VILLAGE OF DECATUR ZONING BOARD OF APPEALS MEETING AGENDA

Monday November 7, 2022



VILLAGE OF DECATUR – Zoning Board of Appeals REGULAR MEETING Monday, November 7, 2022 – 5:00PM Village Hall – 114 N. Phelps Street, Decatur, MI 49045

5:00 PM ZBA Meeting (Action to be taken by the Commission on the following agenda items) **Note: Please be** courteous and turn cell phones off during the meeting.

- 1. CALL TO ORDER
- 2. PLEDGE OF ALLEGIANCE
- 3. ROLL CALL (Excused Absences, if Any)
- 4. PUBLIC COMMENT
- 5. APPROVAL OF AGENDA & MEETING MINUTES
 - 5A Approval of the Regular Meeting Agenda for November 7, 2022
 - 5B Approval of the Regular Meeting Minutes for October 3, 2022

6. PUBLIC HEARING

7A – Application from Harley's Gentleman's Club, 105 N. Phelps Street Decatur, MI 49045, seeking appeal of the Zoning Administrator denial of non-conforming use.

- 7. UNFINISHED BUSINESS
- 8. **NEW BUSINESS**
- 9. ZONING BOARD OF APPEALS COMMENTS
- **10. ADJOURNMENT**

PLEASE NOTE

AUDIENCE PARTICIPATION:

Members of the public may address the Zoning Board of Appeals during public hearings and under "Public Comment, "please limit your comments to three minutes or less per item. Please step up to the podium and state your name and address.

The proposed process for items listed under agenda items above shall be as follows:

- 1. Announcement of the agenda item by the Chairperson.
- 2. Verbal report provided by staff.
- 3. The Chairperson asks Commission members if they have any questions for staff to clarify the staff report.
- 4. Motion is made by a Commission member and seconded by another Commission member.
- 5. The chairperson calls on Commission members to discuss the motion if Commission members wish to discuss.
- 6. Chairperson calls for a vote on the item after discussion has occurred.

Village of Decatur Zoning Board of Appeals Meeting Minutes

Monday October 3, 2022, at 6:00 P.M Village Hall, 114 N. Phelps Street Decatur, MI 49045

I. Trustee Gunther called the meeting to order at 6:00 P.M.

II. Roll Call

Clerk/Treasurer, Duncan provided roll call; Trustee Benson, Trustee Gunther, President Pro Tem Jackson (excused), Trustee Mead Jr, Trustee Pelfrey, Trustee Verran, and President Elwaer (excused) in attendance. Also in attendance Village Manager, Christopher Tapper, Village Clerk/Treasurer, Megan Duncan.

III. Public Comments

a. Kali Marshall, Van Buren Conservation District, made public comment about Van Buren Recycle Roundup Collection in Lawrence at the ISD on October 15, 2022. Electronics and hazardous waste will be accepted. Dump Day 2023 was also discussed.

IV. Approval of Agenda

a. Trustee Verran made a motion with support from Trustee Mead Jr to approve the agenda for October 3, 2022, motion carried 5-0.

V. Approval of By-Laws

a. Trustee Benson made a motion with support from Trustee Verran to approve the Zoning Board of Appeals By-Laws, motion carried 5-0.

VI. Public Hearing

a. Trustee Pelfrey made a motion with support from Trustee Benson to close the regular session and enter into a Public Hearing at 6:03 PM, motion carried 5-0.

No public comment was given.

Discussion was made regarding application from James Hinch II, 410 Harrison Street, seeking appeal of the Zoning Administer denial of non-conforming use. Village Manager Tapper, proceeded with review of the finding of facts regarding application. It should be noted that the report was provide in the agenda packet dated October 3, 2022.

b. Trustee Verran made a motion with the support from Trustee Mead Jr to close the Public Hearing and enter back into Regular Council Meeting, motion carried 5-0, at 6:21 PM.

c. Trustee Mead Jr. made a motion with support from Trustee Verran to approve James Hinch II Zoning Board of Appeals Application, and grant relief to the applicant, motion carried 5-0.

VII. Unfinished Business

a. No unfinished business currently.

VIII. New Business – Request to schedule a public hearing for Monday, November 7, 2022.

a. Trustee Benson made a motion with support from Trustee Verran to schedule a Public Hearing regarding the application received by HSSA,105 N. Phelps Street with Zoning Board of Appeals on November 7, 2022, at 5:00 PM.

XV. Zoning Board of Appeals Comments

a. No comments were given.

XVI. Adjournment

a. Trustee Mead Jr. made a motion with the support of Trustee Pelfrey to adjourn the meeting at 6:34 P.M., motion carried 5-0. Minutes submitted by Megan Duncan, Village Clerk/Treasurer.

VILLAGE OF DECATUR VAN BUREN COUNTY, MICHIGAN

NOTICE OF PUBLIC HEARING AND ZONING BOARD OF APPEALS MEETING

TO: THE RESIDENTS AND PROPERTY OWNERS OF THE VILLAGE OF DECATUR, VAN BUREN COUNTY, MICHIGAN AND ALL OTHER INTERESTED PARTIES.

PLEASE TAKE NOTICE that a Public Hearing/Special Meeting will be held by the Village of Decatur Zoning Board of Appeals on Monday, November 7, 2022, at 5:00 p.m. at the Decatur Village Hall located at 114 North Phelps Street within the Village.

PLEASE TAKE NOTICE that the item(s) to be considered at this Public Hearing include, in brief, the following:

- 1. Appeal the denial from Zoning Administrator, regarding abandonment of Nonconforming Use, Harley's Gentleman's Club, 105 North Phelps Street, Decatur, MI 49045.
- Such other and further matters as may properly come before the Zoning Board of Appeals

PLEASE TAKE FURTHER NOTICE that written comments will be taken from any interested person concerning the appeal at the email address of the Village Clerk, mduncan@decaturmi.us at any time during regular business hours up to 12:00 p.m. on the date of the hearing and will further be received by the Zoning Board of Appeals at the time of said hearing.

The Village of Decatur will provide necessary reasonable auxiliary aids and services to individuals with disabilities at the hearing upon four (4) days' notice to the Village Clerk.

VILLAGE OF DECATUR PLANNING COMMISSION

Megan Duncan, Village Clerk

Decatur Village Hall

114 North Phelps St.

Decatur, MI 49045



Zoning Board of Appeals Application

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 □ To request a variance to certain requirements of the zoning ordinance. Go to section A □ To interpret a particular section of the ordinance. Go to section B □ To interpret the zoning map. Go to section C □ To overturn an action of the zoning administrator. Go to section D 				
For all actions, sign certification on page 4.				
Section A: For variance requests				
Please specify the section and specific regulations from which a variance is being sought:				
	_			
State specifically the reason for this appeal request:				
	-			
	_			

On attached sheets, provide answers to the following questions. Please number the answers the same as they are numbered here. Please be specific and explain your answers.

- 1. Do special conditions and circumstances exist which are peculiar to the land, structure, or building involved and which are not applicable to other lands, structures, or buildings in the same district?
- 2. Does the literal interpretation of the provisions of the zoning ordinance deprive the applicant of rights commonly enjoyed by other properties in the same district under the terms of the zoning ordinance?
- 3. Are the special conditions and circumstances a result of unique characteristics of the parcel of land in question, and not a result of actions of the applicant or previous owners of the land?
- 4. Does granting the variance preserve the essential character of the area?
- 5. Is the requested variance for land use or a potential special use permitted within the respective zoning district?

Section B: For requests to interpret a particular section of the Ordinance

State specifically the reason for this interpretation request:

ZBA Application Rev 4/26/18

tate specifically the reason for this appeal request: ection D: To appeal an action of the zoning administrator				
escribe the portion of the zoning map in question (attach detail maps if applicable): tate specifically the reason for this appeal request: ection D: To appeal an action of the zoning administrator				
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\boxtimes	Attach the written decision of the zoning administrator being appealed

Certification

I certify that all statements made above and in attached documents submitted to the Village of Decatur related to this application to the Village of Decatur Zoning Board of Appeals are true and accurate to the best of my knowledge and that if found to be in error, any Zoning Board of Appeals ruling that may be issued may be void.

Further I agree, any Zoning Board of Appeals ruling and subsequent permit that may be issued is with the understanding all applicable sections of the Village of Decatur Zoning Ordinance will be complied with. I understand any zoning action by the Zoning Board of Appeals conveys only land use rights and does not include any representation or conveyance of rights in any other statute, building code, deed restriction or other property rights.

In lisable

Applicant's Signature

Date

Section D – Reason for Harley's Appeal

This is an appeal of the zoning administrator's determination under Section 42-301 of the village zoning ordinance that HSS Financial LLC, operating as Harley's Gentlemen's Club ("Harley's"), abandoned its right to continue using its 105 N. Phelps Street, Decatur, Michigan property and business as a topless bar. Section 42-301 states that:

Where, at the effective date of adoption or amendment of the [zoning] ordinance from which this chapter is derived, lawful use of land exists that is made no longer permissible under the terms of this chapter as enacted or amended, such use may be continued, so long as it remains otherwise lawful, subject to the following provisions:

If there is evidence that a nonconforming use of land has been abandoned, any subsequent use of such land must conform to the regulations specified by this chapter for the district in which such land is located.

The village adopted its present zoning ordinance in 2017; and it included a new provision prohibiting the operation of sexually orientated businesses (including topless bars) within 1,000 feet of residences, parks, or churches. See, Section 42-139. Since Harley's was open and legally operating as a topless bar at 105 N. Phelps before the village enacted its present zoning ordinance, Harley's had a right under the above-described Section 42-301 to continue its topless bar use so long as Harley's did not abandon such operations.

The right to continue a nonconforming use is a vested right in the use of a particular property that does not confirm to zoning restrictions, but is protected because that use lawfully existed before the zoning regulations went into effect. *Belvidere Twp v. Heinze*, 241 Mich. App. 324, 328 (2000). Michigan law requires that, in order to show abandonment of such a vested right to continue a nonconforming use, the zoning administrator must show both nonuse and an intent to abandon the use. *Livonia Hotel LLC v. City of Livonia*, 259 Mich. App. 116, 127-129 (2003). Evidence of non-use is not enough. *Livonia Hotel*, 259 Mich. App at 127-129. Instead, the administrator must demonstrate "intent and some act or omission on the part of the owner or holder *which clearly manifests a voluntary decision to abandon his/her right to a non-conforming use.*" *Id.*

The village's zoning administrator points to two things as supporting his determination that Harley's has abandoned its right to continue its topless bar use. This first is that "Harley's Gentlemen's Club, a sexually orientated business that previously operated on the parcel, closed down in June of 2020, over two years ago." See, Attachment 1, Zoning Administrator's August 18, 2022 Letter. The administrator also found significant that Harley's "repeatedly inquired to the Village about whether the parcel could be used as a marijuana business instead of a topless bar." *Id.*

Harley's is appealing the zoning administrator's decision on the basis that the administrator's above-described evidence does not clearly show that Harley's intended to abandon its right to continue topless operations on-site. In other words, Harley's above-described non-use and its inquiries into the possibility of a different use for the property does not establish that Harley's had actually decided to give up its topless bar use going forward and put it to (or only pursue buyers for) some other use. Harley's had no such intentions and, since at least November 2020, has pursued buyers wanting to continue the topless bar use on-site.

The Livonia Hotel case (a copy of which is attached as **Attachment 2**) analyzes abandonment under very similar facts to Harley's – namely, when the nonconforming use stops at the property but the owner pursues bringing someone in to re-open such operations on-site. That case involved a hotel, which had a grandfathered right to operate a restaurant serving liquor on the premises. Livonia Hotel, 259 Mich. App. at 127-129. When a new owner purchased the hotel in 1995, the operator of the restaurant decided to close the restaurant operating on-site. *Id.* The new owner continued to operate the hotel and kept the liquor license in full effect after the restaurant closed while he looked for a new operator for the restaurant. *Id.* It took 5 years to sign a lease with a new operator to re-open a restaurant on-site. *Id.*

The City of Livonia took the position that the new owner's discontinued use of a restaurant onsite for 5 years constituted abandonment. *Livonia Hotel*, 259 Mich. App. at 127-129. The city pointed to a provision in its zoning ordinance defining abandonment as "actual discontinuance of a valid nonconforming use for a period of 1 year." *Id.* On appeal of Livonia's abandonment determination, the Michigan Court of Appeals found that the Livonia ordinance incorrectly defines abandonment as non-use for a period of 1 year, without also requiring proof of an intent by the owner to abandon the right to operate such a restaurant. *Id.* The Court of Appeals also held that:

[The hotel owner's] continued efforts to reopen a restaurant in the hotel [negates] any suggestion that [the owner] abandoned its use for a restaurant licensed to serve liquor; [and the] record indicates that, as a matter of law, [the owner] did not abandon its restaurant use. *Livonia Hotel*, 259 Mich. App. at 128-129.

Harley's, like the hotel owner in *Livonia Hotel*, did not abandon its rights to operate a topless bar at 105 N. Phelps. Harley's continued to operate a topless bar until its operations were shut down because of COVID-19 on March 16, 2020. *See*, **Attachment 3**, Statements from Harley Scholtz and Jennifer Scholtz. Due to liability, staffing and compliance with COVID-19 restriction concerns, Harley's remained closed for the duration of the COVID-19 epidemic or through June 22, 2021, when the Michigan Department of Health and Human Services rescinded its COVID-19 restrictions on indoor gatherings applicable to strip clubs and bars. *Id.* Harley's started to talk with realtors and brokers about selling the Harley's business dating back to at least November of 2020 and, instead of reopening in late June of 2021, decided to pursue finding a buyer for the business and the 105 N. Phelps property. *Id.*

Since November of 2020, Harley's has pursued the sale of its business/property to prospective buyers wanting to continue to operate a topless bar on-site. See, **Attachment 3**; see also, **Attachment 4**, Statements from Harley's Realtors. Harley's also kept current and escrowed its liquor license and topless activity permit to allow buyers to continue topless bar operations after purchase. See, **Attachment 3**; see also, **Attachment 5**, Documentation of Harley's Current and Escrowed Liquor License and Topless Activity Permit. The non-use of Harley's facility from March of 2020 to present while Harley's pursues a buyer for the property does not show an intent by Harley's to abandon its topless use; instead, it shows Harley's took steps to pursue a buyer to reopen the topless bar operations on-site.

Harley's exploration into the possibility of selling its property/business for other uses (including, a marijuana provisions center) also does not show an intent to abandon. Harley's has also pursued buyers wanting to convert Harley's to other possible uses and made inquiries with the village about the possibility of a buyer being able to convert the property into a marijuana provisions center. That includes, for example, in and around March of 2022, when Harley's made inquiries with the village about the possibility of the property becoming a marijuana provisions center after

Harley's received a letter of intent from a buyer wanting to buy the property for such a use. See, **Attachment 3**.

Such inquiries, however, did not go any further. The letter of intent Harley's received from the prospective buyer in March did not go anywhere because Harley's was told by the village that it had reached the maximum number of marijuana provision centers allowed under its zoning ordinance. See, **Attachment 3**. Such efforts by Harley's in pursuing the possibility of selling to a buyer for use as a provisions center or other uses merely shows that Harley's has explored the selling of the property for other uses; but it does not show that Harley had actually decided to abandon its topless bar use.

Harley's made no such decision and had no intention of abandoning, or pursuing buyers wanting to continue, a topless bar use on-site. See, **Attachment 3** and **Attachment 4**. Instead, Harley's kept its liquor license and topless activity permit current for prospective buyers. *Id.* The property also continues to be set up, and to have all of the fixtures and furniture required, to continue topless bar operations on-site. *Id.* Harley's has also pursued topless bar buyers since November of 2020, and Harley's realtors have continued those efforts since November of 2021 and pursued buyers wanting to continue the topless bar use that the property is licensed and set up for. *Id.*

Such efforts show an intent to continue topless bar operations at 105 N. Phelps – not abandon them. Such efforts also resulted in Harley's receiving an offer from a buyer who planned to continue operating Harley's as a topless, gentlemen's club and, on August 17, 2022, Harley's notified the village about its offer from a buyer wanting to continue a topless bar at 105 N. Phelps. **Attachment 6**, August 17, 2022, Harley's Email to Village. The next day, on August 18, the zoning administrator sent his above-described letter to Harley's notifying Harley's of his abandonment, which resulted in Harley's having to file this appeal. *See*, **Attachment 1**, **Attachment 5**, and **Attachment 6**.

ATTACHMENT 1



August 18, 2022

Ms. Jennifer Scholtz jenniferscholtz1992@gmail.com Via Email

Re: Abandonment of Nonconforming Use Harley's Gentlemen's Club - 105 North Phelps Street

Dear Ms. Scholtz.

In a recent email to Village Manager Christopher Tapper, you indicated that you are in the process of selling the above referenced parcel and that one of the potential buyers intends to use it as a topless establishment. Mr. Tapper asked whether this would be permitted under the Village's zoning ordinance, given that Harley's Gentlemen's Club was a nonconforming use that is no longer actively operating.

In preparing to address Mr. Tapper's question, I reviewed the relevant zoning records and other available information pertaining to the parcel. After completing that review, I am officially notifying you of my determination that the above-referenced parcel can no longer be used as a sexually oriented business (a category that includes topless bars) because that use has been abandoned pursuant to Section 42-301 of the zoning ordinance.

To further explain, in 2017, the Village Council adopted new zoning regulations that prohibit sexually oriented businesses within 1,000 feet of residences, parks, and churches. See Sec. 42-139. Publicly available information reveals that Harley's is within 1,000 feet of all three of these uses, which makes it nonconforming under the 2017 ordinance.

Section 42-301 of the zoning ordinance addresses nonconforming uses and provides in pertinent part: "If there is evidence that a nonconforming use of land has been abandoned, any subsequent use of such land must conform to the regulations of this chapter for the district in which such land is located." My review of this matter has informed me that Harley's Gentlemen's Club, a sexually oriented business that previously operated on the parcel, closed in June 2020, over two years ago. I am also aware that you have repeatedly inquired to the Village as to whether the parcel could be used as a marijuana business instead of a topless establishment. In my opinion, these facts constitute sufficient evidence that the nonconforming use has been abandoned and cannot be legally resumed.

Please note that you have the right to appeal this determination to the Village's ZBA pursuant to section 42-332 of the zoning ordinance. Absent a successful appeal, the position stated in this letter constitutes an official and final determination of the Village.

Sincerely,

Loe K Sine

Joe Kline, Zoning Administrator

Cc: Harley Scholtz, Resident Agent for HSS Financial LLC 45847 Woodfield Drive, Mattawan, MI 49071

ATTACHMENT 2



User Name: Lance Zoerhof

Date and Time: Tuesday, August 23, 2022 9:23:00 AM EDT

Job Number: 177890144

Document (1)

1. Livonia Hotel, LLC v. City of Livonia, 259 Mich. App. 116

Client/Matter: 999999.999999

Livonia Hotel, LLC v. City of Livonia

Court of Appeals of Michigan

September 10, 2003, Submitted; October 21, 2003, Decided

No. 237609

Reporter

259 Mich. App. 116 *; 673 N.W.2d 763 **; 2003 Mich. App. LEXIS 2608 ***

LIVONIA HOTEL, LLC, Plaintiff-Appellant, v CITY OF LIVONIA and BUILDING OFFICIAL OF LIVONIA, Defendant-Appellees.

Prior History: [***1] Wayne Circuit Court. LC No. 01-119729-CE.

Disposition: Reversed and remanded for entry of an order granting plaintiffs' motion for summary disposition under *MCR* 2.116 (I).

Core Terms

restaurant, hotel, veto, city council, abandoned, liquor license, zoning ordinance, veto power, ordinance, licensed, summary disposition, zoning district, nonconforming use, provisions, vested right, trial court, charter, alcoholic beverage, city charter, decisions, designate, regular meeting, land use, petitions, premises, zoning, planning commission, use decision, defendants', special use

Case Summary

Procedural Posture

Plaintiff property owner appealed from an order of the Wayne Circuit Court (Michigan), which dismissed the owner's complaint against defendants, a city and its building official, seeking a declaratory judgment that the owner had a lawful vested right to a proposed restaurant on the premises, which had not been abandoned, and an order requiring the city to issue the necessary approvals to permit the operation of the proposed restaurant.

Overview

The owner sought approval to have a restaurant operated in its hotel. The court initially noted that the owner was entitled to an appeal as of right under <u>Mich.</u>

Ct. R. 7.203(A) because the owner challenged the legal authority of the mayor to veto the city council's approval of a special use, asserted that it had a vested right to a restaurant licensed to serve alcoholic beverages, and challenged on constitutional grounds the validity of the zoning ordinance's treatment of restaurants in hotels. The court held that the record did not support a finding of legal abandonment, emphasizing the owner's continued efforts to reopen a hotel restaurant that was licensed to serve liquor. However, the owner did not have a vested right to operate a restaurant with a class C liquor license because this constituted a new use of the property. The court held further that, under Mich. Comp. Laws § 117.36 and Livonia, Mich., Zoning Ordinance §§ 11.03 and 19.06, the trial court erred in concluding that the mayor had the power to veto the city council's decisions approving the waiver uses. Thus, the city council's decisions approving the waiver uses in the owner's case stood as final decisions.

Outcome

The court reversed and remanded for entry of an order granting the owner's motion for summary disposition.

LexisNexis® Headnotes

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN1[4] Reviewability, Jurisdiction & Venue

See Mich. Const. art. 6, § 28.

259 Mich. App. 116, *116; 673 N.W.2d 763, **763; 2003 Mich. App. LEXIS 2608, ***1

in the light most favorable to the nonmoving party.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN2[| Standards of Review, De Novo Review

Questions of law are reviewed de novo.

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Evidence > ... > Documentary
Evidence > Writings > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary
Judgment > Summary Judgment Review > General
Overview

Civil Procedure > ... > Summary Judgment > Summary Judgment Review > Standards of Review

Civil Procedure > ... > Summary
Judgment > Entitlement as Matter of Law > General
Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

<u>HN3</u>[♣] Summary Judgment, Motions for Summary Judgment

The appellate court reviews de novo a trial court's grant or denial of summary disposition. Summary disposition of all or part of a claim or defense may be granted when: except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. Mich. Ct. R. 2.116(C)(10). A motion for summary disposition under Rule 2.116(C)(10) tests whether there is factual support for a claim. When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted

Business & Corporate Compliance > ... > Real Property Law > Zoning > Nonconforming Uses

HN4[Zoning, Nonconforming Uses

See Livonia, Mich., Zoning Ordinance § 18.17.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Local Planning

Environmental Law > Land Use & Zoning > Nonconforming Uses

Business & Corporate Compliance > ... > Real Property Law > Zoning > Nonconforming Uses

Business & Corporate Compliance > ... > Real Property Law > Zoning > Regional & State Planning

HN5[Zoning, Local Planning

Livonia, Mich., Zoning Ordinance § 18.17 incorporates the definition of nonconforming use set forth in the City and Village Zoning Act, <u>Mich. Comp. Laws § 125.583a(1)</u>, the zoning enabling statute.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Nonconforming Uses

See Mich. Comp. Laws § 125.583a(1).

Business & Corporate Compliance > ... > Real Property Law > Zoning > Nonconforming Uses

HN7[Zoning, Nonconforming Uses

See Livonia, Mich., Zoning Ordinance § 18.18(b).

Business & Corporate Compliance > ... > Real Property Law > Zoning > Nonconforming Uses

HN8[Zoning, Nonconforming Uses

Abandonment in the contemplation of the law is something more than mere nonuser. It is rather a nonuser combined with intention to abandon the right to the nonconforming use. The burden of proving the abandonment is on the city. The necessary elements of "abandonment" are intent and some act or omission on the part of the owner or holder which clearly manifests his voluntary decision to abandon.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Local Governments > Charters

Governments > Legislation > Interpretation

Governments > Local Governments > Ordinances & Regulations

Pensions & Benefits Law > Governmental Employees > Teacher Pensions

HN9[₺] Standards of Review, De Novo Review

Statutory interpretation is a question of law that is reviewed de novo on appeal. The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the legislature. If the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted. However, if reasonable minds can differ as to the meaning of a statute, judicial construction is appropriate. The rules of statutory construction also apply to ordinances and city charters. If two statutes lend themselves to a construction that avoids conflict, that construction should control. The construction should give effect to each without repugnancy, absurdity or unreasonableness. When two statutes or provisions conflict, and one is specific to the subject matter while the other is only generally applicable, the specific statute prevails.

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Home Rule

HN10 Local Governments, Duties & Powers

The city of Livonia, Michigan, is organized and operates

pursuant to the Michigan Home Rule Act, <u>Mich. Comp.</u> Laws § 117.1 et seq.

Governments > Local Governments > Employees & Officials

<u>HN11</u>[♣] Local Governments, Employees & Officials

See Livonia, Mich., City Charter ch. IV, § 24.

Governments > Local Governments > General Overview

Governments > Local
Governments > Administrative Boards

Governments > Local Governments > Charters

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Employees & Officials

Governments > Local Governments > Mayors

HN12 Sovernments, Local Governments

The Livonia, Michigan city charter grants broad veto power to the mayor.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Administrative Procedure

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

HN13[♣] Zoning, Administrative Procedure

In accordance with the City and Village Zoning Act, the Livonia, Mich., Zoning Ordinance specifies the procedures for application, review and approval of a waiver use, and designates the body or official to review and approve waiver uses.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

HN14[Zoning, Variances

See Livonia, Mich., Zoning Ordinance § 11.03.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

Governments > Local
Governments > Administrative Boards

HN15 Zoning, Variances

See Livonia, Mich., Zoning Ordinance § 19.06.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

Governments > Local Governments > General Overview

Governments > Local
Governments > Administrative Boards

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Employees & Officials

Governments > Local Governments > Mayors

Real Property Law > Zoning > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

HN16 ≥ Zoning, Ordinances

Under the City and Village Zoning Act, the zoning ordinance designates the body or official charged with reviewing special land uses and granting approval. Livonia, Mich., Zoning Ordinance (LZO) §§ 11.03 and 19.06, when read together, provide that city council ultimately makes the decisions regarding applications for special land uses, such as waiver uses. Although the Livonia City Charter grants broad veto power to the mayor, the LZO does not explicitly provide for a mayoral veto with regard to waiver use decisions.

Counsel: Honigman Miller Schwartz & Cohn LLP (by Norman Hyman) for the plaintiff. Bingham Farms.

Sean P. Kavanagh, City Attorney, and Cathryn K. White, Chief Assistant City Attorney, for the defendants. Livonia.

Judges: Before: Owens, P.J., and Griffin and Schuette, JJ.

Opinion by: Donald S. Owens

Opinion

[**765] [*117] PER CURIAM.

In this zoning case, plaintiff appeals as of right from the October 11, 2001, order of dismissal [*118] with prejudice entered by the Wayne Circuit Court. We reverse and remand.

I. Facts

Plaintiff owns and operates a Quality Inn hotel on Plymouth Road in Livonia. Plymouth Road, a major, heavily traveled, east-west thoroughfare that runs the entire length of the city, is zoned and used for commercial and industrial uses. There are a number of restaurants on Plymouth Road, many of which serve beer, wine, and other alcoholic beverages.

The Quality Inn hotel was initially developed as a Holiday Inn hotel in 1967. At the time, the Livonia Zoning Ordinance (LZO) permitted a two-story structure to be constructed within the existing C-2 zoning designation. According to defendant city, the LZO in effect at the time required that waiver use approval be obtained in order to operate a hotel. As a result, the property owners filed and were granted [***2] a waiver use permit in 1967 allowing the construction of the two-story Holiday Inn hotel.

The waiver use approval granted in 1967 was limited to hotel use because the LZO, at the time, provided that restaurants were permitted uses in C-2 zoning districts. Further, the restaurant or lounge on the property was permitted to serve alcoholic beverages, apparently pursuant to the class B hotel liquor license held by the Holiday Inn.

In 1968, the year after the Holiday Inn was constructed, the LZO was amended to provide that restaurants were allowed only as waiver uses (rather than permitted uses) in C-2 zoning districts. In addition, the LZO has since been amended to allow hotels as [*119] permitted uses (rather than waiver uses) in C-2 zoning

districts.

The LZO requires a separate waiver use approval in order to use a class C liquor license in connection with a restaurant in a C-2 zoning district. According to Mark Taormina, the city's planning director, "the requirement that waiver use approval must be obtained in order to utilize a Class C liquor license in a C-2 zoning district was in effect when the Holiday Inn was constructed in 1967 requirement and the has remained continuously [***3] in effect since then." City records indicate that waiver use approval has never been granted for a class C liquor license at the property in question. In 1997, the LZO was amended to enlarge the class of liquor licenses that require waiver use approval in C-2 zoning districts and now includes tavern, club, class A hotel and class B hotel licenses, and microbrewers and brewpubs, as well as class C licenses. However, before the LZO was amended in 1997, a waiver use approval was not required [**766] for the use of a class B hotel liquor license at the property.

Since 1967, the property in question has been used as a hotel, becoming a Ramada Inn for a time, then a Terrace Inn, and finally a Quality Inn. Until some time in 1995, a restaurant and a lounge/night club occupied part of the hotel. Both the restaurant and the lounge/nightclub were licensed to sell alcoholic beverages for consumption on the premises. As already stated, the restaurant and the nightclub were apparently permitted to sell alcoholic beverages pursuant to the hotel's liquor license. The restaurant and the night club were uses accessory to the hotel and were permitted as waiver uses under the Livonia zoning ordinance.

[*120] In 1995, [***4] plaintiff purchased the property in question. "In 1995, the operator of the restaurant and night club vacated the premises." Since the closure of the restaurant and the nightclub in 1995, plaintiff has kept the hotel liquor license current and attempted to obtain a new operator for the restaurant. Despite numerous efforts, plaintiff was unsuccessful in attracting a restaurant operator to reopen the restaurant until May 2000. On September 6, 2000, plaintiff entered into a lease with Hooters of Livonia, Inc., to operate a restaurant in the restaurant portion of the premises. The Hooters restaurant would serve beer and wine, but not liquor, using Hooters own class C liquor license.

According to plaintiff, when the city was contacted in connection with the work of preparing the premises for Hooters' occupancy, the city's building official informed

John Glasnak, plaintiff's managing representative, that plaintiff would be required to obtain a new waiver use approval because the prior restaurant use had been discontinued for over one year, and, thus, the right to operate a restaurant had been "abandoned" under § 18.18 of the LZO. Plaintiff stated that it "never even considered the [***5] idea of abandoning the restaurant use."

Plaintiff filed a waiver use petition with the city on November 2, 2000. Plaintiff was required to file a waiver use petition because the city claimed that the prior restaurant use had been discontinued for more than one year. However, according to plaintiff, it already had waiver use approval for a restaurant. Hooters also filed a waiver use petition. A separate waiver use petition was required because Hooters wanted to use its class C liquor license in connection [*121] with the operation of its restaurant and because there had not been a previous use of such a license at this location.

The planning commission conducted a public hearing on both petitions on December 12, 2000. At the conclusion of the public hearing, the planning commission recommended that both petitions be denied.

The city council then considered the waiver use petitions at a public hearing conducted on March 28, 2001, and a regular meeting held on May 2, 2001. The city council approved the waiver use petitions, each by a four-to-three vote, at its regular meeting on May 2, 2001. On May 7, 2001, the mayor vetoed the city council's approval of the waiver use petitions.

On June 15, 2001, plaintiff [***6] and Hooters filed a seven-count complaint seeking a declaratory judgment, that would state, in pertinent part, that plaintiff "has a lawful vested right to the proposed restaurant on the premises, which has not been abandoned" and seeking an order requiring the city to issue "a certificate of occupancy and such other approvals and permits as are required to permit the operation of the proposed Hooters restaurant within the restaurant portion of the premises upon [**767] presentation of plans which comply with the City's building code." On July 2, 2001, defendants answered the complaint and set forth their affirmative defense, requesting that judgment be entered against plaintiff and Hooters for no cause of action. On August 2, 2001, plaintiff and Hooters moved for summary disposition under MCR 2.116(C)(9) (defendants have failed to state a valid defense to the claims asserted against them) and MCR 2.116(C)(10) (no genuine issue of material fact). In their response on August 29, 2001,

defendants [*122] requested that plaintiff and Hooters' "appeal" be dismissed as "procedurally improper," and, alternatively, that summary disposition be granted in favor of defendants pursuant to \underline{MCR} 2.116(C)(8) (failure to state [***7] a claim on which relief can be granted) and (C)(10).

A hearing regarding the parties' cross-motions for summary disposition was held on September 6, 2001. After hearing argument, the trial court denied plaintiff's and Hooters' motion for summary disposition. In pertinent part, the trial court stated:

Clearly the City had the right to require--first of all, the restaurant was abandoned.

Secondly, the license itself was a Class C license which is a new non conforming [sic] use. So clearly the proper procedure the plaintiff had applied to the zoning--or the Planning Commission and then go to City Council, which they did. The City Council denied it by a four to three vote the mayor vetoed, and the city council decided not to override the veto, and the majority was one vote short.

As far as the legal procedures, that was perceived or conducted by the city in accordance with the law. The proper procedures were there. He had to go before the Planning Commission, City Council, and then has the right to do so. Plaintiff came up with one vote short with the City Council. So the motion for summary disposition is denied.

* * *

The City had the right to reject [the waiver petitions]. They [***8] need one more vote. The bottom line here is the claim of Livonia Hotel, which is Hooters, came up one vote short with the City Council and Mayor. Proper legal procedure was followed; they don't have the vote. That's the bottom line.

On October 8, 2001, the trial court entered an order dismissing the case with prejudice.

[*123] II. Jurisdiction

In their appeal brief, defendants argue that plaintiff is not entitled to an appeal as of right under <u>MCR 7.203(A)</u>, but is required to seek leave to appeal under <u>MCR 7.203(B)</u>, because the decision challenged by plaintiff "is properly the subject of a Circuit Court appeal from the decision of the City Council pursuant to <u>Const 1963</u>, art 6 § 28" As set forth in <u>Const 1963</u>, art 6, § 28:

HN1[1] All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasijudicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing [***9] is required, whether the same are supported by competent, material and substantial evidence on the whole record. . . . Defendants rely, in part, on Krohn v Saginaw, 175 Mich. App. 193; 437 N.W.2d 260 [**768] (1988), in support of their argument that the trial court's dismissal of plaintiffs' complaint in this case arose from an appeal to the circuit court, not an original action, because plaintiffs' claims "relate to the denial of its waiver use petitions and the procedures employed in reaching that decision." We disagree.

A. Standard of Review

HN2[1] Questions of law are reviewed de novo. Sun Communities v Leroy Twp, 241 Mich. App. 665, 668; 617 N.W.2d 42 (2000)

[*124] B. Analysis

As plaintiff points out in its reply brief, the present case does not fall within the exception to an appeal as of right that is listed in <u>MCR 7.203(A)(1)(a)</u>. As plaintiff rightly notes, "this suit has not been treated as an appeal." Plaintiffs' complaint raised issues that "had nothing to do with whether appellant was entitled to special use approval." Rather, plaintiffs challenged the legal authority of the mayor to veto the city council's approval of a special use, [***10] asserted that it had a vested right to a restaurant licensed to serve alcoholic beverages, and "challenged on constitutional grounds the validity of the zoning ordinance's treatment of restaurants in hotels." To hold that the present appeal is not an appeal of right from the circuit court's decision in this case would be contrary to <u>MCR 7.203(A)</u>.

III. Abandonment

Plaintiff argues that the trial court erred in finding that plaintiffs had abandoned the restaurant use of the property. We agree that the trial court erred in finding that plaintiffs had abandoned the property, but we do not agree with plaintiff's contention that plaintiff had a vested right to have a restaurant operate on the property using a class C liquor license.

A. Standard of Review

HN3[1] This Court reviews de novo a trial court's grant or denial of summary disposition. Sun Communities, supra at 668. Summary disposition of all or part of a claim or defense may be granted when:

[*125] except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. <u>MCR 2.116(C)(10)</u>.

A motion for summary disposition [***11] under <u>MCR</u> 2.116(C)(10) tests whether there is factual support for a claim. <u>Spiek v Dep't of Transportation</u>, 456 <u>Mich. 331</u>, 337; 572 <u>N.W.2d 201 (1998)</u>; <u>Mino v Clio School Dist</u>, 255 <u>Mich. App. 60, 67; 661 N.W.2d 586 (2003)</u>. When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. <u>Ritchie-Gamester v City of Berkley</u>, 461 <u>Mich. 73, 76</u>; 597 N.W.2d 517 (1999).

B. Analysis

The record indicates that a waiver use petition was granted in 1967 for the construction of the Holiday Inn hotel. At the time the Holiday Inn was constructed in 1967, restaurants were permitted uses in C-2 zoning districts. Further, at the time of the opening of the Holiday Inn in 1967, the restaurant and the lounge/nightclub on the property were permitted to serve alcoholic beverages, apparently pursuant to the class B hotel liquor license held by the Holiday Inn. After the construction of the Holiday Inn, the LZO was amended in 1968 to designate restaurants as waiver uses [***12] in C-2 zoning districts. Further, in 1997, the LZO was amended again to designate establishments having class B hotel liquor licenses as waiver uses in C-2 zoning [**769] Restaurants were permitted uses in C-2 zoning districts when the waiver use was granted [*126] in 1967 to operate a hotel on the property; therefore, a waiver use was never granted for a restaurant or nightclub/lounge on the property. Likewise, there is no indication that a waiver use was ever granted to permit a restaurant or lounge on the property to serve alcoholic beverages.

The LZO was amended in 1968 to designate restaurants as waiver uses in C-2 zoning districts, and, as a result, the restaurant use in the hotel became a nonconforming use after the Holiday Inn was initially opened. As set forth in part in § 18.17 of the LZO:

HN4 The lawful use of land or a structure exactly as such existed at the time of the enactment of this ordinance, may be continued, except as provided in Section 18.18 of this ordinance, although such use or structure does not conform with the provisions of this ordinance. Such a use, where lawfully continued pursuant to the provisions of this section, shall, for the purpose of this ordinance, be know [***13] [sic] as a "Valid Nonconforming Use"; but where such use is not thus lawfully continued, the same, for the purpose of this ordinance, shall be known as an "Invalid Nonconforming Use." 1

Although plaintiff claims that there was no evidence that there was ever a change in the zoning ordinance that made restaurant use nonconforming because "the restaurant was a use permitted by the zoning ordinance, albeit as a waiver use, on the premises," defendants rightly contend that the restaurant use in plaintiff's [*127] hotel became [***14] nonconforming after 1968, because restaurant uses in C-2 zoning districts were not permitted unless the waiver use standards were met and specific approval was granted for the waiver use. Given that a waiver use had not been approved for the restaurant in the hotel after 1968, it follows that the restaurant use in plaintiff's hotel became a valid nonconforming use after 1968, because "such use . . . does not conform with the provisions of this ordinance." LZO § 18.17.

In addition, use of a class B hotel liquor license in the restaurant became a nonconforming use after the LZO was amended in 1997 to designate establishments having class B hotel liquor licenses as waiver uses in C-2 zoning districts.

While the operation of a restaurant in the hotel was a valid nonconforming use after 1968, there is no evidence that plaintiff abandoned this use, as defendants allege. Section 18.18 of the LZO addresses the abandonment of a nonconforming use of property. Specifically, it provides, in pertinent part, HNT[*] "Actual discontinuance of such valid nonconforming use for a period of one (1) year, either as to the whole or any

¹ As plaintiff points out, § 18.17 <code>HN5[]</code> incorporates the definition of nonconforming use set forth in the City and Village Zoning Act, the zoning enabling statute, <code>MCL 125.583a(1)</code> provides, in pertinent part, that <code>HN6[]</code> "the lawful use of land or a structure exactly as the land or structure existed at the time of enactment of the ordinance affecting that land or structure may be continued . . . although that use or structure does not conform with the ordinance."

part of a building or parcel of land, in which case such discontinuance shall be [***15] considered an abandonment of said use[.]" LZO § 18.18(b).

As plaintiff points out, the Court in <u>Dusdal v Warren, 387 Mich. 354; 196 N.W.2d 778 (1972)</u>, and <u>Rudnik v Mayers, 387 Mich. 379; 196 N.W.2d 770 (1972)</u>, addressed the definition of "abandonment" in the context of zoning law. As [**770] stated in <u>Dusdal</u>, supra at 360:

The record does not support a finding of legal abandonment. HN8[*] Abandonment in the contemplation of the law is [*128] something more than mere nonuser. It is rather a nonuser combined with an intention to abandon the right to the nonconforming use. The burden of proving the abandonment was on the city. It introduced no evidence from which it would be reasonable to conclude that the plaintiff ever intended to relinquish or abandon his vested right to use his property in the manner in which it was being used prior to the residential zoning amendment.

In *Rudnik, supra at 384*, the Court stated, "The necessary elements of "abandonment" are intent and some act or omission on the part of the owner or holder which clearly manifests his voluntary decision to abandon."

As plaintiff correctly notes, "Section 18.18 [***16] is in direct contravention of the Supreme Court's holdings in Rudnik and Dusdal " because it defines abandonment solely on the basis of "actual discontinuance of such valid nonconforming use for a period of one (1) year," LZO 18.18(b), without requiring an intent to abandon the right to the nonconforming use. Further, as plaintiff correctly points out, there was no genuine issue of material fact in this case whether there was an abandonment. As indicated in Glasnak's affidavit, after purchasing the property in 1995, plaintiff continued to operate the hotel and has kept the hotel liquor license in full effect even after the operator of the restaurant ceased the operation of the restaurant. It is undisputed that Glasnak, as plaintiff's managing representative, then began to search for a new operator for the restaurant, which culminated in a lease with Hooters in September 2000. We agree with plaintiff that the "continued efforts to reopen a restaurant in the hotel [negates] any suggestion that Appellant abandoned its waiver use for a restaurant licensed to serve liquor." The record indicates that, as a matter of [*129] law, plaintiff did not abandon its restaurant use. Thus, the trial court erred in [***17] finding that "the restaurant was

abandoned."

Nevertheless, although the trial court erred in finding that plaintiff had abandoned its restaurant use, it does not follow that plaintiff was thereby entitled to summary disposition on this basis. Although plaintiff frames the issue in terms of having a vested right to have the Hooters restaurant in the hotel because it had a waiver use for a restaurant licensed to dispense alcoholic beverages pursuant to its class B hotel liquor license, defendants point out that Hooters sought approval to use its own class C liquor license in connection with its operation of the restaurant. As defendants rightly note, "this type of use is a new use for this location and has always required waiver use approval under the applicable provisions of the LZO." Defendants claim that plaintiff did not have a vested right of a valid nonconforming use to operate a restaurant on the property using a class C liquor license.

In its reply brief, plaintiff contends that the LZO, as amended in 1997, "does not require waiver use approval for establishments having Class C liquor licenses; it requires waiver use approval for 'Establishments having liquor licenses such [***18] as Class C, Tavern, Club, Class A Hotel, Class B Hotel licenses and Micro brewers and Brewpubs" quoting from LZO 11.03(h). According to plaintiff, "the distinction is significant" because "the use which the ordinance makes a special use is a licensed restaurant." There was a licensed restaurant on the property since [**771] 1967, and as a result, plaintiff claims that it had a vested [*130] right to a restaurant licensed to serve liquor, provided that such use was not abandoned.

Although it is true that plaintiff had a vested right to operate a restaurant licensed to serve alcoholic beverages pursuant to its class B hotel liquor license. we agree with defendants that it did not have a vested right to operate a restaurant pursuant to Hooters' class C liquor license because this constituted a new use of the property. As a result, plaintiff and Hooters were each required to file a waiver use petition because this constituted a change in the use of the property. Plaintiff had no vested right to have Hooters, a class C liquor licensed establishment, operate a restaurant in the hotel; thus, it follows that the trial court did not err in denying plaintiff's motion for summary disposition on this basis because waiver use [***19] approval was required to operate a restaurant in the hotel using a class C liquor license.

IV. Mayoral Veto

The trial court erred in concluding that the mayor had the power to veto the city council's decisions approving the waiver uses.

A. Standard of Review

HN9[*] Statutory interpretation is a question of law that is reviewed de novo on appeal. Eggleston v Bio-Medical Applications of Detroit, Inc., 468 Mich. 29, 32; 658 N.W.2d 139 (2003). The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. Frankenmuth Mutual Ins v Marlette Homes, Inc., 456 Mich. 511, 515; 573 N.W.2d 611 (1998). If the plain and ordinary meaning [*131] of the language is clear, judicial construction is neither necessary nor permitted. Sun Valley Foods Co v Ward, 460 Mich. 230, 236; 596 N.W.2d 119 (1999). However, if reasonable minds can differ regarding the meaning of a statute, judicial construction is appropriate. Adrian School Dist v Michigan Public School Employees Retirement System, 458 Mich. 326, 332; 582 N.W.2d 767 (1998). [***20] The rules of statutory construction also apply to ordinances, Gora v Ferndale, 456 Mich. 704, 711; 576 N.W.2d 141 (1998), and city charters, Detroit v Walker, 445 Mich. 682, 691; 520 N.W.2d 135 (1994).

If two statutes lend themselves to a construction that avoids conflict, that construction should control. <u>House Speaker v State Administrative Bd, 441 Mich. 547, 568-569; 495 N.W.2d 539 (1993)</u>. The construction should give effect to each "without repugnancy, absurdity, or unreasonableness. <u>Michigan Humane Society v Natural Resources Comm, 158 Mich. App. 393, 401; 404 N.W.2d 757 (1987)</u>. When two statutes or provisions conflict, and one is specific to the subject matter while the other is only generally applicable, the specific statute prevails. <u>Gebhardt v O'Rourke, 444 Mich. 535, 542-543; 510 N.W.2d 900 (1994)</u>.

B. Analysis

HN10 [The city of Livonia is organized and operates pursuant to the Michigan Home City Rule Act, [***21]
MCL 117.1 et seq. See Korash v Livonia, 388 Mich.
737; 202 N.W.2d 803 (1972). Chapter IV, § 24, of the Livonia City Charter states:

HN11[1] The Mayor shall have the power to veto, except as otherwise in this Chapter provided, which veto, with his reasons [*132] therefor in writing, must be made and filed with the City Clerk prior to the time of the next regular meeting of the Council, at which said meeting the Clerk shall present such veto or vetoes to

the Council; provided, however, that if the next regular meeting of the Council following the meeting or adjournment [**772] thereof, at which an ordinance or resolution was enacted occurs within seven (7) days of the adjournment, the Mayor shall continue to have the right to veto such ordinance or resolution until the next succeeding regular meeting of the Council. The Council may, only at said meeting, or at any adjournment thereof, reconsider the vote by which such proceedings were passed and adopted; and if it so elects, may, only at said meeting or at any adjournment thereof, readopt such proceedings by an affirmative vote of five (5) of the members elect, in which event the Mayor shall have no further right to veto, and in [***22] which event, all such proceedings, except ordinances, shall take effect on the day succeeding said meeting of the Council; and ordinances so passed shall become effective when published according to law, provided, however, that if the next regular meeting of the Council following the receipt of a veto occurs within seven (7) days of the same, the Council shall continue to have the right to readopt such proceedings in the manner herein prescribed at the next succeeding regular meeting of the Council. All resolutions and proceedings, not vetoed by the Mayor in the manner and within the time hereinabove specified, shall become effective on the date succeeding the date of the next regular meeting of the Council; and ordinances not so vetoed by the Mayor shall become effective when published and recorded according to law.

As the parties acknowledge, <code>HN12[1]</code> the charter grants broad veto power to the mayor. In <code>Livonia Drive-In Theatre Co v Livonia, 363 Mich. 438; 109 N.W.2d 837 (1961)</code>, the Supreme Court, interpreting the Livonia Charter, found that the mayor had veto power over not just legislation, but also over administrative matters decided by the city council. In that case, <code>[***23]</code> the <code>[*133]</code> plaintiff challenged the right of the mayor to veto a decision of the city council involving the issuance of a license to operate a drive-in theatre on industrially zoned property. In <code>Livonia Drive-In</code>, the Court ruled that the mayor had the authority to veto the decision and concluded that there was no valid approval of the plaintiff's application because the city council failed to override the mayor's veto.

Plaintiff argues that *Livonia Drive-In* is not controlling in this case because "[that] decision did not . . . deal with the question of whether the provisions of the CVZA [City and Village Zoning Act, *MCL 125.581 et seq.*] overrode the Charter." Since *Livonia Drive-In* was decided, the CVZA has been substantially revised, with the adoption,

in 1978, of <u>MCL 125.584a</u> and <u>MCL 125.584c</u>. [**773] According to plaintiff, "Sections 4a and 4c were added to the CVZA to ensure that administrative decisions, such as the waiver use decision involved in the instant case, were based on standards and procedures specified in the zoning ordinance, and were protected from arbitrary, standardless action." In plaintiff's view, "this case thus involves a clash between the provisions [***24] of a city charter and the provisions of the CVZA."

In support, plaintiff relies on *Korash, supra at 737*in which the city defended the use of initiative to amend the Livonia Zoning Ordinance on the ground that the charter provided broadly for enactment of ordinances by initiative. Ruling against the city, the Supreme Court in *Korash* held that, under the CVZA, a zoning ordinance could not be enacted by initiative because the CVZA, a state statute, prevails over the provisions of the city charter. *Id. at 743* (noting that the Home Rule City Act, *MCL 117.36*, states that, "No provision [*134] of any charter shall conflict with or contravene the provisions of any general law of the state.").

According to plaintiff, *Korash* controls the outcome of this case because § 4a of the CVZA directs that the zoning ordinance "shall specify . . . the body or official charged with reviewing special land uses and granting approval[,]" *MCL* 125.584a(1)(a), and "the procedures . . required for application, review, and approval[,]" *MCL* 125.584a(1)(c). *HN13* In accordance with the CVZA, the LZO specifies [***25] the procedures for application, review, and approval of a waiver use, and designates the body or official to review and approve waiver uses. Specifically, LZO § 11.03, pertaining to "waiver uses," provides, in pertinent part:

HN14[1] The following uses are permitted only if specifically recommended by the City Planning Commission and approved by the Council. The Commission shall recommend approval of the use only if it finds that the proposal for such use complies with the special requirements and regulations provided therefor and with the standards set forth in Section 19.06 of this ordinance. . . .

In relevant part, § 19.06 provides:

Planning Commission to review waivers or approval of conditional uses to be approved by the City Council, such waiver or use shall be approved only where the proposal complies with all of the special requirements for the waiver or use sought to be approved and that the

proposal, whether it is for a waiver or use approval, complies with all of the following general standards:

* * :

The Commission and/or City Council in acting on any request for waiver or approval of a conditional use, may attach any conditions [***26] to its approval which it determines as [*135] necessary to accomplish the reasonable application of the special requirements and the foregoing standards.

The zoning ordinance in question, § 11.03, essentially provides that an application for waiver use is to be reviewed by the planning commission, which then makes a recommendation to the city council for review and ultimate approval or rejection. 2 The relevant zoning ordinance is silent, however, about the role of the mayor in this process. Thus, plaintiff argues that because the zoning ordinance does not give the mayor a role in this process, "the Mayor has no authority to make his own determination as to whether the standards required by the zoning ordinance have been met, and the Mayor has no authority to set aside, reverse, or veto the determination by the City Council." Put in other terms. plaintiff asserts that "the zoning ordinance clearly grants the authority to grant approval for waiver uses to the City Council with no power whatsoever granted to the Mayor to overturn the City Council's approval." In this regard, plaintiff points out that defendants' brief in support of their motion for summary disposition concedes as [***27] much by admitting that the city council has "absolute discretion" and "exclusive authority" to grant waiver use approvals.

[**774] Plaintiff also maintains that <u>The Raven, Inc v</u> <u>City of Southfield, 69 Mich. App. 696; 245 N.W.2d 370 (1976)</u>, [*136] rev'd for reasons stated in dissent, <u>339 Mich. 853; 387 N.W.2d 925 (1977)</u>, <u>387 N.W.2d 925</u>, is dispositive, thereby supporting its view that the mayor had no veto authority in this case. In *The Raven* [***28], the Supreme Court, reversing the decision of this

² There does appear to be some conflict between the two sections in the LZO. Section 11.03 provides that approval of waiver uses requires both the planning commission's approval and the city council's approval. On the other hand, § 19.06 provides that the planning commission reviews waiver uses, which require the approval of city council. Reading the two sections of the LZO together, we believe that the planning commission's approval is not necessary for the final approval of a waiver use and that only the approval of city council is required.

Court, adopted this Court's dissenting opinion by Judge Danhof in concluding that the city council's four-to-three decision approving an application for a liquor license was final because the state statute, which gave the mayor no veto power, prevailed over the mayor's general veto power conferred by the city's charter. As plaintiff notes, Judge Danhof stated in his dissenting opinion that the state statute, which had "only one plain meaning," provided for "a delegation of exclusive legislative power to the City of Southfield's 'legislative body." Judge Danhof further stated that "the statute does not, and the city charter cannot, confer any authority upon the mayor of the city." The Raven, supra at 704.

We agree with plaintiff that "under the authority of *The* Raven and Korash and under MCL 117.36, the Mayor had no veto power, and the City Council's approval must stand." HN16[1] Under the CVZA, the zoning ordinance designates "the body or official charged with reviewing special land uses and granting approval." MCL 125.584a(1)(a). Sections 11.03 and 19.06 of the LZO, when read together, provide that city council ultimately [***29] makes the decisions regarding applications for special land uses, such as waiver uses. Although the Livonia City Charter grants broad veto power to the mayor, the LZO does not explicitly provide for a mayoral veto with regard to waiver use decisions. Given that the city council chose not to provide for a mayoral veto in the LZO when enacting the special land use provisions of the CVZA, we agree with plaintiff that [*137] the trial court erred in concluding that the mayor had the power to veto the city council's decisions approving the waiver uses.

The complete silence of the LZO regarding mayoral veto power of the waiver use decision of the Livonia City Council requires a judicial adherence to the state statute on the matter before this Court. The city officials in Livonia may wish to specifically provide for mayoral veto power in the future. But, the stark omission of such power is in sharp contrast with the specificity required by <u>MCL 125.584a(1)(a)</u>and (c) with which the Livonia City Council adhered consistently.

Contrary to defendants' claim, reliance upon *Korash* is not misplaced. Although *Korash* was decided before the 1978 amendments [***30] of the CVZA pertaining to special land uses, *Korash* remains controlling legal authority for the general proposition that a charter provision may not conflict with or contravene a state statute. Here, we agree with plaintiff that the charter provision pertaining to the veto power of the mayor

conflicts with the CVZA, which provides that if a city wishes to provide for special uses, it must do so "in [the] zoning ordinance" MCL 125.584a(1). Under Korash, the Livonia charter provision granting the mayor broad veto power does not override the CVZA, which indicates that the zoning ordinance must specify the body or official with the power to grant approvals for special land uses and the procedure for approval. In this instance, §§ 11.03 and 19.06 of the LZO specify that the city council is the body authorized to grant approvals for special land uses. Thus, even though the Livonia City Charter, adopted pursuant to the Home Rule City Act, provides [*138] the mayor with broad [**775] veto power over the decisions of city council, the CVZA prevails over the city charter provision, which may not conflict with "any general law of the state" under MCL 117.36 [***31] of the Home Rule City Act. Further, the CVZA, as a more specific statute, prevails over the Home Rule City Act in the event of a conflict concerning the Livonia City Charter provision regarding mayoral veto power. Gebhardt, supra at 542-543. Provisions of the LZO, namely, §§ 11.03 and 19.06, which were enacted pursuant to the CVZA, do not grant the mayor the power to veto the city council's approval of a special land use decision, such as a waiver use; thus, the city council's decisions approving the waiver uses in this case must stand as final decisions.

Further, contrary to defendants' contention, the power of the mayor to veto land use decisions of the city council does present a conflict with the procedures set forth in the CVZA because the zoning ordinance, § 11.03, provides no authority to the mayor to veto the city council's approval. Indeed, defendants' admission that "the subsequent veto by the Mayor served only to force a super-majority vote requirement on the part of the City Council in order to grant final approval of the petitions" is a clear recognition that [***32] the charter provision conferring veto power upon the mayor conflicts with the procedures set forth in the CVZA and expressed in the zoning ordinance, which only requires the city council's approval by a majority vote, not a supermajority vote.

In addition, contrary to defendants' claim, *The Raven* is, for relevant purposes, not distinguishable from the present case. In *The Raven*, the statute provided the exclusive authority to the city council, [*139] while in this case the CVZA, as an enabling statute, directs the zoning ordinance to provide the grant of authority. Although defendants point out that "the CVZA contains no state mandate as to the appropriate body or official to consider special land use requests and instead provides that cities shall make this determination by

designating such body or official in their zoning ordinance," the critical legal fact remains that, in both *The Raven* and this case, the grant of exclusive authority was unequivocal. In *The Raven*, the grant of exclusive authority came directly from the statute, whereas in this case it proceeds from a zoning ordinance enacted pursuant to the statute. In our view, this is a distinction without an essential [***33] legal difference because in both instances the exclusive authority is statutorily based.

Contrary to defendants' contention, Oakland Co Comm'r v Oakland Co Executive, 98 Mich. App. 639; 296 N.W.2d 621 (1980), is not applicable. In Oakland Co Comm'r, the issue involved the county executive's veto power under the optional unified form of county government adopted by Oakland County. Pursuant to MCL 45.561, the county executive may veto any ordinance or resolution adopted by the board of commissioners. In that case, the voters in Oakland County, as authorized by the statute, expressly chose to grant veto power to the county executive. In Oakland Co Comm'r, this Court held that the statutes in question were not in conflict, but were "completely harmonious," where "the ability of the board of commissioners to vote . . . does not conflict with the ultimate veto power of the county executive, nor with the board of commissioners' subsequent ability to override such vetoes. Id. at 652. Unlike Oakland Co [*140] Comm'r, where there was no conflict between the statutes, there is a conflict between the statutes in question [***34] here (the CVZA and the Home Rule City Act). As plaintiff points out, "the applicable statute authorized the City to designate in the zoning ordinance the body or official empowered to grant or deny [**776] special use approval and to specify the procedures applicable. The City could have chosen to provide in its zoning ordinance for a role for the mayor in the special use process, but it chose not to." Moreover, as plaintiff rightly argues, Oakland Co Comm'r is actually consistent with The Raven in that "both cases stand for the proposition that there is no inherent veto power, and that one must look to the controlling statute."

Finally, as plaintiff notes in its supplemental brief, this Court's recent decision in <u>Harbor Telegraph 2103, LLC v</u> <u>Oakland Co Bd of Comm'rs, 253 Mich. App. 40; 654 N.W.2d 633 (2002)</u>, "while not directly on point, is instructive." In <u>Harbor Telegraph</u>, this Court stated that "the clear and unambiguous language of <u>MCL 45.561</u> inescapably leads to our conclusion that the county executive possessed the authority to veto the board of commissioners' detachment resolution . . . " <u>Id. at 54.</u>

As plaintiff points [***35] out, "the executive veto is a creature of statute" and does not exist unless the statute creates it. The reasoning, as applied to the present case, is that because there is no inherent veto power, one must look to the controlling statute to determine whether veto power has been granted. Thus, because neither the CVZA nor the zoning ordinance explicitly granted veto power to the mayor regarding special land use decisions, the [*141] mayor did not have the power to veto the city council's approval of the waiver uses in this case.

V. Conclusion

The mayoral veto issue is dispositive of this appeal. Plaintiff's remaining issues are based on the supposition that the mayor did have veto power and, because we find that he did not, we decline to reach the remaining issues. Accordingly, we reverse the trial court's order dismissing plaintiff's complaint. The mayor had no power to veto the city council's special land use decisions; therefore, we remand for entry of a judgment granting plaintiff's motion for summary disposition under MCR 2.116(I), affording it the relief requested in its complaint, specifically a declaration that the waiver use approvals granted by the city council have full [***36] force and effect and an order directing defendants and their agents to issue "a certificate of occupancy and such other approvals and permits as are required to permit the operation of the proposed Hooters restaurant within the restaurant portion of the premises upon presentation of plans which comply with the City's building code."

Reversed and remanded for entry of an order granting plaintiffs' motion for summary disposition under <u>MCR</u> 2.116(I). We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ Richard Allen Griffin

/s/ Bill Schuette

End of Document

ATTACHMENT 3

VERIFIED STATEMENT OF HARLEY SCHOLTZ

- I am the sole member of HSS Financial LLC. HSS Financial closed on its purchased of Harley's Gentlemen's Club located at 105 N. Phelps Street, Decatur, Michigan ("Harley's) on March 28, 2013.
- 2. When HSS Financial purchased Harley's, Harley's was operating as a topless, gentlemen's club and bar; and my wife, Jennifer Scholtz, and I continued to operate Harley's as a topless bar until March 16, 2020, when Harley's was shut down by Governor Whitmer's first COVID-19 Executive Order.
- 3. My wife and I decided to keep Harley's closed during the COVID-19 epidemic due to liability and staffing concerns, as well as concerns about being able to operate at a profit while complying with social distancing or other COVID-19 restrictions in place during Michigan's attempts in 2020 and early 2021 to reopen Michigan bars and other indoor gathering establishments. That includes Governor Whitmer's attempts to reopen indoor gathering establishments with COVID-19 restrictions from June 8, 2020 to July 29, 2020 and then again from September 25, 2020 to November 15, 2020, as well as the Michigan Department of Health and Human Services ("MDHHS") attempt to reopen the same establishments with COVID-19 restrictions on February 1, 2021.
- 4. Harley's therefore remained closed from March 16, 2020 until June 22, 2021, when the MDHHS rescinded Michigan's COVID-19 restrictions applicable to Harley's and other indoor gathering establishments
- Instead of reopening Harley's in June of 2021, after the MDHHS rescinded its
 COVID-19 restrictions, my wife and I decided sell the Harley's business and its property at 105
 N. Phelps.
- I started talking to realtors and brokers about potential buyers for Harley's before
 the COVID-19 restrictions were lifted and dating back to at least November of 2020 and had

Harley's listed for sale with Well-Rooted Commercial Real Estate from November of 2021 until April 2022 and with Callender Commercial since April 2022.

- 7. My wife and I never intended to abandon the right to continue to operate, or to pursue a buyer to reopen, a topless bar at the Harley's; and have never stopped pursuing buyers wanting to continue such an operation on-site since I started pursuing potential buyers for Harley's back in November of 2020.
- 8. My wife and I have paid to keep the liquor license and topless activity permit for Harley's current with Michigan Liquor Control Commission; and have put both into escrow in anticipation of selling Harley's to a buyer wanting to reopen topless bar operations on-site.
- 9. Harley's remains set up to operate, and has all the fixtures and furniture, to continue operations as a topless, gentlemen's club.
- 10. My wife and I have considered selling and marketed Harley's to buyers wanting to convert the property to other uses, and made inquiries with the village about the possibility of selling to prospective buyers wanting to convert Harley's into a marijuana provisions center; but such efforts and inquiries were to explore the possibility of selling Harley's for another use and were not the result of any decision to stop, or not pursue buyers, to continue the topless bar use that Harley's is currently licensed and set up for.
- 11. In and around March of 2022, my wife and I made inquiries with the village about the possibility of the Harley's property being converted to a marijuana provisions center after receiving a letter of intent from a buyer wanting to buy the property and convert it to such a use. Those inquiries, however, did not go any further, as the village told us that it had reached the maximum number of marijuana provisions centers allowed under its zoning ordinance.

I certify that the above statements are true to the best of my knowledge.

Harley Scholtz

VERIFIED STATEMENT OF JENNIFER SCHOLTZ

- My husband, Harley Scholtz, is the sole member of HSS Financial LLC, which purchased Harley's Gentlemen's Club located at 105 N. Phelps Street, Decatur, Michigan ("Harley's") in 2013.
- 2. When HSS Financial purchased Harley's, Harley's was operating as a topless, gentlemen's club and bar; and my husband and I continued to operate Harley's as a topless bar until March 16, 2020, when Harley's was shut down by Governor Whitmer's first COVID-19 Executive Order.
- 3. My husband and I decided to keep Harley's closed during the COVID-19 epidemic due to liability and staffing concerns, as well as concerns about being able to operate at a profit while complying with social distancing and/or other COVID-19 restrictions in place during Michigan's attempts in 2020 and early 2021 to reopen Michigan bars and other indoor gathering establishments. That includes Governor Whitmer's attempts to reopen indoor gathering establishments with COVID-19 restrictions from June 8, 2020 to July 29, 2020 and then again from September 25, 2020 to November 15, 2020, as well as the Michigan Department of Health and Human Services' ("MDHHS") attempt to reopen the same establishments with COVID-19 restrictions on February 1, 2021.
- 4. Harley's therefore remained closed from March 16, 2020 until June 22, 2021, when the MDHHS rescinded Michigan's COVID-19 restrictions applicable to Harley's and other indoor gathering establishments.
- Instead of reopening Harley's in June of 2021, after the MDHHS rescinded its
 COVID-19 restrictions, my wife and I decided to sell the Harley's business and its property at 105
 N. Phelps.
- 6. My husband started talking to realtors and brokers about potential buyers for Harley's before the COVID-19 restrictions were lifted and dating back to at least November of 2020; and Harley's has been listed for sale with Well-Rooted Commercial Real Estate from

November 2021 through April 2022 and with Callender Commercial since April 2022.

7. My husband and I never intended to abandon the right to continue to operate, or to pursue a buyer to reopen, a topless bar at Harley's; and have never stopped pursuing topless bar buyers since November of 2020.

8. My husband and I have paid to keep the liquor license and topless activity permit for Harley's current with Michigan Liquor Control Commission; and have put both into escrow in anticipation of selling to a buyer wanting to reopen topless bar operations at Harley's.

9. Harley's remains set up to operate, and has all the fixtures and furniture, to continue operations as a topless, gentlemen's club.

10. My husband and I have considered selling and marketed Harley's to buyers wanting to convert the property to other uses, and made inquiries with the village about the possibility of selling to prospective buyers wanting to convert Harley's into a marijuana provisions center; but those efforts and inquiries were for the purposes of exploring the possibility of selling Harley's for another use and were not the result of any decision to stop, or not pursue buyers, to continue the topless bar use that Harley's is currently licensed and set up for.

11. In and around March of 2022, my husband and I made inquiries with the village about the possibility of the property being converted to a marijuana provisions center after receiving a letter of intent from a buyer wanting to buy the property and convert it to such a use. Those inquiries, however, did not go any further, as the village told us that it had reached the maximum number of marijuana provision centers allowed under its zoning ordinance.

I certified that the above statements are true to the best of my knowledge.

Jenniter Scholtz

VALLACHMENT 4

VERIFIED STATEMENT OF ALEXIA VENEZIA

1. I am the Co-Managing Partner and Chief Executive Officer and a licensed real

estate sales associate at Well-Rooted Real Estate located in Troy, Michigan.

2. I was hired by HSS Financial LLC to market and sell the business assets

(including, liquor license and topless activity permit) and property known as Harley's

Gentlemen's Club located at 105 N. Phelps Street, Decatur, Michigan ("Harley's") from around

November 2021 until April 2022.

At Harley's direction, I marketed and pursued deals with buyers wanting to

continue to use Harley's as a topless, gentlemen's bar, as well as buyers wanting to convert

Harley's to other uses. That includes marketing Harley's to buyers wanting to pursue the

possibility of converting Harley's into a cannabis business.

4. During the time I represented Harley's, Harley's continued to be set up to

operate, and continued to have all the fixtures and furniture, to continue topless bar operations

onsite.

I certified that the above statements are true to the best of my knowledge.

Alexa Venezia Sep 06 2022 Alexa Venezia

VERIFIED STATEMENT OF ERIC BOLLES

- 1. I am a commercial real estate sales agent at Callander Commercial and was hired by HSS Financial LLC to market and sell the business assets and property known as Harley's Gentlemen's Club located at 105 N. Phelps Street, Decatur, Michigan ("Harley's") and have served as Harley's agent for the sale of its business and the 105 N. Phelps property since April 2022.
- 2. It is my opinion that the most likely candidate to acquire the subject property will likely want to continue to operate Harley's as a topless, gentlemen's club.
- 3. Alternatively, Seller has indicated they are amenable to exploring a sale to a prospective Buyer that seeks to convert the use, to any and all uses including but not limited to traditional office, retail, restaurant, bar, cannabis, etc.

I certified that the above statements are true to the best of my knowledge.

Eric Bolles

ATTACHMENT 5

----- Forwarded message -----

From: Joe Kline < ikline@safebuilt.com > Date: Fri, Aug 19, 2022 at 11:31 AM

Subject: RE: Harleys Gentlemens Club 105 N Phelps To: Jennifer Scholtz < jenniferscholtz 1992@gmail.com >

Hello,

You will need to appeal this decision if you disagree with the determination. At that time you can dispute the whether or not the use was abandoned.

Sincerely,

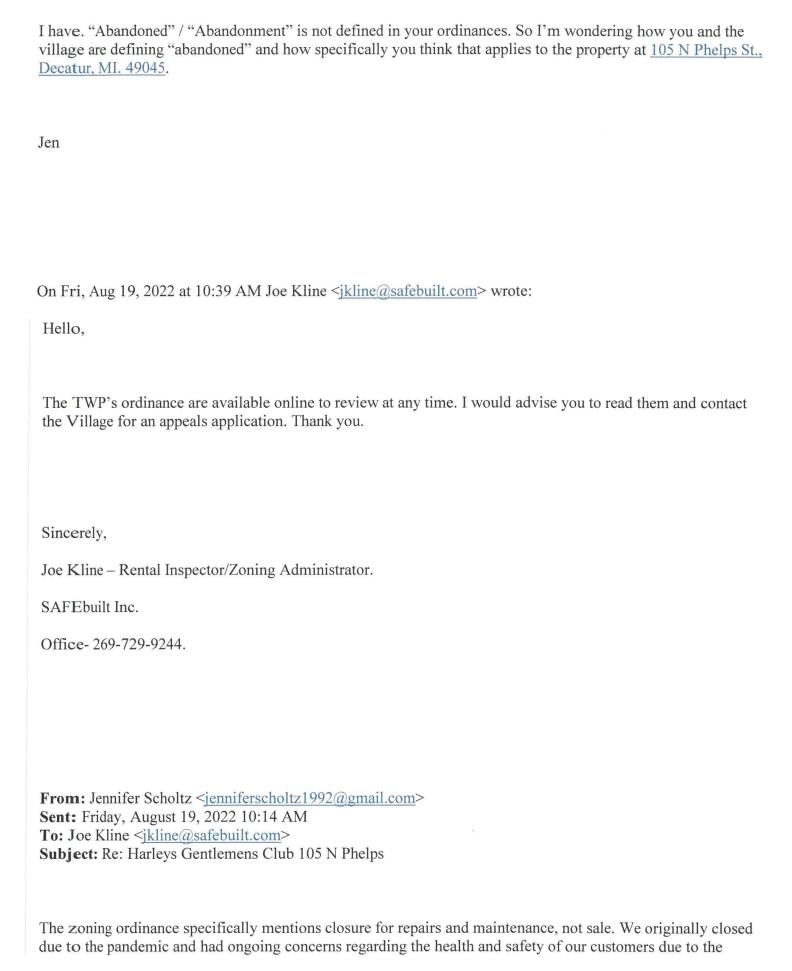
Joe Kline – Rental Inspector/Zoning Administrator.

SAFEbuilt Inc.

Office- 269-729-9244.

From: Jennifer Scholtz < jenniferscholtz1992@gmail.com > Sent: Friday, August 19, 2022 10:58 AM
To: Joe Kline < jkline@safebuilt.com >

Subject: Re: Harleys Gentlemens Club 105 N Phelps



nature of the business. We looked into selling as a provision center and once we received a LOI in March that was when the village manager informed us of the changes, mind you this was after he had spoke with my husband on the topic in person on two previous occasions. So we no longer had that offer Available to us and Now that we have a potential offer for the topless establishment you are notifying us that you consider the business abandoned.
Please send me the Townships definition of abandoned as it is currently defined in the ordinances
Jen
On Fri, Aug 19, 2022 at 9:47 AM Joe Kline < jkline@safebuilt.com > wrote: Hello,
We are not questioning any of the terms or conditions of your state license or whether the property itself was abandoned. We are addressing the "use" of the property. The state license has its own set of rules, regulations, and guidelines for the use of the property. The Village also has its own use rules, regulations, and guidelines set forth in the zoning ordinance which was outlined in my letter to you. It's the local zoning ordinance that we are addressing currently. Please feel free to appeal this decision to the zoning board of appeals if you disagree with current decision regarding your property.
Sincerely,
Joe Kline – Rental Inspector/Zoning Administrator.
SAFEbuilt Inc.
Office- 269-729-9244.

From: Jennifer Scholtz < jenniferscholtz1992@gmail.com > Sent: Thursday, August 18, 2022 3:48 PM

To: Joe Kline < jkline@safebuilt.com>

Subject: Harleys Gentlemens Club 105 N Phelps

Mr. Kline

In response to your letter dated TODAY 8-18-22, The property located at <u>105 N Phelps</u> has not been abandoned and has been listed for sale with various real estate agents as of November 2020. Additionally I reached out to the State licensing department and specifically asked about license escrow restrictions on topless licenses attached is the response.

Licensees

Licensee Details

Licensee Name

HARLEY'S CABARET, INC.

Doing Business As (DBA)

Business ID

230973

Local Governmental Unit (LGU)

DECATUR VILLAGE

Status

Escrow

County

VAN BUREN

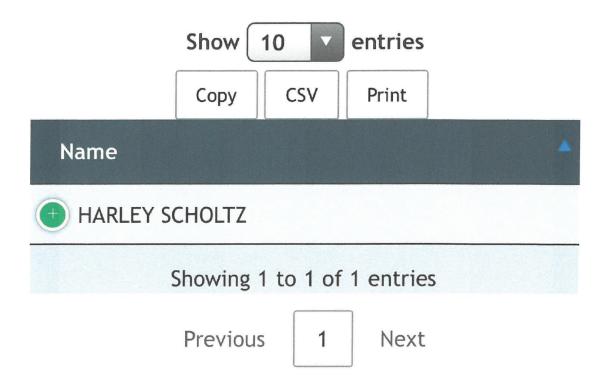
Address

105-107 N Phelps StDecatur, MI 49045-1008

Phone

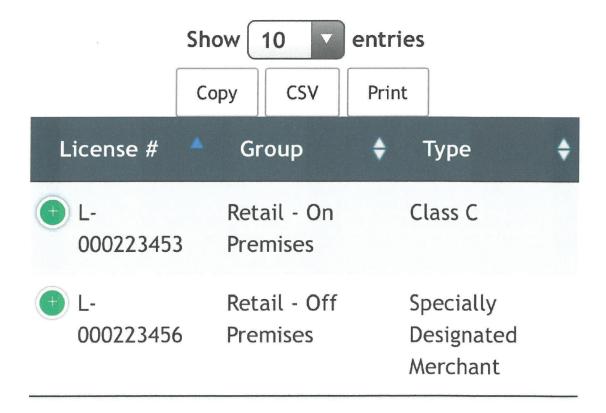
(269) 423-7567

Subordinates



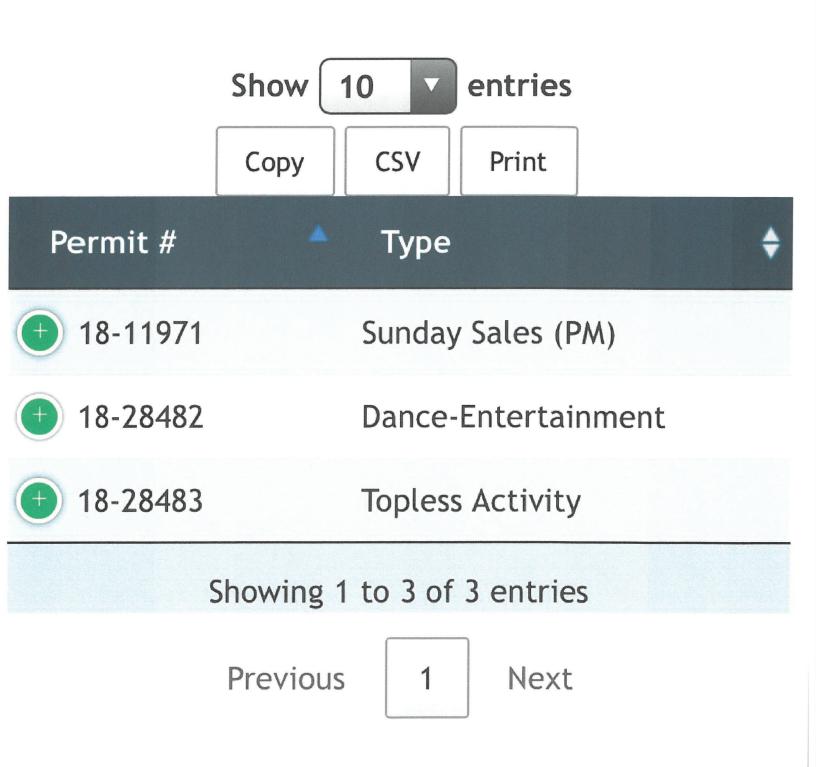
Licenses

To view details of a license, please click the obutton to expand the license details.



Permits

To view details of a permit or permission, please click the obsultion to expand the permit or permission details.



Michigan Liquor Control Commission

525 W Allegan St | Lansing | Michigan 48913

Date Produced Apr-14-2022

*MLCC Company ID 9044030366 - Please ensure your financial institution has this company ID if they require a company ID to process ACH Transactions. Failure to make these arrangements could result in your payment being returned unpaid.

*All submitted payments are pending until honored by your financial institution. For verification that your submitted payment has been paid, please contact your financial institution.

Confirmation # : 22041407240618

Receipt #

: R-1384947

Payment

Amount : \$790.00

Payment

Method : eCheck

Receipt

Paid By

: Jennifer Scholtz

Effective

Date : Apr-14-2022

Fee Payments

Transaction Fee	Туре	Fee Amount	Payment Amount	Related To	Business ID
02025035	Sunday Sales (Sunday Sales Pm)	\$90.00	\$90.00	License: L-000223453 Permit: 18-11971	230973
				License Renewal: RN-22-13402	
02025041	Retail Renewal (Current License Or Banquet Facility Permit)	\$100.00	\$100.00	License: L-000223456	230973
				License Renewal: RN-22-13402	
02025045	Retail Renewal (Current License Or Banquet Facility Permit)	\$600.00	\$600.00	License: L-000223453	230973
				License Renewal: RN-22-13402	

ATTACHMENT 6

----- Forwarded message -----

From: Jennifer Scholtz < jenniferscholtz 1992@gmail.com >

Date: Fri, Aug 19, 2022 at 12:39 PM Subject: Re: Lot next to Harleys

To: Christopher Tapper < ctapper@decaturmi.us >

What timeframe do you have to file an appeal in?

On Fri, Aug 19, 2022 at 12:04 PM Christopher Tapper < ctapper@decaturmi.us > wrote:

From: Christopher Tapper < ctapper@decaturmi.us >

Sent: Friday, August 19, 2022 12:03 PM

To: Jennifer Scholtz < jenniferscholtz1992@gmail.com > Cc: jkline@safebuilt.com < jkline@safebuilt.com >

Subject: Re: Lot next to Harleys

Jennifer.

Please see the following attachment for a copy of the zoning board of appeals application. Copies of forms and applications can be found on the Village of Decatur website also.

Thank you, Christopher Tapper Village Manager Village of Decatur

From: Jennifer Scholtz < jenniferscholtz1992@gmail.com >

Sent: Friday, August 19, 2022 11:48 AM

To: Christopher Tapper < ctapper@decaturmi.us>

Subject: Re: Lot next to Harleys

Please send application for appeal.

On Thu, Aug 18, 2022 at 3:35 PM Jennifer Scholtz < <u>jenniferscholtz1992@gmail.com</u>> wrote: This was my correspondence with the State of Michigan date 3-10-2021

Jennifer Scholtz and Harley Scholtz



The Topless Activity Permit that is part of the State of Michigan liquor license may remain in escrow as long as the liquor license is in escrow. That limit, as you know, is up to 5 licensing years. There is not a oneyear escrow limit for only Topless Activity Permits. The license and permits for Harley's Cabaret, Inc. were placed into escrow on June 26, 2020. Based on the way licensing years are calculated, this license and its permits, including the Topless Activity Permit, may remain in escrow until April 30, 2026.

On Thu, Aug 18, 2022 at 2:57 PM Jennifer Scholtz < <u>jenniferscholtz1992@gmail.com</u>> wrote: Property was not abandoned it has been listed for sale with various agents since November 2020

On Thu, Aug 18, 2022 at 2:26 PM Christopher Tapper < ctapper@decaturmi.us > wrote: Jen,

Thank you for reaching out. Please see the following attachment for the Village of Decatur's response, to your inquiry.

Christopher Tapper Village Manager Village of Decatur

From: Jennifer Scholtz < jenniferscholtz1992@gmail.com >

Sent: Wednesday, August 17, 2022 10:45 AM

To: Christopher Tapper < ctapper@decaturmi.us>

Subject: Re: Lot next to Harleys

Good morning Christophe,

We have a company that is still interested in Harleys for a provision center, we also are expecting an offer this week from an individual who plans on keeping it as a topless establishment. Before excepting the offer I wanted to confirm that nothing has changed regarding the green zone licensing cap and that the village is not willing make an exception for the Harleys location. At this point it doesn't matter to us one way or the other, the purchase price is the same regardless.

Thanks for your time

Jen

On Fri, Apr 8, 2022 at 8:55 AM Christopher Tapper < ctapper@decaturmi.us> wrote: Good morning Jennifer,

I wanted to reach back out to you after our meeting.

I did wanted to provide you with a name of a business owner who is looking to purchase a liquor license. His name is Paul Singh who owns the Marathon gas station in the Village of Decatur. His contact number is 269-207-7169.

Thank you again for taking the time,

Christopher Tapper Village Manager Village of Decatur From: Christopher Tapper < ctapper@decaturmi.us >

Sent: Sunday, March 20, 2022 1:50 PM

To: Jennifer Scholtz < jenniferscholtz1992@gmail.com >

Subject: Re: Lot next to Harleys

Great! See you then

Christopher Tapper Village Manager, Village of Decatur 269-423-6114

From: Jennifer Scholtz < jenniferscholtz1992@gmail.com >

Sent: Sunday, March 20, 2022 12:54:28 PM
To: Christopher Tapper < ctapper@decaturmi.us>

Subject: Re: Lot next to Harleys

Okay. I'll plan on arriving between 9:30-10am

On Sun, Mar 20, 2022 at 11:41 AM Christopher Tapper < ctapper@decaturmi.us > wrote: Anytime between 7:00-11:00 a.m.

Christopher Tapper Village Manager, Village of Decatur 269-423-6114

From: Jennifer Scholtz < jenniferscholtz1992@gmail.com >

Sent: Sunday, March 20, 2022 11:40:21 AM

To: Christopher Tapper < ctapper@decaturmi.us >

Subject: Re: Lot next to Harleys

That's good what time?

On Sun, Mar 20, 2022 at 11:25 AM Christopher Tapper < ctapper@decaturmi.us> wrote: Does Wednesday morning work?

Christopher Tapper Village Manager, Village of Decatur 269-423-6114

From: Jennifer Scholtz < jenniferscholtz 1992@gmail.com>

Sent: Sunday, March 20, 2022 11:18:28 AM **To:** Christopher Tapper < ctapper@decaturmi.us>

Subject: Re: Lot next to Harleys

Sure. What day and time works best for you?

Jen

On Sun, Mar 20, 2022 at 11:01 AM Christopher Tapper < ctapper@decaturmi.us > wrote:

Jen,

Thank you for the inquiry. I would be interested in a follow up conversation regarding these topics.

Are you available to have a meeting regarding this topic? I have some availability this week if you wanted to further this discussion.

Christopher Tapper Village Manager, Village of Decatur 269-423-6114

From: Jennifer Scholtz < jenniferscholtz1992@gmail.com >

Sent: Sunday, March 20, 2022 10:48:49 AM
To: Christopher Tapper < ctapper@decaturmi.us>

Subject: Lot next to Harleys

Hello Sir

I noticed the other night that Roger (auto parts store) was putting up a fence around a portion of the vacant lot next to Harleys. Was that portion sold to him and if so is the portion next to Harleys available for purchase? We've had several sales opportunities fall through due to parking and if that space was turned into a parking lot for our building I believe we can go back to previous potential buyers that were interested and possibly get an offer.

Thank you for your time

Jen



Attorney Memorandum

Intended for Public Release

To: Village of Decatur Zoning Board of Appeals (ZBA)

From: Nick Curcio, Village Attorney

Re: Appeal Regarding Abandonment of Nonconforming Use

Harley's Gentlemen's Club - 105 N. Phelps Street

Date: October 18, 2022

At its meeting of November 7, 2022, the ZBA will consider an appeal filed by HSS Financial, LLC, which is the record title owner of the property at 105 N. Phelps Street ("Property"). The application is signed by Mr. Harley Scholtz, who is the registered agent for HSS. The application further indicates that Mr. Scholtz and his wife Jennifer owned and operated a topless bar known as Harley's Gentleman's Club on the property from 2013 to 2020, under a state liquor license issued to an entity called Harley's Cabaret, Inc. Through the appeal, Mr. and Mrs. Scholtz are challenging zoning administrator Joe Kline's determination that they abandoned the right to continue using the Property as a topless bar by closing it in 2020 and indicating a desire to transition to other uses.

This memo provides guidance to the ZBA regarding the legal standards to be used in considering the appeal. Because the Michigan Zoning Enabling Act (MZEA) charges the ZBA with the responsibility of deciding zoning appeals, it would be inappropriate for me to opine on the ultimate issue of whether Mr. Kline's determination should be upheld. Rather, my intent is to explain the applicable law in order to assist the ZBA in making that determination. Further, part 2 below provides guidance regarding the mechanics of rendering a decision on the appeal.

1. Legal Standards

In 2017, the Village of Decatur adopted new zoning regulations that prohibit sexually oriented businesses within 1,000 feet of residences, parks and churches. In light of these new regulations, the topless bar that had historically been operated at the Property no longer complies with the zoning ordinance.

The MZEA provides that "[i]f the use of a dwelling, building, or structure or of the land is lawful at the time of enactment of a zoning ordinance or an amendment to a

¹ Zoning Ordinance § 42-139(2)-(3).

zoning ordinance, then that use may be continued although the use does not conform to the zoning ordinance or amendment." This rule is known as the doctrine of lawful nonconforming uses or, in layman's terms, "grandfathering." The ability to continue a lawful nonconforming use is a property right that a municipality cannot terminate simply by adopting a new ordinance. Rather, a municipality may only terminate a lawful nonconforming use by purchasing the property right from the property owner or acquiring it through eminent domain.³ Additionally, a nonconforming use may be abandoned by the property owner, and after abandonment the owner no longer has the right to resume the use. Together, these rules balance the rights of the property owner with the municipality's interest in zoning compliance. As courts have explained, "[o]ne of the goals of zoning is the eventual elimination of nonconforming uses, so that growth and development sought by ordinances can be achieved."5

In disputes regarding the continuation of nonconforming uses, the municipality bears the burden of establishing that the property owner intentionally abandoned the use. The two necessary elements of abandonment are: (1) that the owner had the intent to abandon the right to continue the use; and (2) an act or omission on the part of the owner that clearly manifests the voluntary decision to abandon. In other words, the fact that the owner has temporarily stopped using the property for a particular use is not, in and of itself, sufficient to establish abandonment. Accordingly, in a notable case cited by HSS, the Court of Appeals held that the owner of a hotel did not abandon the right to operate a hotel restaurant by ceasing restaurant operation for 5 years, because there was evidence in the record that the owner continuously sought potential partners to operate the restaurant throughout that period.9

While there are few other published Michigan cases discussing the doctrine of abandonment, a prominent commentator has reviewed decisions from across the

² MCL 125.3208(1).

³ See MCL 125.3208(3).

⁴ Dusdal v Warren, 387 Mich 354, 360 (1972).

⁵ Norton Shores v Carr, 81 Mich App 715, 720 (1978).

⁶ Dusdal, 387 Mich at 360.

⁷ Livonia Hotel, LLC v City of Livonia, 259 Mich App 116, 128 (2003).

⁸ Id.

⁹ Id. at 128-129.

country and described other types of evidence that might be relevant to establishing an intent to abandon:

Proof of a previous landowner's decision to dissolve a corporation considered a pre-existing nonconforming use and his choice to cease doing business sufficiently met [the burden of establishing intent to abandon]. Attempts to sell a property for uses other than nonconforming uses, statements of the owner not to return to the site in question, and removal of equipment integral to the nonconforming use are all acts that have been found equating to the abandonment of a nonconforming use. ¹⁰

This list of relevant evidence might be considered persuasive to a Michigan court reviewing an abandonment claim,¹¹ but it would not constitute binding precedent. Further, when there is conflicting evidence in the record regarding the owner's intent to abandon, a court would likely weigh the various pieces of evidence to determine which is ultimately more relevant and persuasive.¹² To the extent the ZBA finds conflicting evidence in this case, I would recommend that it thoroughly discuss each piece of evidence individually and indicate on the record why it views some pieces of evidence to be more important than others.

2. Rendering a Decision

After hearing public comment on the application and discussing the evidence, the ZBA should render its decision by motion. The MZEA provides: "The concurring vote of a majority of the members of the zoning board of appeals is necessary to reverse an order, requirement, decision, or determination of the administrative official or body." Accordingly, if one or more members of the ZBA believes that the zoning administrator erred in determining that HSS abandoned its nonconforming sexually oriented business use, the ZBA should consider a motion something like the following:

Motion to reverse the zoning administrator's August 18 determination that HSS abandoned the nonconforming use of the property at 105 N. Phelps Street because the evidence presented in HSS's application disproves the finding of

¹⁰ Salkin, Abandonment, Discontinuance and Amortization of Nonconforming Uses: Lessons for Drafters of Zoning Regulations, 38 Real Est LJ 486, 494 (2010).

¹¹ Notably, the Michigan Court of Appeals has previously cited other portions of Professor Salkin's article. See *Deer Lake Prop. Owners Ass'n v. Indep. Charter Twp.*, Case No 343965 (Mich App 2019).

¹² See, e.g., S & S Auto Sales, Inc v Zoning Bd for Stratford, 862 A2d 1204, 1211 (NJ Super 2004) ("Contrary manifestations may corroborate and substantiate the expressed intent to continue the nonconforming use. Such circumstances, pro or con, must be qualitatively weighed to determine whether the owner has met his or her burden of establishing a continuing and definite intention to continue the use.").

intent to abandon. The ZBA finds the following evidence particularly persuasive: [reference particular pieces of evidence such as: (1) statements from the owners and their real estate agents indicating that they marketed the property to buyers interested in continuing the topless bar use; (2) LARA documentation showing that the topless bar permit has been escrowed for future use; and/or (3) evidence indicating that the interior of the property is still set up for use as a topless bar].

If no member of the ZBA wishes to make a motion reversing the zoning administrator's decision, or if such a motion fails for lack of support, the ZBA could then consider an alternative motion to affirm. A motion to affirm might be something like the following:

Motion to affirm the zoning administrator's August 18 determination that HSS abandoned the nonconforming use of the property at 105 N. Phelps Street because the evidence presented in HSS's application and the zoning administrator's October 18 letter confirms the findings of nonuse and intent to abandon. The ZBA finds the following evidence particularly persuasive: [reference particular pieces of evidence such as: (1) the February 6, 2018 email in which Jennifer Scholtz stated that she did not like owning Harley's; (2) statements from the owners indicating that the business has been closed since March 2020; (3) statements from the Village Manager and Police Chief regarding discussions about using the property for other purposes and selling the liquor licenses separate from the property; (4) the real estate listing that refers to the property as a "former Gentlemen's Club" and does not list topless bar as a potential future use; (5) LARA documentation indicating that Harley's has not filed an annual report since 2020; and/or (6) LARA documentation indicating that Harley's liquor license is transferable to other properties and that no additional fee was paid to escrow the topless bar permit].

I will be in attendance at your November 7 meeting and can assist you in formulating any motion you would like to make, and can answer any legal questions you may have.



October 18, 2022

Village of Decatur Zoning Board of Appeals (ZBA) 114 N. Phelps Decatur, MI 49046

Re: Documentary Evidence for ZBA Appeal Harley's Gentlemen's Club – 105 N. Phelps

Dear ZBA members:

In a letter dated August 18, 2022, I notified Harley and Jennifer Scholtz that, if they were to sell their property at 105 N. Phelps Street, it could not be used as a topless bar because they had abandoned the right to that use pursuant to Section 42-301 of the zoning ordinance. As proof of abandonment, I cited the fact that Harley's Gentlemen's Club closed over two years ago, and that Mrs. Scholtz had repeatedly inquired to the Village about the possibility of using the property for other uses.

Mr. and Mrs. Scholtz, through a business entity known as HSS Financial, LLC, have appealed my determination of abandonment to the ZBA. In order to assist the ZBA in its consideration of the appeal, I am providing the following attachments as documentary evidence in support of my determination:

- A. An aerial photo from Google maps showing a church, a park, and residential dwellings within 1,000 feet of the property at 105 N. Phelps Street, in violation of the distancing requirements for sexually oriented businesses provided in section 42-139 of the zoning ordinance.
- B. An email dated February 6, 2018, from Jennifer Scholtz to former Village Manager Aaron Mitchell in which she states: "I'll be honest, I do not like owning this club and would like to sell or An option Harley is open to is changing the operation to a dispensary"
- C. Statement of Police Chief VanDerWoude regarding a conversation with Jennifer Scholtz in 2020 about the potential use of the property as a marijuana dispensary.
- D. Statement of Village Manager Chris Tapper regarding:
 - i. A conversation with Harley Scholtz on September 28, 2021, in which Mr. Scholtz indicated he intended to sell the property at 105 N. Phelps Street and asked if it could be used a marijuana business.
 - ii. A conversation with Jennifer Scholtz in April 2022 in which they discussed the possibility of selling/transferring the liquor license associated with Harley's Gentlemen's Club for use on another property in the Village, and then selling the property at 105 N. Phelps Street without an accompanying liquor license.
- E. A real estate listing from Callander Commercial that characterizes the property at 105 N. Phelps Street as a "Former Gentlemen's Club," and lists its potential uses as "Business / Multi-Use / Retail / To Be Determined." The real estate listing includes contact information for agent Eric Bolles, who provided a written statement in support of HSS's application.

- F. A printout from the Michigan Department of Licensing and Regulatory Affairs (LARA) website indicating that Harley's Cabaret, Inc. has not filed an annual report since May 2020. The Michigan Business Corporation Act requires that all active companies file an annual report by May 15 of each year, MCL 450.1911, and provides that failure to do so for 3 consecutive years results in the dissolution of the corporation, MCL 450.1922.
- G. A guidance document from the Michigan Liquor Control Commission (LCC) explaining the process for escrowing inactive licenses so that they can be renewed or sold in the future.
- H. A guidance document from the LCC explaining that the two types of licenses held by Harley's Cabaret, Inc. (Class C and Specially Designated Merchant) can be transferred to different properties within a municipality.

Because the liquor licenses are transferable, in my opinion the fact that Mr. Scholtz escrowed the licenses associated with Harley's Gentlemen's Club does not prove that he intended for future owners of the property to continue the topless bar use. This is particularly true because it appears that Mr. Scholtz did not have to pay any additional fee to escrow the topless bar permit that accompanies the liquor license (Permit 18-28483). Rather, the last page of attachment 5 of the appeal application shows that HSS paid three annual renewal fees in April 2022 to keep its licenses and permits in escrow: (1) a \$90 fee to renew its Sunday sales permit (Permit 18-11971); (2) a \$100 fee to renew its Specially Designated Merchant license (L-000223456); and (3) a \$600 fee to renew its Class C liquor license (L-000223453).

I will be in attendance at the hearing on November 7 and can answer any questions you may have about these materials at that time.

Sincerely,

Joe Kline, Zoning Administrator



October 18, 2022

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 - A conversation with Harley Scholtz on September 28, 2021, in which Mr. Scholtz indicated he
 intended to sell the property at 105 N. Phelps Street and asked if it could be used a marijuana
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 - ii. A conversation with Jennifer Scholtz in April 2022 in which they discussed the possibility of selling/transferring the liquor license associated with Harley's Gentlemen's Club for use on another property in the Village, and then selling the property at 105 N. Phelps Street without an accompanying liquor license.
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I will be in attendance at the hearing on November 7 and can answer any questions you may have about these materials at that time.

Sincerely,

Joe Kline, Zoning Administrator



amitchell@decaturmi.org

From:

Jennifer Scholtz < jenniferscholtz 1992@gmail.com>

Sent:

Tuesday, February 6, 2018 11:33 PM

To: Subject:

amitchell@decaturmi.org Harleys Gentlemen's Club

Mr. Mitchell,

Good Morning. It's my understanding that Decatur has no interest in participating in the commercial medical marijuana market despite surrounding townships openness to the idea. I understand the concerns surrounding the dispensary concepts however it is not nearly as concerning as our strip club and it's more profitable to the township. Annual dues alone is favorable. It's also less concerning for law inforcement because of laws in place preventing medicating on premises as well as limited hours of operation.

I'll be honest, I do not like owning this club and would like to sell or An option Harley is open to is changing the operation to a dispensary, he is willing to dissolve the entertainment license permanently if given a license to be a dispensary. This would secure the townships interest regardless of future purchases giving Decatur the comfort of knowing it can never be a strip club ever again with the additional comfort of knowing the owners (Harley and myself) will only work within the laws and bylaws of the medical marijuana Act.

I worked with the U.S Government, State of Michigan and U.S Military for 11 years. I am familiar with the concept of protocol, policy and procedures. I'm most comfortable working in an atmosphere of black and white.

Mr. Mitchell the strip club has been an unwanted entity in the Decatur community since day one. This can potentially be an opportunity to eliminate the entertainment entity perminantly. Perhaps Decatur would be open to a single dispensary and nothing more in the community if it gives them the opportunity to close the topless entertainment license.

With regards to the liquor license it can be shelved or sold but the entertainment portion is grandfathered to the building address .. it can't be sold and opened down the street. So when it's desolved it's gone forever. Food for thought....

If you would like to meet and discuss this opportunity for both Decatur and ourselves let me know

Respectfully,

Jennifer Scholtz

VERIFIED STATEMENT OF TOM VANDERWOUDE

- 1. I am the Police Chief for the Village of Decatur.
- 2. In late spring or early summer of 2020, Jennifer Scholtz came to Village Hall and asked me whether his property at 105 N. Phelps Street (the "Property") could be used as a marijuana business. I informed him that it could not under current Village ordinances.

I certify that the above statements are true to the best of my knowledge:

Tom VanDerWoude, Police Chief

Date: 10-17 2022

Attachment D

VERIFIED STATEMENT OF CHRIS TAPPER

1. I am the Village Manager for the Village of Decatur.

2. In September 2021, Harley Scholtz came to Village Hall and asked me whether the Village

had amended its ordinances in such a way as to allow a marijuana business to operate at his

property at 105 N. Phelps Street (the "Property"). I informed him that it had not. He then told me

that he was in the process of selling the Property.

3. In early April 2022, Jennifer Scholtz and I met, at her request, to discuss possible options

for future use of the Property. During that conversation, we discussed the possibility of Jennifer

and her husband selling the liquor license associated with Harley's Gentlemen's Club for use on

another property in the Village, and then selling the Property separately without a liquor license.

Ms. Scholtz indicated that she was interested in this possibility.

I certify that the above statements are true to the best of my knowledge:

Chris Tapper, Village Manager

Dated:/0/17__, 2022

Former Gentlemen's Club Liquor License Included!

Business / Multi-Use / Retail / To Be Determined For Sale 105 N Phelps Street Decatur, Michigan

Overview:

Formally a gentleman's club which drew large crowds from both local and afar. Dance floor, plenty of seating, gorgeous bar, locker room, VIP booths, and open basement with cooler etc. Two 5 ton AC units, located on roof, newer roof (19'), liquor license included which includes Sunday Service + beer to go!



Contact Information:

Eric Bolles

(269) 373-8108 [direct] (269) 535-4576 [mobile] ebolles@ccmichigan.com

Zachery VandeWeerd

(269) 384-8367 [direct] (269) 271-5090 [mobile] zvandeweerd@ccmichigan.com



Information:

County: Van Buren

Municipality: Decatur Village

Gross Size: 4,180 SF

Buildings / Units: 1 Building / 1 Unit

Building Levels: 1 Level

Building Levels: 1 Level

Total Acres: 0.09 Acres

Year Built: 1965

Construction: Block / Concrete

Sewer / Water: Public / Public

Heat Type / Source: Forced Air / Gas

Parking # / Type: 10 / Municipal

Restrooms: 2 / Common Area

Air Conditioning: Central Air
Utilities Attached: Gas and Electric
Utilities Available: All Public Utilities

RE Taxes / Year: \$2,786.75 / 2021

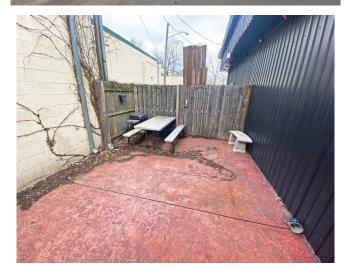
Sale Price:

\$299,000

PROPERTY PHOTOS







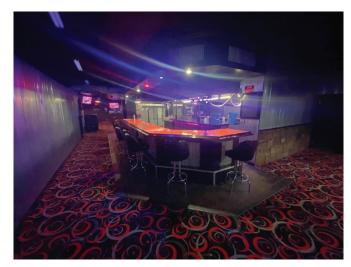


105 N Phelps Street | Decatur

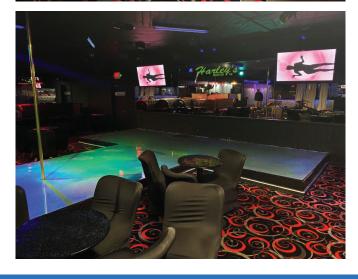




INTERIOR PHOTOS









105 N Phelps Street | Decatur





INTERIOR PHOTOS



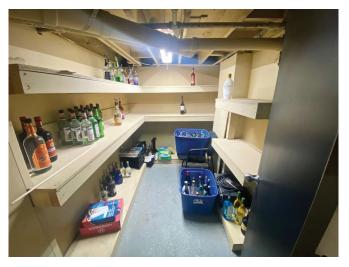






105 N Phelps Street | Decatur





Former Gentlemen's Club 105 N Phelps Street | Decatur

AERIAL PHOTOS





LOCATION AERIAL



Attachment F

Contact LARA Online Services News LARA Home MI.gov Corporations
Online Filing System **Department of Licensing and Regulatory Affairs**

ID Number: 800762708

Request certificate

Return to Results New search

Summary for: HARLEY'S CABARET, INC.

The name of the DOMESTIC PROFIT CORPORATION: HARLEY'S CABARET, INC.

Entity type: DOMESTIC PROFIT CORPORATION

Identification Number: 800762708 Old ID Number: 04719P

Date of Incorporation in Michigan: 10/18/2012

Purpose: All Purpose Clause

Term: Perpetual

Most Recent Annual Report: 2020 Most Recent Annual Report with Officers & Directors: 2018

The name and address of the Resident Agent:

HARLEY SCHOLTZ Resident Agent Name:

Street Address: 46847 WOODFIELD DR

Apt/Suite/Other:

MATTAWAN State: MI Zip Code: 49071

Registered Office Mailing address:

P.O. Box or Street Address:

Apt/Suite/Other:

City: State: Zip Code:

The Officers and	I Directors of	the Corporation:

Title Name		Address		
PRESIDENT	HARLEY SCHOLTZ	46847 WOODFIELD DR MATTAWAN, MI 49071 USA		
TREASURER	HARLEY SCHOLTZ	46847 WOODFIELD DR MATTAWAN, MI 49071 USA		
SECRETARY	HARLEY SCHOLTZ	46847 WOODFIELD DR MATTAWAN, MI 49071 USA		
DIRECTOR	HARLEY SCHOLTZ	46847 WOODFIELD DR MATTAWAN, MI 49071 USA		

Act Formed Under: 284-1972 Business Corporation Act

Total Authorized Shares: 60,000

■ Written Consent

View Assumed Names for this Business Entity

10/12/22, 4:10 PM 1 of 2

View filings for this business entity:	
ALL FILINGS	
ANNUAL REPORT/ANNUAL STATEMENTS	
ARTICLES OF INCORPORATION	
RESTATED ARTICLES OF INCORPORATION	
View filings	_
Comments or notes associated with this business entity:	_
	_

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2 of 2

Business Entity

Name: HARLEY'S CABARET, INC.

Order certified copies	Name of filing	Year filed	Date filed	Filing No.	View PDF
	ANNUAL REPORT	2020	05/06/2020	220271595180	220271595180.pdf, 2 pgs
	ANNUAL REPORT	2019	07/09/2019	201980101390	201980101390.pdf, 2 pgs
	ANNUAL REPORT	2018	08/15/2018	201889509530	201889509530.pdf, 1 pgs
	ANNUAL REPORT	2018	04/20/2018	201856335140	201856335140.pdf, 2 pgs
	ANNUAL REPORT	2017	05/19/2017		INTO001B0C0.TIF, 1 pgs
	ANNUAL REPORT	2016	12/21/2016		INTO0056FD0.TIF, 1 pgs
	ANNUAL REPORT	2016	11/01/2016		INT00044BD2.TIF, 1 pgs
0	ANNUAL REPORT	2015	04/13/2015		GSI02171231.TIF , 1 pgs
	ANNUAL REPORT	2014	03/25/2014		GSI01802246.TIF , 1 pgs
	ANNUAL REPORT	2013	11/15/2013		GSI01569016.TIF , 1 pgs

Note: Annual reports and annual statements that were filed more than ten years ago are not available through Business Entity Search. To order copies of annual reports or annual statements that were filed more than ten years ago, you may contact the Archives of Michigan at archives@michigan.gov or by calling (517) 335-2573.

Return to entity summary

Order filings

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1 of 1

Escrow Rules and Good Cause Requirements

(Authorized by administrative rules R 436.1047 and R 436.1107)

R 436.1107 - Renewal of license (Rule 7 of the Michigan administrative code)

- (1) A **license** that is not in active operation shall be placed in escrow with the Commission.
- (2) A licensee shall have only 5 licensing years after the expiration date of the escrowed license to put the license into active operation. If the licensee fails to put the license into active operation within 5 years after its expiration, then all rights to the license shall terminate unless the commission has received written verification of either of the following:
 - (a) That the license or an interest in the license is the subject of litigation or estate or bankruptcy proceedings in a court of competent jurisdiction.
 - (b) That the license was placed into escrow as a result of damage to the licensed premises by fire, flood, tornado or other natural event that makes the licensed premises unsuitable for the operation of the business and unsafe for public accommodation.
- (3) If the Commission extends the length of time for which a licensee may renew the license during the pendency of litigation or estate or bankruptcy proceedings or as a result of damage to the licensed premises for the reasons as stated in subrule (2) of this rule, then the licensee shall pay the required license fee for each elapsed licensing year before placing the license in active operation.
- (4) The Commission may extend the length of time for which a licensee may renew the license upon written order of the Commission after a showing of good cause.
- (5) Except as provided in subrule (3) of this rule, a license held in escrow with the Commission shall be renewed in the same manner as an active license, including payment of all required license fees, each year by April 30.
- (6) A licensee who places a license in escrow with the Commission shall be responsible for providing the Commission with current contact information, in writing, for all correspondence, which includes the name, mailing address, and telephone number.
- (7) The Commission shall provide or attempt to provide each licensee whose license is in escrow with a copy of this rule.
- (8) A license that is held in escrow with the Commission on the effective date of this rule begins the 5-year period allowed by subrule (2) of this rule on March 24, 2004.

Good Cause Requirements Pursuant to R 436.1107(4)

Commission consideration is required when a licensee needs an extension of time beyond the 5 year renewal/expiration period pursuant to R 436.1107(2). A request for extension of time beyond the 5 year limit requires a written showing of good cause by the license holder. <u>Failure by the licensee to provide this documentation may result in the denial of an extension beyond 5 years for lack of good cause shown, or could result in the cancellation of the license.</u>

A request for good cause for an escrow extension beyond 5 years should be submitted in writing to our office and include:

- 1. A detailed description of the future plans for activation of the license.
 - a) If the business will reopen under the current licensee, a business plan which details the time line, steps being taken for reopening and any renovation plans.
 - b) If the license is for sale, a copy of the current sales listing or other marketing documentation that includes the list price of the license.
 - c) A copy of the signed agreement to be used if you have found a buyer for your license.
- 2. Current escrow contact information must be on file pursuant to R 436.1107(6). As the holder of a liquor license it is your responsibility to maintain current contact information on file with our office which includes a contact name, mailing address, and telephone number. Failure to provide this information may result in the cancellation of the license.

Frequently Asked Questions (FAQ)

Question: My business is currently closed. What do I need to do with my license?

Answer: If your business is closed or will be closed for more than 30 days you need to submit your license document (along with the form LCC-108) to the Lansing offices of the Commission for escrow. As long as you continue to renew your license by April 30 every year, your license will remain on file. If you fail to renew the license it will expire and be cancelled - and cannot be reinstated.

(FAQ continued next page)

Frequently Asked Questions (FAQ) - Continued

Question: If I place my license in escrow what am I required to do with my alcoholic beverage inventory?

Answer:

You have a couple of different options available, depending on the type of license you hold. If you are selling your business, you can include the alcoholic beverage inventory in the sale of the business assets. Your beer and wine inventory can either be taken home for personal consumption or you can contact your wholesaler to see if they would be willing to take it back. You can also put in a request for your spirit inventory to be picked up by your Authorized Distribution Agent (ADA) and returned to the State for a refund, less 10%. If you are only closing temporarily or are requesting to move, you can either secure your alcoholic beverage inventory on the premises or make a written request to the Commission for permission to temporarily store your alcoholic beverage inventory in a secure, off site location.

Question: How long can I hold my license in escrow?

Answer:

Your license can be held in escrow for up to 5 years as long as you pay the license fee by April 30 annually. If the license is not renewed it will expire and be cancelled.

Question: I am remodeling; do I have to place my license in escrow?

Answer:

If you are not actively operating your business for more than 30 days you are required to submit your license document for escrow, with completed form LCC-108 in order to comply with R 436.1107(1).

Question: How do I get my license out of escrow? How long does it take?

Answer:

You can write to our office and request to have your license released from escrow. The time frame will vary, depending on how long your license has been in escrow. In some cases, our enforcement division may have to come out to your establishment and conduct an inspection prior the to the license release; our office would notify you of that requirement if that is the case. Plan to request a release of license from escrow several weeks in advance to avoid any potential interruptions in your business preparations.

Question: My license was cancelled for non-renewal; can I get it back or request a hearing?

Answer:

If your license is cancelled for non-renewal you would have to reapply for a different license. There is not a provision in the liquor control code that allows for a hearing to be conducted to reinstate a liquor license that was cancelled for non-renewal. To avoid this from happening, make sure that all of your mailing information stays current on file with our office to avoid unnecessary delays. All license renewal applications are mailed in February and are due by April 30 every year, regardless of whether or not your business is closed or you are operating.

Question: I see that I have to return my liquor license document to be placed in to escrow - what are those documents?

Answer

A liquor license is the contract between you and the State of Michigan that allows you to sell alcoholic beverages. This is a document that is renewed yearly. It will tell you the types of licenses and permits you hold, the name and address of your establishment, and the dates of the licensing year for which the license is valid.

Question: My license is issued under the provisions of MCL 436.1521a(1)(a) or MCL 436.1521a(1)(b). Can I place this license in escrow?

Answer:

If you go out of business the license must be surrendered to the Commission for cancellation. If you are closing temporarily to remodel or have a special circumstance that requires you to close for a specific period of time, you can submit a written request to the Commission for its consideration. There are cases where you will be able to temporarily escrow your license, subject to renewal requirements and regular communication with the Commission on the status of your license.

Question: My license has been in escrow for 5 years already. Will I be able to renew?

Answer:

You will need to submit a written request to the Commission for an extension beyond 5 years under R 436.1107(4). The written request must demonstrate good cause for the Commission to consider the request. For what "good cause" constitutes see the escrow rules and good cause requirements attachment.

Please note: After the fifth year of license renewal you will **not** receive any further renewal applications, unless you are approved for further extension beyond 5 years. To avoid cancellation of the license you must provide this written request with good cause in order to be considered for an extension of the escrow period.

Question: May I cancel any of my licenses or permits for which fees I must pay annual renewal fees and just renew the main license in escrow?

Answer:

If you hold any on-premises license, such as a Class C or B-Hotel license, or an off-premises Specially Designated Distributor license with which you hold a Specially Designated Merchant (SDM) license or you have permits for which an annual renewal fee is assessed, such as a Sunday Sales Permit, Banquet Facility Permit, Catering Permit, or additional bars, you may cancel the license and permits, leaving just the main license in escrow. Payment of the renewal fees for the main license will still be required annually while the license remains in escrow, but you will not pay the extra fees for the SDM license or permits. If you reactivate the license in the future and want the SDM license or permits added back to your main license, you will need to apply for them through the regular licensing process.



Michigan Department of Licensing and Regulatory Affairs
Liquor Control Commission (MLCC)
Constitution Hall – 525 W. Allegan, Lansing, MI 48933
Mailing Address: PO Box 30005, Lansing, MI 48909
Toll Free 866-813-0011 – www.michigan.gov/lcc

<u>License Location Transfer Requirements & General Information</u>

Many types of retailer liquor licenses may be transferred within a local governmental unit or between local governmental units within the same county, under certain provisions of the law. A current licensee may apply to transfer a license to a new location or an applicant may request a location transfer in conjunction with a request to transfer ownership of a license.

Retailer License Location Transfer Requirements

Off-Premises License Location Transfers

- The location of a Specially Designated Distributor (SDD) license may be transferred within a local unit of government or between local units of government in the same county.
- Resort Specially Designated Distributor licenses issued under MCL 436.1531(5) cannot be transferred to a different location.
- The location of a Specially Designated Merchant (SDM) license may be transferred within a local unit of government or between local units of government in the same county, unless the SDM license was originally issued after January 4, 2017 under a subsection of MCL 436.1533 that prohibits it being transferred by location:
 - A SDM license issued under the "two-mile" waiver under MCL 436.1533(6).
 - A SDM license issued in conjunction with an on-premises licensed under MCL 436.1533(5)(a).
 - A SDM license issued to an establishment that is at least 20,000 square feet and at least 20% of gross receipts are derived from the sale of food under MCL 436.1533(5)(b)(i).
 - A SDM license issued to an establishment that is a pharmacy under MCL 436.1533(5)(b)(ii).

On-Premises License Location Transfers

- The location of an on-premises licenses (Class C, Tavern, B-Hotel, or A-Hotel)
 may be transferred within a local unit of government or between local units of
 government in the same county. A license to be transferred between
 governmental units must be placed into escrow before the transferred license can
 be issued to the applicant at the new location.
- On-premises resort licenses issued under MCL 436.1531(3) and (4) and onpremises licenses issued under the law for specific locations or purposes may not be transferred from one location to another.

• On-premises resort licenses issued under MCL 436.1531(2) may be transferred anywhere within the state.

How to Apply

All applicants requesting to transfer the location of a retail liquor license must submit the following:

Application Form

- For on-premises licenses: On-Premises Retailer License & Permit Application (LCC-100a)
- For off-premises licenses: <u>Off-Premises Retailer License & Permit Application</u> (LCC-100b)
- Inspection Fee A \$70.00 nonrefundable inspection fee is required for each license requested in an application. For example, if an applicant has requested to transfer a Class C license that has a Specially Designated Merchant license in conjunction, the inspection fee would be \$140.00.
- Property Document Applicants must provide documentation that demonstrates they will have control over the property that comprises the proposed licensed premises. Property documents include deeds, land contracts, and lease agreements.
 - A provision to reassign the license in the event of a default on a land contract or termination of a lease agreement may be included, but may only provide for the reassignment subject to Commission approval.
 - If the applicant is a company and its members or stockholders own the real estate as individuals or under another company, a lease agreement is needed.
 - If the applicant is an individual and he or she owns the real estate with a spouse or someone else who will not be named on the license, a lease between the applicant and the owners of the real estate is needed.

Licensing Process

The Licensing Division reviews the application and corresponding documents for completeness and verifies the appropriate fees have been received. If additional documents, fees, or corrections to documents are needed, Licensing will notify the applicant. Once all the necessary documents have been received Licensing will submit the request to the Enforcement Division for its investigation.

The Enforcement Division will contact the applicant to schedule an interview with the applicant (and current licensee for license transfers). At this meeting an investigator will review the purchase agreement, financial documents, property documents, and other items with the applicant. After the interview, the investigator will prepare a report for the Commission regarding the investigation and submit the request back to Licensing for further processing.

Licensing reviews the report from Enforcement and any additional documents received during the interview process. The request is prepared for the Commission to consider and placed on a docket for an upcoming licensing meeting.

The Commission considers the request, including the liquor license operating history of the applicant (if a current or prior licensee), the arrest and conviction record of the applicant, whether the applicant meets the requirements for a license, the applicant's financial information, and the opinions of the local legislative body or police department, if received. The Commission will approve or deny the request based on these factors. Occasionally, the Commission will request more information from the applicant before making a final decision.

After the Commission makes a decision on the request, the file is returned to Licensing for final processing. Approval orders are sent to the applicant requesting any final items before the issuance of the license. Denial orders are sent to the applicant and the applicant may appeal the decision. When all the final items are received by Licensing, the completed request is forwarded to the Renewal Unit for the issuance of the physical license documents.

Churches & Schools

A request to transfer location of an existing license, may be denied if the proposed location is within <u>500 feet</u> of a church or school. The Commission may waive the church/school provision if the church or school <u>does not</u> file an objection to the proposed license. If the church or school <u>does</u> file an objection, the Commission shall hold a hearing before making a decision on the issuance of the license.

Proof of Financial Responsibility

- Liquor liability coverage of at least \$50,000.00 is required by Michigan law for active operation of a licensed business. Types of acceptable coverage are:
 - liquor liability insurance
 - o cash
 - unencumbered securities
 - constant value bond
 - membership in an authorized group self-insurance pool
- For more information, please read the instructions in the <u>Proof of Financial</u> <u>Responsibility (LC-95)</u>.