

## ***Appeals Court Strikes Down Ruling Requiring Modifications to Air Permit for Asphalt Plant***

The Michigan Court of Appeals has overturned a decision by the Jackson County Circuit Court ordering MDEQ to modify an air use permit to install for an asphalt plant owned by Thompson-McCully Company. The appeals court also directed the trial court to clarify several aspects of the trial court's ruling and, if necessary, reevaluate some aspects of the case in light of the appeals court's ruling.

### **Facts**

The City of Jackson (City) filed suit in 1998 against Thompson-McCully seeking to block construction of an asphalt plant in nearby Blackman Township. The suit was filed three days after Thompson-McCully received an air use permit to install from the Michigan Department of Environmental Quality to authorize construction of the asphalt plant. The City was joined by Jackson Public Schools and a citizens group called Support to Oppose the Plant. Blackman Township joined the case on behalf of Thompson-McCully.

The City raised three claims before the trial court: (1) that the construction and operation of the asphalt plant would cause harm to the environment in violation of the Michigan Environmental Protection Act (MEPA); (2) that the operation of the plant would create a nuisance or trespass by unreasonably interfering with the comfortable enjoyment of life and property; and (3) that the construction of the asphalt plant violated local zoning requirements. The trial court ruled that the City had failed to establish an adequate basis for the court to grant relief on any of these three theories. However, the court treated the case as an appeal of the air use permit to install issued by MDEQ and ordered MDEQ to modify the permit in response to some of the City's concerns. Thompson-McCully appealed the court's order to modify the air use permit to install and the City appealed the dismissal of its other claims.

### **Appeals Court's Decision**

The court of appeals first considered the trial court's dismissal of the City's MEPA claim. The court found that a claim under MEPA must be based on a showing that the "conduct of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air water, or other natural resources . . . ." The court of appeals stated that trial courts are to determine whether adverse environmental effects are occurring and, if so, take appropriate action.

There was conflicting expert testimony before the trial court on the issue of dispersion modeling and the potential for harm from the asphalt plant. The appeals court ruled that the trial court provided insufficient findings of fact to allow the appeals court to determine whether the trial court erred in finding that the plant would not cause environmental harm in violation of MEPA. Therefore, the court of appeals sent the case back to the trial court to state specifically its findings of fact.

The court of appeals also directed the trial court to make clear whether its decision was based on its own, original review of the evidence, rather than paying deference to MDEQ's determinations in granting the permit. The appeals court held that trial courts must be reversed on appeal if they defer to an administrative agency's determination regarding whether there has been or will be pollution, impairment or destruction of the environment, rather than making their own, original determinations. The court of appeals also directed the trial court to clarify whether the City had shown that there would be "probable damage to the environment," which the court of appeals ruled was sufficient to state a claim under MEPA.

Regarding the City's claim that the asphalt plant would create a nuisance, the court of appeals ruled that the trial court had an adequate basis to determine that the City had failed to demonstrate that the potential harms that might result from operation of the asphalt plant would be so great as to constitute a nuisance. The court of appeals concluded that the City had failed to provide evidence that an unreasonable and substantial interference with the use and enjoyment of property was "practically certain, strongly probable, or inevitable" from the operation of Thompson-McCully's asphalt plant. Therefore, the court of appeals affirmed the trial court's ruling on the City's nuisance/trespass claim.

On the zoning issues, the court of appeals held that the City's claims were barred by the doctrine of *laches* because it did not challenge the rezoning of the asphalt plant property for industrial use until ten years after the rezoning had taken place. The doctrine of *laches* prohibits courts from granting relief on a claim when the passage of time combined with a change in condition make it inequitable to enforce the claim. In this case, the court found that the passage of time and Thompson-McCully's substantial investment to construct the asphalt plant on its property in reliance on the rezoning made it inequitable to review the rezoning of the property ten years after the fact. Accordingly, the court of appeals affirmed the trial court's denial of the City's zoning claim.

Finally, the court of appeals held that the trial court erred in ordering the MDEQ to modify the air use permit to install for Thompson-McCully's asphalt plant even though it had ruled in favor of Thompson-McCully on all claims raised by the City. The appeals court held that it was improper for the trial court to covert the case from a MEPA claim to a permit appeal after the trial because a challenge to a permit is distinct from a MEPA claim and Thompson-McCully had not notice or opportunity to defend against a permit appeal. Accordingly, the court of appeals reversed the trial court's decision to require modifications to the air use permit to install.

This article was prepared by S. Lee Johnson, a partner in our Environmental Department, and previously appeared in the February, 2000 edition of the Michigan Environmental Compliance Update, a monthly newsletter prepared by the Environmental Department and published by M. Lee Smith Publishers.