

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

KENT A. McNEIL, FRANKLIN E. FISHER,
ROGER GRIFFIN, SCOTT WAY and
JEFF LEGATO,

Plaintiffs-Appellants

SUPREME COURT NO. 134437

COA No. 272410

Lower Court No. 05-881-20-CV

v

CHARLEVOIX COUNTY and NORTHWEST
MICHIGAN COMMUNITY HEALTH AGENCY,

Defendants-Appellees.

AMICUS CURIAE BRIEF OF MICHIGAN TOWNSHIPS ASSOCIATION

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JURISDICTIONAL STATEMENT

On June 5, 2007, the Michigan Court of Appeals issued McNeil, et al v Charlevoix County and Northwest Michigan Community Health Agency, 275 Mich App 686; 741 NW2d 27 (2007). On July 16, 2007, Plaintiffs-Appellants filed an Application for Leave to Appeal. On January 11, 2008, this Court issued an order directing the parties to file supplemental briefs regarding improper delegation of legislative authority and inviting among others the Michigan Townships Association to file briefs amicus curiae. On October 17, 2008, this Court issued an order granting the Application and inviting among others the Michigan Townships Association to file briefs amicus curiae. In its order this Court directed additional issues to be addressed regarding Michigan's at-will employment doctrine. This Court has jurisdiction to review this case by appeal pursuant to MCR 7.301(A)(2).

STATEMENT OF QUESTIONS PRESENTED

1. DOES THE MICHIGAN PUBLIC HEALTH CODE PROPERLY DELEGATE LEGISLATIVE AUTHORITY TO LOCAL COUNTY HEALTH DEPARTMENTS, OR COMBINED COUNTY HEALTH DEPARTMENTS FORMING A DISTRICT HEALTH DEPARTMENT, SUBJECT TO THE APPROVAL OF THE COUNTY BOARDS OF COMMISSIONERS TO REGULATE SMOKING AND NON-SMOKING AREAS FOR THE PROTECTION OF THE HEALTH OF THE PUBLIC NOT LESS STRINGENT THAN STATE LAW?

Plaintiffs-Appellants answer “**No**”.

Defendants-Appellees answer “**Yes**”.

The trial court did not address this question.

The Court of Appeals did not address this question.

Amicus Curiae Michigan Townships Association answers “**Yes**”.

2. DOES THE LOCAL HEALTH DEPARTMENT OR COUNTY BOARD OF COMMISSIONERS, THE ENTITY VESTED WITH FINAL AUTHORIZATION OF THE REGULATION, MCLA 333.2441(1), HAVE AUTHORITY TO CREATE A RIGHT OR PRIVATE CAUSE OF ACTION AGAINST A PRIVATE ENTITY THAT ALTERS MICHIGAN’S AT-WILL EMPLOYMENT DOCTRINE?

Plaintiffs-Appellants answer “**No**”.

Defendants-Appellees answer “**Yes**”.

The trial court did not address this question.

The Court of Appeals did not address this question.

Amicus Curiae Michigan Townships Association answers “**Yes**”.

3. DOES THE RIGHT OR PRIVATE CAUSE OF ACTION CREATED BY CLEAN INDOOR AIR REGULATION §1001 FALL WITHIN THE EXCEPTIONS SET FORTH IN SUCHODOLSKI V MICHIGAN CONSOLIDATED GAS CO, 412 MICH 692 (1982)?

Plaintiffs-Appellants answer “**No**”.

Defendants-Appellees answer “**Yes**”.

The trial court answered “**Yes**”.

The Court of Appeals answered “**Yes**”.

Amicus Curiae Michigan Townships Association answers “**Yes**”.

4. ARE THE PUBLIC POLICY EXCEPTIONS TO MICHIGAN’S EMPLOYMENT AT-WILL DOCTRINE AS SET FORTH IN SUCHOLDOLSKI V MICHIGAN CONSOLIDATED GAS CO, 412 MICH 692 (1982) CONSISTENT WITH TERRIEN V ZWIT, 467 MICH 56 (2002)?

Plaintiffs-Appellants answer “**Yes**”.

Defendants-Appellees answer “**Yes**”.

The trial court did not address this question.

The Court of Appeals did not address this question.

Amicus Curiae Michigan Townships Association answers “**Yes**”.

STATEMENT OF FACTS

The Michigan Townships Association supports the Defendants-Appellees' position and concurs in the Statement of Facts set forth in its Brief on Appeal.

ARGUMENT

I. THE STANDARD OF REVIEW

The de novo standard of review is applicable to this Court's consideration of the following arguments. This Court reviews rulings on motions for summary disposition de novo. Spiek v Dep't of Transportation, 456 Mich 331, 337; 572 NW2d 201 (1998). Additionally, matters of constitutional and statutory interpretation and questions concerning the constitutionality of a statutory provision are also reviewed de novo. Toll Northville Ltd. v Northville Township, 480 Mich 6, 10-11; 743 NW2d 901 (2008).

II. THE MICHIGAN PUBLIC HEALTH CODE PROPERLY DELEGATES LEGISLATIVE AUTHORITY TO LOCAL COUNTY HEALTH DEPARTMENTS, OR COMBINED COUNTY HEALTH DEPARTMENTS FORMING A DISTRICT HEALTH DEPARTMENT, SUBJECT TO THE APPROVAL OF THE COUNTY BOARDS OF COMMISSIONERS TO REGULATE SMOKING AND NON-SMOKING AREAS FOR THE PROTECTION OF THE HEALTH OF THE PUBLIC NOT LESS STRINGENT THAN STATE LAW.

A. The legislative background pertinent to the delegation issue.

1. The Michigan Public Health Code contained in three volumes of Michigan Compiled Laws Annotated, (Sections 333.1101 through 333.25211) is the foundation for the Defendants Northwest Michigan Community Health Agency's non-smoking regulations. Pertinent provisions of that public health code are as follows:

Section 333.1104(7) defines "governmental entity" to mean "a government, governmental subdivision or agency, or public corporation".

Section 333.1105 defines a "local health department" to mean:

- “(a) A county health department of a single county provided pursuant to section 2413 and its board of health, if any.
- “(b) A district health department created pursuant to Section 2415 and its board of health.”

Section 333.1111(1)(2) provides:

- “(1) This code is intended to be consistent with applicable federal and state law and shall be construed, when necessary, to achieve that consistency.”
- “(2) This code shall be liberally construed for the protection of the health, safety and welfare of the people of this state.”

Section 333.1115 provides:

“A state statute, a rule of the department, or an applicable local health department regulation shall control over a less stringent or inconsistent provision enacted by a local governmental entity for the protection of public health.”

Section 333.2406 defines “local governing entity” to mean:

- “(a) In case of a single county health department, the county board of commissioners.
- “(b) In case of a district health department, the county boards of commissioners of the counties comprising the district.”

Article VII, §§1 & 8 of the Michigan Constitution provides with regard to county boards of commissioners:

- “Section 1. Each organized county shall be a body corporate with powers and immunities provided by law.
- “Section 8. Boards of supervisors (now boards of county commissioners) shall have legislative, administrative and such other powers and duties as provided by law.”

Section 333.2413 provides:

“Except if a district health department is created pursuant to section 2415, the local governing entity of a county shall provide for a county health department which meets the requirements of this part, and may appoint a county board of health.”

Section 333.2415 provides:

“Two or more counties or a city having a population of 750,000 or more and one or more counties, by a majority vote of each local governing entity and with approval of the department, may unite to create a district health department. The district board of health

shall be composed of two members from each county board of commissioners or, in case of a city-county district, two members from each county board of commissioners and two representatives appointed by the mayor of the city. With the consent of the local governing entities affected, a county or city may have a greater number of representatives.”

Section 333.2433 provides in pertinent part:

“(1) A local health department shall continually and diligently endeavor to prevent disease, prolong life, and promote the public health through organized programs, including prevention and control of environmental health hazards; prevention and control of diseases; prevention and control of health problems of particularly vulnerable population groups; development of health care facilities and health services delivery systems; and regulation of health care facilities and health services delivery systems to the extent provided by law.

“(2) A local health department shall:

“(a) Implement and enforce laws for which responsibility is vested in the local health department....

“(f) Have powers necessary or appropriate to perform the duties and exercise the powers given by law to the local health officer and which are not otherwise prohibited by law....

“(3) This section does not limit the powers or duties of a local health officers otherwise vested by law.”

Section 333.2435, “Additional Powers”, further authorizes the local health department to:

“(d) Adopt regulations to properly safeguard the public health and to prevent the spread of diseases and sources of contamination.”

Section 333.2441(1) provides:

“A local health department may adopt regulations necessary or appropriate to implement or carry out the duties or functions vested by law in the local health department. The regulations shall be approved or disapproved by the local governing entity. The regulations shall become effective 45 days after approval by the local health department’s governing entity or at a time specified by

the local health department's governing entity. The regulations shall be at least as stringent as the standard established by state law applicable to the same or similar subject matter. Regulations of a local health department supersede inconsistent or conflicting local ordinances."

Section 333.2442, Hearing; Notice, provides as follows:

"Before adoption of a regulation the local health department shall give notice of a public hearing and offer any person an opportunity to present data, views, and arguments. The notice shall be given not less than 10 days before the public hearing and not less than 20 days before adoption of the regulation. The notice shall include the time and place of the public hearing and a statement of the terms or substance of the proposed regulation or a description of the subjects and issues involved and the proposed effective date of the regulation. The notice shall be published in a manner calculated to give notice to persons likely to be affected by the proposed regulation. Methods which may be employed, depending on the circumstances, include publication of the notice in a newspaper of general circulation in the jurisdiction, or when appropriate, in a trade, industry, governmental, or professional publication."

Section 333.2461 involving enforcement of health regulations of a local health department provides as follows:

- "(1) In the manner prescribed in sections 2441 and 2442 a local governing entity may adopt a schedule of monetary civil penalties of not more than \$1,000.00 for each violation or day that the violation continues which may be assessed for a specified violation of this code or a rule promulgated, regulation adopted, or order issued which the local health department has the authority and duty to enforce.
- "(2) If a local health department representative believes that a person has violated this code or a rule promulgated, regulation adopted, or order issued under this code which the local health department has the authority and duty to enforce, the representative may issue a citation at that time or not later than 90 days after discovery of the alleged violation. The citation shall be written and shall state with particularity the nature of the violation, including reference to the section, rule, order, or regulation alleged to have been violated, the civil penalty established for the violation, if any, and the right to appeal the citation pursuant to section 2462. The citation shall be delivered or sent by registered mail to the alleged violator."

Article IV, § 51 of the Michigan Constitution supports the Michigan Public Health Code as follows:

“The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health.

2. On or about 1989, the Michigan Public Health Code was amended by the adoption of what has been designated “Michigan Clean Indoor Air Act” found at MCLA 333.12601 through 333.12617 pertaining to smoking regulations. This amendment provides in pertinent part as follows:

“Section 333.12601 defines terms utilized in the amendment to the Public Health Code such as “public place”, “smoking” and further refers to the definitions contained in Article I of the Public Health Code found in MCLA sections 333.1103 through 333.1113.”

Section 333.12603 provides:

- “(1) Except as otherwise provided by law, an individual shall not smoke in a public place or at a meeting of a public body, except in a designated smoking area.
- “(2) This section does not apply to a room, hall, or building used for a private function if the seating arrangements are under the control of the sponsor of the function and not under the control of the state or local governmental agency or the person who owns or operates the room, hall, or building.
- “(3) This section does not apply to a food service establishment or to licensed premises.
- “(4) This section shall not apply to a private educational facility after regularly scheduled school hours.”

Section 333.12604 prohibits smoking in a childcare institution or center.

Section 333.12604(a) prohibits smoking in a private practice office of a licensed individual, or in a health facility with certain exceptions.

Section 333.12605 provides as follows:

- “(1) A smoking area may be designated by the state or local governmental agency or the person who owns or operates a public place, except in a public place in which smoking is prohibited by law. If a smoking area is designated, existing physical barriers and ventilation systems shall be used to minimize the toxic effect of smoke in both smoking and adjacent nonsmoking areas.
- “(2) In the case of a public place consisting of a single room, the state or local governmental agency or the person who owns or operates the single room shall be in compliance with this part if 1/2 of the room is reserved and posted as a no smoking area.
- “(3) If smoking is permitted in a public place, the state or local governmental agency or the person who owns or operates the public place shall develop a written policy for the separation of smokers and nonsmokers which provides, at a minimum, for all of the following:
- “(a) Nonsmokers to be located closest to the source of fresh air.
 - “(b) Special consideration to be given to individuals with a hypersensitivity to tobacco smoke.
 - “(c) A procedure to receive, investigate, and take action on complaints.”

Section 333.12607 provides minimum smoking regulations as follows:

“The state or local governmental agency or the person who owns or operates a public place shall, at a minimum, do all of the following in order to prevent smoking:

- “(a) Post signs which state that smoking in that public place is prohibited, except in designated smoking areas, pursuant to this part.
- “(b) Arrange seating to provide, as nearly as practicable, a smoke-free area.
- “(c) Implement and enforce the policy for the separation of smokers and nonsmokers developed under section 12605(3).”

Section 333.12613 provides for enforcement of these regulations and at subparagraphs (2), (3) and (4) provides as follows:

- “(2) Pursuant to section 2235, the department may authorize a local health department to enforce this part and the rules promulgated under this part. A local health department authorized to enforce this part and the rules promulgated under this part shall enforce this part and the rules promulgated under this part pursuant to sections 2461(2) and 2462. In addition to the civil fine authorized under section 12611, a local health department may enforce this part and the rules promulgated under this part through an action commenced pursuant to section 2465 or any other appropriate action authorized by law.”
- “(3) In addition to any other enforcement action authorized by law, a person alleging a violation of this part may bring a civil action for appropriate injunctive relief, if the person has used a public place, child caring institution, child care center, health facility, or private practice office of an individual who is licensed under article 15 within 60 days after the civil action is filed.”
- “(4) The remedies under this part are independent and cumulative. The use of 1 remedy by a person shall not bar the use of other lawful remedies by that person or the use of a lawful remedy by another person.”

Section 333.12614 relates to reporting required of the director including as a “minimum”:

“(a) the policy of each state agency that has developed a policy for the separation of smokers and non-smokers.”

A summary of the foregoing provisions is as follows:

“The county board of commissioners as the “local governing entity” or a combination of such county boards shall provide for a county or district health department with a duty to “promote the public health” through the adoption and enforcement of regulations (following a duly noticed public hearing) which are not less stringent than provided by state law (the Michigan Clear Indoor Air Act and the Public Health Code) and which must receive the approval of the “local governing entity” or “entities” (the county board or several county boards of commissioners). The county board or boards of commissioners are by constitution “bodies corporate” with “legislative, administrative and such other powers and duties as provided by law”.

B. The legality of the delegation of the health protection authority.

1. The foregoing Public Health Code provisions properly delegate smoking regulation authority to district community health agencies created by county boards of commissioners which have the legislative obligation to protect and safeguard the public health.

A local or district health department created by the county board or boards of commissioners is required by the aforesaid provisions of the Michigan Public Health Code to “diligently endeavor to...promote the public health through organized programs, including prevention and control of environmental health hazardous.”

It further is required to “implement and enforce laws” pertaining to health and has “powers necessary or appropriate” in this connection and not “prohibited by law”.

It is given the additional power to “adopt regulations to properly safeguard the public health...” under MCLA 333.2435. This power to adopt regulations “appropriate to implement and carry out the duties or functions vested by law in the local health department” is again provided in MCLA 333.2441(1) referred to by the Michigan Supreme Court. Although these latter regulations must be “approved or disapproved” by the county board or boards of commissioners under the last cited provision, such decision is qualified and limited by the requirement that the regulations must “be at least as stringent as the standard established by state law applicable to the same or similar subject matter.” The regulations must also “safeguard the public health” under Section 333.2435 and, of course, must have been subject to a duly noticed due process public hearing conducted by the local health department under MCLA 333.2442.

The foregoing “approval or disapproval” is accordingly not an arbitrary veto power but limited to being exercised by a county board or boards of commissioners that themselves have legislative authority and are controlled by the specified standards that the regulations must pertain to the protection of the public health and not be less stringent than the protections included in the regulations contained in the Michigan Public Health Code.

2. Analysis of the two cases cited in the Supreme Court’s order for supplemental briefs:

(1) **Blue Cross/Blue Shield of Michigan v Governor**. The case of *Michigan Blue Cross/Blue Shield of Michigan vs Governor*, 422 Mich 1 at 51, involved the lack of any standards to guide the actuaries in their delegated authority to determine risk factors for insurance purposes. In addition, although the Insurance Commissioner was given authority to “approve or disapprove” certain factors proposed by the health care corporation, again no guidelines were supplied and, of course, the insurance commissioner was not a legislative body such as the board or boards of county commissioners.

As stated in the *Blue Cross* case on page 55, in explaining and rejecting the standards provided for supporting delegation of authority, which certainly are distinguishable from the case at bar:

“The panel must choose between the factors proposed by the corporation and the Insurance Commission, or reject both and choose a third risk factor. If this is the function delegated to the panel, the standards provided are wholly inadequate. The act is completely devoid of any indication why one factor should be preferred over another; no underlying policy has been articulated, nor has the Legislature detailed the criteria to be employed by the panel in making this determination. This complete lack of standards is constitutionally impermissible.”

In contrast, the local health department in the case at bar was granted authority to prepare additional non-smoking regulations more stringent than those contained in the Michigan Public Health Code following a duly noticed public hearing and subject to the approval of the proposal by the local governing entity (the county boards of commissioners).

(2) **Taylor v Gate Pharmaceuticals.** The case of *Taylor v Gate Pharmaceuticals*, 468 Mich 1, at note 9 on page 10, referred to by this Honorable Court in its supplemental briefs order, we submit, supports the authority delegated to the Northwest Michigan Community Health Agency by the respective county boards of commissioners. The aforesaid note 9, in discussing delegation of authority, states:

“However, the delegation must have standards or principles. If there are none, the delegation is improper because the legislature’s powers have been improperly given to the agency.

Applying the foregoing “standards or principles” to the *Charlevoix County* case, the delegation of anti-smoking authority to the Northwest Michigan Community Health Agency, is limited to the principle that it must involve the “promotion of the public health, and be “at least as stringent as the standards established by state law applicable to the same or similar subject matter.” The requirement that the proposed regulations be “approved or disapproved” by the county boards of commissioners (a legislative body) is similarly guided by the requirement that they be “at least as stringent as the standards established by state law applicable to the same or similar subject matter.”

The following appears at page 9 in the *Taylor* case which further supports the sufficiency of the standards or principles for a proper delegation of authority in the Charlevoix County case:

“A recent case, which is representative of the manner in which the federal judiciary has handled these challenges, is *Whitman v American Trucking Ass’n*, 531 US 457, 465; 121 S Ct 903, 149 L.Ed.2d 1 (2001), in which the United States Supreme Court considered a statute that directed the Environmental Protection Agency to set primary air quality standards ‘which are requisite to protect the public health’ with ‘an adequate margin of safety’. It was argued that this delegation was too vague. It was held, however, that this direction to the EPA was not an improper delegation of legislative authority to the agency because there was within the delegation ‘intelligible principle’.”

In the case at bar, Part 126 of the Michigan Public Health Code, known as the Michigan Clean Indoor Air Act, is extremely descriptive of the state legislature’s adopted smoking regulations which cannot, in any manner, be reduced by any smoking regulations proposed by Northwestern Michigan Community Health Agency and approved by the respective county boards of commissioners. The county boards of commissioners are similarly restricted in their approval of any such proposed regulations to not approve any regulations less stringent than those of the public health code. These controls on legislative regulations clearly honor the separation of powers doctrine in Article III, § 2 of the Michigan Constitution which is the foundation of the delegation law requirements.

3. Judicial decisions supporting the adequacy of the “standards or principles” on which the smoking regulations of the Defendant-Appellee Northwest Michigan Community Health Agency were based involving the duty to “promote the public health” in a manner “at least as stringent as the standards established by state law” are as follows:

(1) The seminal case on delegation of legislative authority, as evidenced by Dean LeDuc in his Treaties on Michigan administrative law referred to by this Honorable

Court on pp 12-13 of its decision in *Taylor v Gate Pharmaceutical, supra*, is *State Conservation Department v Seaman*, 396 Mich 299 (1976).

This case involved authority granted to the director of conservation to add provisions in commercial fishing licenses involving the amount of fish and species allowed to be taken, the areas that can be fished, the season and depth of fishing, the methods and gear to be used and other conditions and restrictions necessary to carry out the provisions of the statute. In determining the sufficiency of this delegation of authority, the court enunciated the following guiding principles:

Page 308,

“The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own actions depend. To deny this would be to stop the wheels of government....

“In making this determination whether the statute contains sufficient limits or standards, we must be mindful of the fact that such standards must be sufficiently broad to permit efficient administration in order to properly carry out the policy of the legislature but not so broad as to leave the people unprotected from uncontrolled, arbitrary power in the hands of administrative officials.

“While no hard or fast rule exists for determining whether a given statute has provided sufficient standards, a number of guiding principles have evolved in Michigan jurisprudence to assist in making a determination in this case.

“First, the act in question must be read as a whole; the provision in question should not be isolated but must be construed with reference to the entire act. *Argo Oil Corp v Atwood, supra*, 53, 264 NW2d 285.

“Second, the standard should be ‘as reasonably precise as the subject matter requires or permits’. *Osius v City of St. Clair Shores*, 344 Mich 693, 698, 75 NW2d 25, 27; 58 ALR2d 1079 (1956). [Fn7]....

“The preciseness of the standard will vary with the complexity and/or the degree to which subject related will require constantly changing regulation. [Fn8] The ‘various’ and ‘varying’ detail associated with managing the natural resources has led to recognition by the courts that it is impractical for the legislature to provide specific regulations and that this function must be performed by the designated

administrative officials. *People v Soule*, 238 Mich 130, 140, 213 NW 195 (1927). See *United States v Grimaud*, 220 US 506, 31 S Ct 480, 55 LED 563 (1910)....

“Third, if possible, the statute must be construed in such a way as to ‘render it valid, not invalid’ as conferring ‘administrative, not legislative’ power and as vesting ‘discretionary, not arbitrary authority’, *Argo Oil Corp v Atwood, supra*, 274 Mich 53, 264 NW 285.” (Emphasis added.)

Comparing these guidelines to the case at bar, we submit the following:

First—the whole act pertinent to delegation would refer to the entire public health code within which Michigan Clean Air Act is contained. The statutory provisions contained in the Sections II A and B of this brief are germane to the “entire act” involved.

Second—the requirements that standards should be ‘as reasonably precise as the subject matter requires or permits’ must recognize that the ways and means of protecting the health of the public from secondhand smoking is a complex and multi-facet issue. It must be concerned with the shape and size of the facility involved, the number of employees and other members of the public in attendance in the facility, the functions engaged in at the facility, the sensitivities of the occupants to smoke, the ventilation and air circulation in the facility and the constant upgrading of medical advice pertaining to the inhalation of smoke. Geographical and atmospheric conditions may also adversely impact smoking conditions.

Third—the emphasis on the interpretation of the validity rather than the invalidity of the delegation of authority as being administrative and discretionary is applicable to the case at bar where the regulations are prohibited from being less stringent than the public health code and must be designed to protect or safeguard public health. The

delegated authority is focused and limited to the parameters contained in the public health code.

(2) The case of *Michigan State Highway Commission v VanderKloot*, 392 Mich 159 (1973) also referred to in the treaties of Dean LeDuc, cited *supra*, involves the issue of whether the standard “necessity” was sufficient to support a legislative delegation of authority to the state highway commission in the context of the Highway Condemnation Act.

The Supreme Court stated at pp169-170 in its support of such delegation sufficiency:

Page 169-170,

“A. Standards for Legislative Delegation of Eminent Domain Power.

“(1) Under US Const., AM. XIV, s1, and Const. 1963, art. 1, s17, no one may be deprived of life, liberty or property without due process of law. One of the requirements of substantive due process is the existence of reasonably precise standards to be utilized by administrative agencies in the performance of delegated legislative tasks. *Milford v People’s Community Hospital Authority*, 380 Mich 49, 57-63, 155 NW2d 835 (1968).

“The standard in question in the instant case is the bare term, ‘necessity,’ contained in MCLA s 213.368; MSA. s 8.261(8) which in relevant part reads as follows:

“Sec. 8. Within ten days after the notice required by section 6 has been given, a person claiming fraud or abuse of discretion, or both, in the necessity of the taking of all or any part of the property for the purposes stated in the petition, and having a justiciable interest in the property involved, may file a motion in the same court and cause, asking that such necessity be reviewed.... At the hearing the court shall determine whether or not there has been either fraud or abuse of discretion in regard to such necessity....”

“(2) We hold that this standard, ‘necessity,’ is sufficient in the context of the Highway Condemnation Act and the history of

highway condemnation to satisfy the demands of due process with respect to delegation of legislative authority.”

Page 172,

“‘Necessity’ is also a recognized standard guiding administrative bodies in making other discretionary determinations based upon delegated legislative authority. See 1 Am. Jur.2d, Administrative Law, s 119, p.927...

“In sum, we hold that the standard ‘necessity’ as utilized in MCLA s 213.368 is a sufficient standard for delegation of eminent domain authority. It is a standard ‘...as reasonably precise as the subject matter requires....’”

Certainly, the “standards or principles” pertinent to the delegation of authority to the local health department in the Charlevoix County case at bar are far more descriptive and limiting than the single standard “necessity” in *VanderKloot, supra*.

(3) A special panel of the Michigan Court of Appeals in the case of *Bendix Safety Restraints Group v City of Troy*, 215 Mich App 289 (1996) resolved the conflict between two panels of the Michigan Court of Appeals in favor of the minority dissent of Judge Taylor in the case of *Marpos Corp v City of Troy*, 204 Mich App 156 (1994) and the reluctant panel decision in the earlier *Bendix* decision at 211 Mich App 801 (1995). It thereby overruled the previous contrary majority decision of *Marposs Corp v City of Troy*, 204 Mich App 156 (1994).

The importance of this special panel's decision in upholding Judge Taylor's dissent in the *Marposs* case is the recognition that a unit of government such as the City Council of Troy and in the case at bar, the board of county commissioners, are themselves a legislative body with authority to perform duties authorized by statute, unimpaired by the separation of powers provisions of the Michigan Constitution involving legislative versus administrative functions.

The *Bendix* case involved the City Council of Troy which refused to give its consent to a proposed tax abatement by the city council of the City of Sterling Heights to the plaintiff, Bendix Safety Restraints Group, if it moved its facility from the City of Troy to the City of Sterling Heights. This denial of consent was pursuant to MCLA 207.559(2)(f) which permitted such a denial without any prescribed standards specified for such denial. As stated by the court in the original Bendix decision at 805,

“As Judge Taylor’s dissent points out, these precedents are not applicable here. The Troy City Council is ‘itself a legislative body,’ not an administrative agency such as those at issue in *Osius*, *Lansing School District.*, and *Petrus*. *Marposs*, *supra* at 165, 514 N.W.2d 202. In contrast to administrative agencies, municipal entities are established under our Constitution. Const. 1963, art. 7, §21. They are guaranteed a ‘general grant’ of ‘power and authority’ regarding municipal concerns. Const. 1963, art. 7, §22. The Michigan Legislature has implemented this constitutional grant of authority in the Home Rule City Act, which specifically provides that a city council is a ‘legislative body’ that is ‘vested with legislative power.’ MCLA§117.3(a) and (l); MSA§ 5.2073(a) and (l). The judiciary must respect the legislative authority vested in municipal governments. *Schwartz v City of Flint*, 426 Mich 295; 395 N.W.2d 678 (1986).”

As previously cited in this brief, art 7, §8 of the Michigan Constitution, similar to city authority, provides:

“Boards of supervisors shall have legislative, administrative and such other powers and duties as provided by law.”

Art 7, § 34 of the Michigan Constitution further provides as follows:

“The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution.”

In connection with the foregoing, MCLA 46.11 details the powers of county boards of commissioners which includes, among others, subparagraph (j) providing as follows:

“By majority vote of the members of the county board of commissioners elected and serving, pass ordinances that relate to county affairs and do not contravene the general laws of this state or interfere with the local affairs of a township, city or village within the limits of the county, and pursuant to section 10b provide suitable sanctions for the violation of those ordinances.”

As also previously stated under the Michigan Public Health Code, MCLA 333.2406 defines “local governing entity” to mean:

“(b) In case of a district health department, the county boards of commissioners of the counties comprising the district.”

MCLA 333.2419 further provides,

“Two or more local governing entities may contract for the employment of personnel or the consolidation of functions of their local health departments under a plan approved by the department.”

The “department” is defined at MCLA 333.1104 as “the state department of community health”.

Accordingly, when the “local governing entity” (the county board of commissioners) is authorized under MCLA 333.2441(1) to “approve or disapprove” the regulations adopted by the local health department, it is performing a legislative as distinguished from an administrative function. Although such “approval or disapproval” is guided by the standard that the regulation must be “at least as stringent as the standard established by state law applicable to the same or similar subject matter”, this guidance is more pertinent and applicable to the local health department that is proposing the public health regulations.

III. THE LOCAL HEALTH DEPARTMENT OR COUNTY BOARD OF COMMISSIONERS, THE ENTITY VESTED WITH FINAL AUTHORIZATION OF THE REGULATION, MCLA 333.2441(1), HAVE AUTHORITY TO CREATE A RIGHT OR PRIVATE CAUSE OF ACTION AGAINST A PRIVATE ENTITY THAT ALTERS MICHIGAN'S AT-WILL EMPLOYMENT DOCTRINE.

With the preceding section having established that there was no improper delegation of legislative authority, the next issue for consideration focuses on the specific provisions in the local health department clean indoor air regulations (Plaintiffs-Appellant's Appendix, pp 79a-104a) to determine whether the local health department or county board of commissioners can create in such regulations a right or private cause of action against a private entity that alters Michigan's at-will employment doctrine. The following supports a determination that such a right or private cause of action can be properly created.

The genesis of Michigan case law regarding whether local ordinances or regulations can create private causes of action can be found in the case of Taylor v Lake Shore & MSR Company, 45 Mich 74; 7 NW 728 (1881). Taylor involved an ordinance that placed a duty upon a private landowner to maintain the public sidewalk.

In Taylor, plaintiff, a private individual, sued defendant railroad company to recover damages for an injury suffered by her in the consequence of a slip and fall on ice which had formed on a sidewalk in front of defendant's property in the city of Monroe. Plaintiff based her cause of action against defendant on defendant's violation of a city ordinance which required property owners and occupants to maintain the sidewalks in front of the premises including, keeping them free of ice and snow. The ordinance provided specifically for fines and/or jailing for its violation as well as indemnification to the city for any damages the city was required to pay as a result of

the property owner's or occupant's violation. The trial court granted judgment for defendant, and the plaintiff appealed.

In beginning its analysis, the Taylor court set forth the following as a proper statement of law in Michigan:

“To maintain this proposition [that the ordinance violation gave plaintiff a direct cause of action against defendant] it is necessary to make it appear that the duty imposed was a duty to individuals rather than a duty to the whole public of this city; for if it was only a public duty it cannot be pretended that a private action can be maintained for a breach thereof. A breach of public duty must be punished in some form of public prosecution, and not by way of individual recovery of damages. Nevertheless, the burden that individuals are required to bear for a public protection or benefit may in part be imposed for the protection or benefit of some particular individual or class of individuals also, and then there may be an individual right of action as well as a public prosecution if a breach of the duty causes individual injury. Atkinson v Waterworks Company, 6 Exch 404. Taylor, supra, at 77.” (bracketed information supplied).

It is clear from the above, that the Taylor court acknowledged that an ordinance violation could form the basis of a private cause of action if the ordinance was intended to impose a duty, at least in part, to individuals, and not solely to the public. This rule is also recognized by other jurisdictions. McQuillins Municipal Corporation (3rd Edition revised §22:2) provides in part that:

“There is considerable conflict, in result at least, among the cases as to whether or not and when an action by one person against another can be predicated upon the violation of an ordinance. The governing principle is whether or not a duty under an ordinance primarily is to the public as such or primarily is to the public as composed of individuals or, in other words, to individuals as constituting the public. In this connection, ordinances, the purpose of which is to protect persons or property, frequently are deemed to give rise to a duty to individuals constituting the public and hence to protect them to the extent that a violation of the ordinance causing injury constitutes or evidences actionable negligence. Accordingly, some courts assert that the breach of duty arising from the violation of either a statute or ordinance, where the duty is one owed to individuals, is of the same nature and gives rise to a cause of action. In

support of this view, the well-established principle that an ordinance duly enacted by a municipal corporation is as binding on all persons within the corporate limits as a statute or other law of the state, and the principle that all persons bound by an ordinance are required to take notice of its existence have been invoked. In an action for damages where it appeared the defendant had failed to comply with the requirements of an ordinance, it has been said: ‘The doing of an unlawful act subjects the doer to every consequence which flows from it. This is the principle of universal operation, and founded in good sense and public justice’”. (Footnote and citations omitted). *McQuillins*, supra, at 550-551.

The question still remained for the Taylor court to determine whether the particular ordinance in question imposed a duty to individuals. The Taylor court determined that the ordinance at issue in Taylor imposed only a public duty. It arrived at that determination in the following manner. First, it looked to the language of the ordinance itself. Finding it to be inconclusive or ambiguous, it then looked to the statute which was the authority for enactment of the ordinance and found that the statute, itself, contemplated only duties to the public. It held, therefore, that “the city ordinance could go no further and give individual rights of action.” Taylor, supra, at 78.

Once Taylor is properly analyzed and understood, the rule which can be culled is that no private cause of action will arise from an ordinance violation where the authority to enact such an ordinance has not been granted to the municipality by the state, or where the municipality has not itself enacted such an ordinance even though it has been granted the authority to do so. Or, to frame it in positive terms, where a municipality has been given the power by the state to enact ordinances which impose a duty to individuals, at least in part, and a municipality has done so, the violation of such an ordinance can provide a private cause of action. The proper interpretation of Taylor can be seen in its progeny. See, Bolden v Operating Corporation, 239 Mich 318; 214

NW 241 (1927), and Levendowski v Geisenhaver, 375 Mich 225; 134 NW2d 228 (1965).

The principles from Taylor are equally applicable to the case at bar as a local ordinance or health department regulation, approved by the county commission, are for these purposes analytically analogous. Both local ordinances and health department regulations garner their basic authority from legislative grants and both carry with them the force of law. [See MCLA 333.2441 and MCLA 333.2461 with regard to the local health department regulations].

In the case at bar, the health department regulations with approval by the county board of commissioners properly created a right or private cause of action against a private entity that alters Michigan's at-will employment. The general and specific regulatory authority discussed supra at pages 2 through 8 grants to the health department and the approving county board of commissioners the ability to adopt certain regulations for the protection of an individual's health, including as in this case, protection from secondhand smoke. The referenced statutory authority contained in the Public Health Code clearly contemplates protecting the health of individuals by public regulation which may occur by way of local health department regulations. MCLA 333.12613 explicitly creates an individual right to protection from the effects of secondhand smoke in the form of injunctive relief and other lawful remedies. The local regulations shall be at least as stringent as the standard established by state law applicable to the same or similar subject matter. MCLA 333.2441(1). The local health department has been granted authority to provide through its local regulations for the protection of an individual's health from secondhand smoke and in doing so can provide

for individual causes of action to further the effectiveness of its regulations within this statutory authorization. How effective would the regulations be for the employees' health if they feared loss of their job for reporting the health violation?

Directly applying the Taylor case to the local regulations at hand it is apparent that there is underlying legislative authority to create an individual right or private cause of action to carry forward the more stringent nonsmoking regulations. With this authority, §1011 of the local indoor air regulations does in fact create such a private cause of action. This cause of action to protect the individual's right to a smoke-free environment does in fact permissibly alter Michigan's at-will employment doctrine. It should be noted that there are no specific legislative restrictions being contravened by §1011 which would prevent this alteration of at-will employment. In light of this analysis from Taylor, an individual can lawfully assert their right to nonretaliation under said local indoor air regulation §1011.

The Plaintiffs-Appellants' reliance on Mack v Detroit, 467 Mich 186; 649 NW2d 47 (2002) and Garrett v City of Detroit, 2008 Mich App LEXIS 1636 (August 2008) (Appellant's appendix 105a-109a) to prove that the local health department may not create a cause of action against a private entity that alters Michigan's at-will employment is misplaced in light of the Taylor case and a proper reading of these cases.

In Mack, the court considered the implications of the governmental immunity defense where the plaintiff argued that certain provisions of the city charter created a private cause of action for damages. The court in Mack stated that:

We hold that regardless of whether the charter provides a private cause of action against the city for sexual orientation discrimination, such a cause of action would contravene the Governmental Tort Liability Act (GTLA), MCLA 600.1407. Accordingly, we do not accept plaintiff's invitation to recognize such a cause of action." Mack, supra, at 190.

In Mack there was no statutory provision from which to infer the intent to waive governmental immunity for sexual orientation discrimination, therefore, such a private cause of action could not be recognized. The cause of action conflicted with the statutory scheme set forth by the GTLA. Any expansion or contraction of that immunity had to be made within the GTLA itself. This situation is far different from the case at bar where there is underlying legislation creating individual rights and the private cause of action established by the board of health regulation does not defeat any all encompassing statutory scheme with regard to employment at-will. In Mack there was no legislative authority upon which the City of Detroit could by inference or otherwise rely.

The Garrett case merely applies the holding from Mack in finding that the city's privatization ordinance did not supersede the GTLA since the City of Detroit could not create a cause of action against itself in violation of the GTLA. This too is inapplicable to the case at bar as the board of health has the statutory authority to create a private cause of action in its local regulations in order to protect the health of individuals from secondhand smoke. The Plaintiffs-Appellants' arguments regarding this issue are unpersuasive.

IV THE RIGHT OR PRIVATE CAUSE OF ACTION CREATED BY CLEAN INDOOR AIR REGULATION §1001 FALLS WITHIN THE EXCEPTIONS SET FORTH IN SUCHODOLSKI V MICHIGAN CONSOLIDATED GAS CO, 412 MICH 692 (1982).

The right or private cause of action in question created by the health department clean indoor air regulation provides in §1011 that:

“No person or employer shall discharge, refuse to hire or in any manner retaliate against any employee, applicant for employment or customer because such employee, applicant or customer exercises any right to a smoke-free environment afforded by this regulation.”

This regulation alters Michigan’s at-will employment doctrine which provides generally that “in the absence of a contractual basis for holding otherwise, either party to an employment contract for an indefinite term may terminate it at any time for any, or no, reason.” Suchodolski v Michigan Consolidated Gas Co, 412 Mich 692, 694-695; 316 NW2d 210 (1982), citing generally Toussaint v Blue Cross and Blue Shield of Michigan, 408 Mich 579; 292 NW2d 880 (1980). The court in Suchodolski recognized three exceptions to this general rule “based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable.” Suchodolski, supra, at p 695.

The first exception to the general at-will employment doctrine occurs when there are “explicit legislative statements prohibiting the discharge, discipline or other adverse treatment of employees who act in accordance with a statutory right or duty.” (Footnote omitted) Suchodolski, supra, at p 695.

The second exception occurs when “the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment”. Suchodolski, supra, at p 695.

The third exception prohibits “retaliatory discharges when the reason for a discharge was the employee’s exercise of a right conferred by a well-established legislative enactment.” (Citations omitted) Suchodolski, supra, at p 696.

The private cause of action established by the clean indoor air regulation §1011 falls within these exceptions to Michigan’s at-will employment doctrine and is founded upon the principle set forth in Suchodolski. Regulation §1011 protects an employee from being discharged where doing so would be so contrary to public policy as to be actionable. Suchodolski, supra at p 695.

In applying Suchodolski it should first be set forth as fundamental that public bodies such as the county board of commissioners or local health department create public policy through authority granted to them by the Michigan Constitution and state statutes. This Court in Terrien v Zwit, 467 Mich 56; 648 NW2d 602 (2002) (discussed in more detail in Argument V herein) recognized that indicators of public policy are not just found in the Constitution and statutes. Terrien, supra at p 67. An example of statutory recognition that local public bodies establish public policy can be found in the Michigan Open Meetings Act, PA 1976 No. 267, as amended; MCLA 15.261, et seq. (OMA). The OMA addresses formulation of public policy at public meetings of public bodies such as the board of health and the county board of commissioners. The OMA definitions are instructive with regard to this point and provides in part that:

- “(a) ‘Public body’ means any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, that is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function”

- “(b) ‘Meeting’ means the convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy”
- “(d) ‘Decision’ means a determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy.” MCLA 15.262.

MCLA 15.262 clearly recognizes that a public body may make decisions which effectuate or formulate public policy. In the case at bar the local board of health and the county board of commissioners, pursuant to their lawful grants of authority, established public policy with regard to the subject matter in the local clean indoor air regulations. Public policy can be set by the board of health regulations and the Suchodolski exceptions can be applied where discharging an employee would be contrary to this public policy.

In the case at bar all three of the Suchodolski exceptions to at-will employment could be applicable. The first exception is found in explicit legislative statements which create the cause of action. Through legislative authority granted by the Public Health Code, the local clean indoor air regulation §1011, provides an explicit legislative statement providing an employee with a cause of action where that employee acts in accordance with the right to a smoke-free environment established in the regulations. The regulation which represents the public policy expressed by the local board of health and approved by the county board, is itself the explicit legislative statement creating the exception to at-will employment.

The second exception as stated in Suchodolski could also be applicable to the local clean indoor air regulations even in the absence of an explicit prohibition against

retaliatory discharge. Such a cause of action altering the at-will employment doctrine exists if the reason for the discharge of the employee was the failure or refusal to violate a law (i.e., the local clean indoor air regulations) in the course of employment. The word “law” as used in the second exception of Suchodolski includes principles promulgated in constitutional provisions, statutes, common law and regulations. Vagts v Perry Drug Stores, 204 Mich App 481, 485; 516 NW2d 102 (1994). In any case, the local clean indoor air regulations have force of law. (MCLA 333.2441 and MCLA 333.2461). The law established by the local clean indoor air regulations represents public policy and to discharge an employee for refusing to violate its provisions could be so contrary to this public policy as to be actionable.

Finally, the third Suchodolski exception to at-will employment would apply to prevent retaliatory discharge when the reason for the discharge was the employee’s exercise of a right conferred by the local clean indoor air regulations (“a well-established legislative enactment”). The employees’ rights are conferred by the Public Health Code through the adoption of the local clean indoor air regulations approved by the county commission. These regulations create the public policy rights conferred upon the employee which can alter at-will employment. Well-established legislative enactments have been held to not just include state statute but could also include federal statute Garavaglia v Centra, Inc., 211 Mich App 625, 631; 536 NW2d 805 (1995). Conceptually, if public policy is established as set forth in Terrien, supra. (See Argument V herein), then well-established legislative enactments should include enactments stemming from legislative authority, such as regulations and ordinances as these also set public policy. Based upon the authority conferred under MCLA

333.2441(1) to adopt the local clean indoor air regulations, the public policy to reduce the effects of smoking and secondhand smoke under the Public Health Code, and the local clean indoor air regulations themselves, there exists strong public policy to alter the at-will employment doctrine to prevent retaliatory discharge based upon the employee's exercise of the rights conferred under the local regulations.

V THE PUBLIC POLICY EXCEPTIONS TO MICHIGAN'S EMPLOYMENT AT-WILL DOCTRINE AS SET FORTH IN SUCHODOLSKI V MICHIGAN CONSOLIDATED GAS CO, 412 MICH 692 (1982) ARE CONSISTENT WITH TERRIEN V ZWIT, 467 Mich 56 (2002)

In addressing this final question regarding whether the Suchodolski public policy exceptions are consistent with Terrien we begin by reviewing the public policy holdings in Terrien. This court in Terrien held that:

“In defining ‘public policy’, it is clear to us that this term must be more than a different nomenclature for describing the personal preferences of individual judges, for the proper exercise of the judicial power is to determine from objective legal sources what public policy is, and not simply assert what such policy ought to be on the basis of the subjective views of individual judges. This is grounded in Chief Justice Marshall’s famous injunction to the bench in Marbury v Madison, 5 US (1 Cranch) 137, 177, 2 L.Ed. 60 (1803), that the duty of the judiciary is to assert what the law ‘is’ and not what it ‘ought’ to be.” Terrien, supra, at 66-67.

This court in Terrien goes on to hold that:

“In identifying the boundaries of public policy, we believe that the focus of the judiciary must ultimately be upon the policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law. (Citation omitted). The public policy of Michigan is not merely the equivalent of the personal preferences of a majority of this court; rather, such a policy must ultimately be clearly rooted in the law. There is no other proper means of ascertaining what constitutes our public policy.” Terrien, supra, at 66-67.

The footnote to the last sentence of the above-referenced quote is instructive as to where public policy may be found. In this footnote the court stated:

“We note that, besides constitutions, statutes and the common law, administrative rules and regulations, and public rules of professional conduct may also constitute definitive indicators of public policy.” Terrien, supra, at 67.

The court in Suchodolski did not specifically address the definition or boundaries of public policy, therefore, Terrien is instructive in this regard. The at-will employment public policy exceptions of Suchodolski must be interpreted within the context of the principles of public policy as expressed in Terrien and in doing so Suchodolski can be consistent. In Suchodolski an employer’s right to discharge an employee at-will is altered where the reason for the discharge contravenes public policy. Suchodolski, supra at 695. This public policy should be understood within the parameters of Terrien and in doing so is consistent therewith. In light of Terrien, the three exceptions from Suchodolski should rely on indicators of public policy stemming from constitutions, statutes, the common law, administrative rules and regulations and other definitive indicators of public policy. We would submit that these indicators of public policy can also be found in local ordinances and local health department regulations.

The three exceptions to at-will employment as provided in Suchodolski (explicit legislative statements, failure or refusal to violate a law, and well-established legislative enactments) all involve underlying constitutional or legislative authority as the source for providing definitive indicators of public policy in limiting employment at-will discharges. If anything, the Suchodolski examples of these exceptions are too narrow and do not explicitly provide for other indicators of public policy. The public policy exceptions in

Suchodolski do not allow the judiciary to create public policy and this appears consistent with Terrien.

CONCLUSION

On the basis of the foregoing, Amicus Curiae Michigan Townships Association submits that the provisions of the Michigan Public Health Code do not offend the separation of powers requirement of the Michigan Constitution in delegating to a local health department or district health department the authority to adopt more restrictive smoking regulation to promote and protect public health than set forth in the Michigan Clean Air Act where such regulations are subject to a duly noticed public hearing, and finally their ultimate approval, prior to becoming effective, by the legislative body or bodies known as county board or boards of commissioners, which also were responsible for establishing said local health department.

Further, the local health department or county board of commissioners, the entity vested with final authorization of the regulation, has authority to impose a duty to individuals for their public health and thereby create in its local clean indoor air regulations a right or private cause of action against a private entity which alters at-will employment. Such right or private cause of action falls within the Suchodolski exceptions, being supported by the clear public policy established in the Public Health Code and the local clean indoor air regulations themselves. Finally, this Court's decision in Suchodolski is consistent with its decision in Terrien and a reading of these two cases together supports a finding that the local clean indoor air regulations

represent public policy which may permit the alteration of the at-will employment doctrine.

Respectfully submitted.

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