Fahey Schultz Burzych Rhodes

EXPERT COUNSEL REAL SOLUTIONS

WHEN ZONING PROVISIONS ARE CHALLENGED:

RECENT COURT DECISIONS EVERY PLANNER SHOULD KNOW

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ZONING AS WE ALL KNOW IT

- 1920s: Zoning ordinances as authorized by Euclid
  - Idea that there are use districts with prohibited uses
    - Explicitly listed uses that were prohibited (ex: no restaurants in R-1 District)
- 2006: MZEA created broad categories of uses
  - If the use is similar to a permitted use, it is allowed under the zoning district

PROHIBITED USES

(1) Veterinary hospital

(2) Reduction of garbage, refuse offal or dead animals.

(3) Explosives and fireworks, manufacture or storage.

(4) Cement, line, gypsum or plaster of paris manufacture.

(5) Chlorine, or hydrochloric, nitric or Picric acid manufacture.

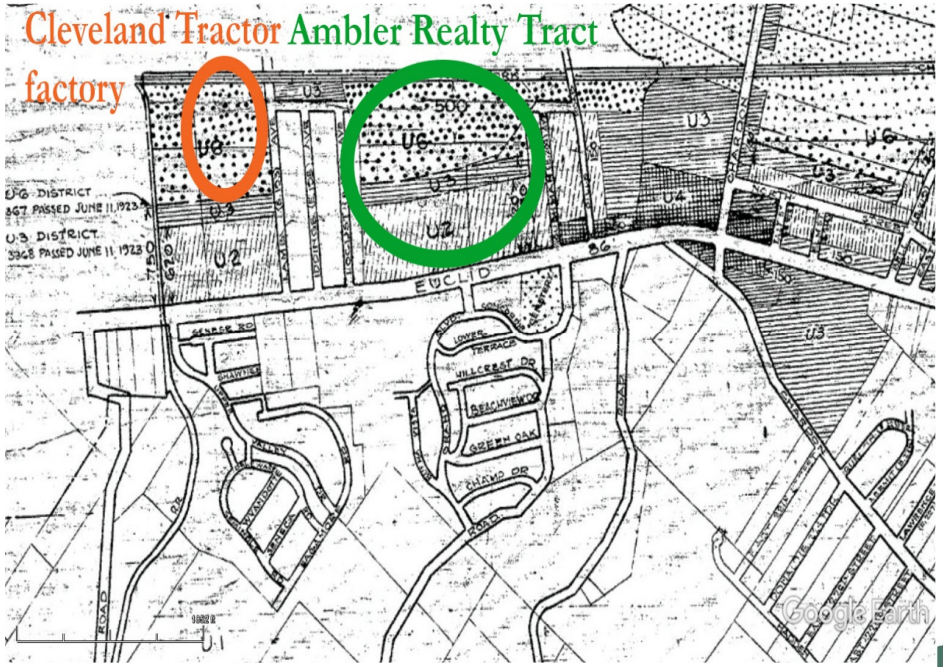
(6) Smelting of iron, copper, tin or zinc ores.

(7) Distillation of bones, fat rendering, glue manufacture from raw materials, fertilizer manufacture.

(8) Stock yards, slaughtering of animals.

(9) Tanneries, oil refineries.

(10) Storage of volatile oil or gasoline in excess of 25000 gallons.

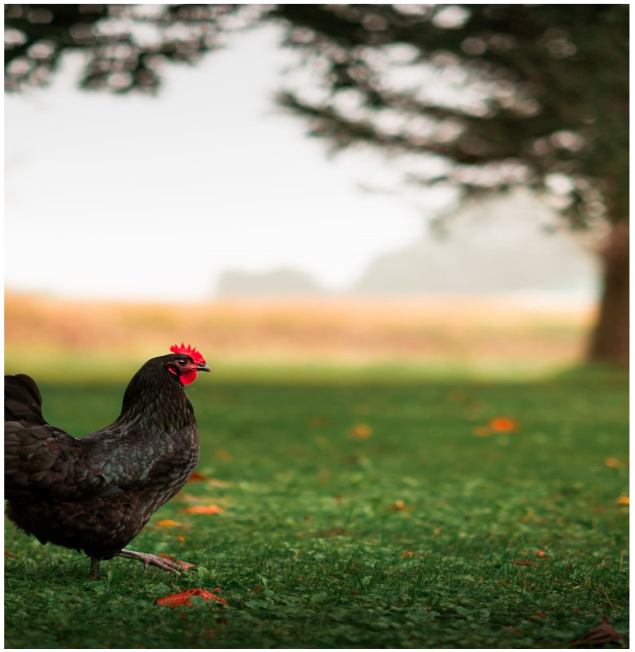


THE COURT OF APPEALS CLUCKS ABOUT ZONING SCHEMES: *DEZMAN V CHARTER TOWNSHIP OF BLOOMFIELD*

REAFFIRMING PERMISSIVE ZONING ORDINANCES

THE CHICKEN CASE

- Plaintiffs owned property in R-3 (One-Family Residential Zone) and had a chicken coop in the backyard.
- The Township's position was that the property owners would need to apply for a variance to keep their coop because it is a "farm" under the ordinance, not an accessory to the single-family residential zone.
- Plaintiff argued that that they should be able to keep their coop without a variance because the zoning ordinance was silent on whether chicken coops were permitted.



THE FOX WAS IN THE HEN HOUSE

- **Michigan Court of Appeals**: June 1, 2023 (2023 Mich. App. LEXIS 3923) – chickens are permitted
  - The ordinance is silent as to whether that use was permitted, so the family is not required to get a variance .
  - Because there is not an extensive list of all the uses, there are other property uses that are permitted on the property even though the ordinance is silent.

- **Supreme Court of Michigan**: November 22, 2023 (513 Mich. 898) – chickens are prohibited
  - Reversed the 2023 Ct. of Appeals. The zoning ordinance states, "what activities are permitted at the one-family detached dwellings" and that under the *Pittsfield* case, the ordinance excludes any use not specifically stated.
  - Keep in mind that the ordinance language allows for "accessory" uses (so not <u>every</u> use needs to be listed)
- **Michigan Court of Appeals**: June 27, 2024 (2024 Mich. App. LEXIS 5043) – chickens are prohibited
  - **<u>The absence of a reference to chicken-keeping in the zoning ordinance at issue means the use is necessarily excluded</u>**
  - Reaffirms permissive zoning ordinances

KEY TAKEAWAYS FOR PLANNERS

- Permissive zoning requires scrutiny: if it is not listed, it is not allowed.
- Include clear language in ordinances to clear up any ambiguity.
  - "if it is not included, it is prohibited" or "these are the only permitted uses allowed"
- Consider amending ordinances to clarify accessory uses not covered by the existing ordinance.
- Rely on additional safeguards from the Zoning Board of Appeals for administrative appeals and interpretive powers.
  - Should be able to interpret current zoning that is already being used to classify the uses, this gives greater flexibility.
    - The monkey wrench in it all!
      - *Whitman v Galien Township* (should be careful about lawfully delegating power to the planning commission, and emphasizes why the listing of uses is important).

DID THE MICHIGAN SUPREME COURT END CONDITIONAL REZONINGS: *JOSTOCK V MAYFIELD TOWNSHIP*

ADDRESSES CONDITIONAL REZONING ISSUES

CONDITIONAL REZONINGS

- Since 1968, the Dragway had operated **as a non-conforming use** within the R-1 zoning district (single family residential) with approval from the Township.
- In 2018, the new owners of the dragway sought conditional rezoning to C-2 (local commercial) to accommodate changes to the dragway — approved by the Township.
- Question of whether the rezoning that was approved is permissible.

THE USE MUST BE LISTED TO BE ALLOWED!

- **Michigan Court of Appeals**: May 4, 2023 (2023 Mich. App. LEXIS 3925) – conditional rezoning invalid; drag racing not a permitted use in C-2
  - Principal uses in C-2 zoning districts include all C-1 uses, including other similar uses and uses incidental to the principal permitted uses
  - Dragway not listed as a principal permitted use in C-2 district, so conditional rezoning was invalid.
- **Michigan Supreme Court:** July 1, 2024 (2024 Mich. LEXIS 1128)
  - Conditional rezoning is invalid if the proposed new use is not a permitted use.
  - Whether the dragway is a permitted use was not addressed, so the case was remanded back to Circuit Court to determine whether a dragway is a permitted use in the C-2 district.
    - Example: C-2 allows for "open air business use" which includes tennis courts, archery courts, miniature golf, driving ranges, etc. There may be an argument that a dragway could fit this use

TAKEAWAYS

Conditional rezoning is only a tool to change zoning districts subject to voluntary conditions and cannot authorize uses other than what is explicitly allowed in the new zoning district.

If you do a conditional rezoning, you are already required to take certain steps (ex: application, public hearing, etc.) Consider proposing a text amendment to amend the zoning district to include a new use within the zoning district if it isn't currently authorized.

WOULD YOU EVER ARGUE TO SEVER YOUR OWN ORDINANCE

INT'L OUTDOOR, INC V CITY OF TROY

- Zoning dispute involving the denial of a variance for a billboard exceeding the city's dimensional limitations.
- The applicant mounted a legal challenge alleging a First Amendment violation, including that various sign regulations not related to billboards were unconstitutional, requiring the entire section regulating signs to be struck down.
- On appeal, one of the questions was whether the unconstitutional sign provisions were severable from the ordinance, or whether those provisions were integral to the city's sign regulations.
- Severability clauses in zoning ordinances are designed to allow unlawful provisions to be removed while leaving the rest of the ordinance intact.
- The Sixth Circuit found that the city's explicit severability clause allowed for removal of unconstitutional provisions without rendering the entire ordinance inoperable.

Section 16.16 NOT FOR PROFIT SHELTERS FOR SMALL ANIMALS.

Non-profit shelters for the temporary housing of small animals shall be allowed in an NSC Neighborhood Service Commercial District provided they conform to the following regulations and conditions in addition to all applicable regulations in effect in the district in which they are to be located:

A. All animals shall be housed within the principal building, which building shall be constructed in such a manner that it is sound proof to prevent the noise of the animals being heard outside the building.

B. The minimum lot size shall be two (2) acres and all setbacks of the principal structure shall be fifty (50) feet from all boundary lines.

C. Any exercise area shall only be located in the rear yard area, but not within the rear setback and in compliance with the setback requirements set forth herein. Wastes shall not be allowed to accumulate and shall be disposed of as in (D) below.

D. The disposal of all waste shall be in a manner approved by the Livingston County Health Department.

E. Any outdoor exercise area shall be constructed in such a manner to insure that no animal can escape therefrom and shall be screened from public view in a manner approved by the Planning Commission.

F. The facility shall be operated in accordance with all applicable local and state regulations.

G. The facility shall be operated so as not to generate objectionable noise or odors beyond the property limits.

(Ord. No. 1 eff. Jan. 8, 1983; amend. by Ord. No. 31 eff. Oct. 3, 1991)

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A. All animals shall be housed within the principal building [redacted]

B. The minimum lot size shall be two (2) acres and all setbacks of the principal structure shall be fifty (50) feet from all boundary lines.

C. Any exercise area shall only be located in the rear yard area, but not within the rear setback and in compliance with the setback requirements set forth herein. Wastes shall not be allowed to accumulate and shall be disposed of as in (D) below.

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[redacted]

F. The facility shall be operated in accordance with all applicable local and state regulations.

[redacted]

(Ord. No. 1 eff. Jan. 8, 1983; amend. by Ord. No. 31 eff. Oct. 3, 1991)

TAKEAWAYS

Int'l Outdoor, Inc v City of Troy

- An important reminder to include severability clauses in the text of the zoning ordinance and in zoning amendments.
- Also a cautionary tale to address unconstitutional sign provisions ASAP, as unsuccessful applicants may target unrelated sign provisions as leverage to receive approval for their sign.

WHEN ARE PROPERTY RIGHTS AT ISSUE?

NO VESTED PROPERTY RIGHTS, NO TAKING

Moskovic v. City of New Buffalo

- Plaintiffs purchased multiple properties with the intention of using them for short-term rentals ("STRs").
- The City's zoning ordinance was silent on STRs, though it did ban all uses that were not specifically authorized.
- The City adopted a police power ordinance that provided a permitting process for STRs. However, an STR moratorium was soon enacted.
- During the moratorium, the City developed zoning ordinance regulations that prohibited STRs in certain residential districts.
- Plaintiffs sued, claiming they had a vested right to use single-family dwellings for STRs.
- The District Court disagreed, stating that there were no vested property rights.

NO VESTED PROPERTY RIGHTS, NO VIOLATION

Moskovic v. City of New Buffalo

- On appeal, the Sixth Circuit upheld the district court's decision that STRs were not permitted uses by right under the city's previous regulations, and that no vested property rights existed if the use was not authorized at the time of zoning.
  - In reaching this decision, the Court applied a more "common sense" test as to whether STRs were permitted than previously seen, rather than a rigorous examination of potentially applicable definitions in the zoning ordinance.
- The Sixth Circuit noted that while a license holder may have a property interest in *renewing* their license, a first-time applicant does not possess any protected property rights in their application.

TAKEAWAYS

Moskovic v. City of New Buffalo

- Importantly, a property right is not vested if it is not authorized at the time the zoning ordinance was adopted or amended.
- Indicative of judicial trends in classifying STRs: they are seen as commercial uses, not residential, and likely do not fit in single-family neighborhoods absent specific authorization to the contrary.

SAND AND GRAVEL EXTRACTION REVIEW ISSUES

"VERY SERIOUS CONSEQUENCES" REQUIREMENT

Northstar Aggregates, LLC v Watson Township

- The MZEA sets a "very serious consequences" test for mining operations, allowing extraction of valuable resources unless such consequences would result.
- Township denied a special use permit application for a sand and gravel mining operation.
- Northstar Aggregates appealed the decision to the Circuit Court on the grounds that the decision was not supported by substantial evidence.
- The Circuit Court upheld the Township's decision.
- On appeal, the Court of Appeals considered the "need" aspect of MCL 125.3205(4) and whether the mining operation would pose "very serious consequences."
- The Court of Appeals held that the lower court's consideration of "no very serious consequences" was inadequate as it mostly considered the impact on property values and relied on outdated reports.

The Court of Appeals did not take a position on the issue but noted that there must at least be *some* consideration of whether a consequence can be considered "very serious."

TAKEAWAYS

Northstar Aggregates, LLC v Watson Township

- Highlights the special protections afforded to mining operations under the MZEA—these applications should be treated with care.
- Showcases analysis required when reviewing applications as adequate information and consideration of *current* evidence are crucial when evaluating the potential impact of mining operations.

THE QUESTION OF PREEMPTION FOR LAND DIVISION AND BOUNDARY ADJUSTMENTS

Lane v Grattan Township

- Plaintiffs used a quitclaim deed to change the boundary lines of two parcels.
- A land division application was submitted to the Township for approval of boundary-line adjustment.
- Township required additional material for land division application.
- Plaintiffs stated the additional material was irrelevant and did not produce the requested materials.
- The Township did not complete the review process.
- Plaintiffs disputed the township's authority, claiming preemption by the Land Division Act.
- The Court ruled the local ordinance did not conflict with the Act.

TAKEAWAYS

Lane v Grattan Township

- Townships who require approval of boundary adjustments can be confident that such approval requirements align with the Land Division Act.
- This case emphasizes the importance of local ordinances controlling land divisions, lot splits and boundary adjustments.
- Local ordinances add clarity to the land division process, ensuring robust standards beyond what the Act specifies.

UNDERSTANDING TAKINGS

"TAKINGS" AND THE 5TH AMENDMENT

- The Fifth Amendment prohibits governments from "taking" private property "for public use, ***without just compensation***."
- This can be implicated by "exactions."
- An "exaction" is a condition imposed upon the development of a certain property that is often meant to make the developer or landowner internalize the negative externalities or costs associated with the proposed development.

THE UNCONSTITUTIONAL CONDITIONS DOCTRINE:

- This doctrine was created by the Supreme Court through a string of cases to reconcile competing concerns between landowners who are seeking some form of zoning approval, and the land use concerns and regulations of a local government.
- Essentially, courts will consider when a land use approval with conditions oversteps the constitutional limitation and becomes an uncompensated “taking” in violation of the Fifth Amendment.

THE *NOLLAN/DOLAN* TEST FOR VALID CONDITIONS:

Generally, the *Nollan/Dolan* test has three parts:

1. A court asks whether the condition would qualify as a "taking" if the government had directly required it outside of the permit approval context.
2. If yes, there must be a "nexus" between the condition and the project's social costs. This "nexus" requirement means that the condition must be imposed because of the potential impacts of the land use and not for other reasons.
3. Additionally, there must be "rough proportionality" between the condition and the impacts of the land use. In other words, the condition's burdens on the owner must be proportional to the project's burdens on society.

THE NEXUS REQUIREMENT

- Nexus is a connection between the condition being imposed and the specific land use concerns that underpin the rationale for imposing the condition
- For example, if there are parking concerns caused by a proposed business, a condition can be imposed to require additional parking.

THE *NOLLAN* EXAMPLE

- The landowners in *Nollan* challenged a condition to their land use permit that required them to grant a public access easement across their beachfront property.
- The rationale for the condition was that the *Nollan's* addition to the house would increase the blockage of the public's view of the ocean, cause beach congestion, and create a "psychological barrier" to the public's recognition of its right of access to the beach. Thus, the rationale was that the development would make people think that there was no available beach access.

THE *NOLLAN* EXAMPLE

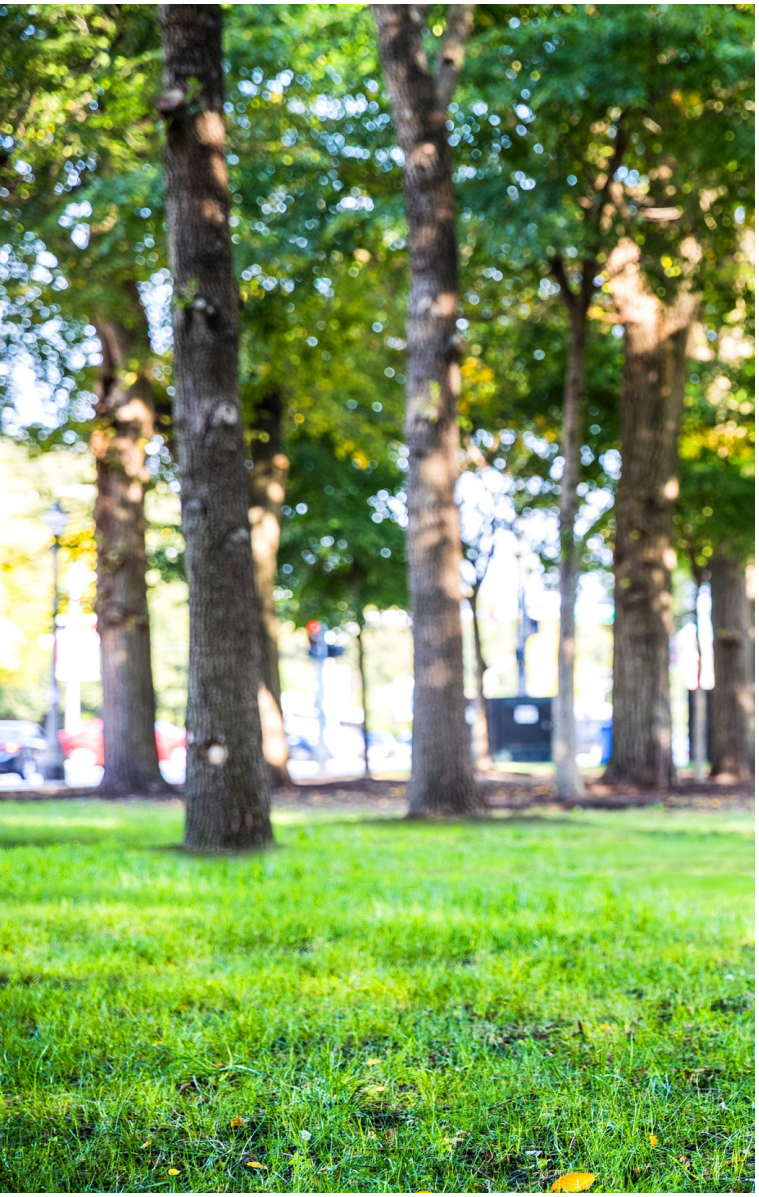
- The Court held that there was no essential "nexus" between the land use concerns and the condition requiring the Nollans to grant a public access easement across their beach property.
- The issue was *perceived* access to the beach, not actual physical access to the beach, so requiring a public easement across the Nollan's property had no nexus to the land use concerns of the public's perception of beach access.

THE ROUGH PROPORTIONALITY REQUIREMENT

- "Rough proportionality" must exist between the burden imposed by a condition and a development's social costs/impact.
- Courts have been clear that the "rough proportionality" requirement has no precise mathematical calculation; rather, there must be some individualized determination whether the burden is proportional to the potential impact.
- Must be more than conclusory statement that the condition will alleviate negative externalities associated with the development.

THE *DOLAN* EXAMPLE

- In *Dolan*, Florence Dolan wanted to redevelop her plumbing and electrical supply store.
- As permit conditions, the city required her to dedicate 10% of her land for public green space as a “floodplain easement” and to facilitate a bike and walking path by either connected existing paths or paying the city.



THE *DOLAN* EXAMPLE

- Unlike in *Nollan*, the Court found a "nexus" between the development and the conditions because the conditions would alleviate the traffic and stormwater problems that would be increased by redeveloped store.
- However, the Court held that the condition was still unconstitutional.
- As the Court reasoned, the city could require the Mrs. Dolan to keep **private** greenspace to alleviate stormwater runoff concerns (nexus), but the city failed to explain why that greenspace had to be public.

KNIGHT V METRO GOV'T OF NASHVILLE & DAVIDSON COUNTY

- The Sixth Circuit Court of Appeals assessed Nashville's sidewalk ordinance under the *Nollan/Dolan* test.
- The sidewalk ordinance required property owners who were applying for building permits to either:
  - Build a sidewalk on their property; or
  - Pay an "in lieu" fee
- The ordinance also required all permit applicants to grant Nashville a public sidewalk easement.

KNIGHT V METRO GOV'T OF NASHVILLE & DAVIDSON COUNTY

- While the court did not reach the merits of this decision, the court notes that Nashville's sidewalk ordinance could, in theory, impose these conditions.
- However, the Court explains that the ordinance would still have to satisfy the "nexus" and "rough proportionality" requirements from *Nollan/Dolan.*

SHEETZ V COUNTY OF EL DORADO

- Sheetz challenged a $23,420 traffic impact fee imposed by El Dorado County, CA as a condition for obtaining a building permit for a manufactured home. The fee was due to a rate schedule established by the county, not an individually determined fee.
- Sheetz argued that the fee was an unlawful exaction under the Takings Clause.
- The County argued that the fee was legislatively imposed and uniformly applied, exempting it from *Nollan/Dolan* scrutiny, arguing that it only applies to ad hoc administrative decisions.

SHEETZ V COUNTY OF EL DORADO

- Supreme Court ruled in favor of Sheetz, holding that the criteria established in the *Nollan* and *Dolan* decisions should apply universally to both legislative and administrative actions.

TAKEAWAYS

- Conditions can be imposed on a broad range of land use decisions as authorized under the MZEA.
- You should be aware of not only satisfying the statutory requirements that authorize conditions, but then consider any limitations imposed by the federal takings cases.
- A developed record, with independent factual findings that underpin the rationale for the condition is the best defense when a condition is challenged.
- Any fee or permit condition is now more vulnerable to a Takings Clause challenge. A thorough review of zoning fees may be necessary to determine their appropriateness and avoid unconstitutional exactions.
- Fees and conditions must be justified by an individualized assessment using a formula or set of standards to meet the *Nollan/Dolan* criteria.
- While impact fees are not authorized per se in Michigan, techniques such as Community Benefit Agreements must be carefully structured to avoid demands exceeding what is necessary to mitigate a project's impact, which could trigger a takings claim.
- Avoid imposing unreasonable conditions by ensuring they align with the specific review standards in the Zoning Ordinance.

AND THERE IS MORE!!

- Oakland Tactical Supply, LLC v. Howell Township (The Trilogy)
  - “A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”
  - In a case challenging a municipal zoning law revision to prevent operation of a shooting range, the majority of the Pennsylvania Supreme Court held that the plain text of the Second Amendment was implicated, but that the restriction could be justified by analogy to historical tradition. Barris v. Stroud Township, 310 A.3d 175 (Pa. 2024).
  - The Sixth Circuit agrees that shooting ranges are covered by the plain text of the Second Amendment. The majority determined that the plain text did not cover shooting at 1,000 yards ("make no convincing argument that the right extends to training in a particular location or at the extremely long distances Oakland Tactical seeks to provide“).
- Pinebrook Warren, LLC v City of Warren
  - Medical marijuana review committee was a “public body” subject to OMA requirements.
  - City council delegated its job as a public body to city’s medical marijuana review committee with respect to applications for medical marijuana dispensary licenses, and thus the committee was subject to the requirements of the Open Meetings Act (OMA), where the city’s marijuana ordinance empowered committee to score license applications, committee scored applications, and city council voted to approve applications that were the most highly ranked by committee without any independent consideration of the merits of applications

QUESTIONS

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