STATE OF MICHIGAN

IN THE COURT OF APPEALS

PATRICK FLYNN, AJ RATERINK, PATRICIA LOOKS, BRIAN DOKTER, AND STEVE AND JAMIE LEMIEUX,

Plaintiffs-Appellants,

v

OTTAWA COUNTY DEPARTMENT OF PUBLIC HEALTH, LISA STEFANOVSKY, M. ED., in her official capacity as Administrative Health Officer for the Ottawa County Department of Public Health, AND THE OTTAWA COUNTY BOARD OF COMMISSIONERS,

Defendants-Appellees.

Court of Appeals Docket No. 359774

20TH Circuit Case NO. 21- 6624-CZ

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DEFENDANTS-APPELLEES' RESPONSE BRIEF

Oral Argument Requested Under AO 2019-6

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STATEMENT OF QUESTION INVOLVED

1. Do MCL §333.2453 and MCL §333.2441(1) describe the same approval process when they don't refer to each; they use different subjects; they use different verbs; they have different objects and they serve different purposes?

The Plaintiffs/Appellants say, "yes."

The Defendants/Appellees say, "no."

The Trial Court said, "no."

STATEMENT OF APPELLATE JURISDICTION

On December 6, 2021, the 20th Circuit Court delivered its opinion from the bench. A final order was issued on or about December 16, 2021, and the Plaintiffs/Appellants timely appealed on or about January 4, 2022.

The December Opinion and subsequent were final orders under MCR 7.202(6)(a)(1) and Plaintiffs/Appellants' appeal is an appeal of right under MCR 7.203(A)(1). Because they filed their claim of appeal within 21 days of the final order, their appeals are timely, and this Court has jurisdiction MCR 7.204 (A)(1)(a).

SUMMARY OF THE ARGUMENT

The Appellants' argument is in a word, "frivolous." They say there is no need for statutory interpretation of the key statute, MCL §333.2453, which spawned the mask mandate that they challenge as their ultimate objective, because they claim the plain meaning of a different section of the Public Health Code, MCL §333.2441(1), governs MCL §333.2435, even though neither statute mentions the other and to make the claim that they are related, they have to add words to MCL §333.2441(1) that are not present therein, by relying on external dictionary definitions.

Appellants claim that words matter, yet they ignore the fact that the State Legislature chose as the subject in Section 2453 the words "health officer"[a person] rather than "health department" [an inanimate department which is the subject of Section 2441(1)], and then as the verb in Section 2453 chose the word "issue" instead of the verb "adopt" as used in Section 2441(1), and then as the object of Section 2453, chose the word "order" rather than the object "regulation" in Section 2441(1). Simply stated, Appellants' so-called plain reading of MCL §333.2453 requires the Court to add a word that is not in MCL §333.2441(1) and then ignore the fact that the two statutes use different words to express different actors taking different actions—all for the purpose of finding that even though they don't mention either, the two are part of the same, singular process.

Never will this Court see a better example of pure sophistry.

COUNTER-STATEMENT OF FACTS

The parties do not dispute that Lisa Stefanovsky is the appointed "Health Officer" under the Public Health Code and has issued limited mask mandate COVID 19 orders (only to children who do not have vaccines available to them) under MCL §333.2453. In fact, now that a COVID 19 vaccine for students aged 5 through 12 is available, those orders will expire by their terms before the start of the next semester.

Plaintiffs/Appellants limit their assertion of error to the legal claim that the orders fact "regulations" issued under MCL §333.2441 which require the permission of the Board of Commissioners "before they obtain the force of law." See FAC ¶52 and request for relief (b) on page 12 of FAC. Response Appendix p. 012A. It is undisputed that the Commissioners are not qualified to be public health officers and have not been so appointed. It is also not disputed that the Commissioners do not have access to private health information to which the Health Officer has access.

While Plaintiffs/Appellants claim that they believe "words matter," they failed to include the words of the 20th Circuit Court which they appeal, where the Court highlighted the differences in the key words that the State Legislature used in the two statutes that the Appellants need to link:

> Under MCL 333.2428, the local health officer has powers and duties. Those are powers and duties given to the **local health officer**. On section 23 -- excuse me -- 2453, they are the duties of the **local health department. It's different**. 2441 is the adoption of regulations, which is why we're here, but as Mr. Van Essen points out, to **adopt those regulations** there's a notice requirement and it's at least 20 days. 2442 gives a notice requirement and that's perfectly fine for regulations, but

> to require the County Board of Commission to act on an order by the health officer, that would gut 2453 if the local health officer -- this is not the department, this is the local health officer -- determines that control of an epidemic is necessary to protect public health, he or she **may issue emergency orders**. I mean, my goodness, we can think of situations where there's an epidemic and to require 20 days to evaluate that and have politicians look at that and in the meantime the epidemic is spreading perhaps by wildfire. No. This order can be issued immediately. And then 2451, imminent danger to health or lives. Upon determination that imminent danger to the health or lives of individuals exists, the local health officer, not the department, the local health officer immediately shall inform the individual affected by the imminent danger to issue an order shall be delivered to a person authorized to avoid, correct, or remove the imminent danger. Imminent, immediate. To require 20 days and then maybe up to 45 days to issue the regulation, that would gut 2451 of its meaning. And then 2443, except as otherwise provided in this act, a person who violates a regulation of a local health department or an order of a local health officer **-- they're two separate animals --** is guilty of a misdemeanor. It's **a regulation of a local department or an order of a local officer. They're separate animals here.**

(Transcript pp. 22-23)(Emphasis Added) Response Appendix pp. 036A -037A. Indeed. The different words used in the different statutes mean the statutes describe a different process. End of story and end of appeal.

STANDARD OF REVIEW

This Court reviews a decision to grant a motion for declaratory and injunctive relief on the de *novo* standard. See *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

ARGUMENT

I. The Plaintiffs/Appellants' FAC legally fails for a fundamental reason: "Administrative Orders are different from Administrative Regulations."

The Plaintiffs/Appellants' argument that the limited mask mandate of

the Health Officer issued under MCL §333.2453 requires rulemaking under MCL §333.2441 is a novel challenge that no other plaintiff challenging the State Director's 2020 or multiple county health officers' mask mandates in 2021 has raised. There is a good reason for this omission. As noted in the Ottawa Appellees' Motion for Summary Judgment, Appellants' argument requires this Court to find that there is no difference between a public health regulation setting septic system standards and an ephemeral epidemic order despite a long line of Michigan cases recognizes the distinctions between promulgated "regulations" and issued "orders," *finding that regulations are actions of "general applicability" and permanence while "orders" are derived* from express statutes and are temporal, addressing situations of limited time frame. See e.g. *Mich. Trucking Ass'n v. Pub. Serv. Comm.*, 225 Mich. App. 424, 430 (1997); *City of Romulus v Michigan Dept of Envtl Quality*, 260 Mich App 54, 82 (2003); *By Lo Oil Co v Dept of Treasury*, 267 Mich App 19, 47 (2005).

Here, this Court need go no further than to recognize that these are two different statutes with two different procedures as is appropriate where there are two different settings out of which the action is required. MCL §333.2441(1) provides:

> A local health department may adopt regulations necessary or appropriate to implement or carry out the duties or functions vested by law in the local health department. The regulations shall be approved or disapproved by the local governing entity. The regulations shall become effective 45 days after approval by the local health department's governing entity or at a time specified by the local health department's governing entity. The regulations shall be at least

> as stringent as the standard established by state law applicable to the same or similar subject matter. Regulations of a local health department supersede inconsistent or conflict local ordinances.

MCL §333.2453(1) provides:

> If a local health officer determines that control of an epidemic is necessary to protect the public health, the local health officer may issue an emergency order to prohibit the gathering of people for any purpose and may establish procedures to be followed by persons, including a local governmental entity, during the epidemic to ensure continuation of essential public health services and enforcement of health laws. Emergency procedures shall not be limited to this code.

A public health "regulation" does not involve private health information, is adopted by a legislative body, a District Health Board, or a Board of Commissioners, requires advance public notice of at least 10 days before the Board of Commissioners considers it [MCL §333.2442] and typically does not take effect until 45 days after the appropriate body approves it. The regulations last indefinitely until amended or expressly repealed. Thus, a health regulation typically takes several months to draft, propose, and enact and lasts for years because its purpose is to set long standing health standards of indefinite duration.[1]

In contrast, an administrative order does not require advance notice before enactment, is made by the health officer not a District Health Board or

[1] This Court can take judicial notice of the Environmental Health Regulations that the Ottawa County Board of Commissioners has adopted for the Health Department. See Exhibit A; Response Appendix pp. 040A -066A.

Board of Commissioners, requires factual findings typically based on private health information not available to the Commissioners, and is typically effective immediately and only lasts during the temporal pendency of the epidemic or some other emergency condition.

Appellants' interpretation would nullify or negate MCL §333.2453(1), making the two statutes one and that one statute being MCL §333.2441(1). That is to say, why bother with the Health Officer's statute, if one has to additionally follow the legislative body's regulation procedure? This effective reality is fatal to the Appellants' case because it is axiomatic that the courts should not interpret statutes to effectively render one a nullity. See *Pittsfield Charter Twp. v Washtenaw Co*, 468 Mich 702, 714 (2003).

This Court should find as a matter of law that these statutes are distinct, having different triggers, different actors, different time frames for enactment, different time periods for applicability and different intended purposes. Indeed, this Court can take judicial notice of the pending case before the 20th Circuit Court at the same time as this one; namely, *Lucas as Next Friend vs. Ottawa County Health Department*, et. al, Case No. 21-6659-CZ, which involved a chicken pox outbreak and under MCL §333.2453(1), the Health Officer directed an unvaccinated student to stay home for 21 days until the gestation period for chicken pox was over. It would be impossible for a regulation of general applicability to be drafted, heard, and adopted and become effective in time for such an order to even be effective to achieve its goals of stopping the temporal spread.

Likewise, there is no predicate in MCL §333.2453(1) that would require that the Health Department have promulgated and published a regulation on the same subject under MCL §333.2441(1) before issuing an order under MCL §333.2453(1). Simply stated, if the State Legislature wanted to condition an exercise under MCL §333.2453(1) to the process under MCL §333.2441(1), whether before or after the Health Officer's Order, it would have said so. The Legislature having not included such language in MCL §333.2453(1), this Court certainly cannot do so.[2]

The simple truth is that while the Appellants' argument is novel to the COVID context, Michigan court have entertained before the challenge that an administrative order should have been processed through rulemaking and have found that there where—as in this case--there is a separate statute authorizing the administrative officer to exercise discretion to act without any express rule making requirement, the proper action to take to exercise that discretion is to issue an "order" not promulgate a regulation. See e.g. *City of Romulus v Michigan Dept of Envtl Quality*, 260 Mich App 54, 82 (2003)["However, a 'rule' does not include, inter alia, '[a] decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected.'"]. No different result should occur here.

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[2] Representative Luke Meerman is working with the Plaintiffs in this lawsuit and prior to its filing, he sought an opinion from the General Counsel to the Michigan House of Representatives who rejected the Plaintiff's argument, finding that the Ottawa County Board of Commissioners has no authority over the Health Officer's mask mandate. See attached Exhibit C; Response Appendix pp. 067A -069A.

II. Requiring Ms. Stefanovsky to use the rule making process not order process to address an epidemic would violate all relevant rules of statutory construction, not the least of which is that it would lead to absurd, arbitrary results that defeat the purpose of the statute.

The Michigan Supreme Court has coalesced many of the rules of statutory construction that affect the issue before the Court:

> "The question this Court addresses is one of statutory construction. 'Assuming that the Legislature has acted within its constitutional authority, the purpose of statutory construction is to discern and give effect to the intent of the Legislature. In determining the intent of the Legislature, this Court must first look to the language of the statute. The Court must, first and foremost, interpret the language of a statute in a manner that is consistent with the intent of the Legislature.' 'As far as possible, effect should be given to every phrase, clause, and word in the statute. The statutory language must be read and understood in its grammatical context unless it is clear that something different was intended.' 'Moreover, when considering the correct interpretation, the statute must be read as a whole. Individual words and phrases, while important, should be read in the context of the entire legislative scheme. While defining particular words in statutes, we must consider both the plain meaning of the critical word or phrase and its placement and purpose in the statutory scheme.
>
> A statute must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained. The statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme. Moreover, courts must pay particular attention to statutory amendments because a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute. Finally, an analysis of a statute's legislative history is an important tool in ascertaining legislative intent."

Bush v Shabahang, 484 Mich 156, 166–68 (2009)(Citations omitted).

In addition, it is worth noting that our Supreme Court recently held that "[w]hen a potential conflict like this surfaces within a statute, 'it is our duty to, if reasonably possible, construe them both so as to give meaning to each;

that is, to harmonize them.'" *TOMRA of N Am, Inc v Dept of Treasury*, 505 Mich 333, 349 (2020) [citing *Nowell v. Titan Ins. Co.*, 466 Mich. 478, 483, 648 N.W.2d 157 (2002).] Finally, our courts have held that statutes should be given a "common sense" interpretation "so that the ordinary person can tell what he may or may do thereunder." See *People v. Jones,* 142 Mich App 819, 823 (1985). The kissing cousin of this rule is that an interpretation leading to absurd results should be avoided. See *People v. Thompson,* 487 Mich 730 (2010).

Here, the Plaintiffs/Appellants premise their argument on the sophomoric notion that unless the Board of Commissioners approves an epidemic order, "the voice of Ottawa County's residents [will not have] value." See FAC ¶12; Response Appendix p. 004A. The Public Health Code nowhere requires that epidemic orders (or any other order) be the subject of town hall democracy. There is no way to even know whether the limited mask mandate order pertaining to elementary school children is supported by a majority of parents or not. Even if one could engineer a plebiscite that would poll all parents on the subject, a resulting majority opinion could not possibly inform itself on a medical issue, resulting in a medical tyranny devoid of rational basis.

Had the Plaintiffs/Appellants been deposed, it is likely that they "believe" that masks do not impair COVID spread. They would be wrong, since peer reviewed studies since the beginning of the school year show that schools requiring masks have 50% fewer COVID cases than schools without—on average. If the Plaintiffs/Appellants had been deposed, it likely that they "believe" that COVID does not adversely affect children under 12. They are

wrong.

Of course, this case was decided on "(c)(8) motion," and whether the facts above are true (which they are) or false is irrelevant. What is relevant is that MCL §333.2453(1) cloaks the Health Officer—who statutorily has to have academic training and experience in public health before being approved by the Board of Commissioners [MCL §333.2428] ***and*** the State Department of Health and Human Services [See R 325.13002, 3 and 8] the authority to make the mask mandate, epidemic decision. She has daily access to epidemiologists who report to her and to private health information that medical providers must give to her to inform her decision. To suggest that the unqualified commissioners, who have no medical training amongst them at all—and who by law cannot have access to private health information and have no day-to-day contact with epidemiologists could overturn her decision because they are subject to re-election is an absurd proposition unsupported by any logical reading of the Public Health Code.

Indeed, the typical MCL §333.2453(1) context is a chicken pox outbreak at one or more schools in the County; or the norovirus that shutdown Hope College several years ago for a couple of weeks; or the COVID outbreak at GVSU that required its shutdown to in person learning for several weeks in the beginning six weeks of the COVID epidemic. Each of these settings is urgent, temporary and requires access to private health information and medical training to implement.

The fact that the limited mask mandate is of a longer duration than typical is nothing more than a consequence that the COVID pandemic is of longer duration than a norovirus outbreak and is not relevant to the plain meaning interpretation of MCL §333.2453(1), which only ties to the duration of an order to the duration of the epidemic, which in this case is longer than any epidemic in 100 years. Harmonizing MCL §333.2441(1) and MCL §333.2453(1) suggests that one can pertains to subjects such as septic standards, which can be understood by a set of ay county commissioners, who can promulgate regulations only after notice and a public opportunity to be heard while the other has to be made by a medically qualified person in an urgent, temporary crisis, based on informed access to private health information with a findings-based order timed only to the epidemic or conditions within the epidemic.

In short, the Ottawa County Defendants/Appellees' statutory interpretation is supported by the following rules of statutory construction:

1. Gives effect to both statutes.
2. Gives effect to the plain language used and not used.
3. Harmonizes a logical intent for both statutes.
4. Avoids absurd results that defeat legislative intent.

In contrast, the Appellants' interpretation reads words into MCL §333.2453(1) that are not there, leaves it without any purpose distinct from MCL §333.2441(1), and would leave it totally unable to meet the frequently occurring exigencies of a temporary health crisis which it was obviously

intended to mitigate—and all for the purpose of enabling a minority of activists to shut down the functioning of an Ottawa County Board of Commissioners meeting until they get their uninformed way.

CONCLUSION

Appellants are right that words in a statute matter. When one statute has a different actor, a different action, a different object and a different purpose than another and each fail to reference each other, their words proscribe two different statutes, not one. The Appeal should be dismissed with prejudice and the 20th Circuit Court's Opinion and Order affirmed.

Respectfully submitted,

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Date: March 17, 2022

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CERTIFICATE OF COMPLIANCE

I certify pursuant to AO 2019-6 (B)(1) that the above brief contains 3,223 words excluding the title page, table of contents, index of authorities, statement of the basis of jurisdiction, statement of the questions involved, signature block and listing of counsel at the end of the brief, certificate of compliance, proof of service, exhibits, and appendices, counted using Microsoft Word's word count function.

This brief is set in Calisto MT 12-point font, except for primary and secondary headings, which are set in Calisto MT 14-point font, and footnotes, which are set in Calisto MT 11-point font. All text of the body is justified, and lines are spaced at 18 points, with 6 points of additional spacing around paragraphs.

Respectfully submitted,

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

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DEFENDANTS-APPELLEES' APPENDIX TO

RESPONSE BRIEF

STATE OF MICHIGAN

CIRCUIT COURT FOR THE COUNTY OF OTTAWA

PATRICK FLYNN, AJ RATERINK, PATRICIA LOOKS, BRIAN DOKTER, AND STEVE AND JAMIE LEMIEUX,

Plaintiffs,

v

OTTAWA COUNTY DEPARTMENT OF PUBLIC HEALTH, LISA STEFANOVSKY, M. ED., in her official capacity as Administrative Health Officer for the Ottawa County Department of Public Health, AND THE OTTAWA COUNTY BOARD OF COMMISSIONERS,

Defendants.

CASE NO. 21-6624-CZ

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AMENDED COMPLAINT FOR IMMEDIATE DECLARATORY RELIEF AND MANDAMUS

There is no other pending or resolved civil action arising out of the transactions or occurrences alleged in this Complaint.

NOW COME the Plaintiffs, Patrick Flynn ("Mr. Flynn"), AJ Raterink ("Ms. Raterink"), Patricia Looks ("Ms. Looks"), Brian Dokter ("Mr. Dokter"), and Steve and Jamie LeMieux (the "LeMieuxes"), (collectively, the "Plaintiffs"), by and through their counsel, Smith Haughey Rice & Roegge, P.C., and for

their Amended Complaint against the Defendants, Ottawa County Department of Public Health (the "Health Department"), Lisa Stefanovsky, M. Ed., in her official capacity as Administrative Health Officer for the Ottawa County Department of Public Health ("Ms. Stefanovsky"), and the Ottawa County Board of Commissioners (the "County Commission"), hereby state as follows:

INTRODUCTION

1. This lawsuit is an attempt by several community members to reclaim the machinery of local government. More specifically, in this case, the Plaintiffs challenge the ability of one unelected government official to unilaterally make decisions affecting their fundamental rights without any oversight or accountability.

2. On August 20, 2021, three days before the scheduled start of the school year, Ms. Stefanovsky, acting as Administrative Health Officer for the Health Department, issued an order (the "Mask Mandate") requiring every student and teacher in the K-6 setting to wear a face covering while indoors. (**Exhibit 1**, 8/20/21 Order).

3. The Mask Mandate was an unlawful exercise of governmental authority because it purported to take effect without the County Commission, a group that serves as the elected representatives of the people, voting to approve it. The Mask Mandate was unlawful for other reasons, too.

4. The public's reaction to the Mask Mandate was swift and definitive. Nearly one-thousand people attended the next County Commission meeting on August 24, 2021. And, the vast majority of them expressed their outrage at the Mask Mandate and asked the County Commission to do something about it. At the same meeting, several County Commissioners took the position that they were powerless to stop the Mask Mandate from taking effect.

5. On August 25, 2021, the very next day, the County Commission's Chairman, Roger Bergman, issued a public statement doubling-down on his alleged political powerlessness. In that

statement, Commissioner Bergman claimed that there is "no question that the [County Commission] cannot make this decision and cannot reverse this decision." (**Exhibit 2**, Commissioner Bergman's 8/25/21 statement). That's simply untrue.

6. The Plaintiffs filed this lawsuit challenging the Mask Mandate on several grounds. In response, on October 8, 2021, Ms. Stefanovsky issued a new order (the "Reconciled Mask Mandate") that made several "factual determinations" in an attempt to reconcile other previous orders, including the Mask Mandate, with "current facts and law." (**Exhibit 3**, 10/8/21 Order).

7. At the same time, the Reconciled Mask Mandate "supersede[d] the…August 20, 2021 Order where inconsistent and incorporate[d] by reference all provisions of the…August 20, 2021 Order that are not inconsistent." Put another way, then, the Reconciled Mask Mandate left the original Mask Mandate's face covering restrictions fully intact.

8. The Reconciled Mask Mandate was designed to clean up the Health Department's previous mandates and help them survive judicial scrutiny by bolstering their factual underpinnings.

9. However, the Reconciled Mask Mandate did not attempt to cure the original Mask Mandate's procedural defect. More specifically, the Reconciled Mask Mandate was issued without County Commission approval.

10. Not surprisingly, while answering the Plaintiffs' Complaint, the Defendants relied upon the Reconciled Mask Mandate. They also reiterated their pre-suit contention that Ms. Stefanovsky can promulgate orders like the ones at issue without the County Commission's approval. But, the Defendants are wrong. Michigan law requires the County Commission to approve of the Mask Mandate, the Reconciled Mask Mandate, and any other future orders before the same can be given legal effect. Ms. Stefanovsky is not allowed to operate in an accountability vacuum.

11. In light of these recent developments, the central question posed by this lawsuit—whether Ms. Stefanovsky can issue mandates like these without obtaining the County Commission's approval—is framed perfectly for judicial review. So, the Plaintiffs are filing an Amended Complaint, and sharpening their claims for declaratory relief.

12. The Plaintiffs now seek a judicial declaration that the Reconciled Mask Mandate is unlawful; that the Health Department's regulations—including pandemic orders—don't take effect until the County Commission has approved them; and that the voice of Ottawa County's residents still has value. For the reasons that follow, the Plaintiffs' request for relief should be granted.

PARTIES, JURISDICTION, AND VENUE

13. Mr. Flynn is a resident of Ottawa County. He has a child who attends a Jenison Public School in the K-6 setting, and is otherwise subject to the Reconciled Mask Mandate. Michigan law recognizes Mr. Flynn's fundamental right to "make decisions concerning the care, custody, and control" of his child. *In re Sanders*, 495 Mich 394, 409; 852 NW2d 524 (2014); see also *Frowner v Smith*, 296 Mich App 374, 382; 820 NW2d 235 (2012) (holding that "a parent's precious right to raise his or her child is so firmly rooted in our jurisprudence that it needs no further explanation."). The Reconciled Mask Mandate interferes with that right. So, Mr. Flynn has standing to bring this challenge.

14. Ms. Raterink is a resident of Ottawa County. She has a child who attends an Allendale Public School in the K-6 setting. For that reason, Ms. Raterink also has a legally recognized "fundamental right" to make decisions regarding the care, custody, and control of her child. *In re Sanders*, supra, at 409. The Reconciled Mask Mandate interferes with that right. She has standing to bring this challenge, too.

15. Ms. Looks is a resident of Ottawa County. She has a child who attends a Coopersville Public School in the K-6 setting. Ms. Looks has a legally recognized "fundamental right" to make decisions regarding the care, custody, and control of her child. *In re Sanders*, supra, at 409. The Reconciled Mask

Mandate interferes with that right. So, like the other Plaintiffs, Ms. Looks has standing to bring this challenge.

16. Mr. Dokter is a resident of Ottawa County. He has three children who attend a Hudsonville Public School in the K-6 setting. Mr. Dokter has a legally recognized "fundamental right" to make decisions regarding the care, custody, and control of his children. *In re Sanders*, supra, at 409. The Reconciled Mask Mandate interferes with that right. Mr. Dokter has standing to bring this challenge, too.

17. The LeMieuxes are residents of Ottawa County. They have a child who attends a Coopersville Public School in the K-6 setting. The LeMieuxes have a legally recognized "fundamental right" to make decisions regarding the care, custody, and control of their child. *In re Sanders*, supra, at 409. The Reconciled Mask Mandate interferes with that right. So, they have standing to bring this challenge.

18. The County Commission is an elected body that represents the people of Ottawa County, Michigan. Its powers are derived from the Michigan Constitution and state statutes. *Arrowhead Development Co v Livingston County Road Commission*, 413 Mich 505, 511-512; 322 NW2d 702 (1982). Moreover, the County Commission constitutes a "local governing entity" as that term is used in MCL 333.2406(a), the portion of the public health code relevant to this dispute. Finally, according to Ottawa County's website, the County Commission "provides leadership and policy direction for all County activities," and is responsible for "[establishing] the policies of county government" and "[devoting] ... time to oversight of the administrators in county government." See https://www.miottawa.org/departments/boc/

19. The Health Department is the local administrative agency tasked with protecting the public health of Ottawa County, but only within the limits of its statutorily delegated authority. Additionally, the Health Department constitutes a "local health department" as that term is used in MCL 333.2401, *et seq.*

20. Ms. Stefanovsky is the Administrative Health Officer of the Health Department. She constitutes a "local health officer" as that term is used in MCL 333.2428.

21. This Court has jurisdiction over this dispute by virtue of MCL 600.605.

22. Venue is proper in this Court under MCL 600.1615 because all the Defendants exercise governmental authority in Ottawa County. Each Defendant maintains a principal office in Ottawa County. Venue is appropriate in this Court for that reason, too.

23. Under MCR 2.605, an action for declaratory judgment is considered "within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment." As such, the fact that the Plaintiffs are seeking declaratory relief does not affect this Court's jurisdiction over the underlying action.

24. Finally, under MCR 3.305(A)(B), an action for mandamus against a county commission, like this one, must be brought in a circuit court for a county in which venue is proper under the general venue statutes and rules. So, venue for the purpose of the Plaintiffs' mandamus claim is proper here, too.

IMMEDIATE DECLARATORY RELIEF UNDER MCR 2.605 IS APPROPRIATE

25. Under Michigan law, "whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment." *League of Women Voters v Secretary of State*, 506 Mich 561, 585-586; 957 NW2d 731 (2020).

26. To that end, MCR 2.605(A)(1) states that, "[i]n a case of actual controversary in its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment."

27. To show an "actual controversary," the Plaintiffs need only "plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised." *Lansing School Educational Association v Lansing Board of Education*, 487 Mich at 372 n 20; 792 NW2d 686 (2010).

28. Michigan's appellate courts have consistently found that a plaintiff pleads an "actual controversary" where they allege that an invalid rule or illegal action jeopardizes their rights or interests. See *Lash v Traverse City*, 479 Mich 180, 196-197; 735 NW2d 628 (2007); *UAW v Central Michigan University Trustees*, 295 Mich App 486, 496-497; 815 NW2d 132 (2012).

29. Here, the Plaintiffs allege that the Reconciled Mask Mandate was issued in violation of the Public Health Code's statutory framework. Moreover, each of the Plaintiffs has a constitutionally protected interest that is affected by the Reconciled Mask Mandate's restrictions. They (and their children) are also susceptible to civil or criminal penalties for non-compliance with the Reconciled Mask Mandate. So, the Reconciled Mask Mandate, which they allege to be invalid, jeopardizes the Plaintiffs' well-established rights or interests. A declaratory judgment is therefore necessary to sharpen the issues raised, and to clarify that the Reconciled Mask Mandate is an invalid and unlawful exercise of governmental authority.

30. Additionally, in their Answer to the Plaintiffs' initial Complaint, the Defendants take the position that orders like the Reconciled Mask Mandate are not subject to reversal, ratification, approval, or rejection by the County Commission. That position further sharpens the central issue in this lawsuit. Declaratory relief is appropriate for that reason, too.

31. Finally, MCR 2.605(D) says that a court "may order a speedy hearing of an action for declaratory relief" and otherwise "advance it on the calendar." Given the purely legal nature of the issues presented and the fundamental nature of the rights involved, the Plaintiffs hereby request an expedited determination of their claims.

32. For these reasons, then, the Plaintiffs request a declaratory judgment under MCR 2.605.

FACTUAL BACKGROUND

33. On August 20, 2021, the Health Department issued the original Mask Mandate, which required every educational institution in Ottawa County to ensure that its students in "Pre-Kindergarten

through Grade 6 consistently and properly wear a facial covering while inside any enclosed building or structure of the institution." (**Exhibit 1**, p. 3).

34. The Mask Mandate also required every educational institution to ensure that "all persons, regardless of vaccination status, providing service to any persons in Pre-Kindergarten through Grade 6 properly and consistently wear a facial covering while inside an enclosed building or structure of the institution." (*Id.*).

35. Under the Mask Mandate, the term "persons" includes "students, teachers, administrative staff, attendees, volunteers, coaches, camp leaders, and other employees or volunteers" of an educational institution. (*Id.*). The Health Department's Mask Mandate further defines "educational institutions" as including "youth camps, youth programs, child care centers, preschools, primary through secondary schools," among other things. (*Id.*).

36. According to the Mask Mandate's plain terms, the Health Department allegedly derived the authority to issue it from several statutes and one administrative rule. But, none of those code sections authorized that version of the Mask Mandate. Nor did any of those legal authorities otherwise insulate the Mask Mandate from the County Commission's plenary power to approve or disapprove of it.

37. The Plaintiffs filed this lawsuit, challenging the Mask Mandate on several grounds. In direct response to those challenges, Ms. Stefanovsky issued the Reconciled Mask Mandate. According to its plain terms, that new order, which was also issued without County Commission approval, incorporated and superseded the original Mask Mandate. (**Exhibit 3**, page 4). The Reconciled Mask Mandate also left all the Health Department's previous mandates, including the Mask Mandate related to K-6 student face coverings, fully intact.

38. The initial Mask Mandate contained several loosely connected and, ultimately, insufficient factual findings in support of the Health Department's COVID-19 mitigation mandates. The Defendants

recognized that was a problem. As a result, the Reconciled Mask Mandate made several new factual findings in an attempt to support the Defendant's assertion that requiring everyone in the K-6 setting to wear a face covering while indoors is necessary to protect the public health; to ensure continued access to essential public health services; to ensure continued enforcement of health laws; and to prevent imminent danger to Ottawa County's residents. Aside from those additional factual findings, though, the Reconciled Mask Mandate left Ms. Stefanovsky's August 20, 2021 order virtually unchanged.

39. Several days after the Reconciled Mask Mandate was issued, the Defendants filed their Answer to the Plaintiffs' initial Complaint. In that pleading, the Defendants denied most of the Plaintiffs' allegations, including that the original Mask Mandate was unlawful. The Defendants also relied upon the new factual findings contained in the Reconciled Mask Mandate.

40. More importantly, though, the Defendants' Answer made two, far more significant assertions: (1) that the original Mask Mandate was not a Health Department "regulation" because it was an "order"; and (2) that, as an "order," the original Mask Mandate was not subject to reversal, modification, ratification, or approval by the County Commission under MCL 333.2441. Neither of these things are true.

41. In light of the Reconciled Mask Mandate's content, as well as the Defendants' official litigation position, the Plaintiffs' are now amending their claims. More specifically, the Plaintiffs no longer challenge whether Ms. Stefanovsky's factual findings were enough to trigger the authority granted by the statutes and rules cited in the original Mask Mandate and incorporated by the Reconciled Mask Mandate. Rather, the Plaintiffs focus solely on the Defendants' contention that Ms. Stefanovsky and the Health Department can operate in an accountability vacuum, where the people's elected representatives are powerless to intercede, despite clear statutory authority to the contrary.

42. Moreover, none of the urgency surrounding the Plaintiffs' claims has been dissipated by these recent events. Both the original Mask Mandate and the Reconciled Mask Mandate were, are, and will

continue to be invalid exercises of governmental authority. Yet, Ottawa County's residents, including the Plaintiffs and their children, remain subject the Reconciled Mask Mandate's restrictions, the violation of which is a misdemeanor "punishable by imprisonment for not more than 6 months or a fine not more than $200, or both." MCL 333.2443.

43. The Health Department had previously taken other steps to enforce the original Mask Mandate, too. On September 15, 2021, it issued a form Attestation to the relevant COVID-19 response contact person at every school in Ottawa County. (**Exhibit 4**, 9/15/21 Attestation). This Attestation was supposed to be signed by every principle or head administrator of a school under the Health Department's jurisdiction, and required those individuals to declare that they had: (1) "enforced" the original Mask Mandate and corrected any violations of it, (2) told parents and teachers that the original Mask Mandate "[was] not optional and [was] not a matter of parental or personal choice," and (3) told their staff that any student who takes their mask off "must … replace it or be directed to the office where the parent is then called and asked to promptly pick the child up." (*Id.*).

44. Based upon the language of the Attestation, the Health Department intends to enforce its face covering regulations, including those that are contained in the Reconciled Mask Mandate, by requiring that every K-6 student who refuses to wear a face covering be removed from the classroom and sent home.

45. Ultimately, then, the salient facts are these: (1) just like the Health Department's original Mask Mandate, the Reconciled Mask Mandate was issued unlawfully without the County Commission's approval; (2) the failure to comply with the Reconciled Mask Mandate places every noncompliant child or adult at risk of one or more of the penalties set forth above; and (3) the Defendants are entrenched in the position that the Reconciled Mask Mandate (and any subsequently issued orders of that type) are immune from County Commission oversight.

46. Given these considerations, an actual, justiciable controversary exists and immediate declaratory relief is appropriate.

COUNT I
JUDICIAL DECLARATION: THE COUNTY COMMISSION HAS A STATUTORY DUTY TO "APPROVE" OR "DISAPPROVE" OF THE RECONCILED MASK MANDATE

47. The Plaintiffs incorporate the allegations of the proceeding paragraphs as if fully set forth herein.

48. The Health Department is a "local health department" under the Public Health Code. As such, its authority is limited and explicitly defined by statute. The statutory limits of the Health Department's authority are defined as follows:

a. Under MCL 333.2433(2)(a) and (f), a local health department shall "[i]mplement and enforce laws for which responsibility is vested in the local health department" and "[h]ave powers necessary or appropriate to perform the duties and exercise the powers given by law to the local health officer and which are not otherwise prohibited by law";

b. Under MCL 333.2435(d) and (i), a local health department may "[a]dopt regulations to properly safeguard the public health and to prevent the spread of diseases and sources of contamination" and "[p]erform a delegated function";

c. Under MCL 333.2441, a "local health department may adopt regulations necessary or appropriate to implement or carry out the duties or functions vested by law in the local health department"; and

d. Under MCL 333.2428, the "local health officer shall act as the administrative officer of the Board of Health and local health department and may take actions and make determinations necessary or appropriate to carry out the local health department's functions under this part or functions delegated under this part and to protect the public health and prevent disease."

49. According to the Health Department, the Reconciled Mask Mandate is an "order" promulgated under the authority conferred by MCL 333.2451, MCL 333.2453, MCL 333.2433, and MCL 333.2428(2).

50. The County Commission constitutes a "local governing entity" under Michigan's Public Health Code. Furthermore, under Michigan law, "local health departments" are created by a "local governing entity." MCL 333.2413. In that sense, the County Commission has primacy over, and is statutorily obligated to oversee, the Health Department.

51. The Public Health Code's plain language supports this conclusion by providing that, when a local health department adopts a "regulation," it "shall be approved or disapproved by the local governing entity." MCL 333.2441. And, those regulations only become effective after receiving this "approval." (*Id.*).

52. Clearly, then, Michigan law requires that a local governing entity oversee, and ultimately, approve any "regulations" issued by a local health department before they obtain the force of law.

53. The Health Department's Reconciled Mask Mandate is a "regulation" within the plain meaning of MCL 333.2441.

54. So, the County Commission is statutorily obligated to approve or disapprove of the Reconciled Mask Mandate before it takes effect.

WHEREFORE, the Plaintiffs hereby respectfully request that this Honorable Court issue an Order declaring that:

a. Under MCL 333.2441, the County Commission has a mandatory statutory duty to exercise oversight over the Health Department's regulations;

b. Any orders promulgated by the Health Department under MCL 333.2451, MCL 333.2453, MCL 333.2433, and MCL 333.2428(2) are "regulations" within the plain meaning of MCL 333.2441; and

c. Under the plain language of MCL 333.2441, the Health Department's Reconciled Mask Mandate is a "regulation" subject to the County Commission's approval or disapproval.

d. The Health Department's Reconciled Mask Mandate is procedurally invalid and legally inoperative because it was never approved by the County Commission.

COUNT II
MANDAMUS

55. The Plaintiffs incorporate the allegations of the proceeding paragraphs as if fully set forth herein.

56. Although it cannot be used to compel a particular outcome, mandamus is properly employed "to require a body or an officer charged with a duty to take action in the matter, notwithstanding the fact that the execution of that duty may involve some measure of discretion." *Teasel v. Department of Mental Health*, 419 Mich 390, 410; 355 NW2d 75 (1984).

57. Under MCL 333.2441, the County Commission has a mandatory statutory duty to exercise oversight in relation to the Health Department's regulations, including the Reconciled Mask Mandate. Use of the term "shall" within the relevant statutory framework plainly establishes this fact.

58. So, while the County Commission has discretion to *either* "approve" *or* "disapprove" of the Health Department's Reconciled Mask Mandate, its exercise of that discretion is statutorily mandated by the plain language of MCL 333.2441. Put another way, then, the County Commission cannot refuse to "approve" or "disapprove" of the Reconciled Mask Mandate.

WHEREFORE, the Plaintiffs respectfully request that this Honorable Court issue a writ of mandamus compelling the County Commission to comply with its statutory duty and vote to either "approve" or "disapprove" of the Reconciled Mask Mandate as required by the plain language of MCL 333.2441.

REQUEST FOR RELIEF

WHEREFORE, for the reasons stated above, the Plaintiffs respectfully request that this Honorable Court:

a. Order "a speedy hearing" of this action and "advance it on the calendar" of the docket under MCR 2.605(D);

b. Issue a judgment providing the declaratory relief articulated above;

c. Issue a writ of mandamus compelling the County Commission to comply with its statutory duty and vote to either "approve" or "disapprove" of the Reconciled Mask Mandate; and

d. Grant any other relief deemed to be equitable and just.

Date: October 25, 2021

By: _____

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STATE OF MICHIGAN

20th CIRCUIT COURT FOR THE COUNTY OF OTTAWA

PATRICK FLYNN, AJ RATERINK, PATRICIA LOOKS, BRIAN DOKTER, and STEVE AND JAMIE LEMIEUX,

Plaintiffs,

File No. 21-6624-CZ

Hon. Jon Hulsing

v

OTTAWA COUNTY DEPARTMENT OF PUBLIC HEALTH, LISA STEFANOSKY, M.ED., in her official capacity as Administrative Health Officer for the Ottawa County Department of Public Health AND THE OTTAWA COUNTY BOARD OF COMMISSIONERS,

Defendants.
_____/

PLAINTIFF'S COMPLAINT FOR IMMEDIATE DECLARATORY RELIEF AND MANDAMUS AND MOTION FOR SUMMARY DISPOSITION
AND
DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT FOR IMMEDIATE DECLARATORY RELIEF AND MANDAMUS

BEFORE THE HONORABLE JON HULSING, CIRCUIT JUDGE

Grand Haven, Michigan - Monday, December 6, 2021

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Grand Haven, Michigan

Monday, December 6, 2021 - 3:04 p.m.

THE COURT: This is file number 21-6624-CZ, Patrick Flynn, et al, versus the Ottawa County Department of Public Health, Lisa Stefanovsky, and the County Board of Commissioners. Counsel are here. I have reviewed all of the materials in advance of today's hearing. I also had a brief conversation with counsel in chambers regarding possible DQ or recusal, and it's my understanding that neither counsel believes that there's a conflict with the court sitting in this case. I did share some communications that I had with the other judges and with Mr. Van Essen prior to this lawsuit being filed and that was dealing with county protocols as it pertained to mask mandates and I shared those emails. Obviously Mr. Van Essen has seen them in the past. I shared them with Mr. Tountas, but we're okay to proceed then?

MR. TOUNTAS: We are, your Honor.

THE COURT: Okay.

MR VAN ESSEN: Yes, your Honor.

THE COURT: Who wishes to go first? I know we kind of have cross motions, but I'll leave it -- who wishes to go first?

MR. TOUNTAS: He filed first, if you want to

go.

MR VAN ESSEN: It's my motion and I'm older.

THE COURT: Mr. Van Essen, you may proceed.

MR VAN ESSEN: So age before beauty, your Honor.

THE COURT: There we go.

MR VAN ESSEN: Good afternoon again, your Honor. Doug Van Essen on behalf of Lisa Stefanovsky, the Board of Commissioners, and the Department of Public Health of Ottawa County.

The plaintiff's position, as I understand it from reading their brief, your Honor, is that the court's task is very easy. You just apply the plain language of Chapter 2441 and Chapter 2453. You don't even have to interpret the two, and in their view it's clear that the promulgation processes for 2441 and 2442 apply to any order issued under 2453.

Honestly, your Honor, if we're not going to get to statutory interpretation, then I think clearly the defendant's motion must be granted. That is to say there's nothing in 2441 that says it applies to an order issued by a health officer under 2453. There's nothing in 2453 that says the promulgation procedure described by the statute in 2441 and 2442 applies to a health officer's issued order under 2453 or 2451, which is the

imminent hazard or imminent threat statute. So the plain language of the Public Health Code would seemingly support the defendant's position that the orders are -- and the Public Health Code at least -- different from regulations, and one cannot say that under the Public Health Code every order is also a regulation and indeed we know that's not true. This court is eventually going to issue an order as a state officer. It's not going to issue a regulation. It doesn't promulgate regulations. Regulations are part of the positive law of the state or public health regulations adopted by Ottawa County are akin to an ordinance and they're part of the positive law of the -- of Ottawa County. Orders have the hallmark of typically -- not always because the Public Service Commission can issue an order, but typically they're issued by officers and they're not promulgated in the sense of notice and an opportunity to be heard, but rather they're issued upon factual findings and they're temporal in nature.

Now, the plaintiffs argue that in 2441 it has language that talks about regulations track with the authority given to the department under the Public Health Code, but that's the department, not the health officer. The provisions of 2451 and 2453 are personal to the health officer. The mask mandate was issued not by the

Public Health Department, but it was issued by the health officer as the mask mandates of 2020 were issued by the director of the department, not by the Michigan Department of Community Health.

I have before the court the relevant sections from the Public Health Code that I think the court needs to review and we start with 2233. This is the language in chapter 22 that pertains to the state's authority, but the language is almost exactly as the legislature use when it turned in 24 -- chapter 24 to the local health department's authority. So, we see in 2233 that the department may promulgate rules. We have an actor, the agency. We have a process, a discretionary process may promulgate. We have an object, it's a regulation.

2251, Imminent Danger. We have the director now, a different actor, that upon a different process a finding of imminent health shall -- not discretionary, but shall immediately issue a notice and shall issue an order immediately; not a promulgation as under 2233 which requires the Administrative Procedures Act to be followed, 30 days' notice at a minimum. Now we have an imminent danger by a different actor, the health -- the director of the Department of Health, who has to do something immediate and that is to issue a notice and an order.

My friends Larry Willey and Chip Chamberlain are defending Director Lyon, Nick Lyon, who is the accused by the state of Michigan of violating his personal duties under 2251 with respect to the Flint lead crisis. Namely, he knew there was an imminent threat. He essentially made those findings in a number of communiques, but he failed to immediately notify the residents of Flint or to issue an order trying to protect them from the imminent health hazards, and that is alleged by the state of Michigan to be a personal, criminal violation of the law by not the department, but by the director at the time, Nick Lyon.

Then we see the same statute effectively for the health -- the Director of Community Health in epidemics, that if the director determines that control of an epidemic is necessary, the director by emergency order may prohibit the gathering of people for any purpose. There's no sense that you have to wait for 30 days and have the department promulgate a gathering restriction order. It is an emergency order which can go in effect upon the finding that the epidemic requires it.

In structuring penalties and violations for the Public Health Code or rules promulgated or orders issued in 2262, we have the department now may promulgate a regulation that will set a fine schedule or other penalty

for a violation of the code, the statute, a violation of the regulation promulgated -- again, a different process, a different object, namely a regulation -- or the issuance of an order, that personal order which the director can issue. Clearly, if you look at the Department of Community Health's authoritative -- authority given by the Public Health Code, you see a distinction between the positive law regulation and a temporal, immediate issuance of an order such as the court would issue upon a finding of certain conditions.

So then we migrate over to chapter 24 which is obviously the set of statutes we're most focused on now. The premise of the plaintiffs apparently is that the legislature would use the same terms but in a different fashion with respect to local health departments. There's nothing in here that would suggest that. In fact, it uses the same language. 2441, the department. When the department is the actor, it may adopt regulations -- which is different than issuing an order -- to carry out the functions or the duties vested by law in the department as opposed to the officer. The regulations then have to be approved by the local governing body in a process that typically requires -- well, that does according to 2442 require notice and an opportunity to be heard and a minimum of 20 days.

There's no way you can promulgate a county health department regulation in less than 20 days because 2442 absolutely requires a minimum comment period of 22 days before any regulation can be promulgated at the local level.

We then have the same imminent hazard statute in 21 -- 2451 and now it's not the department. It's a different actor. In this case it's the health officer with a personal responsibility that's obligatory, not discretionary. It's an obligation of Lisa Stefanovsky if she finds there is an imminent danger to public health that she immediately issue a notice and an order to individuals affected by that imminent danger. There are sections in here which immediately -- that define imminent danger, which clearly indicate not a reflective notice opportunity and promulgation opportunity, but imminent action based on factual findings of an imminent threat. That is carried over to epidemics in 2453. If a local health officer determines that control of an epidemic is necessary to protect the public health, the health officer may issue an emergency order to prohibit the gathering of people.

Now, all attacks on my client Lisa Stefanovsky's issuance of the order in this case independent of the possible interface of the Board of

Commissioners have been dropped. At this point it is conceded by the plaintiffs that she made adequate findings of fact that there was an epidemic and that supported adequately her issuance not of any order, but of an emergency order, and courts have already determined that the mask mandate as a condition for gathering is a sufficient or appropriate exercise of -- whether it's 2253 as it was last year or 2453 as it is this year, a health officer or Community Mental Health director's exercise of this particular statute.

In section 2 of this key statute, there's a discussion about providing involuntary detention. So, a health officer can -- whether it's AIDS or whether it is chickenpox, theoretically the health officer has the ability to abate that condition or to abate that threat by actually issuing an order that would require the detention of individuals who are contagious and who are a threat to public health. Now, obviously there's a whole process whereby once detained the individual has to be given due process and an opportunity and -- earlier in the epidemic and, in fact, we still haven't repealed that. We -- Judge Van Allsburg issued a blanket order allowing the health department to seize individuals in COVID and place them in detention. We haven't exercised that blanket order and that order does require within 48

hours that a petition be filed, et cetera, compliant with 2453 too, but that's how imminent and urgent activities are under 2453.

We have the same disjunctive language, your Honor, in the local health department's authority as we have with the department when it comes to establishing violations. This time it's the Board of Commissioners, again like it would be the department pursuant to regulation, that would have to promulgate a fee schedule, a fine schedule, and again the objects are disjointed. A violation of the code, a violation of the Board of Commissioners' approved regulations, or the violation of an issued order can all be the subject of that regulation that establishes those fines.

So, it isn't just the notion that we can equate regulation and order that the court would have to undertake and essentially find that all orders are regulations in this context, but you'd also have to ignore the issuance versus promulgation language that is there with both the department and with the local health department. And you would also have to find that it's irrelevant that the legislature always chooses order in association with an individual's responsibility or authority to issue these orders and it always selects agency or local health department when it uses the verb

promulgate and the object regulations. You would have to find that it's meaningless that in both the violation sections the legislature chose to authorize regulations or rules that would make discreet fines for a violation of the statute, regulations, or the rules. That obviously we know there's a difference between the statute and the regulations, but you would have to find that it's a nullity that they added the fines and the possibility of fines for the violation of issued orders that they meant the same thing as a regulation. And, in fact, the court would have to engage in mental gymnastics that in the hundred years of this statute no court has ever even been asked to do. If they're right then Director Gordon's or Director Hertel's mask mandates last year were equally ineffective because they weren't promulgated regulations. No one challenged that. I submitted the opinion of the House attorney that despite the request of Representative Meerman, said, no, this is an issued order of the health officer. The Board of Commissioners has nothing to do with either approving or disproving those emergency orders under this particular statute.

If the court were to grant the plaintiff's the declaratory relief that they're asking, the health department and the health officer would be unable to meet

the regular and ordinary use of 2253, which is noroviruses such as we had at Hope College a few years ago, the chickenpox case that -- or the chickenpox situation which Judge Miedema recently resolved. Those were orders that had to be issued in an urgent situation where the time period for contagion was well under 20 days, where if 20 days had to be waited before the health department's officers could act, the contagion would have spread and would have defeated the very purpose for the order. This code was developed after the pandemics of the flu and of smallpox. It has now been used again a hundred years later for COVID. We can all hope we never have to have another epidemic order of that nature, a pandemic, as applied locally or at the state level through these statutes, but to take away their regular tool for dealing with smallpox or chickenpox or measles or noroviruses would mean to defeat the obvious intent of the legislature in giving health officers the personal authority and cloak them with the power to deal with those situations. We respectfully request that the court not accept that invitation. Thank you.

THE COURT: Thank you. Mr. Tountas?

MR. TOUNTAS: Thank you, your Honor. Adam Tountas here on behalf of the plaintiffs. Your Honor, it's this simple: The August 20 and October 8 mask

mandates are unenforceable, invalid, and they are that way because they were not voted on by the local governing entity. In this instance, the Board of County Commissioners.

The defendants acknowledge this is a case of statutory construction and Mr. Van Essen stood at this podium eloquently for about 25 minutes and didn't engage of one instance of statutory construction, didn't talk about these words, didn't cite a case, didn't cite a legal dictionary, didn't cite a lay dictionary. That's what we have to do, your Honor, when we interpret code sections. We do that because words have meaning, because in order to understand what the law says you have to understand what those words mean, and when you do that text is king. Text is where we go first and we start with the framework.

Let's start with the framework of the local Public Health Act. You have MCL 333.2413 which says a local governing entity -- in this case, your Honor, the Board of Commissioners -- creates the health department. Section 2428 says that local governing entity appoints the health officer, in this case Ms. Stefanovsky. She doesn't act with any authority in her own right. She acts because she was appointed to act in that fiduciary capacity by the County Commission. And then you have

another section, 2441, the one we're talking about today, which says the health department may adopt regulations but they shall be subject to the oversight of the local governing entity. It's within that entire framework of accountability that these questions are answered. And we do have the epidemic section and the pandemic section which says that -- these are specifically 2451 and 2453 that mention the term order and those words are undefined in the statute. They're undefined in any single section of the health code, the broad one and the one that deals with local health agencies, and so here we're stuck in this quandry. We don't know what those words mean without engaging in statutory construction and our supreme court at the state and federal level has shown us how to do that. You go to a dictionary, and we've cited three different dictionary definitions that deal with these terms. Black's Law Dictionary, which is the one we're taught to go to in law school first and foremost, it says a regulation is, quote, an official rule or order having legal force usually issued by an administrative agency. Merriam Webster's Dictionary of the Law, which the state supreme court has cited on more than on occasion, defines regulation as, quote, an authoritative rule, specifically a rule or order issued by a governmental agency and often having force of law. We

also cited Merriam Webster's Collegiate Dictionary to have a lay dictionary's take on this issue that says a regulation is, quote, a governmental order having the force of law. So wherever you look, whichever one of these tools out of the kit that the supreme court has said you go to to interpret a statute, we come to this conclusion: An order is a type of regulation issued by an administrative agency. It's how that agency tells people like me and my kids and these plaintiffs here's what you can do, here's what you can't do. It's how that agency regulates and governs. And so if those two terms are the same, now we know how we have to read section 2441. Now we understand that even though you're allowed to have the issuance of an emergency order and you can do so without the notice and hearing provided in 2441, that doesn't mean you get to issue that order in an accountability vacuum. That is an absurd result when you look at the entire framework where the County Commission creates a health department, appoints an administrator, and has final say over what does and doesn't have the force of law.

Now, the argument that Mr. Van Essen offered basically comes down to this: Well, of course they mean different things. They're different words. And we're not going to bother looking at what those words mean in

the law or in a dictionary of any sort, but they're different and so they have to be different because of chickenpox or because of this instance that happened a hundred years ago. Those are textually unsupportable arguments. There's nowhere in the local health code that it says you can issue a regulation, but it can't deal with disease. You know, your regulations, you can issue orders about stuff that isn't subject to normal business. It simply says you can issue an order if you have to act more rapidly and outside the auspices of the normal rulemaking process, but it does not, your Honor. There's no textual support in the statute, no case they've cited, no case we've cited that says you're otherwise immune from accountability. You're otherwise outside the scope of the local governing entities' absolute authority to regulate what does and doesn't have the authority of law.

Now, the point I would offer if you're going to go for these non-textual arguments is to, good grief, look at the statutory framework. You know, they say, well -- and they made this argument in writing, your Honor: Well, look, if regulations and orders were subject to the same approval process, then you've basically merged the rules and it's the first one and everything's gotta go through notice and comment. Well, no, that's not true. Notice doesn't show up in the other

section. But flip the argument. What if they're right? What if there's this regulation rulemaking process which is arcane and takes a long time and is out here, but then there's this process the administrator can use whenever he or she decides they want to, not subject to any review, judicial, elected official or otherwise? It can be about any subject matter they want that's normally within the purview of the health department and there's not a darn thing anybody can do about it whether here, whether at the County Commission meeting, or otherwise. That is where the exception swallows the rule. That is untenable when you look at the statutory framework of the Public Health Code.

And, quite frankly, -- I'm not embarrassed to state from the podium, we said it in our brief -- it's un-American. We don't live in East Germany in some administrative state where somebody who's unelected gets to make rules that dictate the scope, course, and trajectory of our lives. We live in the United States of America where elected officials are accountable to us at the ballot box and they are ultimately in charge of the people that they appoint subject to our accountability. That's how we do government in this country. They have cited no case suggesting otherwise. They have pointed us to no legal dictionary suggesting we've got order and

regulation wrong. They do nothing but stand up here and weave a confusing tapestry about chickenpox and hundred year-old rules and that's nonsense. That's not how we do it. The August 20 order is invalid because it was not voted on by the County Commissioners that my clients elected, that I elected, that sit in control of that arm of government and so they should be stricken.

Now, that brings us to our second item of relief which is this order of mandamus. Your Honor, we cited the arguments and the authority in our brief. Mandamus can't compel the exercise of discretion in any particular way, but it can compel the exercise of discretion, period. We think that's an appropriate remedy here. It's not about masks. This is about the process. This is about forcing the County Commissioners to do what they were elected to do, which is to sit and make a difficult judgment call on whether kids in school should be wearing masks. If they take that vote and they say yes, then kids wear masks, period, until we have new commissioners and that's the way we do government in this country. But if they say nothing, Ms. Stefanovsky's order means nothing because it has no force and effect of law. And so the second item of relief we're asking for, your Honor, is not just to strike down these unlawful orders, but it's to require the County Commission to vote

if they insist on renewing these orders or mandating vaccines or mandating anything down the road that we can't think of now outside the COVID pandemic or not in the interest of public health. When the health department acts, it does not do so in an accountability vacuum. And we'll rest on our brief beyond that. Thank you, your Honor.

THE COURT: Mr. Van Essen, these orders are set to expire, like, on January 3 or something; is that accurate?

MR VAN ESSEN: January 2nd.

THE COURT: Right before the kids return from the school break?

MR VAN ESSEN: That's correct, your Honor.

THE COURT: All right. Thank you very much. I thank the attorneys for their presentation. I thank everybody for the ton of time that they spent on doing these briefs. I note that the court has about 56 days to render its opinion. It would be, I guess, easy for a judge to say, oh, it's December 6 today and January 2 or 3 is less than a month away. I'll sit on it and moot it out. I'm not going to do that. I'm going to make a decision. I'm going to give my reasons for it, but I'm going to give the answer right now because I don't want the persons who are concerned in this to say what's this

guy talking about? What's the answer? Are the director's orders lawful? Yeah, they are and here's why. So, I'm not going to grant the relief that Mr. Tountas requests. I am going to grant the relief that corporate counsel would like.

Under MCL 333.2428, the local health officer has powers and duties. Those are powers and duties given to the local health officer. On section 23 -- excuse me -- 2433, they are the duties of the local health department. It's different. 2441 is the adoption of regulations, which is why we're here, but as Mr. Van Essen points out, to adopt those regulations there's a notice requirement and it's at least 20 days. 2442 gives a notice requirement and that's perfectly fine for regulations, but to require the County Board of Commission to act on an order by the health officer, that would gut 2453 if the local health officer -- this is not the department, this is the local health officer -- determines that control of an epidemic is necessary to protect public health, he or she may issue emergency orders. I mean, my goodness, we can think of situations where there's an epidemic and to require 20 days to evaluate that and have politicians look at that and in the meantime the epidemic is spreading perhaps by wildfire. No. This order can be issued immediately.

And then 2451, imminent danger to health or lives. Upon determination that imminent danger to the health or lives of individuals exists, the local health officer, not the department, the local health officer immediately shall inform the individual affected by the imminent danger to issue an order shall be delivered to a person authorized to avoid, correct, or remove the imminent danger. Imminent, immediate. To require 20 days and then maybe up to 45 days to issue the regulation, that would gut 2451 of its meaning. And then 2443, except as otherwise provided in this act, a person who violates a regulation of a local health department or an order of a local health officer -- they're two separate animals -- is guilty of a misdemeanor. It's a regulation of a local department or an order of a local officer. They're separate animals here.

So obviously there are requirements. 2453 requires that there be an epidemic. 2451 requires that there be a determination of imminent danger. There has to be a reason behind the orders issued by the health officer. You know, if the health officer issues those orders, then they're valid.

Now, can a local health officer abuse his or her authority? Absolutely. What can be done? The county board hired them. The county board can fire them

and change the law. One can think of a number of situations where a local health officer could exceed his or her -- the grounds of common sense. Fire the officer, change the law, but until that's done, those persons who were unsuccessful in the last election have to wait until the next election, and if your side still loses, you have to comply with the rules that have been lawfully done until your side wins. It requires, I think, 56 votes in the House and I forget how many in the Senate and the Governor as well. So until you win, you have to comply with the rules. These rules are valid. Thank you very much. Thank you. Will you prepare the order?

MR VAN ESSEN: Yes.

THE COURT: Thank you.

MR. TOUNTAS: Thank you, your Honor.

THE COURT: Thank you.

(At 3:39 p.m., hearing concluded)

STATE OF MICHIGAN

COUNTY OF OTTAWA

I certify that that this transcript, consisting of 25 pages, is a complete, true, and correct record of the videotape of the proceedings and testimony taken in this case as recorded on Monday, December 6, 2021.

Date: 12-8-21

Lorri L. Coleman, CER 8536
Ottawa County 20th Circuit Court
414 Washington Avenue, Suite 300
Grand Haven, Michigan 49417
(616)846-8230

County of Ottawa

Environmental Health Regulations

Effective September 1, 2016
As Amended July 26, 2016

miOttawa Department of
Public Health

Environmental Health Division
12251 James ST, Suite 200
Holland, MI 49424
616-393-5645 phone
616-393-5643 fax
www.miottawa.org

Table of Contents

Article I - General Provisions

Section

A. **Title** - The Board of Commissioners of Ottawa County, Michigan, by virtue of the power vested in the body under authority of Sections 2435 & 2441 (1) of the Michigan Public Health Code, Act 368, P.A. 1978, as amended, being Sections 333.2435 & 333.2441 of the Michigan Compiled Laws, hereby provides and adopts the following regulation known as the: *County of Ottawa Environmental Health Regulations.*

Article II - Definitions

Section

A. **Appeal -** A formal, written request directed to the Appeals Board for review of decisions made or actions taken by the Health Officer in his/her administration of the single and two family sewage disposal system requirements of this Regulation.

B. **Approved or Acceptable** - Suitable for the intended use in accordance with the intent and purpose of these Regulations as determined by the Health Officer, based on examination and evaluation, and/or on evidence of compliance with acts, rules or specifications developed by the Department or other recognized agency.

C. **Board** - The Board of Commissioners of Ottawa County, Michigan.

D. **Code** - The Public Health Code of Michigan, Act 368, P.A. 1978, as amended (MCL 333.1101 et seq).

E. **Department** - The Ottawa County Department of Public Health, Environmental Health Division.

F. **Dwelling or Habitable Premises** - Any permanent or temporary building, house, structure, tent, watercraft, trailer, vehicle, tract of land or part thereof, where one or more persons permanently or transiently reside, live, sleep, cook, eat, are employed or congregate.

G. **Health Hazard** - A condition, or practice exists which could reasonably be expected to cause death, disease, or physical harm if not abated or eliminated.

H. **Health Officer** - The Acting or Administrative Health Officer of the Ottawa County Department of Public Health or any other employee of the Department designated or authorized by the Health Officer to perform services or functions pursuant to the provisions of this code. For the purpose of these regulations, designated, authorized employees of the Health Officer shall include the Director of the Environmental Health Division, the Supervisors within the Environmental Health Division, and all Environmental Health Specialists employed by the Department.

I. **Inspection** - An examination, review, investigation, or evaluation of a surveillance or enforcement nature.

J. **Municipality** - Any city, village or township within Ottawa County (State of Michigan).

K. **Notice of Violation** - A written order issued by the Health Officer stating a violation and ordering correction of a condition or conditions in violation of these Regulations.

L. **Nuisance** - Any condition or activity on private or public premises which, in the judgment of the Health Officer, may be injurious, endangering, or detrimental to human life, safety and health of the public; annoying, offensive or obnoxious to the senses; obstructs the comfortable use or sale of adjacent property or may cause degradation of the natural environment.

M. **Owner** - The title holder of record, or the person legally occupying or in possession of any dwelling or premises.

N. **Person** - Any individual, party, company, partnership, firm, corporation, society, owner, association, trustee, agency or any other private or public entity.

O. **Premises** - A tract or parcel of land within Ottawa County with or without a dwelling or habitable building.

P. **Regulations** - Collectively, all acts, rules, requirements, standards, laws, policies and procedures contained in the Ottawa County Environmental Health Regulations.

Q. **Variance** - A modification from the provisions of these Regulations as may be permitted by the Health Officer.

Article III - Authority, Jurisdiction, and Administration

Section

A. **Authority** - These regulations are hereby adopted or incorporated by reference and enforced by virtue of authority conferred upon local health departments by Sections 2435 & 2441 (1) of the Michigan Public Health Code, Act 368, P.A. 1978, as amended, being Sections 333.2435 and 333.2441 of the Michigan Compiled Laws.

B. **Purpose** - These regulations are hereby adopted for the purpose of protecting public health and safety and the quality of the natural environment by establishing numerous standards, policies, and procedures; appeal processes; penalties for violations thereof; and fees for services performed.

C. **Jurisdiction** - The Health Officer is authorized to apply, administer, and enforce the provisions of these regulations. The Department shall have jurisdiction throughout Ottawa County, including all cities, villages, and townships for the administration and enforcement of these regulations, including all amendments, standards, policies and procedures hereafter adopted. The Health Officer shall have the authority to approve or deny any permit required by this Regulation.

D. **Enforcement** - The Health Officer is authorized to conduct inspections of all premises, public or private, to assure compliance with the provisions of this regulation as provided by Section 2246 of the Code, being Section 333.2246 of the Michigan Compiled Laws. The Health Officer may collect such samples for laboratory examination, or seize such property, or perform such tests or examinations as deemed necessary to fulfill the duties and responsibilities of these regulations. These regulations are intended to be utilized by Environmental Sanitarians who, by virtue of their education, training, and experience, are qualified to exercise the professional judgment necessary to uniformly enforce the provisions adopted herein.

E. **Right of Entry and Inspection** - No person shall refuse to permit the Health Officer entry to any private or public premise at reasonable times. It shall be unlawful for any person to molest, intimidate or resist the Health Officer during discharge of official duties for the protection of public health and safety. The Health Officer, after giving proper identification and receiving prior consent of the owner or occupier of the premises, is authorized to inspect any matter, person, premise, record, vehicle, incident, or event to assure compliance. The Health Officer may request the assistance of the Ottawa County Sheriff Department, or other police agency when necessary to execute official duties and assure compliance with these Regulations where an imminent danger or health hazard exists or is believed to exist which requires that an inspection be conducted immediately and prior consent cannot be obtained. Pursuant to any valid entry and inspection affected under this Section, the Health Officer may take possession of any evidence obtained in the course of the investigation which demonstrates a violation of, or noncompliance with, any of this Regulation.

F. **Interference with Notices** - No person shall remove, mutilate, alter, or conceal any notice or placard posted by the Health Officer.

G. **Amendments** - The Department may recommend to the Board of Commissioners from time to time, amendments to the Regulations in the same manner as they were originally adopted and approved.

H. **Power to Establish Operation and Construction Standards, Policies, Procedures and Interpretations** - The Health Officer is hereby granted the authority to develop and establish construction and operation standards, policies, procedures, interpretations and definitions not in conflict with the intent of this Regulation, for the purpose of carrying out the responsibilities herein delegated to the Health Officer by law and which shall be in full force and effect throughout all of Ottawa County. These operation and construction standards, policies, procedures and interpretations may be revised periodically, shall be in writing, shall be kept in a policy file and made available to the public upon request.

I. **Certification and Training** - The Health Officer may require certification and/or training of contractors, owners, operators, and licensee's affected by the requirements of these regulations.

J. **Other Laws and Regulations** - These Regulations are intended to be consistent with applicable federal and state laws relating to public health and shall supersede all local regulations and ordinances not conforming with the minimum requirements as set forth in this Regulation.

K. **Injunctive Proceeding** - Notwithstanding the existence and pursuit of any other remedy, the Health Officer may maintain an action in a court of competent jurisdiction for an injunction or other process against any person to restrain, correct, or prevent violations of this Regulation which the Health Officer believes adversely affects the public health.

L. **Violations Notification** - The Health Officer shall be empowered to issue a notice of violation to any person who violates a provision of this Regulation. Failure to correct or abate the violation in the prescribed manner may result in the issuance of a misdemeanor appearance ticket and/or monetary civil citation.

M. **Order of Immediate Discontinuance** - The Health Officer may require immediate discontinuance of any operation or construction in existence where continuation would create a health hazard, actions or conditions do not comply with the construction or operation requirements of the Department, there is direct violation of these Regulations, or where construction has proceeded unlawfully without a valid permit. Such enforcement action may also result in the issuance of a misdemeanor appearance ticket and/or monetary civil citation.

N. **Validity** - If any section, subsection, clause, or phrase of these Regulations is for any reason judged unconstitutional or invalid, it is hereby provided that the validity of remaining provisions of the Regulations shall not be affected.

O. **Pre-Existing Violations** - Any act, situation or offense committed or any action, liability, order, notice or penalty incurred under previous sections of the Ottawa County Environmental Health Code shall continue to be a violation and fully enforceable if similar sections or provisions are contained in this Regulation.

P. **Variances** - The Health Officer shall be empowered to issue variances or modifications of required isolation distances, materials or size of sewage disposal systems and may issue variances in cases where dimensions of features of the premises create a physical impossibility for compliance, provided all the following conditions exist:

1) That no substantial health hazard or nuisance is likely to occur;
2) That strict compliance with the requirement of the Regulation would result in unnecessary or unreasonable hardship;
3) That no state or local statute or other applicable laws would be violated;
4) That any such variance would provide essentially equivalent protection in the interest of the citizens of Ottawa County;

5) That any such modified sewage disposal system would provide equal or better treatment and disposal than the minimum requirements of this regulation.

Q. **Interpretation/Interchangeability** - The word "shall" is always mandatory and "may" is merely permissive. Words used in the masculine form include the feminine, or the reverse, and words used in the present tense include the future, words in singular number include the plural number, or reverse. Words and terms not defined herein shall be interpreted in the manner of their common meaning and usage.

R. **Repeal** - Previous regulations entitled "Ottawa County Environmental Health Code", as amended and approved by the Board on December 10, 1985, is hereby repealed.

S. **Approval and Effective Date** - These Regulations entitled "Ottawa County Environmental Health Regulations" were approved by action of the Health and Human Services Committee of the Board on July 13, 2016 and adopted by action of the Board on July 26, 20166. These Regulations shall become effective September 1, 2016.

Article IV - Fees

Section

A. **Fees** - A schedule of fees for permits, licenses, services, hearings, and functions authorized and required to be performed by the Department may be adopted and revised periodically by the Board pursuant to Section 2444 of the Code, being Section 333.2444 of the Michigan Compiled Laws. All fees shall be collected by the Department and shall be receipted for and deposited with the Ottawa County Treasurer and credited to the Department. Established fees shall be reasonable and related to the costs incurred by the Department in providing the requested services.

B. **Advance Payment of Fees** - Fees required for services and permits shall be paid in full prior to the performance of such service or issuance of such permit by the Department.

C. **Refunds of Fees** - Fees paid for services or permits authorized by these Regulations shall not be refunded unless requests for refunds are received prior to the commencement of action by the Department or the Department determines the request for service is not required.

Article V - Penalties

Section

A. **Violations Defined** - Any person who violates a provision or requirement of these Regulations including those statutes of the State of Michigan incorporated by reference and adopted as part of these Regulations shall be deemed guilty of a misdemeanor as provided in Section 2441 (2) of the Code, being Section 333.2441 of the Michigan Compiled Laws. In the case of continuing violations of these Regulations, each day's violation shall constitute a separate offense, and may be cited as such. Upon conviction thereof, such misdemeanors shall be punishable by imprisonment for not more than ninety (90) days, or a fine of not more than $200.00, or both.

B. **Misdemeanor Appearance Tickets** - Under authority of Section 2463 of the Code, being Section 333.2463 of the Michigan Compiled Laws, the Health Officer and designated employees are specifically authorized by law to issue and serve misdemeanor appearance tickets with respect to violations of these Regulations and the Statutes of the State of Michigan concerning health matters which are under the authority of the Department.

C. **Civil Citations** - Pursuant to Section 2461 of the Code, being Section 333.2461 of the Michigan Compiled Laws, the Health Officer and designated employees are specifically authorized by law to issue and serve civil citations to be assessed for specific violations of these Regulations and Statutes of the State of Michigan concerning health matters which

are under the authority of the Department. The citation shall be written, shall state specifically the nature of the violation, including reference to the section alleged to have been violated, the monetary civil penalty established for the violation, the right to appeal the citation and shall be delivered or sent not later than ninety (90) days after discovery of the alleged violation.

D. **Civil Citation Appeals** - Pursuant to Section 2462 of the Code, being Section 333.2462 of the Michigan Compiled Laws, not later than twenty (2) days after receipt of a civil citation, the alleged violator may petition the Department for an administrative hearing with the Health Officer which shall be held within thirty (30) days after receipt of such petition. A person aggrieved by a decision of the Health Officer, may file a petition with the Circuit Court of Ottawa County for court review not later than sixty (60) days following receipt of the final decision. A civil penalty shall become final if a petition for an administrative hearing is not received within thirty (30) days of its issuance.

E. **Monetary Civil Penalties** - A schedule of monetary civil penalties for specified violations of the Code or of these Regulations or order issued which the Department has the authority and duty to enforce, are hereby adopted and may be revised periodically by the Board pursuant to Section 2461 (1) of the Code, being Section 333.2461 of the Michigan Compiled Laws. All civil penalties imposed under this part shall be payable to the Department and shall be deposited with the Ottawa County Treasurer and credited to the Department. The amount of monetary penalty shall be doubled for second and succeeding citations for the same violation. When a violation of this Regulation or another law which the Health Officer has the duty to enforce exists, and for which no specific monetary penalty has been established, the monetary penalty shall be $200.00 for the first citation and doubled for the second and succeeding violations. In the specific case of a licensed food service establishment or any other licensed entity, an unpaid civil penalty shall be charged in addition to the regular license fee for the next licensing period and nonpayment may be made a basis for refusing to issue a new or renewed license.

Article VI - Environmental Health Appeals Board

Section

A. **Applicability** - Any person who is, or may be reasonably effected by an administrative action or decision by the Department to deny, limit, suspend or revoke a permit for construction of an onsite sewage disposal system to serve a single or two family dwelling shall be entitled to appeal such action or decision.

B. **Creation of Appeals Board** - In order to provide for reasonable and equitable interpretation and application of these Regulations relating to sewage disposal requirements for single and two family dwellings but not for violations thereof, there is hereby created a Board of Appeals.

C. **Composition of Appeals Board** - The Appeals Board shall consist of not less than seven (7) members who shall reside within Ottawa County and be representative of diversified interests and broad geographical areas. The composition of the Appeals Board shall consist of five (5) qualified electors from the county at large; the supervisor or manager representing the municipality from which the appeal originates; and the Supervising Sanitarian of the Environmental Health Division representing the Department.

D. **Appointment** - The five (5) members at large shall be selected upon the basis of their respective qualifications and fitness to serve without consideration of their political activities. Appointments shall be made by the Chairman of the Board of Commissioners in concurrence with the full Board of Commissioners.

E. **Terms of Office** - Terms of office shall be staggered with eligibility for re-appointment.

F. **Conduct** - The Appeals Board shall select a chairperson, vice chairperson, and secretary and shall review, hear and maintain records of all appeal proceedings.

G. **Quorum** - A quorum of the Appeals Board shall consist of at least four (4) members.

H. **Request for Hearing** - Requests for appeal hearings before the Appeals Board shall be submitted to the Department by the appellant on forms provided for such purpose.

I. **Appeal Fees** - The Board has established fees for appeal hearings in accordance with Article IV of these Regulations and are stated in the Department fee schedule. Such fees shall be paid-in-full to the Department by the appellant at the time of submission of a request for an appeal hearing.

J. **Scheduling of Hearing** - The Appeals Board, upon receiving an appeals hearing request, may elect to grant a hearing at such time and location as the Appeals Board may specify, but shall be scheduled not more than twenty one (21) days following receipt of request. A written notice of the date, time, and place shall be sent or delivered to the appellant.

K. **Hearings** - The chairperson shall have the power to call for such evidence, testimony, witnesses, records, or other information as may be deemed relevant to the issue. The Appeals Board shall review and pass judgment upon decisions made or actions taken by the Department in its administration of these Regulations. The final decision issued by the Appeals Board shall be supported by all the following conditions:

1) That no substantial health hazard or nuisance is likely to occur;
2) That strict compliance with a requirement of the Regulations would result in unnecessary or unreasonable hardship to the appellant;
3) That no state or local statute or other applicable laws would be violated;
4) That the decisions issued would provide essentially equivalent protection for the public's health and safety.

L. **Decision Vote** - A decision of the Appeals Board requires an affirmative vote of a majority of a quorum. A decision of the Appeals Board shall be the final administrative determination concerning the issue being appealed.

Article VII - Technical Definitions

Section

A. **Absorption Bed** - An approved type of subsurface soil absorption system constructed within a square, rectangular, or similar excavation which contains perforated distribution conduit laid ona uniform bed of stone so as to allow for the absorption of septic tank effluent by the surrounding soil.

B. **Absorption Trench** - An approved type of subsurface soil absorption system constructed within a narrow excavated trench which contains a single line of perforated distribution conduit laid on a uniform bed of stone so as to allow for the absorption of septic tank effluent by the surrounding soil.

C. **Automatic Pump or Siphon** - A mechanical device located within a dose tank or pump vault which will automatically pump or release a predetermined amount of effluent at periodic intervals to a soil absorption system or other device approved by the Department.

D. **Available Municipal Sewer** - If a municipal sanitary sewer is within two hundred (200) feet of a dwelling or habitable premises in which sewage originates, then the sewer is considered available to that structure for connection and disposal of sewage.

E. **Dose Tank** - A water tight tank or screened pump vault used for the purpose of retaining the effluent from a septic tank, pending its controlled discharge to a soil absorption system or other approved device via a automatic pump or siphon.

F. **Effluent** - The partially treated liquid sewage released through the outlet of a septic tank.

G. **Experimental Sewage Disposal System** - A method of sewage collection, treatment and disposal which possesses unique and untested characteristics relative to its design,

location or principals of operation and may be authorized for limited use by the Department under the provisions of a controlled test program.

H. **Flood Plain** - The elevation of the contour defining the flood plain limits of any area subject to flooding based on a historical recurrence period commonly referred to as once in about one hundred (100) years or 1 percent flood or 10 percent (10 year) flood as determined by the Land and Water Management Division of the Michigan Department of Environmental Quality.

I. **Garbage Disposal Unit** - A mechanical device generally located in a sink drain and so designed to macerate garbage prior to discharge into a sewer.

J. **High Ground Water Elevation** - The highest level or elevation to which the soil beneath the ground surface is saturated by ground water as may occur during wet periods and determined by observation of distinctive color patterns (mottles) in the soil, site drainage characteristics and verified by information included in the Soil Survey of Ottawa County, Michigan.

K. **Municipal Sewage Disposal System** - A method of sewage collection, transportation and treatment for which the ownership and responsibility for maintenance and operation resides with a governmental entity.

L. **New Use** - Any change in the status or use of a dwelling or premises utilizing or intending to utilize on-site sewage disposal and/or water supply.

M. **Permeability** - The capability of a soil to transmit water.

N. **Precast Unit or Block Trench** - An approved type of subsurface soil absorption system constructed within a rectangular excavation or trench comprised of loosely laid cement blocks or precast concrete, plastic, or fiberglass units surrounded with washed-stone so as to allow for the absorption of septic tank effluent by the surrounding soil.

O. **Safe and Adequate Water Supply** - A water supply which is constructed and located in such a manner as to provide water which will not endanger the health of the user and which provides sufficient water pressure to operate all connected plumbing fixtures.

P. **Septage Waste** - Any human excrement, other sanitary, domestic or restaurant waste, or other material removed or discharged from a septic tank, block trench, precast unit, cesspool, portable toilet, sewage lift station or other enclosure but does not include liquid or hazardous industrial waste.

Q. **Septic Tank** - A water tight, non-corrosive tank constructed of materials approved by the Health Officer, having an inlet and outlet, used for the purpose of receiving all sewage and so designed to provide partial treatment by separation and storage of solids and anaerobic decomposition, prior to releasing the effluent.

R. **Sewage** - All water carried wastes produced by any toilet, sink, bathtub, shower, lavatory, garbage disposal unit, laundry device or drain and human body wastes, in any form originating within or upon any premise. Excluded from the definition are waste waters from roofs, water softening devices, foundation footing drains, floor drains, swimming pools and hot tubs.

S. **Sewage Disposal System** - A method of sewage collection and disposal other than a municipal sewage disposal system consisting of a sewer line connected to one or more septic tanks and a soil absorption system or any other device approved by the Health Officer.

T. **Sewage Related Nuisance** - Any unsanitary condition or activity involving sewage or septage waste occurring on private or public property which the Health Officer reasonably believes to be a potential cause of illness, poses a threat to the health or safety of the public, pollutes surface or ground water, creates an odor, has an obnoxious or detrimental effect on or to the senses of people, or obstructs the comfortable use or sale of adjacent property.

U. **Sewer** - A water tight conduit used for transporting sewage from a dwelling or habitable building to a sewage disposal system.

V. **Soil Absorption System** - A method of distributing septic tank effluent below the ground surface utilizing the surrounding soil for subsequent absorption as approved by the Health Officer.

W. **Stone** - Clean or washed natural stone, crushed stone, crushed rock or other aggregate in a size range from 1/4 inch to 2 inch in diameter as may be approved and required by the Department to be utilized for structural support and sewage effluent dispersal within a soil absorption system.

X. **Surface Water** - A flowing or still body of water whose top surface is exposed to the atmosphere and includes ponds, lakes, bayous, impoundments, rivers, drains, streams, ditches, springs, either natural or constructed.

Y. **Vacant Land Evaluation** - An on-site investigation of a premises to evaluate the suitability of soils and ground water aquifers to support an on-site sewage disposal system and water supply.

Z. **Other Definitions** - Technical terms not defined in this article, but which may be used in these regulations shall mean the most commonly recognized interpretation or description of the term used in the Environmental Health profession.

Article VIII - Single and Two Family Sewage Disposal Requirements

Section

A. **Scope of Article** - The requirements of this article shall apply only to on-site sewage disposal systems serving single and two family dwellings.

B. **Adequate Sewage Disposal System Required** - It shall be unlawful for any person to construct, rebuild, move onto any parcel of land, occupy, permit to be occupied, use, or offer for rent/lease any dwelling or habitable premises which is not provided with an acceptable on-site sewage disposal system as determined by the Health Officer or is not connected to a municipal sewage disposal system for the sanitary and safe disposal of sewage as required by this Regulation.

C. **Separate System for Each Dwelling** - Every dwelling or habitable premises not served by a public sewerage disposal system shall be served by its own individual sewage disposal system except as may be approved by the Health Officer. Every sewage disposal system installed subsequent to the effective date of these regulations shall conform to the design, location, and construction specifications of these regulations. Sewage disposal systems in use prior to the effective date of these regulations may continue in use providing such usage does not create a hazard to public health and safety, a nuisance, or degradation of the natural environment.

D. **Connection Required** - All plumbing fixtures such as flush toilets, urinals, lavatories, sinks, bathtubs, showers, whirlpool tubs, wash machines, laundry tubs or any similar fixtures used to receive or conduct water carried wastes or sewage shall be connected to an approved sewage disposal system. Sump water, footing or perimeter drainage, ground water heat pumps, swimming pools, hot tubs, storm water from roofs or parking areas or products/chemicals which pose a threat to ground water quality shall not be discharged into a sewage disposal system.

E. **Connection to a Municipal Sewage Disposal System** - Newly constructed dwellings/habitable premises shall be required to connect to an available municipal sewage disposal system for wastewater disposal when such public sewers are available and consistent with municipal codes and ordinances. Existing dwellings/habitable premises shall be ordered to connect to available municipal sewer by the Health Officer when continued use of the on-site sewage disposal system constitutes a sewage related nuisance or a new use of the structure requires upgrading of the sewage disposal system.

F. **Basement Plumbing Fixtures** - When plumbing fixtures are installed in basements, it shall be necessary to install a separate sump pump to be used for no purpose other than pumping sewage directly to the septic tank, unless gravity flow is possible. Diversion valves shall not be allowed on the discharge pipe of sump pumps receiving sewage.

G. **Non-complying Sewage Disposal Systems** - It shall be unlawful for any person to create a sewage related nuisance whereby sewage effluent or septage waste is exposed, discharged, deposited, or drains on or to the surface of the ground, or is permitted to drain into any surface water, may contaminate a public or private ground water supply, or creates a hazard to public health and safety, a nuisance or degradation of the natural environment or be in direct violation of any section of this Regulation. Any person who violates a provision of these Regulations resulting from improper sewage disposal practices, a malfunctioning or improperly constructed sewage disposal system or any sewage disposal system not functioning as intended or permitted shall be issued a violation notice by the Health Officer and may be ordered to take corrective action within a specified period of time. The Health Officer may require immediate discontinuance of any operation or construction of a sewage disposal system and/or order such premises vacated and declared unfit for use or habitation until satisfactory remedy can be demonstrated.

H. **Discharge from Public or Private Drain of Unknown Origin** - Whenever the Health Officer shall determine that sewage is flowing from the outlet of any public or private drain of unknown course or origin, he may issue public notices requiring persons owning premises from which such sewage originates, to connect such sewage flow to a municipal sewage disposal system if available, or in the absence thereof, to comply with the provisions of this Regulation. Public notice shall consist of the posting of at least five (5) conspicuous notices in the probable area served by said drain. After not less than ten (10) days following posting of the notices, the Health Officer may plug or cause to be plugged the outlet of said drain until such time as the sources of the sewage have been located. Owners of properties known to be discharging sewage in a drain shall be given written notice of corrections required within a specified period of time and shall be responsible for bearing the costs of correction and plugging the outlets. Failure to comply shall be considered a violation of this Regulation. The Department or any employee thereof shall not be liable for damages caused by plugging of such outlets/drains following posting of public notices.

I. **Replaced, Altered, or Repaired Existing Dwellings** - Whenever the interior living or working area of any existing dwelling or habitable premises is replaced, altered, increased or repaired in excess of 50% of the fair market value, the existing onsite sewage disposal system shall not be utilized unless it can be shown to be in substantial compliance with the Regulation. The Health Officer shall require upgrading of such sewage disposal systems as deemed necessary to meet the minimum requirements of this Regulation.

J. **New Use of Existing Dwelling or Habitable Premises** - Whenever a new or increased use is proposed for an existing dwelling or habitable premises, the Health Officer may require upgrades of the sewage disposal system as deemed necessary to meet the minimum requirements of this Regulation.

K. **Location of Sewage Disposal Systems** - All sewage disposal systems shall be located entirely upon the premises served except under certain conditions where suitably executed and recorded easements exist as determined by the Health Officer.

L. **Stop Work Order** - In instances where construction of a sewage disposal system or part thereof has proceeded unlawfully and without a valid permit, or is found to be in violation of construction requirements, the Health Officer shall issue a "Stop Work Order" requiring immediate discontinuance of said construction. Noncompliance with such order shall be a violation of this Regulation.

M. **Abandonment of Existing Systems** - If the Health Officer shall so order, septic tanks, dose tanks, seepage pits, dry wells, block trenches or similar below grade contrivances

shall be emptied and completely filled with soil or other inert materials when their use is to be permanently discontinued.

N. **Optional Sewage Disposal System Features** - Following review and approval by the Health Officer, optional features which exceed the minimum construction criteria of this Regulation shall be permitted to be incorporated into the design of a sewage disposal system and shall be indicated on the sewage disposal system construction permit. Other design features may be required by the Health Officer as a condition of permit issuance, including but not limited to the use of pumps or siphons for intermittent dosing of effluent; recirculating pumps; sand filters; diverter valves; multiple absorption beds to allow alternate dosing; installation of inspection ports or breather tubes; larger reserve areas; filter devices on outlets of septic tanks; use of low flush toilets, water saving shower heads and self-closing faucets; dosing pump counter and timer; alarms; and water use meter.

O. **Alternative Sewage Disposal Systems** - In the absence of applicable guidelines, technical information, and construction standards concerning a new type of proposed alternative sewage disposal system, the Health Officer may authorize use of such a system if it is determined that no hazard to public health and safety, nuisance, or degradation of the natural environment will result and that in his opinion, the system would include an infiltrate area or provide soil absorption and treatment equivalent to the minimum standards of this Regulation. The Health Officer may impose special conditions and requirements pertaining to the approval and use of such a system and prior to any construction of alternative sewage disposal systems, may require specific training and/or certification of contractors and sewage disposal system installers.

P. **Repair/Replacement Systems** - When sewage disposal system repairs or replacements for existing dwellings or habitable premises cannot conform to the site and design specifications of a new system as set forth in this Regulation, the Health Officer may grant deviations from the minimum requirements and conditions if the spirit and intent of this Regulation are observed and the public health, safety and welfare are assured.

Q. **Holding Tank Systems** - Holding tanks utilizing pump and haul on a permanent basis for new single and two family dwellings are not an acceptable alternate method of sewage disposal on sites that do not meet the acceptance criteria (as specified in Article IX, Section H) required for a soil absorption system. The Environmental Health Appeals Board may elect to grant a hearing for a request to use a holding tank on a new site that has been denied an on-site sewage disposal system permit by the Department. The Health Officer may consider pump and haul for existing dwellings and habitable premises only after all other possible corrective remedies for sewage disposal have been eliminated. In addition, the Health Officer may grant temporary approval to use pump and haul for new dwellings awaiting connection to a municipal sewer disposal system. All approved pump and haul operations shall comply with the requirements and conditions set forth in the Construction Standards and Policies of this Regulation.

R. **Construction Standards** - On-site sewage disposal systems for single or two family dwellings shall meet the Construction Standards as set forth by the Health Officer and are incorporated by reference in this Regulation. Further, the Health Officer shall develop internal policies and procedures to effectively carry out the intent of this Regulation.

S. **Existing Sewage Disposal Systems in Flood Affected Areas** - It shall be unlawful for sewage disposal systems to create a public health nuisance, as determined by the Health Officer, in flood affected areas. In order to avoid such a nuisance, all replacement septic tanks and holding tanks shall be watertight and fitted with watertight access. Sewage disposal systems that do present a public health hazard shall be properly abandoned and replaced with either a fully compliant system or with a holding tank system in accordance with Section Q of Article VIII of this Regulation. Sewage disposal systems shall be brought into full compliance with this Regulation, and all other applicable regulations, upon sale of the property, expiration of the existing system's useful life, failure of the existing system, or a change in factual or legal circumstances as determined by the Health Officer. Any

variance from this policy must be approved by the Health Officer and may only be issued if: (a) the County would be at significant risk of a legal finding of inverse condemnation if it enforced this regulation or (b) the property owner has committed in writing to sell the property to the county, state, or federal governments for nonresidential purposes. A variance must in writing, signed by the Health Officer and may not be relied upon by any subsequent purchaser or prospective purchaser of the property. The County reserves the right to revoke or terminate the variance if the property is sold or if the County is no longer at significant risk of any inverse condemnation in enforcing this regulation.

Article IX - Permits

Section

A. **Permit Required** - No person shall construct, repair, enlarge, alter, relocate, or rejuvenate any onset sewage disposal system serving any premises within Ottawa County unless he/she has first obtained a sewage disposal system construction permit from the Health Officer who is empowered to issue permits authorizing the installation of all sewage disposal systems subject to his/her jurisdiction. No person shall begin or allow construction of any dwelling requiring an on-site sewage disposal system without first obtaining approval and a permit issued by the Health Officer. All sewage disposal system installations shall be constructed in accordance with the permit requirements utilizing construction standards and provisions of these Regulations.

B. **Permit Exceptions** - The requirement for a sewage disposal system construction permit from the Department shall not apply when any of the following circumstances prevail:

1) All sewage will be discharged directly into a Municipal sewage disposal system.
2) In the judgment of the Health Officer, the proposed actions relative to the sewage disposal system are of a very minor nature.
3) The served premises falls within a category which subjects the sewage disposal system to the legal jurisdiction of another agency.

C. **Application for a Permit** - An application and substantiating data shall be provided on forms furnished by the Department. A completed application, signed by the applicant and accompanied by the established fee shall be submitted to the Department before the Health Officer will respond for an on-site evaluation. The Health Officer may require supplemental information including but not limited to engineering plans or drawings, topographic maps indicating surface relief or grade elevations, soil analyses, additional soil borings, ground water elevations, flood plain contours, estimates of daily wastewater flows, anticipated use of structure, number of persons served, detailed plot plan, legal description of property and staking of the building site. It shall be the responsibility of the permit applicant to furnish the Health Officer with all requested facts, details, designs, and information.

D. **Permit Issuance** - The Health Officer, following review of an application and on-site evaluation, shall issue a permit to the applicant authorizing the requested construction, repair, enlargement, or relocation of a sewage disposal system, providing all of the site acceptance criteria and construction requirements can be met. Copies of all sewage disposal system construction permits shall be forwarded to the municipality involved.

E. **Permit Expiration** - Permits shall become void and expire twenty four (24) months from the date of issuance. The permit may be renewed, but will be subject to the prescribed renewal fee and any intervening changes to this Regulation. Any proposed changes in regulations, policy, materials, design, elevation, location, wastewater flow, or use will invalidate the original permit and a new or amended permit in compliance with these Regulations shall be issued and subject to the required permit fee.

F. **Transfer of Permits** - Permits may be transferable from person to person upon written request on forms provided by the Department and payment of the prescribed transfer fee, providing the structure size, use and specifications of the sewage disposal system remain

unchanged and are certified by the new owner as being the same as originally specified. Any proposed changes in material, design, elevation, location, wastewater flow, or use will invalidate the original permit and a new permit shall be required. Copies of all transferred permits shall be forwarded to the municipality involved.

G. Permit Denial - The Health Officer shall withhold issuance of a sewage disposal system construction permit for any of the following reasons or causes:

1) A municipal sewage disposal system sewer is available for connection.
2) Failure to submit the required permit fee.
3) Incomplete, inaccurate, or false information supplied by the applicant.
4) Failure of the proposed sewage disposal system installation site to meet the site acceptance criteria of the Regulations.
5) Failure of the proposed sewage disposal system to meet the construction and design acceptance criteria of the Regulations.
6) A safe and adequate water supply is questionable or not available.
7) The existence of any conditions or facts which give the Health Officer reasonable grounds to believe that issuance of the requested permit would create a threat, nuisance, or hazard to public health, safety, or the environment.

When an application for a sewage disposal system permit has been denied, the Health Officer shall notify the applicant of such action, stating the specific reasons for the denial, and advising further actions if any, which the applicant can undertake.

H. Site Acceptance Criteria - The following minimum characteristics shall be evaluated and used by the Health Officer in determining the acceptability of a site for the construction, repair enlargement, or relocation of a sewage disposal system:

1) The site shall possess naturally occurring soils which are of sufficient quantity and permeability to absorb all sewage effluent to be discharged upon such site, and to insure its confinement beneath the ground surface. Determinations of soil permeability shall be made by persons trained in soil science using such methods as physical observations of soil texture, structure and coloration; sieve analysis; and information contained in the Soil Survey of Ottawa County, Michigan. Parent soils of acceptable texture and permeability, as determined by the Health Officer, shall extend to a minimum vertical depth of two (2) feet beneath the lowest elevation of the proposed soil absorption system.
2) The highest seasonal ground water elevation or evidence thereof shall be a minimum of six (6) inches beneath the natural ground surface in order for the site to be considered acceptable.
3) The site shall not be subject to seasonal surface water flooding or ponding, frequent surface run-off due to precipitation, or be located within the ten (10) year flood plain as determined by credible statistical projections, or historical evidence.
4) The site shall not possess slope conditions detrimental to the installation/operation of a sewage disposal system.
5) The site shall possess sufficient reserve area for a future replacement system at least equal to the area required for the initial system and any required fill.
6) The site shall possess sufficient, usable area to allow for the installation of a sewage disposal system of adequate size and capacity to accommodate all sewage from the premises to be served as specified by these Regulations.
7) The premises shall possess sufficient horizontal area to provide isolation of all components of a sewage disposal system from other structures, objects, boundaries, water wells or natural/man made features in accordance with the minimum distances specified by these Regulations.
8) The location of the sewage disposal system and reserve area shall be accessible for purposes of cleaning, maintenance, construction and inspection.
9) The site shall not be comprised of filled ground (manmade) over naturally occurring, unacceptable soils/materials. Unacceptable soils/materials shall include peat, muck,

marl, impervious clay, organic material, solid/hazardous waste or other soil/materials identified as unacceptable by the Health Officer.

I. **Voidance of Permits** - The Health Officer may declare a previously issued sewage disposal system construction permit to be null and void for any of the following reasons:
   1) Any change in the plans or scope of the project affecting the sewage disposal system design, location, or use.
   2) Acquisition of new information indicating that the previously approved installation site does not comply with the requirements of these Regulations or permit was issued for incorrect parcel or was in violation of the on-site Sewage Disposal System Requirements of the Subdivision Control Act, being Act 288, P.A. of 1967 as amended.
   3) Misrepresenting, omitting, falsifying, or withholding pertinent information upon which the minimum requirements contained in this Regulation are based.
   4) Information indicating an approved water well depth or water quality/quantity cannot be obtained.

J. **Site Modifications** - Site modifications, such as cutting, grading, or filling may be permitted in some cases for the purpose of overcoming permeability limitations of natural soils or ground water isolation requirements. Limits on the nature and extent of allowable modifications and fill shall be prescribed by the Health Officer as authorized by Article III, Section H of this Regulation.

K. **Inspection Required** - The Health Officer shall be empowered to conduct such inspections as may be deemed necessary in connection with the review of applications and the construction, repair, enlargement or relocation of a sewage disposal system. After construction of the sewage disposal system has been completed but before any portion of the system has been covered or placed in operation, it shall be the responsibility of the permit applicant or installer to notify the Department that the system is ready for inspection. The Health Officer shall respond to a request for a final inspection within two (2) working days following completion of system and request for inspection unless other arrangements between the permit applicant and installer are mutually agreed upon. Upon completion of a final inspection the Health Officer shall notify the permit holder and installer of all findings and shall signify an approval or disapproval. The requirements for a final inspection may be waived by the Health Officer if the completed work can be adequately verified by other means.

L. **Final Approval Required** - The Heath Officer may deny final approval of any installation which does not comply with all permit conditions, is of faulty workmanship and/or construction materials, or otherwise does not meet requirements of this Regulation. It shall be a violation of this Regulation for anyone to utilize a sewage disposal system, to occupy or use any premises unless the Health Officer has given an approval. All systems disapproved by the Health Officer shall be brought into compliance with these Regulations within a period of time specified by the Health Officer.

M. **Backfilling** - Following approval of the sewage disposal system by the Health Officer, the system shall not be allowed to remain open for longer than seventy-two (72) hours unless otherwise approved by the Health Officer.

N. **Workmanship** - All work carried out during the repair, correction, installation, modification, revitalization or alteration of an on-site sewage disposal system shall be performed in a workmanlike manner and the property served left in a safe and sanitary condition as determined by the Health Officer.

Article X - Sewage Disposal System Requirements for Other than Single and Two Family Dwelling

Section

A. **Permit Required** - No person shall construct, repair, enlarge, alter or relocate any sewage disposal system serving other than a single or two family dwelling on any premises within Ottawa County unless they have first obtained a sewage disposal system construction permit from the Health Officer. No person shall begin or allow construction of any dwelling or habitable premises requiring an on-site sewage disposal system without first obtaining approval and a permit issued by the Health Officer. All sewage disposal system installations shall be constructed in accordance with the permit requirements utilizing construction standards and provisions of these Regulations.

B. **Application for a Permit** - An application and substantiating data shall be provided on forms furnished by the Department. A completed application, signed by the applicant and accompanied by the established fee and proposed project plans shall be submitted to the Department before the Health Officer will respond for an on-site evaluation and plan review. Such information as the Health officer deems necessary to adequately evaluate a permit application shall be required, including, but not limited to engineering plans or drawings, topographic maps indicating surface relief or grade elevations, soil analyses, additional soil borings, ground water elevations, floodplain contours, estimates of daily wastewater flows, anticipated use of structure, number of persons served, detailed plot plan, identification (staking) of the building site and legal description of property. It shall be the responsibility of the permit applicant or authorized representative to furnish the Health Office with all requested facts, details, designs, and information.

C. **Michigan Criteria** - The Michigan Criteria for Subsurface Sewage Disposal and any subsequent updated or amended revisions thereto are incorporated by reference and adopted as part of these Regulations and shall provide minimum uniform standards of design and construction for proposed sewage disposal systems regulated by the publication. This publication was revised on 6/89 and published by the Michigan Department of Public Health in accordance with the Water Resources Commission Policy Statement adopted 8/18/83.

D. **Construction Requirements** - All on-site sewage disposal system design and construction standards not addressed in the Michigan Criteria for Subsurface Sewage Disposal shall meet construction requirements as set forth by the Health Officer and are incorporated by reference in this Regulation. Further, the Health Officer shall develop internal policy and procedure to effectively carry out the intent of this Regulation.

E. **Pump and Haul Facilities** - Where no alternative methods of sewage disposal are available, on-site storage, hauling, and final disposal at an off-site receiving facility (Pump and Haul) is considered as a method of "last resort". The Water Resources Commission Policy Statement for Pump and Haul Facilities (12/15/83), Technical Guidance for Pump and Haul Facilities (1/11/84).and policies and guidelines for review, approval, and permit requirements of Pump and Haul sewage disposal facilities as set forth by the Health Officer and any subsequent updated or amended revisions thereto are incorporated by reference and adapted as part of these regulations and shall be utilized for review of Pump and Haul applications.

Article XI - Privies and Similar Toilet Devices

Section

A. **Authority** - All privies, "outhouses" and similar toilet devices shall be constructed, and maintained in accordance with provisions of Section 12771 of the Code and Administrative Rules promulgated therefrom.

B. **Permit Required** - No person shall place, construct or relocate a privy, outhouse, or similar toilet device intended to deposit sewage into the ground on any premises within Ottawa County unless they have first obtained a sewage disposal system construction permit from the Health Officer. Portable, self-contained temporary privies (Port-o-Johns) and privies with holding tanks, vaults, or incineration devices not intended to deposit sewage into the

ground, used at camps, parks, construction sites, places of public assembly, etc. either temporarily or permanently do not require a permit from the Department prior to use. However, when such portable, temporary privies are cleaned or serviced, the person performing such service shall comply with Act 181, P.A. 1986, as amended (MCL 325.311 et seq.).

C. **Construction Standards** - All privies shall be located, constructed and installed in accordance with applicable requirements of the construction standards incorporated by reference in this Regulation, and maintained in a manner which will not create a sewage related nuisance.

Article XII - Vacant Land Evaluations

Section

A. **Purpose** - The Health Officer shall conduct vacant land evaluations on behalf of requesting persons for the purpose of determining the suitability of undeveloped properties as sites for installation of on-site sewage disposal and water supply systems. Such evaluations for onsite sewage disposal shall be conducted utilizing the site and design acceptance criteria specified in these Regulations.

B. **Application for Request** - Requests for vacant land evaluations shall be submitted via application forms provided for such purpose by the Department and shall be accompanied by the established fee as per Article IV of these Regulations before the Health Officer will respond to the request.

C. **Special Evaluative Procedures** - If the Health Officer determines that additional information is necessary in order to conduct a thorough evaluation such as excavations, soil borings, permeability tests, texture analysis, or other similar tests, the responsibility for arranging for such procedures and paying associated expenses shall be that of the applicant.

D. **Evaluation Reports** - The results of a vacant land evaluation shall be provided in writing to the applicant and shall relate only to the specific site and proposal as outlined by the applicant at the time of submitting the request. Results of vacant land evaluations are intended for informational purposes only and shall be subject to subsequent revisions of these Regulations.

Article XIII - Real Estate Evaluations

Section

A. **Purpose** - The Health Officer shall conduct Real Estate Transfer Evaluations on behalf of requesting persons for the purpose of determining the quality and condition of the on-site water supply system and the condition of the on-site sewage disposal system serving existing dwellings or habitable premises prior to their sale and/or transfer of ownership. Real Estate Transfer Evaluations shall be conducted in accordance with Ottawa County Department of Public Health: Real Estate Transfer Evaluation Policy.

B. **Evaluation Required** - It shall be unlawful for any person to sell or transfer ownership of any dwelling or habitable premises in Ottawa County served by its own on-site water supply system and/or on-site sewage disposal system unless he/she has first requested and obtained a Real Estate Evaluation and written report from the Health Officer.

C. **Application for Request** - Requests for Real Estate Evaluations shall be submitted by the seller or designated agent on application forms provided for such purpose by the Department. An accurately completed application, accompanied by the established fee as per Article IV of these Regulations must be submitted to the Department before the Health Officer will respond to the request.

D. **Obligations of Seller** - The Department shall provide the results of a Real Estate Evaluation in writing to the seller or designated agent which shall be valid for twelve (12) months from date of report. As part of the closing transaction, the seller or designated agent shall provide the purchaser with complete evaluation results as received from the Department. Failure to request a real estate evaluation and submit the required Real Estate Evaluation results to the purchaser at time of closing shall constitute a violation of this Regulation and may result in the issuance of a civil citation or misdemeanor appearance ticket.

Article XIV - Nuisances

Section

A. **Nuisances Defined and Prohibited** - The word "Nuisance" as used in this Regulation is defined in Article II, Section L of this Regulation. All such nuisances as determined by the Health Officer are hereby prohibited and declared a violation of this Regulation.

B. **Nuisance Related Definitions**

1) Garbage - means putrescible rejected food waste accumulation of animal, fruit, or vegetable matter used or intended for food or that attend the preparation, use, cooking, dealing in or storing of meat, fish, fowl, fruit or vegetables, including cans, containers and wrappings associated therewith.
2) Refuse - means all putrescible and non-putrescible solid waste (except body and sewage waste) and includes garbage, rubbish, ashes, incinerator residue, street sweepings, solid market and industrial waste, and other substances which may become a nuisance.
3) Rubbish - means non-putrescible solid waste, excluding ashes, consisting of both combustible and noncombustible waste such as paper, cardboard, tin cans, glass, crockery, yard clippings, wood, building material, rags, bedding or bulk items of any kind that may become a detriment to public health and safety.
4) Solid Waste - means either ashes, garbage, refuse, rubbish, either singularly or in any combination thereof.
5) Vermin - means noxious small animals or insects as mice, rats, flies, cockroaches, fleas, lice, etc. that are destructive, annoying or harmful to public health and safety.

C. **Administration** - Requirements of this Regulation with respect to nuisances occurring within Ottawa County shall be those requirements set forth in Section 2455 (1) through (5) in the Code.

D. **Authority** - This Regulation extends the authority of the Code to include the existence of environmental nuisances, sources of filth, causes of sickness, hazards, actual or potential conditions injurious to public health sewage related nuisances and unsanitary conditions of very description, except those permissible under the Right to Farm Act.

E. **Inspection** - All premises affected by this Regulation shall be subject to entry and inspection by the Health Officer after giving proper identification, as per Article III, Section D & E, of this Regulation, except where an imminent danger or health hazard exists or is believed to exist which requires that an inspection be conducted immediately.

F. **Emergency Abatement** - The Health Officer may take such action as may be immediately necessary to commence the abatement of any nuisance if the public safety and health requires such action. The Health Officer may thereafter take such other action under Article III, Section K, as is necessary to complete the abatement of the nuisance, with permission granted by the Board or by order of the court, the cost of such abatement may be charged to the premises and the owners and occupiers thereof.

G. **State Laws, Rules, and Regulations** - This Article incorporates by reference the statutes of the State of Michigan relating to the storage, transportation, and disposal of solid waste, the same being Act 451, P.A. 1994, as amended, and all rules and regulations relating

thereto, and any subsequent mandatory revisions thereto, are hereby expressly incorporated into and made a part of this Regulation. Any person violating any such statute, rule, or regulation may be issued a civil citation and/or a misdemeanor appearance ticket.

H. **Solid Waste Control** - It shall be unlawful for any person to accumulate upon their premises any refuse except in containers of rodent/fly proof, durable, and watertight construction. Bulky rubbish such as tree limbs, weeds, wood, cardboard boxes, newspapers, magazines, yard clippings, and so forth, may be bundled or so stored as not to provide a harborage or breeding place for rodents or insects. Garbage and rubbish shall be disposed of in a manner which creates neither a nuisance nor a hazard to health. The deposit of or accumulation of solid waste which because of its character, condition or improper storage may invite the breeding or infestation of flies, mosquitoes, or rodents, or which may in any manner, endanger the public health, safety, or welfare is prohibited. It shall be unlawful for any person to deposit any refuse upon, on, into any roadway, street, alley, waterway or property, public or private. This shall not prohibit the placing of tree leaves in the street where an organized pickup by the municipality having jurisdiction exists or the practice of properly maintained backyard composting of yard trimmings, grass clippings and leaves to a degree that a nuisance shall not be created therefrom.

I. **Solid Waste Disposal** - The Health Officer shall enforce the applicable provisions of the Ottawa County Solid Waste Management Plan

J. **Vermin Control** - It shall be unlawful for any person to create or maintain a vermin infested condition on premises owned or occupied by that person. When the Health Officer has reasonable cause to believe that there is vermin infestation in a definable area, and upon proper notice, it shall be the responsibility of the owner or occupant of the premises to take whatever measures are deemed necessary to abate the condition and protect same against ingress of vermin using methods acceptable to the Health Officer.

K. **Dead Animals** - It shall be unlawful for any person to allow a dead animal(s) to remain for over twenty-four (24) hours after death on premises owned or occupied by that person. Such animals shall be removed from the site and properly disposed; buried to a depth of four (4) feet at a location approved by the Health Officer; or as otherwise specified by the Health Officer in circumstances where high ground water elevation is a limiting factor.

L. **Uninhabitable Premises** - Whenever the Health Officer has reasonable cause to believe that a premises is infected with contagious disease, or flooded, or unfit for human habitation, or dangerous to the public health, safety, or welfare by reason of unsanitary conditions, rodent and/or insect infestation, want of repair or lack of an adequate sewage disposal or water supply system, the Health Officer may order such premises vacated within a specified period of time and declared unfit for use or human habitation.

Article XV - Plats

Section

A. **Authority** - This Article incorporates by reference and adopts as part of this Regulation the "Subdivision Control Act" being Act 288, P.A. 1968 as amended (MCL 560.101 et seq.) and Rules of the Michigan Department of Public Health (R. 560.401 - R. 560.405). The above cited Act and Rules and any subsequent mandatory revisions thereto shall be the basis for the acceptance or rejection of all proposed subdivisions within Ottawa County that are not served by municipal sewers and municipal water.

Article XVI - Public Swimming Pools

Section

A. **Authority -** This Article incorporates by reference and adopts as part of this Regulation the "Michigan Public Health Code" being Act 368, P.A. 1978, as amended, Part 125, Section

12521 to 12534 and Administrative Rules regulating public swimming pools. The above cited Act and Rules and any subsequent mandatory revision thereto shall be the basis for design, construction, and operation of all public swimming, spa, wading, and diving pools within Ottawa County.

Article XVII - Public Bathing Beaches

Section

A. **Authority** - This Article incorporates by reference and adopts as part of this Regulation the "Michigan Public Health Code" being Act 368, P.A. 1978 as amended, Part 125, Section 12541 to 12546 regulating bathing beaches open to the public. The above cited Act and Rules and any subsequent mandatory revisions thereto shall be the basis for evaluating water quality, safety and rescue/communications equipment at all public bathing beaches within Ottawa County.

Article XVIII - Campgrounds

Section

A. **Authority** - This Article incorporates by reference and adopts as part of this Regulation the "Michigan Public Health Code" being Act 368, P.A. 1978 as amended, Part 125, Section 12501 to 12516 and Administrative Rules regulating campgrounds. The above cited Act and Rules and any subsequent mandatory revisions thereto shall be the basis of design, construction, operation, sanitation and safety standards for all campgrounds within Ottawa County.

Article XIX - Mobile Home Parks

Section

A. **Authority** - This Article incorporates by reference and adopts as part of this Regulation the "Mobile Home Commission Act" being Act 419, P.A. 1976 as amended (MCL 125.1101 et seq.) and Act 96, P.A. of 1987 as amended and Rules of the Michigan Department of Public Health. The above cited Act and Rules and any subsequent mandatory revisions thereto shall be the basis of design, construction, operation, sanitation, and safety standards for all mobile home parks within Ottawa County.

Article XX - Septic Tank Servicing

Section

A. **Authority** - This Article incorporates by reference and adopts as part of this Regulation the "Septage Waste Servicers Act" being part 117 of the Natural Resources and Environmental Protection Act, 1994 P.A. 451, as amended regulating the handling of septage waste. The above cited Act and any subsequent mandatory revisions thereto shall be the basis for evaluating the removal, transporting, and disposal of septage wastes within Ottawa County.

Article XXI - Marinas

Section

A. **Authority** - This Article incorporates by reference and adopts as part of this Regulation the "Marina Act" being Act 167, P.A. 1970, as amended and Rules R 235.2581 to R 235.2591 regulating Marina facilities. The above cited Act and Rules and any subsequent mandatory

revisions thereto shall be the basis for water supplies, refuse storage and removal, toilet facilities, pump-out facilities and safety standards for all marinas within Ottawa County.

Article XXII - Solid Waste Haulers

Section

A. **Authority** - This Article incorporates by reference and adopts as part of this Regulation the "Ottawa County Facility Operating Standards", Ordinance No. 93-1, adopted May 25, 1993. The above cited Ordinance and any subsequent mandatory revisions thereto shall be the basis to license haulers bringing solid waste to licensed landfills within Ottawa County, to require permits for occasional or one time users, to assess fees, and to provide a method of monthly reporting by licensed haulers of solid waste.

Article XXIII - Private and Public Water Supplies

Section

A. **Authority** - This Article incorporates by reference and adopts as part of this Regulation the "Michigan Water Well Construction and Pump Installation Code" Part 127 of Act 368, P.A. 1978 as amended, being Sections 325.1001 through 325.1023 of the Michigan Compiled Laws; and related "Groundwater Quality Control Rules" being R 325.1601 through R 325.1676 of the Michigan Administrative Code; and the "Safe Drinking Water Act", Act 399, P.A. 1976, as amended, being Sections 325.1001 through 325.1023 of the Michigan Compiled Laws and related Administrative Rules; and Act 165, P.A. 1993 relative to issuance of fines for failure to monitor public water supplies. The above cited Acts and Rules and any subsequent mandatory revisions thereto shall be the basis for qualifications of well drilling contractors and pump installers, abandonment of wells, design specifications, issuance of well construction permits, minimum well construction standards, operation criteria, water quality standards, and evaluation/monitoring penalties of all public water supplies under the jurisdiction of the Department.

B. **Definitions** - A private water supply system is one that provides water for drinking and/or domestic purposes and intended for use only in a single family house which is the owners permanent residence, or intended for use only for farming purposes on the owner's farm, and where the waters produced are not intended for use by the public or in any residence other than the owners. Public water supplies as used in these Regulations are defined in Act 399, P.A. 1976, as amended, and shall include Type I, II, and III public water supplies.

C. **Permit Required** - No person shall begin construction of a new private or public water supply well, or make extensive changes to existing wells, on any premises within Ottawa County without first obtaining a water supply well construction permit from the Department. No person shall begin or allow construction of any dwelling or habitable premises requiring an on-site water supply system without first obtaining approval and a water supply well construction permit issued by the Health Officer. All water supply well installations shall be constructed in accordance with the permit requirements utilizing construction standards and provisions contained within these Regulations. This section does not apply to waste disposal wells or gas/oil wells which are licensed or regulated by another Act or Agency.

D. **Permits Issued by Another Agency** - If a permit for a public water supply system is required to be directly or exclusively obtained from another agency, it shall not be a requirement to obtain a permit from the Ottawa County Department of Public Health, Environmental Health Division.

E. **Availability of a Municipal Water Supply** - The availability of a municipal water supply shall not preclude the issuance of an individual water supply well construction permit by the Department.

F. **Permit Application** - An application and substantiating data shall be provided on forms furnished by the Department. A completed application, signed by the applicant and accompanied by the established fee shall be submitted to the Department before the Health Officer will respond to the request. It shall be the responsibility of the permit applicant to furnish the Health Officer with all requested facts, details, designs, and information.

G. **Permit Issuance** - The Health Officer, following review of an application and any necessary on-site evaluation, shall issue a water supply well construction permit when the data obtained indicates that the requirements of this Regulation can be met. The permit may impose special requirements or conditions which the Health Officer deems necessary to protect the public health or ground water quality. Copies of all water supply well construction permits shall be forwarded to the municipality included.

H. **Permit Expiration** - Water supply well construction permits shall become void and expire two (2) years from the date of issuance. The permit may be renewed, but will be subject to the prescribed renewal fee and any intervening changes to these Regulations.

I. **Permit Transfer** - Permits may be transferred from person to person upon written request on forms provided by the Department and payment of the prescribed transfer fee, provided that no change in the scope of the project has or will occur. Copies of all transferred permits shall be forwarded to the municipality involved.

J. **Permit Denial** - The Health Officer shall withhold issuance of a water supply well construction permit or void a previously issued water supply well construction permit for any of the following reasons:

1) Any change in the plans or scope of the project effecting location, use, or design.
2) Acquisition of new information or awareness indicating an approved water well depth of water quality/quantity may not be able to be obtained.
3) Misrepresenting, omitting, falsifying, or withholding pertinent information.
4) Water supply well construction permit was issued for incorrect parcel.
5) Parcel is found to be in violation of the on-site water supply requirements of the "Subdivision Control Act" being Act 288, P.A. 1967, as amended and administrative rules.
6) Information indicating that an approved on-site sewage disposal system meeting the minimum requirements of this Regulation cannot be obtained.

K. **Inspection and Sampling** - All new or extensively changed water supply systems shall be subject to inspection and sampling by the Department during and/or after completion of construction. It shall be the responsibility of the well driller, owner or owner's agent to notify the Department during and upon completion of the water supply system. All water samples shall be collected by the Health Officer or other person specifically designated by the Health Officer. Analysis of water samples shall be performed by accredited laboratories approved the Department.

L. **Approval** - After completion and notification of a new or extensively changed water supply system, the following requirements shall be met before final approval can be granted by the Department.

1) The water supply system installation has been inspected by the Health Officer and found to be in compliance with these regulations and all permit requirements.
2) A completed and signed "Water Well and Pump Record" has been received by the Department.
3) Results of the analysis of water samples have been received by the Department indicating that the raw water meets current established maximum (MCL'S) for specific contaminants. Minimum water sample analysis for private water supplies shall include coliform bacteria and nitrate concentrations, however, other parameters may be required as deemed necessary by the Health Officer.
4) The water supply system shall provide a safe and adequate water supply.

M. **Well Depth Measurement** - Well depth shall be measured from the lowest natural elevation within fifty (50) feet of the well to the top of the well screen.

N. **Test Wells** - The Health Officer may require the installation of a test well(s) on any premises for purposes of measuring well depth and/or determining water quality, quantity or aquifer characteristics when documented data or other evidence indicate acceptable well depth or water quality/quantity may not be able to be obtained.

O. **Stop Work Order** - In instances where construction of a water supply system or part thereof has proceeded unlawfully without a valid permit or is found to be in violation of construction requirements of this Regulation, the Health Officer shall issue a "Stop Work Order" requiring immediate discontinuance of said construction. Work shall not resume until a compliance agreement is reached and the Stop Work Order is rescinded by the Health Officer.

P. **Separate Water Supplies** - Each private, single family dwelling or habitable premises shall be served by its own individual water supply system unless otherwise approved by the Health Officer. A well not located on the same property as the dwelling or habitable premises it serves shall require specific approval by the Health Officer and shall require special conditions or requirements which the Health Officer deems necessary to protect the public health and ground water quality.

Q. **Adequate Water Supply System Required** - It shall be unlawful for any person to occupy, permit to be occupied, use, or offer for rent, lease or occupancy, any dwelling or habitable premises which is not provided with a safe and adequate water supply. Any person who violates a provision of these Regulations resulting in a lack of or an unapproved water supply system shall be issued a violation notice and ordered to take corrective action within a specified period of time. In addition, the Health Officer may order such premises vacated and declared unfit for use or human habitation until satisfactory remedy can be demonstrated.

R. **Replaced, Altered or Repaired Existing Dwellings** - Whenever the living or working area of any existing dwelling or habitable premises is replaced, altered, increased or repaired in excess of 50% of the fair market value, the existing on-site water supply system shall not be utilized unless it can be shown to be in substantial compliance with this Regulation and capable of providing a safe and adequate water supply. The Health Officer may require upgrading of such water supply systems as deemed necessary to meet the minimum requirements of this Regulation.

S. **Change is Use** - A change in use of a premises which may result in a significant increase in the demand on the water supply shall not be allowed unless it can be shown to be in substantial compliance with this Regulation. The Health Officer may require upgrading of the water supply as deemed necessary to meet the minimum requirements of this Regulation and be capable of providing a safe and adequate water supply.

T. **Emergency Conditions** - Where the lack of water will result in undue hardship and it is deemed necessary to begin construction immediately on a new well, a registered well driller or owner may begin changes to or construction of a new water supply well without notification or a permit when the office(s) of the Department are closed. The well driller, owner, or owner's agent shall contact the Department on the next regular working day and make application for a permit.

U. **Existing Water Supplies** -A private water supply system in existence prior to the effective date of this Regulation, which is in compliance with state and local laws in effect at the time of construction, may be continued in service as long as extensive changes are not made to the well, the water remains potable, and the well is not subject to contamination due to insufficient isolation from contamination sources, or improper construction. Existing public water supply systems which are determined by the Health Officer to be in non-compliance shall be ordered to bring such water supply systems into compliance with the current requirements of this Regulation.

V. **Monitoring** - For Type III public water supplies, the Health Officer may require samples to be collected and analyzed for bacteriological and chemical contamination. Monitoring of Type III public water supplies may be required pursuant to a schedule specified by the Department.

W. **Existing Water Supply Systems in Flood Affected Areas** - It shall be unlawful for water supply systems to create a public health nuisance, as determined by the Health Officer, in flood affected areas. In order to avoid such a nuisance, well caps shall be watertight and vented no less than twelve (12) inches above the one-hundred (100) year floodplain elevation. Water supply systems located within flood affected areas shall be in full compliance with Part 127 of Act 368 of the Public Acts of 1978, as amended. Abandoned wells shall be properly plugged in accordance with all applicable rules. Any variance from this policy must be approved by the Health Officer and may only be issued if: (a) the County would be at significant risk of a legal finding of inverse condemnation if it enforced this regulation or (b) the property owner has committed in writing to sell the property to the county, state, or federal governments for nonresidential purposes. A variance must in writing, signed by the Health Officer and may not be relied upon by any subsequent purchaser or prospective purchaser of the property. The County reserves the right to revoke or terminate the variance if the property is sold or if the County is no longer at significant risk of any inverse condemnation in enforcing this regulation.

Article XXIV - Food Service Sanitation

Section

A. **Authority** - This Article incorporates by reference and adopts as part of this Regulation Act 368, P.A. 1978, as amended, Part 129 and Administrative Rules adopted thereunder, including, but not limited to adopted portions of the U.S.P.H.S. Food Service Sanitation Ordinance (1976) and Vending Ordinance (1978), Michigan Food Service Sanitation Statute, Minimum Criteria for the Design, Installation, and Operation of Ventilation Systems, Hot Water Design Criteria, Recommended Design Criteria for Construction and Operating of Food Display Facilities, Criteria for Outdoor cooking, Preparation and Serving of Food, Recommended Design Criteria for Construction, Installation and Operation of Cook/Chill Systems and Operational Criteria for Temporary and Mobile Food Service Establishments. The above cited Act, Rules, and Criteria as may be subsequently deleted, added to, updated or amended shall be the basis for establishing sanitation standards for food protection, food service personnel, food service operations, food service equipment and utensils, requiring permits, licenses, license fees or certificates for the operation of food service establishments, regulating the inspection of such establishments and providing for enforcement and the fixing of penalties for food establishments in Ottawa County.

B. **Food Service Enforcement and Appeal Policy** - The "Ottawa County Health Department, Environmental Health division, Food Service Enforcement Policy" adopted in 1992 and as may be subsequently deleted, added to, updated or amended is incorporated by reference and adopted as part of this Regulation and shall be the basis of enforcement actions and hearing procedures for food service establishments that fail to maintain adequate sanitation levels, reveal chronic violations or allow substantial public health hazards to exist. As per Article III, Section H, the Health Officer is granted the authority to develop and establish construction and operation standards, policies, procedures, and interpretations of all acts, rules, guidelines and criteria dealing with food service for the purpose of carrying out the responsibilities and enforcement delegated in this article and may include specific training and/or certification of food service establishment owners/operators.

Article XXV – Cemetery Siting Evaluations

Section

A. **Authority -** Local Health Departments have the authority to promulgate rules, regulations and standards for human and animal cemeteries that safeguard public health, prevent the spread of disease, and prevent sources of contamination. See: MCL 333.1101-333.2511; MCL 333.2441 and MCL 333.2458.

B. **Administration -**

1) **Regulations Applicable:** The Health Officer shall conduct Cemetery Siting Evaluations on behalf of requesting persons for the purpose of determining the location and practicality of the placement of a new cemetery or the expansion of an existing cemetery. Cemetery Siting Evaluations shall be conducted in accordance with Michigan law and the Ottawa County Department of Public Health Cemetery Siting and Approval Policy ("the Policy") which is adopted and incorporated by reference as if fully set forth herein. Copies of the Policy shall be made available upon request at the offices of the Ottawa County Department of Public Health, and shall be posted on the website of Ottawa County.
2) **Evaluation Required:** It shall be unlawful for any person to create a new cemetery or expand an existing cemetery unless he/she has first requested and obtained a Cemetery Siting Evaluation and written report from the Health Officer granting approval of the requested location.
3) **Application for Forms:** Requests for Cemetery Siting Evaluations shall be submitted by the property owner or designated agent on application forms provided for such purpose by the Department. An accurately completed application, accompanied by the established fee as set forth in Article IV of these Regulations must be submitted to the Department before the Department will respond to the request.
4) **Obligations of Property Owner:** The Department shall provide the results of a Cemetery Siting Evaluation in writing to the property owner or designated agent which shall be valid for 3 years from date of the report. As part of final approval, a recorded survey with the location of the approved cemetery plat must be filed and recorded with the Ottawa County Clerk/Register of Deeds.

C. **Enforcement** - Violations of Article XXV of the County of Ottawa Environmental Health Regulations may result in the issuance of a civil infraction citation, issuance of a misdemeanor appearance ticket, and/or in the filing of a civil injunctive action to compel compliance with this Regulation.

Article XXVI – Residual Methamphetamine Contamination Cleanup

Section

A. **Authority -** Local Health Departments have the authority to promulgate rules, regulations, and standards, and to issue orders concerning the use or habitation of property and/or dwellings which are determined by the Health Officer as likely to be contaminated by methamphetamine manufacturing, by methamphetamine activities, or by the use of methamphetamine. See: MCL 333.12103(3).

B. **Administration -** For purposes of this regulation, all definitions and requirements concerning the regulation, use, or habitation of property and/or dwellings which are determined by the Health Officer as likely contaminated by methamphetamine manufacturing, by methamphetamine activities, or by the use of methamphetamine, shall be as set forth in Michigan law, as if fully set forth herein. This regulation shall be enforced by the Health Department in accordance with Michigan law and the Ottawa County Residential Methamphetamine Contamination Cleanup Policy ("the Policy"), which is adopted and incorporated by reference as if fully set forth herein. Copies of the Policy shall be made available upon request at the offices of the Ottawa County Department of Public Health, and shall be posted on the website of Ottawa County.

C. **Enforcement** - Violations of Article XXVI of the County of Ottawa Environmental Health Regulations may result in the issuance of a civil infraction citation, issuance of a misdemeanor appearance ticket, and/or in the filing of a civil injunctive action to compel compliance with this Regulation.

Article XXVII – Racing and Carrier Pigeons

Section

A. **Authority** - Local Health Departments have the authority to promulgate rules, regulations, and standards for the construction, operation and maintenance of carrier pigeon lofts and for granting carrier pigeon permits. See: MCL 433.351-433.355.

B. **Administration** - All definitions and requirements concerning racing and carrier pigeons contained in MCL 433.351-433.355 are incorporated by reference in this Regulation as if fully set forth herein. This Regulation shall be enforced by the Health Department in accordance with the requirements of MCL 433.351-433.355 and in accordance with the Ottawa County Racing and Carrier Pigeon Permit and Inspection Policy ("the Policy"), which is adopted and incorporated by reference as if fully set forth herein. Copies of the Policy shall be made available upon request at the offices of the Ottawa County Department of Public Health and shall be posted on the website of Ottawa County.

C. **Enforcement** - Violations of Article XXVII of the County of Ottawa Environmental Health Regulations may result in the issuance of a civil infraction citation, issuance of a misdemeanor appearance ticket, and/or in the filing of a civil injunctive action to compel compliance with this Regulation.

Appendix A – Schedule of Monetary Civil Penalties

Violation Description	Civil Penalty*
Operation of any establishment, entity, business, service, or facility without a license as required by the Ottawa County Department of Public Health.	$250
Installation of a Type II or III water well, as defined by Act 399, P.A. 1976, as amended (homeowner and/or licensed well driller) without required permit.	$250
Installation/construction of a Type I, II, III or private single family water well by an unlicensed driller that is required by law to be licensed.	$250
Failure to comply with an order of immediate discontinuance or correction issued by the Ottawa County Department of Public Health.	$250
Failure to request a real estate evaluation or submit the evaluation results to the purchaser at time of closing.	$250
Installation of an onsite sewage disposal system without required permit (homeowner and/or installer).	$200
Installation of a private single family water well without required permit (homeowner and/or licensed well driller).	$200
Operation of a temporary food service establishment without required license.	$200
Construction/renovation of a food service establishment without approved plans.	$200
Failure of a Type II or III public water supply owner/operator to comply with construction requirements in a timely manner or routinely monitor water quality as required by Act 399, P.A. 1976, as amended or the Ottawa County Department of Public Health.	$200
Creation of a public health hazard or nuisance.	$200
Failure of a public swimming pool operator to maintain acceptable water quality or routinely monitor water quality as required by law.	$200
Failure to maintain a private, single family sewage lagoon in a safe operating condition as required by the Ottawa County Department of Public Health.	$200
Failure to submit applicable Environmental Health inspection fees as established by the Ottawa County Board of Commissioners.	$200
Violation of this Regulation, or another law which the Health Officer has the duty to enforce exists, and for which no specific monetary penalty has been established.	$200

** Amount for first citation, amount may be doubled for the second and succeeding violations*

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TO: **Representative Meerman**

FROM: **Frankie Dame**

DATE: **August 30, 2021**

RE: **Local health department mask mandates and related county government action**

Representative Meerman,

You asked two related questions about local health department mask mandates and the county board of commissioners:

(1) Can a county board of commissioners nullify or overturn a county health department's mask mandate?

Short answer: No.

(2) Can the county board of commissioners remove the local health officer?

Short answer: Yes.

It's my understanding that you asked these questions because, over the past few weeks, Allegan, Kent, and Ottawa counties' health departments have issued mask mandate orders under MCL 333.2451 and 333.2453. *See, e.g.*, August 20, 2021 Ottawa County Order, https://bit.ly/3yp5yYU.

Legal background

Before diving into the analysis, it's important to set the legal stage. Michigan's Public Health Code (the "Code") requires that every county either belong to a "district health department" or "provide for a county health department." MCL 333.2413. The Code considers a county health department—which Allegan, Kent, and Ottawa counties each have—a "local health department." MCL 333.1103. And each of those three counties' "local governing entity" is their respective board of commissioners.

The Code requires local health departments to "continually and diligently endeavor to prevent disease, prolong life, and promote the public health through organized programs, including . . . prevention and control of diseases." MCL 333.2433(1). They must therefore "[i]mplement and enforce laws for which responsibility is vested in the local health department." MCL 333.2433(a). Such implementation can take the form of either (a) a regulation or (b) an order:

Regulations. The Code allows a local health department to "[a]dopt regulations to properly safeguard the public health and to prevent the spread of diseases and sources of contamination." MCL 333.2435. Crucially, every local health board regulation is either "approved or disapproved

by the local governing entity." MCL 333.2241. The regulations go into effect only once the local governing entity approves. *Id.*

Orders. A local health department can also issue orders. For example, the counties here issued orders under MCL 333.2453(1) (emphasis added), which is worth quoting in full:

> If a local health officer determines that control of an epidemic is necessary to protect the public health, *the local health officer may issue an emergency order* to prohibit the gathering of people for any purpose *and may establish procedures to be followed by persons, including a local governmental entity, during the epidemic* to insure continuation of essential public health services and enforcement of health laws. Emergency procedures shall not be limited to this code.

Importantly, orders and regulations are *not* the same thing—especially not emergency orders. They are both governmental actions, but they are different kinds of actions and are sometimes judged by different standards.

Analysis

1. **Answer to Question (1): A county board of commissioners *cannot* nullify or overturn a local health department's order under MCL 333.2453.**

A MCL 333.2453 order cannot be touched by the county board of commissioners for three reasons. First, the Code requires a county board of commissioners to either approve or disapprove local health department *regulations*. MCL 333.2441(1). But it doesn't give them any parallel role in approving or disapproving *orders*. That the legislature explicitly gave the county board of commissioners oversight role in one area means we can't just assume it exists in another area. That authority must be clearly written out, and here, it just isn't. Second, MCL 333.2453 says that orders promulgated under it extend to a "local governmental entity," which would include a county board of commissioners. It would be nonsensical to allow the local health department to bind a county board of commissioners with an order that the latter could overturn whenever it wanted. Third, a local health department's ability to exercise the police power is strongest when dealing with an epidemic—specifically when promulgating epidemic-related orders under MCL 333.2453. So it's no surprise that its orders aren't reviewable by the county board of commissioners.

Given this, the Allegan, Kent, and Ottawa county boards of commissioners have no authority to nullify or overturn their local health departments' mask mandates.

2. **Answer to Question (2): Because the county board of commissioners has the power to appoint the local health officer to an unspecified term, it also has the authority to remove that officer.**

MCL 333.2428 says that every local health department must "have a full-time local health officer appointed by the local governing entity." The Allegan, Kent, and Ottawa boards of county commissioners have all appointed local health officers—Angelique Joynes, Adam London, and Lisa Stefanovsky respectively.

The Michigan Supreme Court has long held that when a person is appointed to a position without a fixed term of office---in other words, when there's no statutory end date to their appointment—

the same entity that appointed them may remove them. In *Brand v. Common Council of City of Detroit*, 271 Mich. 221, 228 (1935) (cleaned up), for example, the Court said: "It is a well-established rule of law that the power to appoint to an office or position, where the term or tenure is not defined by statute or otherwise, necessarily carries with it the power of removal." Many other Michigan Supreme Court and Michigan Court of Appeals opinions and other legal treatises say the same. *See, e.g.*, *Att'y Gen. v. Mich. Pub. Serv. Comm'n*, 243 Mich. App. 487, 512 (2000) ("Since the Attorney General has the power to appoint counsel for the Commission, he likewise has the power to remove such counsel.").[1]

Here, local health officers are not appointed to a fixed term in office. Their appointment is open-ended. The end date is not set by statute. Thus, the Allegan, Kent, and Ottawa county boards of commissioners should have the authority to remove these local health officers if they so choose.

The boards' authority to remove the local health officers persists no matter what the local health officers' contracts say. In *Aguirre v. Michigan*, 315 Mich. App. 706, 720 (2016) (cleaned up), the court said that a governmental body cannot contract away its removal power:

> Moreover, when the power of appointment or removal is provided for by law, the future exercise of this governmental power of appointment or removal typically cannot be bargained away by contract. A contract to limit a future governing body's lawful power of removal or appointment of a public officer is considered void as a matter of public policy.

Thus, even if the local health officers' contracts purport to be for a specific number of years (e.g., a three-year contract), or say the local health officer may be fired only for cause, the county board of commissioners may still remove them from their office. Such contract provisions would be void because they violate public policy.

One final policy note: Even if a local health officer is removed, their orders remain in effect until removed. *See, e.g.*, Judith Nichter Morris, 11 Mich. Civ. Jur. Health § 30. So to change requirements for schoolchildren, the county boards of commissioners would have to remove their current respective local health officer and appoint a new one, and that new local health officer would then have to rescind the offending order.

[1] We found many other cases and authorities echoing this rule. We are happy to provide those sources and quotations to the extent they may be helpful.

STATE OF MICHIGAN

IN THE COURT OF APPEALS

PATRICK FLYNN, AJ RATERINK, PATRICIA LOOKS, BRIAN DOKTER, AND STEVE AND JAMIE LEMIEUX,

Plaintiffs-Appellants,

v

OTTAWA COUNTY DEPARTMENT OF PUBLIC HEALTH, LISA STEFANOVSKY, M. ED., in her official capacity as Administrative Health Officer for the Ottawa County Department of Public Health, AND THE OTTAWA COUNTY BOARD OF COMMISSIONERS,

Defendants-Appellees.

Court of Appeals Docket No. 359774

20TH Circuit Case NO. 21- 6624-CZ

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PROOF OF ELECTRONIC SERVICE

The undersigned certifies that on the **March 17, 2022**, copies of Defendants-Appellees' Response Brief, Defendants-Appellants' Appendix to Response Brief and this Proof of Service were served upon the following:

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