

CONSTRUCTION LAW UPDATE

April 2008

NEW DECISION SHOULD REDUCE “TOLL” ON DEVELOPERS

By Jason R. Thompson, Attorney

The recent decision by the Michigan Supreme Court in *Toll Northville, Ltd. v Township of Northville* will delay tax increases to real estate developments in connection with the installation of public service improvements and developments.

At issue in the *Toll Northville* case was the ability of the municipality to tax the increased value to property caused by “additions.” Under Proposal A of 1994, the Michigan Constitution was amended to limit increases in the taxable value of property. However, an important exception to that limitation is for “additions” to property.

At issue in the *Toll Northville* case was the statute which defined “addition” to include construction of public services on property; including water service, sewer service, a primary access road, natural gas service, electrical service, telephone service, sidewalks or street lights.

Toll Northville – a developer who invested millions of dollars to install infrastructure such as a primary access roads, street lights, sewer service, etc. for a condominium and single family residential development – challenged the ability of the Township of Northville to increase the taxable value of their property. The development was a subdivision and the infrastructure was required before final approval of the plat. The

Township, pursuant to statute, increased the taxable value of Toll Northville’s property because of the installation of these public services. Toll Northville claimed the increases were unconstitutional because public services were not additions as provided for in the Michigan Constitution and, therefore, could not be used to increase the taxable value of the property.

The court found it dispositive that the public service improvements at issue in the case were not physically located on the residential property to be taxed. Instead, the title to those improvements would ultimately vest in the municipality or utility company. The Supreme Court concluded:

“because public service improvements located on public easements or land that ultimately becomes public do not constitute additions as that term was understood when Proposal A was enacted. We affirm the judgment of the Court of Appeals that MCL 211.34(d)(1)(b)(viii) is unconstitutional.”

In conclusion, the decision will delay tax increases on residential developments due to public service improvements. It would appear that ultimately the value of the public service

improvements will have been incorporated into the price on individual residential units, and thus will be taxed after the units are sold/developed. Builders and developers who have been assessed for public service improvements that will

ultimately be public or belong to public utilities should consider contacting an attorney to review their options.

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BUILDING INSPECTOR WHO MISSED 44 CODE VIOLATIONS IS NOT LIABLE TO HOME OWNER

By Benjamin H. Hammond, Attorney

Recently, the Court of Appeals considered the case of *Hughes v Wood, et. at.* In April 2003, Ms. Hughes contracted to build a log home in Antrim County. A building inspector for Antrim County inspected the home and issued a certificate of occupancy in January 2004. In August 2004, the home was randomly selected to be re-inspected based on an audit by the State Bureau of Construction Codes. Inspectors from the Michigan Department of Labor performed the re-inspections and found 44 code violations. Ms. Hughes filed three separate lawsuits, one of which included counts of gross negligence directly against the individual building inspectors who inspected her home.

In Michigan, a building inspector is granted governmental immunity, which means that they are immune from tort liability, i.e. ordinary negligence. However, a building inspector can be found liable if they are grossly negligent and that gross negligence is the proximate cause of the damage. Gross negligence is defined as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” To be the proximate cause of damages, the gross negligence must be “the one

most immediate, efficient and direct cause of the injury or damage.”

At the trial court, the judge dismissed the counts against the building inspectors finding that their failure to find 44 code violations and otherwise not enforce parts of the code did not rise to the level of gross negligence. The judge further held that the damages in this case were the result of bad construction by the contractor. Thus, the failure of the inspectors to properly inspect the home was not the proximate cause of the defects that needed repair. The Court of Appeals upheld these rulings.

In sum, a plaintiff must show two things in order to prevail on a claim against a building inspector: (1) gross negligence; and (2) that the gross negligence was the proximate cause of the damages. Although the facts of each case vary, given this high burden it seems unlikely that many homeowners will be able to recover directly from a building inspector – even where it is clear the inspector failed to discover multiple code violations.

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STANDING TO CHALLENGE ZONING DECISIONS CONCERNING NEIGHBORING PROPERTY

By Craig R. Noland, Attorney

The Michigan Zoning Enabling Act provides that, “any party aggrieved by any order, determination, or decision of any officer, agency, board, commission, zoning board of appeals, or legislative body of any local unit of government” made in connection with a zoning matter “may obtain a review in the circuit court....”

In *Stewart v City of Detroit and City Heat Cabaret*, the Court of Appeals addressed the criteria by which property owners may have a “standing” to challenge zoning decisions concerning neighboring property.

In *Stewart*, the City Heat Cabaret obtained a renovation permit from the City Building Department. The plaintiffs – a neighbor residing within 300 feet of the facility, and a “nearby” rival business owner – sought to challenge the decision before the Board of Zoning Appeals, claiming that the permit improperly expanded a “nonconforming use.” The Zoning Board refused to allow an

appeal. The plaintiffs filed suit in circuit court, and the case was dismissed on the ground that “plaintiffs lack standing to maintain it.” The Court of Appeals affirmed the decision, holding that – in “the zoning context” – an aggrieved party must “allege and prove that he has suffered some special damages not common to other property owners similarly situated.”

Significantly, the Court observed that “entitlement to notice” of zoning proceedings [typically property owners within 300 feet] “is not the same as standing to initiate litigation.” Moreover, the Court concluded that, “general concerns relating to increases in traffic, or reductions in property values, do not bring standing,” and that “a person’s financial interest in the development of neighboring properties is not the kind of legally protectable property right or privilege which creates standing to seek review.”

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