3001-13

STATE OF MICHIGAN

IN THE COURT OF APPEALS

CITY OF LAKE ANGELUS,

Plaintiff-Appellee,

v

MICHIGAN AERONAUTICS COMMISSION, MICHIGAN DEPARTMENT OF TRANSPORTATION, and DIRECTOR OF MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendants-Appellants.
_____/

Court of Appeals
Case No. 238996

Lower Court
Case No. 01-031671-CZ

AMICI CURIAE'S BRIEF ON APPEAL

Proof of Service

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TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Page

Cases

Statutes / Court Rules / Other Authorities

IDENTITY AND INTEREST OF AMICI CURIAE IN THIS LITIGATION

Amici curiae in this litigation are the Michigan Municipal League and the Michigan Townships Association.

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative efforts. Its membership is comprised of some 513 Michigan cities and villages, of which 427 are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the member cities and villages in litigation of statewide significance. This amicus curiae brief is authorized by the Legal Defense Fund's board of directors, whose membership includes: the president and executive director of the Michigan Municipal League and the officers and directors of the Michigan Association of Municipal Attorneys; Philip A. Balkema, city attorney, Grand Rapids; William B. Beach, city attorney, Rockwood; John E. Beras, city attorney, Southfield; Randall L. Brown, city attorney, Portage; Abigail Elias, city attorney, Ann Arbor; Catherine R. Ginster, city attorney, Saginaw; Andrew J. Mulder, city attorney, Holland; Debra A. Walling, corporation counsel, Dearborn; Eric D. Williams, city attorney, Big Rapids; and William C. Matthewson, general counsel, Michigan Municipal League.

The Michigan Townships Association is non-profit Michigan corporation whose purpose is the providing of education, exchange of information, and guidance to and

among township officials in order to enhance the administration of township government services under the laws of the state of Michigan. Its membership is comprised of more than 1,235 townships within the state, including both general-law townships and charter townships.

In Administrative Rule 259.401 (2000 MR 13, R 259.401, effective November 10, 2000), the defendant-appellant Michigan Aeronautics Commission passed a regulation that purports to permit the aeronautics commission to "override" local ordinances and to require local units of government to obtain the pre-approval of the aeronautics commission before they may enforce their own ordinances affecting the landing of seaplanes in waterways situated within the boundaries of the local units of government.

The Wayne Circuit Court granted the motion for summary disposition of plaintiff-appellee City of Lake Angelus in this declaratory judgment action, holding that Administrative Rule 259.401, as promulgated by the defendant-appellant Michigan Aeronautics Commission, is invalid because it is in excess of the power granted by the Legislature to the aeronautics commission in its enabling statute, MCL 259.51(1), and violates the statutory and constitutional powers otherwise conferred on cities, villages, and townships to make ordinances affecting the locations of airports and landing fields within their own boundaries.

This issue is of major importance to the cities, villages, and townships in Michigan because it concerns their ability to affect the use of the lands and waters within their own boundaries, as guaranteed by numerous statutes and the state constitution.

STATEMENT OF QUESTION INVOLVED WHICH THIS AMICI CURIAE BRIEF ADDRESSES

Did the Michigan Legislature in MCL 259.51(1) grant to the defendant Michigan Aeronautics Commission the unlimited and exclusive authority to unilaterally determine the locations of all seaplane landing areas in all local communities, so that the Michigan Aeronautics Commission can, merely by way of an administrative regulation, unilaterally override (i.e., nullify) the existing ordinances of local units of government that address the issue of the location of seaplane landing areas situated within their own geographical boundaries and also require that local units of government obtain the permission of the Michigan Aeronautics Commission before being able to pass and enforce ordinances that address the issue of the location of seaplane landing areas situated within their own geographical boundaries?

(This issue corresponds to Issue II in the briefs of defendants-appellants and plaintiff-appellee.)

- The trial court answered: "No"
- Plaintiff-appellee City of Lake Angelus answers: "No"
- Amici Curiae herein answer: "No"
- Defendants-appellants Michigan Aeronautics Commission, et al., answer: "Yes"

"This land is your land, this land is my land. . .
This land was made for you and me."
-Woody Guthrie

STATEMENT OF FACTS

Amici curiae herein adopt the Counter-Statement of Facts set forth in the brief on appeal of plaintiff-appellee City of Lake Angelus.

The Counter-Statement of Facts set forth by the city properly emphasizes that the Sixth Circuit Court of Appeals has already held that the ordinances of the City of Lake Angelus of relevance in this matter constitute a valid exercise of the authority of a local government to regulate the use of land within its geographical boundaries and that the city's ordinances are not preempted by either federal aviation law or the Michigan Aeronautics Code, MCL 259.1 et seq. See *Gustafson v City of Lake Angelus*, 76 F3d 778 (CA 6, 1996), reh and reh en banc den (1996), cert den 519 US 823; 117 SCt 81; 136 L Ed2d 39 (1996).

The Counter-Statement of Facts set forth by the city also properly emphasizes the relationships between Robert Gustafson, who owns waterfront property on the inland lake of Lake Angelus in Oakland County and who unilaterally chose to land a rented seaplane on that inland lake in direct violation of two city ordinances[1] on August 9, 1991; Alice

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[1]As noted by the Sixth Circuit Court of Appeals, the two ordinances of the City of Lake Angelus which Robert Gustafson violated when he landed his rented seaplane on Lake Angelus on August 9, 1991, are Ordinance 66(E) and Ordinance 25(J):

> Plaintiff [Robert Gustafson] was in violation of city ordinances 66(E) and 25(J). Ordinance 66(E) is an amendment to the City's zoning ordinances, which reads in relevant part:

Gustafson, who is Robert Gustafson's wife and a member and sometime chairperson of the Michigan Aeronautics Commission; and the Seaplane Pilots Association.

Amici curiae would also like to emphasize the trial court's succinctly stated holding as expressed at the November 28, 2001, hearing on the city's motion for summary disposition. The trial court's holding admirably and, in only a few sentences, accurately states the applicable test and the proper application of that test to the legal issue presented in this case. The trial court held in pertinent part as follows:

> At issue is the validity of an administrative rule, rule 259.401.
>
> The parties do not dispute that to determine the validity of an administrative rule the court must consider a three part test. The first prong is whether the rule is within the subject matter of the enabling statute, *Bun*[*ce*] *vs. Secretary of State*, 239 Mich App 204.
>
> The Michigan Aeronautics Commission is charged with the responsibility to promulgate rules related to, among other things, the location and operation of airports and landing fields. However, with respect to exclusive authority, the statute refers only to operation of landing fields,

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> 4.10. Nuisances prohibited. Land may not be used for any of the following purposes, all of which are declared to be public nuisances:
> E. The mooring, docking, launching, storage, or use of any . . . aircraft powered by internal combustion engines. . . .

Ordinance 25(J) is an amendment to the City's nuisance ordinance, and states that the following is a public nuisance:

> J. The landing upon the lands, waters, or ice surfaces within the Village of Lake Angelus of any aircraft, airplane, sailplane, seaplane, helicopter, ground effect vehicle, or lighter than air craft. [*Gustafson v City of Lake Angelus*, 76 F3d 778, 781 (CA 6, 1996), reh and reh en banc den (1996), cert den 519 US 823; 117 SCt 81; 136 L Ed2d 39 (1996).]

> MCL 259.51. The MAC['s] exclusive authority does not include the authority to dictate location. As such, rule 259.401 which purports to give MAC[] authority to override a local ordinance that addresses the location of landing fields is not within the statutory rule making authority of the agency.
>
> The statute gives them the authority to make rules regarding location, but it does not include the authority to preempt a local ordinance. The exclusive authority with which they have been empowered involves the operation of airports and landing strips. Plaintiff's motion is granted. [Transcript of November 28, 2001, motion for summary disposition, p 5.]

Amici curiae herein join in the position taken by plaintiff-appellee City of Lake Angelus in this matter that the trial court's holding is correct and that there is certainly no reason for this Court to disturb it.

STANDARD OF REVIEW

Plaintiff-Appellee City of Lake Angelus's brief on appeal correctly states the applicable standard of review. Regarding the issue raised by defendants to which this amicus brief is directed (Defendants-Appellants' Brief on Appeal, Issue II), the standard of review is de novo because the trial court granted the city's motion for summary disposition pursuant to MCR 2.116(C)(10) and because the issue that the trial court decided concerns the interpretation of a statute. *Liberty Mutual Ins Co v Michigan Catastrophic Claims Ass'n*, 248 Mich App 35, 40; 638 NW2d 155 (2001).

ARGUMENT

The Michigan Legislature in MCL 259.51(1) did not grant to the defendant Michigan Aeronautics Commission the unlimited and exclusive authority to determine the locations of all seaplane landing areas in all local communities; therefore, the Michigan Aeronautics Commission cannot, in an administrative regulation, unilaterally override (i.e., nullify) the existing ordinances of local units of government that address the issue of the location of seaplane landing areas situated within their own geographical boundaries or require local units of government to obtain the permission of the Michigan Aeronautics Commission before being able to pass and enforce ordinances that address the issue of the location of seaplane landing areas situated within their own geographical boundaries.

A. Local units of government have broad and extensive power under Michigan's constitution and statutes to adopt ordinances relating to property situated within their geographical boundaries.

Local units of government in Michigan, such as townships, cities, villages, and counties, have broad and extensive powers under the Michigan constitution and Michigan statutes to adopt ordinances relating to the use of land and water within their geographical boundaries. No such power is similarly conferred on state agencies in general or the aeronautics commission in particular.

1. Townships have broad powers to adopt zoning ordinances relating to the use of property situated within their geographical boundaries.

The Michigan constitution provides for townships to be vested with the powers provided by law:

> Each organized township shall be a body corporate with powers and immunities provided by law. [Const 1963, art 7, § 17.]

Michigan law, in the form of the Township Zoning Act, MCL 125.271, et seq., provides that townships can regulate the use of land and natural resources by way of zoning ordinances:

> An act to provide for the establishment in townships of zoning districts within which the proper use of land and natural resources may be . . . regulated by ordinance. [Township Zoning Act, 1943 P.A. 184, Preamble.]

The Township Zoning Act explicitly states that a township's board may provide by zoning ordinances for the regulation of land development to facilitate transportation systems, recreation, and the public health and safety:

> The township board of an organized township in this state may provide by zoning ordinance for the regulation of land development and the establishment of districts . . . to facilitate adequate and efficient provision for transportation systems . . . recreation, and other public service and facility requirements; and to promote public health, safety, and welfare. [MCL 125.271(1).]

In addition, the Township Planning Act, MCL 125.321 et seq., provides that a basic zoning plan shall show the planning commission's recommendations for the development of the township and include, among other things, the general location of water front developments:

> The basic plan shall include . . . (b) [t]he general location . . . of . . . water front developments. [MCL 125.327(2)(b).]

Both the Supreme Court and this Court have stated that the Township Zoning Act provides townships with a broad grant of power to regulate the use and development of land and recreational facilities. See, e.g., *Burt Twp v Dep't of Natural Resources*, 459

Mich 659, 665; 593 NW2d 534 (1999) ("The Legislature, through the [Township Zoning Act], has granted significant authority to townships. . . . The [Township Zoning Act] broadly vests authority in townships to regulate land development 'to meet the needs of the state's citizens for . . . recreation . . . and other uses of land."); *Addison Twp v Gout (On Remand)*, 435 Mich 809, 813, 816; 460 NW2d 215 (1990) (The Township Zoning Act "is a broad grant of authority," and "[o]nly in very rare instances will a permit issued for one purpose obviate local zoning laws."); *Charter Twp of Delta v Dinolfo*, 419 Mich 253, 260; 351 NW2d 831 (1984) (The Township Zoning Act "is, on its face, a broad grant of power."); *Cornerstone Investments, Inc v Cannon Twp (On Remand)*, 239 Mich App 98, 101-102; 607 NW2d 749 (1999) (The Township Zoning Act "is an enabling act granting townships the power to regulate land use and pass zoning ordinances" and "broadly vests authority in townships to regulate land development to meet the needs of the state's citizens"); *Frericks v Highland Twp*, 228 Mich App 575, 593; 579 NW2d 441 (1998), lv den 459 Mich 972 (1999) (The Township Zoning Act grants townships "broad powers.").

Finally, the Michigan constitution itself specifically requires that the provisions in the constitution and in the laws of Michigan concerning townships "shall be liberally construed in their favor." Const 1963, art 7, § 34. The Convention Comment to this section of the Michigan constitution emphasizes that the enjoyment of a broad construction of the powers of a township was intentionally inserted in this new section in the constitution as a guide for courts to follow:

> This is a new section intended to direct the courts to give a liberal or broad construction to statutes and constitutional provisions concerning all local governments. Home rule cities and villages already enjoy a broad construction of their powers and it is the intention here to extend to counties and townships within the powers granted to them equivalent latitude in the interpretation of the constitution and statutes. [1963 Const, art 7, § 34, Convention Comment; *Hess v West Bloomfield Twp*, 439 Mich 550, 560-561; 486 NW2d 628 (1992) ("We must employ this constitutional mandate.")]

2. Cities and villages have broad powers to adopt zoning ordinances relating to the use of property situated within their geographical boundaries.

The Michigan constitution provides for cities and villages to be vested with the power to adopt ordinances relating to property, subject to the constitution and law:

> Each . . . city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section. [1963 Const, art 7, § 22.]

Michigan law, in the form of the City and Village Zoning Act, MCL 125.581 et seq., specifically provides that cities and villages may regulate and restrict the use of land by way of ordinances:

> An act to provide for the establishment in cities and villages of districts or zones within which the use of land . . . may be regulated by ordinance. [City and Village Zoning Act, 1921 P.A. 207, Preamble.]

The City and Village Zoning Act explicitly provides that the legislative body of a city or village may regulate and restrict the use of land:

> The legislative body of a city or village may regulate and restrict the use of

> land . . . to meet the needs of the state's residents for . . . recreation, industry, trade, service, and other uses of land; to insure that uses of the land shall be situated in appropriate locations and relationships . . . and to promote public health, safety, and welfare. [MCL 125.581(1).]

This Court has recognized that a city's zoning regulations are a legitimate means to protect important property interests and accommodate competing uses of property within a community. *The Jesus Center v Farmington Hills Zoning Bd of Appeals*, 215 Mich App 54, 67; 544 NW2d 698 (1996).

The Supreme Court has recognized that "zoning involves 'the hopes, aspirations, and ambitions of human beings and contests between them over competing interests," and that "zoning ordinances typically are worded so as to confer broad discretion on zoning boards." *Macenas v Village of Michiana*, 433 Mich 380, 389; 446 NW2d 102 (1989). Similarly, the Supreme Court has recognized that Michigan's laws have wisely committed zoning powers to the people of local communities, to be exercised through their appropriate legislative bodies:

> Our laws have wisely committed to the people of a community themselves the determination of their municipal destiny, the degree to which the industrial may have precedence over the residential, and the areas carved out of each to be devoted to commercial pursuits. . . . The people of the community, through their appropriate legislative body, and not the courts, govern its growth and its life. [*Macenas*, 443 Mich at 392, quoting *Brae Burn, Inc v Bloomfield Hills*, 350 Mich 425, 430-431; 86 NW2d 166 (1957); see also *City of Muskegon Heights v Wilson*, 363 Mich 263, 269; 109 NW2d 768 (1961) ("zoning [is] a province of the local government.").]

Moreover, for home rule cities, such as plaintiff-appellee City of Lake Angelus in this case, the power to be wielded by the city concerning the use of the property within its borders is even greater than it would otherwise be.

In accordance with the Home Rule City Act, MCL 117.1 et seq., cities are required to include a provision in their charters providing for "[a]dopting, continuing, amending, and repealing the city ordinances." MCL 117.3(k). Moreover, cities are specifically permitted to include a provision in their charters providing for "[t]he establishment of districts or zones within which the use of land . . . may be regulated." MCL 117.4i(c). And the Home Rule City Act authorizes charter cities to exercise any power, enumerated or not, that advances the interests of the city. MCL 117.4j(3); *Wilcox v General Retirement System of the City of Detroit*, 233 F3d 899, 901-902 (CA 6, 2000), reh and reh en banc den (2001), cert den sub nom *Taunt v General Retirement System of the City of Detroit*, 533 US 929; 121 SCt 2550; 150 LEd 2d 717 (2001).

Both the Supreme Court and this Court have recognized that the Home Rule City Act, when it was enacted originally in the state's 1908 constitution, was intended to shift power from state agencies to cities. *City of Detroit v Walker*, 445 Mich 682, 687-690; 520 NW2d 135 (1994); *Adams Outdoor Advertising, Inc v City of Holland*, 234 Mich App 681, 687-689; 600 NW2d 339 (1999), aff'd 463 Mich 675; 625 NW2d 377 (2001).

Finally, by constitutional mandate, the Home Rule City Act and the powers conferred by it on cities, is to be liberally construed by courts in favor of municipalities. Const 1963, art 7, § 34; *City of Lansing v Edward Rose Realty, Inc*, 442 Mich 626, 633; 502 NW2d 638 (1993); *Inch Memorials v City of Pontiac*, 93 Mich App 532, 535; 286 NW2d 903 (1979).

Thus, there is "broad authority granted to home cities by the Home Rule City Act."

Adams Outdoor Advertising, 234 Mich App at 688. And that broad authority is buttressed, expanded, and to be liberally construed by courts in favor of local units of government, as directed by explicit provisions in the state's constitution. Const 1963, art 7, §§ 22, 34.

3. Counties have broad powers to adopt zoning ordinances relating to the use of property situated within their geographical boundaries.

The third type of local unit of government (in addition to townships, and cities and villages) that has broad powers to adopt zoning ordinances relating to the use of property situated within its geographical boundaries is the county.

The Michigan constitution provides that counties are vested with the powers provided by law:

> Each organized county shall be a body corporate with powers and immunities provided by law. [1963 Const, art 7, § 1.]

Michigan law, in the form of the County Zoning Act, MCL 125.201 et seq., provides that counties can use zoning ordinances for the uses of land within its boundaries:

> The county board of commissioners of a county of this state may provide by zoning ordinance for the establishment of land development regulations and districts . . . to insure that uses of the land shall be situated in appropriate locations and relationships. [MCL 125.201(1).]

And, as already noted, the Michigan constitution includes a provision directing courts to interpret this power liberally in favor of local units of government. 1963 Const, art 7, § 34, and Convention Comment.

B. The aeronautics code confers exclusive authority on the aeronautics commission for approving the "operation of airports, landing fields, and other aeronautical facilities within the state, so as to assure a uniformity of regulations covering aeronautics," but it does not confer exclusive authority on the aeronautics commission for determining the "location . . . of airports and landing fields."

The enabling statute for the aeronautics commission does not confer unlimited authority on the commission. Rather, by its plain language, it confers on the commission the exclusive authority for approving the "operation" of airports and landing fields, and it confers the non-exclusive (i.e., shared) authority for promulgating rules concerning the public safety governing the "location" of airports and landing fields.

The enabling statute could have stated in its text, but does not state, that the aeronautics commission can decide--without being limited by the valid zoning or other ordinances made applicable by local units of government--where airports and landing fields (or, more specifically regarding the instant litigation, where seaplane landing zones) must be located within local communities.

The aeronautics commission's enabling statute, MCL 259.51(1), states in pertinent part as follows:

> **The commission has** general supervision over aeronautics within this state, with **exclusive authority** to approve the **operation** of airports, landing fields, and other aeronautical facilities within the state, so as to assure a uniformity in regulations covering aeronautics. The commission shall encourage, foster, and participate with and provide grants to the political subdivisions of this state in the development of aeronautics within this state. The commission shall establish and encourage the establishment of airports, landing fields, and other aeronautical facilities. The commission shall promulgate rules that it considers necessary and advisable for the public safety governing the designing, laying out, location, building, equipping,

and operation of airports and landing fields. [MCL 259.51(1), emphasis added.]

The plain language of this enabling statute indicates that the Legislature granted the aeronautics commission the exclusive authority to approve things concerning the "operation" of airports and landing fields so as to assure a uniformity in regulations covering aeronautics. Thus, the aeronautics commission can, by itself, determine how airports and landing fields are to be operated, so long as those determinations are for the purpose of assuring uniformity concerning aeronautics.

The plain language of this enabling statute further indicates that the Legislature has not granted exclusive authority to the aeronautics commission to determine where airports or landing fields are to be located, however. In other words, the Legislature intended to limit the commission's exclusive authority to matters involving the operation of airports and landing fields, so as to assure a uniformity in regulations covering aeronautics, but, as its plain language establishes, it never intended to extend that exclusive authority to matters involving the location of airports and landing fields in local communities.

Nevertheless, the relevant (post-*Gustafson*) regulation that the aeronautics commission promulgated, 2000 MR 13, R 259.401 (effective November 10, 2000), purports to permit the commission to "override" local ordinances that have nothing to do with the "operation" of airports or landing fields and to require local units of government to have to obtain the pre-approval of the aeronautics commission before they may enforce

their own ordinances applicable to areas within their own boundaries concerning matters that have nothing to do with how airports or landing fields are operated.[2]

1. The applicable principles of statutory construction.

The issue raised in this case presents this Court with a question of statutory construction or interpretation: namely, whether the Legislature intended, in the enabling statute of MCL 259.51(1), to confer on the Michigan Aeronautics Commission the exclusive authority to determine the locations of seaplane landing areas in local communities, thereby permitting the commission to act unilaterally in this area and to be able to ignore or overrule zoning and other ordinances passed by local units of government in whose jurisdictions the seaplane landing areas would actually be located.

To aid in the task of resolving questions of statutory interpretation, courts have developed certain principles of construction. Some of those principles were recently and succinctly stated by the Supreme Court in *Pohutski v City of Allen Park*, ___ Mich ___, ___; ___ NW2d ___; 2002 WL 485808 (4/2/2002), as follows:

> When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000); *Massey v Mandell*, 462 Mich 375, 379-380; 614 NW2d 70 (2000). We give the words of the statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent

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[2]The entire text of Rule 259.401, entitled "Seaplane Operations," is attached to the brief on appeal of plaintiff-appellee City of Lake Angelus as its Exhibit 3. The "override" paragraph of the rule is paragraph 3, and the "pre-approval" paragraph of the rule is paragraph 4.

> only if the statutory language is ambiguous. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995). Where the language is unambiguous, "we presume that the Legislature intended the meaning clearly expressed--no further judicial construction is required or permitted, and the statute must be enforced as written." *DiBenedetto, supra* at 402. Similarly, courts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature. See *Lansing v Lansing Twp*, 356 Mich 41, 649-650; 97 NW2d 804 (1959).
>
> When parsing a statute, we presume every word is used for a purpose. As far as possible, we give effect to every clause and sentence. "The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another." *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000). Similarly, we should take care to avoid a construction that renders any part of the statute surplusage or nugatory. *In re MCI* [*Telecommunications*, 460 Mich 396, 414; 596 NW2d 164 (1999).]

As emphasized very recently by the Supreme Court in *Bright v Littlefield*, ___ Mich ___, ___; ___ NW2d ___; 2002 WL 524553 (4/9/2002), in interpreting statutes, the primary goal is to ascertain the intent of the Legislature by examining the language of the statute itself and, if that language is unambiguous, to apply the statute as written:

> In construing statutes, "[t]he primary goal of judicial interpretation is to ascertain and give effect to the intent of the Legislature." *McJunkin v Cellasto Plastic Corp*, 461 Mich 590, 598; 608 NW2d 57 (2000). To do that we examine the "language of the statute itself." *In re MCI Telecommunications*, 460 Mich 396, 411; 596 NW2d 164 (1999). If the language is unambiguous, this Court applies the statute as written.

Another principle of statutory interpretation that is of relevance in this case is the maxim of *expressio unius est exclusio alterius*, which means that the expression of one thing in a statute implies the exclusion of other similar things. See *County of Alcona v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246-247; 590 NW2d 586 (1999), lv den 461 Mich 854 (1999); *Twp of Burt v State of Michigan*, 459 Mich 659,

670; 593 NW2d 534 (1999); *Capital Region Airport Authority v Charter Twp of DeWitt*, 236 Mich App 576, 594-596; 601 NW2d 141 (1999), lv den 461 Mich 996 (2000).

2. There is a three-part test for determining whether a state commission, in promulgating a particular regulation, has exceeded the authority delegated to it by the Legislature in an enabling statute, and that test focuses on legislative intent.

It is well established that "[a]n agency has no inherent power. Any authority it has must come from the Legislature." *Pharris v Michigan Secretary of State*, 117 Mich App 202, 204; 323 NW2d 652 (1982). Moreover, "an administrative agency may not, under the guise of its rule-making power, abridge or enlarge its authority or exceed the powers given to it by statute." *Sterling Secret Service, Inc v Michigan Dep't of State*, 20 Mich App 502, 513; 174 NW2d 298 (1970). The Supreme Court has cautioned that, "[w]hen an executive agency . . . interprets a statute it administers by promulgating a rule, the action must be taken within the confines of the enabling statute. In that sense, the agency's action is 'checked' by the statute." *Blank v Dep't of Corrections*, 462 Mich 103, 117, n 8; 611 NW2d 530 (2000).

Whether a rule promulgated by an agency exceeds the scope of the authority delegated to the agency by the Legislature in an enabling statute is determined under a three-part test:[3]

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[3]Both of the parties in this case agree that this three-part test is applicable and determinative. (See Defendants-Appellants' Brief on Appeal, p 19; Plaintiff-Appellee's Brief on Appeal, p 24.)

> (1) whether the rule is within the subject matter of the enabling statute; (2) whether it complies with the legislative intent underlying the enabling statute; and (3) whether it is arbitrary and capricious. [*Blank*, 462 Mich at 127.]

Defendants in this case, by way of the promulgation of Rule 259.401 by the aeronautics commission, essentially maintain that the commission is immune from all provisions of all local zoning ordinances. The Supreme Court has stated that this issue concerns whether the Legislature, in an enabling statute, intended to confer exclusive, or complete, authority on an agency (or other governmental unit) so as to permit it to promulgate rules that are not subject to local zoning ordinances:

> We hold today that the legislative intent, where it can be discerned, is the test for determining whether a governmental unit is immune from the provisions of local zoning ordinances. [*Dearden v City of Detroit*, 403 Mich 257, 264; 269 NW2d 139 (1978); see also *Byrne v State of Michigan*, 463 Mich 652, 657-661; 624 NW2d 906 (2001); *Twp of Burt v State of Michigan*, 459 Mich 659, 666; 593 NW2d 534 (1999).]

Similarly, this Court has also recently stated that legislative intent is the test for determining whether an entity is immune from the provisions of local zoning ordinances:

> Our Supreme Court has said in *Dearden v Detroit* and *Burt Twp v Dep't of Natural Resources*, and most recently in *Byrne v Michigan*, that "the legislative intent, where it can be discerned, is the test for determining whether a governmental unit is immune from the provisions of local zoning ordinances."
>
> * * *
>
> [O]ur courts have historically been reluctant to read into a legislative grant of authority exclusive power in derogation of other laws or governmental authority. [*Pittsfield Charter Twp v Washtenaw Co*, 246 Mich App 356, 358, 362; 633 NW2d 10 (2001).]

Moreover, it is incumbent on the agency to carry the burden of establishing "a clear legislative intent" to exempt the agency from the effect of local zoning ordinances. *Twp of Burt*, 459 Mich at 666.

Thus, a state agency must obey a local regulatory ordinance unless the agency establishes that language in the agency's enabling statute indicates a clear legislative intent to grant exclusive authority to the agency regarding that specific matter.[4]

Significantly, when a statute itself exempts certain matters from local control, but not other matters, or grants exclusive authority to an agency for certain matters, but not for other matters, the agency is still subject to the local ordinances concerning the "other matters." Under the maxim of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of others), the "other matters" are things regarding which the agency does not have exclusive authority, and therefore, like everyone else, must comply

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[4]A recent Attorney General Opinion succinctly summarized this matter concerning a state agency's authority vis-a-vis a local regulation as follows:

> Whether a state agency is subject to a local regulation is determined by legislative intent. *Burt Twp v Dep't of Natural Resources*, 459 Mich 659, 663; 593 NW2d 534 (1999); see also *Dearden v Detroit*, 403 Mich 257, 264; 269 NW2d 139 (1978); and *Capital Region Airport Authority v DeWitt Charter Twp*, 236 Mich App 576; 601 NW2d 141 (1999). A state agency must obey a local regulatory ordinance unless language in the agency's enabling statute indicates a legislative intent to grant exclusive jurisdiction to that agency. Although the precise term "exclusive jurisdiction" is not required, the legislative intent to grant the state agency exclusive jurisdiction must be clear. *Burt Twp*, 459 Mich at 669. Additionally, the state statute that gives the local governing body the power to regulate the same subject matter must be examined to determine if the state agency is subject to the local regulation. *Burt Twp*, 459 Mich at 664, and *Dearden*, 403 Mich at 264. [OAG, 2000, No 7063; 2000 WL 1530877 (October 12, 2000).]

with the applicable ordinances of the local units of government. See *County of Alcona*, 233 Mich App at 246-247, 252; *Capital Region*, 236 Mich App at 594; *Twp of Burt*, 459 Mich at 670-671.

3. The regulation that the aeronautics commission promulgated and which purports to arrogate to the commission the exclusive authority for determining the location of seaplane landing areas within the boundaries of local units of government, exceeds the authority delegated to the aeronautics commission by the Legislature in the applicable enabling statute.

Defendants in this case argue that "[t]he Aeronautics Code [namely, MCL 259.51(1)] confers exclusive authority" on the aeronautics commission to promulgate the content of Rule 259.401 because it [namely, MCL 259.51(1)] grants exclusive authority to the commission to approve the "operation" of landing fields. (Defendants-Appellants' Brief on Appeal, p 18.) Defendants state that, "[i]n regard to seaplanes, the exclusive authority to 'approve' the 'operation' of landing fields can only mean the exclusive authority to decide whether or not a waterway may be used by seaplanes to land and take off." (Defendants-Appellants' Brief on Appeal, p 23.)

Defendants' argument is simply without merit. "Operation" and "location" are different words and mean different things.

The enabling statute itself, MCL 259.51(1), unambiguously states the specific area

for which the Legislature granted exclusive authority to the commission, as well as the other areas for which the Legislature did not grant exclusive authority to the commission. Thus, the statute plainly states that the commission has the exclusive authority "to approve the operation of airports, landing fields, and other aeronautical facilities within the state, so as to assure a uniformity in regulations covering aeronautics."[5] MCL 259.51(1). Approving the **operation** of airports or landing fields has nothing to do with determining the **location** of where airports or landing fields may be placed. Moreover, if that were not clear enough, the statute itself goes on to state, in a sentence not concerning

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[5]This language concerning the "exclusive authority" of the commission relating to the "operation" of airports and landing fields so as to assure a uniformity in regulations "covering aeronautics," was added to the enabling statute, MCL 259.51(1), in 1996. See 1996 PA 370. There is nothing in the House Bill Analyses for this public act to indicate any legislative intent to permit the aeronautics commission to ignore, nullify, or otherwise intrude upon the valid exercise of the powers of local units of government to pass ordinances affecting the use of the lands within their own boundaries--much less there being any mention that the commission is at liberty to require local units of government to obtain the commission's pre-approval before being able to enforce their own zoning and other ordinances within their own boundaries. If such a drastic shift or break with the past was intended by the Legislature, one would reasonably expect to find some mention of it in a bill analysis. Instead, what is apparent from the bill analyses is that the statutory amendments were intended to bring the operations and practices within the field of aeronautics in Michigan into compliance with current industry standards and changes in federal law concerning the regulation of the aeronautics industry. See House Legislative Analysis, HB 5257, February 27, 1996, p 1, and House Legislative Analysis, HB 5257 (Second Analysis), July 18, 1996, p 1. (attached as Exhibit A.) The Legislature did not state in the text of the amendment to the statute, but knew how to state if it had desired to do so, that, for example, "a local unit of government shall not enact, maintain, or enforce an ordinance, regulation, or resolution that conflicts in any manner with this act," as the Legislature stated in 1999 in the Michigan Right to Farm Act, MCL 286.474, as amended by 1999 PA 261; *Travis v Preston (On Rehearing)*, 249 Mich App ___, ___; ___ NW2d ___; 2002 WL 84261 (1/22/2002). The Legislature knew how to express an intention to deprive local units of government of their broad and statutorily conferred rights to regulate the use of the lands and waters within their boundaries, but it certainly did not do so in MCL 259.51(1).

any "exclusive authority" of the commission, that the commission shall promulgate rules "advisable for the public safety governing the . . . location . . . of airports and landing fields." Id. In other words, in the sentence concerning the commission's grant of exclusive authority, only "operation" is mentioned, and in an entirely separate sentence concerning the commission's non-exclusive authority, "location" is included.

The Legislature has designated one area (operation) in which the commission is to have exclusive authority. In accordance with the maxim of *expressio unius est exlusio alterius*, the expression of one thing--"operation"--excludes other things--such as "location." To make this absolutely clear, the Legislature actually included the word location in a separate sentence within the list of subjects for which the commission is not given exclusive authority--subjects such as the designing, laying out, location, and building of airports and landing fields.

The power granted to local units of government to pass zoning and other ordinances affecting the use of the areas within their respective boundaries (see Section A, *supra*) is a power that is broad, specifically conferred by numerous statutes, and specifically reaffirmed by provisions in the state's constitution. The state's constitution specifically directs courts to liberally construe those statutes in favor of local units of government.

The defendant-agency in this case (which has also been granted certain specific powers by the Legislature) wishes not only to intrude upon, but also to nullify, the broad and traditionally held powers of local units of government concerning land use. The

defendant-agency, in essence, wants to unilaterally re-write and expand the enabling statute that provides it with limited powers. For any such possible result, the agency should petition the Legislature, and let the people, through their legislators, decide.[6] Undoubtedly, any discussion about changing the law as we know it, so as to entirely deprive local citizens of their ability to decide whether they want airplanes landing in their backyards or in the waters off their beaches would cause, to say the least, a spirited public-policy debate.

Admittedly, the enabling statute provides the exclusive authority for the aeronautics commission to approve the "operation" of airports and landing fields "so as to assure a uniformity in regulations covering aeronautics." MCL 259.51(1). The power to unilaterally determine the location of such airports and landing fields, however, is not mentioned. Nor is there any mention of any ability to ignore, override, or otherwise intrude upon the valid exercise of the powers of local units of government to pass ordinances affecting the use of the lands and waters within their own boundaries--much

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[6]See the separation of powers clause, Const 1963, art 3, § 2; *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 406; 572 NW2d 210 (1998) ("The Legislature can and may rewrite the statute, but we will not do so."); *Hakari v Ski Brule, Inc*, 230 Mich App 352, 358; 584 NW2d 345 (1998) ("The role of the judiciary is to construe statutes as intended by the Legislature, not to rewrite them."); *Freeman v Hi Temp Products, Inc*, 229 Mich App 92, 100, n 3; 580 NW2d 918 (1998), lv den 460 Mich 852 (1999) ("In effect, Hi Temp argues that we should rewrite the statute. . . . As judges, we cannot constitutionally act as legislators."); *Freeman v Wozniak*, 241 Mich App 633, 637; 617 NW2d 46 (2000) (where "a statute is applicable to the circumstances and dictates the requirements for relief by one party, equity will not interfere."); *Michalski v Bar-Levav*, 463 Mich 723, 733-734; 625 NW2d 754 (2001) ("the Legislature may, and perhaps should, amend the [statute] . . . [but] we decline to do so by construing the [statute] in a manner inconsistent with its plain language.").

less there being any mention that the commission is at liberty to require local units of government to obtain the commission's pre-approval before being able to enforce their own zoning and other ordinances within their own boundaries!

In light of the limited exclusive authority conferred on the aeronautics commission in the enabling statute (concerning only the issue of the operation of airports and landing fields for the purpose of assuring uniformity in regulations covering aeronautics), the aeronautics commission might argue in some other case that a local unit of government should not be permitted to enforce a particular ordinance seeking to control precisely the aeronautical activities taking place within existing airports. However, the plain language of the enabling statute itself makes clear that the aeronautics commission does not have the exclusive authority to unilaterally dictate the new locations of airports and landing areas within the boundaries of local units of government throughout the state of Michigan. There is nothing in the enabling statute to support the position that the aeronautics commission alone has been vested with such unlimited exclusive authority as to usurp all of the traditional and broad zoning powers that have been granted to local units of government by numerous statutes and by the state's constitution concerning this matter.

Accordingly, in an unpublished opinion of this Court, *Twp of Oxford v Bentley*, unpublished opinion per curiam of the Court of Appeals, decided 10/19/1999 (Docket No. 206581); 1999 WL 33434977 (attached as Exhibit B) it was stated that no zoning laws were effectively repealed by the language in the aeronautics commission's enabling

statute, and that therefore a local unit of government continues to be able to determine the location of airports and landing areas within its boundaries:

> Townships may still determine the locations of airports and landing areas, and control non-aeronautical activities, but may not determine what aeronautical activities take place on the property. The 1996 amendments to the Aeronautics Code simply operated to clarify the law in an area where townships had never previously had express legislative authority to control aeronautical activities. . . . [N]o zoning laws were effectively repealed by the amendments to the Aeronautics Code.

In sum, the powers granted to local units of government to regulate the use of areas within their boundaries are conferred by numerous statutes and by constitutional provisions, and by constitutional direction the statutes conferring these powers must be broadly interpreted by the courts in favor of local units of government. The exclusive authority granted to the aeronautics commission in its enabling statute is narrow, concerns solely the approval of the "operation" of aeronautical facilities for the purpose of assuring a uniformity in regulations covering aeronautics, and does not mention abrogating local ordinances of any kind, much less abrogating ordinances concerning the essence of local governance--that is, the use of local properties. A panel of this Court (in an unpublished opinion) has specifically held that a local unit of government remains fully able to pass ordinances concerning the determination of the locations of airports and landing areas within its boundaries. Any other conclusion would run directly contrary to the plain language of the aeronautics commission's enabling statute and would improperly (in violation of numerous statutes and the state constitution) deprive local units of government of their right to self-determination.

RELIEF REQUESTED

Amici curiae herein join plaintiff-appellee City of Lake Angelus in asking this Court to AFFIRM the circuit court's order granting the city's motion for summary disposition.

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April , 2002
362480

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LIST OF EXHIBITS

Exhibit **A** House Legislative Analysis, HB 5257, February 27, 1996; and House Legislative Analysis, HB 5257 (Second Analysis), July 18, 1996

Exhibit **B** *Twp of Oxford v Bentley*, unpublished opinion per curiam of the Court of Appeals, decided 10/19/1999 (Docket No. 206581); 1999 WL 33434977

House
Legislative
Analysis
Section

Olds Plaza Building, 10th Floor
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Phone: 517/373-6466

AERONAUTICS CODE: CODIFY RULES

House Bill 5257 as enrolled
Public Act 370 of 1996
Second Analysis (7-18-96)

Sponsor: Rep. Michael Nye
House Committee: Transportation
Senate Committee: Transportation and Tourism

THE APPARENT PROBLEM:

The Aeronautics Code provides for the licensing and regulation of aircraft, airports, pilots, aviation schools, and numerous other aspects of aeronautics within Michigan, and gives the Michigan Aeronautics Commission general supervision over aeronautics in the state. The code was enacted in 1945 at a time when aviation was still in its early stages of growth, and has been updated occasionally over the last 50 years to reflect current industry standards and to bring it into compliance with federal law; the last major update of the code occurred in 1976. In addition, to keep abreast of changes that have occurred within the industry and at the federal level over the last 20 years, the commission generally has altered administrative rules to reflect current practices and terminology. Some people believe the act needs to be updated again, partly for purposes of incorporating into it the more modern language and standards contained in rules, but also to reflect changes in federal law which have affected the way the commission currently regulates the industry.

THE CONTENT OF THE BILL:

The bill would amend the Aeronautics Code to switch to a calendar year for purposes of registration and licensing of persons regulated under the act, and to codify provisions currently contained in administrative rules governing the licensing and regulation of aircraft, flight schools, aeronautical facilities, airport managers, and other aspects related to aviation, in order to clarify and simplify the act and bring it into conformity with federal rules and regulations and current industry standards.

Change to calendar year. Currently, the act provides for aircraft registration to run from August 1 of one year to July 31 of the next, and requires the registration fee to be paid prior to August 1 of each year. Under the bill, the registration year would be the same as a calendar year; registrations would expire on January 1, and the fee for a new registration would be due on December 31. The bill also would adjust licensing and registration provisions which apply to other types of licensees under the act to conform with the calendar year (i.e., for airport managers and aeronautical facilities), and would make other changes to reflect calendar-year registration.

Increase temporary field permit fee. The commission may issue a temporary field permit for up to 15 days, for which it currently charges a $2 fee. The bill would set the fee for this permit in statute at $50 and specifies the permit would be good for up to 120 days. Also, an application for this permit now must be received at least seven days before the requested date of issuance; under the bill, it would have to be received 14 days prior to this date.

Registration certificate, aircraft decal, assigned number. The act currently requires the registration certificate issued by the aeronautics commission to be carried "in a conspicuous place" in an aircraft at all times. The bill would remove language requiring conspicuous placement of the certificate and, thus, would require merely that it be carried in an aircraft. In addition, the act currently requires certain "decal plates" to be affixed at various points on the external surface of an aircraft. The bill would delete this requirement and other references to decals, but would retain language requiring each aircraft to "display the number assigned to it by the United States or a foreign country."

Aeronautical traffic rules. Current provisions contained in administrative rules, including general aeronautical rules that apply both in the air and on the ground, the use of licensed facilities by aircraft users, emergency actions

required by aircraft users in the event of an accident, rules governing landings and takeoffs, and minimum operating altitudes for aircraft would be codified in the act.

Flight schools. The bill would codify and update provisions contained in administrative rules relative to aviation schools. Rules, however, currently refer to both "ground schools" (where students study aviation in classrooms) and "flight schools" (time spent in the air learning how to fly). The bill would codify provisions governing flight schools only, but with minor changes to make the language consistent with industry standards and bring it into compliance with federal rules governing flight schools.

Public use facilities. The bill would codify provisions currently contained in rules relating to public use landing areas, and would require all licensed public-use facilities to be included on state aeronautical charts and in other aviation publications offered to the public.

Aeronautical facilities. The bill would codify and update provisions currently contained in rules governing the different categories of licensed aeronautical facilities. Current rules provide for six different types of airports: a class D substandard airport, classes C, B, and A public airports, seaplane bases, and heliports. The bill would establish six different types of aeronautical facilities, the first three of which essentially correspond to the four classes of airports contained in rule, with some alterations. These would include the basic utility airport, general utility airport, and air carrier airport. The bill would incorporate into the act provisions now in rules governing the seaplane base and heliport, and would include a new category--the hospital heliport--along with minimum specifications for this facility similar to those which apply to the others.

Airport managers. Provisions similar to those currently in rules governing airport managers would be adopted into the act under the bill.

Flying club. The bill would define a flying club as a nonprofit entity organized for the express purpose of providing its members with aircraft for their personal use and enjoyment, where aircraft ownership would be vested in the club's name or owned in equal shares by all its members. Property rights of club members would be equal, and any part of net earnings of a flying club that were to be distributed to members would have to be in equal shares to all members. A club could not derive greater revenue from the use of aircraft than the amount necessary for its actual operation, maintenance, and replacement or upgrade of its aircraft, and a club's aircraft could not be used by members for rental purposes or by anyone for charter or lease.

State ownership of airports. The act currently permits the state to own and operate an "airport at Lansing" (currently known as the Capital City Airport). The bill would delete this language--since this airport no longer is owned and operated by the state--and, instead, would permit the state to own and operate multiple airports. (The state currently owns and operates five airports.)

Reciprocal agreements with Ohio, Indiana. Currently, the act specifies that the governing body of a political subdivision in Wisconsin whose laws permit may acquire, establish, construct, enlarge, own, control, lease, equip, improve, maintain, and operate various types of aeronautical facilities in Michigan--subject to all laws, rules, and regulations of Michigan applicable to its political subdivisions in such aeronautical projects--but subject to Wisconsin's laws in all matters relating to financing of such projects. Under the bill, these and related provisions would be applicable to political subdivisions in the states of Ohio and Indiana.

Powers of political subdivisions. The bill would codify various provisions currently found in rules that permit political subdivisions of the state to acquire air easements surrounding aeronautical facilities and establish aeronautical facilities. Also, provisions in rule governing the powers of county boards of commissioners relative to funds for publicly owned or operated facilities, and prescribing the state's authority to create a state plan for approach protection surrounding aeronautical facilities, would be codified.

Commission powers. Current rules prescribe the Aeronautics Commission's authority to deal with determinations of hazard at public- and state-owned aeronautical facilities, limit activities within airport property, and regulate aircraft activities over, above, and upon the state's lands and waters; the bill would codify these provisions. Also, the act currently grants the commission general supervision over aeronautics in the state and, among other things, authorizes it to provide for the licensing of aircraft manufacturers. The bill would clarify that the commission has "exclusive authority to approve the operation of airports, landing fields, and other aeronautical facilities within the state" in order to assure uniform regulation of aeronautics, and would eliminate the commission's authority to license aircraft manufacturers.

Suspension, revocation of license. The bill would codify current rules authorizing the commission or its authorized representative, after considering the facts of a case and holding a hearing, to suspend or permanently revoke, or both, the license, certificate, or letter of authority of someone who committed certain proscribed activities or failed to take appropriate action as specified.

Penalty provisions. Currently, someone who violates the act generally is guilty of a misdemeanor. Under the bill, a person who violated the act would be responsible for a civil infraction and would have to pay a civil fine of up to $500. In addition, the bill would codify various penalty provisions contained in rules relating to tampering with markings of aeronautical facilities, allowing domestic animals or fowl on aeronautical facility property, and conduct constituting misdemeanor and felony violations.

Repeal. The bill would repeal obsolete sections of the act governing airspace reservations, decal plates, certificates of public convenience and necessity, landing areas for emergency public use, and authority of the Aeronautics Commission to issue revenue bonds in amounts up to $5 million to pay for improvements to the Capital City Airport. In addition, other sections would be repealed dealing with aviation instructors, aviation schools, and inspection of aircraft, as these provisions would be added elsewhere to the act by the bill. And finally, a section governing certificates of competency would be repealed as this is an area currently governed by federal rules.

MCL 259.2 et al.

FISCAL IMPLICATIONS:

The Aeronautics Commission, within the Department of Transportation, says the bill would not affect state or local budget expenditures. (7-18-96)

ARGUMENTS:

For:

The bill would bring the Aeronautics Code into the 1990s by codifying language contained in administrative rules, revising the act to reflect current federal rules, and clarifying numerous provisions currently in the act. For instance, the Aeronautics Commission is authorized by rule to regulate aviation schools, which are divided between "flight schools" and "ground schools." Yet the commission no longer oversees aviation studies in ground schools as this is an activity performed by colleges or other traditional school settings and, thus, is under the purview of the Department of Education. Another example includes language that authorizes the commission to license aircraft manufacturers, which was inadvertently added to the act by the 1976 amendments; since this has always been a federal responsibility, this provision should be deleted from the act. The bill would add to the act updated provisions from rules relating to flight schools only, and would add other updated and clarified language from rules governing commission powers, specifying the different categories of licensed aeronautical facilities and minimum criteria they would have to meet, and regulating airport managers, aeronautical traffic rules, state authority to own multiple airports, and numerous other provisions. Also, the bill would repeal a number of sections that are either obsolete or which contain provisions that, for the sake of clarity, belong elsewhere in the act.

Analyst: T. Iversen

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

House
Legislative
Analysis
Section

Olds Plaza Building, 10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

AERONAUTICS CODE: RAISE TAX ON AVIATION FUEL, CODIFY RULES

House Bill 5257 (Substitute H-1)
First Analysis (2-27-96)

Sponsor: Rep. Michael Nye
Committee: Transportation

THE APPARENT PROBLEM:

The Aeronautics Code provides for the licensing and regulation of aircraft, airports, pilots, aviation schools, and numerous other aspects of aeronautics within Michigan, and gives the Michigan Aeronautics Commission general supervision over aeronautics in the state. The code was enacted in 1945 at a time when aviation was still in its early stages of growth, and has been updated occasionally over the last 50 years to reflect current industry standards and to bring it into compliance with federal law; the last major update of the code occurred in 1976. In addition, to keep abreast of changes that have occurred within the industry and at the federal level over the last 20 years, the commission generally has altered administrative rules to reflect current practices and terminology. Some people believe the act needs to be updated again, partly for purposes of incorporating into it the more modern language and standards contained in rules, but also to reflect changes in federal law which have affected the way the commission currently regulates the industry.

Moreover, the act currently levies a tax on aviation fuel of three cents per gallon, where those who buy fuel to supply commercial air carriers receive a one and one-half cent refund per gallon while all other "general aviation" users pay the full amount. At present, of the revenue generated from taxes, about one-third is used to support the infrastructure needs of state aeronautical facilities; and most of this third is used to support facilities that primarily serve commercial air carriers. However, as general aviation has grown in popularity in recent years, maintenance and upkeep of the state's general aviation infrastructure has been declining, and numerous improvements are needed. In light of these needs, and since the tax levied on aviation fuel has not changed in over 50 years, some have proposed raising the aviation fuel tax paid by general aviation users by three cents per gallon in order to pay for infrastructure needs of general aviation facilities.

THE CONTENT OF THE BILL:

The bill would amend the Aeronautics Code to increase the tax levied on aviation fuel as well as the tax refund that applies to certain persons, raise certain fees imposed under the act, and switch to a calendar year for purposes of registration and licensing of persons regulated under the act. In addition, the bill would codify provisions currently contained in administrative rules governing the licensing and regulation of aircraft, flight schools, aeronautical facilities, airport managers, and other aspects related to aviation, in order to clarify and simplify the act and bring it into conformity with federal rules and regulations and current industry standards.

Increase fuel tax, refund. The act currently levies a "privilege tax" of three cents per gallon on all aircraft fuel sold and used in the state, and provides a refund of one and one-half cents per gallon to airline operators who prove within six months of purchasing fuel that they were operating interstate on scheduled operations. The bill would increase this tax to six cents per gallon, and would increase the refund provided to airline operators to four and one-half cents per gallon. (Essentially, this tax increase would be paid on aircraft fuel purchased and used solely for "general aviation" purposes.)

Change to calendar year. Currently, the act provides for aircraft registration to run from August 1 of one year to July 31 of the next, and requires the registration fee to be paid prior to August 1 of each year. Under the bill, the registration year would be the same as a calendar year; registrations would expire on January 1, and the fee for a new registration would be due on December 31. The bill also would adjust licensing and registration provisions which apply to other types of licensees under the act to conform with the calendar year (i.e., for airport managers and aeronautical facilities), and would make other changes to reflect calendar-year registration.

Increase licensing, permit fees. Currently, the act imposes licensing and permit fees on different types of licensees, as follows: for airport managers, $5; for aircraft owners, $5; and for a temporary field permit, $2. The bill would increase licensing fees which apply to airport managers and aircraft owners to $10, and would increase the fee for a temporary field permit to $50. However, a temporary field permit would be good for 120 days, rather than the current 15 days. Also, an application for this permit now must be received at least seven days before the requested date of issuance; under the bill, it would have to be received 14 days prior to this date.

Registration certificate, aircraft decal, assigned number. The act currently requires the registration certificate issued by the aeronautics commission to be carried "in a conspicuous place" in an aircraft at all times. The bill would remove language requiring conspicuous placement of the certificate and, thus, would require merely that it be carried in an aircraft. In addition, the act currently requires certain "decal plates" to be affixed at various points on the external surface of an aircraft. The bill would delete this requirement and other references to decals, but would retain language requiring each aircraft to "display the number assigned to it by the United States or a foreign country."

Aeronautical traffic rules. Current provisions contained in administrative rules, including general aeronautical rules that apply both in the air and on the ground, the use of licensed facilities by aircraft users, emergency actions required by aircraft users in the event of an accident, rules governing landings and takeoffs, and minimum operating altitudes for aircraft would be codified in the act.

Flight schools. The bill would codify and update provisions contained in administrative rules relative to aviation schools. Rules, however, currently refer to both "ground schools" (where students study aviation in classrooms) and "flight schools" (time spent in the air learning how to fly). The bill would codify provisions governing flight schools only, but with minor changes to make the language consistent with industry standards and bring it into compliance with federal rules governing flight schools.

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State ownership of airports. The act currently permits the state to own and operate an "airport at Lansing" (currently known as the Capital City Airport). The bill would delete this language--since this airport no longer is owned and operated by the state--and, instead, would permit the state to own and operate multiple airports. (The state currently owns and operates five airports.)

Reciprocal agreements with Ohio, Indiana. Currently, the act specifies that the governing body of a political subdivision in Wisconsin whose laws permit may acquire, establish, construct, enlarge, own, control, lease, equip, improve, maintain, and operate various types of aeronautical facilities in Michigan--subject to all laws, rules, and regulations of Michigan applicable to its political subdivisions in such aeronautical projects--but subject to Wisconsin's laws in all matters relating

to financing of such projects. Under the bill, these and related provisions would be applicable to political subdivisions in the states of Ohio and Indiana.

Powers of political subdivisions. The bill would codify various provisions currently found in rules that permit political subdivisions of the state to acquire air easements surrounding aeronautical facilities and establish aeronautical facilities. Also, provisions in rule governing the powers of county boards of commissioners relative to funds for publicly owned or operated facilities, and prescribing the state's authority to create a state plan for approach protection surrounding aeronautical facilities, would be codified.

Commission powers. Current rules prescribe the Aeronautics Commission's authority to deal with determinations of hazard at public- and state-owned aeronautical facilities, limit activities within airport property, and regulate aircraft activities over, above, and upon the state's lands and waters; the bill would codify these provisions. Also, the act currently grants the commission general supervision over aeronautics in the state and, among other things, authorizes it to provide for the licensing of aircraft manufacturers. The bill would clarify that the commission has "exclusive authority to approve the operation of airports, landing fields, and other aeronautical facilities within the state" in order to assure uniform regulation of aeronautics, and would eliminate the commission's authority to license aircraft manufacturers.

Suspension, revocation of license. The bill would codify current rules authorizing the commission or its authorized representative, after considering the facts of a case and holding a hearing, to suspend or permanently revoke, or both, the license, certificate, or letter of authority of someone who committed certain proscribed activities or failed to take appropriate action as specified.

Penalty provisions. Currently, someone who violates the act generally is guilty of a misdemeanor. Under the bill, a person who violated the act would be responsible for a civil infraction and would have to pay a civil fine of up to $500. In addition, the bill would codify various penalty provisions contained in rules relating to tampering with markings of aeronautical facilities, allowing domestic animals or fowl on aeronautical facility property, and conduct constituting misdemeanor and felony violations.

Repeal. The bill would repeal obsolete sections of the act governing airspace reservations, decal plates, certificates of public convenience and necessity, landing areas for emergency public use, and authority of the Aeronautics Commission to issue revenue bonds in amounts up to $5 million to pay for improvements to the Capital City Airport. In addition, other sections would be repealed dealing with aviation instructors, aviation schools, and inspection of aircraft, as these provisions would be added elsewhere to the act by the bill. And finally, a section governing certificates of competency would be repealed as this is an area currently governed by federal rules.

MCL 259.2 et al.

FISCAL IMPLICATIONS:

The Aeronautics Commission, within the Department of Transportation, says the bill would result in increased revenue to the Aeronautics Fund of between $3 million to $3.5 million annually, which would be used primarily to pay for needed maintenance, repairs, and improvements to the state's general aviation airport facilities. (2-22-96)

ARGUMENTS:

For:

The bill would bring the Aeronautics Code into the 1990s by codifying language contained in administrative rules, revising the act to reflect current federal rules, and clarifying numerous provisions currently in the act. For instance, the Aeronautics Commission is authorized by rule to regulate aviation schools, which are divided between "flight schools" and "ground schools." Yet the commission no longer oversees aviation studies in ground schools as this is an activity performed by colleges or other traditional school settings and, thus, is under the purview of the Department of Education. Another example includes language that authorizes the commission to license aircraft manufacturers, which was inadvertently added to the act by the 1976 amendments; since this has always been a federal responsibility, this provision should be deleted from the act. The bill would add to the act updated provisions from rules relating to flight schools only, and would add other updated and clarified language from rules governing commission powers, specifying the different categories of licensed aeronautical facilities and minimum criteria they would have to meet, and regulating airport managers, aeronautical traffic rules, state authority to own multiple airports, and numerous other provisions. Also, the bill would repeal a number of sections that are either obsolete or which contain provisions that, for the sake of clarity, belong elsewhere in the act.

For:

The current tax levied on aviation fuel is at the same level as when the act was first created 50 years ago--that is, three cents per gallon. Currently, commercial air carriers receive a one and one-half cent refund on this tax, since they purchase huge quantities of fuel to supply the needs of the high-powered jets and other aircraft that make up their fleets. Of the approximately $8.5 million raised under the act from this tax, between $2.5 million to $3 million is used for capital and infrastructure needs of aeronautics facilities around the state. However, close to 70 percent of this amount now goes to pay for infrastructure needs of facilities that primarily benefit or serve commercial air carriers. As interest in general aviation continues to grow, the needs of the infrastructure that serves this segment of aeronautics likewise increases. The bill proposes to raise the aviation fuel tax and the refund paid to commercial air carriers by three cents. Thus, the tax would be paid entirely by general aviation users, and the commission says that the additional revenue raised under the bill would be used primarily for improving the infrastructure needs of general aviation airports and facilities throughout the state. And, it should be noted, the tax increase has the support of groups representing a cross-section of the flying public involved in general aviation.

Response:

The bill fails to guarantee that the additional revenue generated would be earmarked solely for improving infrastructure needs of general aviation facilities. An amendment should be added that would dedicate this revenue solely for its intended purpose. In fact, the act fails to specify how current revenue generated from the tax is to be used, leaving it up to the commission to direct money where it is most needed. While this may give the commission ample flexibility, it also may result in a situation where a disproportionate amount of tax revenues paid by general aviation users goes to support infrastructure needs primarily benefitting commercial air carriers, or vice-versa. It may be wise to adopt a formula that directs revenue from the two sources into two separate categories, in order to ensure adequate funding of infrastructure needs of both.

For:

The bill would provide for minor fee increases for certain licenses and permits issued under the act to levels that reflect the commission's costs to issue them. Thus, the fee for an airport manager would be raised from $5 to $10, while the fee for a temporary field permit would go from $2 to $50. (The fee increase for this permit is not being raised as dramatically as it would appear since the bill also would increase the effective time period for this permit from 15 days to 120 days.) The bill also would raise the penalty for failing to timely register an aircraft from $5 to $10.

POSITIONS:

The Capital Region Airport Authority, which owns and operates both the Capital City Airport and the Mason Airport, supports the bill. (2-22-96)

The Michigan Association of Airport Executives supports the bill. (2-22-96)

The Aircraft Owners and Pilots Association supports the bill. (2-22-96)

Chrysler Pentastar Aviation, Inc., supports the bill. (2-27-96)

The Department of Transportation has not yet taken a position on the bill. (2-22-96)

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

Only the Westlaw citation is currently available.

NOTICE: THIS IS AN UNPUBLISHED OPINION. SEE MI R A MCR 7.215 FOR RULES REGARDING THE USE AND CITATION OF UNPUBLISHED OPINIONS.

Court of Appeals of Michigan.

**TOWNSHIP OF OXFORD, Plaintiff,
and
Gerald R. BENTLEY, Arline Bentley, Richard J. Caloia, Lisa A. Caloia, Charles W. Gardner, June V. Gardner, Julia Hickmott, Dennis A. Jameyfield, Diann C. Jameyfield, Jessie G. Reynolds, Harwood L. Rowland, Sandra A. Rowland, John D. Shaw, Adele K. Shaw, Bruce Wynkoop, Susan Wynkoop, Harold Zuschlag and Penny Zuschlag, Intervening Plaintiffs-Appellants,
v.
Philip HANDLEMAN, Successor-in-Interest to Pierce E. Woodworth, Defendant-Appellee.**

No. 206581.

Oct. 19, 1999.

Before: NEFF, P.J., and MURPHY and J.B. SULLIVAN, [FN*] JJ.

FN* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

PER CURIAM.

***1** Intervening plaintiffs appeal by leave granted from an order striking a 1981 injunctive prohibition against guest flights on defendant Philip Handleman's property in Oxford Township. We affirm.

This case dates back to 1980, when plaintiff Oxford Township ("plaintiff") sought to enjoin former defendant Pierce Woodworth from developing an airport on his property located in Oxford Township. Intervening plaintiffs are residents living in the surrounding area who were allowed to join in the action. This matter was originally assigned to Oakland Circuit Court Judge Farrell E. Roberts. Following a bench trial, Judge Roberts ruled that Woodworth had a vested right to operate a private airport on his property, but was permanently enjoined from operating the airport as a public facility. The court expressly limited the use of the airport to Woodworth, his wife, and his children, for personal use only. This Court subsequently affirmed the trial court's decision and issuance of a permanent injunction. *Twp of Oxford v. Woodworth,* unpublished opinion per curiam, issued July 21, 1983 (Docket No. 59030).

In 1988, Philip Handleman purchased the Woodworth property. Judge Fred Mester, the successor to Judge Roberts, subsequently held that the 1981 injunction applied to Handleman. In May 1997, Handleman filed a motion to set aside the 1981 injunction based upon changes in state law that vested exclusive control over airport operations in the Michigan Aeronautics Commission ("MAC"), a state agency. After entertaining arguments, Judge Mester agreed that the portion of Judge Roberts' 1981 injunction that limited the use of the private airport to the property owner and his immediate family was invalid and unenforceable and, therefore, entered an order striking the invalid portion of Judge Roberts' order from the 1981 injunction. Intervening plaintiffs moved for rehearing, but their motion was denied. This Court subsequently granted intervening plaintiffs' application for leave to appeal. [FN1] We now affirm.

FN1. The Experimental Aircraft Association has been granted the right to participate in this case as amicus curiae.

Defendant Handleman sought relief from the 1981 injunctive order pursuant to MCR 2.612(C)(1)(e). This Court reviews a trial court's decision to grant relief from a judgment for an abuse of discretion. *Hadfield v. Oakland Co. Drain Comm'r,* 218 Mich.App. 351, 354, 554 N.W.2d 43 (1996). "In civil cases, an abuse of discretion exists when the decision is so violative of fact and logic that it evidences a defiance of judgment and is not the exercise of reason, but rather, of passion or bias. *Id.* at 355, 554 N.W.2d 43.

Intervening plaintiffs moved for reconsideration of the trial court's decision to grant Handleman relief from the injunction and it is that order that has been appealed in this case. A motion for rehearing or reconsideration under MCR 2.119(F) requires the moving party to "demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." This Court reviews a trial court's decision to deny a motion for reconsideration for an abuse of discretion. *In re Berlinger Trust,* 221 Mich.App. 273, 279, 561

N.W.2d 130 (1997).

*2 Intervening plaintiffs contend that they had a vested right to the continuation of Judge Roberts' 1981 injunctive order, which prohibited Handleman from allowing guest flights on the subject property. We disagree. In general, there is a strong policy favoring the finality of judgments. However, this case is distinguishable from a typical civil judgment in that the 1981 judgment included the permanent injunctive order that had prospective application. Under MCR 2.612(C)(1)(e), a court may grant a party relief from the effect of an injunctive order if it is no longer equitable for that judgment to apply prospectively. *Sylvania Silica Co. v. Berlin Twp.*, 186 Mich.App. 73, 76, 463 N.W.2d 129 (1990). An injunction is always subject to modification or dissolution by a trial court if the facts merit such action. *Opal Lake Ass'n v. Michaywe' Ltd. Partnership,* 47 Mich.App. 354, 367, 209 N.W.2d 478 (1973). Thus, a party that procures a permanent injunction against another party does not have a vested right in the continuation of that injunction if the facts or law no longer support continuation of the injunction. We therefore reject intervening plaintiffs' argument that they had a vested right to the continuation of the 1981 injunction as a matter of procedure.

Turning to the merits of Handleman's request for relief from the 1981 injunctive order, we agree that it was no longer equitable for the court to continue the injunction insofar that it prohibited guest flights on Handleman's property. The MAC was created pursuant to M.C.L. § 259.26(1); MSA 10.126(1). In 1996, legislation was adopted that resulted in significant changes to the Aeronautics Code. See 1996 PA 370. Significantly, in § 51(1) of the Aeronautics Code, it was established that the MAC has exclusive jurisdiction over aeronautical activity within the state. MCL 259.51; MSA 10.151, which became effective July 3, 1996, states:

> (1) The commission has general supervision over aeronautics within this state, with exclusive authority to approve the operation of airports, landing fields, and other aeronautical facilities within the state, so as to assure a uniformity in regulations covering aeronautics. The commission shall encourage, foster, and participate with and provide grants to the political subdivisions of this state in the development of aeronautics within this state. The commission shall establish and encourage the establishment of airports, landing fields, and other aeronautical facilities. The commission shall promulgate rules that it considers necessary and advisable for the public safety governing the designing, laying out, location, building, equipping, and operation of airports and landing fields. In order to implement this act, the commission may establish programs of state financial assistance in the form of grants, leases, loans, and purchases, or a combination of grants, leases, loans, and purchases, for assisting political subdivisions or other persons. The commission shall not grant an exclusive right for the use of an aeronautical facility....

*3 Before this 1996 amendment, § 51(1) did not contain language stating that the MAC had exclusive authority to approve the operation of airports and landing fields within the state.

This Court has recently held that the Legislature intended for the MAC (along with airport authorities) to have exclusive jurisdiction over aeronautical activities throughout the state to assure uniformity in laws regulating aeronautics for the public good. *Capitol Region Airport Authority v. Charter Twp of DeWitt,* 236 Mich.App ----; --- NW2d ---- (Docket No. 201181, issued July 23, 1999), slip op at 7-8. This Court concluded that, because exclusive authority for aeronautical activities was granted to the state agency, that agency was not subject to local land use ordinances or regulations if those ordinances or regulations related to aeronautical activities. *Id.*, slip op at 6-8. Therefore, even if a local township had been granted broad powers to regulate local land use under the Township Planning Act, M.C.L. § 125.321 *et seq.;* MSA 5.2963(101) *et seq.*, the township's authority was subservient to the agency's authority in matters related to the agency's expertise. *Id.* However, the township's authority over local land development could include airport property to the extent that the authority asserted by a township involves only non-aeronautical uses or development of the land. *Id.*, slip op at 9.

On the basis of the above authority, intervening plaintiffs' argument that the township zoning laws were effectively repealed as a result of the trial court's interpretation of M.C.L. § 259.24a; MSA 10.124a and M.C.L. § 259.51(1); MSA 10.151(1) lacks merit. Townships may still determine the locations of airports and landing areas, and control non-aeronautical activities, but may not determine what aeronautical activities take place on the property. The 1996 amendments to the Aeronautics Code simply operated to clarify the law in an area where townships had never previously had express legislative authority to control aeronautical activities. It also follows that there is no violation of the title-

object clause of the state constitution, Const 1963, art 4, § 24, given that no zoning laws were effectively repealed by the amendments to the Aeronautics Code.

To the extent that plaintiff township was asserting a right to control the activity on defendant Handleman's property, it was attempting to regulate aeronautical activity. Intervening plaintiffs are similarly seeking to enforce a restriction that limits the type of flights that may be made to and from Handleman's property. Intervening plaintiffs' intent to limit the flight activities exceeds the scope of the township's authority to regulate Handleman's property in light of the MAC's exclusive jurisdiction. After defendant Woodworth was granted the right to maintain a private airport on his property, a right now possessed by Handleman, the local authority's control over this mater with respect to aeronautical activities ended and that authority is now vested exclusively with the MAC.

*4 1996 PA 370 also added § 24a to the Aeronautics Code, M.C.L. § 259.24a; MSA 10.124a, which, as initially enacted, provided:

> "Private landing area" means any location, either on land or water, that is used for the take-off or landing of aircraft, and is to be used by the owner or persons authorized by the owner. Commercial operations shall not be conducted on private landing areas.

This section was recently amended by 1998 PA 268, effective July 17, 1998, and now provides:

> "Private landing area" means any location, either on land or water, that is used for the takeoff or landing of aircraft, and is to be used by the owner or persons authorized by the owner. *Notwithstanding any existing limitation or regulation to the contrary, the owner and any person authorized by the owner shall have the right to use such private landing area.* Commercial operations shall not be conducted on private landing areas. [Emphasis added.]

This more recent change reflects that the owner of a private landing field has the right to authorize others to use the landing field, notwithstanding any limitation or regulation to the contrary. Thus, the Legislature has made it clear that the owner of a private landing field has the right to allow guests to use the landing field. Although the latest version of § 24a had not yet been adopted when Judge Mester issued his decision, it provides further support for that decision.

Reading §§ 24a and 51(1) together, we are satisfied that Judge Mester properly granted defendant Handleman's request for relief from the 1981 injunctive order, because it was no longer equitable to continue the injunction in light of the statutory changes.

Intervening plaintiffs further argue that the effect of Judge Mester's ruling and the legislative changes is to effectuate a taking of their property without just compensation. However, intervening plaintiffs do not explain what property of theirs has been taken. To the extent they claim a vested property right in the injunction, that argument is meritless for the reasons previously discussed.

Intervening plaintiffs next argue that the newly adopted amendments to the Aeronautics Code violate their rights to due process. Legislation comports with due process where the legislation bears a reasonable relationship to a permissible legislative objective. *Fort Gratiot Charter Twp. v. Kettlewell,* 150 Mich.App. 648, 653, 389 N.W.2d 468 (1986). The changes made to the Aeronautics Code were intended to clarify the MAC's authority over aeronautical matters, as well as promote uniformity and safety in air travel. Because the amendments had the effect of clarifying the MAC's jurisdiction and matters within its exclusive control, these changes are reasonably related to a permissible legislative objective. Thus, intervening plaintiffs have not shown that the statutory amendments violate their due process protections, even if the changes adversely affect their rights.

Intervening plaintiffs also argue that the legislative changes to the Aeronautics Code had the effect of violating the separation of powers clause of the state constitution, Const 1963, art 3, § 2. Plaintiffs argue that the Legislature overstepped its bounds and invaded the judicial branch's authority because the effect of the statutory amendments was to invalidate Judge Roberts' 1981 injunctive order. Under the separation of powers doctrine, the Legislature may not reverse a judicial decision or set aside a final judgment through a legislative enactment. *Wylie v. Grand Rapids City Comm.,* 293 Mich. 571, 582- 583, 292 N.W. 668 (1940).

*5 Intervening plaintiffs' argument is flawed. Judge Roberts' made his ruling in the absence of any controlling state law on point. Injunctive relief is an extraordinary remedy that should only issue when justice requires it and there is no adequate remedy at law. *Kernan v. Homestead Development Co.,* 232 Mich.App. 503, 509, 591 N.W.2d 369 (1998). Here, Judge Roberts' ruling was one in equity only because there was no controlling legal authority at the time.

It is the Legislature's function to make laws and the judicial branch is vested with the authority to interpret and apply laws, not make them. *Randall v. Meridian Twp. Bd.,* 342 Mich. 605, 608, 70 N.W.2d 728 (1955). It was certainly within the Legislature's authority to enact a law clarifying the jurisdiction of the MAC and defining private landing rights. It is not inappropriate for the Legislature to adopt new legislation in response to court rulings without violating the separation of powers doctrine if those statutes apply prospectively to future actions. The Legislature is only precluded from adopting retroactive legislation that either reopens or sets aside a final judgment of a court already entered. See *Quinton v. General Motors Corp.,* 453 Mich. 63, 82-84, 551 N.W.2d 677 (1996) (Opinion of Levin, J.). The effect of the changes made by the Legislature was not to invalidate the trial court's equity powers, even though the proposed changes had an effect on the subject matter of the 1981 injunctive order. We conclude that it was not a violation of the separation of powers clause for Judge Mester to modify the 1981 injunction in light of the recent legislative changes.

Finally, we find no merit to intervening plaintiffs' claim that res judicata applies. Res judicata does not apply if the relevant facts change or new facts develop. *Labor Council, Michigan Fraternal Order Police v. Detroit,* 207 Mich.App. 606, 608, 525 N.W.2d 509 (1994). Since 1981, the basis for the injunctive order has changed as a result of the statutory amendments made by the Legislature.

Intervening plaintiffs also argue that defendant Handleman's right to land planes on his property should be abolished altogether because the effect of Judge Mester's decision was to expand the rights originally granted by Judge Roberts in 1981. We find no merit to this argument. Defendant Handleman's right to operate a private landing strip was established by the 1981 judgment and this Court affirmed that decision. This Court is bound to follow its prior decision on that issue as the law of the case. *Freeman v. DEC Int'l, Inc.,* 212 Mich.App. 34, 37-38, 536 N.W.2d 815 (1995). However, due to an intervening change in the law that applies to Judge Roberts' injunctive order, the law of the case doctrine does not apply to the portion of the court's order prohibiting guest flights and that portion may therefore be set aside. Moreover, because Judge Roberts' original intent was to allow defendant Woodworth to operate a private landing field, as opposed to a public airport, we do not believe the effect of Judge Mester's ruling was to improperly expand defendant Handleman's rights.

***6** Intervening plaintiffs also adopt and incorporate by reference the issues raised by Oxford Township in Docket No. 205688. However, because Oxford Township's appeal has since been disconsolidated and dismissed by stipulation of the parties, this issue is no longer properly before this Court.

Affirmed.

END OF DOCUMENT

STATE OF MICHIGAN
IN THE COURT OF APPEALS

CITY OF LAKE ANGELUS,

Plaintiff-Appellee,

v

MICHIGAN AERONAUTICS COMMISSION,

MICHIGAN DEPARTMENT OF TRANSPORTATION, and
DIRECTOR OF MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendants-Appellants.
_____/

Court of Appeals
Case No. 238996

Lower Court
Case No. 01-031671-CZ

PROOF OF SERVICE

STATE OF MICHIGAN)
)ss.
COUNTY OF WAYNE)

ENIS J. BLIZMAN, being first duly sworn, deposes and says that she is associated with the law firm of GARAN LUCOW MILLER, P.C., attorneys for amici curiae, MICHIGAN MUNICIPAL LEAGUE and THE MICHIGAN TOWNSHIPS ASSOCIATION, in the above-entitled cause of action and that on the _____ day of April, 2002, she caused to be served a true copy of AMICI CURIAE'S BRIEF ON APPEAL and a copy of this PROOF OF SERVICE upon the attorneys of record by enclosing a true copy of same in a well-sealed envelope addressed as follows:

Lawrence R. Ternan (P21334)
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with full legal postage prepaid thereon and deposited in the United States mail.

Further, deponent saith not.

ENIS J. BLIZMAN

Subscribed and sworn to before me, a
Notary Public, this _____ day of April, 2002.

Notary Public, Wayne County, Michigan
My commission expires:
362480.1