

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Hon. Donald S. Owens, Presiding Judge

MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY and
DIRECTOR OF THE DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Plaintiffs/Appellants,

v

TOWNSHIP OF WORTH,

Defendant/Appellee.

Supreme Court No. 141810

Court of Appeals Docket No. 289724

Ingham County Circuit Court
File No. 07-970-CE

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**MICHIGAN ASSOCIATION OF REALTORS®
BRIEF AMICUS CURIAE
IN SUPPORT OF THE POSITION OF
DEFENDANT/APPELLEE, TOWNSHIP OF WORTH**

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TABLE OF CONTENTS

	<u>Page</u>
INDEX OF AUTHORITIES	ii
STATEMENT IDENTIFYING ORDER APPEALED FROM AND RELIEF SOUGHT	iv
STATEMENT OF QUESTIONS PRESENTED	v
I. INTRODUCTION AND STATEMENT OF INTEREST	1
II. STATEMENT OF MATERIAL FACTS AND PROCEEDINGS	3
III. ARGUMENT	5
A. Standard Of Review	5
B. The Court Of Appeals Correctly Determined That MCL 324.3109 Does Not Create Strict Liability On The Part Of Municipalities For The Discharge Of Raw Sewage Of Human Origin Within Its Borders	6
1. Applicable Principles Of Statutory Construction	6
2. NREPA Requires That A Municipality Be “Responsible For” A Discharge In Order To Be Liable Under MCL 324.3109	7
3. The Court Of Appeals Correctly Interpreted MCL 324.3109	10
C. The Court Of Appeals Decision Is Supported By Prior Case Law Interpreting NREPA	15
D. Townships Are Neither Historically Nor Statutorily Obligated To Construct And Maintain Wastewater Treatment Systems	18
E. Public Policy Concerns Weigh In Favor Of Affirming The Decision Of The Court Of Appeals	23
IV. CONCLUSION AND RELIEF REQUESTED	24

INDEX OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>Altman v Meridian Twp</i> , 439 Mich 623; 487 NW2d 155 (1992)	6, 12
<i>Apsey v Memorial Hosp</i> , 477 Mich 120; 730 NW2d 695 (2007)	7
<i>Brunsell v Zeeland</i> , 467 Mich 293; 651 NW2d 388 (2002)	6
<i>Bush v Shabahang</i> , 484 Mich 156; 772 NW2d 272 (2009)	13, 14
<i>Chestnut Development, LLC v Twp of Marion</i> , Docket Nos. 287312 and 292894, 2010 WL 2505905 (Mich App, June 22, 2010)	17, 18
<i>Dept of Environmental Quality v Worth Twp</i> , 489 Mich 856; 795 NW2d 13 (2011)	5
<i>Grand Rapids v Consumers Power Co</i> , 216 Mich 409; 185 NW 852 (1921)	2
<i>Horace v City of Pontiac</i> , 456 Mich 744; 575 NW2d 762 (1998)	11
<i>Koontz v Ameritech Services, Inc</i> , 466 Mich 304; 645 NW2d 34 (2002)	6
<i>Lake Isabella Development, Inc v Village of Lake Isabella</i> , 259 Mich App 393; 675 NW2d 40 (2003)	1, 2, 15-17
<i>Lincoln v General Motors Corp</i> , 461 Mich 483; 607 NW2d 73 (2000)	6
<i>Macomb County Prosecutor v Murphy</i> , 464 Mich 149; 627 NW2d 247 (2001)	7, 13
<i>McJunkin v Cellasto Plastic Corp</i> , 461 Mich 590; 608 NW2d 57 (2000)	5
<i>Roberts v Mecosta County General Hosp</i> , 466 Mich 57; 642 NW2d 663 (2002), after remand 470 Mich 679; 684 NW2d 711 (2004)	6
<i>Title Office, Inc v Van Buren Co Treasurer</i> , 469 Mich 516; 676 NW2d 207 (2004)	11

STATUTES

1965 PA 328	14
1978 PA 368	8

MCL 324.101	v, 5
MCL 324.3101(m)	13
MCL 324.3109	1, 5-8, 10, 12-16, 18
MCL 324.3115	8, 9, 16
MCL 324.4105	17
MCL 333.1115	3, 19
MCL 333.13801 to 333.13831	8
MCL 333.2235	21
MCL 333.2413	21
MCL 333.2428	21
MCL 333.2433	21
MCL 333.2435(d)	22
MCL 333.2441	22
MCL 333.2461-MCL 333.2471	22
MCL 41.411(1)	18

OTHER

MDEQ Rule 299.2933(4)	1
Mich Const 1963, art 9, § 29	15
Random House Webster's College Dictionary (2d ed)	11
Sanilac County Environmental Health Code	3, 19-21
Worth Township, Resolution 2004-9	3

**STATEMENT IDENTIFYING ORDER APPEALED FROM
AND RELIEF SOUGHT**

Amicus Curiae, Michigan Association of REALTORS[®], adopts the Counter-Statement of Order Appealed From and Relief Sought as set forth in the Brief on Appeal of Defendant/Appellee, Township of Worth (“Worth Township”). For the reasons discussed below, the August 17, 2010 Opinion of the Court of Appeals (the “COA Opinion”) should be affirmed.

STATEMENT OF QUESTIONS PRESENTED

- I. WHETHER THE NATIONAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT, MCL 324.101 *et seq.*, EMPOWERS THE DEPARTMENT OF ENVIRONMENTAL QUALITY TO SEEK, AND THE CIRCUIT COURT TO GRANT, AN ORDER EFFECTIVELY REQUIRING A TOWNSHIP TO INSTALL A SANITARY SEWER SYSTEM WHEN A WIDESPREAD FAILURE OF PRIVATE SEPTIC SYSTEMS RESULTS IN CONTAMINATION OF LAKE WATERS?

The Court of Appeals answered, “No.”

The Circuit Court answered, “Yes.”

Plaintiff/Appellant, Michigan Department of Environmental Quality, answers, “Yes.”

Defendant/Appellee, Worth Township, answers, “No.”

Amicus Curiae, Michigan Association of REALTORS®, answers, “No.”

- II. DO PUBLIC POLICY CONCERNS WEIGH IN FAVOR OF AFFIRMING THE COURT OF APPEALS DECISION?

The Court of Appeals would answer, “Yes.”

The Circuit Court would answer, “No.”

Plaintiff/Appellant, Michigan Department of Environmental Quality, would answer, “No.”

Defendant/Appellee, Worth Township, answers, “Yes.”

Amicus Curiae, Michigan Association of REALTORS®, answers, “Yes.”

I. INTRODUCTION AND STATEMENT OF INTEREST

The Michigan Association of REALTORS® (the “Association”) is Michigan’s largest nonprofit trade association, comprised of 47 local boards and a membership of more than 24,000 brokers and salespersons licensed under Michigan law. Each day, the Association’s members are involved in hundreds of real estate transactions. Therefore, one of the goals of the Association is to oppose laws and court decisions which eliminate, restrict or otherwise impede the ability of the Association’s members to sell homes in Michigan.

This case is of vital concern to the Association and its members, as it involves the proper scope of a state department’s authority to regulate construction and maintenance of septic and sewer systems, which regulation affects and may impede the construction of new homes as well as the sale of existing homes. The Court of Appeals in this case negated the Michigan Department of Environmental Quality (“MDEQ”) attempt to force Worth Township to build a public sewer system to remedy the effects of failing private septic systems under the guise of an invalid interpretation of the Natural Resources and Environmental Protection Act (“NREPA”); specifically, MCL 324.3109. The MDEQ seeks not only reversal of the COA Opinion, but also reversal of the decision of the Court of Appeals in *Lake Isabella Development, Inc v Village of Lake Isabella*, 259 Mich App 393; 675 NW2d 40 (2003).

In *Lake Isabella*, the Court of Appeals invalidated MDEQ Rule 299.2933(4) which, as a condition precedent to the MDEQ’s consideration of a private owner’s application for a sewerage system permit, required that the application be accompanied by a Resolution from the local governmental agency having jurisdiction, that the governmental agency shall assume responsibility for the effective and continued operation and maintenance of the proposed sewerage system if the owner fails to perform in this capacity. In *Lake Isabella*, as here, the

MDEQ maintained that under NREPA, townships are strictly liable for the failures of sewerage systems located within their borders. The MDEQ, in this case, again seeks the same authority over, and strict liability of, townships that it was unable to achieve in the *Lake Isabella* case. Such authority/liability is not only unlawful, but unnecessary. This State already has adequate regulatory oversight of septic systems by its counties.

Under Michigan's longstanding public health regulation, individual private septic systems are installed by private property owners; county health departments like the Sanilac County Health Department regulate their construction and maintenance under a sanitary code, and enforce those obligations to protect the public health and the environment. MDEQ's artificial reading of the statute would shift the responsibility to remedy individual failed private septic systems to local government and local taxpayers, and create a new layer of government regulation that is unnecessary and burdensome. Accordingly, the effect of a reversal of the Court of Appeals decisions in this case and/or *Lake Isabella* would be to eliminate the construction of many proposed subdivisions as well as sales of existing homes as a result of the local government agency's unnecessary involvement.

The issues in this appeal directly affect the ability of REALTORS[®] to sell affordable housing. In *Grand Rapids v Consumers Power Co*, 216 Mich 409, 415; 185 NW 852 (1921), this Court stated: "This Court is always desirous of having all the light it may have on the questions before it. In cases involving questions of important public interest, leave is generally granted to file a brief as amicus curiae" The Association believes that this is a case of important public interest, and the outcome of this case is of continued and vital concern to the Association and its members. The Association's experience and expertise could be

beneficial to this Court in the resolution of the issues presented by this appeal. Therefore, the Association seeks leave to file this Brief Amicus Curiae in support of the position of Defendant/Appellee.

II. STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

The Association generally accepts the Statement of Facts contained in Worth Township's Brief on Appeal, as highlighted by the following:

1. Worth Township does not operate a public sanitary sewer system. Instead, all residences and businesses within Worth Township rely solely upon privately owned septic systems for waste disposal.
2. Some of these private septic systems are failing, resulting in the pollution of Lake Huron and its tributaries and causing Worth Township to declare a moratorium on construction within certain parts of Worth Township. See, Worth Township, Resolution 2004-9, App 48a.
3. The failures of these septic systems was confirmed by inspections performed by the Sanilac County Health Department ("SCHD") under the authority granted to it by the Public Health Code and Sanilac County Environmental Health Code (the "Sanilac County Code"). A copy of the Sanilac County Code is attached as Exhibit 1.
4. More specifically, Sanilac County inspections of the private septic systems were conducted by its then County Environmental Health Director/Program Coordinator, Grant Carmen, JR.S., and Environmental Health Staff Sanitarian, Susan VanDyke, R.S. See, MDEQ's Court of Appeals Brief, pp 8-9.

5. As a result, Worth Township requested the assistance of SCHD in resolving the septic system issues and bringing the “responsible” parties forward.

Would you please check this out and find out if all the home’s septic systems are running to the ditch or if it can be traced to who is responsible.

If you do find out who is responsible, can you condemn that house until they replace their system?

I know you have sent us information that a house on Cedar, east of Lakeshore, has their septic running to the ditch and it is up for sale. Why is this house not condemned until the septic system is fixed?

See, Letter from Worth Township to SCHD, Exhibit 13 to the MDEQ’s Court of Appeals Brief.

6. However, notwithstanding its exclusive jurisdiction over the failing septic systems, although the SCHD inspected the failing septic systems, it took no other action to enforce the provisions of the Sanilac County Code by way of, for example, citation of the responsible parties.

7. Instead, the MDEQ filed this lawsuit to compel Worth Township to fix the failing private septic systems by constructing and operating a public sanitary sewer system.

8. The MDEQ admits that it “cannot specifically compel [Worth] Township to engage in a particular corrective action, such as the construction of a wastewater collection and treatment system.” MDEQ Brief on Appeal, p 6.

9. Nonetheless, the MDEQ is attempting to do just that by filing this lawsuit requesting that Worth Township be compelled “to take necessary corrective action” to remedy the failing privately owned septic systems.

10. MDEQ claims that, pursuant to MCL 324.3109, municipalities such as Worth Township are strictly liable for any and all discharges into the waters of the state of a substance that is or may become injurious, regardless of whether the municipality caused the discharge.

11. The Circuit Court adopted MDEQ's interpretation of MCL 324.3109 and issued an Order requiring Worth Township "to take necessary corrective action" to remedy the failing septic systems and establish a time-frame within which Worth Township must design, construct, and begin operation of a public sanitary sewer system.

12. The Court of Appeals reversed, finding that MCL 324.3109 did not impose strict liability upon municipalities merely because a discharge occurred within its boundaries.

13. On March 23, 2011, this Court granted the MDEQ's Application for Leave to appeal limited to the following issue:

[W]hether the Natural Resources and Environmental Protection Act, MCL 324.101, et seq. ("NREPA") empowers the Department of Environmental Quality to seek, and the circuit court to grant, an order effectively requiring a township to install a sanitary sewer system when a widespread failure of private septic systems results in contamination of lake waters.

Dept of Environmental Quality v Worth Twp, 489 Mich 856; 795 NW2d 13 (2011).

III. ARGUMENT

A. Standard Of Review

The standard of review in this matter is de novo because it involves the interpretation and application of a statute. See, *McJunkin v Cellasto Plastic Corp*, 461 Mich 590,

596; 608 NW2d 57 (2000), citing *Lincoln v General Motors Corp*, 461 Mich 483, 489-490; 607 NW2d 73 (2000). Likewise, rulings on motions for summary disposition are subject to de novo review on appeal. *Brunsell v Zeeland*, 467 Mich 293, 295; 651 NW2d 388 (2002).

B. The Court Of Appeals Correctly Determined That MCL 324.3109 Does Not Create Strict Liability On The Part Of Municipalities For The Discharge Of Raw Sewage Of Human Origin Within Its Borders

1. Applicable Principles Of Statutory Construction

It hardly bears repeating that the rules governing the interpretation of a statute in Michigan are well established.

An anchoring rule of jurisprudence, and the foremost rule of statutory construction, is that courts are to effect the intent of the Legislature. To do so, we begin with an examination of the language of the statute. If the statute's language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written. A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.

Roberts v Mecosta County General Hosp, 466 Mich 57, 63; 642 NW2d 663 (2002) (citations omitted), after remand 470 Mich 679; 684 NW2d 711 (2004).

When interpreting a statute, the court must not treat any word in a statute as surplusage or rendered nugatory but, rather, must give meaning to every word of a statute.

Altman v Meridian Twp, 439 Mich 623, 635; 487 NW2d 155 (1992). Further,

Under the doctrine of *noscitur a sociis*, a phrase must be read in context. A phrase must be construed in light of the phrases around it, not in a vacuum. Its context gives it meaning. *Koontz v Ameritech Services, Inc.*, 466 Mich. 304, 318, 645 N.W.2d 34 (2002).

Apsey v Memorial Hosp, 477 Mich 120, 130; 730 NW2d 695 (2007). A court should also harmonize different parts of the same statute to give effect to it as a whole. *Macomb County Prosecutor v Murphy*, 464 Mich 149, 159-160; 627 NW2d 247 (2001).

**2. NREPA Requires That A Municipality Be
“Responsible For” A Discharge In Order
To Be Liable Under MCL 324.3109**

The statute at issue in this appeal provides, in full:

Sec. 3109. (1) A person shall not directly or indirectly discharge into the waters of the state a substance that is or may become injurious to any of the following:

- (a) to the public health, safety, or welfare.
- (b) To domestic, commercial, industrial, agricultural, recreational, or other uses that are being made or may be made of such waters.
- (c) To the value or utility of riparian lands.
- (d) To livestock, wild animals, birds, fish, aquatic life, or plants or to their growth or propagation.
- (e) To the value of fish and game.

(2) The discharge of any raw sewage of human origin, directly or indirectly, into any of the waters of the state shall be considered **prima facie evidence** of a violation of this part by the **municipality** in which the discharge originated unless the discharge is permitted by an order or rule of the department. If the discharge is not the subject of a valid permit issued by the department, a municipality **responsible for** the discharge **may be** subject to the remedies provided in section 3115. If the discharge is the subject of a valid permit issued by the department pursuant to section 3112, and is in violation of that permit, a municipality **responsible for** the discharge **is** subject to the penalties prescribed in section 3115.

(3) Notwithstanding subsection (2), a municipality is not responsible or subject to the remedies provided in section 3115 for

an unauthorized discharge from a sewerage system as defined in section 4101 that is permitted under this part **and owned by a party other than the municipality**, unless the municipality has accepted **responsibility** in writing for the sewerage system and, with respect to the civil and penalty under section 3115, the municipality has been notified in writing by the department of its **responsibility** for the sewerage system.

(4) Unless authorized by a permit, order, or rule of the department, the discharge into the waters of this state of any medical waste, as defined in part 138 of the public health code, 1978 PA 368, MCL 333.13801 to 333.13831, is prima facie evidence of a violation of this part and subjects **the responsible person** to the penalties prescribed in section 3115.

(5) Beginning January 1, 2007, unless a discharge is authorized by a permit, order, or rule of the department, the discharge into the waters of this state from an oceangoing vessel of any ballast water is prima facie evidence of a violation of this part and subjects the **responsible person** to the penalties prescribed in section 3115.

(6) A violation of this section is prima facie evidence of the existence of a public nuisance and in addition to the remedies provided for in this part may be abated according to the law in an action brought by the attorney general in a court of competent jurisdiction.

MCL 324.3109 (footnotes omitted; emphasis supplied). The contention, as it involves this statute, is whether it imposes strict liability upon every municipality within the State of Michigan, including Worth Township, for discharges of sewage within their jurisdictions, regardless of causation, or lack thereof. The MDEQ opines that it does, thereby giving the MDEQ the authority to require Worth Township to install and operate a public sanitary sewer system – even though Worth Township was not responsible for and did not cause the discharges at issue. The MDEQ, however, reaches this erroneous conclusion through the use of constrained grammatical construction of modifying clauses and antecedent phrases. MDEQ Brief on Appeal,

p 12. By contrast, the Court of Appeals and here, *amicus curiae*, examine the entire statutory scheme as a whole, reading individual words and phrases in context and in accordance with the statute's legislative history.

Although the primary focus in this case by the parties and the Court of Appeals has been on the micro analysis of the statute (specific words and phrases), the context for the interpretations of these individual words and phrases is perhaps better understood by first reviewing the statute as a whole. As demonstrated by the bolding of language in the statute as cited above, in no less than six instances, the statute uses the word *responsible/responsibility*. In fact, twice in the disputed subsection (2), the Legislature has chosen to limit a municipality's liability for discharges within its jurisdiction to those municipalities "responsible for the discharge." The entire statute breaks down as follows.

First, in subsection (2), the first sentence establishes the *prima facie* liability of a municipality for discharges occurring within its jurisdiction. Next, the *prima facie* case for a violation of Chapter 31 branches into two different forms of liability. In the second sentence of subsection (2), a municipality responsible for the discharge **may be** subject to the remedies provided in section 3115 if the discharge is not subject to a valid permit issued by the MDEQ. If, however, the discharge is the subject of a valid permit issued by the MDEQ and is in violation of that permit, then in the third sentence of subsection (2), a municipality responsible for the discharge **is** subject to the penalties prescribed in Section 3115. On the whole, subsection (2) creates a rebuttable presumption of liability on the part of a municipality for discharges that occur within its jurisdiction and then differentiates between the level of liability (may or is), dependent

upon whether the discharge was the subject of a valid permit. However, in all instances, for the municipality to be liable, it must be “responsible for” the discharge.

3. The Court Of Appeals Correctly Interpreted MCL 324.3109

This interpretation of MCL 324.3109 comports with the statutory analysis undertaken by the Court of Appeals in all respects. First, the Court of Appeals looked to specific phrases within subsection (2) as support for its decision; specifically, the phrase “prima facie evidence” and the phrase “by the municipality.” Black’s Law Dictionary clearly defines prima facie evidence as rebuttable, merely creating a presumption that the municipality is responsible unless it can demonstrate that it did not cause the discharge. In relevant part, the Court of Appeals, citing Black’s Law Dictionary, stated:

Prima facie evidence is evidence that, until its effect is overcome by other evidence, will suffice as proof of fact and issue; ‘prima facie case’ is one that will entitle party to recover if no evidence to contrary is offered by opposite party.

COA Opinion, p 2. In short, subsection (2) simply shifts the burden of proof from MDEQ to the municipality.

The MDEQ does not dispute the meaning of “prima facie evidence.” In fact, the MDEQ agrees that prima facie evidence is merely a presumption. MDEQ Brief on Appeal, p 13. Instead, the MDEQ argues that the phrase “prima facie evidence” means nothing with respect to the subsequent language of the same subsection (2); that is, “by the municipality” and “a municipality responsible for the discharge.” Instead, the MDEQ argues that the phrase “prima facie evidence” relates solely to the prior subsection (1) of the statute, which merely sets forth the types of discharges into the waters of this State which are considered unlawful. This

interpretation is illogical. If, in fact, it was intended that prima facie evidence would relate to subsection (1), the phrase “prima facie evidence” would be included in subsection (1). It is not.

The MDEQ’s argument that the phrase “by the municipality” does not mean “as a result of the municipality,” thereby establishing a causation requirement, is equally illogical. Instead, as correctly found by the Court of Appeals:

Second, we look to the meaning of the phrase “by the municipality.” This phrase is key because it answers plaintiffs’ contention that MCL 324.3109(2) imposes responsibility for a discharge upon a municipality without regard to the source of the discharge. That is, **plaintiffs argue that any discharge of raw sewage within a municipality constitutes prima facie evidence of a violation by the municipality even if the municipality is not the source of the discharge.** We disagree. The word “by” has many meanings. As a nonlegal term, we look to a layman’s dictionary rather than a legal one. *Horace v. City of Pontiac*, 456 Mich. 744, 756; 575 NW2d 762 (1998). We find these from the Random House Webster’s College Dictionary (2d ed) to be particularly helpful: “10. through the agency of” and “12. as a result or on the basis of.” **Thus, MCL 324.3109(2) imposes responsibility on the municipality not merely because the violation occurs within the boundaries of the municipality, but when the violation occurs “through the agency of” the municipality or “as a result” of the municipality. That is to say, where it is the actions of the municipality that leads to the discharge.**

COA Opinion, pp 2-3 (emphasis supplied). The Court of Appeals correctly gave the words within the statute their plain and ordinary meaning, using dictionary definitions for non-legal terms. *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 522; 676 NW2d 207 (2004) (when determining the common, ordinary meaning of a word or phrase, consulting a dictionary is appropriate).

Second, consistent with the statutory interpretation maxim that courts should harmonize different parts of the same statute and give effect to it as a whole, the Court of Appeals correctly determined that adopting the MDEQ's interpretation of MCL 324.3109 would render subsections of the same statute contradictory – specifically, subsection (3) of MCL 324.3109 with subsection (2). As discussed, subsection (2) initially establishes a presumption of liability on the part of a municipality in which the discharge originated and then splits the extent of liability on the part of a municipality **responsible for** the discharge into two possibilities, dependent upon whether the discharge is the subject of a valid permit. In keeping with this statutory scheme, subsection (3) then provides an exception to subsection (2), stating that “notwithstanding subsection (2),” a municipality is **not responsible** for an unauthorized discharge that is “owned by a party **other than** the municipality, unless the municipality has accepted **responsibility** in writing for the sewerage system” Accordingly, subsection (3) provides for yet a third instance in which a municipality may be held responsible for a discharge – where the municipality has accepted responsibility in writing for a sewerage system owned by a party other than the municipality. If the purpose of subsection (2) was to impose liability on a municipality strictly, simply because a discharge occurred within its boundaries, then there is no scenario in which subsection (3) would apply. Under the MDEQ's interpretation, subsection (3) is therefore not only contradictory, but is rendered nugatory and mere surplusage, contrary to Michigan law. *Altman*, 439 Mich at 635.

Third, as found by the Court of Appeals, the definition of “municipality” again supports the finding of no strict liability under NREPA's Section 3109. For purposes of Part 31 of NREPA, “municipality” is defined as:

This state, a county, city, village, or township, or an agency or instrumentality of any of these entities.

MCL 324.3101(m). Thus, under the MDEQ's reading of subsection (2), the MDEQ itself, as well as Sanilac County and Worth Township are all strictly liable in this case for the discharges at issue, resulting in overlapping jurisdiction, overlapping regulation, overlapping oversight, and overlapping liability. This outcome does little to advance the remediation of discharges and other corrective action, and instead promotes finger-pointing amongst the various "strictly liable" entities. No such duplicative and redundant allocation of responsibility was intended by MCL 324.3109, and none is necessary. To the contrary, the common sense and harmonious reading of the definition of "municipality" with MCL 324.3109 is to direct liability at the one entity (be it state, county, city, village, township or agency/instrumentality of these entities) "**responsible for**" the discharge. *See, Macomb County Prosecutor*, 464 Mich at 159-160.

Finally, the interpretation of MCL 324.3109 confirmed by the Court of Appeals is supported by the legislative history of the statute. Under Michigan law, changes in an Act must be construed in light of preceding statutes and historical developments. As stated by this Court:

This Court cannot assume that language chosen by the Legislature is inadvertent. To the contrary, this Court must assume that an express legislative change denotes either a change in the meaning of the statute itself or a clarification of the original legislative intent of the statute. We cannot assume that the change means nothing at all.

Bush v Shabahang, 484 Mich 156, 169-170; 772 NW2d 272 (2009). The prior version of Section 3109 had provided, in part:

Sec. 6. (a) It shall be unlawful for any person directly or indirectly to discharge into the waters of the State any substance which is or may become injurious to the public health, safety, or welfare: or

which is or may become injurious to domestic, commercial, industrial, agricultural, recreational, or other uses which are being or may be made of such waters: or which is or may become injurious to the value or utility of riparian lands: or which is or may become injurious to livestock, wild animals, bird, fish aquatic life, or plants or the growth or propagation thereof be prevented or injuriously affected: or whereby the value of fish and game is or may be destroyed or impaired.

Raw Sewage; prima facie evidence of violation of act.

(b) The discharge of any raw sewage of human origin, directly or indirectly into any of the waters of the State shall be considered prima facie evidence of the violation of section 6(a) of this act unless said discharge shall have been permitted by an order, rule, or regulation of the commission. Any **city, village or township** which permits, allows or suffers the discharge of such raw sewage of human origin into any of the waters of the State **by any of its inhabitants or persons occupying lands from which said raw sewage originates**, shall be subject only to the remedies provided for in section 7 of this act.

1965 PA 328 (emphasis supplied). Relevant changes by the Legislature include the replacement of the language “city, village or township” with “municipality,” which, as discussed above, now includes the state, counties and their agencies/instrumentalities. The expansion of potentially liable parties suggests an intent to NOT place the entire burden of remediating discharges on local government. Rather, State and County governments are now equally potentially liable.

In addition, deleted from the prior version of modern day Section 3109 is the language “by any of its inhabitants or persons occupying lands from which said raw sewage originates.” Express legislative changes in the language of the statute denote changes in the meaning of the statute itself or clarifications of the original legislative intent. *Bush*, 484 Mich at 169-170. Accordingly, by the absence of language rendering municipalities liable for the discharges of its inhabitants in the current version of Section 3109, it must be presumed that the

Legislature intended a change in meaning; specifically, the elimination of liability imposed upon municipalities for discharges for which they are not responsible. As this is the very form of liability promoted by the MDEQ in this case, the Court of Appeals correctly refused to adopt the MDEQ's theory of liability.

In fact, this amendment to Section 3109 by the Legislature illustrates the circular nature of the MDEQ's position. As stated by the Court of Appeals:

Indeed, plaintiffs' argument in this respect places them in a logical corner. If the prior statute did impose a duty on a township to install a sanitary sewer in these circumstances, then the change in statutory language of necessity did away with that duty. But if no such duty existed under the previous statute and the current statute does, then the Headlee Amendment obligates the state, of which the DEQ is an agency, to provide the funding in order for plaintiffs to compel defendant to install such a system.

COA Opinion, pp 3-4, fn 7.¹ The MDEQ's position is the proverbial "Gordian Knot."

C. The Court Of Appeals Decision Is Supported By Prior Case Law Interpreting NREPA

In *Lake Isabella Development, Inc v Village of Lake Isabella*, 259 Mich App 393; 675 NW2d 40 (2003), the MDEQ first attempted to make townships strictly liable for any release of sanitary sewage in the township, regardless of the source. This attempt, like the one made herein, was disallowed by the Court of Appeals.

More specifically, in *Lake Isabella*, the Court of Appeals affirmed the trial court's decision granting plaintiff developer summary disposition, invalidating an MDEQ rule that no

¹ As discussed by Worth Township, the Headlee Amendment obligates the State of Michigan to provide funding for a new activity or service or an increase in the level of any activity or service beyond that required by existing law. Mich Const 1963, art 9, § 29.

private wastewater treatment system could be built unless the local government agreed to be liable for its operation. The MDEQ rule at issue required applicants seeking to construct a private sewerage system to obtain a resolution from the local government agency agreeing to take over the sewerage system if the owner failed to properly operate or maintain it. Defendant, Village of Lake Isabella, claimed, in relevant part, that the MDEQ rule was contrary to the legislative intent underlying the MDEQ's enabling statute, was arbitrary and capricious, constituted an unlawful delegation of authority and, contrary to public policy, gave local government absolute veto power over any private sanitary sewer system, even if such system met the MDEQ permit requirements. *Lake Isabella*, 259 Mich App at 407 and 410-411. The MDEQ argued that the rule at issue was in accordance with its enabling statute because MCL 324.3109(2) imposes strict liability upon municipalities for the discharge of sewage that originates within their borders. The Court of Appeals did not agree, stating:

Strict liability is “[l]iability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe.” In order to find a violation of MCL 324.3109(2), MCL 324.3115 states that liability requires actual knowledge, constructive knowledge, or disregard. Clearly, the operation of MCL 324.3115 makes DEQ's assertion that local governments will be strictly liable for a discharge under MCL 324.3109(2) erroneous. We agree with the circuit court that MCL 324.3109(2) does not impose strict liability on municipalities and does not provide statutory authority for the challenged Rule 33 requirement.

Lake Isabella, 259 Mich App at 404. MCL.324.3109 has not been amended, modified or changed in any way from the time of the *Lake Isabella* decision. The *Lake Isabella* Court and the Court of Appeals in this case were both correct in their interpretation of MCL 324.3109.

The Court of Appeals in *Lake Isabella* touched briefly on the issue of NREPA's preemption of local township ordinances. Therein, the Court of Appeals commented that it could be inferred from MCL 324.4105 that:

Because both individuals and government agencies are required to obtain [sewerage system] permits from the DEQ, the DEQ has exclusive jurisdiction over those permits.

Lake Isabella, 259 Mich App at 407. More recently, the Court of Appeals made this "inference" the law in Michigan, finding that a township's private sewer ordinances were preempted by NREPA. *Chestnut Development, LLC v Twp of Marion*, Docket Nos. 287312 and 292894, 2010 WL 2505905 (Mich App, June 22, 2010), attached as Exhibit 2. The Court held that NREPA completely occupied the field of regulation regarding wastewater treatment systems so as to preempt the township's private sewer ordinances. *Chestnut Development*, 2010 WL 2505905 at *10.

Both *Lake Isabella* and *Chestnut Development* illustrate the error in the MDEQ's arguments herein. Preemption is simply inconsistent with strict liability. It makes no sense to require a township to construct and maintain a sanitary sewer system that it cannot regulate. To allow the MDEQ to impose strict liability on townships and other forms of local government for discharges occurring within their jurisdictions for which they are not responsible, but yet deny those municipalities the ability to regulate the occurrence of unlawful discharges within their jurisdictions, is to allow the MDEQ to "run with the hare and hunt with the hounds." The decision of the Court of Appeals is correct and consistent with existing Michigan law. This Court should therefore affirm the decision of the Court of Appeals.

D. Townships Are Neither Historically Nor Statutorily Obligated To Construct And Maintain Wastewater Treatment Systems

Both the MDEQ and Justice O’Connell, in his dissent, claim that townships have historically been responsible for addressing issues regarding utilities within their boundaries.

Justice O’Connell states:

Townships have the statutory authority to adopt ordinances regulating public health, safety, and welfare, including ordinances that require individual property owners to hook up to a public system.

COA Opinion, p 11. Justice O’Connell cites the Township and Village Public Improvement and Public Service Act.

However, this Act speaks only generally to a township’s ability to, in its discretion, maintain sanitary sewers and sewage disposal plants or equipment. MCL 41.411(1). This section does not mandate the provision or maintenance of sanitary sewer systems by townships. In fact, again, the notion of mandatory provision of sanitary sewer systems by townships runs contrary to NREPA’s preemption of any local government ordinance or other regulation of wastewater treatment systems. Moreover, any alleged historical “responsibility” is now erased by the most recent amendments to MCL 324.3109 discussed above, as well as the MDEQ’s complete occupation of the field of regulation regarding the discharge of waste into the waters of this state. *Chestnut Development*, 2010 WL 2505905 at *10. In short, the MDEQ cannot compel Worth Township to construct and maintain and operate a public sanitary sewer system. To the contrary, legislatively and judicially, the municipality is given the choice.

In addition, again contrary to Justice O’Connell’s dissenting opinion, there are responsible parties for the discharges occurring in Worth Township who have been identified and can be held accountable. The discharges at issue here are from private septic systems – not a public sanitary sewer system. That is, a public sanitary sewer system is the MDEQ’s proposed “fix” to the problem – not the “cause” of the problem. Historically, sanitary sewers and septic systems have been treated differently as pertains to investigation and regulation.

Historically, the counties of this state have exclusive jurisdiction over septic systems. Under the Public Health Code, MCL 333.1115,

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 government entity for the protection of public health.

Consistent with the Public Health Code, the Sanilac County Code, Article II, regulates onsite sewage disposal systems. See, Exhibit 1. Section 2.1 provides:

It shall be unlawful for any person to occupy or permit to be occupied any premise not provided with an approved sewage disposal system to which all facilities producing sewage, such as flushed toilets, urinals, lavatories, sinks, bathtubs, showers and laundry are connected.

Under section 2.3, an approved sewage disposal system is either an onsite sewage disposal system designed, installed, and maintained "in accordance with this Code," one that was installed under a prior code that is not causing or does not have the potential to cause a threat to public health or excessive environmental degradation, or a public sewer system. The consequence of a failed septic system, as all parties agree has occurred in Worth Township, is specifically addressed in Section 2.5:

Under no condition may the sewage from an existing or hereafter constructed building be discarded or deposited upon the surface of the ground or into any surface water, county drain, ditch, or storm sewer.

The consequence is also specified, in Section 2.7:

Any premise which is not in accordance with this regulation may be declared unfit for habitation and may be so posted by the Department and ordered vacated. Such premises may be used only upon installation of an approved sewage disposal system and upon written approval to occupy by the Department.

A permit is required under Section 3.1 to install, construct, alter, repair, extend, or replace any sewage disposal system, and under Section 3.3,

a. No municipality, township, or other agency or any officer or employee thereof shall issue a building permit for a new habitable building where public sewers are not available until either written approval or a sewage disposal permit has been obtained from the Department.

b. No municipality, township, or other agency or any officer or employee thereof where public sewers are not available shall issue a building permit for an addition to an existing habitable building or a building such as a shed or garage which will result in the increased production of sewage or adversely affect the sewage disposal system or its replacement area without first obtaining the approval of the Department.

Under Section 3.4, the department may evaluate the adequacy of an existing sewage disposal system. Installers of septic systems must be registered with Sanilac County. Section V.

Article I provides the basic authority of the Sanilac County Health Department to enforce its requirements, allowing injunctive proceedings, Section VI, criminal penalties, Section VII, right of inspection, Section VIII, and in the case of an imminent danger, health hazard, or menace to the environment, an order from the health officer under Section 10.1 to abate the

condition, under Section 10.2 a declaration by the health officer that a premise is "unfit for human habitation," and under Section 10.3, an order by the health officer that it be posted and ordered vacated. Thereafter, "[s]uch premises may only be used upon the proper repairs or corrections being made and written approval to occupy by the Health Officer." And, like the Public Health Code, the Sanilac County Code controls or prevails over a less stringent or inconsistent regulation enacted by a local governmental entity for the protection of public health. Section 5.2.

Pursuant to the Michigan Public Health Code, the state delegates basic public health powers and functions to local health departments, MCL 333.2235, which are then considered "to be the primary organization responsible for the organization, coordination, and delivery of those services and programs in the area served by the local health department."

In the vast majority of cases, the county provides a county health department which meets all the requirements of the Public Health Code. MCL 333.2413. The Local Health Officer is given broad statutory powers which include, among other things, taking actions and making determinations "necessary or appropriate to carry out the local health department's functions under this part or functions delegated under this part and to protect the public health and prevent disease." MCL 333.2428.

Under MCL 333.2433, 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 healthcare facilities and health services

delivery systems; and regulation of healthcare 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.

Under MCL 333.2435(d), the local health department is authorized to

adopt regulations to properly safeguard public health and to prevent the spread of diseases and sources of contamination.

MCL 333.2441 restates the preemption of local ordinances by local health department regulation:

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.*

MCL 333.2441. The local health department may issue citations for violations, enforce fines and enjoin and restrain violations. MCL 333.2461-MCL 333.2471.

Here, there has simply been no conclusion that the private septic systems that are failing cannot be fixed. Sanilac County investigated but did not require that the private owners of the offending septic systems take any corrective action to fix their own failed systems. No answer has been given as to why the individual owners of these private septic systems were not being required to remediate, repair and take necessary corrective action. Clearly, such action can be compelled by Sanilac County. In point of fact, it is Sanilac County, not Worth Township,

which can hold those parties who are truly responsible for the discharges accountable for the discharges and effectuate repairs.

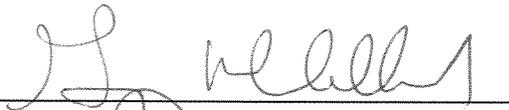
**E. Public Policy Concerns Weigh In Favor Of Affirming
The Decision Of The Court Of Appeals**

As demonstrated by this case, the mere possibility of strict liability against the municipalities provides no incentive for private owners to maintain their septic systems. To the contrary, placing the entire economic burden upon townships can and will be catastrophic. In order to shoulder the financial burden of constructing and maintaining a sanitary sewer system, municipalities have limited resources and virtually none where the taxpayers of the district vote no. The Headlee Amendment provides a potential sources of funding but, obviously, as illustrated by this case, not without substantial litigation. Consistent remediation responses and financial responsibility have been placed by the Legislature upon: (1) the MDEQ with respect to sanitary sewer systems; and (2) the counties of this state with respect to septic systems. These entities have enforcement authority against the individuals responsible for the discharges. That this involved a catastrophic failure of several septic systems should be treated no differently than a single isolated violation. Certainly, the applicable legislation makes no such distinction. In the end, townships without financial resources, such as Worth Township in this case, are left to employ “knee-jerk” reactions such as what was done here – specifically, a moratorium on development – something that this state can ill afford and which public policy does not favor. The housing market in this State is already upside down. The continued curtailing of the development of new housing and the sale of existing homes will only further entrench Michigan’s real estate market and overall economy in perpetual stagnation.

IV. CONCLUSION AND RELIEF REQUESTED

For all the foregoing reasons, the Association respectfully requests that this Honorable Court grant the Association's Motion for Leave to File a Brief Amicus Curiae and affirm the Opinion of the Court of Appeals.

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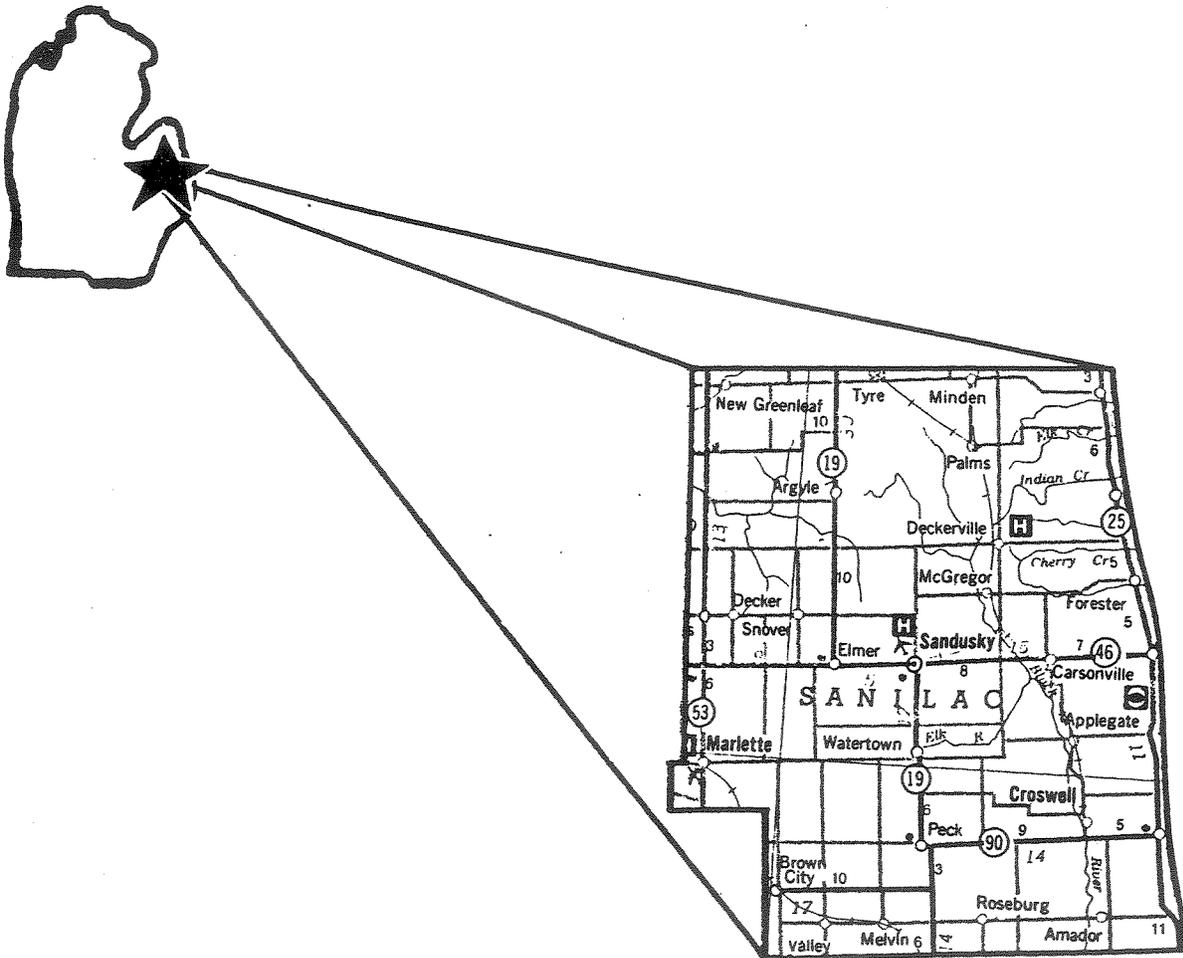
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SANILAC COUNTY ENVIRONMENTAL HEALTH CODE



**EFFECTIVE
AUGUST 1, 1992**

SANILAC COUNTY ENVIRONMENTAL HEALTH CODE

TABLE OF CONTENTS

Page

ARTICLE I. TITLE, AUTHORITY, DEFINITION, JURISDICTION,
PURPOSE AND ADMINISTRATION

SECTION I.	TITLE.....	1
SECTION II.	AUTHORITY.....	1
SECTION III.	INTERPRETATION CLAUSE.....	1
SECTION IV.	DEFINITIONS.....	1,2
SECTION V.	JURISDICTION.....	2
SECTION VI.	INJUNCTIVE PROCEEDINGS.....	2,3
SECTION VII.	PENALTY.....	3
SECTION VIII.	RIGHT OF INSPECTION.....	3
SECTION IX.	INTERFERENCE WITH NOTICE.....	3
SECTION X.	ABATEMENT OF IMMINENT DANGER OR HEALTH HAZARD.....	4
SECTION XI.	SEVERABILITY.....	4
SECTION XII.	AMENDMENTS.....	4
SECTION XIII.	OTHER LAWS AND REGULATIONS.....	4
SECTION XIV.	REPEAL OF PREVIOUS REGULATIONS.....	4,5
SECTION XV.	APPROVAL AND EFFECTIVE DATE.....	5
SECTION XVI.	FEES.....	5
SECTION XVII.	POWER TO ESTABLISH CRITERIA.....	5
SECTION XVIII.	VARIANCES.....	5,6
SECTION XIX.	APPEALS.....	6,7,8

ARTICLE II. ON SITE SEWAGE DISPOSAL REGULATION

SECTION I.	DEFINITIONS.....	9-12
SECTION II.	APPROVED SEWAGE DISPOSAL SYSTEM REQUIRED.....	12,13
SECTION III.	PERMIT, APPLICATION, AND ISSUANCE.....	13-17
SECTION IV.	FINAL INSPECTION BY HEALTH OFFICER.....	17,18
SECTION V.	INSTALLER REGISTRATION.....	18
SECTION VI.	DESIGN, LOCATION, AND INSTALLATION OF ON-SITE SEWAGE DISPOSAL SYSTEMS.....	19
SECTION VII.	SEWERS.....	19,20
SECTION VIII.	SEPTIC TANKS.....	20,21
SECTION IX.	SOIL ABSORPTION SYSTEMS.....	22-26
SECTION X.	OUTHOUSES AND PRIVIES.....	26
SECTION XI.	HOLDING TANKS.....	26
SECTION XII.	ALTERNATIVE SEWAGE DISPOSAL FACILITIES.....	27

ARTICLE III. WATER SUPPLY REGULATION

SECTION I.	FACILITIES REQUIRED.....	28
SECTION II.	EVALUATION OF EXISTING WATER SUPPLY SYSTEMS.....	28
SECTION III.	WELL CONSTRUCTION CODE FOR WATER SUPPLY SYSTEMS.....	28
SECTION IV.	PERMIT FOR WATER SUPPLY SYSTEMS.....	28

SANILAC COUNTY ENVIRONMENTAL HEALTH CODE

ARTICLE I. TITLE, AUTHORITY, DEFINITIONS, JURISDICTION,
AND ADMINISTRATION

SECTION I. TITLE

- 1.1 These regulations shall be identified by the title "Sanilac County Environmental Health Code" and may be referred to as the code.

SECTION II. AUTHORITY

- 2.1 This code is hereby adopted pursuant to authority conferred upon local health departments by Section 2441 (1) of the Michigan Public Health Code, Act 368, P.A. 1978 as amended.

SECTION III. INTERPRETATION CLAUSE

- 3.1 When not inconsistent with the context, words used in the present tense include the future, words in the singular number include the plural number, and words in the plural number include the singular. The word "shall" is always mandatory, and not merely directory. Words, terms or expressions not defined herein shall be interpreted in the manner of their commonly accepted meanings, in accordance with standard English usage.

SECTION IV. DEFINITIONS

- 4.1 "Approved"
- 4.2 "Board of Health" means the Board appointed by the Sanilac County Board of Commissioners to be the "Board of Health".
- 4.3 "Criteria" means standards by which decisions are made.
- 4.4 "Habitable Building" means any structure, dwelling, building, place, or portion thereof where persons live, sleep, reside, or are employed, or congregate, and which is occupied in whole or in part or which is designed or intended for such use.
- 4.5 "Health Department" means the Environmental Health Division of the Sanilac County Health Department, and may be referred to in this code as the "Department".

- 4.6 "Health Hazard" means an act or condition that has a documented and known potential for causing human disease, injury, or sickness.
- 4.7 "Health Officer" means the Administrator/Health Officer of the Sanilac County Health Department, and/or his or her authorized representatives.
- 4.8 "Imminent Danger" means a condition or practice which could reasonably be expected to cause death, disease, or serious physical harm immediately or before the imminence of the danger can be eliminated through enforcement procedures established in this code.
- 4.9 "Owner" means the title holder of record or the person occupying or in possession or control of any property or premise.
- 4.10 "Person" means any individual, firm, partnership, party, corporation, company, society, association, governmental entity, or other legal entity.
- 4.11 "Premise" means any tract or parcel of land including the buildings, dwellings, and structures thereon.
- 4.12 "Public Health Code" means Act 368, P.A. 1978, being Sections 333.1101 to 333.25211 of Michigan Compiled Laws, as amended (including its subsequent revisions).

SECTION V. JURISDICTION

- 5.1 The Health Officer shall have jurisdiction throughout Sanilac County in all areas incorporated and unincorporated, which includes cities, villages, and townships for the administration and enforcement of this code.
- 5.2 This code shall control or prevail over a less stringent or inconsistent regulation enacted by a local governmental entity for the protection of public health.
- 5.3 Nothing contained herein shall be construed to restrict or abrogate the authority of any municipality in Sanilac County to adopt more restrictive regulations or codes.

SECTION VI. INJUNCTIVE PROCEEDINGS

- 6.1 Notwithstanding the existence and pursuit of any other remedy, the Health Officer, without posting bond, may

maintain an action in a court of competent jurisdiction for an injunction or other process against any person to restrain or prevent violations of this code or to correct a violation or activity or condition which he believes adversely affects public health pursuant to the Public Health Code, Section 2465(1).

SECTION VII. PENALTY

7.1 Any person who shall fail to comply with any provision of this code, criteria adopted under this code or a condition of a permit or final order issued pursuant to this code shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punishable by fine of not more than one-thousand (1000) dollars, and/or imprisonment for not more than six (6) months in the county jail, and costs of prosecution. Each day a violation of this code exists shall constitute a separate and distinct violation and may be cited as such. Any person aiding or abetting in the violation of this code shall be subject to the same penalties as prescribed herein. In addition to any other relief provided by this section the court may impose on any person who violates any provision of this code, criteria adopted under this code or fails to comply with a permit or final order issued pursuant to this code, to pay to the Department the costs of surveillance and enforcement incurred by the Department as a result of the violation.

SECTION VIII RIGHT OF INSPECTION

8.1 All premises affected by this code shall be subject to inspection by the Health Officer who, after proper identification and during reasonable hours, may conduct inspections, evaluations or tests, take photos or collect such samples for laboratory examination as he or she deems necessary to assure compliance with the provisions of this code.

8.2 It shall be unlawful for any person to molest, assault, willfully oppose or otherwise obstruct the Health Officer during the routine performance of his or her duties.

SECTION IX. INTERFERENCE WITH NOTICE

9.1 No person shall remove, mutilate, or conceal any notice or placard posted by the Department, except with the permission of the Department.

SECTION X. ABATEMENT OF AN IMMINENT DANGER OR HEALTH HAZARD

- 10.1 The Health Officer can order the immediate and complete abatement at a premise of an imminent danger, health hazard, or menace to the environment.
- 10.2 To eliminate an imminent danger or health hazard the Health Officer can declare a premise unfit for human habitation.
- 10.3 A premise which is found by the Health Officer to be an imminent danger, health hazard, or menace to the environment may be posted and ordered vacated. Such premises may only be used upon the proper repairs or corrections being made and written approval to occupy by the Health Officer.

SECTION XI. SEVERABILITY

- 11.1 If any section, subsection, clause, or phrase of this code is for any reason declared unconstitutional or invalid, it is hereby provided that the remaining portions of this code shall not be affected.

SECTION XII. AMENDMENTS

- 12.1 The Board of Health may amend, supplement, or change this code or portions thereof, subject to approval of the Board of Commissioners of Sanilac County.

SECTION XIII. OTHER LAWS AND REGULATIONS

- 13.1 These regulations are supplemental to the Michigan Public Health Code, and to other statutes duly enacted by the State of Michigan relating to public health and safety.

SECTION XIV. REPEAL OF PREVIOUS REGULATIONS

- 14.1 The previous code titled "Sanitary Code", as adopted by the Health and Legislative committees of the Sanilac County Board of Supervisors and approved by the Sanilac County Board of Supervisors on April 19, 1956 including amendments, is hereby repealed.
- 14.2 No existing violation of the repealed code or portion thereof shall be made legal by virtue of adoption of this code.

SECTION XV. APPROVAL AND EFFECTIVE DATE

- 15.1 This code was adopted by the Board of Health on February 18, 1992, and approved by action of the Sanilac County Board of Commissioners on June 10, 1992.
- 15.2 This code shall be in effect as of August 1, 1992.

SECTION XVI. FEES

- 16.1 All fees (except fees for other agencies) collected by the Environmental Health Division shall be receipted for and deposited in the General Fund with the Treasurer of Sanilac County to the credit of the Sanilac County Health Department.
- 16.2 A schedule of fees for licenses and other services authorized by Section 2444(1) of the Public Health Code shall be adopted and revised periodically by the Board of Health and approved by the Sanilac County Board of Commissioners.
- 16.3 Fees paid for services or permits authorized by authority of the Public Health Code, shall be non-refundable unless requests for refunds are received within six months of receipt and prior to the commencement of actions by the Department pursuant to the requested services or permits.
- 16.4 All fee schedules existing prior to the adoption of this code shall remain in effect until revised by the Board of Health.

SECTION XVII. POWER TO ESTABLISH CRITERIA

- 17.1 Authority to establish criteria not in conflict with this code, for the purpose of carrying out the responsibilities herein is delegated to the Health Officer with approval of the Board of Health. Copies of criteria shall be written and available to the public for review upon request.

SECTION XVIII. VARIANCES (FOR SINGLE AND TWO FAMILY DWELLINGS)

- 18.1 The Health Officer, shall have the power in specific cases to authorize in writing variations or modifications when a literal enforcement of this code would make their application a physical impossibility. The variations or modifications shall be in accord with the spirit and intent of this code and not create a hazard to the public

health or environment, not violate any local, state, or federal law or be materially injurious to adjoining property. Variance requests shall be made prior to installation. Any variance allowed by the Health Officer under the provisions of this code shall be made in writing, including the conditions and facts upon which his or her judgement and action is based. The explanation of the variance shall be written on the permit or attached to it. The consideration of variances concerning sewage disposal systems serving other than single or two family dwellings shall follow the procedure outlined in the "Michigan Criteria for Subsurface Sewage Disposal".

SECTION XIX. - APPEALS

19.1 Applicability

When a person objects to a decision or determination made by the Department, pursuant to the rules of this code, that person shall have the right to file a petition with the Sanilac County Health Department Board of Appeals to hear his or her evidence pertaining to the specific case for which the appellant seeks a change. However, there shall be no appeal of the requirements of Article II, Sections 3.8 and 3.14 of this code. Appeals concerning sewage systems under the jurisdiction of the "Michigan Criteria for Subsurface Sewage Disposal" shall be made to the Water Resources Commission of the Department of Natural Resources or to the board, committee, department, or person designated by the Department of Natural Resources.

19.2 Written Petition

An appellants petition shall be in writing to the Health Officer and indicate the nature of the change sought and the reason for the request, along with data and information which the appellant believes supports his request or that may be required by the Department (see Article II, Section 3.7).

19.3 Fee

The appellant may be charged a fee according to Article I, Section XVI of this code.

19.4 File Information

The Health Officer shall transmit the appellants petition to the Board of Appeals along with a summary report and the file pertaining to the subject of the appeal.

19.5 Board of Appeals

The Board of Health or the board appointed by the Board of Health shall comprise the Sanilac County Board of Appeals. The Board of Health shall adopt rules concerning the Board of Appeals, however no person may hear an appeal who has a special interest or would benefit either directly or indirectly from the appeal.

19.6 Technical Assistance

The Board of Appeals may request the technical assistance of governmental agencies and/or other experts in the appeals hearing.

19.7 Decision

The final decision of the Board of Appeals to either reverse, modify or affirm the decision or determination made by the Department shall be in writing and concurred in by two-thirds of the appointed board members. Any deviation granted an individual by the Appeals Board as a result of an appeal shall be in accord with the spirit and intent of this code and not create a hazard to the public health or environment, not violate any local, state or federal law, or be materially injurious to adjoining property.

19.8 Hearings

- a. The Board of Appeals shall set a reasonable time, not to exceed thirty (30) days from the date the petition was received for the hearing and shall give due notice thereof to interested parties. The 30 day time limit may be extended upon written application of either party to the appeal based upon good cause shown.
- b. The decision of the Board of Appeals in all cases is final and shall be subject to judicial review as may be provided for by law.
- c. The Board of Appeals shall meet at such times as the board may determine. There shall be a fixed place of meetings, a notice of the hearing shall be put in the local paper, and all meetings shall be open to the public. Said meeting shall be conducted in accordance with the "Open Meetings Act" in effect in the State of Michigan. The Board of Appeals shall adopt its own rules or procedures and shall keep a record of its proceedings.

- d. The Board of Appeals shall send notice of the hearing to the adjoining landowners surrounding a parcel of land in question. Such notice shall be hand delivered or sent by first class certified mail to the last known address of the owner of record of that particular parcel.

ARTICLE II. ON SITE SEWAGE DISPOSAL SYSTEM REGULATION

SECTION I. DEFINITIONS

- 1.1 "Absorption Field" means a method of distributing septic tank effluent below the ground surface by means of a series of lines of drain pipe with holes laid in a bed of screened washed aggregate so as to allow the effluent to be absorbed by the surrounding soil, e.g. trench or bed.
- 1.2 "Absorption Field Aggregate (stone)" means clean, hard, inert washed properly sized aggregate used in an absorption field.
- 1.3 "Absorption Field Failure" means an absorption field for which one or more of the following conditions exist.
- a. Effluent does not flow from the septic tank.
 - b. Effluent seeps or is drained to the ground surface or surface water.
 - c. Areas over the absorption field become damp and spongy.
 - d. Effluent contaminates a source of drinking water.
 - e. The septic tank or other chambers receive backflow from the absorption field.
- 1.4 "Alternative Sewage Disposal Facility" means a facility which employs design features, processes, or operational methods significantly different from those which apply to a conventional sewage disposal facility.
- 1.5 "Benchmark" means a designated reference point established to compare relative elevations or levels at a construction site. Its uses include the following:
- a. Determining the elevation of the absorption field.
 - b. Determining the elevations of the septic tank and the sewer outlet from the building.
 - c. Determining the amount of fill needed.
- 1.6 "Deep Cut System" means an on-site sewage disposal system where the impermeable upper layers of the soil profile are removed and replaced with granular material down to permeable soil below.
- 1.7 "Distribution Pipe" means pipe constructed and approved for use in absorption fields.
- 1.8 "Distribution Pipe Invert" means the bottom of the distribution pipe.
- 1.9 "Distribution Box" means a watertight receptacle, used for the purpose of assuring the equal distribution of septic tank effluent, which has a footing to prevent movement by frost and has outlets which are on the same horizontal plane.

- 1.10 "Dosing Tank" means a watertight receptacle used for the purpose of retaining the overflow of effluent from the septic tank pending its automatic discharge to a selected point by means of a pump, siphon, or other means.
- 1.11 "Dwelling" means any home, building, structure, tent, mobile home, watercraft, shelter, trailer or vehicle or portion thereof which is occupied or was heretofore occupied, or will be occupied in whole or in part as a home residence, living, or sleeping place for one or more human beings either permanently or transiently.
- 1.12 "Effluent" means sewage unless the context in which it is used implies otherwise.
- 1.13 "Inert" means not subject to decomposition through chemical, physical, or biological processes.
- 1.14 "Infiltrative Surface" means that portion of the interface between a soil absorption field and surrounding soils which is intended to conduct effluent away from the absorption field into the surrounding soil.
- 1.15 "Installer" means a properly licensed and registered sewage disposal system installer.
- 1.16 "Michigan Criteria for Subsurface Sewage Disposal" means a Michigan Department of Public Health publication adopted by the Michigan Water Resources Commission as a policy statement to provide minimum standards for the underground disposal of sewage up to 10,000 gallons per day. The criteria apply to subsurface sewage disposal systems for commercial and other than single or two family dwellings. Copies are available from the Department on request.
- 1.17 "Mottled Soil" means a soil that has spots or blotches of contrasting color which is usually caused by saturation for some period during a normal year.
- 1.18 "Permeable" means for purposes of this code any soil which will percolate one (1) inch of water in no more than sixty (60) minutes using standard percolation tests.
- 1.19 "Public Sewer" means a sewage disposal system for which the ownership and responsibility for maintenance and operation resides with a governmental entity and is under the jurisdiction of Act 98, Public Acts of 1913 as amended.
- 1.20 "Replacement Area" means a suitable area permanently reserved on the premise to accommodate one replacement system equivalent in size to the initial system meeting the requirements of this regulation without utilization or disruption of the initial installation.

- 1.21 "Sand Mound System" means an on site sewage disposal system where fill sand is used to elevate the absorption field in an attempt to achieve acceptable effluent disposal where soils have poor permeability and/or are subject to periodic saturation or ponding.
- 1.22 "Septage" means stabilized sludge accumulations removed from a septic tank as part of the routine maintenance of the septic tank after several months usage.
- 1.23 "Septic Tank" means a water tight covered receptacle fabricated of non-corrosive materials receiving sewage and having an inlet and outlet designed to permit the separation and retention of solids in suspension from such wastes and to permit such retained solids to undergo decomposition therein, releasing the liquid effluent or outflow for disposal.
- 1.24 "Sewage" means a combination of the domestic liquid or semi-solid wastes conducted away from a habitable building. This includes human excreta, garbage disposal wastes, dishwater, bath and shower water, lavatory water, laundry water, but excludes roof runoff water, water softener discharge, floor drains, footing water and storm or surface water.
- 1.25 "Sewage Disposal System" means an on-site system for a habitable building other than a public sewer system which receives sewage. Included within the scope of this definition are septic tanks, soil absorption systems, lagoons, privies, composting toilets or any other device or system approved by the Department.
- 1.26 "Sewer" means for purposes of this code the pipe carrying sewage from a habitable dwelling to the septic tank and from the septic tank to the absorption field.
- 1.27 "Site Evaluation" means an on-site investigation to evaluate the suitability of a site to support an absorption field for on-site sewage disposal. The evaluation may include but is not limited to the following:
- a. Soil permeability based upon soil texture and structure to a depth of at least four (4) feet below the ground surface.
 - b. A determination of the seasonal high water table.
 - c. Slope or topography limitations.
 - d. Location of the site in relation to flooding.
 - e. Availability of sufficient area to install a disposal system and a replacement system which comply with the requirements of this regulation.
 - f. Drinking water supply.
- 1.28 "Surface Water" means a body of water whose surface is exposed to the atmosphere, including marshes, a flowing body, ponds or lakes either natural or constructed, or a seasonally flooded area.

- 1.29 "Permeability" means the characteristics of a soil formation that affect the rate of water movement through the soil. Permeability is determined by soil texture and structure.
- 1.30 "Water Table (High, Elevated or Seasonal)" means the highest level or elevation to which the soil is saturated as may occur during the normally wet periods of the year. The high water table is commonly interpreted by the presence of color mottles.
- 1.31 "Other Definitions" other technical definitions not described herein but which may be used shall mean the most commonly recognized interpretation or description of the technical term used in the environmental health profession.

SECTION II. APPROVED SEWAGE DISPOSAL SYSTEM REQUIRED FOR ALL PREMISES

- 2.1 It shall be unlawful for any person to occupy or permit to be occupied any premise not provided with an approved sewage disposal system to which all facilities producing sewage, such as flush toilets, urinals, lavatories, sinks, bathtubs, showers and laundry are connected.
- 2.2 Each individual habitable building shall be served by a separate sewage disposal system.
- 2.3 An approved sewage disposal system shall be either an on-site sewage disposal system designed, constructed, installed, operated and maintained in accordance with the provisions specified in this regulation; an on-site system that was installed before this regulation was adopted and that is not causing or has the potential to cause a threat to the public health or excessive environmental degradation, as determined by the Department; or a public sewer system.
- 2.4 All premises from which sewage originates shall connect to a public sewer system when available and where required according to the Public Health Code.
- 2.5 Under no condition may the sewage from an existing or hereafter constructed building be discarded or deposited upon the surface of the ground or into any surface water, county drain, ditch, or storm sewer.
- 2.6 Footing drainage, downspouts, water softener regenerating water, and any other waste water not defined as sewage shall not be connected to or discharged into an on-site sewage disposal system.

2.7

Any premise which is not in accordance with this regulation may be declared unfit for habitation and may be so posted by the Department and ordered vacated. Such premises may be used only upon installation of an approved sewage disposal system and upon written approval to occupy by the Department.

SECTION III. PERMIT, APPLICATION PROCEDURE, AND ISSUANCE

3.1 Permit Required

- a. No person shall install, construct, alter, repair, extend or replace any sewage disposal system without first obtaining a permit from the Department unless otherwise approved in writing by the Department. In the case of an alteration or repair the permit requirement may be waived by the Department after reviewing the proposed work.
- b. No person shall connect a habitable building to an existing sewage disposal system without first obtaining the written approval of the Department.
- c. Where a sewage disposal system has been installed without a permit a fee of three (3) times the original fee shall be charged.

3.2 Change in Use

A change in the use of a premise which may result in an increase in the generation of sewage shall not be approved by the Department unless it can be shown by the owner or his representative that the sewage disposal system will be adequate for the increased use.

3.3 Priority Over Building Permits

- a. No municipality, township, or other agency or any officer or employee thereof shall issue a building permit for a new habitable building where public sewers are not available until either written approval or a sewage disposal permit has been obtained from the Department.
- b. No municipality, township, or other agency or any officer or employee thereof where public sewers are not available shall issue a building permit for an addition to an existing habitable building or a building such as a shed or garage which will result in the increased production of sewage or adversely affect the sewage disposal system or its replacement area without first obtaining the approval of the Department.

3.4 Evaluation of Existing Sewage Disposal Systems

The Department may evaluate the adequacy of an existing sewage disposal system. When the evaluation is requested by the owner or another person the Department may charge a fee.

3.5

Application Procedure

Application for a sewage disposal permit shall be made in writing on a form provided by the Department and signed by the owner or his authorized representative. The application shall include a detailed site plan along with other such information the Department requires such as the name and address of the applicant, location of the property, actual or proposed use of the property, property tax identification number, and details concerning the building. Payment of the established service fee shall be submitted with the completed application form.

3.6

Site Evaluation by the Department

The Department shall inspect the proposed construction site in order to determine the sites suitability for the sewage disposal system, any changes in an existing system or any other factors affecting the sites use for a habitable building. Unless otherwise indicated by the Department the permit applicant shall have ready at the time of the site evaluation two (2) test holes at least four (4) feet deep and twelve (12) inches across at least forty (40) feet apart in the location of the proposed absorption field area. Additional test holes including backhoe cuts may be required by the Department to adequately judge soil suitability.

3.7

Substantiating Data

- a. The Department may require additional data including but not limited to engineering drawings, maps, soil analysis, percolation tests, groundwater and flood elevations, and detailed plans of the proposed on-site sewage disposal system. The Department may require that the design plans and specifications be prepared by a registered professional engineer, however submittal of any plan is not a guarantee of approval.
- b. Percolation tests shall conform to the procedures established in the "Michigan Criteria for Subsurface Sewage Disposal". Copies of the procedure are available from the Department. When such tests are done they shall be conducted under the supervision of a registered professional engineer unless approved otherwise by the Department.

3.8

Minimum Site Criteria Considered Suitable for an Absorption Field Serving a Single or Two Family Dwelling

A site considered suitable for an absorption field shall possess sufficient soil permeability and water table characteristics for all sewage to discharge into the soil with minimum likelihood of causing a health or environmental hazard. Characteristics considered for a site to be suitable shall include:

- a. Permeable on-site soils such as sand, gravel, sandy loam or loam to a depth of at least four (4) feet.

- b. No seasonal high water table or evidence (mottling) thereof within four (4) feet of the natural ground surface.
- c. No seasonal flooding or ponding where the absorption field or its replacement area are to be located.
- d. Adequate area available on the premise to install a properly located and sized system meeting the requirements of this regulation.
- e. Slopes at the location of the absorption field and its replacement area are not excessive.
- f. Adequate replacement area available for one (1) replacement system meeting the requirements of this regulation.

3.9 Issuance of Permits for Sewage Disposal Systems for Single or Two Family Dwellings

The Department shall issue a permit when the site conditions listed in Section 3.8 are found and when the other requirements of this regulation and applicable local state and federal statutes have been or will be met. Issuance of a permit, however, is not a guarantee of proper operation or longevity.

3.10 Issuance of permits for a Sewage Disposal System for Commercial or other than Single or Two Family Dwellings Producing up to 10,000 Gallons of Sewage per Day

The Department shall issue a permit when the data obtained indicates that the requirements of the "Michigan Criteria for Subsurface Sewage Disposal" and applicable local, state, and federal statutes have been or will be met. The Department may use its own local code when the discharge is less than four (4) hundred gallons per day.

3.11 Permit Expiration

The permit shall be valid for a period of twelve (12) months from the date of issuance unless declared void as provided in Section 3.12. A permit may be renewed by the permit holder for a period of twelve (12) months provided the renewal request is reviewed by the Department prior to the permit expiration date. The permit holder shall be the person to whom the permit was originally issued.

A fee may be charged for the renewal. No installation, construction, alteration, extension, repair or replacement shall occur without a valid permit. Permit holders whose permits have expired shall make new application, and shall meet the minimum criteria for acceptance as set forth in current regulations.

3.12 Void Permits

The permit for a sewage disposal system may be declared void by the Department if the area designated for the soil absorption field or replacement area(s) is in the opinion of the Department adversely affected by filling, excavating, building, flooding, etc; if a public sewer becomes available as defined in the Public Health Code; if location of a water supply well or other feature

encroaches upon any required isolation distance; if there is any increase in the scope of the project; if the information provided to the Department is found to be inaccurate or untrue; if the sewage disposal system is not being installed in accordance with the permit or this regulation; or if specific conditions under which permit approval was granted cannot be adhered to. No installation, construction, alteration, repair, extension, or replacement shall continue without a valid permit.

3.13

Transfer of Permits

Should the ownership of the property for which a permit has been issued change, the permit may be transferred to the new owner provided that in the opinion of the Department, no change in the property, location of the system or replacement area(s), or scope of the project has or will occur. The Department may re-evaluate the property to verify that no change has occurred. Such transfer must be requested in writing on forms to be provided by the Department and signed by the permit holder. The permit holder being the person to whom the permit was originally issued. A fee for the permit transfer may be charged by the Department.

3.14

Denial of Application

- a. The Department shall deny the application for a permit to construct a sewage disposal system for any premise when the information is found to be inaccurate or untrue; when a public sewer is available as defined in The Public Health Code, or when it is determined by the Department that any applicable local, state, or federal laws are or will be broken.
- b. The Department shall deny the application for a permit to construct a sewage disposal system serving a single or two family dwelling when the data obtained indicates that the requirements of this regulation have not or cannot be met including the site criteria in Section 3.8 of this regulation. However, due to the many areas of Sanilac County where unsuitable soil and high seasonal water table exist, the Board of Health does not want the Department to restrict development in widespread areas of the county. Therefore where the soil and/or water table do not meet the requirements of Article II Sections 3.8 (a) or 3.8 (b) but the other requirements of this regulation can be met and there are two (2) replacement areas available for two (2) replacement systems the Department may look at those sites on a case by case basis and issue permits for systems which may minimize adverse impacts on public health and the environment. There shall be no variances (Article I Section XVIII) granted for reducing the two (2) replacement areas required when the soil and/or water table do not meet the requirements indicated in Article II Section 3.8 (a) or 3.8 (b).

- c. The Department shall deny the application for a permit to construct a sewage disposal system serving a habitable building other than a single or two family dwelling when the data indicates the flow is more than 400 gallons and the requirements of the Michigan Criteria for Subsurface Sewage Disposal" cannot be met. The application for a permit shall also be denied when the flow is less than 400 gallons per day and the requirements of this regulation cannot be met (see Section 3.10 of this regulation).

3.15 Filing of Affidavits

Where a vacant parcel of land is found to be unsuitable for the on-site disposal of sewage, or where an adequate, safe and potable water supply is not available, or where a habitable structure has a water supply or sewage disposal system that may pose a threat to the public health, the Department may require and file a sworn affidavit with the Register of Deeds to be recorded on the property abstract, listing such conditions.

SECTION IV. FINAL INSPECTION BY HEALTH OFFICER

- 4.1 When the sewage disposal system has been installed, to the extent that sewers, tank, and absorption field have been placed and before being covered or placed into operation, request for an inspection shall be made to the Department. If the Department has not inspected the system within two (2) working days after the notification, the system may be covered and put into operation. In such an instance the installer shall submit to the Department a statement certifying that the system has been installed as shown on the permit. Said statement shall be on a form provided by the Department and shall include an as built plan of the system. After approval of the system for backfill, it shall not be allowed to remain open for longer than forty eight (48) hours unless otherwise approved by the Department.
- 4.2 The following site conditions are required for a final inspection unless approved otherwise by the Department:
 - a. The sewer from the building to the septic tank shall be exposed.
 - b. The inlet and outlet to the septic tank shall be exposed.
 - c. The manhole cover(s) of the septic tank(s) shall be exposed.
 - d. The sewer line from the septic tank to the soil absorption system shall be exposed.
 - e. The midpoint and both ends of each distribution line shall be exposed.
 - f. The Department may specify site requirements in addition to those listed in a. through e. above if such are necessary to conduct an adequate final inspection.

- 4.3 Nothing in this regulation shall prohibit the Department from requiring a pre-final inspection.
- 4.4 It is unlawful to manufacture, install, construct, alter, replace, repair, or extend a sewage disposal system in a manner that does not comply with the permit, this regulation and/or general workmanship standards. When a system has been improperly installed the owner and/or the installer will be held liable and may be required by the Department to make whatever changes deemed necessary. The system shall not be covered until approved by the Department.
- 4.5 When a soil absorption system has been improperly installed for a new habitable building the local municipality having jurisdiction shall not issue an occupancy permit until the system is inspected and approved by the Department.
- 4.6 When the plan for the sewage disposal system is drawn by a registered professional engineer, he or she must certify in writing to the Department that the installation is in compliance with the approved plans. This is in addition to the Departments final inspection.

SECTION V. INSTALLER REGISTRATION

- 5.1 No person shall engage in the manufacture, installation, construction, alteration, extension, repair or replacement of sewage disposal systems in Sanilac County without registering with the Department. A fee may be charged for registration with the Department.
- 5.2 It shall be unlawful for any person to install a sewage disposal system in Sanilac County without an appropriate State of Michigan Contractors license when and where required pursuant to Act 383, P.A. of 1965 as amended (including its subsequent revisions).
- 5.3 The county registration of an installer may be temporarily or permanently suspended by the Department if, after giving the installer written warning, the installer continues to install on-site sewage disposal systems contrary to permit specifications and/or this regulation.
- 5.4 In no way shall this provision be construed to prohibit an individual from installing a sewage disposal system on property owned or leased by the individual that will serve only his own family residence, provided that he or she obtains a sewage disposal permit from the Department and follows all other requirements of this regulation.

SECTION VI. DESIGN, LOCATION, AND INSTALLATION OF ON-SITE
SEWAGE DISPOSAL SYSTEMS

- 6.1 On-site sewage disposal systems which are to serve one and two family dwellings shall be designed, located, and installed as specified in this regulation unless otherwise provided for in this regulation.
- 6.2 On-site sewage disposal systems which are to serve commercial and other than one and two family dwellings shall be designed, located, and installed in accordance with "Michigan Guidelines for Subsurface Sewage Disposal" as published by the Michigan Department of Public Health and any subsequent revisions to said document. Copies are available from the Department.
- 6.3 When a replacement system is to be installed for an existing habitable building the Department may without filing for or declaring a formal variance, deviate from the specifications contained in this regulation or the "Michigan Criteria for Subsurface Sewage Disposal Systems" if it is virtually a physical impossibility to comply fully with the specification(s) and if the deviation from the specification(s) would not create a public health hazard or an environmental hazard. If the future use of the system creates a public health hazard or environmental hazard, the owner of the premise will be held liable according to the applicable sections of this code.
- 6.4 A sewage disposal system shall not be located in a road or utility right of way. Sewage disposal systems shall be located as indicated on the permit and wholly on the property served unless a suitable recorded easement agreement exists. It is not the responsibility of the Department to determine where the property boundaries are located.
- 6.5 The owner or his agent shall notify the well installer of the required location of the sewage disposal system and replacement area prior to installation of the well. The well location shall not interfere with the required location of the sewage disposal system and its replacement area.

SECTION VII. SEWERS

- 7.1 Stabilization
Sewers shall be stabilized and bedded in sand or other granular material.
- 7.2 Compliance with Other Laws
Sewers shall comply with applicable plumbing codes.
- 7.3 Bends
No short radius 90 degree elbows shall be used between the dwelling and the septic tank.

- 7.4 Isolation Distances from Water Supply
Any buried sewer line shall comply with water supply isolation distances as required by law. The requirements are available from the Department.
- 7.5 Infiltration
Sewers shall be watertight.
- 7.6 Grade
a. The sewer between the dwelling and the septic tank shall be laid at a grade of not less than 1/8 inch per foot or greater than 1/4 inch per foot unless otherwise approved by the plumbing inspector having jurisdiction or by the Department.
b. The sewer line carrying effluent from the septic tank to the nearest portion of the absorption field may be laid at any appropriate grade.
- 7.7 Protection in Traffic Areas
Sewers shall be protected in a manner acceptable to the Department when installed under vehicular traffic areas.

SECTION VIII. SEPTIC TANKS

- 8.1 Influent Requirements
All sewage generated by any dwelling shall be discharged into a septic tank prior to being discharged to any absorption field.
- 8.2 Construction
Septic tanks shall be watertight and constructed of noncorrosive and durable materials. The design of septic tanks shall be approved by the Department. Specific design requirements are available from the Department. Septic tanks shall be structurally capable of withstanding all loads and pressures to which they will be subjected. All seams, joints and pipe connections shall be properly sealed and watertight. An outlet device shall be securely mounted to the tank outlet in such a manner to prevent leakage or dislodgement.
- 8.3 Installation
A septic tank shall be installed in a level position on a firm base, and the surrounding excavation shall be properly backfilled.
- 8.4 Location
No septic tank shall be located where it is inaccessible for inspection and maintenance nor shall any structure be placed over any tank in a way that makes the tank inaccessible for inspection and maintenance. The septic tank shall be located so as to minimize the need for sharp angle bends in the dwelling sewer whenever possible and in accordance with the minimum horizontal separation distances prescribed in the following table (greater isolation may be required on individual sites):

<u>Feature</u>	<u>Minimum Separation Distance</u> <u>(In Feet) From Septic Tank</u>
a. Buildings, Swimming Pools	5
b. Water Supply Wells for single family dwellings and Suction Lines	50
c. Type I and Type IIa Public Water Supply Wells	200
d. Type IIb and Type III Public Water Supply Wells	75
e. Water Supply lines Under Pressure	10
f. Bluffs, Drop offs, Ditches, Property Lines	10*
g. High Water Elevation of Lake Huron	100*
h. Surface Water and Areas of Flooding	50*

* Greater set back distances may be required by the Shorelands Protection and Management Act, Act 245 of 1970 as amended and the Soil Erosion and Sedimentation Control Act, Act 347 of 1972 as amended (and their subsequent revisions).

8.5 Septic Tank Sizing

a. The table below presents the minimum liquid septic tank capacities required for one and two family dwellings. Liquid capacity shall be measured from the invert of the outlet. The Department may require a greater capacity than that listed below when the factors of a given installation demand it.

<u>Number of Bedrooms</u>	<u>Minimum Liquid Capacity</u>
1 & 2	1,000 gallons
3	1,250 gallons
4	1,500 gallons
5	1,750 gallons
6	2,000 gallons

b. When two septic tanks are connected in series the liquid capacity of the first tank shall be equal to one half (1/2) to two thirds (2/3) of the total capacity.

8.6 Maintenance

Septic tanks shall be properly maintained. This is the responsibility of the owner. The tank should be inspected annually to note the level of scum and sludge accumulation. On an average a properly sized septic tank may need pumping every three (3) to five (5) years.

8.7 Abandonment of a Septic Tank

To prevent a future safety hazard any septic tank removed from service shall be either pumped out and filled with sand or other inert material, or pumped out and caved in and the hole filled in with inert materials.

SECTION IX. SOIL ABSORPTION FIELDS

9.1 Location

In no case shall a driveway, parking area, paved surface, stockpiled material, swimming pool, structure, building, or trees and shrubs be placed over the absorption field. All surface drainage shall be diverted away from the absorption field. The absorption field shall remain accessible for maintenance and shall be located in order to insure the following minimum separation distances from the feature listed (greater isolation may be required on individual sites):

<u>Feature</u>	<u>Minimum Separation Distance</u> <u>(In Feet) from Absorption Fields</u>
a. Water Supply Wells for single family dwellings and Suction Lines	50
b. Type I and Type 2a. Public Water Supply Wells	200
c. Type 2b. and Type 3 Public Water Supply Wells	75
d. Property Lines, Swimming Pools	10
e. Basements and Footing Drains	20
f. Foundation (undrained) and Buried Water Pressure Lines	10
g. Surface water and Areas of Flooding	100*
h. High water elevation of Lake Huron	100*
i. Banks or Drop offs	50*
j. Ditch or Subsurface Drain Tile	25
k. Bedrock	4
l. Water Table	1.5

* Greater isolation distances may be required by the Shorelands Protection Act, Act 245 of 1970 as amended and the Soil Erosion and Sedimentation Control Act, Act 347 of 1972 as amended (including their subsequent revisions).

9.2 Materials

- a. Pipe used in the absorption field shall be approved by the Department. All perforated pipe approved by the Michigan Department of Public Health is acceptable. The pipe shall be stamped with the letters "MS" signifying certification under Michigan Standards. Compatible couplings, tees, and elbows shall be used. Sweep tees which direct the flow of effluent are not approved for use in absorption fields.
- b. The aggregate used in absorption fields, or other material serving the same purpose, shall be approved by the Department. Aggregate shall be washed, clean, hard, inert, free from dust, soil or excessive fine material, and of a size meeting the Michigan State Department of Transportation standard of 6A or its equivalent (100% passes 1-1/2" screen, 95-100% passes 1" screen, 30-60% passes 1/4" screen, 0-8% passes #4 screen, 1% maximum lost by washing). Untreated paper, two (2) inches of straw (not hay), or other material approved by the Department shall be placed over the aggregate prior to backfill to prevent soil from filtering into the aggregate.

- c. Fill used for an absorption field shall be approved by the Department. No silt or clay shall be allowed. Graded or washed sand may be required in some installations. The fill shall be installed in accordance with Section 9.7 (b) of this regulation. The Department may require the installation and inspection of the fill prior to issuance of the permit. Filling shall not be allowed over unstable soil such as peat, muck, mud, or organic material. Fill elevations shall not exceed any local requirements or adversely affect adjoining property.

9.3

General Design and Construction Specifications for Distribution Systems Within an Absorption Field (Trench or Bed)

- a. If the absorption system is a gravity flow system the dwelling foundation and the sewer leaving the dwelling shall be high enough so the absorption field can be installed at the required elevation. If the dwelling is not high enough to install the absorption field at the required elevation a sewage ejector pump may be required. The Department may designate a benchmark at the construction site. The owner or the owners representative shall notify affected contractors of the benchmark. The contractors whose work will be affected by the benchmark shall follow it. No changes in the benchmark shall be made without prior approval of the Department. If for any reason something happens to the benchmark prior to installation of the absorption field the Department shall be notified immediately.
- b. The bottom of the trenches or bed shall be excavated so they are level and at the proper elevation. After the area required for the soil absorption field has been excavated the sides and bottom shall be raked if the soil surfaces have been smeared. The connection of the sewer from the septic tank to the distribution header shall be near the center of the header and offset from the distribution lines. A solid level header shall be installed to promote uniform distribution of the septic tank effluent to each distribution line. The header shall be stabilized and bedded in sand or other granular material. A manifold header shall be installed when the header is over twenty five (25) feet in width. At least six (6) inches of aggregate shall then be placed on the bottom of the trenches or bed. The effluent distribution pipes shall be laid on top of the aggregate. A footer shall connect the ends of the distribution lines to provide a continuous loop distribution network. For gravity fed systems, distribution pipes shall be laid at a constant slope not to exceed one (1) inch per fifty (50) feet. At least

two (2) inches of aggregate shall be placed over the distribution pipe and shall extend the full width of the excavated area. The aggregate shall be covered with a layer of untreated building paper, newspaper, two (2) inches of straw or other material approved by the Department to prevent the aggregate from becoming clogged with soil backfill and still allow the passage of air and moisture. The soil absorption area (after inspection by the Department) shall then be backfilled with at least eight (8) inches but no more than twelve (12) inches of soil and graded so that ponding of surface water will not occur. The top layer of soil shall be of sufficient depth and quality to support vegetation.

SUMMARY TABLE OF DESIGN SPECIFICATIONS
FOR TRENCH AND BED ABSORPTION FIELDS

<u>Items</u>	<u>Maximum</u>	<u>Minimum</u>
Slope on Trench & Bed Bottom	Level	Level
Width of Trenches	30"	24"
Length of Trenches	100'	
Distance Between Trench Distribution Lines		6'
Distance Between Bed Distribution Lines	4'	
Distance Between Distribution Line & Bed Wall	2'	
Depth of Aggregate Under Distribution Lines (8" Minimum in 30" trench)		6"
Slope on Headers and Footers	Level	
Slope on Distribution Pipe	1"/50'	Level
Depth of Aggregate over Pipe		2"
Depth of Straw Over Aggregate		2"
Depth of Final Cover	12"	8"

9.4 General Construction Considerations

All construction shall be completed in a workmanlike manner. Construction equipment shall not be driven unnecessarily on the area to be used for the absorption field to prevent undesirable compaction of the native soil and damage to the infiltrative surface. For the same reason construction shall not be initiated in or on soils having a significant amount of silt or clay when the soil moisture content is high or the soil is frozen except in case of emergency and with the prior approval of the Department. The Department may restrict the installation of soil absorption fields to certain times of the year depending on but not limited to frost or severe moisture conditions in the soil.

9.5 Dosing

The Department may require that dosing tanks and pumps or automatic siphons be used to insure uniform distribution of the septic tank effluent or to install the absorption field at the proper elevation. The specific requirements concerning standard pumping systems and pressure distribution systems are available from the Department.

9.6

Sizing of Absorption Fields

a. The minimum size required for a subsurface soil absorption field shall be determined from the following table. However, the specific system for a particular situation shall in all cases be based on the judgement and experience of the Department.

MINIMUM TRENCH SYSTEM LINEAL FOOTAGE (BASED ON BEDROOMS)

	1 bdm.	2 bdms.	3 bdms.	4 bdms.
Sand	150'	200'	250'	300'
Sandy Loam	200'	250'	300'	350'
Loam	250'	300'	350'	400'
Silts & Clays - The Department may approve a system. (See Article II Section 3.14 (b) and 9.7)				

MINIMUM BED SYSTEM AREA IN SQUARE FEET (BASED ON BEDROOMS)

	1 bdm.	2 bdms.	3 bdms.	4 bdms.
Sand	400	500	600	800
Sandy Loam	Not approved			
Loam	Not approved			
Silts and Clays	Not approved			

9.7

Sand Mound Systems

Sand mounds may be required by the Department when the soil and/or water table conditions are not adequate for the installation of a conventional soil absorption system. Sand mounds shall meet all applicable requirements of this regulation including Article II Section 3.14 (b) as well as the following.

- a. Sand mounds and their replacement areas shall be located a minimum distance of ten (10) feet from property lines measured from the outer edge of the mound. The outer edge of the mound is defined as the toe of the slope.
- b. In order to minimize compaction of the native soil and damage to the infiltrative surface the installer shall utilize the following procedure. Only work on the soil when the moisture level is low and do not allow any vehicles to drive over the proposed mound area prior to installation of the system. Thoroughly mix the original sod and topsoil surface but do not remove the topsoil unless approved by the Department. Larger types of vegetation and long grass shall be cut and removed.

When the sand is brought to the site do not drive onto the proposed mound area. To avoid compacting the native soil dump the sand just outside the mound area and then push it into place. Drive only on the fill not on the native soil under the mound. The Department may inspect the installation of the fill.

- c. The minimum size and design of a sand mound system shall be based on the judgement and experience of the Department.
- d. The bottom of the stone in the disposal field shall be at least eighteen (18) inches above the water table. The Department may require additional distance between the water table and the absorption field depending on the hydrogeological characteristics of the site.

9.8

Deep Cuts

On sites having permeable soil below a surface layer of limited permeability deep cuts may be approved by the Department provided all the requirements of this regulation are met including the following.

- a. Deep cuts shall not be made into or through saturated soils or exceed fifteen (15) feet in depth.
- b. Deep cuts will not be allowed without hydrogeologic evidence verifying protection of usable aquifers.

SECTION X. OUTHOUSE OR PRIVIES

- 10.1 Outhouses or Privies shall be located, constructed, and maintained in accordance with local or state law.

SECTION XI. HOLDING TANKS

- 11.1 Holding tanks relying on removal and transportation of the sewage to an off site treatment facility shall only be approved by the Department for an existing building that has a failed sewage disposal system which is uncorrectable by any other means. Prior to issuing a permit for a holding tank the applicant shall provide the following to the Department:

- a. A copy of a contract between the owner and a licensed septic tank pumper.
- b. A copy of an affidavit recorded with the Sanilac County Register of Deeds on the property abstract which indicates that the building is reliant on a holding tank.
- c. Written approval of the local unit of government in which the holding tank is located.
- d. Written approval of the local municipal sewage disposal facility accepting the waste. Land application shall not be approved.

SECTION XII. ALTERNATIVE SEWAGE DISPOSAL FACILITIES

12.1 Alternative sewage disposal facilities, devices, or processes may be approved by the Department. The Department may also prepare criteria concerning the application, location, design, construction, usage, and maintenance of alternative sewage disposal facilities. The Department shall not approve an alternative sewage disposal facility which will cause a public health hazard or an environmental hazard, or fails to comply with any other applicable laws, rules, or regulations. The Department may impose special conditions and requirements pertaining to the approval and use of such a facility including periodic operational reports and periodic inspections. An alternative sewage disposal facility does not include a septic tank and absorption field.

ARTICLE III. WATER SUPPLY REGULATION

SECTION I. FACILITIES REQUIRED

- 1.1 Every habitable building shall be provided with a water supply approved by the Department.
- 1.2 Any habitable building which is not in accordance with this regulation may be declared unfit for habitation and may be so posted by the Department and ordered vacated. Such buildings may be used only upon installation of an approved water supply and upon written approval to occupy by the Department.

SECTION II. EVALUATION OF EXISTING WATER SUPPLY SYSTEMS

- 2.1 The Department may evaluate the adequacy of an existing water supply system. When the evaluation is requested by the owner or another person the Department may charge a fee.

SECTION III. WELL CONSTRUCTION CODE FOR WATER SUPPLY SYSTEMS

- 3.1 Requirements with respect to water well construction and water pump installations for new water wells within Sanilac County shall be those rules set forth in Act 368 P.A. 1978, Part 127 being Sections 333.12701 to 333.12715 of Michigan Compiled Laws as amended and Rules or its subsequent revisions and where applicable Act 399 P.A. 1976 being Sections 325.1001 to 325.12606 of Michigan Compiled Laws as amended and Rules or its subsequent revisions.

SECTION IV. PERMIT FOR WATER SUPPLY SYSTEMS

- 4.1 From and after the effective date of these regulations, it shall be unlawful for any person to construct any new water supply system within Sanilac County unless the owner or his representative has obtained a permit from the Department. Community water supplies regulated by the Michigan Department of Public Health shall be exempt from this requirement.
- 4.2 The application for a permit to construct a water supply system shall be in writing, on a form provided by the Department, and shall be signed by the owner or his or her authorized representative. A plan of the proposed well location shall be provided on the application showing the well location in relationship to buildings, property lines, and possible sources of contamination. The Department may inspect the proposed well site prior to construction. The applicant may be charged a fee according to Article I, Section XVI. of this code.
- 4.3 A permit to construct shall be issued upon approval of a completed application and payment of the fee. Where a water supply system has been installed without a valid permit a fee of three (3) times the original fee shall be charged.
- 4.4 All new water supply installations may be subject to inspection by the Department prior to covering. A well log may be considered an adequate demonstration of compliance with this regulation.

AMENDMENT TO SANILAC COUNTY ENVIRONMENTAL HEALTH CODE
Effective: February, 2007

SECTION III. PERMIT, APPLICATION PROCEDURE, AND ISSUANCE

3.14 Denial of Application Replacement Area

- b. The Department shall deny the application for a permit to construct a sewage disposal system serving a single or two family dwelling when the data obtained indicates that the requirements of this have not or cannot be met including the site criteria in Section 3.8 of this regulation. However, due to the many areas of Sanilac County where unsuitable soil and high seasonal water table exist, the Board of Health does not want the Department to restrict development in widespread areas of the county. Therefore where the soil and/or water table do not meet the requirements of Article II Section 3.8 (a) or 3.8 (b) but the other requirements of this regulation can be met and there is one (1) replacement area available for one (1) replacement system the Department shall evaluate those sites on a case by case basis and issue permits for systems which may minimize adverse impacts on public health and the environment. The replacement area availability requirement shall not be subject to variance.

SECTION IX. SOIL ABSORPTION FIELDS Topsoil

9.3 General Design and Construction Specifications for Distributions Systems Within an Absorption Field (Trench or Bed).

- b. The proposed topsoil language follows: " In order to minimize compaction of the native soil and damage to the infiltrative surface the installer shall utilize the following procedure: If possible, only work on the soil when the moisture level is low and do not allow any vehicles to drive over proposed mound area at any time. Stripping of sod and topsoil is not mandatory but when it is done it shall be stripped with the teeth of an excavator or similar equipment, it shall not be stripped with a bulldozer, to avoid smearing or packing of the underlying soil layers. Topsoil that is heavy, very silty, or highly organic soil should be stripped. Lighter, granular, more permeable soil could be left in place if desired by the Health Department and the installer. When the sand is brought in it should be laid over the soil with an excavator bucket at first to six (6) inch to eight (8) inch deep and then tilled into the subsoil to an approximate depth of twelve (12) inches to eighteen (18) inches to provide drainage channels. The balance of the sand then should be pushed or thrown onto the area without driving on existing soils to avoid compaction (only drive on the sand fill). The department shall inspect the installation of the fill and the site preparation. Failure to protect the native soil or improper installation of fill shall result in the relocation of the sewage treatment system.

SECTION XI. HOLDING TANKS

- 11.1 (d) This language is deleted.

SECTION XII. ALTERNATIVE SEWAGE DISPOSAL FACILITIES

- 12.1 Alternative/advanced sewage treatment/disposal systems, devices, or processes may be approved by the Department on a case by case basis. Applicants will be required to submit engineered plans, including but not limited to, detailed site plans, design capacity, and product specifications. The Department shall not approve an alternative/advanced sewage treatment/disposal facility which will cause a public health hazard or an environmental hazard, or fails to comply with any other applicable laws, rules, or regulations. The Department may impose special conditions and requirements pertaining to the approval and use of such a facility including periodic operational reports and periodic inspections. The Department may revise existing permit conditions or impose new permit conditions that are designed to achieve maximum system performance.

2

Westlaw

Page 1

Not Reported in N.W.2d, 2010 WL 2505905 (Mich.App.)
 (Cite as: 2010 WL 2505905 (Mich.App.))

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT
 RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.
 CHESTNUT DEVELOPMENT, LLC, Plaintiff-
 Appellant,

v.

TOWNSHIP OF MARION, Defendant-Appellee.
 Chestnut Development, LLC, Plaintiff-Appel-
 lant/Cross-Appellee,

v.

Township of Marion, Defendant-Appel-
 lee/Cross-Appellant.

Docket Nos. 287312, 292894.
 June 22, 2010.

West KeySummaryEnvironmental Law 149E

🔗172

149E Environmental Law

149EV Water Pollution

149Ek169 Concurrent and Conflicting Stat-
 utes or Regulations

149Ek172 k. State Preemption of Local
 Laws and Actions. Most Cited Cases

Municipal Corporations 268 🔗710

268 Municipal Corporations

268XI Use and Regulation of Public Places,
 Property, and Works

268XI(B) Sewers, Drains, and Water Courses

268k710 k. Private Sewers and Drains.
 Most Cited Cases

A township's private sewer ordinances were preempted by NREPA. NREPA completely occupied the field of regulation regarding private wastewater treatment systems so as to preempt the township's private sewer ordinance because

NREPA provided for the exclusive regulation of wastewater treatment systems by the Michigan Department of Environmental Quality. A developer challenged the township's private sewer ordinance because it alleged that the ordinance prevented a proposed development from being economically viable. M.C.L.A. §§ 41.181, 324.101 et seq.

Livingston Circuit Court; LC No. 04-020966-CZ.

Before: BANDSTRA, P.J., and FORT HOOD and DAVIS, JJ.

PER CURIAM.

*1 In docket number 287312, plaintiff appeals as of right the trial court's judgment in favor of defendant in this action arising from defendant's denial of plaintiff's rezoning application. In docket number 292894, plaintiff appeals, and defendant cross-appeals, the trial court's award of \$6,070 to defendant as taxable costs for expert witness fees. We affirm the trial court's judgment in favor of defendant. We also affirm the trial court's determination that defendant is entitled to recover reasonable expert witness fees incurred in preparation for trial. However, we vacate the trial court's award of \$6,070 for expert witness fees and remand for re-determination of the taxable amount of such fees. Additionally, we conclude that defendant's ordinance §§ 6.27 and 6.30 are preempted by the Natural Resources and Environmental Protection Act, MCL 324.101 et seq. (NREPA).

FACTUAL BACKGROUND AND PROCEED- INGS BELOW

Plaintiff owns approximately 136 acres, zoned SR (Suburban Residential), located in the northwest corner of the township (the property). As currently zoned, the property, which does not have access to public sewer and water service, requires a minimum lot size of .75 acres. Based on engineering studies, it has been determined that the majority of the property lacks suitable soils to permit septic fields

Not Reported in N.W.2d, 2010 WL 2505905 (Mich.App.)
(Cite as: 2010 WL 2505905 (Mich.App.))

that would meet appropriate standards.^{FN1} The majority of plaintiff's property is located in defendant's wellhead protection area. Therefore, plaintiff is prohibited, by zoning ordinance § 6.27, from constructing and operating a private wastewater treatment facility on the portion of its property within the wellhead protection area. Further, ordinance § 6.30 prohibits private wastewater treatment facilities from treating waste generated by non-residential sources. Plaintiff asserts that as currently zoned, without access to public sewer and in the absence of a private wastewater treatment system, the potential development of the property is limited to 41 single-family residential lots, at a cost exceeding the market value of the lots. Plaintiff further asserts that such development is not economically viable.

FN1. Defendant's sewer district borders the property immediately to the southwest. Plaintiff requested that defendant amend its sewer district to allow the extension of sewer and water service to the property at plaintiff's cost, after confirming that the system possessed sufficient capacity to accommodate the property. Plaintiff's request was not granted.

In December 2003, plaintiff requested that defendant rezone the property UR (Urban Residential). This zoning classification would permit single-family residential dwellings on lots with a minimum size of 12,000 square feet or, as part of a Planned Unit Development (PUD), a minimum size of 10,370 square feet for single-family detached units or 8,700 square feet for single-family attached units. At the same time, plaintiff filed an application for approval of a mixed-use PUD for the property, referred to as Red Hawk Landing, which was premised on the property being zoned UR and which was to include 305 single-family homes, a senior living center, daycare center and a grocery store.

Defendant acted on plaintiff's rezoning request independently of, and without considering, the PUD application. Consequently, defendant considered

that rezoning plaintiff's property to the UR classification would permit plaintiff to construct up to 1,000 attached multifamily units on the property, rather than the 305 single-family units plus attendant uses plaintiff sought to develop under its proposed PUD. Noting, in part, that the area surrounding the property consisted of property zoned SR or Agricultural Residential (AR), which requires minimum lots of 2 acres, defendant denied plaintiff's rezoning request in May 2004. Thereafter, defendant declined to consider plaintiff's PUD request because it lacked the necessary underlying zoning classification (UR).

*2 Plaintiff filed the instant action asserting that defendant violated its constitutional rights to substantive due process and equal protection and that defendant's decisions constituted exclusionary zoning under MCL 125.297a, as well as a taking under the federal and Michigan Constitutions. Defendant moved for, and was granted, partial summary disposition on the equal protection and exclusionary zoning claims.^{FN2} Plaintiff moved for, and was denied, partial summary disposition on its assertion that defendant's private sewer ordinances, ordinance §§ 6.27 and 6.30, are preempted by NREPA. The case proceeded to trial on plaintiff's substantive due process and takings claims. At the conclusion of the presentation of plaintiff's case, the trial court granted defendant's motion to dismiss those claims pursuant to MCR 2.504(B)(2).^{FN3} Judgment was entered in defendant's favor in accordance with that ruling. The trial court expressly declined to rule on plaintiff's assertion that defendant's private sewer ordinances were preempted by NREPA, finding it unnecessary to do so to resolve the claims before it.

FN2. Plaintiff has not appealed that decision and those claims are not at issue here.

FN3. MCR 2.504(B)(2) provides:

In an action, claim, or hearing tried without a jury, after the presentation of

Not Reported in N.W.2d, 2010 WL 2505905 (Mich.App.)
(Cite as: 2010 WL 2505905 (Mich.App.))

the plaintiff's evidence, the court, on its own initiative, may dismiss, or the defendant, without waiving the defendant's right to offer evidence if the motion is not granted, may move for dismissal on the ground that, on the facts and the law, the plaintiff has no right to relief. The court may then determine the facts and render judgment against the plaintiff, or may decline to render judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in MCR 2.517.

Following entry of judgment in its favor, defendant moved to tax costs, seeking expert witness fees in the amount of \$38,279.50. The trial court concluded that defendant was entitled to recover expert witness fees incurred in preparation for trial and awarded defendant \$6,070 in such fees.

PLAINTIFF'S SUBSTANTIVE DUE PROCESS AND TAKINGS CLAIMS

Plaintiff challenges the trial court's decision to involuntarily dismiss its substantive due process and takings claims at the close of plaintiff's presentation of evidence at trial. Plaintiff argues that the trial court's decision to involuntarily dismiss these claims was against the great weight of the evidence and was founded on the application of incorrect legal principles, and thus, must be reversed. We disagree.

"The involuntary dismissal of an action is appropriate where the trial court, sitting as the finder of fact, is satisfied at the close of the plaintiff's evidence that 'on the facts and the law the plaintiff has shown no right to relief.' " *Samuel D Begola Servs., Inc. v. Wild Bros.*, 210 Mich.App. 636, 639, 534 N.W.2d 217 (1995), quoting MCR 2.504(B)(2). A plaintiff is not afforded the advantage of the most favorable interpretation of the evidence, but rather the trial court is called upon to act as a trier of fact. *Marderosian v. The Stroh Brewery Co.*, 123 Mich.App. 719, 724, 333 N.W.2d 341 (1983).

Therefore, this Court reviews a decision to grant or deny a motion for involuntary dismissal under the clearly erroneous standard; the trial court's decision will not be overturned unless the evidence manifestly preponderates against the decision. *Phillips v. Deihm*, 213 Mich.App. 389, 397, 541 N.W.2d 566 (1995); *Sullivan Indus., Inc. v. Double Seal Glass Co., Inc.*, 192 Mich.App. 333, 339, 480 N.W.2d 623 (1991). A finding is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. MCR 2.613(C); *Carrier Creek Drain Drainage Dist. v. Land One, LLC*, 269 Mich.App. 324, 329, 712 N.W.2d 168 (2005). In reviewing the trial court's findings of fact, regard is to be given to the trial court's special opportunity to evaluate the credibility of the witnesses who appeared before it. *Morris v. Clawson Tank Co.*, 459 Mich. 256, 271, 587 N.W.2d 253 (1998). This Court reviews any issues of law de novo and reviews the trial court's underlying findings of fact for clear error. *Sands Appliance Servs., Inc. v. Wilson*, 463 Mich. 231, 235-236 n. 2, 238, 615 N.W.2d 241 (2000).

*3 Both the Michigan and United States Constitutions guarantee that no person shall be deprived of life, liberty, or property without due process of law. US Const, Am XIV; Const 1963, art 1, § 17. "The essence of a claim of a violation of substantive due process is that the government may not deprive a person of liberty or property by an arbitrary exercise of power." *Landon Holdings, Inc. v. Grattan Twp.*, 257 Mich.App. 154, 173, 667 N.W.2d 93 (2003). In *A & B Enterprises v. Madison*, 197 Mich.App. 160, 162, 494 N.W.2d 761 (1992), this Court explained that

[i]n order to successfully challenge a zoning ordinance, a plaintiff must prove (1) that there is no reasonable governmental interest being advanced by the present zoning classification, or (2) that the ordinance is unreasonable because of a purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the area under consideration....

Not Reported in N.W.2d, 2010 WL 2505905 (Mich.App.)
(Cite as: 2010 WL 2505905 (Mich.App.))

Judicial review of a substantial due process challenge requires application of three rules: (1) the ordinance is presumed valid; (2) the challenger has the burden of proving that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of the property ...; and (3) the reviewing court gives considerable weight to the findings of the trial judge.

Further, this Court has recently emphasized that “[t]o sustain a substantive due process claim against municipal actors, the governmental conduct must be so arbitrary and capricious as to shock the conscience.” *Mettler Walloon LLC v. Melrose Twp.*, 281 Mich.App. 184, 198, 761 N.W.2d 293 (2008).^{FN4}

FN4. While the bulk of Michigan jurisprudence relating to substantive due process claims in land use cases frames the question as a “challenge to a zoning ordinance,” see, e.g., *Kropf*, 391 Mich. 157; *Yankee Springs v. Fox*, 264 Mich.App. 604, 609, 692 N.W.2d 728 (2004), the same standards are applied to cases in which a landowner challenges the denial of a rezoning request, see *A & B Enterprises v. Madison*, 197 Mich.App. 160, 161-162, 494 N.W.2d 761 (1992) (explicitly applying the same framework to challenge of denial of rezoning). Moreover, there is no substantive difference between these kinds of claims. In either case, the landowner is asserting that the existing zoning classification is not reasonable and justified, whether the unreasonableness is manifested as the original creation of the classification or the subsequent affirmation of the classification by the municipality's denial of a rezoning request. Further, in either case, the landowner is seeking to demonstrate that another classification is more appropriate for the land.

In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 71 L.Ed. 303 (1926),

the United States Supreme Court held that a municipal zoning ordinance would survive a substantive due process challenge so long as it was not “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.” In *Brae Burn, Inc. v. City of Bloomfield Hills*, 350 Mich. 425, 431, 86 N.W.2d 166 (1957), our Supreme Court stated that “[i]n view of the frequency with which zoning cases are now appearing before this Court, we deem it expedient to point out again, in terms not susceptible of misconstruction, a fundamental principle: this Court does not sit as a super-zoning commission”; an “ordinance comes to us clothed with every presumption of validity.” *Id.* at 432, 86 N.W.2d 166. The Court added:

This is not to say, of course, that a local body may with impunity abrogate constitutional restraints. The point is that we require more than a debatable question. We require more than a fair difference of opinion. It must appear that the clause attacked is an arbitrary fiat, a whimsical *ipse dixit*, and that there is no room for a legitimate difference of opinion concerning its reasonableness. [*Id.*]

“[I]t is the burden of the party attacking to prove affirmatively that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of his property.” *Id.* See also, *Kropf v. City of Sterling Heights*, 391 Mich. 139, 162, 215 N.W.2d 179 (1974) (adopting the statements quoted above).

*4 Plaintiff argues that, because this case presents a challenge to a discrete zoning decision affecting only its property, and not a challenge to the adoption of a zoning ordinance, the presumption of validity afforded a zoning ordinance does not apply here. Instead, plaintiff asserts the trial court was required to determine whether the decision to deny the request for rezoning advanced a legitimate government interest, whether it was an unreasonable means of advancing a legitimate government interest, and whether it unreasonably, arbitrarily, and capriciously excluded other types of

Not Reported in N.W.2d, 2010 WL 2505905 (Mich.App.)
(Cite as: 2010 WL 2505905 (Mich.App.))

legitimate land uses from the area in question. Plaintiff cites *City of Essexville v. Carrollton Concrete Mix, Inc.*, 259 Mich.App. 257, 673 N.W.2d 815 (2003) in support of this assertion. In *Essexville*, 259 Mich.App. at 259-263, 673 N.W.2d 815, this Court considered a claim that the defendant city engaged in illegal spot zoning when it rezoned the plaintiff's property from an industrial district to a development district, purportedly for the purpose of lowering the value of the land, so that the property could later be acquired, as provided in the master plan, as part of a scheme to improve the residential character of the city. The trial court, relying on *Penning v. Owens*, 340 Mich. 355, 65 N.W.2d 831 (1954), and *Anderson v. Twp. of Highland*, 21 Mich.App. 64, 174 N.W.2d 909 (1969), determined that the city clearly singled out the plaintiff's property to be used as a park when the surrounding property was industrial and that there was no reasonable basis for the rezoning other than that the city wanted river access. *Essexville*, 259 Mich.App. at 265, 673 N.W.2d 815. On appeal, this Court held:

[W]hen a discrete zoning decision is made regarding a particular parcel of property—typically a decision involving an amendment or variance that results in allowing uses for specific land that are inconsistent with the overall plan as established by the ordinance—the courts will apply greater scrutiny. Those isolated or discrete decisions are more prone to arbitrariness because they are micro in nature, i.e., the decisions are based on the particular land and circumstance at issue in the request for amendment or variance. To the contrary, macro decisions made by the local body, such as the enactment of a new zoning ordinance, typically reflect a decision on how the city will be developed in the years to come, i.e., are made pursuant to an overall plan of action. [*Id.* at 274, 673 N.W.2d 815.]

That said, however, this Court determined that the *Penning* and *Anderson* “arbitrariness of zoning ordinances” test did not apply to the case before it,

because the defendant's decision to rezone the plaintiff's property was made pursuant to a plan and was not a haphazard or piecemeal decision, and therefore, it did not constitute spot zoning. *Id.* at 275-277, 673 N.W.2d 815. Therefore, instead of applying *Penning* and *Anderson*, this Court applied the deferential *Brae Burn* and *Kropf* “general principles of reasonableness” test, including its presumption of validity. *Id.* at 274-275, 673 N.W.2d 815.

*5 As in *Essexville*, the instant case is not a spot zoning case; as in *Essexville*, defendant's decision to rezone the plaintiff's property was made pursuant to a plan and was not a haphazard or piecemeal decision. Rather, it was a refusal by defendant to change a macro decision concerning the manner in which the township will be developed pursuant to defendant's master plan. Therefore, the trial court correctly evaluated plaintiff's substantive due process claim under the *Brae Burn* and *Kropf* deferential “general principles of reasonableness” test.

Further, even if the stricter scrutiny approach advocated for by plaintiff was applicable here, the trial court stated that it “would still have dismissed [p]laintiff's substantive due process claim based, in part, on the inconsistency of [p]laintiff's proposed development with defendant's Master Plan and the lack of public sewer services.” We agree. Before deciding against plaintiff's rezoning request, defendant considered advice from its planning consultant, the nature of the surrounding property, the absence of sewer service, and the notation in the county comprehensive plan that sewer should not be extended to property such as plaintiff's. The trial court did not err by dismissing plaintiff's substantive due process claim under either standard of evaluation.^{FN5}

FN5. Plaintiff also argues that the trial court erred by applying the “legitimate difference of opinion” analysis set forth in *Conlin v. Scio Twp.*, 262 Mich. 379, 686 N.W.2d 16 (2004), on the basis that this

Not Reported in N.W.2d, 2010 WL 2505905 (Mich.App.)
 (Cite as: 2010 WL 2505905 (Mich.App.))

standard was overturned in *Newman Equities v. Charter Twp. of Meridian*, 474 Mich. 911, 705 N.W.2d 111 (2005). We note that, as pointed out by defendant, the Supreme Court's order in *Newman Equities*, does not mention *Conlin*, or any of the authorities relied on by *Conlin* by name. Further, *Conlin* was summarizing prior Supreme Court case law regarding the appropriate standards; it did not create new law. Further, while the trial court mentioned that plaintiff "failed to establish that there is no room for a legitimate difference of opinion concerning the reasonableness of the Zoning Ordinance," the trial court also relied on the standards set forth in *Kropf*, 391 Mich. 139, 215 N.W.2d 179, and *Brae Burn*, 350 Mich. 425, 86 N.W.2d 166, which remain good law and are not implicated in any way by the Supreme Court's order in *Newman Equities*.

Turning to the trial court's decision to dismiss plaintiff's regulatory takings claim, we again conclude that the trial court's decision was not against the great weight of the evidence, nor was it based on an incorrect application of relevant law. Therefore, reversal is not warranted.

Both the United States and Michigan constitutions prohibit the taking of private property for public use without just compensation. US Const, Am V ; Const 1963, art 10, § 2; *Dorman v. Clinton Twp.*, 269 Mich.App. 638, 645, 714 N.W.2d 350 (2006). A governmental agency may effectively "take" property by overburdening it with regulation. *K & K Constr. v. DNR*, 456 Mich. 570, 576, 575 N.W.2d 531 (1998). As our Supreme Court explained in *K & K Constr.*,

While all taking cases require a case-specific inquiry, courts have found that 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.

The second type of taking, where the regulation denies an owner of economically viable use of land, 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 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

In the former situation, the categorical taking, a reviewing court need not apply a case-specific analysis, and the owner should automatically recover for a taking of his property. A person may recover for this type of taking in the case of a physical invasion of his property by the government (not at issue in this case), or where a regulation forces an owner to "sacrifice all economically beneficial uses [of his land] in the name of the common good..." In the latter situation, the balancing test, a reviewing court must engage in an "ad hoc, factual inquir[y]," 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 576-577, 575 N.W.2d 531 (citations omitted).]

*6 With regard to the economic effect prong of this balancing test, "a mere diminution in property value ... does not amount to a taking." *Bevan v. Brandon Twp.*, 438 Mich. 385, 402-403, 475 N.W.2d 37 (1991).

Plaintiff first argues that defendant's decision to deny its rezoning petition constituted a categorical taking because the decision deprived it of any economically beneficial use of the land. We disagree. The categorical taking test does not guarantee property owners a certain minimum economic profit from the use of their land. *Paragon Props. Co. v. Novi*, 452 Mich. 568, 579 n. 13, 550 N.W.2d

Not Reported in N.W.2d, 2010 WL 2505905 (Mich.App.)
(Cite as: 2010 WL 2505905 (Mich.App.))

772 (1996); *Sun Oil Co. v. City of Madison Heights*, 41 Mich.App. 47, 56, 199 N.W.2d 525 (1972) (“The test of a zoning ordinance’s constitutionality is not profitability”). “[I]t is well established that a municipality is not required to zone property for its most profitable use, and that ‘mere diminution in value does not amount to [a] taking.’” *Dorman*, 269 Mich.App. 638, 714 N.W.2d 350, quoting *Bell River Assoc. v. China Twp.*, 223 Mich.App. 124, 133, 565 N.W.2d 695 (1997). A “[p]laintiff cannot establish a confiscation by simply showing a disparity in value between uses.” *Gackler Land Co. v. Yankee Springs Twp.*, 427 Mich. 562, 572, 398 N.W.2d 393 (1986). “A plaintiff who asserts that he was ‘denied economically viable use of his land’ must show something more—‘that the property was either unsuitable for use as zoned or unmarketable as zoned.’” *Dorman*, 269 Mich.App. at 647, 714 N.W.2d 350, quoting *Bell River*, 223 Mich.App. at 133, 565 N.W.2d 695, quoting *Bevan*, 438 Mich. at 403, 475 N.W.2d 37. To establish a categorical regulatory taking, “the property owner must be *completely deprived* of economically beneficial use of his property[.]” *K & K Constr.*, 456 Mich. at 586, 575 N.W.2d 531 (emphasis added).

Plaintiff asserts that there was no evidence presented to permit the trial court to find that market conditions impacted the economics of developing the property. We agree. However, even in the absence of such evidence, plaintiff’s categorical takings claim fails. Plaintiff asserts that it established that there was no other alternative layout or potential development of the property that would be more economically beneficial than its 41-unit plan, which would result in a loss of more than \$40,000 per lot. However, plaintiff acknowledged that it did not pursue any PUD request under its current SR zoning, did not evaluate the potential for splitting the property for development, and it presented no evidence indicating that it could not use the property in some other economically viable manner, or that the property was unmarketable, for some use, as zoned. Thus, plaintiff did not establish that it

was completely deprived of all economically beneficial uses of the property.

Further, given that there were no changed conditions affecting the development of the property and no changes in zoning between the time plaintiff purchased the property and the time plaintiff filed its complaint, that plaintiff paid more than \$1 million for the property as zoned would seem to belie the assertion that the property lacks value as zoned. Therefore, considering the record presented, the trial court did not clearly err by concluding that plaintiff failed to establish a categorical taking of its property resulting from defendant’s denial of the request for rezoning.

*7 Plaintiff also argues that the trial court erred by concluding that it failed to establish a taking under the *Penn Central* balancing test. Again, on the record presented, we disagree.

In *K & K Constr.*, 456 Mich. at 578, 575 N.W.2d 531, our Supreme Court held that, in applying the *Penn Central* balancing test, courts “must engage in an ‘ad hoc, factual inquir[y],’ focusing 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. In *Lingle v. Chevron USA Inc.*, 544 U.S. 528, 539, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005) the United States Supreme Court noted that

all regulatory takings ... inquiries ... share a common touchstone. Each aims to identify regulatory actions that are *functionally equivalent to the classic taking* in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.

Accordingly, “the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the mag-

Not Reported in N.W.2d, 2010 WL 2505905 (Mich.App.)
(Cite as: 2010 WL 2505905 (Mich.App.))

nitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Id.* at 540.

In the present case, the "character" of defendant's action is the denial of plaintiff's rezoning petition. Defendant's denial of the request for rezoning does not amount to a physical taking, thus, "[t]he relevant inquiry regarding the character of the government's action is whether it singles [a] plaintiff [] out to bear the burden for the public good and whether the regulation being challenged 'is a comprehensive, broadly based regulatory scheme that burdens and benefits all citizens relatively equally.'" *Cummins v. Robinson Twp.*, 283 Mich.App. 677, 720, 770 N.W.2d 421 (2009); *K & K Constr.*, 267 Mich.App. at 523, 705 N.W.2d 365. This Court has recognized that zoning regulations are generally "comprehensive, universal, and ubiquitous, and provide an 'average reciprocity of advantage' for all property owners[.]" *Id.* at 531, 705 N.W.2d 365. That is true here. And, indeed, defendant's decision here was to decline to treat plaintiff's property differently than that of other landowners in the township. Plaintiff did not establish that defendant's decision to deny its rezoning petition was arbitrary or capricious; rather, it was based on the master plan and the comprehensive county plan, on considerations of the zoning classifications and uses of the surrounding property, and on future development of defendant township, and was consistent with the recommendation of defendant's Planning Commission, the County Planning Commission and defendant's planning consultant. Therefore, the character of defendant's action does not favor a finding that a taking resulted.

The next factor, the economic impact of the decision, presents a somewhat closer question. As noted above, plaintiff presented evidence that it was not economically beneficial to develop the property as zoned, with single-family homes utilizing septic systems. However, plaintiff did not establish that it considered other PUD uses for the property, such as applying for a PUD under the SR zoning classifica-

tion, or that it attempted to market the property for sale. And, plaintiff's own conduct in purchasing the property for a substantial price, with knowledge of the soil conditions and zoning classification, belies the notion that the property lacks value or that defendant's decision, leaving plaintiff in exactly the same position it was in when it purchased the property, deprived plaintiff of existing economic value, as opposed to value that could be obtained if the property could be developed under a different classification. Plaintiff's principal admitted that, as with all land deals, the purchase of the property was a risk, premised on the hope that he could obtain rezoning, PUD approval and/or an extension of the public sewer district to the property, none of which was guaranteed at any point in time. Further, defendant notes, that at a May 13, 2004 Township Board meeting, plaintiff's principal represented that he "could have sold this property several times over by now, and made my money and been gone." Therefore, this factor also does not favor a finding that a taking has occurred.

*8 Finally, concerning investment-backed expectations, the evidence showed that plaintiff purchased the property with full knowledge of its zoning classification and that the soils were of limited suitability for economically advantageous development. Our Supreme Court has recognized that "[i]nvestment-backed expectations are distinguishable from mere financial speculation." *Paragon Props.*, 452 Mich. at 579, 550 N.W.2d 772. Further, "[t]he Taking Clause does not guarantee property owners an economic profit from the use of their land ... '[t]he interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests .' Furthermore, the mere diminution of property value by application of regulations without more does not amount to an unconstitutional taking." *Id.* at 579, n. 13, 550 N.W.2d 772 (citations omitted).

Although a person's knowledge of a regulatory enactment does not act as an absolute bar to a takings claim based on the regulation, a "key factor" in

Not Reported in N.W.2d, 2010 WL 2505905 (Mich.App.)
(Cite as: 2010 WL 2505905 (Mich.App.))

determining whether a regulation has interfered with investment backed expectations “is notice of the applicable regulatory regime[.]” *K & K Constr.*, 267 Mich.App. at 555, 705 N.W.2d 365. Plaintiff was aware, when it acquired its interest in the property, that it was zoned SR. Such notice “should ... be taken into account” and “does ... shape the analysis of whether plaintiff’s expectations were reasonable.” *Id.* at 555, 557, 705 N.W.2d 365. Plaintiff’s desired development of the property required that the property be rezoned, that a PUD application be approved and that the sewer be extended to the property. By plaintiff’s admission, none of these things were certain to occur. Any “expectation” that plaintiff would reap profits from development of the property as Red Hawk Landing was “mere financial speculation” under such circumstances.

In sum, none of the factors of the *Penn Central* balancing test favor plaintiff’s argument that defendant’s decision to deny the rezoning request constituted a regulatory taking. Therefore, the trial court’s decision that plaintiff failed to establish in its case in chief that defendant’s actions constituted a taking was neither clearly erroneous nor against the great weight of the evidence.

PREEMPTION

Plaintiff asserts that the trial court erred by denying its motion for partial summary disposition on the basis that defendant’s private sewer ordinances are preempted by NREPA. We agree. In doing so, we note that ordinance §§ 6.27 and 6.30 are only tangentially related, if at all, to the trial court’s determination of the propriety of defendant’s zoning decisions, and that our determination that these sections are preempted by NREPA, while perhaps impacting plaintiff’s future development of the property, has no effect on resolution of plaintiff’s substantive due process and takings claims, and does not affect the instant judgment entered in favor of defendant.

“This Court reviews de novo a trial court’s decision to grant or deny summary disposition. Like-

wise, we review de novo the application of the theory of preemption, which is an issue of statutory interpretation.” *Howell Twp. v. Rooto Corp.*, 258 Mich.App. 470, 475, 670 N.W.2d 713 (2003) (citations omitted).^{FN6} Townships have no inherent powers; they possess only those limited powers conferred on them by the Legislature or the state constitution. *Hess v. Cannon Twp.*, 265 Mich.App. 582, 590, 696 N.W.2d 742 (2005). The township ordinance act, MCL 41.181, allows townships to enact ordinances that regulate the public health, safety, and general welfare. “While the provisions of the Constitution and law regarding counties, townships, cities, and villages must be liberally construed in their favor, the powers granted to townships by the Constitution and by law must include only those fairly implied and not prohibited by the Constitution. Const 1963, art 7, § 34.” *Howell Twp.*, 258 Mich.App. at 475-476, 670 N.W.2d 713. Accordingly, an ordinance may not preempt state law.

FN6. Defendant argues that the trial court’s decision was proper because plaintiff did not seek relief on this issue in its complaint. Defendant cites *Dacon v. Transue*, 441 Mich. 315, 327-329, 490 N.W.2d 369 (1992), for the proposition that a party may not seek relief under a theory or claim when the party’s pleadings do not provide reasonable notice to the defendant of that theory or claim, because “[I]eaving a defendant to guess upon which grounds plaintiff believes recovery is justified violates basic notions of fair play and substantial justice.” Defendant also cites *City of Bronson v. American States Ins. Co.*, 215 Mich.App. 612, 618-619, 546 N.W.2d 702 (1996), and *Reid v. Michigan*, 239 Mich.App. 621, 630, 609 N.W.2d 218 (2000) in support of its argument. However, *City of Bronson* and *Reid* are distinguishable from the instant case; in those cases the trial court was acting of its own accord regarding a theory of relief or

Not Reported in N.W.2d, 2010 WL 2505905 (Mich.App.)
(Cite as: 2010 WL 2505905 (Mich.App.))

issue that was not raised by the plaintiffs at any time before or during trial. Here, although the complaint does not set forth plaintiff's preemption claim, plaintiff did raise the issue more than 22 months before trial, in its motion for summary disposition. Thus, there was no element of surprise regarding this claim. Further, the issue presented is one of law and it has the potential to re-arise between these same parties regarding this same property in the future. Therefore, in the interest of judicial efficiency, we choose to address it. See, *Detroit Leasing Co. v. Detroit*, 269 Mich.App. 233, 237-238, 713 N.W.2d 269 (2005); *Tingley v. Kortz*, 262 Mich.App. 583, 588, 688 N.W.2d 291 (2004).

*9 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); *McNeil v. Charlevoix Co.*, 275 Mich.App. 686, 697, 741 N.W.2d 27 (2007), aff'd 484 Mich. 69, 772 N.W.2d 18 (2009); *Czymbor's Timber, Inc. v. Saginaw*, 269 Mich.App. 551, 555, 711 N.W.2d 442 (2006), aff'd 478 Mich. 348, 733 N.W.2d 1 (2007); *Mich Coalition for Responsible Gun Owners v. City of Ferndale*, 256 Mich.App. 401, 408, 662 N.W.2d 864 (2003). 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); *Howell Twp.*, 258 Mich.App. at 476-477, 670 N.W.2d 713.

Plaintiff first asserts that "the Michigan appellate courts have uniformly held that NREPA demands exclusive regulation of [wastewater treatment systems] by the MDEQ," and thus that NREPA completely occupies the field of regulation regarding private wastewater treatment systems so

as to preempt defendant's private sewer ordinance. Plaintiff cites this Court's decisions in *Lake Isabella Dev., Inc. v. Mich. Dep't of Environmental Quality*, 259 Mich.App. 393, 675 N.W.2d 40 (2003), and *City of Brighton v. Hamburg Twp.*, 260 Mich. 345, 677 N.W.2d 349 (2004) in support of this assertion.

In *Lake Isabella*, 259 Mich.App. at 395-396, 412, 675 N.W.2d 40, this Court affirmed a trial court decision granting the plaintiff developer summary disposition regarding an administrative rule, promulgated by the Department of Environment Quality (DEQ), that required that applicants seeking to construct a private sewerage system obtain a resolution from the local government agency agreeing to take over the sewerage system if the owner failed to properly operate or maintain it. This Court determined that the rule was "arbitrary and capricious because it constitutes an unlawful delegation of discretionary power to municipalities" and was not in compliance with the legislative intent of the DEQ's enabling statute. In the course of that decision, which did not involve the question whether NREPA preempted a local ordinance, this Court commented that it could be inferred from MCL 324.4105 that "because both individuals and government agencies are required to obtain [sewerage system] permits from the DEQ, the DEQ has exclusive jurisdiction over those permits." *Id.* at 407, 675 N.W.2d 40.

At issue in *City of Brighton*, 260 Mich.App. at 346, 677 N.W.2d 349, was "the question of which level of government, state or local, has the authority to determine the permissible level of chemicals to be deposited in our state's waters ... by a government-licensed wastewater treatment plant." This Court first observed that NREPA provides "no express preemption," and further that an examination of the legislative history did not conclusively answer the question of whether preemption may be implied. However, the Court concluded that "the ordinance is preempted ... because (1) the *comprehensive scheme* set forth in part 31 of NREPA clearly occupies the field of regulation that the mu-

Not Reported in N.W.2d, 2010 WL 2505905 (Mich.App.)
(Cite as: 2010 WL 2505905 (Mich.App.))

municipality seeks to enter and (2) the regulated *subject matter* demands exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest." *Id.* at 350-351. The Court reasoned as follows:

*10 A review of part 31 of NREPA reveals that, through this enactment, the Legislature established a pervasive and detailed state regulatory scheme covering point source discharges and effluent limits. This far-reaching legislation demonstrates the Legislature's intent to achieve uniformity and to serve the public policy interest of protecting the waters of our state.

* * *

The [applicable] provisions [of NREPA] grant the DEQ substantial powers to limit water pollution. Moreover, the DEQ is the only agency authorized to grant a discharge permit for waste effluent into the waters of the state, and any person who desires to discharge or dispose of waste or operate a wastewater treatment plant must apply with and obtain a permit from the DEQ. MCL 324.3112(1). As further evidence of the DEQ's broad powers regarding water pollution, the Legislature expressly gave to the DEQ exclusive criminal and civil enforcement authority. Also, NREPA grants to the DEQ power to seek injunctive relief for any violations of NREPA or for any violation of a permit issued by the DEQ under NREPA.

A careful review of these and other statutory provisions of NREPA lead us to conclude that the Legislature *impliedly intended to preempt the field of regulation regarding discharge of waste into the waters of this state* and the establishment of discharge effluent limits. *Plainly, our Legislature enacted a pervasive state regulatory scheme with the DEQ having sole responsibility for regulation of point source discharges into the waters of our state.* [*Id.* at 352-355 (emphasis added).]

The Court further observed that "[t]he 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." *Id.* at 355. Additionally, the Court noted prior decisions holding that state statutes preempt local regulation of solid waste disposal, as well as of hazardous waste disposal, because these areas, too, "require[] statewide treatment ." *Id.* at 355-356.

Defendant's ordinance §§ 6.27 and 6.30 plainly attempt to regulate "the discharge of waste into the waters of the state," and, considering testimony presented at trial, they prevent plaintiff from operating a private wastewater treatment plant that would be permissible under state law. Thus, they directly conflict with NREPA by prohibiting that which regulation under the statute might permit. *Llewellyn*, 401 Mich. at 322 n. 4, 257 N.W.2d 902; *Howell Twp.*, 258 Mich.App. at 476-477, 670 N.W.2d 713. Therefore, this Court concludes that §§ 6.27 and 6.30 of defendant's ordinance are preempted on the basis that they are in direct conflict with NREPA.^{FN7}

FN7. We are not presented with the question of, nor do we offer any conclusion as to, the propriety of a private wastewater treatment system under the state statutory scheme.

TAXATION OF EXPERT WITNESS FEES

Both parties challenge the trial court's ruling regarding defendant's recovery of expert witness fees as taxable costs following trial. This Court reviews a trial court's determination to award expert witness fees for an abuse of discretion. *Rickwalt v. Richfield Lakes Corp.*, 246 Mich.App. 450, 466, 633 N.W.2d 418 (2001). An abuse of discretion occurs when the court's decision falls outside the range of principled and reasonable outcomes. *Maldonado v. Ford Motor Co.*, 476 Mich. 372, 388, 719 N.W.2d 809 (2006). Any accompanying issue involving the interpretation and application of a statute involves a question of law that this Court review *de novo*. *Assoc Builders & Contractors v.*

Not Reported in N.W.2d, 2010 WL 2505905 (Mich.App.)
(Cite as: 2010 WL 2505905 (Mich.App.))

Dep't of Consumer & Indus. Services Dir, 472 Mich. 117, 123-124, 693 N.W.2d 374 (2005).

*11 MCR 2.625(A) provides that “[c]osts will be allowed to the prevailing party in an action unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action.” A trial court has discretion, under MCL 600.2164(1), to award expert witness fees for court time and for the time required to prepare for testifying, as an element of taxable costs to the prevailing party at trial. *Guerrero v. Smith*, 280 Mich.App. 647, 675, 761 N.W.2d 723 (2008); *Rickwalt*, 246 Mich.App. at 466, 633 N.W.2d 418; *Herrera v. Levine*, 176 Mich.App. 350, 357-358, 439 N.W.2d 378 (1989). MCL 600.2164(1) provides:

No expert witness shall be paid, or receive as compensation in any given case for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear, or has appeared, awards a larger sum, which sum may be taxed as a part of the taxable costs in the case. Any such witness who shall directly or indirectly receive a larger amount than such award, and any person who shall pay such witness a larger sum than such award, shall be guilty of contempt of court, and on conviction thereof be punished accordingly. [MCL 600.2164(1)]

Plaintiff first asserts that the trial court should not have awarded defendant any expert witness fees because defendant's expert witnesses did not testify at trial in this case, considering that the matter was dismissed at the close of plaintiff's proofs. However, as this Court explained in *Peterson v. Fertel*, 283 Mich.App. 232, 240-241, 770 N.W.2d 47 (2009).

[T]he statute addressing expert witness fees [MCL 600.2164(1)] does not state that the expert must provide testimony in order to recover expert witness fees ...

Indeed, it is well settled that, regardless whether the expert testifies, the prevailing party may recover fees for trial preparation. *Miller Bros. v. Dep't of Natural Resources*, 203 Mich.App. 674, 691, 513 N.W.2d 217 (1994); *Herrera v. Levine*, 176 Mich.App. 350, 357-358, 439 N.W.2d 378 (1989). As the Court in *Herrera* explained:

The language “is to appear” in [MCL 600.2164] applies to the situation at bar in which the case was dismissed before defendant had a chance to call its proposed expert witnesses at trial. Furthermore, the trial court was empowered in its discretion to authorize expert witness fees which included preparation fees.

As the trial court here noted, defendant's expert witnesses did not have the opportunity to testify at trial, because the case was dismissed at the close of plaintiff's proofs. As the trial court pointed out, were this Court to accept plaintiff's argument, “it would in essence be punishing defendant for obtaining a directed verdict.” Thus, the trial court did not abuse its discretion by awarding the Township expert witness fees.

That said, however, we conclude that the trial court abused its discretion when determining the amount of taxable expert witness fees. *Guerrero*, 280 Mich.App. at 675, 761 N.W.2d 723. Plaintiff presented testimony from each of its experts regarding the nature of the services provided on the dates leading up to trial. Rather than rule on whether fees for time spent on certain services were taxable, the trial court simply “arbitrarily” knocked down the amount of those hours, from 80.38 to 20 for one expert, and from 46 and 28 to 10 for two others. The trial court offered no principled basis for its decision, and did not explain how it arrived at these amounts. A trial court abuses its discretion when its decision falls outside the range of principled and reasonable outcomes. *Maldonado*, 476 Mich. at 388, 719 N.W.2d 809. There does not seem to be any identifiable or principled basis for the trial court's decision, and therefore, we find that it constitutes an abuse of discretion. Consequently, we

Not Reported in N.W.2d, 2010 WL 2505905 (Mich.App.)
(Cite as: 2010 WL 2505905 (Mich.App.))

reverse the trial court's determination of the amount of expert witness fees awarded, but affirm the grant of expert witness fees, and remand for a determination of the amount of fees recoverable consistent with this opinion.^{FN8}

FN8. For purposes of remand we note that "conferences with counsel for purposes such as educating counsel about expert appraisals, strategy sessions, and critical assessment of the opposing party's position" are not "properly compensable as expert witness fees." *City of Detroit v. Luftran Co.*, 159 Mich.App. 62, 67, 406 N.W.2d 235 (1987). Furthermore, expert witnesses may not be compensated for any "services" that exceed the scope of what such an expert would normally render. *Id.* Therefore, any time expended by defendant's expert witnesses or their assistants not directly necessary to the preparation of opinion testimony intended to be presented in court was not compensable.

*12 We affirm the trial court's judgment in favor of defendant, as well as the trial court's determination that defendant is entitled to tax reasonable expert witness fees incurred in preparation for trial. However, we vacate the trial court's award of \$6,070 for such expert witness fees and remand for a determination of the amount of fees taxable consistent with this opinion. Additionally, we conclude that defendant's ordinance §§ 6.27 and 6.30 are preempted by NREPA. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

Mich.App.,2010.
Chestnut Development, LLC v. Township Of Mari-
on
Not Reported in N.W.2d, 2010 WL 2505905
(Mich.App.)

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