UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HUCUL ADVERTISING, LLC, a Michigan limited liability company,

Plaintiff,

v.

CHARTER TOWNSHIP OF GAINES, a Michigan municipal corporation,

Defendant.
_____/

File No. 1:11-CV-682

HON. ROBERT HOLMES BELL

OPINION

This action is before the Court on Plaintiff Hucul Advertising, LLC's appeal of Defendant Gaines Charter Township Zoning Board of Appeal's ("ZBA") denial of its request to erect a digital billboard.[1]

I.

Plaintiff Hucul Advertising, LLC, is an outdoor advertising company. On February 4, 2011, Plaintiff filed an application for zoning approval from Defendant Gaines Charter Township to install a digital billboard on property located at 4500 60th Street SE in Gaines

[1]Plaintiff's complaint contains 8 counts. Counts 1, 2, 3, and 7 have been dismissed. Counts 4, 5, and 6, raise constitutional claims of substantive due process, § 1983, and equal protection. Count 8 is an appeal of the ZBA's denial of its request to erect a digital billboard. Only Count 8 is currently before the Court.

Township, Kent County, Michigan (the "Property"). ZBA 1.[2]

The Gaines Township Planning Director, determined that the Property was not eligible for a billboard for two reasons: "First, the property is not adjacent to M-6 right-of-way. Second, the new proposed billboard would be located within 4,000 feet of an eligible digital billboard." ZBA 7.

Billboards are regulated in § 17.12 of the Gaines Charter Township Zoning Ordinance (the "Ordinance"). ZBA 73-89. The Ordinance provides that "[b]illboards are allowed on parcels adjacent to M-6 and which are located in the I-1 and I-2 zoning districts," subject to the regulations contained in § 17.12(A) - (O). Ord. § 17.12. One of those regulations provides that "[n]o digital billboard shall be located within 4,000 feet of another digital billboard abutting or visible from either side of M-6." Ord. § 17.12(L)(3). Chapter 28 of the of the Ordinance defines "abutting or adjacent property" as "[a]ny lot or parcel of land adjoining or having a common border with a second lot or parcel of land." Ord. § 28.2(A).

Plaintiff appealed the Planning Director's decision to the ZBA. ZBA 13-19. Plaintiff raised four issues in its appeal. Plaintiff challenged the Planning Director's interpretation of "adjacent to" and his interpretation of the 4,000 feet digital billboard spacing requirement. In the alternative, Plaintiff requested a dimensional variance as to the "adjacent to" requirement, and a dimensional variance as to the 4,000 feet digital billboard spacing

[2]The parties' stipulated record regarding Plaintiff's appeal of the ZBA decision will be referenced as "ZBA" followed by a page number from 1-133. (Dkt. No. 13, Stipulated R.)

requirement. On May 11, 2011, the ZBA denied all four grounds for relief. ZBA 57-69.

Plaintiff filed this action on June 8, 2011, in the Kent County Circuit Court. Count 8 of Plaintiff's complaint requests that the ZBA's decision be reversed because it was arbitrary, an abuse of discretion, contrary to law, not based upon competent, material and substantial evidence on the record, and because it was inconsistent with relief granted to other outdoor commercial advertisers. (Compl. ¶ 99.) Defendant removed the action to this Court. The matter is currently before the Court on Plaintiff's appeal of the ZBA decision.

II.

Under Michigan law, when a party appeals a decision of a zoning board appeals, the court must review the record and decision to ensure that the decision meets all of the following requirements:

> (a) Complies with the constitution and laws of the state.
> (b) Is based upon proper procedure.
> (c) Is supported by competent, material, and substantial evidence on the record.
> (d) Represents the reasonable exercise of discretion granted by law to the zoning board of appeals.

Mich. Comp. Laws § 125.3606(1). The reviewing court may may affirm, reverse, or modify the decision of the zoning board of appeals, and make other orders as justice requires. Mich. Comp. Laws § 125.3606(4).

A. Interpretation of the Ordinance

Plaintiff's first two issues on appeal challenge the ZBA's interpretation of the ordinance. Legal questions, such as the interpretation of a township zoning ordinance, are

reviewed *de novo*. *Yankee Springs Twp. v. Fox*, 264 Mich. App. 604, 605-06, (2004). "The rules governing the construction of statutes apply with equal force to the interpretation of municipal ordinances." *Gora v. City of Ferndale*, 456 Mich. 704, 711 (1998).

> The court is not free to substitute its judgment by imposing what it considers to be the wisest version of the ordinance, but is confined to an analysis of the text of the ordinance and, in the face of ambiguity, a determination of what the legislative body that enacted the ordinance intended by the language in question.

Macenas v. Village of Michiana, 433 Mich. 380, 396-97 (1989).

1. Adjacent to M-6

The ZBA upheld the Planning Director's determination that the Property on which Plaintiff proposed to install a billboard was not "adjacent to M-6" because it did not adjoin or have a common border with M-6. ZBA 60-62.

Plaintiff contends that the ZBA's interpretation of the phrase "adjacent to M-6" is contrary to law because: (1) the ZBA improperly looked outside of Chapter 17 for a definition of "adjacent;" (2) a road is not a parcel of property to which the Chapter 28 definition can apply; and (3) the interpretation is inconsistent with the Township's treatment of previous billboard applications.

In response, Defendant contends that Plaintiff's argument regarding the interpretation of "adjacent" in § 17.12 is moot because the Ordinance was amended on April 11, 2011, to provide:

> Billboards are only permitted within 100 feet of the M-6 freeway on property in the I-1 and I-2 zoning districts. The lot on which the billboard is located must abut and have frontage on the M-6 right-of-way.

Ord. § 17.12(A) (as amended on Apr. 11, 2011). (Dkt. No. 23, Def.'s Resp. Ex. A.)

Under Michigan law, a landowner does not have a vested property interest in a particular zoning classification unless he has a valid building permit and has completed substantial construction. *Seguin v. City of Sterling Heights*, 968 F.2d 584, 590 (6th Cir. 1992). Accordingly, "if a zoning ordinance has been amended to forbid a given use a court will give effect to the amendment even when the land owner had previously had an absolute right to put his land to the now forbidden use." *Klyman v. City of Troy*, 40 Mich. App. 273, 277-78 (1972). The April 11, 2011, amendment to the Ordinance replaced the phrase "adjacent to M-6" with the phrase "abut and have frontage on the M-6 right-of-way." Because the phrase "adjacent to M-6" is no longer in the Ordinance, Plaintiff's appeal of the ZBA's interpretation of "adjacent to M-6" is moot.

Moreover, even if the issue were not moot, the Court would affirm the ZBA's interpretation. The plain meaning of "adjacent" is not limited to adjoining, and may also be defined as "near" or "close." It is more reasonable to interpret adjacent in a manner that would give the term a useable meaning in the zoning context. "Close to" is not a workable term in the zoning context because it is imprecise. Moreover, the ZBA's reliance on the definition of "adjacent" found in Chapter 28 of the Ordinance was not improper. Chapter 17, the chapter devoted to signage regulations, contains a list of definitions that apply to that

chapter. Ord. § 17.3. Chapter 17 does not define "adjacent." Therefore, it was appropriate to look to Chapter 28, which includes definitions that apply to the Ordinance as a whole. ZBA 99-114.) As indicated in the introduction to Chapter 28, the definitions in that section are "[f]or the purpose of their use in this Ordinance." Ord. § 28.1.

Chapter 28 defines "Abutting or Adjacent Property" as "[a]ny lot or parcel of land adjoining or having a common border with a second lot or parcel of land." Ord. § 28.2(A). Because the term "lot" is defined as "[a] parcel of land, exclusive of any road or street right-of-way," and because M-6 is a road, Plaintiff contends that the Chapter 28 definition of "adjacent" cannot govern the meaning of "adjacent to M-6."

Although the Chapter 28 definition cannot be inserted word for word into § 17.12, it still tends to support the ZBA's determination that "adjacent," as used in § 17.12, means "abutting" as opposed "close to."

Finally, Plaintiff contends that the ZBA's definition of "adjacent to M-6" is contrary to law because it is inconsistent with the Township's previous approval of billboards on properties that are close to, but do not abut M-6.

The three billboards at issue are on property that abuts property owned by the Michigan Department of Transportation ("MDOT"). The ZBA explained that "[t]he Township has historically treated this MDOT-owed property as being part of the M-6 right-of-way, to be used for future expansions of the freeway or interchange/bridge areas." ZBA 61. Because the Township has treated such property as M-6 property, these billboards are

not evidence that the Township has treated parcels or lots not touching or fronting on M-6 as being "adjacent" to M-6.

The ZBA's interpretation of "adjacent to M-6" is consistent with both the plain meaning of the term and with the definition of "adjacent" in Chapter 28, and it is not inconsistent with the Township's previous interpretations of "adjacent to M-6." Accordingly, the Court is satisfied that the ZBA's interpretation of "adjacent to M-6" is not contrary to law.

2. Digital Billboard Spacing

The ZBA also upheld the denial of Plaintiff's application for a digital billboard on the basis that it did not meet the digital billboard spacing requirement of § 17.12(L)(3). The Ordinance provides:

> No digital billboard shall be located within 4,000 feet of another digital billboard abutting or visible from either side of M-6.

§ 17.12(L)(3).

The Property on which Plaintiff proposes to install a digital billboard is within 4000 feet of a CBS Outdoor billboard on the southeast corner of East Paris and M-6. ZBA 117, Consent J. ¶ H. At the time Plaintiff filed its billboard application, and at the time the ZBA denied Plaintiff's request, the CBS Outdoor billboard had a static face. However, CBS Outdoor had entered into a Consent Judgment with Gaines Township.[3] The Consent

[3] *CBS Outdoor Inc. v. Gaines Charter Twp.*, No. 09-06224-CZ (Kent Co. Cir. Ct. Aug. 24, 2010) ZBA 115-33.

Judgment provides in pertinent part that "[a]t any time after the execution of this Consent Judgment, CBS Outdoor, at its option, may change one or both faces on the Southeast East Paris Billboard from static to trivision or digital . . . ." Consent J. 121, ¶ 9.

When the ZBA denied Plaintiff's application to erect a digital billboard, the CBS Outdoor billboard had not been converted to a digital billboard. Plaintiff contends that a digital billboard is only prohibited under § 17.12(L)(3) if it conflicts with another actual and existing digital billboard. Plaintiff contends that because there is no existing digital billboard, and because the Consent Judgment does not compel CBS Outdoor to build a digital billboard or contain a sunset clause, the 4,000 foot digital billboard spacing requirement does not apply, and the Township's denial of its application on the basis of its proximity to an "eligible" digital billboard is contrary to law.

Defendant and CBS Outdoor entered into the Consent Judgment before Plaintiff filed its application for a digital billboard. Pursuant to the Consent Judgment, CBS Outdoor has a vested right to convert its existing billboard to a digital billboard at any time without seeking any further approval from the Township. The Consent Judgment provides:

> The provisions of this Consent Judgment giving certain rights to CBS Outdoor are self-executing and CBS Outdoor shall not be required to seek any approvals from the Township to exercise those rights, including but not limited to any variance, special use permit or building permit.

ZBA 124, Consent J. ¶ 17.

Section 17.12(L)(3) does not specify that it only applies to an "actual and existing" billboard as opposed to an "authorized" billboard. It would not be logical to require the

Township to ignore previously authorized digital billboards simply because they have not yet been constructed. Under such a reading of § 17.12(L)(3), the Township would not be able to reasonably control the spacing of digital billboards.

The Township's interpretation of § 17.12(L)(3) to extend to CBS Outdoor's vested right to erect a digital billboard is reasonable and not contrary to law.

B. Variance

Plaintiff's final two issues on appeal challenge the ZBA's denial of a variance as to the adjacency requirement and the 4000 foot spacing requirement.

1. Standards Applied

Plaintiff contends that the variances were denied in violation of Michigan law because the ZBA considered unnecessary hardship standards[4] that are applicable only to a use variance, and not to a non-use, dimensional variance.

The Michigan Zoning Enabling Act, Mich. Comp. Laws § 125.3101 *et seq.*, grants local units of government the authority to grant nonuse variances:

> The zoning board of appeals of all local units of government shall have the

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[4]The unnecessary hardship factors Plaintiff identifies are:

> (1) the property cannot reasonably be used in a manner consistent with existing zoning, (2) the landowner's plight is due to unique circumstances and not to general conditions in the neighborhood that may reflect the unreasonableness of the zoning, (3) a use authorized by the variance will not alter the essential character of a locality, and (4) the hardship is not the result of the applicant's own actions.

Janssen v. Holland Charter Tp. Zoning Bd. of Appeals, 252 Mich. App. 197, 201 (2002).

> authority to grant nonuse variances relating to the construction, structural changes, or alteration of buildings or structures related to dimensional requirements of the zoning ordinance or to any other nonuse-related standard in the ordinance.

Mich. Comp. Laws § 125.3604(8). With respect to the procedures and standards for granting variances, the Zoning Enabling Act provides:

> If there are practical difficulties for nonuse variances as provided in subsection (8) or unnecessary hardship for use variances as provided in subsection (9) in the way of carrying out the strict letter of the zoning ordinance, the zoning board of appeals may grant a variance in accordance with this section, so that the spirit of the zoning ordinance is observed, public safety secured, and substantial justice done. The ordinance shall establish procedures for the review and standards for approval of all types of variances. The zoning board of appeals may impose conditions as otherwise allowed under this act.

Mich. Comp. Laws § 125.3604(7). By its terms, the Zoning Enabling Act grants a zoning board of appeals discretion to grant a nonuse variance, as long as there are practical difficulties. The Act also provides, however, that the ordinance may include additional standards for approval of nonuse variances.

In keeping with the Zoning Enabling Act, the Gaines Township Ordinance provides that non-use (dimensional) variances shall not be granted unless the ZBA finds that "a practical difficulty will occur unless the variance is granted." ZBA 95, Ord. § 26.8(D). However, the Ordinance also lists nine additional standards,[5] including whether the variance

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[5]The Ordinance provides that the ZBA shall not grant a non-use (dimensional) variance unless it finds that all of the following standards are met:

> 1. The variance request, if granted, will be the minimum variance . . . that will make possible the reasonable use of the land, structure, or building involved.

would be detrimental to neighboring properties, whether the problem is due to unique circumstances relating to the property, and whether the problem was self-created. *Id.* Although these standards exceed the minimum practical difficulty showing, the inclusion of

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> 2. The granting of the variance will not be injurious or detrimental to neighboring properties or residents.
>
> 3. The variance will not be detrimental to the public welfare or change the essential character of the neighborhood.
>
> 4. The variance will not impair the intent or purpose of this Ordinance.
>
> 5. The problem or condition for which the variance is requested is not a self-created problem by the applicant or property owner (or their predecessors in title) as to the property involved.
>
> 6. The condition or situation involved is not of so general or recurrent a nature that it would be more reasonable or practical for the Township to amend the provision of the Ordinance involved rather than to grant a variance for the condition or situation.
>
> 7. There are exceptional, unique, or extraordinary physical conditions or circumstances which directly relate to the property itself . . . rather than the individual situation or desire of the applicant or property owner. . . .
>
> 8. The variance must be necessary for the preservation and enjoyment of a substantial property right which is similar to that possessed by other properties in the same zoning district and vicinity. (NOTE – a possible increased financial return shall not, of itself, be deemed sufficient to warrant a variance.)
>
> 9. As specified above, the ZBA must also find that the applicant has practical difficulty complying with the Ordinance provision or provisions at issue.

ZBA 95-96, Ord. § 26.8(D).

additional standards is consistent with the Zoning Enabling Act's mandate to establish standards for approval of all types of variances.

There is no dispute that Plaintiff's two variance requests concerned non-use (dimensional) variances rather than land use variances. There is also not dispute that standards considered by the ZBA are the nine standards listed in the Ordinance. Plaintiff nevertheless contends that the nine standards include unnecessary hardship factors, and that it was inappropriate for the ZBA to consider the unnecessary hardship factors in evaluating Plaintiff's request for a non-use dimensional variance. Plaintiff cites *Heritage Hill v. City of Grand Rapids*, 48 Mich. App. 765 (1973), and *National Boatland, Inc. v. Farmington Hills Zoning Bd. of Appeals*, 146 Mich. App. 380, 387 (1985), in support of the proposition that it is improper to consider unnecessary hardship factors when ruling on a non-use variance. Plaintiff's reliance on these cases is misplaced. *Heritage Hill* and *Boatland* were decided before the Zoning Enabling Act was enacted in 2006, and neither case addressed a governing municipal ordinance, such as we have in this case, that required consideration of specific standards in addition to practical difficulty before the issuance of a non-use variance.

Furthermore, these cases do not stand for the broad proposition for which they are cited. In *Heritage Hill*, the court rejected the plaintiff's contention that the zoning board should have considered unnecessary hardship factors in evaluating a third-party's nonuse variance: "To justify the grant of a nonuse variance there need only be a showing of practical difficulty. It is not necessary, as claimed by the plaintiff, to show unnecessary hardship."

48 Mich. App. at 769. The court did not hold that it would have been error to consider unnecessary hardship factors, but only that it was not necessary to consider those factors.

In *National Boatland,* the court held that because the requested variances were of the non-use variety, the applicant only needed to show practical difficulties, and not unnecessary hardship. 146 Mich. App. at 387. The court reasoned that the non-use variance was properly denied in part because the applicant's problem was self-created. *Id.* at 386. This reasoning undermines Plaintiff's argument because self-created hardship is one of the unnecessary hardship factors that Plaintiff contends should not be considered for a non-use dimensional variance.

Any suggestion in *Heritage Hill* and *National Boatland* that it is improper to consider factors generally associated with unnecessary hardship for nonuse dimensional variances is contradicted by the Michigan Supreme Court's holding in *Johnson v. Robinson Twp.*, 420 Mich. 115 (1984), that it was appropriate to apply the "self-created hardship" and "unique circumstances" standards to a nonuse variance request. *Id.* at 126. As the Court noted, "[t]here is no sound reason why those principles ought not to be considered by a board of appeals in the exercise of its discretionary power to grant area, as well as use, variances." *Johnson v. Robinson Twp.*, 420 Mich. 115, 126 (1984); *see also Cryderman v. City of Birmingham*, 171 Mich. App. 15, 21 (1988) ("An area variance . . . may be granted when enforcement of the zoning ordinance would result in practical difficulty or unnecessary hardship.") Finally, there is ample authority for denying nonuse dimensional variances on

the basis of self-created hardships. *See Norman Corp. v. City Of East Tawas*, 263 Mich. App. 194, 202 (2004) (holding that the plaintiffs' size variance was rightly denied because the problem was self-created); *Cryderman*, 171 Mich. App. at 22 (the area variance was properly denied because the only practical difficulty or hardship was self-imposed).

The Township did not violate the law by applying the standards outlined in the Ordinance to evaluate Plaintiff's non-use dimensional variance request.

2. Substantial Evidence

Plaintiff also contends that the ZBA's denial of its request for variances was not supported by competent, material, and substantial evidence on the record.

On appeal, the court reviews the record and decision to ensure that the ZBA's decision is supported by competent, material, and substantial evidence on the record. Mich. Comp. Laws § 125.3606(1). "'Substantial evidence' is evidence that a reasonable person would accept as sufficient to support a conclusion. While this requires more than a scintilla of evidence, it may be substantially less than a preponderance." *Dowerk v. Charter Twp. of Oxford*, 233 Mich. App. 62, 72 (1998) (citing *Tomczik v. State Tenure Comm'n*, 175 Mich. App. 495, 499 (1989)). "On appeal, the factual findings of the ZBA are to be accorded deference." *Hughes v. Almena Twp.*, 284 Mich. App. 50, 60 (2009). "The primary reason for this deference to the findings of the board of appeals is obvious – its members are local residents who reside in the township and who possess a much more thorough knowledge of local conditions, current land uses, and the manner of future development desirable for those

who reside in the township." *Szluha v. Avon Charter Twp.*, 128 Mich. App. 402, 410 (1983).

Plaintiff contends that the ZBA incorporated facts into its decision that were not part of the presentation before the ZBA. Specifically, Plaintiff contends that the ZBA made findings regarding injury to neighboring property, other potential uses of the property, and a financial motive, even though no testimony or evidence was presented on these issues.

The ZBA found that seven of the nine standards for a variance from the adjacency requirement had not been met, and that eight of the nine standards for a variance from the the digital billboard spacing requirement had not been met. In its evaluation of Standards 1, 7, 8, and 9, the ZBA determined that the Property can be used for a number of reasonable uses as currently zoned; there are no unique conditions or practical difficulties that would prevent the Property from being used for multiple light-industrial uses.

Plaintiff's objection that these other potential uses of the property are not supported by substantial evidence is not well-founded. A zoning board's finding that property can be used consistent with its zoning classification does not require evidence. Such findings are consistent with the board's general knowledge of the ordinance and local conditions. Moreover, because Plaintiff was the party seeking the variance, Plaintiff bore the burden of proof to establish record facts demonstrating that a particular finding on each standard should be made. *Shelby Oaks, LLC v. Charter Twp. of Shelby*, No. 241135, 241253, 2004 WL 225056, at *2 (Mich. Ct. App. Feb. 5, 2004) (citing *Lafayette Market & Sales Co v. Detroit*, 43 Mich. App. 129, 133 (1972)). There is no suggestion that Plaintiff produced any evidence

that a variance was necessary for the reasonable use of the land (Standard 1); because of unique conditions (Standard 7); for the preservation of a substantial property right (Standard 8); or due to practical difficulty in complying with the Ordinance (Standard 9.) Having produced no evidence on these standards, Plaintiff cannot complain that the board did not have evidence to support a finding that was adverse to Plaintiff on these Standards.

In evaluating Standard 2, the ZBA found that a variance allowing Plaintiff's proposed billboard "would severely restrict potential billboard locations on the Steelcase property which is clearly adjacent to M-6, as opposed to the property on which the Applicant desires to install the billboard." Plaintiff complains that there is no evidence to support a finding that a billboard would be injurious or detrimental to the Steelcase property, or that Steelcase was concerned about it. Under standard 2, the burden was on Plaintiff to show that a variance would not be injurious or detrimental to neighboring properties or residents. The record does not suggest that Plaintiff presented any evidence in support of such a showing. Under these circumstances, the Court cannot say that it was improper for the ZBA to consider hypothetical injuries to neighboring properties.

In evaluating Standard 8, the ZBA found that "the variance request is based substantially on a desire for an increased financial return, both for the owner of the Property and the Applicant (as the lessee of a portion of the Property)." Plaintiff challenges this finding because no testimony or evidence was presented on this issue. Even if this challenge is well-taken, it would not alter the outcome because there is substantial evidence in the

record to support the ZBA's determination that Plaintiff did not meet all nine standards, as required under the Ordinance.

For the reasons stated, the Gaines Charter Township Zoning Board of Appeals' May 11, 2011, resolution denying Plaintiff's two appeals and two requests for variances will be affirmed.

An order consistent with this opinion will be entered.

Dated: April 2, 2012

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HUCUL ADVERTISING, LLC, a
Michigan limited liability company,

Plaintiff,

v.

CHARTER TOWNSHIP OF GAINES,
a Michigan municipal corporation,

Defendant.
_____/

File No. 1:11-CV-682

HON. ROBERT HOLMES BELL

ORDER

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that, upon consideration and review of Plaintiff's appeal of the Gaines Charter Township Zoning Board of Appeals' May 11, 2011, resolution denying Plaintiff's two appeals and two requests for variances, (Docket # 17), the May 11, 2011, resolution is **AFFIRMED**.

Dated: April 2, 2012

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
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File No. 1:11-CV-682

HON. ROBERT HOLMES BELL

OPINION

This action challenging a township's denial of a billboard application is before the Court on the parties' cross-motions for summary judgment on Plaintiff's constitutional claims. (Dkt. Nos. 26, 28.) For the reasons that follow, Defendant's motion will be granted and Plaintiff's motion will be denied.

I.

Plaintiff Hucul Advertising, LLC, engages in outdoor commercial advertising. (Dkt. No. 1, Ex. 1B, Compl. ¶ 3.) On February 4, 2011, Plaintiff filed an application to install a digital billboard on property located at 4500 60th Street SE in Defendant Gaines Charter Township in Kent County, Michigan (the "Property"). At the time Plaintiff filed its application, the Gaines Charter Township Zoning Ordinance ("Ordinance") provided that "[b]illboards are allowed on parcels adjacent to M-6 and which are also located in the I-1 and

I-2 zoning districts," subject to the regulations contained in § 17.12(A) - (O). (Dkt. No. 13, Def. Br., Ex. A, Ord. § 17.12).[1] It further provided that "[n]o digital billboard shall be located within 4,000 feet of another digital billboard abutting or visible from either side of M-6." (*Id.*)

The Gaines Township Planning Director determined that the Property was not eligible for a billboard because it was not adjacent to the M-6 right-of-way and because the proposed billboard would be located within 4,000 feet of an eligible digital billboard. (ZBA 7.)[2] Plaintiff appealed the Planning Director's interpretation of the Ordinance's adjacency to M-6 and digital billboard spacing requirements to the Gaines Township Zoning Board of Appeals ("ZBA"), and, in the alternative, requested variances from the Ordinance's adjacency to M-6 and digital billboard spacing requirements. On May 11, 2011, the ZBA denied all four grounds for relief. (ZBA 57-69.)

Plaintiff filed this eight-count action in the Kent County Circuit Court. Defendant removed the action to this Court. The parties have now filed cross-motions for summary

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[1]Chapter 17 of the Ordinance was subsequently amended effective April 26, 2011, to provide: "Billboards are only permitted within 100 feet of the M-6 freeway on property in the I-1 and I-2 zoning districts. The lot on which the billboard is located must abut and have frontage on the M-6 right-of-way." (Dkt. No. 27, Def.'s Ex. C, Ord. § 17.12(A).)

[2]The parties have filed a stipulated record of the Zoning Board of Appeals ("ZBA") decision regarding Plaintiff's billboard application. (Dkt. No. 13, Stipulated R.) The record will be referenced as "ZBA" followed by a page number from 1 to 133.

judgment on the constitutional claims raised in Counts 4, 5, and 6 of Plaintiff's complaint.[3]

II.

The Federal Rules of Civil Procedure require the Court to grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In evaluating a motion for summary judgment the Court must look beyond the pleadings and assess the proof to determine whether there is a genuine need for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If Defendant carries its burden of showing there is an absence of evidence to support a claim, Plaintiff must demonstrate by affidavits, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25 (1986).

In considering a motion for summary judgment, "the district court must construe the evidence and draw all reasonable inferences in favor of the nonmoving party." *Martin v. Cincinnati Gas and Elec. Co.*, 561 F.3d 439, 443 (6th Cir. 2009) (citing *Jones v. Potter*, 488 F.3d 397, 403 (6th Cir. 2007)). Nevertheless, the mere existence of a scintilla of evidence in support of Plaintiff's position is not sufficient to create a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The proper inquiry is whether the evidence is such that a reasonable jury could return a verdict for Plaintiff. *Id.*; *see*

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[3]Counts I, II, III, and VII have been dismissed on stipulation of the parties. (Dkt. Nos. 20, 27.) Count VIII, which is an appeal from the ZBA's denial of Plaintiff's appeals and variance requests, was resolved in favor of Defendant. (Dkt. No. 48.)

generally Street v. J.C. Bradford & Co., 886 F.2d 1472, 1476-80 (6th Cir. 1989).

III.

Plaintiff has alleged a substantive due process violation (Count IV), deprivation of civil rights (Count V), and an equal protection violation (Count VI). Plaintiff explains that its civil rights claim contains the "under color of state law" allegations for purposes of 42 U.S.C. § 1983, and is derivative of its substantive due process claim. (Dkt. No. 28, Pl.'s Mot. ¶ 8.) Accordingly, there are only two constitutional claims: substantive due process and equal protection. The parties have filed cross-motions for summary judgment on these claims.

A. Substantive Due Process/First Amendment

Although Count IV is entitled "Substantive Due Process Violation," Plaintiff's allegations are framed in terms of a First Amendment violation. Plaintiff alleges that the Ordinance's adjacency to M-6 and digital billboard spacing requirements on their face, and/or as applied, violate the First Amendment of the United States Constitution. Plaintiff contends that they are unreasonable time, place and manner restrictions and/or do not reasonably advance a substantial governmental interest, or do so in an unreasonable manner. (Compl. ¶¶ 69-71.)

It is well settled that "[w]here a particular Amendment provides an explicit textual source of constitutional protection' against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide

for analyzing such a claim." *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (internal quotations omitted); *see also Brandenburg v. Housing Auth. of Irvine*, 253 F.3d 891, 900 (6th Cir. 2001) (holding that substantive due process claim was duplicative of First Amendment claim). Because Plaintiff's complaint concerns limits on outdoor commercial advertising, which is constitutionally protected commercial speech, and because the First Amendment provides an explicit textual source of constitutional protection against limits on speech, the Court will analyze Plaintiff's allegations in Count 4 under the First Amendment rather than under substantive due process.[4]

There is no dispute that billboards involve speech that is protected by the First Amendment. *Prime Media, Inc. v. City of Brentwood, Tenn.*, 398 F.3d 814, 818 (6th Cir. 2005) ("Billboards and other visual signs, it is clear, represent a medium of expression that the Free Speech Clause has long protected."). However, billboards "pose distinctive problems" that are subject to a municipality's "police powers" because billboards "take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation." *Id.* (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994)). Time, place, and manner restrictions on speech are valid provided:

> (1) that they are justified without reference to the content of the regulated speech, (2) that they are narrowly tailored (3) to serve a significant

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[4]This is consistent with Plaintiff's brief in support of its own motion for summary judgment which argues the viability of Count IV under First Amendment standards. (Dkt. No. 29, Pl. Br. 7-14.)

> governmental interest, and (4) that they leave open ample alternative channels for communication of the information.

Prime Media, 398 F.3d at 818 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). The narrow tailoring test is a form of intermediate scrutiny. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994) ("[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny. . . .").

Plaintiff contends that the Court should apply the four-part intermediate scrutiny test that is applied to restrictions on commercial speech. *See Pagan v. Fruchey*, 492 F.3d 766, 770 (6th Cir. 2007) (en banc) (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980)). The *Central Hudson* test bears a strong resemblance to the time, place, and manner test. Under the *Central Hudson* test, the Court considers the following factors:

1. whether commercial speech concerns lawful activities and is not misleading,
2. whether the government has asserted a substantial interest in support of its regulation
3. whether the restriction on commercial speech directly and materially advances that interest, and
4. whether the regulation is narrowly drawn.

See Pagan, 492 F.3d at 770-71.

Although Plaintiff intends to use the billboards for commercial speech, the Gaines Township sign Ordinance does not differentiate between commercial and non-commercial speech, and Plaintiff's billboard application was denied without reference to the use of the

billboards for commercial advertising. Accordingly, the Court will analyze the constitutionality of the Ordinance under the narrow tailoring test applied to time, place and manner restrictions, rather than under the *Central Hudson* test. *See Naser Jewelers, Inc. v. City of Concord, N.H.*, 513 F.3d 27, 33 (1st Cir. 2008) (applying the narrow tailoring test rather than the *Central Hudson* test to content-neutral regulations even though the targeted speech was primarily commercial).

The first question under the narrow tailoring test is whether the regulation is content neutral. To determine content neutrality in time, place, or manner cases, the principal inquiry is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). On its face, the adjacency to M-6 requirement is content neutral. So is the requirement concerning the spacing of digital billboards. "If a regulation is content-neutral on its face and states its purposes, we look to the legislative body's statement of intent." *Naser Jewelers*, 513 F.3d at 34. The purpose of the signage regulations is outlined in the Gaines Township Ordinance:

> This chapter is intended to regulate the type, number, physical dimensions, erection, placement and maintenance of signs in Gaines Charter Township. Its purpose is to:
>
> A. Promote the public peace, health, and safety of residents and visitors;
> B. Eliminate distractions that are hazardous to motorists and pedestrians;
> C. Protect the public's ability to identify establishments and premises;
> D. Protect the natural beauty and distinctive character of Gaines Charter Township;
> E. Protect commercial, business, office and industrial districts and areas from visual chaos and clutter;
> F. Provide an environment that fosters the reasonable growth and development of business and commerce;
> G. Protect and enhance property values; and,

H. Balance the individual rights of property owners to communicate their message with the public's right to be free of unreasonable distractions and aesthetic intrusions.

(ZBA 73, Ord. § 17.1.) The regulations are justified on the basis of traffic safety and aesthetics, without reference to the content of the regulated speech.

The Court turns to consideration of whether the regulations serve a significant governmental interest. Traffic safety and community aesthetics have long been recognized to constitute significant governmental interests. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981) (plurality opinion) (concluding that there can be no "substantial doubt that the twin goals that the ordinance seeks to further – traffic safety and the appearance of the city – are substantial governmental goals"); *Prime Media*, 398 F.3d at 819 (holding that city's sign regulations advanced "legitimate governmental interests" in aesthetics and traffic safety); *Naser*, 513 F.3d at 34 (concluding that sign regulation's stated goals of promoting traffic safety and community aesthetics "plainly constitute significant governmental interests"). Plaintiff has conceded that the Township has a right to implement reasonable regulations as to signs based on safety and aesthetics. (Dkt. No. 29, Pl. Br. 11.)

Plaintiff contends, however, that the regulations do not directly advance the intended governmental interest. In support of this assertion, Plaintiff notes that the Township previously approved three billboards on property that does not abut the M-6 freeway. Plaintiff further notes that these three billboards are 475, 250, and 155 feet from the M-6 right-of-way, while Plaintiff's proposed billboard would only be 100 feet from the M-6 right-of-way. Plaintiff contends that the Township has undercut its proffered goals by allowing

signs that are not adjacent to M-6 and that are at a greater distance from the M-6 right-of-way.

The Township has presented evidence that the three referenced billboards are on property that abuts property owned by the Michigan Department of Transportation ("MDOT"). These billboards were approved under a previous Ordinance, and pursuant to the Township's historical practice of "treat[ing] this MDOT-owned property as being part of the M-6 right-of-way, to be used for future expansions of the freeway or interchange/bridge areas." (ZBA 61.)

The fact that the Township at one point in time had a differently-worded ordinance, or that it interpreted a term in the former ordinance in a particular manner, does not undercut the legitimacy of its stated goal of including an adjacency requirement to further its legitimate interests in traffic safety and aesthetics. Courts are inclined to accept a municipality's efforts at self-correction as long as they are genuine. *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 982 (6th Cir. 2012). Because Defendant's adoption of amendments to its ordinance appear to be genuine, Defendant's practice under the previous Ordinance is moot. *See id.* at 981.

Moreover, even if the Township continues its practice of treating MDOT property that abuts M-6 as part of the M-6 right of way, that practice does not undermine the Township's rationale for the adjacency requirement. A content-neutral regulation may advance legitimate interests even if it does not completely achieve those interests. *Prime Media*, 398 F.3d at 821. All that is required is a reasonable fit, not a perfect fit. *Id.* at 821-22; *see also Lorillard*

Tobacco Co. v. Reilly, 533 U.S. 525, 556 (2001) ("[T]he case law requires a reasonable 'fit between the legislature's ends and the means chosen to accomplish those ends.'"). The Township's decision to treat MDOT property that was set aside for interchanges and bridges like the M-6 right-of-way rather than like private property is not unreasonable.

Plaintiff contends that the 4,000-foot requirement improperly singles out digital billboards for extra regulation. Plaintiff notes that the Michigan Court of Appeals has held that an ordinance differentiating readily changeable billboards from static billboards was not narrowly tailored to advance a legitimate governmental interest. *See Outdoor Systems, Inc. v. City of Clawson*, 262 Mich. App. 716, 724 (2004) ("Whether a sign is readily changeable or not, it presents the same sort of traffic distraction or aesthetic problem.").

Clawson is distinguishable from this case because it involved a total prohibition on readily changeable signage, regardless of size. *Id.* at 821. Moreover, to the extent *Clawson* suggests that a municipality cannot draw distinctions between digital and static billboards, the Court disagrees with the case and declines to follow it. It is not unreasonable for municipalities to draw distinctions between digital and static billboards because their increased visibility and changing display have a greater effect on safety and aesthetics. Plaintiff acknowledged that digital billboards are visible from a greater distance. (Dkt. No. 27, Ex. C, Hucul Dep. 24.) Plaintiff's sales consulting expert acknowledged that the changing message on digital billboards is more effective at drawing the viewer's attention. (Dkt. No. 27, Ex. E, Hyde Dep. 19.)

Plaintiff also contends that the 4,000-foot spacing requirement for digital billboards

is not narrowly tailored as evidenced by the fact that the Michigan Highway Advertising Act ("MHAA"), Mich. Comp. Laws §§ 252.301-.323, allows digital billboards within 1,000 feet of each other.

The MHAA's 1,000-foot spacing requirement is a minimum spacing requirement rather than a mandatory or maximum spacing requirement. *See* Mich. Comp. Laws § 252.317 (providing that a sign structure "shall not be erected closer than 1,000 feet to another sign structure on the same side of the highway"); *see also Twp. of Homer v. Billboards By Johnson, Inc.*, 268 Mich. App. 500, 504 (2005) (holding that the MHAA Act "sets forth minimum requirements that a township cannot fall below, but that a township is free to exceed. Thus, the township may enact ordinances that are more restrictive than required by the HAA."). The MHAA does not prevent the Township from requiring a greater spacing requirement.

To be "narrowly tailored," a regulation does not need to be the "least restrictive" means of achieving the government's legitimate content-neutral interests. *Prime Media*, 398 F.3d at 819.

> [T]he requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.

Id. (quoting *Ward*, 491 U.S. at 799). "The validity of time, place, or manner regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most

appropriate method for promoting significant government interests or the degree to which those interests should be promoted." *Id.* at 820 (quoting *Ward*, 491 U.S. at 800).

Plaintiff also objects that the Ordinance offers no justification for its 4,000-foot spacing requirement. A similar demand for an explanation was rejected in *Prime Media* in the context of a discussion on regulations restricting the size of billboards:

> To ask the City to justify a size restriction of 120 square feet over, say, 200 square feet or 300 square feet would impose great costs on local governments and at any rate would do little to improve our ability to review the law – because any further explanation assuredly would contain the kind of aesthetic and subjective judgment that judges are not well-equipped to second guess.

Prime Media, 398 F.3d at 823-24. The Township's choice of a particular spacing requirement is not invalid simply because the Plaintiff or the Court might consider a smaller spacing requirement sufficient. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative. *Id.* at 819-20; *see also Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 105 (2d Cir. 2010) ("The City's rejection of an alternative model does not invalidate the regime selected by the City."); *Twp. of Blair v. Grand Lamar OCI North Corp.*, No. 296661, 2011 WL 5108510 (Mich. App. Oct. 27, 2011) (holding that a 2,640-foot billboard spacing requirement was constitutionally valid).

Finally, the Court is satisfied that the Gaines Township regulations leave open ample alternative channels for communication of the information. They permit billboards that meet the adjacency and spacing requirements, and they do not affect Plaintiff's freedom to

exercise the right to speak through other modes of communication. *See Prime Media*, 398 F.3d at 819 (holding that billboard size and height regulations left open ample alternative communication).

The Court concludes Township's adjacency to M-6 and digital billboard spacing requirements are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information. Because the regulations are valid time, place, and manner restrictions, they do not violate Plaintiff's First Amendment right to free speech.

B. Equal Protection

Plaintiff's equal protection claim is based on its contention that Defendant has discriminated by creating two classes of property "adjacent" to M-6 and has treated those properties differently. Plaintiff contends that the Township has treated it differently from the three billboard owners who were allowed to place signs on parcels not adjacent to M-6, simply because the intervening property was owned by the MDOT rather than by a private party.

Plaintiff's equal protection claim is moot.[5] "Under Michigan law, a landowner does

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[5]Defendant also contends that Plaintiff lacks standing to challenge the adjacency requirement on equal protection grounds because Plaintiff's injury will not be redressed by a favorable decision on the equal protection claim in light of Plaintiff's violation of the 4,000-foot spacing requirement. *See In Midwest Media Property, L.L.C. v. Symmes Twp., Ohio*, 503 F.3d 456 (6th Cir. 2007) (discussing redressability requirement); *Covenant Media of S. Car. v. City of N. Charleston*, 493 F.3d 421, 430 (4th Cir. 2007) (holding that the plaintiff did not have standing to challenge other billboard regulations in light of its violation (continued...)

not possess a vested property interest in a particular zoning classification unless the landowner holds a valid building permit and has completed substantial construction." *Seguin v. City of Sterling Heights*, 968 F.2d 584, 590 (6th Cir. 1992) (citing cases). After the Township denied Plaintiff's billboard application, the Township amended the Ordinance. The revised ordinance clarifies the adjacency standard. The lot on which the billboard is located must abut and have frontage on the M-6 right-of-way. Plaintiff does not contend that its Property meets the requirements of the amended ordinance. Plaintiff acknowledges that there is an intervening property owned by a private party that lies between Plaintiff's Property and M-6. *See Bench Billboard*, 675 F.3d at 981 (holding that claims for injunctive and declaratory relief were mooted by the enactment of a new ordinance). Because Plaintiff's proposed billboard does not comply with the current ordinance, Plaintiff's equal protection claim is moot.

In addition, even if Plaintiff's Equal Protection claim is not moot, it nevertheless fails on the merits. "The Equal Protection Clause prohibits discrimination by government which either burdens a fundamental right, targets a suspect class, or intentionally treats one differently than others similarly situated without any rational basis for the difference." *Bench Billboard*, 675 F.3d at 986 (quoting *TriHealth, Inc. v. Bd. of Comm'rs*, 430 F.3d 783, 788

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[5](...continued)
of the billboard spacing requirement). While Defendant's argument may have merit with respect to Plaintiff's application for a digital billboard, Plaintiff also submitted an application for a static billboard that would not have been subject to the 4,000-foot spacing requirement. (Compl. ¶¶ 10-13, & Ex. 2.)

(6th Cir.2005)). The Supreme Court only applies heightened scrutiny to equal protection claims alleging that the government has infringed on a class of people's fundamental rights or targets a member of a suspect class. *Id.* at 986 (quoting *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir. 2006)). Plaintiff is not a member of a suspect class, and although Plaintiff claims its First Amendment rights are at issue, Plaintiff alleges that only it was deprived of those rights. Plaintiff is accordingly proceeding on a "class of one" theory.

To proceed on a "class of one" theory, Plaintiff must demonstrate that the challenged action treats similarly situated people differently and lacks a rational basis for doing so. *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 312 (6th Cir. 2005). Under rational basis scrutiny, the plaintiff has the burden to overcome the presumption of rationality. *Warren v. City of Athens*, 411 F.3d 697, 710-11 (6th Cir. 2005). The plaintiff must show that the adverse action is "so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the government's actions were irrational." *Rondigo, L.L.C. v. Twp. of Richmond* , 641 F.3d 673, 682 (6th Cir. 2011) (quoting *Warren v. City of Athens*, 411 F.3d 697, 710-11 (6th Cir. 2005)). "This showing is made either by negativing every conceivable reason for the government's actions or by demonstrating that the actions were motivated by animus or ill-will." *Id.* The Township has no obligation to produce evidence to sustain the rationality of its action; "its choice is presumptively valid and 'may be based on rational speculation unsupported by evidence or empirical data.'" *TriHealth, Inc. v. Board of Comm'rs, Hamilton Cnty., Ohio*, 430 F.3d 783, 790 (6th Cir. 2005) (quoting

F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993)).

Plaintiff has produced no evidence that the Township acted with animus or ill-will. Plaintiff's contention is that there was no rational basis for treating MDOT property as M-6 property, or for distinguishing between property that abuts private property and property that abuts MDOT property.

The Township explained its differing treatment in two ways. First, it noted that it had historically treated MDOT-owned property as being part of the M-6 right-of-way because the property was to be used for further expansions of the freeway or interchange/bridge areas. (ZBA 61.) Second, the three billboards were approved under a prior version of the ordinance that required the "billboard" to be "adjacent to State of Michigan Trunk line." The Township explained that because a billboard is a structure rather than a parcel of property, it cannot itself have frontage on a road, so the definition of adjacent under the previous ordinance language could reasonably mean "close to" rather than "abutting." (*Id.*) On this record, the Court cannot find that the Township's actions were irrational.

IV.

For the reasons stated, the Court will grant the Township's motion for summary judgment and deny Plaintiff's motion for summary judgment.

An order consistent with this opinion will be entered.

Dated: September 14, 2012

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HUCUL ADVERTISING, LLC, a
Michigan limited liability company,

Plaintiff,

v.

CHARTER TOWNSHIP OF GAINES,
a Michigan municipal corporation,

Defendant.
_____/

File No. 1:11-CV-682

HON. ROBERT HOLMES BELL

ORDER

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that Defendant Charter Township of Gaines's motion for summary judgment (Dkt. No. 26) is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff Hucul Advertising, LLC's motion for summary judgment (Dkt. No. 28) is **DENIED**.

Dated: September 14, 2012

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HUCUL ADVERTISING, LLC, a
Michigan limited liability company,

Plaintiff,

v.

CHARTER TOWNSHIP OF GAINES,
a Michigan municipal corporation,

Defendant.
_____/

File No. 1:11-CV-682

HON. ROBERT HOLMES BELL

JUDGMENT

In accordance with the order entered this date,

JUDGMENT is entered in favor of Defendant.

Dated: September 14, 2012

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE