UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOEL Q. HACK, an individual, and
WREN BEAULIEU-HACK, an individual,

Plaintiffs,

v

Case No.: 2:18-cv-13330
Hon. Marianne O. Battani

THE CHARTER TOWNSHIP OF MILFORD, a Michigan municipal corporation, **TOWNSHIP OF MILFORD BOARD**, a public body, **DONALD D. GREEN**, in his personal capacity and in his official capacity as Supervisor of Milford Township, and **TIMOTHY C. BRANDT**, in his personal capacity and in his official capacity as Building and Zoning Administrator of Milford Township,

Defendants.

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BROUGHT PURSUANT TO FED. R. CIV. P. RULE 56

Plaintiffs Joel Q. Hack and Wren Beaulieu-Hack (the "Hacks"), through counsel, Maddin, Hauser, Heller & Roth, P.C., file their Response to Defendants' Motion for Summary Judgment Brought Pursuant to Fed. R. Civ. P. Rule 56,

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SUMMARY

"A motion for summary judgment may not be granted until a plaintiff has had an opportunity for discovery." *Tucker v. Union of Needletrades, Indus. & Textile Employees*, 407 F.3d 784, 787–88 (6th Cir. 2005). Plaintiffs have not been permitted to conduct meaningful discovery, and Summary Judgment is premature.

Plaintiffs were not required to exhaust their administrative remedies, to the extent they even existed, for multiple reasons. Plaintiffs are facially challenging Milford Ordinances 32-574 and 32-586, which are the sole sources of authority relied on by Defendants; exhaustion is not required in such situations. *Landon Holdings, Inc. v. Grattan Twp.*, 257 Mich. App. 154, 177 (2003). Milford Ordinance Sec. 32-574 (**Ex. L**) does not authorize Milford to impose topographical surveys, drainage calculations, tributary studies, or volume calculations as required in the Oct. 8 letter of Milford's engineer (**Ex. G**). Further, both Sec. 32-586 (**Ex. J**) and Sec. 32-574 are unconstitutionally vague because, at least according to Defendants, they permit Defendants to exercise unfettered discretion to selectively enforce the ordinances in a discriminatory, capricious manner. *Twp. of Plymouth v. Hancock*, 236 Mich. App. 197, 200; 600 N.W.2d 380 (1999). Relatedly, exhaustion was not required based on futility: pursuing additional administrative remedies would have been a "useless effort" where the Hacks questioned

Defendants' authority to impose the conditions whatsoever. *Dickerson v. Warden, Marquette Prison*, 99 Mich. App. 630, 641, 298 N.W.2d 841 (1980).

There are genuine issues of material fact as to the Hacks' due process and takings claims. The Hacks have a constitutionally-protected interest to enjoy the use of their land, including access to the street and ingress and egress from their property. *Michigan State Highway Comm'n v. Sandberg*, 383 Mich. 144, 149; 174 N.W.2d 761 (1970); *Horton v. Williams*, 99 Mich. 423, 428–29, 58 N.W. 369 (1894). At this early stage, the Hacks have submitted ample evidence showing that Defendants deprived the Hacks of these property rights (**Exs. G** and **F**). It is a question of fact as to whether Defendants did so in an arbitrary and capricious manner, or in such a way as to shock the conscience. Defendants have formally admitted that, in the past ten years, Milford has not required a drainage map, retention volume calculations, topographical survey, or drainage calculations in connection with the construction of any single-family detached residential project (**Ex. O** at *RFA Nos. 15, 17, 18, 19, and 20*). The Hacks asked Defendants to identify any single-family detached residence projects, since 2000, wherein Milford required any of the above conditions; Milford failed to identify a single project. **Ex. O**. The Hacks' Discovery Responses (**Ex. P**) and the Affidavit of their Construction Manager (**Ex. H**) also challenge Defendants' assertions that

"filling" or "grading" took place beyond the Building Permit—which Defendants ostensibly claim gave rise to Defendants imposing unique requirements.

Multiple fact issues exist. Summary judgment is grossly premature and the case should proceed through discovery.

PERTINENT FACTUAL AND PROCEDURAL HISTORY

On June 13, 2016, Plaintiffs Joel Q. Hack and Wren Beaulieu-Hack (the "Hacks") purchased a vacant 3.15-acre parcel of land located in the Charter Township of Milford and commonly known as 2610 Pearson Road, Milford Township, Michigan, 48380 (the "Property") for $75,000. *Verified Complaint* at ¶¶ 11 and 12. The Property had previously been vacant and unimproved, and was subject to flooding. *Id.* at ¶ 13.

Plaintiffs retained EBI, Inc. ("EBI") and its owner, William Rogers, to construct a single-family detached residential home on the Residential Property and to obtain all necessary permits and approvals to do so. *Id.* at ¶ 14.

In November of 2017, EBI, in compliance with Milford's ordinances, submitted to the Milford Building Department Plaintiffs' application for a single-family detached residence, and accessory buildings, structures, and uses thereto, including a home, garage, driveway, septic system, and other elements incidental to a single-family detached home. *Id.* at ¶ 17. Plaintiffs' application included building plans and detailed schematics ("Building Plans"), attached as **Ex. A**.

The Building Plans identified the scope of the proposed improvements, including, among other things, the following construction elements:

a. A single-family, detached residential home, with a new basement and garage;

b. A driveway—10–12 feet wide and 380 feet long—connecting the residential home to the County Roads; and

c. A septic system, as required by state law.

Notably, the Building Plans specified that pea stone and sand was to be brought to the site as part of the home's and garage's foundation. **Ex. A** at BLDG 00021. Milford required no "fill permit" for this material. Indeed, Milford handwrote, "Backfill Approved 12/8/2017" on Milford's file notes for the Building Plans. **Ex. Q** at BLDG 00070. Further, the Building Plans showed the nominal change in elevation that would occur in connection with the Plans. **Ex. A** at RES00022. Mr. Rogers averred that the Building Plans revealed all grading, excavation, or fill that would be taking place on the Property. **Ex. H** at ¶ 8. Plaintiffs further asserted in discovery that "Plaintiffs' building permit plan included both driveway schematics and schematics for the home, both of which must necessarily [] meet code. The Township was well aware that Plaintiffs' proposed building permit plan required nominal changed in grade, as do all residential developments, to meet code." **Exhibit P** at *RFA 2*. The elevation was approved without a "grading permit" pursuant to the Building Permit issued by

Milford on November 13, 2017. **Ex. B**.

Pursuant to the approved Building Plans, EBI completed the grade around the property. The land on which the Hacks' Property sits was raised no more than two inches; virtually all homes require such nominal increases, and would have been readily anticipated by Milford at the time Milford reviewed the Building Plans and issued the Building Permit. **Ex. H** at ¶¶ 8–11; 14. No other property was touched; the attached schematic shows that the vast majority of the Property was never altered. **Ex. R**, *Property Schematic.* After issuance of the Building Permit and during the above construction, multiple Milford agents visited and inspected the Property over the course of the next several months without decrying any "fill" or "grading" activity. **Exhibit Q**.

Construction of the home was completed in Spring of 2017. In June of 2017, EBI proceeded with construction of the driveway as set forth in the Building Plans and as authorized by the Building Permit. Specifically, EBI directed that a nominal amount of earth be brought to the Property to be placed underneath the driveway and to camber the driveway. To carry out those Building Plans and the driveway dimensions therein, the total dirt to be added for the driveway is 168 square yards, mixed with 112 square yards of stone. **Ex. H** at ¶ 9. The total area of land touched by this dirt and stone covers **less than .05% of the Residential Property's 3.15 acres**, which equates to 15,253.33 square yards. *Id.* at ¶ 10.

Allegedly, a neighbor contacted Milford, regarding the driveway material. Defendant Donald Green, Milford's Supervisor, personally got involved in the construction project at this point. Shortly after Supervisor Green's direct involvement, on June 13, 2018, Milford's Building Administrator, Defendant Timothy Brandt, sent a cease and desist letter to EBI, claiming that "[t]he filling and grading activity taking place on the [Residential Property] requires review, approval, and permitting from this office." **Ex. C**. The June 13 letter directed Plaintiffs to complete and submit an application "with engineered grading plans," "to be reviewed by the consulting engineers for the Township and approved by [Milford's] Board of Trustees." *Id.*

Plaintiffs retained the registered engineering firm, Boss Engineering, to conduct a topographical and grading survey of the Residential Property and property border adjoining the complaining neighbor's land (the "Boss Plan"). **Exhibit D.** On August 14, 2018, Boss Engineering completed its Plan, which confirmed what a visual inspection readily revealed: the complaining neighbor's land sits **higher than** Plaintiffs' Residential Property for the entire length of the construction area. The Boss Plan definitively demonstrated that the neighbor's alleged complaints were unfounded and, on August 24, 2018, Milford's own engineering firm—Hubbell, Roth & Clark, Inc. ("HRC")—issued a letter **approving** the Boss Plan. **Exhibit E**.

At the time, Milford's Building Department, without explanation, claimed that the Milford Board to review HRC's August 24 approval, and to either approve or reject it.

Milford's Board Meeting took place on September 19, 2018. At the September 19 Milford Board Meeting, the Milford Board refused to make a decision. Clerk Brandt—a Board member and the wife of Defendant Timothy Brandt—incorrectly claimed that the Hacks had provided only a "single page" to Milford regarding the project when in fact Milford had both the original drawings submitted with the Hacks' plans in November of 2017 **and Boss Engineering's drainage plan submitted in July of 2018**. ECF No. 16-6, PageID 520 (Exhibit E); **Ex. D**, *Boss Plan*. Clerk Brandt further stated that "the building official (her husband, Tim Brandt) indicated that [the Hacks] did not get our engineer to review for quite some time. The permit was pulled in November of 2017 and the letter from our engineer is dated July of 2018 so there was a large timeframe where the Township was waiting on information." *ECF No. 16-6,* PageID 520. Clerk Brandt's statements are, again, remarkably disingenuous: the Building Permit was approved in November of 2017, the first request for additional plans was made in June of 2018 after Defendant Brandt's June 13 letter, and those additional plans were submitted in July of 2018. In other words, a month had passed between Milford's (unauthorized) request for additional plans and the submission of the

Boss plan.

Both drawings included elevations and dimensions, and Boss Engineering's plan specifically provided measurements to explain how the retention pond on the Hacks' property would be expanded. **Milford's own engineer** was able to use these drawings, dimensions, and measurements to **approve** Boss Engineering's plan on August 24, 2018, writing:

> The [Boss Engineering] plans indicate that the driveway will require 780 cyd of fill in this area and a new low area is proposed to be excavated along the west side of the driveway providing 890 cyd of volume. Therefore, the proposed volume of the low area **has not been reduced** within the boundaries of the [Hacks'] residential property. It can be assumed that **any flooding that occurs post development should be similar to the flooding elevations predevelopment**.

In other words, the Hacks' plans would not change the predevelopment status quo regarding flooding.

Nonetheless, after the September Board meeting, the Milford Board directed HRC to revise its August 24 Letter and demand additional requirements. In the October 8 letter, HRC candidly admits that it "was directed by Milford Township to **re-review** the proposed fill and grading plans submitted" by Plaintiffs. **Ex. G** (emphasis added). HRC writes in its October 8 letter that "it appears that certain pre-development conditions **may have been different** than originally presented by the applicant." *Id.* (emphasis added). But HRC provides no factual specificity or definitiveness. In its October 8, 2018 letter, HRC added multiple conditions before

Plaintiffs be allowed to build a simple driveway, including:

a. A drainage area map **showing the area's entire tributary system**;

b. Determine the retention volume created by a 10-year storm;

c. Calculate the preconstruction area of the low spot that contained this volume;

d. Improve an unspecified amount of swales (ditches); and

e. Provide other related calculations.

Ex. G, *October 8, 2018 HRC Letter*.

On October 17, 2018, Plaintiffs filed their Verified Complaint challenging, *inter alia*, Milford's authority to impose these requirements. Later that day, Milford held a Board Meeting, at which undersigned counsel challenged the Board's authority to impose the above requirements on the Hacks. The Board and its counsel refused to identify the basis for its authority or the evidence supporting its approval of the October 8 HRC letter. *ECF No. 16-8*, PageID 532-33.

ARGUMENT

A. Summary Judgment may not be granted until a plaintiff has an opportunity to conduct meaningful discovery. Plaintiffs have not been permitted to conduct meaningful discovery, and Summary Judgment is premature.

Plaintiffs have engaged in preliminary written discovery, but discovery is in its early stages. Indeed, this matter's Scheduling Order provides for discovery through May 30, 2019. Further, this Court, based on Defendants' request, has

prohibited Plaintiffs from taking any depositions until February 11, 2019. *See* ECF No. 18.

Plaintiffs were not permitted to conduct discovery until the parties conducted their Rule 26(f) conference. Undersigned counsel first requested a 26(f) conference on October 24, 2018; Defense counsel did not provide availability until November 15, 2018. The Parties conducted their Rule 26(f) conference on November 19, 2018. Shortly thereafter, undersigned counsel requested deposition dates for Defendants Timothy Brandt and Donald Green, as well as for third-parties Michael Darga, David Mamo, and Valerie Mamo. Defense counsel filed a Motion for Protective Order, asking the Court to prohibit Plaintiffs from conducting depositions until Defense counsel was available in mid-February. The Court granted Defense counsel's request, and to date Plaintiffs have been precluded from deposing any party or third-party witness.

On November 19, 2019, the Parties' counsel engaged in this matter's Rule 26(f) Conference. On December 18, 2019, this Court ordered the parties to facilitation, to occur no later than January 31, 2019 (ECF No. 19). Defendants have failed to comply with the mediation deadline, necessitating a Motion to Compel Mediation (ECF No. 20). No depositions have been taken based on Defendants' motion for protective order, and limited written discovery has occurred to date.

Defendants' Rule 56 Motion is premature and must be denied. *Tucker*, 407 F.3d at 787–88.

B. Exhaustion is not necessary.

1. Plaintiffs are facially challenging Milford Ordinances 32-574 and 32-586.

Milford's Motion and discovery responses confirm that Defendants ostensibly relied on two sources of authority to issue the June 13 cease and desist, to require a "grading and fill permit," and to impose the requirements set forth in HRC's October 8 letter: Milford Ordinances, Sec. 32-583 and Sec. 32-574. **Ex. O**, *Answer to Int. Nos. 7, 10, 11*. As alleged in the Hacks' Verified Complaint, Defendants acted without authority, and Sec. 32-583 and Sec. 32-574 are facially unconstitutional.

"A plaintiff can bring a facial challenge that claims arbitrariness or capriciousness and need not exhaust any remedies." *Landon Holdings, Inc. v. Grattan Twp.*, 257 Mich. App. 154, 177 (2003). In *Long v. City of Highland Park*, 329 Mich. 146 (1950), the Michigan Supreme Court applied this principle to reject the municipality's argument that plaintiffs had failed to exhaust their remedies: "Appellant claims that equity does not have jurisdiction where the plaintiffs had not exhausted their remedy. . . . There is no merit in the claim. . . . . The municipal authorities referred to do not have the power to declare the ordinance unconstitutional and void as applied to plaintiffs' property and they could not grant

the relief here sought. An attempt by them to do so, which in effect would result in a violation of the ordinance, would have been ineffective." *Long*, 329 Mich. at 149.

Further, when the controlling issue involves a constitutional right, the exhaustion doctrine does not apply. *Universal Am-Can Ltd. v. Attorney Gen.*, 197 Mich. App. 34, 38; 494 N.W.2d 787 (1992). That rule is based on the fact that the "constitutionality of particular requirements do not require the agency's special expertise or fact-finding skills." *Universal*, 197 Mich. App. at 39.

i. Sec. 32-574 does not authorize Milford to impose topographical surveys, drainage calculations, or volume calculations.

In *Int'l Bus. Machines Corp. v. State, Dep't of Treasury, Revenue Div.*, 75 Mich. App. 604, 610, 255 N.W.2d 702, 705 (1977), the Michigan Court of Appeals allowed the plaintiff to seek relief in the circuit court even though the available administrative remedies had not been exhausted where the plaintiff argued that the agency had no authority to take any action in the first place: plaintiff "consistently asserted that the Treasury lacked the power" to take the action that it did, and the "very harm that plaintiff seeks to avoid would inevitably occur if plaintiff were required to exhaust administrative remedies before access to judicial review." *Int'l Bus. Machines*, 75 Mich. App. at 608-10. *See also Huggett v. Dep't of Nat. Res.*, 232 Mich. App. 188, 192, 590 N.W.2d 747, 750 (1998), *aff'd*, 464 Mich. 711, 629 N.W.2d 915 (2001) (rejecting exhaustion argument because "plaintiffs did not

challenge the propriety of defendant's denial of the permit but sought a declaration that defendant had no statutory authority to require a permit in the first place.")

Here, in the Hacks' Verified Complaint, the Hacks challenged Defendants' authority in multiple ways, including as follows:

- "Whether Plaintiffs are required to seek and obtain the approval of Defendant Township Board before constructing the driveway pursuant to the Building Permit and Building Plan." Paragraph 88(b).
- "Whether Defendants are **permitted to interpose the requirements** set forth in the October 8, 2018 letter of HRC." Paragraph 88(c).
- "Whether Defendants are permitted to request further surveys, reports, calculations, or other information in connection with Plaintiffs' construction of its driveway pursuant to the Building permit and Building Plan." Paragraph 88(d).
- "To the extent that Defendants claim authority under unspecified Ordinances of Milford Township to interfere with, deprive, and take Plaintiffs' property interests, those unspecified ordinances violate the Fifth and Fourteenth Amendments of the U.S. Constitution, and Art. I, §§ 10 and 17 of the Michigan Const. of 1963, as amended, as they would Defendants to take Plaintiffs' property without due process or just compensation." Paragraph 115.

See also Paragraphs 120(b), (c); Page 17-18(B); Page 18(D).

Milford's correspondence to Plaintiffs is bare of citation to any authority or ordinance authorizing Milford's position. For instance, Milford's June 13 letter cites no statute or ordinance authorizing its action. Nor does HRC's October 8 letter. Further, at the October 17, 2018 Milford Board meeting, undersigned counsel addressed the Board: "There are no ordinances or law that I found or that

has been pointed out to me by [] your city attorney that actually authorize the process that my clients are currently going through and I will be specific there is no ordinance authorizing the township to require drainage plans, to require site engineering plans, to require topographical surveys." *ECF No. 16-8* at PageID 527. **Milford's Board and attorney had no response regarding their purported authority.** *Id.*

Now in litigation, Milford scrambles to find authority by referring to Milford Ordinance Section 32-574 (**Ex. J**), which provides as follows:

> (a) Any building requiring yard space shall be located at such an elevation that a sloping grade shall be maintained to cause the flow of surface water to run away from the walls of the building. A sloping grade, beginning at the sidewalk level, shall be maintained and established from the center of the front lot line to the finished grade line at the front of the building, and also from the rear lot line to the front, both grades sloping to the front property line. However, this shall not prevent the grading of a yard space to provide sunken or terraced areas, provided proper means are constructed and maintained to prevent runoff of surface water from flowing onto the adjacent properties. Grade elevations shall be determined by using the elevation at the centerline of the road in front of the lot as the established grade or such grade determined by the township engineer or zoning administrator.
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> * * *
>
> (b) Final grades shall be approved by the zoning administrator who may require a "Certificate of Grading and Location of Building within the Township of Milford," which has been duly completed and certified by a registered engineer or land surveyor.

Section 32-574 does not reference a "grading permit," or authorize Milford to require Plaintiffs or any other party to obtain a grading permit for a single-

family detached residence, let alone the other conditions imposed in the October 8 letter. Section 32-574 merely authorizes Milford's engineer or zoning administrator to ensure that buildings requiring yard space be on land containing a sloping grade sufficient "to cause the flow of surface water to run away from the walls of the building." **Ex. L**. This is precisely what EBI did. **Ex. H**. To date, Defendants have never contested the adequacy or propriety of the Property's grade, or provided any evidence indicating that the grade is improper. Milford has never claimed in any of its communications that Plaintiffs' construction fails "to cause the flow of surface water to run away from the walls of the building."

Section 32-574's limited application, at least as applied to single-family detached residences, are confirmed by Milford Ordinance, Sec. 32-586(1), attached as **Exhibit J**. Sec. 32-586(1) makes clear that site engineering plans, drainage plans, and grading plans, including identification of "existing grades" and "water runoff drainage uses", are **not required** for single-family detached residences and related structures and uses, such as Plaintiffs' home and residential driveway. **Ex. J**. In discovery, Defendants admitted that Sec. 32-586 exempts single-family detached residences from the site plan review procedures set forth in 32-586 and admitted that Sec. 32-586 is inapplicable to the Hacks' proposed construction on the Property. **Ex. O**, *RFA Nos. 9 and 13.*

Further, Section 32-574 **does not** involve Milford's Board anywhere in the approval process, including authorizing the Board to "approve" the grading certificate; yet the Milford Board insisted that the Hacks' grading plan be subject to Board approval. This procedure indicates that Milford is creating law *ad hoc* or, at best, mixing, matching, and conflating its own ordinances.

ii. Sec. 32-586 and Sec. 32-574 are unconstitutionally vague.

Both Sec. 32-586 and 32-574 are contained within Chapter 32 of the Milford Ordinances, which contains penalties for non-compliance pursuant to Sec. 32-4(a):

> (a) Any person who shall violate any of the provisions of this chapter, or who fails to comply with any of the regulatory measures or conditions of the board of appeals, or the township board, adopted pursuant thereto, is responsible for a municipal civil infraction, subject to payment of a civil fine as specified in section 1-17 of this Code, plus costs and other sanctions, for each infraction. Each day such violation continues shall be deemed a separate offense.

Had the Hacks ignored Defendants unauthorized requirements and constructed their driveway, Milford would have subjected the Hacks to significant daily fines and "other sanctions" based on Defendants' misuse of Sec. 32-586 and 32-574.

Due process requires that laws not be vague. *600 Marshall Entm't Concepts, LLC v. City of Memphis*, 705 F.3d 576, 586 (6th Cir. 2013). "[A]n enactment is void for vagueness if its prohibitions are not clearly defined." *Id.* One of the dangers of vague laws is that they allow for "arbitrary and discriminatory

enforcement." *Id.* "An ordinance is unconstitutionally vague if it (1) does not provide fair notice of the type of conduct prohibited or (2) encourages **subjective and discriminatory application** by delegating to those empowered to enforce the ordinance the **unfettered discretion to determine whether the ordinance has been violated.**" *Twp. of Plymouth v. Hancock*, 236 Mich. App. 197, 200; 600 N.W.2d 380 (1999).

Milford Ordinance, Sec. 32-583, attached as **Exhibit K**, is sparse, providing as follows:

> It shall be unlawful for any person to use land for filling with materials of any kind without approval of the township board and subject to requirements as may be appropriate.

Plaintiffs are not "using land for filling." As noted above, a nominal amount of dirt and stone must be placed underneath the driveway incidental to normal driveway construction, just as in connection with the home's foundation. **Ex. H** at ¶ 9. This incidental and nominal amount of dirt does not constitute "using land for filling" based on the plain reading of the Milford Ordinance.

Section 32-583 is unconstitutionally vague to the extent that Milford may construe the ordinance to require Milford Board approval each time a speck of dirt or single stone is brought onto a piece of property. If that activity constitutes "using land for filling," then virtually all construction in Milford would require a fill permit and Milford Board approval. But that is not how Milford operates, as

evidenced by Milford's discovery responses and admissions. **Exhibit O**, *RFA Nos.* 15, 17, 18, 19, and 20.

Indeed, even as to the Hacks' project, Milford did not require Milford Board approval of the Building Permit even though it required that pea stone and sand be brought to the Property to place in the home's foundation. **Ex. A** at BLDG 00021. This conduct confirms that either Milford itself does not know what Sec. 32-583 requires—hence the inconsistent application—or that Milford relies on the ordinance's vagueness to subjectively apply it in Milford's unfettered discretion. Either result is precisely what the vagueness doctrine prohibits. *Hancock*, 236 Mich. App. at 200.

2. Futility.

"The exhaustion rule . . . does not apply where it is obvious that to pursue additional procedures would be a useless effort." *Dickerson v. Warden, Marquette Prison*, 99 Mich. App. 630, 641, 298 N.W.2d 841, 846 (1980).

In *Diggs v. State Bd. of Embalmers & Funeral Directors*, 321 Mich. 508; 32 N.W.2d 728 (1948), the Michigan Supreme Court rejected the defendant's exhaustion argument, noting that, "if the entire statute is unconstitutional, then the provisions with reference to an appeal from an order of defendant board would necessarily fall with the rest of the act. It is scarcely logical to say that plaintiff is bound to press a remedy ostensibly granted by the statute **the validity of which he**

assails." *Diggs*, 321 Mich. at 513 (emphasis added). *See also Universal*, 197 Mich. App. at 38 ("While it was possible for plaintiff to have first pursued any remedies it may have had before the PSC, both judicial economy and the interests of justice supported plaintiff's actions in filing a complaint in the circuit court for declaratory relief. Plaintiff claimed that the PSC lacked statutory authority. . . . Requiring plaintiff to first pursue its administrative remedies would have been futile; therefore, the failure to do so is excusable.")

Like Michigan courts, this Court does not "want to put barriers to litigation in front of litigants when it is obvious that the process down the administrative road would be a waste of time and money. . . ." *Bannum, Inc. v. City of Louisville*, 958 F2d 1354, 1362-63 (6th Cir. 1992).

3. Inadequacy of relief.

"Exhaustion of administrative remedies . . . will not be required if review of the agency's final decision would provide an inadequate remedy." *L & L Wine & Liquor Corp v Liquor Control Com'n*, 274 Mich App 354, 359–60; 733 NW2d 107, 112 (2007).

Plaintiffs sought expedited, emergency review of their Verified Complaint based on Milford's delay in reaching a decision relating to the construction of their driveway and the safety issues raised in accessing the Property. Both the Oakland County Circuit Court and this Court saw the need for expedited procedures.

At the time of the Verified Complaint's filing, the portion of Plaintiffs' property providing egress and ingress to Plaintiffs' home was submerged in water approximately 90% of the days through the calendar year due to the incomplete driveway. *Verified Complaint* at ¶ 58. On average, the water was approximately 10 to 15 inches deep. *Id.* at ¶ 59. However, during periods of prolonged or heavy rain, the water was multiple feet deep. *Id.* at ¶ 60. Passage over this water could not be made except by light trucks and SUVs; heavier vehicles, such as loaded vans, heavy trucks, and emergency vehicles, could not get through the water at all. *Id.* at ¶ 61. Indeed, construction vans could not access the home from approximately February to April of 2018 due to the water and incomplete driveway. *Id.* at ¶ 62. Further, light trucks and SUVs can only get through the water due to gravel that was initially placed on the location for the driveway. *Id.* at ¶ 63. With each passing day, the gravel is washed away by water and use, making passage increasingly difficult and risky. *Id.* at ¶ 64.

At the time Plaintiffs filed their Verified Complaint and emergency motion, the Property remained "under significant amounts of water (now routinely freezing), which blocks ingress and egress for Plaintiffs and visitors, and presented a safety risk in the event emergency vehicles needed to access the property and home." *Verified Complaint* at ¶ 65; **Ex. F**, *Representative Photos of Property*.

The delay in seeking administrative review through a lumbering process ,

including the Milford Board "tabling" the issue at the September Board meeting, did not provide adequate relief to timely address Plaintiffs' emergency situation.

C. Plaintiffs' right of access to their Property, and Plaintiffs' Due Process claims.

When evaluating a procedural due process claim, this Court examines first "whether the interest at stake is a protected liberty or property right under the Fourteenth Amendment," and second "whether the deprivation of that interest contravened notions of due process." *Thomas v. Cohen*, 304 F.3d 563, 576 (6th Cir. 2002). "Only after a plaintiff has met the burden of demonstrating that he possessed a protected property or liberty interest and was deprived of that interest will the court consider whether the process provided the plaintiff in conjunction with the deprivation, or lack thereof, violated his rights to due process." *Warren v. City of Athens, Ohio*, 411 F.3d 697, 708 (6th Cir. 2005).

"Property does not consist merely in the right to the soil, but in the right, as well, to its beneficial use and enjoyment." *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308, 320 (1874). For instance, "[t]hat **right of access** ordinarily attaches to property abutting a public highway and that this constitutes a property right is not disputed by plaintiff and must be accepted as long having been the law in Michigan." *Michigan State Highway Comm'n v. Sandberg*, 383 Mich. 144, 149; 174 N.W.2d 761, 764 (1970). Such right of access "is not a license merely, but an easement appurtenant to and running with the land." *Horton v. Williams*, 99 Mich.

423, 428–29, 58 N.W. 369, 371 (1894). Indeed, the Michigan Supreme Court has held that legislative bodies have no more right to deprive a property owner's access to the street than to "the lot itself." *Horton v. Williams*, 99 Mich. 423, 429; 58 N.W. 369 (1894).

Plaintiffs have a constitutionally protected property right to access and enjoy their Property. There is a fact issue as to whether they have been deprived of that right, and whether that deprivation contravened notions of due process. Plaintiffs have filed a Verified Complaint alleging that they have lost safe and effective egress and ingress to their land by virtue of Defendants' misconduct and unauthorized actions, due to the flooding on Plaintiffs' property and Milford's interference with Plaintiffs' construction of a driveway connecting their home to the county roads. The third-party affidavit of the construction manager, Bill Rogers, has been submitted in support. **Ex. H** at ¶ 15. Photographs corroborate Plaintiffs' allegations. **Ex. F**. Meanwhile, initial discovery reveals that Plaintiffs have been subjected to permitting requirements **(Ex. G**) unique to them. Why this is so, and whether it was justified, are questions of fact.

"To state a substantive due process claim in the contest of zoning regulations, a plaintiff must establish that (1) a constitutionally protected property or liberty interest exists, and (2) the constitutionally protected interest has been deprived through arbitrary and capricious action." *Braun v Ann Arbor Charter*

Twp, 519 F.3d564, 573 (6th Cir. 2008). To state a cognizable substantive due process claim, the plaintiff must allege "conduct intended to injure in some way unjustifiable by any government interest" and that is "conscience-shocking" in nature. *Mitchell v. McNeill*, 487 F.3d 374, 377 (6th Cir. 2007). "[T]he measure of what is conscience shocking is no calibrated yard stick," nor is it "subject to mechanical application." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847-50; 118 S. Ct. 1708, (1998). The test is a subjective standard. *Range v. Douglas*, 763 F.3d 573, 590 (6th Cir. 2014). "Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking." *Range*, 763 F.3d at 590. The focus "is upon the entirety of the situation—the type of harm, the level of risk of the harm occurring, and the time available to consider the risk of harm are all necessary factors in determining whether an official was deliberately indifferent." *Id.* at 591.

As set forth above, Plaintiffs have a constitutional right to the "beneficial use and enjoyment" of their Property, including a property interest in the right to access the street and to have effective ingress and egress from to the Property. *Horton v*, 99 Mich. at 429; *Sandberg*, 383 Mich. at 149. As also indicated above, this is a fact-intensive analysis. There are multiple factual issues in dispute

regarding Defendants' conduct, whether it was authorized by law, whether it was factually justified under the circumstances, why HRC was directed to revise its initial approval, and why the Hacks are the first residents in at least 10 years to be subjected to such onerous requirements, in addition to a prolonged review process that appears designed to dispirit the Hacks.

D. Takings Claim.

"The term 'taking' should not be used in an unreasonable or narrow sense. It should not be limited to the absolute conversion of property, and applied to land only; but it should include cases where the value is destroyed by the action of the government, or serious injury is inflicted to the property itself, or exclusion of the owner from its enjoyment, or from any of the appurtenances thereto." *Thom v. State (State Report Title: Thom*, 376 Mich. 608, 613, 138 N.W.2d 322, 323 (1965).

In *Peterman v. State Dep't of Nat. Res.*, 446 Mich. 177, 189, 521 N.W.2d 499, 506 (1994), the Michigan Supreme Court recognized that "[t]aking has been found . . . when the state has eliminated access to property . . . or made the usual access to plaintiffs' land very difficult." *Peterman*, 446 Mich at 189, *citing Ranson v. Sault Ste. Marie*, 143 Mich. 661, 670-671; 107 N.W. 439 (1906); *Big Rapids v. Big Rapids Furniture Mfg. Co.*, 210 Mich. 158, 175, 177 N.W. 284 (1920); *Thom*, *supra* 376 Mich. at 627, 138 N.W.2d 322. Indeed, "[a]ny injury to

the property of an individual which deprives the owner of the ordinary use of it is equivalent to a taking." *Peterman*, 446 Mich. at 190.

In *Ranson v. City of Sault Ste. Marie*, *supra*, the city, without physical invasion of plaintiff's property, built a bridge in the street and constructed approaches thereto, seriously interfering with plaintiff's access to the street from the adjacent property, and it was said by this court; the Michigan Supreme Court found that interference sufficient to constitute a taking. *Ranson*, 143 Mich. at 670.

"The amount to be recovered by the property owner [in a takings case] is generally left to the discretion of the trier of fact after consideration of the evidence presented." *Poirier v. Grand Blanc Twp.*, 192 Mich. App. 539, 543, 481 N.W.2d 762, 766 (1992).

ACCORDINGLY, Plaintiffs Joel Q. Hack and Wren Beaulieu-Hack respectfully request that this Court enter an order denying Defendants' Motion for Summary Judgment brought pursuant to Fed. R. Civ. P. Rule 56.

Respectfully submitted,

/s/ R.J. Cronkhite
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Dated: January 16, 2019

CERTIFICATE OF SERVICE

I hereby certify that on **January 16, 2019**, I electronically filed the above document(s) with the Clerk of the Court using the ECF system, which will send notification of such filing to those who are currently on the list to receive e-mail notices for this case.

/s/ R.J. Cronkhite
Attorney for Plaintiffs