alternatively, Count III must be dismissed under MCR 2.116(C)(10) because no genuine issue of material fact exists and the claim fails as a matter of law.

(c) Count IX (preemption/conflict with state law)

The Michigan Supreme Court recognizes there are four factors in determining whether a state law preempts a local ordinance: "(1) [whether] the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive," (2) "[whether] preemption of a field of regulation may be implied upon an examination of legislative history," (3) "[whether] the pervasiveness of the state regulatory scheme may support a finding of preemption," and (4) "[whether the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest." *People v Llewellyn*, 401 Mich 314, 323-24; 257 NW2d 902 (1977). A zoning ordinance regulation is preempted by state law only if "(1) the statute completely occupies the field that the ordinance attempts to regulate, or (2) the ordinance directly conflicts with a state statute." *Rental Prop Owners Ass'n of Kent Co v City of Grand Rapids*, 455 Mich 246, 257; 566 NW2d 514 (2014).

Howell-Mason advanced this precise preemption argument in its zoning appeal of the Township Board's decision, contending that the prohibition on gasoline service stations within wellhead protection areas was preempted by state law. Judge McGivney squarely rejected that argument after extensive analysis, explaining:

> Appellant challenges Section 16.11(C)(8) as being preempted by State law or in conflict with State law, but then selectively defines the field of regulation to be those areas of State law that regulate drinking water and wellhead protection – areas of law which are notoriously comprehensively regulated by the State. Appellant's definition of "field" is erroneous at best or deliberately misleading at worst. The Zoning Ordinance does not seek to regulate [either of these fields] ...Appellant's unwritten underlying premise – that any municipal regulation that arises from a concern for environmental protection is itself an environmental regulation – is fundamentally flawed, and it renders their entire analysis faulty. [9/16/24 Opinion and Order on Appeal, p. 9]

Howell-Mason may not relitigate that same preemption challenge in this action. Res judicata bars the reassertion of claims arising from the same underlying transaction that were actually litigated or could have been litigated in a prior proceeding. *Duncan*, 300 Mich App at 194. Collateral estoppel independently precludes Howell-Mason from relitigating the same preemption issue that was necessarily decided in the zoning appeal. *Barrow*, 235 Mich App at 480-81.

Even if Howell-Mason were permitted to advance its preemption arguments again, the claim would still fail as a matter of law. Judge McGivney's analysis demonstrates that the Township's zoning ordinance regulates land use—not drinking water or environmental protection—and neither occupies a field preempted by state law nor directly conflicts with any state statute. That reasoning applies with equal force here, which the Michigan Court of Appeals agreed with in denying Howell-Mason's appeal "for lack of merit in the grounds presented." *Pioneer State Mut Ins Co v Michalek*, 330 Mich App 138, 145; 946 NW2d 812 (2019) (explaining the phrasing of "lack of merit in the grounds presented" is a review of the merits and an

adjudication of the same). Further, Howell-Mason has done nothing within discovery (on this legal issue, no less) to create a material question of fact.

Count IX is barred by res judicata and collateral estoppel and must be dismissed under MCR 2.116(C)(7). Alternatively, Count IX must be dismissed under MCR 2.116(C)(10) because no genuine issue of material fact exists and the preemption claim fails as a matter of law.

2. Howell-Mason's anticipated jurisdictional argument is contrary to the law and the appellate history of this case.

Howell-Mason has repeatedly attempted—and will undoubtedly attempt again—to avoid the preclusive effect of the zoning appeal by advancing the assertion that Judge McGivney lacked jurisdiction to resolve certain arguments raised in that zoning appeal. Howell-Mason has framed this contention as a jurisdictional limitation, arguing that the zoning appeal could challenge only the Township Board's decision to deny the special land use permit, while this lawsuit is purportedly the sole forum in which Howell-Mason may attack the validity of the underlying zoning regulations themselves.

This self-serving argument is not merely wrong; it is irreconcilable with the record Howell-Mason itself created in the zoning appeal. In the zoning appeal, Howell-Mason expressly invoked the Circuit Court's constitutional review authority and argued—at length—that the Township Board's decision was not "authorized by law" because it allegedly violated statutory and constitutional provisions, including substantive due process, procedural due process, equal protection, and state-law preemption principles. Howell-Mason urged Judge McGivney to reverse the Township Board's decision on precisely those grounds. Judge McGivney accepted Howell-Mason's invitation, addressed the arguments presented, and resolved them on the merits. When Howell-Mason later attempted to retreat from the scope of review it had demanded, Judge

McGivney accurately characterized the maneuver for what it was: "*The argument that this Court lacked jurisdiction...constitutes the most flamboyant manufactured appellate parachute this Court has ever seen.*" [5/7/25 Opinion and Order re: Plaintiff's motions for reconsideration, p. 7 (emphasis added)]

The governing law confirms that Judge McGivney had full authority to do exactly what Howell-Mason asked him to do. Where, as here, a township zoning ordinance does not provide for review of a special land use permit decision by a zoning board of appeals, the township board's decision is final and subject to direct appellate review by the circuit court pursuant to Const 1963, art 6, § 28. That constitutional provision establishes a *minimum* scope of judicial review—not a ceiling—and expressly includes review of whether the administrative decision was authorized by law.

The appellate history of this case further underscores the hollowness of Howell-Mason's jurisdictional theory. Howell-Mason raised the same arguments to the Michigan Court of Appeals, which denied leave to appeal "for lack of merit in the grounds presented," which is a merits-based reject of the arguments. *Pioneer*, 330 Mich App at 145. Had Howell-Mason been correct that Judge McGivney lacked jurisdiction to decide the issues he addressed, the Court of Appeals would not have disposed of the application in that manner.

B. Howell-Mason's Arguments.

1. Neither res judicata nor collateral estoppel apply [sic] to Counts I, II, III, and IX because even if an appellate court considers and rules upon constitutional questions on appeal from a ZBA decision, those rulings are invalid for want of jurisdiction.

Contrary to Defendant's contention, Counts I, II, III, and IX of Plaintiff's Complaint are not barred by the doctrine of res judicata or collateral estoppel:

> [A] ZBA lacks jurisdiction to consider constitutional claims, and ... because a circuit court reviewing a ZBA's decision is confined to the record and decision of the ZBA, the circuit court is similarly barred from ruling on constitutional issues presented in an appeal from a ZBA's decision". Thus, res judicata does not apply to a plaintiff's constitutional claims arising from the same facts. The court issued this ruling despite the fact that the plaintiff had argued its constitutional claims before the ZBA and the circuit court. [*Houdini Props, LLC v City of Romulus*, 480 Mich 1022; 743 NW2d 198, 199 (2008)].

This is not a quote taken out of context, it is well established Michigan law. Even if an appellate court considers and rules upon constitutional questions on appeal from a ZBA decision, those rulings are invalid for want of jurisdiction. See also *Zelasko v Charter Twp of Bloomfield*, 347 Mich App 141, 161–162; 14 NW3d 441, 453 (2023); *Jon Jon's Inc v City of Warren*, 534 F App'x 541, 544 (CA 6, 2013); *Get Back Up, Inc v City of Detroit*, 878 F Supp 2d 794, 806 (ED Mich, 2012).

2. Plaintiff was denied procedural due process in connection with its special land use permit application because Plaintiff's application was denied as a result of Defendant's irregular, partial, administration of public regulations.

Defendant [sic], in its motion for summary disposition, raises due process concerns related to the handling of Plaintiff's special land use application governed by Howell Township ordinances 16.02 – 16.06, that is, whether Plaintiff was afforded the typical processes afforded to special land use applicants throughout the state. Plaintiff's Brief in Support, p. 13. With respect to the constitutionality of ordinance 16.11, Plaintiff relies on its own Brief in Support of its Motion for Summary Disposition.

Initially, Defendant argues that Plaintiff's procedural due process claims fail because Plaintiff does not have a constitutionally protected property or liberty interest—a requirement of both substantive and procedural due process.

> Liberty and property interests are intricately related in our system of political economy, a system based on free choice of careers and occupations, private property, and the right to compete. A complex of rights and duties characterizes any particular liberty or property interest. Generally speaking, freedom to choose and pursue a career, to engage in any of the common occupations of life, qualifies as a liberty interest which may not be arbitrarily denied by the State. When governmental institutions regulate careers or occupations in the public interest through the licensing process, their definitions of rights in a license or other statutory entitlement may give rise to competition rights and constraints that define property interests. [*Wilkerson v Johnson*, 699 F2d 325, 328 (CA 6, 1983) (internal citations omitted)].

Plaintiff has the protected liberty interest of its right to pursue its livelihood which cannot be denied by arbitrary regulations or the irregular, partial, administration of public regulations. *Id.* The Supreme Court has held repeatedly that the property interest in a person's means of livelihood is one of the most significant that an individual can possess. *Ramsey v Bd of Ed of Whitley Co*, 844 F2d 1268, 1273 (CA 6, 1988) (internal citations omitted).

With respect to Plaintiff's SLUP application, governed by Howell Township ordinance 16.02 -16.06, Defendant contends Plaintiff was afforded the typical processes afforded to special land use applicants throughout the state. "A fundamental requirement of [procedural] due process is the opportunity to be heard. It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *United Pet Supply, Inc v City of Chattanooga, Tenn*, 768 F3d 464, 485 (CA 6, 2014), quoting *Armstrong v Manzo*, 380 US 545, 552; 85 S Ct 1187; 14 L Ed 2d 62 (1965). Plaintiff was not afforded the opportunity to be heard, either at a meaningful time or in a meaningful manner. Plaintiff's application for a SLUP was interfered with and inhibited by the political motivations of at least two individuals in control of the process.

> The regular and impartial administration of public rules governing these interests, as required by due process, prohibits the subtle distortions of prejudice and bias as well as...the punishment of political and economic enemies through the administrative process. [*Ramsey*, 844 F2d at 1273].

Bob Wilson, a member of the Howell Township Board of Trustees, who voted to deny Plaintiff's special use land permit application, actively pursued a boycott against Plaintiff's entire business based on personal animus.



Bob Wilson
On a serious note. if we can pull together as a community and boycott mugg and bopps, he will feel it. More calls need to be made to him. His name is Todd. I got to ask him in a meeting at the twp hall why he sets gas prices to high in our county. He told me to ask Kroger. He is using that extra money to keep on buying gas stations and trying to build new ones. Just wait till he owns them all then see how much gas will be. I personally have not bought a thing from mugg and bopps in over 10yrs. And yes, it did feel good to call him out in a twp board meeting. I wanted to see what kind of a man he was. I have no desire to be friends with or support a person with the attitude he has over the gas prices. More should follow. Maybe everyone should start calling him?

3h Like Reply 2

In addition to Mr. Wilson's boycott campaign, Greg Tatara, utility director of the Marion, Oceola, Genoa Water Authority (MHOG) initially supported Plaintiff's request for a SLUP, but later changed his position "because of the whole negative aspect that the public was addressing regarding this gas station, and I was thinking it's going to make me, in particular, look really bad if I have these letters out here saying we don't object".

In early 2021, Mr. Tatara, reviewed Plaintiff's site plan and proposal for installing a gasoline station service center within the 10-year capture zone of the wellhead. On February 1, 2021, MHOG issued its opinion in support of the Plaintiff as long as Plaintiff followed certain protective measures. Plaintiff and MHOG engaged in two years of discussion regarding

Plaintiff's request for approval of a special land use permit. On February 23, 2023, MHOG issued a second letter to Plaintiff approving the proposed project with conditions. Specifically, MHOG stated "[p]rovided the above conditions are met, MHOG would not object to the construction of the fueling station." Plaintiff met all of MHOG's required conditions.

Unbeknownst to Plaintiff, Mr. Tatara then drafted a third letter dated May 19, 2023, revoking MHOG's prior approval of the site plan and objecting to Plaintiff's plan to build a gasoline station service center at the Property. Mr. Tatara testified during his deposition that he wrote the letter on his own without prompting from the township trustees or any other individual.

> *Q.* On that letter -- it looks like the prior two letters were directed to our clients. This letter went to -- the 23rd letter -- I'm sorry -- who is it directed to?
>
> *A.* Howell Township Board.
>
> *Q.* Did you mail this letter to Howell-Mason?
>
> *A.* No.
>
> *Q.* So in that three-month period, for lack of a better phrase, you changed your mind –
>
> *A.* Yes.
>
> *Q.* -- fair?
>
> *A.* Fair.
>
> *Q.* And despite having written two letters previous to that -- to the May 2023 letter where Howell-Mason agreed to all your conditions, you write a third letter and you don't copy them on it; is that correct?
>
> *A.* Correct.
>
> *Q.* Why didn't you copy them on that letter?
>
> *A.* Because they were going through the site plan approval process, so the previous two letters were requested -- Howell-Mason, LLC, specifically requested that I write a letter

Q. Okay.

A. -- to them.· Not to the township, but to them.· They were already, to the best of my knowledge, going through the site plan approval process, because now I wanted to make sure that as part of the approval process this information was provided to the township so they made the best decision that they could.

Q. Did it occur to you that it might be wise to include Howell-Mason on a copy of that letter?

A. Did not, no.

Q. Did someone from the township request that letter?

A. No.

Q. You did that on your own initiative?

A. Yes.

Q. Nobody requested it?

A. No.

Q. Well, do you know whether or not Howell Township was aware of your two previous letters?

A. Yes.

Q. How were you aware of that?· How did you know that?

A. How did I -- because -- because they were in their site plan approval packet, as far as I know.

Q. And how do you know that?· Did you review the site plan approval packet?

A. No.

Q. Then how would you know that?· I'm just trying to understand.· I'm not trying to give you a hard time. How would you know that?

A. Because Howell-Mason, LLC, requested those letters of me so they could include them in their site plan approval packet to Howell Township.

Q. I understand that.· But how do you know that they were in the packet or not in the packet?

A. Because Howell-Mason, LLC, requested that I provide them a letter that they could put in their site plan approval packet. [Deposition of Greg Tatara, pp. 81-83]

Despite Mr. Tatara's consistent denial that he conversed with the Trustees regarding the wellhead protection area and his prior letters approving the gasoline service station, the meeting minutes from the May 8, 2023, Board of Trustees meeting, just 11 days prior to Tatara writing his letter, clearly state Treasurer Hohenstein had discussions with Mr. Tatara regarding the wellhead protection area:

> Treasurer Hohenstein explained during the March 20, 2023 Howell Township Board meeting the Board discussed a request to change the wording of our ordinance to allow a gas station to be sited inside MHOG's wellhead protection area. The Board rejected the request to change the current wording in the ordinance therefore denying the gas station at the proposed site. After that meeting, he had discussions with Greg Tatara, Director of MHOG, regarding their wellhead protection area. Greg has been working with the municipalities that are in the wellhead protection area to try to get similar wellhead protection ordinances in place. Marion Township has passed the attached draft wellhead protection ordinance; the City of Howell is still working on theirs. He recommends approval to send the attached draft wellhead protection ordinance to the Planning Commission for consideration as a zoning ordinance for Howell Township. [Minutes of May 8, 2023 Township Board meeting, p. 2]

It is evident that Mr. Hohenstein had communication with MHOG director Tatara influencing him to write the May 19, 2023, letter to the Board of Trustees revoking MHOG's prior approval. Significantly, after the Board reviewed Tatara's proposed wellhead protection ordinance, the Trustees saw fit to modify Tatara's draft to specifically exclude petroleum from the wellhead protection area:

> Discussion followed. MOTION by Graham, SECOND by Melton, "TO APPROVE SENDING THE ATTACHED WELLHEAD PROTECTION ORDINANCE TO THE PLANNING COMMISSION FOR CONSIDERATION AS A ZONING ORDINANCE FOR HOWELL TOWNSHIP <u>WITH PETROLEUM TO BE ADDED TO THE ORDINANCE.</u>" Discussion followed. Motion carried. [Minutes of May 8, 2023 Township Board meeting, p. 2 (underlining added)]

On November 19, 2023, as a result of Mr. Tatara's letter, the MHOG Board resolved to submit a formal objection to the Howell Township Trustees. MHOG resolved:

1. The siting of a fueling station at the intersection of Mason and Burkhart Roads is inconsistent with the Goals of the Wellhead Protection Plan most recently updated in August of 2023 and also potentially jeopardizes the approval of well installation in MHOG Reserve Wellfield Area (Parcel 4706-32-400-014)

2. Should the township of Howell approve the sitting of a gas station we request that all conditions set within previous correspondence dated February of 2021 and February of 2023 as described above be a condition of approval to provide maximum protection of the ground water resources. [MHOG resolution dated 11/15/23]

Plaintiff was not given a copy of the May 23, 2023, letter, notice of the MHOG public meeting, nor was Plaintiff provided a copy of the November 15, 2023 MHOG resolution. For all of the reasons set forth above and the reasons in Plaintiff's Motion for Summary Disposition, Plaintiff has been denied substantive and procedural due process.

3. Plaintiff was denied equal protection under the law.

§16.11(C)(8) facially violates the equal protection clause. The total ban of gas stations facially violates the equal protection clause.

> To prevail on an equal protection claim, the plaintiffs must show that "the government treated [them] 'disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis. [*Ctr for Bio-Ethical Reform, Inc v Napolitano*, 648 F3d 365, 379 (CA 6, 2011)].
>
> Where, as here, a plaintiff does not contend that a municipality's actions burden any fundamental right and has not suggested that he is a member of any suspect class, then the plaintiff still may proceed as a "class of one," but to do so he must put forth evidence that he "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." [*Village of Willowbrook v Olech*, 528 US 562, 564; 120 S Ct 1073; 145 L Ed 2d 1060 (2000)].

Where the purpose of the ordinance at issue is described as protecting drinking water or protecting the wellhead from potential contaminants, a ban of gasoline service stations from the area while still allowing multiple other businesses that use and store contaminants above ground and underground "has no foundation in reason and is a mere arbitrary or irrational exercise of power." *Paterek v Village of Armada, Mich*, 801 F3d 630, 648 (CA 6, 2015). Here, one singular industry was banned without any rationale for disparate treatment under the law. Ordinance 16.11 does not apply uniformly to all property uses that pose a risk of contamination to the wellhead and it does not apply evenly to those uses which traditionally store contaminants in underground storage or that pose a threat of surface run off, such as automotive repair centers and drycleaners. It only applies to gasoline service stations.

To the extent Defendant argues that the Michigan Supreme Court recently reiterated that there is not a "fundamental right to continue a particular business model free from government regulation" or that "Michigan's zoning laws permit categorical restrictions on land uses", any such regulation or law must be constitutional—it must not violate due process or equal protection under the law.

For the reasons set forth herein and in Plaintiff's Motion for Summary Disposition, Plaintiff has been denied equal protection under the law and ordinance 16.11 is unconstitutional facially and as applied.

4. Section 16.11(C)(8) of the Township's zoning ordinance is in direct conflict with, and preempted by, State statutory and regulatory schemes fully administered by State agencies.

State law preempts a municipal ordinance where the ordinance directly conflicts with a state statute or where the statute completely occupies the field that the ordinance attempts to regulate. *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 257; 566 NW2d

514 (1997). A direct conflict exists when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits. *People v Llewellyn*, 401 Mich 314, 322 n 4; 257 NW2d 902 (1977).

(a) Regulation of underground storage tanks.

In 1994, Governor John Engler created the underground storage tank division within the department of natural resources for, among other reasons, "activities related to the underground storage tank programs can be performed more efficiently by one agency." Executive Reorganization Order 1994-4, p. 1; codified at MCL 299.901. The underground storage tank division is divided between Environment, Great Lakes, and Energy ("EGLE") successor of the Department of Environmental Quality ("DEQ"), and the Department of Licensing and Regulatory Affairs Bureau of Fire Services ("BFS"). Together, EGLE and BFS regulate the licensing, inspection, and installation of active underground storage tanks as well as the cleanup and closure of leaking underground storage tanks. The design, construction, installation and maintenance of underground storage tanks that store regulated substances are licensed under Part 211, Underground Storage Tank Regulations ("USTR"), of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA).

The USTR governs, among other things, the minimum safe distances of USTs to wells, to reduce the risk of contamination, and provides a framework for the licensing, inspection, and installation of active underground storage tanks. MCL 324.21102 states:

> A person that is the owner of an underground storage tank system shall register the underground storage tank system with the department prior to bringing the underground storage tank system into use. Additionally, an installation registration form containing the information required by the department shall be submitted to the department at least 45 days prior to the installation of the underground storage tank system.

Buttressing Governor Engler's Executive Order and in conformity with the federal equivalent, Michigan's legislature saw fit to prohibit local municipalities from enacting legislation inconsistent with NREPA and the USTR while establishing a process whereby a municipality can propose and BFS may approve a plan implementing heightened safety measures with respect to USTs. The specific section of PA 451 of 1994, preempting local municipalities from legislating in the area of Underground Storage Tanks is MCL 324.21109, which states:

> (1) The department may, upon resolution of the governing body of a local unit of government in whose jurisdiction an underground storage tank system is being installed, require additional safeguards, other than those specified in rules, when the public health, safety, or welfare, or the environment is endangered.
>
> (2) A local unit of government shall not enact or enforce a provision of an ordinance that is inconsistent with this part or rules promulgated under this part.
>
> (3) A local unit of government shall not enact or enforce a provision of an ordinance that requires a permit, license, approval, inspection, or the payment of a fee or tax for the installation, use, closure, or removal of an underground storage tank system.

Further evidence of the legislative intent behind MCL 324.21109 is found in the March 10, 2017, State Budget Office Regulatory Impact Statement. The State Budget Office, Office of Regulatory Reinvention, pursuant to the authority of the Administrative Procedures Act, issued a Regulatory Impact Statement to the BFS Storage Tank Division which provides insight into the legislature's intent:

> Identify any laws, rules, and other legal requirements that may duplicate, overlap, or conflict with the proposed rule(s). Explain how the rule has been coordinated, to the extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter. This section should include a discussion of the efforts undertaken by the agency to avoid or minimize duplication. [March 10, 2017, SBO Regulatory Impact Statement, p. 3].
>
> The BFS responded:
>
> These rules adopt 2015 federal rules regulating all underground storage tank facilities storing and/or handling flammable and combustible liquids. PA 451 of

> 1994 states that the regulated authority over these facilities is with the State, and notes that local units of government cannot be more restrictive than State regulations. [March 10, 2017, SBO Regulatory Impact Statement, p. 3].

(b) Regulation of wellhead protection areas.

The State of Michigan Wellhead Protection Program was created following amendments to the Federal Safe Drinking Water Act adopted in 1986 to regulate wellhead protection areas. Under the State Wellhead Protection Program ("WHPP"), EGLE has instituted certain rules that provide, among other things, a municipality may propose a wellhead protection area ("WHPA") with heightened protections for EGLE to review. The rules provide that EGLE may approve the proposed WHPA in a process similar to that regarding USTs, outlined in MCL 324.2119, discussed *Supra*. Important to the present case, the WHPP makes it clear that no business or activity may be excluded from operating in the WHPA:

> The WHPA is determined and is submitted to the Michigan Department of Environment, Great Lakes, and Energy (EGLE) for approval. Once approved, the WHPA receives a higher level of environmental monitoring at the state level for certain activities which are permitted through the state. For example, an underground storage tank must have an extra layer of protection around the tank (secondary containment), or businesses with groundwater discharge permits may need to perform more frequent monitoring. **As stated previously, the WHPP does not exclude any businesses or activities from your WHPA.** [The Michigan Wellhead Protection Program Guide, p. 7 (emphasis added)]

Michigan Courts have repeatedly recognized that

> [t]he Legislature vested in the DEQ, the important job of preserving our state's valuable water supply with the imperative that the DEQ control the pollution of *all* the waters of the state and the Great Lakes...[including] ground waters, lakes, rivers and streams and all other watercourses and waters within the jurisdiction of this state. [*City of Brighton v Twp of Hamburg*, 260 Mich App 345, 355–356; 677 NW2d 349 (2004); MCL 324.3103][2]

> Consistently with the fact that our states waters are connected and flow through many and varied localities, the Legislature invested in one agency, the DEQ, the

[2] See also *Southeastern Oakland Co Incinerator Auth v Avon Twp*, 144 Mich App 39; 372 NW2d 678 (1985) and *Cascade Twp v Cascade Resource Recovery, Inc*, 118 Mich App 580; 325 NW2d 500 (1982).

> public trust of protecting "all " our state's waters, which protection can only be accomplished by a statewide, consistent, and coherent uniform policy.
>
> ...
>
> The subject matter of the regulation, the control of pollution entering the state's inter-connected waterways, clearly calls for a statewide, uniform system of regulation. The state's ability to control water pollution statewide would be substantially undermined by a Balkanized patchwork of inconsistent local regulations. [*City of Brighton*, 260 Mich App at 355–356; MCL 324.3106].

Moreover, any person, including a city or township, that is aggrieved by the DEQ's issuance of a permit may, as here, request and have a contested hearing under the APA. MCL 324.3112(3). This procedure for local input by way of contested hearings and the ultimate adoption or rejection by the head of the DEQ ensures uniformity and coherence of a statewide policy to protect our state's water resources. *Id.* EGLE replaced the DEQ on April 22, 2019.

Importantly, the entities that do regulate the State's waterways and underground storage tanks, EGLE and BFS, both agree Plaintiff's proposed gasoline service station is safe and has implemented sufficient safeguards to meet their requirements. Plaintiff's expert, Gregory Buhovecky, "there is an extremely low to no chance of risk" to the health, safety, and welfare of MHOG's existing and proposed wells. [Deposition of Gregory Buhoveckey, p. 120]. For what it is worth, MHOG also agreed until Mr. Tatara was pressured to change his position.

To conclude, Plaintiff respectfully requests this court enter an order denying Defendant's Motion for Summary Disposition, granting Plaintiff's motion for summary disposition on all counts, setting trial for a determination of damages, awarding Plaintiff its reasonable attorney fees, and granting such other relief as this Court deems just and equitable.

C. The Court's Ruling.

The Township is entitled to summary disposition under MCR 2.116(C)(7), because Howell-Mason's claims are barred by the doctrines of res judicata and collateral estoppel. As stated above, these doctrines "serve an important function in resolving disputes by imposing a state of finality to litigation where the same parties have previously had a full and fair opportunity to adjudicate their claims." *William Beaumont Hosp*, 315 Mich at 398.

The claims are barred by res judicata, because the prior action was decided on the merits, both actions involve the same parties or their privies, and the matters in the instant case were, or could have been, resolved in the first. *Adair*, 470 Mich at 121.

Collateral estoppel also applies, and prohibits Plaintiff from relitigating the due process, equal protection, and preemption issues. These issues were essential to the judgment that was actually litigated in the appeal, and the same parties had the full and fair opportunity to litigate the issues. Critically, Howell Township would have been bound by the prior decision if it had gone against the Township. *Monat*, 469 Mich at 684-685 (cleaned up).

The Court rejects Plaintiff's argument that the Court lacked jurisdiction to decide the issues in the appeal. Plaintiff raised the constitutional issues in the appeal, and briefed and argued the issues to the Court. Plaintiff will not be heard to complain now that the Court lacked jurisdiction to consider those arguments. For its argument about lack of jurisdiction, Plaintiff relies on a single quote from *Houdini Properties, LLC v City of Romulus*, 480 Mich 1022; 743 NW2d 198 (2008). However, *Houdini*'s holding is narrow and distinguishable from this case. First, *Houdini* dealt with a different standard of review; the case concerned a decision of a zoning board of appeals—not a legislative body like the Township Board. Second, the Michigan Supreme Court in *Houdini* narrowly held that it was improper to resolve a constitutional taking

claim when there was an insufficient record to do so—it did not hold that it would be improper to consider constitutional challenges to zoning regulations. Here, in contrast, Howell-Mason's claims were all able to be resolved by this Court based on the record in the appeal, making this case factually distinguishable from *Houdini*. Finally, *Houdini* does *not* stand for the proposition that the Court lacks jurisdiction when a party literally submits to it.

This Court has "appellate jurisdiction from all inferior courts and tribunals except as provided by law." Const 1963, art 6, § 13. It is firmly established that "where a township zoning ordinance does not provide for review of a request for a special land use permit by a zoning board of appeals, the township board's decision is final and subject to appellate review by the circuit court pursuant to Const 1963, art 6, § 28." *Carleton Sportsman's Club v Exeter Twp*, 217 Mich App 195, 200 (1996). This constitutional standard of review establishes a floor—not a ceiling—for judicial review:

> This review shall include, *as a minimum*, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. [Const 1963, art 6, § 28 (emphasis added)]

Further, the Court of Appeals necessarily rejected Plaintiff's argument about lack of jurisdiction when it denied leave to appeal. On April 11, 2025, the Court of Appeals denied Howell-Mason's delayed application for leave to appeal "for lack of merit in the grounds presented." When the Court of Appeals denies "an application from a noninterlocutory order for lack of merit in the grounds presented, the order means what it says—it is on the merits of the case." *Michalek*, 330 Mich App at 144. Importantly, Howell-Mason in its Reply Brief to the Court of Appeals argued extensively that this Court did not have jurisdiction to resolve Howell-Mason's constitutional claims. The Court of Appeals subsequently denied the application for

leave *on the merits*, meaning res judicata and collateral estoppel apply and dismissal is warranted.

Finally, Howell-Mason is barred from re-litigating these claims under the doctrine of judicial estoppel. Under that doctrine, "a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding." *Opland v Kiesgan*, 234 Mich App 352, 362; 594 NW2d 505 (1999) (citations omitted). There "must be some indication that the court in the earlier proceeding accepted that party's position as true" and "the claims must be wholly inconsistent." *Id.* Judicial estoppel is properly applied to prevent a party from acting in a way that otherwise would result in a miscarriage of justice. *Id.* at 364. Howell-Mason presented and litigated its constitutional claims and asking the Court to consider them in the appeal, and therefore cannot argue in this case that Court lacked jurisdiction to hear those claims. Howell-Mason succeeded in getting this Court's jurisdiction in the appeal, and simply because it disagrees with that decision, it should not be given an opportunity to relitigate those issues.

The Township is entitled to summary disposition under MCR 2.116(C)(10) as well. Even viewing the evidence in the light most favorable to Plaintiff, there is no genuine issue of material fact and the Township is entitled to judgment as a matter of law. The claims for substantive and procedural due process fail because Plaintiff lacks a protected property interest in a discretionary decision concerning a SLUP; the Township's zoning regulations advance legitimate governmental interests (as conceded by Plaintiff's own land-use expert, Paul LeBlanc); and the application of those regulations is not unconstitutional in every circumstance. Plaintiff asserts in its Response that it purchased this property specifically "because of the current and future zoning designations." [Plaintiff's response brief, p. 2]. Thus, Plaintiff concedes that the property interest

in the land (not in any specific zoned use) was subject to a discretionary zoning review, and its own expert admitted that the Township could not approve the application as presented; and that even though the application process was "futile," the Township Board provided Plaintiff with due process as required.

Regarding the claim for equal protection, this claim fails because Plaintiff has failed to present any evidence of a similarly situated landowner, and has not asserted a viable "class of one" theory or any other threshold requirement for such a claim. Plaintiff asserts that a "total ban of gas stations facially violates the equal protection clause," Response brief, p. 14, but the Township does *not* have a total ban on gas stations. Rather, the ban on gas stations is limited to those within 300 feet of a wellhead protection area. Howell-Mason has not identified anyone who is similarly situated to support this claim—even though this case has been litigated for more than two years and discovery is complete.

Finally, the preemption claim fails because the Township's Zoning Ordinance regulates land use – not drinking water or environmental protection – and neither occupies a field preempted by state law nor directly conflicts with any state statute. The exhibits cited by Plaintiff do not create a genuine issue of material fact.

WHEREFORE, IT IS HEREBY ORDERED that Defendant's motion for summary disposition as to Counts I, II, III, and IX is granted pursuant to MCR 2.116(C)(7) and (C)(10), and those counts are dismissed in their entirety.

IT IS SO ORDERED.

6/25/2026

Susan Longsworth (P65575)
Circuit Judge

STATE OF MICHIGAN 44TH CIRCUIT COURT JUDICIAL CIRCUIT LIVINGSTON	PROOF OF SERVICE FOR PARTY NOTIFICATION	CASE NO. 2024 0000032242-CZ

204 S HIGHLANDER, STE 4
HOWELL, MI 48843

(517)546-9816

Judge: SUSAN LONGSWORTH

Date: MONDAY JUNE 29, 2026

Plaintiff/Petitioner	v	Defendant/Respondent
HOWELL-MASON LLC		HOWELL TOWNSHIP

SEE ENCLOSED OPINION AND ORDERS 1-3.

CERTIFICATE OF MAILING

The following parties were served by e-mail (MCR 2.107(C)(4)):

Name	Complete address of service
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06/29/2026
Date

STATE OF MICHIGAN

IN THE 44TH CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

HOWELL-MASON, LLC,

Plaintiff,

Case No. 24-32242-CZ
Hon. Susan Longsworth

v

HOWELL TOWNSHIP,

Defendant.
_____/

OPINION AND ORDER REGARDING HOWELL TOWNSHIP'S MOTION FOR SUMMARY DISPOSITION ON COUNTS V AND VI

At a session of Court
Held in the City of Brighton, County of Livingston, on

June 25, 2026

This matter is before the Court on the motion for summary disposition of Defendant, Howell Township, on Counts V and VI, pursuant to MCR 2.116(C)(10). The Court heard oral argument on June 18, 2026. For the reasons set forth below, the motion is granted.

I. FACTS AND PROCEEDINGS

Plaintiff, Howell-Mason, LLC ("Plaintiff" or "Howell-Mason") owns three contiguous parcels of real property located at and near the corner of Mason Road and Burkart Road in Howell Township (the "Property"). The Property includes two parcels (Tax ID Nos. 4706-33-300-001 and 4706-33-300-108) that are currently zoned Neighborhood Service Commercial (NSC). The third parcel is currently zoned residential, master planned commercial, and is not at issue in this matter.

Plaintiff is in the business of developing and operating gasoline service stations with attached restaurants. Plaintiff purchased the Property in 2017, intending to build a Mugg &

Bopps gas station, convenience store, and drive-thru fast-food restaurant on the two lots zoned NSC. The Howell Township Ordinance allows convenience stores by right in the NSC district; however, a gas station and drive-thru are allowed only by special permit. In addition, the lots are located within 300 feet of the Marion Howell Oceola Genoa Township ("MHOG") wellhead protection area, and the Zoning Ordinance does not permit gas stations within 300 feet of the wellhead protection area.

In 2021, Plaintiff sought a use variance, which was denied. In the Spring of 2023, Plaintiff asked that the Zoning Ordinance be amended to allow gas stations in the wellhead protection area, but Howell Township (the "Township") denied the request.

In June of 2023, Plaintiff submitted to the Township Planning Commission an application for a special land use permit ("SLUP"). The Planning Commission recommended denial of the application, and the Township Board of Trustees voted to deny the SLUP application and site plan proposal in December of 2023. Plaintiff appealed to the Circuit Court (Case No. 24-350-AA), which affirmed the Township Board's decision in September of 2024. The Court of Appeals denied leave to appeal on April 11, 2025. The Supreme Court denied leave on August 29, 2025.

Plaintiff also filed this original action in the Circuit Court in March of 2024. As discussed in more detail below, the Circuit Court dismissed some, but not all, of the claims in January of 2025.

In the instant motion, the Township moves for an order granting summary disposition on Count V (Open Meetings Act) and Count VI (Regulatory Taking) pursuant to MCR 2.116(C)(10).

A. The Township's Recitation of Facts[1]

1. The Howell Township Board considered Howell-Mason's Special Land Use Permit application consistent with the Open Meetings Act.

Howell-Mason's Open Meetings Act claim rests on three allegations. First, that "the outcome of the December 11, 2023, Township Board Meeting and vote was predetermined by the board outside of a public meeting[.]" First Amended Complaint, ¶ 80. Second, that "Defendant and/or its agents colluded with and/or goaded MHOG into violating the OMA by taking a vote explicitly against Plaintiff's properties without required notice to Plaintiff." First Amended Complaint, ¶ 81. Third, that "Defendant has demonstrated a pattern of manipulating legal requirements regarding notice and conduct of public meetings[.]" First Amended Complaint, ¶ 82. Judge McGivney characterized these allegations as "largely conclusory" but allowed the claim to proceed past the pleading stage, concluding that "further discovery" might stand a "fair chance of uncovering factual support." [Transcript of 1/16/25 Hearing, p. 17].

The Township attempted through discovery to identify what, specifically, Howell-Mason was alleging. In response to interrogatories seeking the factual basis for its OMA claim, Howell-Mason provided nothing beyond a restatement of its original vague allegations, asserting only that its support consisted of "board member statements during public meetings and board member statements when out in public," without identifying a single Township Board member, a single statement, or a single meeting. Howell-Mason conducted no discovery of its own in support of this claim. Discovery is now closed. What the undisputed record does establish is the following:

- The Howell Township Planning Commission conducted a duly noticed public hearing on November 21, 2023, at which Howell-Mason appeared and was afforded the opportunity to present materials, expert opinions, and arguments in support of its application.

[1] These facts are provided in addition to the facts set forth in the Township's other motion for summary disposition (regarding Counts I, II, III, and IX), also set for hearing June 18, 2026. Some citations to exhibits have been removed for simplicity.

- The Howell Township Board held a duly noticed public meeting on December 11, 2023, at which Howell-Mason again appeared and was afforded the opportunity to present its position.

- Howell-Mason has admitted it received proper notice of both.

- Howell-Mason's own land use expert, Paul LeBlanc, confirmed that the process was "typical" of what is afforded to special land use applicants throughout Michigan and that it was consistent with what is required under the Michigan Zoning Enabling Act. When asked whether any additional process should have been afforded to Howell-Mason, the only item Mr. LeBlanc identified was a ZBA appeal from the Township Board's denial, which is not required under Michigan law. [Deposition of Paul LeBlanc, pp. 31-32]

- Howell Township Treasurer Jonathan Hohenstein, who served on the Township Board at all relevant times and continues to serve today, avers based on his personal knowledge that the consideration of Howell-Mason's application was reviewed "in compliance with the Michigan Open Meetings Act." [Affidavit of Jonathan Hohenstein].

In short, Howell-Mason's own expert confirmed the process was lawful, its own discovery responses identified no evidence of a violation, and the only sworn testimony in the record affirmatively refutes each of its allegations.

2. Howell-Mason purchased the Property with full knowledge of the zoning restrictions, its own expert confirmed the application was "futile" and based on incorrect zoning advice, and alternative land uses remain available.

Howell-Mason began purchasing the parcels comprising the Property in 2017. It has never disputed that it was aware of the applicable zoning restrictions at the time of purchase. First Amended Complaint, ¶ 8. To the contrary, Howell-Mason has admitted that it "conducted due diligence regarding the zoning restrictions on the Property before purchasing it" and that it "knew the zoning restrictions applicable to the Property when [it] purchased it." In the Commercial Purchase Agreement for a portion of the Property, Howell-Mason negotiated a 120-day due-diligence period specifically to determine whether the "Property is properly zoned or can be rezoned to permit Purchaser's proposed development and use."

The Property is located in the Neighborhood Services Commercial District and sits within a designated wellhead protection area. First Amended Complaint, ¶¶ 5, 9. There are domestic potable wells in the immediate vicinity of the proposed site, a fact that Howell-Mason's own hydrogeological expert, Gregory Buhoveckey, PE, confirmed but did not analyze. [Deposition of Gregory Buhoveckey, pp. 37-38]. At all relevant times, the Zoning Ordinance has prohibited gasoline service stations within 300 feet of a wellhead protection area. Zoning Ordinance §16.11(C)(8). That prohibition has been upheld by Judge McGivney, the Michigan Court of Appeals, and the Michigan Supreme Court.

Howell-Mason purchased the Property with the subjective desire to operate a gasoline service station. First Amended Complaint, ¶ 8. It is unclear why Howell-Mason believed it could do so given the plain language of the prohibition. Its own land use expert, Paul LeBlanc, AICP, testified that the Township Board could not have lawfully approved the application in light of §16.11(C)(8) and described the entire application as "futile." [LeBlanc dep., pp. 39, 41]. When asked how it did not surprise him that Howell-Mason invested $1.4 million in a use that was prohibited on the face of the ordinance, Mr. LeBlanc responded: "Frankly, I think they had their engineers giving them zoning advice that was incorrect." He added that had he been involved at the outset, he would have "absolutely" flagged the prohibition. [LeBlanc dep., p. 48]. Mr. LeBlanc further confirmed that a special land use permit is "not guaranteed to be approved" and that there is "no guarantee" an applicant will see a return on pre-approval investments. [LeBlanc dep., p. 47].

Howell-Mason now contends that the denial of its application constitutes a regulatory taking. But the Zoning Ordinance does not strip the Property of all economically viable use. The Neighborhood Services Commercial District permits multiple uses as of right, including retail

establishments, restaurants, and service uses. Zoning Ordinance §9.02. Mr. LeBlanc confirmed that "the commercial district allows other uses by right and some by special use" and that the uses by right could be pursued so long as Howell-Mason "submitted a site plan and met the objective criteria." [LeBlanc dep., p. 49]. When asked whether he had discussed any of those alternative uses with Howell-Mason, Mr. LeBlanc answered "No." [LeBlanc dep., p. 49]. Howell-Mason's own interrogatory response confirms this self-imposed limitation: when asked to identify "all alternative developments for the Subject Property Plaintiff has considered," Howell-Mason responded: "None. Plaintiff does not develop and operate businesses other than gasoline service stations with auxiliary food service." Mr. LeBlanc was not asked to offer any opinions on damages, lost profits, or the value of the Property, and confirmed he would offer none at trial. [LeBlanc dep., p. 20].

B. Howell-Mason's Recitation of Facts

Plaintiff incorporates the statement of facts set forth in its Response to Defendant's motion for summary disposition as to Counts I, II, III, and IX.

II. SUMMARY DISPOSITION STANDARDS

A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests whether there is factual support for a claim. Judgment may be entered under this rule when "there is no genuine issue as to any material fact." In evaluating a motion brought under MCR 2.116(C)(10), a reviewing court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. MCR 2.116(G)(5); *Coblentz v City of Novi*, 475 Mich 558, 567-568; 719 NW2d 73 (2006). Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving

party is entitled to judgment as a matter of law. *Id.*; see also MCR 2.116(C)(10) and MCR 2.116(G)(4).

Initially, the moving party bears the burden of supporting its claim to summary disposition with affidavits, depositions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Once this burden is met, the nonmoving party may not rely on mere allegations or denials in its pleadings, but must establish that a genuine issue of disputed fact exists for trial. *Id.* Affidavits, depositions, and documentary evidence offered in support of, and in opposition to, a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden*, 461 Mich at 120-121.

III. ANALYSIS

Regarding Count V, the Open Meetings Act (the "OMA"), MCL 15.261 *et seq.*, obligates "public bodies [to] conduct their meetings, make all of their decisions, and conduct their deliberations (when a quorum is present) at meetings open to the public." *Speicher v Columbia Twp Bd of Trustees*, 497 Mich 125, 134-135; 860 NW2d 51 (2014). According to MCL 15.270(1), "[d]ecisions of a public body shall be presumed to have been adopted in compliance with the requirements of" the OMA. *Hambley v Ottawa Co*, 348 Mich App 585, 598; 19 NW3d 411 (2023).

Regarding Count VI, a regulatory taking is one in which the government effectively "takes" a person's property by overburdening it with regulations. *Merkur Steel Supply Inc v City of Detroit*, 261 Mich App 116, 130; 680 NW2d 485 (2004). Land use regulations effectuate a taking in two general situations: (1) where the regulation does not substantially advance a legitimate state interest, or (2) where the regulation denies an owner economically viable use of

his land. *Id.*, citing *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470, 485; 107 S Ct 1232, 94 L Ed 2d 472 (1987).

The second type of taking is further subdivided into two situations: (a) a "categorical" taking, where the owner is deprived of "all economically beneficial or productive use of land," or (b) a taking recognized on the basis of the application of the traditional "balancing test" established in *Penn Central Transp Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978). *Merkur Steel*, 261 Mich App at 130. With regard to this balancing test, a reviewing court must engage in an "ad hoc, factual inquiry," centering on three factors: (1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations. *Id.* at 131, citing *Penn Central*, 438 US at 124.

A. The Township's Arguments.

1. Summary disposition is proper under MCR 2.116(C)(10) because no genuine issue of material fact exists as to Howell-Mason's Open Meetings Act claim.

The Michigan Open Meetings Act ("OMA"), MCL 15.261 *et seq.*, imposes several requirements on public bodies. All meetings of a public body must be "open to the public" and "held in a place available to the general public." MCL 15.263(1). All decisions of a public body

must be "made at a meeting open to the public." MCL 15.263(2). All deliberations of a public body "constituting a quorum of its members must take place at a meeting open to the public." MCL 15.263(3). Public bodies must provide public notice of meetings, MCL 15.265, and must keep minutes of each meeting showing, among other things, "the date, time, place, members present, members absent, any decisions made at a meeting open to the public." MCL 15.269(1).

The Legislature has provided limited remedies for violations of these requirements, and those remedies are important to understand here because they define the legal standard Howell-Mason must satisfy to survive summary disposition. The OMA authorizes four categories of relief: invalidation of a decision made in violation of the Act, MCL 15.270; injunctive relief to compel compliance or enjoin further noncompliance, MCL 15.271; criminal prosecution of a public official for intentional violations, MCL 15.272; and personal liability of a public official for intentional violations, MCL 15.273.

As a matter of law, three of these four remedies are categorically unavailable to Howell-Mason in this action. Invalidation of the Township Board's decision under MCL 15.270 is time-barred, as any such action must be commenced "within 60 days after the approved minutes are made available to the public." MCL 15.270(3)(a). Criminal prosecution under MCL 15.272 is not a remedy available in a civil action. And personal liability for damages under MCL 15.273 runs only against a "public official who intentionally violates this act," not against the Township as an entity, which is the sole defendant in this case. MCL 15.273(1). The only remaining remedy is injunctive relief under MCL 15.271 to compel compliance or enjoin further noncompliance with the Act.

That remedy, however, carries a demanding legal standard. To obtain injunctive relief based on an alleged OMA violation, a plaintiff must demonstrate an "ongoing violation" and that

the "public body is not complying with the OMA." *Citizens for a Better Algonac Community Sch v Algonac Community Sch*, 317 Mich App 171, 181; 894 NW2d 645 (2016). This requires more than allegations concerning a single meeting or isolated conduct; rather, the plaintiff must show "a regular pattern of conduct during a pertinent timeframe such that it could be said that there was an ongoing OMA violation." *Id.* at 184. In *Citizens for a Better Algonac Community Schools*, the Michigan Court of Appeals addressed whether evidence of a practice of mass group email communications, offered as proof of OMA violations, was sufficient to establish an ongoing violation. *Id.* at 182–183. The Court concluded that it was not, explaining that the emails "were inadequate to establish a regular pattern of conduct during a pertinent timeframe such that it could be said that there was an ongoing OMA violation, assuming the past conduct even violated the OMA." *Id.* at 184.

The dispositive question at this stage is whether the evidentiary record presents a genuine issue of material fact that Howell Township is continuing to violate the OMA through a regular pattern of conduct. In the operative Complaint, Howell-Mason advanced allegations that Judge McGivney characterized as "largely conclusory." [Transcript of 1/16/25 hearing, p. 17]. Judge McGivney nonetheless recognized that Michigan is a notice-pleading state and concluded that "further discovery" might stand a "fair chance of uncovering factual support" for the OMA claim. [Transcript of 1/16/25 hearing, p. 17]. Howell-Mason was therefore afforded the opportunity to substantiate its allegations through discovery. *Discovery is now closed, and the fundamental defect in Howell-Mason's Open Meetings Act claim is clear: discovery produced no evidence to substantiate any of the "largely conclusory" allegations identified above.*

In fact, rather than developing factual support, Howell-Mason doubled down on vagueness when required to provide specifics. For instance, in response to an interrogatory seeking the factual

basis for its OMA claim, Howell-Mason asserted that its support consisted of "board member statements during public meetings and board member statements when out in public," without identifying a single Township Board member, a single statement, or a single meeting. Howell-Mason likewise asserted—without evidentiary support—that legal counsel's review of the project caused the Township Board to disregard "the actual facts surrounding [the] development" because a gasoline service station is not permitted within a wellhead protection area. That assertion is not evidence of an Open Meetings Act violation; it is a disagreement with the Township's legal conclusion (a conclusion that multiple courts have upheld). Finally, Howell-Mason alleged that a Township Board member "engages with Facebook group(s) opposing" the project, without identifying any deliberation, decision-making, or closed-session conduct prohibited by the OMA.

The salient point is that none of these assertions—individually or collectively—establishes an ongoing violation of the Open Meetings Act or a regular pattern of noncompliance. They do not describe closed deliberations, secret decision-making, or any conduct that the OMA regulates.

While it could, the Township is also not merely resting on the lack of discovery pursued by Howell-Mason. In support of this filing, the Township provides an affidavit from Treasurer Jonathan Hohenstein that directly refutes the claims by Howell-Mason. Specifically, Treasurer Hohenstein, who was a Township Board member at all relevant times, avers that he made independent decisions regarding the project, did not collude and/or goad MHOG to violate the OMA, and is not aware of any notice defects to Howell-Mason.[2] Moreover, Treasurer Hohenstein says, based on his personal knowledge, the Township Board acted consistent with the

[2] The alleged notice defects seem to have been entirely unsupported as Howell-Mason admitted they received notice of both the Planning Commission Meeting on November 21, 2023 and the Township Board Meeting on December 11, 2023.

OMA. It is also highly relevant in this posture for this Court to recognize and apply the longstanding presumption under Michigan law that municipal officials are presumed to have "acted in good faith and have correctly and faithfully exercised the discretion reposed in them." *Graham v Grand Rapids*, 179 Mich 378, 387; 146 NW 248 (1913).[3]

Finally, the Township also points out that Howell-Mason's own land use expert, Mr. LeBlanc, testified the Township Board provided process consistent with Michigan law:

> *Q*. Was the process that Howell Township went through reviewing the special land use application, in your view, consistent with what is required under the Michigan Zoning Enabling Act?
>
> *A*. **Yeah.** [LeBlanc dep., p. 31 (emphasis added)].

Mr. LeBlanc, who testified he has handled the review of many special land use applications, did not identify any issue with process.

On this record, no reasonable factfinder could conclude that Howell Township violated the OMA, much less that it is engaged in an ongoing violation. Summary disposition is appropriate.

2. Summary disposition is required under MCR 2.116(C)(10) because no genuine issue of material fact exists as to Howell-Mason's regulatory takings claim.

Both the state and federal constitutions prohibit the taking of private property for public use without just compensation." *Shepard Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 340; 675 NW2d 271 (2003).[4] A land use regulation may effectuate a regulatory taking in one of two ways: "(1) [if] the regulation fails to advance a legitimate state interest, or (2) [if] the regulation denies an owner economically viable use of his land." *K&K Constr, Inc v*

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[3] It is also worth noting that the Township's publicly accessible website demonstrates the Township posts notice of each meeting along with agenda information that is available to the public: https://www.howelltownshipmi.org/government/boards/board.

[4] Howell-Mason pled its takings claim under the state constitution. However, "the Takings Clause of the state constitution is substantially similar to that of the federal constitution," *Tolksdorf v Griffith*, 464 Mich 1, 2; 626 NW2d 163 (2001), and so it is appropriate to look at authorities from both federal and state courts to analyze the claim.

Dep't of Natural Resources, 456 Mich 570, 585; 575 NW2d 531 (1998). To establish that a regulation fails to advance a legitimate governmental interest, a property owner must demonstrate that there is "no reasonable governmental interest being advanced" or that the regulation is "purely arbitrary, capricious, and unfounded." *Frericks v Highland Twp*, 228 Mich App 575, 594; 579 NW2d 441 (1998). To establish a categorical taking, the owner must show that the regulation denies "all economically beneficial or productive use of the land." *K&K Const, Inc*, 456 Mich at 585. Even where a regulation does not amount to a categorical taking, it may nevertheless be so "burdensome to rise to the level of a taking" under a multi-factor analysis. *Id.* citing *Penn Central Transportation Co v New York City*, 438 US 104 (1978).

No viable regulatory taking claim can be maintained by Howell-Mason for the reasons explained below, and summary disposition is therefore required under MCR 2.116(C)(10).

> (a) No genuine issue of material fact exists because the Township's denial advanced legitimate governmental interests as a matter of law, entitling the Township to judgment.

Howell-Mason initially couches its regulatory taking claim in terms of the Zoning Ordinance failing to advance a legitimate interest with respect operating a gas station "within wellhead protection areas." First Amended Complaint, ¶¶ 83-91. But Judge McGivney—as well as the Michigan Court of Appeals and the Michigan Supreme Court—have already recognized the interests underlying the relevant zoning regulation. This Court cannot now reverse course and hold to the contrary. *People v Gates*, 434 Mich 146, 154; 452 NW2d 627 (1990) (explaining collateral estoppel binds a party from relitigating an issue they already had the opportunity to litigate).

There is also a fundamental defect in Howell-Mason's takings theory. Howell-Mason narrowly asserts that Zoning Ordinance § 16.11(C)(8) caused a "severe economic impact" because

it allegedly prevented the operation of an "operational business." First Amended Complaint, ¶¶ 87, 90. That assertion fails because it rests on the false premise that § 16.11(C)(8) was the but-for cause of the denial. It was not. The Township Board denied Howell-Mason's special land use application on its failure to meet four independent and mandatory approval standards, including not only § 16.11(C)(8), but also §§ 16.06(A), (D), and (F) of the Zoning Ordinance. Each of those provisions independently required denial, and Howell-Mason does not dispute—nor has it ever challenged—that those additional standards advance legitimate land-use interests. And its own expert agrees:

> *Q*. In talking about that with the other standards in the Howell Township zoning ordinance, you agree that the failure to satisfy even one of the conditions required denial of the special land use application?
>
> *A*. Yes.
>
> *Q*. And in this case, there was (sic) four requirements that were deemed not satisfied, correct?
>
> *A*. Correct.
>
> *Q*. So each one of those would be an independent basis to deny the special land use application?
>
> *A*. Because they found that they weren't met[.] [LeBlanc dep., p. 43].

In other words, there were four reasons why Howell-Mason's land use was not allowed, and Howell-Mason challenges only one of those reasons. As a result, even if this Court were to assume, contrary to Judge McGivney and the Michigan appellate courts, that § 16.11(C)(8) failed to advance a legitimate governmental interest, Howell-Mason still could not have obtained approval for its proposed use.

This is dispositive under settled takings jurisprudence: no taking can occur where the asserted interest was "not part of [the owner's] title to begin with." *Lucas v SC Coastal Council*,

505 US 1003, 1027; 112 S Ct 2886; 120 L Ed 2d 798 (1992). Likewise, there can be no compensable taking where a plaintiff lacks any legally protected entitlement to a discretionary governmental approval. *Richardson v Twp of Brady*, 218 F3d 508 (CA 6, 2000); *Triomphe Investors v City of Northwood*, 49 F3d 198 (CA 6, 1995).

As to whether a legitimate government interest was being served, this Court need to only consider Howell-Mason's hydrogeologist testimony that confirmed the concerns for the immediate environment:

> *A.* ...if we have release at the site, that is a problem. It's problem for, you know, safety, for an explosion, for a fire. It's a problem for shallow ground water contamination right there. It's a problem for surface water runoff, contamination.
> ...
> *Q.* Did you analyze any potential impact to those domestic potable wells?
> *A.* No.
> ...
> *Q.* ...underground storage tanks do leak, correct?
> *A.* They do leak. Yes. [Buhoveckey dep., pp. 35, 37, 67].

In other words, while this Court need not get into the specifics of the dispute, Howell-Mason's own expert confirmed underground storage tanks leak, and that when they leak at the proposed site, environmental harm would result.

Simply put, because Howell-Mason never possessed a legally protected right to operate a gas station on the Property under any set of circumstances, no taking occurred as a matter of law. *Lucas*, 505 US at 1027.

> (b) No genuine issue of material fact exists because the Township's decision did not deprive Howell-Mason of all economically viable use of the Property, entitling the Township to judgment as a matter of law.

The next step in the takings analysis requires this Court to determine whether Howell-Mason can demonstrate that the challenged regulation denies it "all economically beneficial or

productive use of the land." *K&K Constr*, 456 Mich at 585; see also *Gackler Land Co v Yankee Springs Twp*, 427 Mich 562, 572; 398 NW2d 393 (1986).

Howell-Mason cannot meet its burden of demonstrating a denial of all economically viable use. This is because the Township's Zoning Ordinance does not categorically preclude all economically beneficial or productive use of the Property. The Property is located in the Neighborhood Services Commercial District, which permits multiple principal uses as of right, including retail establishments, restaurants, and service uses such as laundry or dry-cleaning operations. Zoning Ordinance § 9.02. Howell-Mason cannot dispute these potential land uses.

Instead, Howell-Mason has affirmatively admitted that it has chosen not to consider any alternative development of the Property. Howell-Mason was asked to explain "all alternative developments for the Subject Property Plaintiff has considered," and answered: "**None. Plaintiff does not develop and operate businesses other than gasoline service stations with auxiliary food service**." That admission is dispositive. A voluntary business decision to pursue only a preferred use does not establish a denial of all economically beneficial or productive use; it reflects a self-imposed limitation, not a regulatory taking.

This principle is well settled. A regulation does not affect a taking merely because it prevents the "most beneficial use of the property." *Penn Central*, 438 US at 125. Nor does a diminution in profitability render a zoning ordinance unconstitutional. *Sun Oil Co v City of Madison Hts*, 41 Mich App 47, 56; 199 NW2d 525 (1972). Because economically viable alternatives plainly exist under the Zoning Ordinance—and because Howell-Mason has voluntarily elected not to pursue them—it cannot, as a matter of law, establish a categorical taking based on an alleged deprivation of all economically viable use. *Dorman v Twp of Clinton*, 269 Mich App 638, 647; 714 NW2d 350 (2006).

(c) No genuine issue of material fact exists because the Township's decision did not interfere with any legally cognizable investment-backed expectations, entitling the Township to judgment as a matter of law.

Howell-Mason's final avenue to proceed with a regulatory taking claim is if the regulation is so "burdensome to rise to the level of a taking" under a multi-factor analysis (known as the "*Penn Central* factors"): (1) the character of the governmental action, (2) the economic effect of the regulation on the claimant, and (3) the extent to which the regulation interfered with distinct investment-backed expectations. *Penn Central*, 438 US at 124-125 (1978). Howell-Mason's cause of action fails under consideration of *Penn Central* factors, as is explained in more detail below.

First, as it relates to the character of the government action, it is well established that zoning regulations are a "classic example" of governmental action that affect land and are a permissible exercise of authority. *Grand/Sakwa of Northfield, LLC v Twp of Northfield*, 304 Mich App 137, 146-147; 851 NW2d 574 (2014). Courts have time and time again upheld land use regulations as a lawful exercise of authority under the Michigan Zoning Enabling Act. See, e.g., *Gym 24/7 Fitness, LLC v State*, 341 Mich App 238; 989 NW2d 844 (2022).

Second, as it relates to the economic effect of the regulation on the claimant, the question is "whether the plaintiff was denied all use of even those ***preexisting*** property rights, those being under the zoning classification the plaintiff purchased the property at." *Id.* at 148 (emphasis supplied). **There was no "preexisting" property right to operate a gas station**—such a land use has always been subject to the special land use process, which Howell-Mason knew (and was charged with the knowledge of)[5] when it purchased the Property. Moreover, an impact in property

[5] Although it is clear Howell-Mason had actual knowledge of the zoning regulations, it is black letter law in Michigan that "everyone dealing with [municipalities]...[are] charged with knowledge of the...provisions of lawfully adopted ordinances." *Hughes v Almena Twp*, 284 Mich App 50, 78; 771 NW2d 453 (2009).

value is insufficient to maintain a cause of action for a takings claim. *Bevan v Brandon Twp*, 438 Mich 385, 402-403; 475 NW2d 37 (1991) ("a mere diminution in property value ... does not amount to a taking")

Third, with respect to interference with investment-backed expectations, Michigan law is crystal clear: a property owner who purchases land subject to existing zoning restrictions "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." *Grand/Sakwa*, 304 Mich App at 146–147. The record confirms that Howell-Mason knowingly accepted this business risk because Howell-Mason's own purchase documents expressly contemplated the existing zoning framework. In fact, in the Commercial Purchase Agreement for one parcel of the Property Howell-Mason obtained, it negotiated a 120-day due-diligence period specifically to allow it to determine whether it was satisfied that the "Property is properly zoned or can be rezoned to permit Purchaser's proposed development and use." See also Plaintiff's Responses to Defendant's First Request to Admit to Plaintiff ("Admit that your conducted due diligence regarding the zoning restrictions on the Property before purchasing it... ANSWER: Admitted that due diligence was conducted...; Admit that you knew the zoning restrictions applicable to the Property when you purchased it... ANSWER: Admitted..."). Having bargained for the opportunity to do due diligence into the zoning regulations and proceeding with the purchase nonetheless, Howell-Mason cannot now recast the continued enforcement of the zoning regulations as a compensable taking.

The clearest way to illustrate the absurdity of Howell-Mason's takings claim actually comes from the testimony of Howell-Mason's land use expert who was asked if he was surprised at how Howell-Mason had invested in the property:

Q. You said that the special land application was futile because the township board could not approve it with the prohibition?

A. Right.

Q. How does it not surprise you that they invested 1.4 million dollars in a land use that was prohibited on the face of the ordinance?

A. Well, I wasn't involved at that early stage of the project. Frankly, I think they had their engineers giving them zoning advice that was incorrect. Whether they knew about the prohibition of the wellhead area, I don't know if they knew that upfront or not.

Q. If you were involved at the outset, would that have been something that you would have flagged in your professional review?

A. Absolutely. [LeBlanc dep., p. 48].

It is not possible for Howell-Mason to claim a taking when their own land use expert testified they relied on bad "zoning advice" from their engineers and that they should have recognized the issue.

In conclusion, these claims were permitted to proceed only to determine whether discovery would reveal facts capable of supporting them. It did not. With discovery closed and the governing law settled, Howell-Mason cannot establish an Open Meetings Act violation or a compensable regulatory taking, and Howell Township is therefore entitled to summary disposition on Counts V and VI as a matter of law pursuant to MCR 2.116(C)(10).

B. Howell-Mason's Arguments.

1. The Township has repeatedly violated the Open Meetings Act.

Howell Township Board of Trustees is a public body and is subject to Michigan's Open Meetings Act, Act 267 of 1976, MCL 15.261, *et. seq.* Marion, Oceola, Genoa Water Authority (MHOG) is a public body created under the Michigan Sewage and Water Supply Systems Act, Michigan Public Act 233 of 1955, MCL 124.281, *et. seq.*, and is also subject to Michigan's Open Meetings Act, Act 267 of 1976, MCL 15.261, *et. seq.* The Open Meetings Act provides that all

meetings of a public body must be open to the public and must be held in a place available to the general public. MCL 15.263. Although there are some exceptions, none apply to the present case. MCL 15.267.

Plaintiff, in its complaint, seeks the following relief under count V, Open Meetings Act Violation:

> WHEREFORE, Plaintiff HOWELL-MASON, LLC respectfully requests that this Honorable Court:
>
> A. Declare Defendant to have violated the OMA;
>
> B. Enjoin Defendant from further OMA violations;
>
> C. Award Plaintiff actual and reasonable attorney fees and costs; and
>
> D. Grant any further relief deemed just and equitable by the court.

Without giving Plaintiff notice and an opportunity to be heard, the Howell Township Board of Trustees held two public meetings, on March 20, 2023, and May 8, 2023, at which Plaintiff's proposed zoning ordinance amendment, Plaintiff's property, and Plaintiff's SLUP application, were discussed and voted against. Plaintiff seeks to invalidate the March 20, 2023 and May 8, 2023, decisions of the Howell Township Board of Trustees and to enjoin further violations of the Open Meetings Act.

Evidence of Board member's improper communication regarding Plaintiff's request for a special use land permit is present in Bob Wilson's online postings in the Facebook page Howell MI Happenings. Bob Wilson, a member of the Howell Township Board of Trustees, who voted to deny Plaintiff's special use land permit application, actively pursued a boycott against Plaintiff's entire business based on personal animus.



Bob Wilson

On a serious note. if we can pull together as a community and boycott mugg and bopps, he will feel it. More calls need to be made to him. His name is Todd. I got to ask him in a meeting at the twp hall why he sets gas prices to high in our county. He told me to ask Kroger. He is using that extra money to keep on buying gas stations and trying to build new ones. Just wait till he owns them all then see how much gas will be. I personally have not bought a thing from mugg and bopps in over 10yrs. And yes, it did feel good to call him out in a twp board meeting. I wanted to see what kind of a man he was. I have no desire to be friends with or support a person with the attitude he has over the gas prices. More should follow. Maybe everyone should start calling him?

3h Like Reply 2

In addition to Mr. Wilson's boycott campaign and Defendant's failure to provide the required notice of public hearings, Greg Tatara, utility director of the Marion, Oceola, Genoa Water Authority (MHOG), initially supported Plaintiff's request for a SLUP, but later changed his position "because of the whole negative aspect that the public was addressing regarding this gas station, and I was thinking it's going to make me, in particular, look really bad if I have these letters out here saying we don't object." [Deposition of Greg Tatara, p. 116].

In early 2021, Mr. Tatara, reviewed Plaintiff's site plan and proposal for installing a gasoline station service center within the 10-year capture zone of the wellhead. [Tatara dep., p. 60. On February 1, 2021, MHOG issued its opinion in support of the Plaintiff as long as Plaintiff followed certain protective measures. Plaintiff and MHOG engaged in two years of discussion regarding Plaintiff's request for approval of a special land use permit. On February 23, 2023, MHOG issued a second letter to Plaintiff approving the proposed project with conditions.

Specifically, MHOG stated "[p]rovided the above conditions are met, MHOG would not object to the construction of the fueling station." [Tatara dep., p. 64]. Plaintiff met all of MHOG's required conditions.

In accordance with his political motivations, Mr. Tatara then drafted a third letter dated May 19, 2023, revoking MHOG's prior approval of the site plan and objecting to Plaintiff's plan to build a gasoline station service center at the Property. Mr. Tatara testified during his deposition that he wrote the letter on his own without prompting from the township trustees or any other individual.

> *Q.* On that letter -- it looks like the prior two letters were directed to our clients. This letter went to -- the 23rd letter -- I'm sorry -- who is it directed to?
>
> *A.* Howell Township Board.
>
> *Q.* Did you mail this letter to Howell-Mason?
>
> *A.* No.
>
> *Q.* So in that three-month period, for lack of a better phrase, you changed your mind –
>
> *A.* Yes.
>
> *Q.* -- fair?
>
> *A.* Fair.
>
> *Q.* And despite having written two letters previous to that -- to the May 2023 letter where Howell-Mason agreed to all your conditions, you write a third letter and you don't copy them on it; is that correct?
>
> *A.* Correct.
>
> *Q.* Why didn't you copy them on that letter?
>
> *A.* Because they were going through the site plan approval process, so the previous two letters were requested -- Howell-Mason, LLC, specifically requested that I write a letter

Q. Okay.

A. -- to them.· Not to the township, but to them.· They were already, to the best of my knowledge, going through the site plan approval process, because now I wanted to make sure that as part of the approval process this information was provided to the township so they made the best decision that they could.

Q. Did it occur to you that it might be wise to include Howell-Mason on a copy of that letter?

A. Did not, no.

Q. Did someone from the township request that letter?

A. No.

Q. You did that on your own initiative?

A. Yes.

Q. Nobody requested it?

A. No.

Q. Well, do you know whether or not Howell Township was aware of your two previous letters?

A. Yes.

Q. How were you aware of that?· How did you know that?

A. How did I -- because -- because they were in their site plan approval packet, as far as I know.

Q. And how do you know that?· Did you review the site plan approval packet?

A. No.

Q. Then how would you know that?· I'm just trying to understand.· I'm not trying to give you a hard time. How would you know that?

A. Because Howell-Mason, LLC, requested those letters of me so they could include them in their site plan approval packet to Howell Township.

Q. I understand that. But how do you know that they were in the packet or not in the packet?

A. Because Howell-Mason, LLC, requested that I provide them a letter that they could put in their site plan approval packet. [Deposition of Greg Tatara, pp. 81-83]

Despite Mr. Tatara's consistent denial that he conversed with the Trustees regarding the wellhead protection area and his prior letters approving the gasoline service station, the meeting minutes from the May 8, 2023, Board of Trustees meeting, just 11 days prior to Tatara writing his letter, clearly state Treasurer Hohenstein had discussions with Mr. Tatara regarding the wellhead protection area:

> Treasurer Hohenstein explained during the March 20, 2023 Howell Township Board meeting the Board discussed a request to change the wording of our ordinance to allow a gas station to be sited inside MHOG's wellhead protection area. The Board rejected the request to change the current wording in the ordinance therefore denying the gas station at the proposed site. After that meeting, he had discussions with Greg Tatara, Director of MHOG, regarding their wellhead protection area. Greg has been working with the municipalities that are in the wellhead protection area to try to get similar wellhead protection ordinances in place. Marion Township has passed the attached draft wellhead protection ordinance; the City of Howell is still working on theirs. He recommends approval to send the attached draft wellhead protection ordinance to the Planning Commission for consideration as a zoning ordinance for Howell Township. [Minutes of May 8, 2023 Township Board meeting, p. 2]

It is evident that Mr. Hohenstein had communication with MHOG director Tatara influencing him to write the May 19, 2023, letter to the Board of Trustees revoking MHOG's prior approval.

Significantly, after the Board reviewed Tatara's proposed wellhead protection ordinance, the Trustees saw fit to modify Tatara's draft to specifically exclude petroleum from the wellhead protection area:

> Discussion followed. MOTION by Graham, SECOND by Melton, "TO APPROVE SENDING THE ATTACHED WELLHEAD PROTECTION ORDINANCE TO THE PLANNING COMMISSION FOR CONSIDERATION AS A ZONING ORDINANCE FOR HOWELL TOWNSHIP <u>WITH PETROLEUM TO BE ADDED TO THE ORDINANCE.</u>" Discussion followed.

Motion carried. [Minutes of May 8, 2023 Township Board meeting, p. 2 (underlining added)]

Subsequently, on November 19, 2023, in advance of the December 11, 2023 Board of Trustees' meeting on Plaintiff's SLUP application and as a direct result of Mr. Tatara's letter, the MHOG Board resolved to submit a formal objection to the Howell Township Trustees. MHOG resolved:

1. The siting of a fueling station at the intersection of Mason and Burkhart Roads is inconsistent with the Goals of the Wellhead Protection Plan most recently updated in August of 2023 and also potentially jeopardizes the approval of well installation in MHOG Reserve Wellfield Area (Parcel 4706-32-400-014)

2. Should the township of Howell approve the sitting of a gas station we request that all conditions set within previous correspondence dated February of 2021 and February of 2023 as described above be a condition of approval to provide maximum protection of the ground water resources. [MHOG resolution dated 11/15/23]

Plaintiff was not given a copy of the May 23, 2023 letter, notice of the MHOG public meeting, nor was Plaintiff provided a copy of the November 15, 2023 MHOG resolution.

Defendant, in support of its contention that Board members did not violate the open meetings act, relies on the affidavit of Jonathan Hohenstein. In his affidavit, Mr. Hohenstein attests:

> Any discussions in which I participated regarding Howell-Mason's application occurred during properly noticed public meetings of the Township Board or in circumstances expressly permitted by the Michigan Open Meetings Act.
>
> I did not engage in any regular pattern or practice of deliberating Township Board business outside of public meetings, nor am I aware of any such conduct by the Howell Township Board.
>
> I listened to and considered all evidence, testimony, and materials presented to the Township Board regarding Howell-Mason's application during properly noticed public meetings, including materials submitted by Howell-Mason and comments from members of the public.

...

> All votes and decisions of the Howell Township Board concerning Howell-Mason's application were made during open public meetings. [See Exhibit F to Defendant's Brief in Support of its Motion for Summary Disposition as to Counts V and VI].

Mr. Hohenstein's attestations are in direct contradiction to the meeting minutes of the May 9, 2023, Board of Trustees meeting indicating Mr. Hohenstein had been in discussions with Mr. Tatara outside of a public meeting and the text messages showing Mr. Wilson's boycott campaign against Plaintiff. "A party or a witness may not create a factual dispute by submitting an affidavit that contradicts his own prior conduct." *Palazzola v Karmazin Prods Corp*, 223 Mich App 141, 155; 565 NW2d 868 (1997); *Aetna Cas & Surety Co v Ralph Wilson Plastics Co*, 202 Mich App 540, 548; 509 NW2d 520 (1993).

For all of the reasons set forth above and the reasons in Plaintiff's Motion for Summary Disposition, Defendant has violated the open meetings act, its decisions should be invalidated, Defendant should be enjoined from further violations, and Plaintiff is entitled to its actual attorney fees and costs.

2. The Township's unreasonable and unlawful denial of Plaintiff's SLUP application results in a regulatory taking.

"The United States Supreme Court has created a dichotomy in regulatory takings. *Lucas*[6] applies where the regulation has deprived the property of all economic value, and *Penn Central* applies where the regulation deprives the property of less than all economic value." *State ex rel. RTG, Inc v State*, 98 Ohio St 3d 1, 8; 780 NE2d 998 (2002). Under *Penn Central*, applicable here, "a taking may be found based on "a complex of factors," including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the

[6] 505 US at 1019.

governmental action." *Palazzolo v Rhode Island*, 533 US 606, 617; 121 S Ct 2448, 150 L Ed 2d 592, citing *Penn Central*, 438 US at 124.

"The term 'taking' can encompass governmental interference with rights to both tangible and intangible property." *AFT Mich v State*, 497 Mich 197, 218; 866 NW2d 782 (2015). "A business owner's right to engage in and continue their business has long been recognized as a property right." *Dep't of Transp v Gilling*, 289 Mich App 219, 240; 796 NW2d 476 (2010). "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Murr v Wisconsin*, 582 US 383, 393; 137 S Ct 1933; 198 L Ed 2d 497 (2017).

Here, Plaintiff purchased the Property based on its current zoning and master plan. Plaintiff then applied to and received approvals for the project from the State of Michigan Department of Licensing and Regulatory Affairs Bureau of Fire Services (BFS), Department of Environment, Great Lakes, and Environment ("EGLE"), State of Michigan Fire Marshal, the local fire Marshal, and MHOG (subsequently reversed under political pressure) to develop a combined gasoline service station and restaurant on the Property. The Township, despite the clear record demonstrating Plaintiff's proposal was environmentally safe, denied Plaintiff's application almost entirely on the basis of an unconstitutional, preempted, arbitrary and capricious ordinance banning gas stations within 300-feet of a wellhead protection area.

Defendant contends, among other things, that Plaintiff's takings claim is barred because Plaintiff had knowledge of the ordinance at the time it purchased the property. Contrary to Defendant's contention, the Supreme Court of the United States in *Palazzolo, supra*, held that notice of the existence of the regulation prior to making a purchase is not fatal to a takings claim. "A blanket rule that purchasers with notice have no compensation right when a claim becomes

ripe is too blunt an instrument to accord with the duty to compensate for what is taken. *Palazzolo*, 533 US at 609.

In *Palazzolo*, the plaintiff ("Palazzolo") was the owner of 18 acres of coastal wetland made up of salt marshes. In 1971, Rhode Island created the Rhode Island Coastal Resources Management Council (Council) and charged it with protecting the State's coastal properties. The Council's regulations, known as the Rhode Island Coastal Resources Management Program (CRMP), designated salt marshes like those on Palazzolo's property as protected "coastal wetlands" on which development is greatly limited. In 1978, Palazzolo became the owner of the property as a result of the dissolution of his company, SGI. Palazzolo submitted a special land use application to the Council seeking permission to turn 11 of the 18 acres into a private beach club; however, the Council rejected his application on the basis that the property had been designated as protected coastal wetlands under the CMRP. Palazzolo filed suit in the state court alleging a taking had occurred. The trial court held and the Rhode Island Supreme Court upheld, among other things, Plaintiff had no right to challenge regulations predating 1978, when he succeeded to legal ownership of the property. *Id.* at 607.

The United States Supreme Court disagreed and reversed the Rhode Island Supreme Court, and remanded for further proceedings, holding that "[a] blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken." *Palazzolo*, 533 US at 628.

In this case, the *Penn Central* factors weigh in favor of granting Plaintiff's takings claim. Plaintiff purchased this property for the purpose of expanding its current business, building gasoline service centers combined with a restaurant, and the effect of Defendant's illegal ban on gasoline stations makes this property unsuitable, thereby diminishing its value to Plaintiff.

Plaintiff was told by the Howell Township Zoning Supervisor, Joe Daus, that if Plaintiff received approval of its plans from MHOG, it could obtain a variance that would allow Plaintiff to build its gasoline station service center. Plaintiff obtained MHOG's approval on February 1, 2021, but the Zoning Board of Appeals denied its request for a variance on March 16, 2021. Where the Howell Township Supervisor believed Plaintiff could obtain a variance, Plaintiff's belief that he could obtain a variance was justified and Plaintiff had reasonable investment backed expectations in purchasing the property to expand its business.

Given that the character of Defendant's ordinance is unconstitutional, arbitrary, and preempted by State regulations, each of the *Penn Central* factors weigh in favor of granting Plaintiff's takings claim.

As a result of Defendant's unconstitutional taking of Plaintiff's property, Plaintiff lost the value of his initial investment in purchasing the property and his expected profits over time, in excess of one million dollars.

In conclusion, Plaintiff respectfully requests this court enter an order denying Defendant's motion for summary disposition, granting Plaintiff's motion for summary disposition on all counts, setting trial for a determination of damages, awarding Plaintiff its reasonable attorney fees, and granting such other relief as this Court deems just and equitable.

C. The Court's Ruling.

The Township is entitled to summary disposition under MCR 2.116(C)(10). Even viewing the evidence in the light most favorable to Plaintiff, there is no genuine issue of material fact and the Township is entitled to judgment as a matter of law.

Regarding Count V, the claim for OMA violations fails because there is no evidence of an OMA violation, let alone an *ongoing* violation. There is no dispute that Plaintiff received

notice of the relevant meetings, and that the Township's meeting schedule is online and publicly available. Additionally, Plaintiff is not entitled to the relief it seeks under the OMA. Plaintiff was required to commence any action "within 60 days after the approved minutes are made available to the public" to request the Court invalidate the decision of the Township Board. MCL 15.270(3)(a). Plaintiff did not do this, and it provides no authority that would permit the relief requested.

Thus, in order to recover under the OMA, Plaintiff must show an ongoing violation. Plaintiff has failed to present evidence to show there is a genuine issue of fact for trial. Plaintiff makes the conclusory statement that the Township has violated the OMA through its meetings on March 20, 2023 and May 8, 2023. However, Plaintiff has not cited to any evidence that the Township Board made any decisions or deliberations *as a quorum* in violation of the OMA. In fact, the documents Plaintiff cites are duly noticed meeting minutes for open public meetings with no evidence to suggest that any decision was made outside of the public meeting.

The undated Facebook post purportedly made by a Township Board Member (Trustee Bob Wilson) appears to have been made after Plaintiff's SLUP application was denied. In any event, it is not evidence of an OMA violation, because the OMA governs deliberations by a quorum of board members. MCL 15.263(3) (requiring all deliberations of a public body "constituting a quorum of its members must take place at a meeting open to the public"). A single official is not a public body. *Herald Co v City of Bay City*, 463 Mich 111, 130; 614 NW2d 873 (2000) (stating under the OMA, the term public body connotes a collective entity). Further, the fact that Mr. Hohenstein communicated with MHOG director Greg Tatara and allegedly influenced Tatara to write the May 19, 2023 letter is not evidence of an OMA violation. Tatara is

not a member of the Township Board. Neither Mr. Wilson's nor Mr. Hohenstein's alleged statements or conversations could be a quorum of the Township Board.

Regarding Count VI, the claim for regulatory taking fails for multiple reasons. Plaintiff's Response focuses solely on the Township's prohibition of gasoline service stations within 300 feet of a wellhead protection area under Section 16.11(C)(8). However, there is no dispute that the Township's denial of Plaintiff's SLUP included three grounds in addition to the wellhead protection area issue, and Plaintiff does not address those other bases.

In any event, there is no regulatory taking under the *Penn Central* test. The Township's Zoning Ordinance has not deprived Howell-Mason of *all economic value* for the Property. Plaintiff's Response primarily relies on *Palazzolo v Rhode Island*, 533 US 606 (2001) to argue that its regulatory takings claim is not barred despite it having notice of the zoning classification within the Township. But even after *Palazzolo*, whether an individual or entity had notice of the zoning classification at issue is considered, and relevant, to determine if an individual's investment backed expectations are reasonable under *Penn Central*. See *K&K Constr*, 267 Mich App at 555 (stating a "key factor is notice of the applicable regulatory regime" and "notice of such regulations should nevertheless be taken into account"). Thus, the regulatory scheme when Plaintiff purchased the Property, i.e., the Property being located within the Township's Neighborhood Services Commercial District and within a wellhead protection area, is relevant to determine if Plaintiff had *reasonable* investment-backed expectations.[7]

[7] The economic impact of a regulation concerns whether the plaintiff was denied of all use those "***preexisting property rights***." *Grand/Sakwa*, 304 Mich App at 148 (emphasis added). Plaintiff did not have a "preexisting" property right to operate a gasoline service station. Plaintiff was always subject to approval by the Township Board.

In *K&K Construction*, the Court rejected the plaintiff's claims for regulatory taking because of the following:

> (1) wetland regulations are, much like zoning regulations, comprehensive, universal, and ubiquitous, and provide an 'average reciprocity of advantage' for all property owners, including plaintiffs; (2) plaintiffs have developed and retain the ability to develop a significant amount of their property, and thus plaintiffs' property retains a significant value even after the permit denial; and (3) plaintiffs are experienced commercial land developers who clearly had or were on notice of the wetland regulations promulgated under the WPA and, therefore, plaintiffs' distinct, investment-backed expectations would reasonably have been tempered with the knowledge that their development of the property would be restricted because of the presence of wetlands. [267 Mich App at 531].

Similarly here, the Township's Zoning Ordinance is comprehensive, universal, and ubiquitous and provides average reciprocity for all property owners. The Court of Appeals and Supreme Court on appeal upheld the Township's ordinance, thus foreclosing Plaintiff from relitigating that point. Under the Township's Zoning Ordinance the Property is located in the commercial district, which has other uses allowed by right or special land use. Mr. Leblanc, Plaintiff's own land use expert, indicated that Plaintiff has not discussed any of the alternative uses, even though they exist. Finally, Plaintiff is an experienced land developer who was legally charged with actual notice of the zoning ordinance regulations. Therefore, under the *Penn Central* test there is no genuine issue of material fact that the Township did not commit a regulatory taking.

Plaintiff claims in response that Joe Daus, the Howell Township Zoning Supervisor, told Plaintiff the application would be approved if Plaintiff got approval from MHOG. However, even if Mr. Daus made the statement—and he did not—the statement of one official at the Township cannot bind the Township in a takings case. *Nickola v Grand Blanc*, 394 Mich 589, 596 n 1; 232 NW2d 604 (1975). The Township provided an affidavit from Mr. Daus confirming that he *actually* instructed Howell-Mason that gasoline service stations are a special land use in

that district of the Township and are not permitted within 300 feet of a wellhead protection area.

WHEREFORE, IT IS HEREBY ORDERED that Defendant's motion for summary disposition as to Counts V and VI is granted pursuant to MCR 2.116(C)(10), and those counts are dismissed in their entirety.

This Order resolves the last pending claim and closes the case.

IT IS SO ORDERED.

6/25/2024

Susan Longsworth (P65575)
Circuit Judge