STATE OF MICHIGAN
IN THE COURT OF APPEALS

RICK BUCKHALTER,

Plaintiff-Appellee,

v

CITY OF TRAVERSE CITY,

Defendant-Appellant,

and

GREAT LAKES FISHERY COMMISSION,

Intervening Defendant-Appellant.
/

Court of Appeals Nos. 357216 and 357254

Grand Traverse Circuit Court
No. 2020-35540-AW

BRIEF OF AMICUS CURIAE
ATTORNEY GENERAL DANA NESSEL

Dana Nessel
Attorney General

Fadwa Hammoud (P74185)
Solicitor General
Counsel of Record

B. Eric Restuccia (P49550)
Deputy Solicitor General

Attorneys for the Attorney General
Department of Attorney General
Solicitor General Division
P.O. Box 30212
Lansing, MI 48909
(517) 335-7628

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1A. Whether the City Charter requires a vote prior to the construction of the FishPass Project where the Project does not "dispose" of property as provided by section 126?

Appellant's answer: No.

Appellee's answer: Yes.

Trial Court answer: Yes.

Attorney General as Amicus: No.

1B. Whether the City Charter requires a vote prior to the construction of the FishPass Project where the subject property has not been "dedicated" as a park as provided by section 128?

Appellant's answer: No.

Appellee's answer: Yes.

Trial Court answer: Yes.

Attorney General as Amicus: No.

RELEVANT CITY CHARTER PROVISIONS

CHAPTER XII - MUNICIPALLY OWNED UTILITIES

Section 126. - Disposal of Plants.

The City shall not sell, exchange, lease or in any way alien or dispose of the property, easements, income or other equipment, privilege or asset belonging to and appertaining to any utility which it may acquire, or its parks, unless and except the proposition for such purpose shall first have been submitted, at a regular or special election held for the purpose in the manner provided in this Charter, to the qualified voters of the City and approved by them by a three-fifths (3/5) majority vote of the electors voting thereon. All contracts, negotiations, grants, leases or other forms of transfer in violation of this provision shall be void and of no effect as against the City. The provisions of this section shall not, however, apply to the sale or exchange of any real estate which is not necessary to the operation of any utility or utility department or any articles or equipment of any City owned utility as are worn out or useless, or which could, with advantage to the service, be replaced by new and improved machinery or equipment.

CHAPTER XIII – STREETS, PUBLIC GROUNDS AND PROPERTY, CEMETERIES, PARKS, TRUSTS

Section 127. – General.

The City shall possess and hereby reserves to itself the right to use and to control and regulate the use of its streets, alleys, bridges and public places, and the space above and beneath them, and shall have the power to acquire, own, establish, maintain, operate and administer, either within or without its corporate limits, parks, boulevards, cemeteries, hospitals, almshouses, buildings and all works which involve the public health or safety.

Section 128. - Perpetual Dedication.

All grants or dedications heretofore made shall continue without change. All cemeteries and parks now owned or hereafter acquired by the City of Traverse City either within or without its corporate limits shall be dedicated solely to cemetery or park purposes respectively, provided, however, that the electors by a three-fifths (3/5) majority vote may approve subsequently disposal of such cemeteries and parks or portions thereof.

Section 129. – Trusts.

All trusts heretofore established for cemetery, park or other purposes shall be used and continued in accordance with the terms of the trusts. The City of Traverse City may, in its discretion, receive and hold any property in trust for cemetery, park or other public purposes and shall apply the same to the execution of such trusts and for no other purposes whatsoever.

All money to be derived from the rights to explore for oil, gas and/or minerals on the Brown Bridge or other property of the City of Traverse City, together with production money (royalties), shall be placed in a perpetual trust fund in one or more banking institutions designated by the City Commission. This fund shall be known as the Brown Bridge Trust Fund, all portions of which shall be invested in obligations of the United States of America. The income from said Trust shall be used to supplement City taxes as a credit against the General Fund levy as established yearly by the City Commission. Said funds shall remain in a perpetual trust, the principal of which shall not be used except by a three fifths (⅗) majority vote of the qualified electors voting thereon. However, any amount of the principal in the Brown Bridge Trust Fund that is over twelve million dollars ($12,000,000) may be placed in a separate trust fund for a period of five years beginning November 4, 2014, and ending November 5, 2019, and used for City parks capital improvements when matching funds can be secured from outside sources. However, any amount of the principal in the Brown Bridge Trust Fund that is over twelve million dollars ($12,000,000) may be placed in a separate trust fund for a period of five years beginning November 5, 2019, and ending November 4, 2024, and used for City park capital improvements and/or acquisition of property to be designated and used as City parkland; provided that no single allocation to a City park capital improvement or City parkland acquisition will be in excess of $250,000. (Amended 11-4-14; Amended 11-5-19)

Section 130. - Cemetery Care Funds.

The amount now standing to the credit of the Perpetual Care Fund, together with all additions thereto, shall be kept in a separate fund known as the Perpetual Care Fund, which shall constitute a trust fund, the income of which shall be used as occasion may require for the general care and maintenance of those lots for the benefit of which said funds shall have been deposited. Said fund shall never, under any pretext or evasion, be diverted from its declared purpose. All moneys received by the City for the perpetual care of lots or graves may be

invested only in bonds of either the City of Traverse City, School District of Traverse City, County of Grand Traverse, or bonds or other full faith obligations of the United States of America, as the City Commission may direct. All portions of said Perpetual Care Fund not so invested in bonds shall be kept in a separate checking account in some banking institution to be designated by the City Commission. There shall also be created a fund known as the Cemetery Care Fund, and fifty percent (50%) of all moneys which shall from time to time be received from the sale of lots and graves and crypts shall be placed in said Fund, the income of which shall be used as occasion may require for the general care and maintenance of the entire City cemetery property. Said Cemetery Care Fund shall also constitute a trust fund, the moneys of which shall never under any pretext be diverted. This Fund or portions of this Fund may be invested only in bonds of the City of Traverse City, School District of the City of Traverse City, County of Grand Traverse, or bonds or other full faith obligations of the United States of America. Any moneys in said funds not so invested shall be placed in a separate checking account in such banking institution as the City Commission may designate.

Section 131. - Platting and Sale.

The City Commission shall cause cemeteries to be laid out into lots, avenues and walks, the plats thereof to be recorded in the office of the City Clerk. The City Commission shall fix the price of such lots and manner of conveyance and recording.

Section 132. - Protection; Establishment; Maintenance.

The City Commission shall have power to enact all ordinances deemed necessary for the establishment, maintenance and protection of all cemeteries and parks (together with the improvements thereon and appurtenances thereto) now owned or hereafter acquired by the City of Traverse City either within or without its corporate limits and like power with reference to all cemeteries within the City belonging to, or under the control of, any church, religious society, corporation, company or association; and the City shall have power to condemn property for cemetery purposes in accord with the general statutes of the State.

STATEMENT OF AMICUS CURIAE AND INTRODUCTION

The Attorney General is the chief legal officer for the State of Michigan and she serves as counsel for the Michigan Department of Natural Resources among other state agencies. The State agencies work cooperatively with local governments, such as the City of Traverse City, to protect Michigan waterways and to maintain the many beautiful state and municipal parks throughout the State.

The FishPass project is a vital one. It is important to the residents of the City of Traverse City, to protect the downtown from flooding, but it is also important to the entire State to ensure that invasive species do not travel the Boardman River and other waterways in Michigan. The legal issues are also important ones. The Attorney General believes that City Charters, like Michigan's constitution, must be given a common-sense construction, consistent with the apparent meaning that an ordinary resident would provide it. This construction understands that certain words are terms of art that convey a special meaning, as here, such as "dispose" or "dedicate." These are words with a definite legal meaning that provide the necessary guidance to resolve the issues raised here.

In short, there are two key provisions of the Traverse City's Charter that makes clear that the City has authority to make the proposed improvements to the Union Street Dam Park consistent with the history of the City's maintenance of the Dam over the last 70 years without placing this matter before the electorate. Under section 126 of the City Charter, the proposed improvements here did not "dispose" of the Dam that would require a vote. And under section 128 of the Charter, the Dam had not been "dedicated" as a park as that term is used in the Charter.

In other words, the circuit court erred in its reading of the relevant Charter provisions, giving them a construction that conflicts with their plain meaning, but also will constrict the ability of the City – in a way not contemplated by the Charter – to make changes to public property. The provisions here are not unique to the City of Traverse City's Charter, and a decision here will affect other municipalities. For example, if the circuit court's construction were accepted by this Court, the provision in section 128 – and any other city with a similar provision – would prevent changes to a cemetery or park because they have to be maintained "without change" under this reading if ever used as a park. Soon, Michigan's cemeteries and parks would become museums, unless the city electors were asked to vote every time a city wished to redesign a cemetery or provide new landscaping to a park. This Court should reverse the decision below and allow this important project to proceed.

STANDARD OF REVIEW

Like the Michigan's constitution, the Michigan courts construe a charter's language by giving it its plain meaning, and no words should be treated as surplusage. *Clexton v City of Detroit*, 179 Mich App 209, 214 (1989). The charter provisions pertaining to a given subject matter must be construed together, "and if possible harmonized." *Id.,* citing *Brady v Detroit*, 353 Mich 243, 248 (1958). And if the charter employs technical or legal terms of art, like a constitution this Court should "construe those words in their technical, legal sense." See *County of Wayne v Hathcock*, 471 Mich 445, 469 (2004) (citing this principle for the constitution).

ARGUMENT

I. The City of Traverse City did not need to submit its plan to improve the Union Street Dam Park to the city electors under its City Charter.

Like the Michigan constitution, the municipal city charters in Michigan provide the framework from which the cities govern themselves. They are practical, working documents that should be given their plain and ordinary meaning, and where the charter uses terms of art, those terms should be honored.

The Union Street Dam Park has functioned as a dam for the City of Traverse City for more than 150 years. It has also functioned as a park for many years. This is classic dual usage. But the City has not "disposed" of the park as that term is used in section 126. And it was never "dedicated" as a park as that term is used in the City Charter, section 128. In purporting to give the Charter a plain reading, the lower court would effectively require that every cemetery or park remain "without change" except by vote of the electorate. And any significant change to property, easements, income, or other equipment related to a utility or a park would require a vote of the electorate. Such a reading would bring city government to a standstill. These provisions are not unique to Traverse City. This Court should reverse.

A. The limitations of section 126 of the City Charter apply to property and equipment related to utilities and parks and only require a vote of the electorate when they are sold or disposed of, but not for other lesser changes.

The two key provisions of the Charter are sections 126 and 128. They use different language and perform distinct functions. Section 126 governs property related to utilities and parks, while section 128 governs dedicated cemeteries and parks. To begin, section 126 is ultimately inapplicable here.

The key analysis from section 126 is that it lists five actions (using five verbs) for which the City must obtain electoral approval by 3/5 majority vote with respect to city utilities (and property and equipment related to them) and parks. These actions are as follows: (1) "sell"; (2) "exchange"; (3) "lease"; (4) "in any way alien"; or (5) "dispose" of the city utilities or parks. The circuit court below did not rule that the City sold Union Street Dam Park or that it exchanged it, or leased it, or alienated it. Rather, it ruled that it "disposed" of the Dam. See App'x 0107–0108. Not so.

The virtually identical language to the City Charter here was examined by this Court with respect to a contract the City of St. Louis Michigan entered with Consumers Energy for purchasing electric energy and leaving the city's electric plants largely fallow. See *Ayers v City of Saint Louis*, 20 Mich App 686, 692 (1969).[1] This Court found that such an action did not "dispose" of the city's electric plant.

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[1] The Charter at issue in *Ayers* stated as follows:

> *The City shall not sell, exchange, lease, or in any way alien or dispose of the property, eastments [sic], or other equipment, privilege or asset (except income) belonging to and appertaining to any utility which it may acquire, or its parks, unless and except the proposition for such purpose shall first have been submitted at a regular or special election held for the purpose in the manner provided in this charter to the qualified voters of the city approved by them by a three-fifths (3/5ths) majority vote of the electors voting thereon.* All contracts, negotiations, grants, leases or other forms of transfer in violation of this provision, shall be void and of no effect as against the city. The provisions of this section shall not, however, apply to the sale or exchange of any real estate which is not necessary to the operation of any utility or utility department or any articles or equipment of any city owned utility as are worn out or useless, or which could with advantage to the service be replaced by new and improved machinery or equipment. [Emphasis added.]

Notably, this Court explained that the South Haven Charter was the "same" in substance as this section. *Id.* at 693.

In *Ayers*, this Court was examining whether "the contract with Consumers the City has alienated and disposed of the privilege to generate electric energy for a period of 5 years, at least up to 90% of its requirements." *Ayers,* 20 Mich App at 692. The contract required the City to establish a "suitable site on the City's property for the Company's said substation" and also provided "all necessary rights of way over the City's streets and property for the Company's transmission lines." *Id.* at 689. Even so, the Court reasoned that the City continued the operations of its facility, even if reduced, and that it "will maintain its electric generating facilities in good operating condition, conducting periodic test runs, to the end that such facilities will be available for use at such times as the City Council may determine." *Id.* at 694. The significant point was that the City had not "contracted away its privilege of generating electric energy," which did not "render useless its diesel generating facilities," because it did not contract "100% of its electric energy needs." See *id.* at 693, contrasting *Clark v City of South Haven,* 8 Mich App 74 (1967) (City of South Haven contracted away 100% of its electric needs for 10 years). For that reason, the Court ruled the City was "exercising its managerial function" and "*did not* ***dispose*** of any privilege belonging to its municipally owned utility." *Ayers,* 20 Mich App at 695 (emphasis added).

The comparison to the circumstance here is instructive. While the issue here relates to public property that the circuit court determined to be parkland, rather than a utility, the same terms apply. And there is no dispute that at least a substantial part of the current Union Street Dam Park will continue to be used for recreational activity. Like *Ayers,* any parkland has not been disposed of by law.

And this conclusion is confirmed by the legal meaning of the word "dispose" here. It is used in the property setting, and it is used in a legal way. Thus, a legal dictionary seems to be the appropriate place to look. The City Charter from the City of Traverse City was first enacted in 1940, so the Black's Law Dictionary from 1951, 4th edition, is near in time:

> To alienate or direct the ownership of property, as disposition by will. Used also of the determination of suits. Called a word of large extent.
>
> *To exercise **finally**, in any manner, one's power of control over; **to pass into the control of someone else**; to alienate, relinquish, part with, or get rid of; to put out of the way; **to finish with**; to bargain away.* Often used in restricted sense of "sale" only, or restricted by context. [*Id.* at 557 (emphasis added; citations omitted).]

For the first and third definitions, "alienate" or "sale," are already listed in section 126, so the second definition is the applicable one. It conveys the idea that there is a permanent loss of control of the property into the power of someone else. The Michigan appellate decisions reflect the same understanding of "dispose." See, e.g., *Kaplan v City of Huntington Woods*, 357 Mich 612, 617–618 (1959) ("the imposition of a restriction [of an easement] is the loss of the use of a valuable property right and it would appear that such right was *disposed of* by the city of Huntington Woods either as a sale or a gift.") (Emphasis added.)

Again, this understanding confirms that there was no "disposal" here, where Traverse City at all times maintains its ownership interest over the property, and any loss of control is really only a delegation that is temporary and partial in nature, which occurs in virtually every construction project. The City's actions are perfectly consistent with use of the Union Street Dam to prevent flooding into the City.

B. The limitations of section 128 of the City Charter to leave all cemeteries and parks dedicated to the City "without change" does not apply because the Union Street Dam Park was never "dedicated."

Like "dispose" in section 128, the use of "dedicate" here is a legal term, used with a specific legal meaning. Again, Black's Law Dictionary (4th ed) from near that time of the Charter provides a helpful definition in its definition of "dedication":

> In real property. *An appropriation of land to some public use, made by the owner, and accepted for such use by or on behalf of the public.* A deliberate appropriation of land by its owner for any general and public uses, reserving to himself no other rights than such as are compatible with the full exercise and enjoyment of the public uses to which the property has been devoted. [*Id.* at 500 (emphasis added).]

This black-letter law definition is consistent with Michigan law.

The concept of a dedication is predicated on the transfer of private property to the public for a public use. As explained by the Michigan Supreme Court, "[a] 'dedication' of land is an appropriation of land to some public use, accepted for such use by or in behalf of the public." *2000 Baum Family Trust v Babel,* 488 Mich 136, 144 (2010) (internal quotes omitted), citing *Clark v Grand Rapids,* 334 Mich 646, 656–657 (1952). There are two components: a dedication requires (1) a clear intent to dedicate on the part of the property owner and (2) "acceptance by the public." *Nash v Duncan Park Comm'n*, 304 Mich App 599, 627 (2014), vacated in part on other grounds, 497 Mich 1016 (2015), citing *Lee v Lake,* 14 Mich 12, 18 (1865). "Acceptance of an offer to dedicate land to public use is essential to a completed dedication." *Nash,* 304 Mich App at 627, citing *Field v Village of Manchester,* 32 Mich 279, 281 (1875).

There are two types of dedications recognized in Michigan: statutory and common law. *Nash,* 304 Mich App at 627, *Gunn v Delhi Twp,* 8 Mich App 278, 282 (1967). "[B]y a common-law dedication the fee does not pass, but only an easement." *Badeaux v Ryerson,* 213 Mich 642, 647 (1921).

This concept of an offer by the owner and an acceptance by the government conforms to the Michigan Supreme Court's understanding of "dedicate" and the question at issue here about whether there was a dedication. See, e.g., *Baldwin Manor, Inc v City of Birmingham*, 341 Mich 423, 429 (1954) ("The right of a municipality to alter the status and use of property conveyed to and accepted by it for a specific purpose has been repeatedly considered by the courts"); *id.* at 429–430 ("the uses to which land dedicated by its private owner as a park may be devoted depend upon the purposes of the dedication, as determined by the intention of the dedicator, *and such land cannot be used for any purpose* ***inconsistent with that intention****, even though there has been a change in the character of the surrounding property*") (emphasis added), citing 39 Am Jur 816.

The key concept here is the one of "dedication" of property. The City is required to accept the term of the conveyance from those who grant or dedicate property to the City and use it according to the terms. That is the sense in which that term is understood in the Michigan Supreme Court's decision in *Baldwin.* That is the reason that the municipality may not use the dedicated property in a fashion that is "inconsistent" with the purpose of the dedicator. 341 Mich at 429–430.

Such a formal dedication would impose limits on the future use of the property in contrast to the argument as advanced by Buckhalter that a dedication arises from the use of the property as a park because the municipality makes some general statement later about maintaining all of its parks. (See Buckhalter's Brief, p 26: "both the 'writings' and 'acts' demonstrate the park in issue is a sufficiently 'dedicated' park, as well as a 'park' protected by the Charter.") That does not fit the understanding of dedication under Michigan law as used in the Charter.

Buckhalter relies on the Michigan Supreme Court's decision in *Baum Family Trust,* 488 Mich 136. (See Buckhalter's Brief, p 26.) But this opinion further supports the traditional legal understanding of dedication. It is true that a "dedication" may made "without writing" in a "act *in pais*," which the Court translated as "an act performed outside of legal proceedings." 488 Mich at 145. The central point is that "the law will give effect to a dedication of land that has been *solemnly devoted* to the use of the public for as long as the land continues to be exercised in accordance with its dedicated public use." *Id.* at 146 (emphasis added).

The Court balances the considerations of the "dedicator," the grantee, and the public. *Baum Family Trust,* 488 Mich at 146. In describing it as the "first principle," the Court recognized that it is the "use for which the dedication was made":

> We are guided in the instant case by this first principle, and reaffirm the precept that we articulated well over a century ago in resolving a dedication dispute: "This being a case to which the law of dedication applies, *the use for which the dedication was made must determine the extent of the right parted with* by the owner of the land and acquired by the public." [*Baum Family Trust,* 488 Mich at 147 (emphasis added), quoting *Patrick v YMCA*, 120 Mich 185, 193 (1899).]

The "solemnity" for which the property dedication is made requires some level of formality and specificity to enable a court to determine whether a subsequent use matches the dedicator's original purpose. See *id.* at 429–430 ("inconsistent with that intention"). See also *Clark,* 334 Mich at 659 ("If the city government has failed to perfectly perform the obligations assumed in the acceptance of this gift, a court of equity has the power to compel such performance."). Buckhalter's argument citing the 1986 resolution from the City Commission, see p 19, and the subsequent ordinance later enacted, see p 20, referring to the "preserving all current parks" only belies its claim. A dedication is, by definition, not an ongoing relationship, but a single event, a conveyance with terms and conditions. And it would relate to a specific park. It would not generally have multiple dates and it would not govern multiple properties, but it is specific to the particular park.

For that reason, the traditional property understanding of "dedication" as used by the treatises of municipal and property law identify the content of the dedication and the dedication's limitations on the property's use. For example, the treatise of Michigan Civil Jurisprudence explains that for municipal corporations, the "[t]he use and control of public parks and commons are subject *to the restrictions in the dedication* or *donation*, if so acquired." 18 Mich Civ Jur Municipal Corporations § 237 ("Acquisitions of Parks and Commons") (emphasis added), citing *Clark*, 334 Mich 646. It is notable that the treatise employs the same kind of framing, joining together "dedications" and "donations," just as section 128 lists

"grants or dedications." Likewise, the eminent treatise, Corpus Juris Secundum, also offers the standard definition, requiring offer and acceptance:

> A "dedication" of property to the public normally consists of two steps: an offer of dedication, and an acceptance of this offer by a proper public authority. All that is required to constitute a dedication is the assent of the owner of the land, *and the fact of its being used for the public purposes* ***intended*** *by the appropriation.* [26 CJS Dedication § 1 ("Definition and nature") (emphasis added).]

Indeed, the whole point of the dedication is to safeguard the dedicator's purpose. *Id.* at 26 CJS Dedication § 96 ("What constitutes misuse or diversion – Parks") ("Where grounds are dedicated for use as a park, they must be reserved for the use of the public *for the purposes of the donation*." (Emphasis added).

In this way, the central inquiry on the issue whether there has been dedication that creates a limit on the future use of the property examines the content and purposes of the specific dedication. No such dedication occurred here.

This conclusion is further buttressed by the limitation imposed in section 128 that once dedicated, the "dedication" must "continue ***without change***." Charter, Section 128 (emphasis added). The contention that there was a dedication in 1986 by the City Commission – for all of the property in the city being operated as a park – which freezes the Union Street Dam Park in its exact condition at that time would seem to prove too much. Without there being any formal specificity to the "dedication," it is not clear what changes, if any, the City could ever make without requiring a vote.

The contrast about what is alleged here to be sufficient to trigger the obligations under section 128, and a true dedication for the deed at issue in *Baldwin* is noteworthy. See *Baldwin,* 341 Mich at 426 ("[the] devise was also made subject to the condition subsequent that the property, if not used as a park and *for that purpose only, within two years after the death of testatrix, should revert to her estate*") (emphasis added). There was nothing like that at issue here.

Buckwalter suggests such a construction would make section 128 "meaningless" because the deed itself would bar the change in use. (See Buckhalter's Brief, pp 18–19.) But that argument overlooks the fact that there are "implied dedications," whose terms may be known with adequate assurance even if there were not expressly placed in a deed or some other conveyance. Cf. 26 CJS Dedication § 17 ("Implied dedication") ("A dedication is implied when the acts and conduct of the owner manifest an intention to devote the property to public use and are inconsistent with any theory other than that such a dedication was intended . . . and is founded on the doctrine of estoppel *in pais*, not on grant.") See also *Baum Family,* 488 Mich at 145 (referencing the "act *in pais*"). Section 128 is not a dead letter.

In the end, sections 126 and 128 operate harmoniously, preventing parks from sale or disposition more generally, and when dedicated or given as a donation to the City, the dedicator's or donor's intent is honored. The Union Street Dam Park was neither sold nor devised, and it was never dedicated under section 128, requiring that it be maintained "without change." This Court should reverse.

CONCLUSION AND RELIEF REQUESTED

This Court should reverse the circuit court's decision and allow the FishPass Project to proceed.

Respectfully submitted,

Dana Nessel
Attorney General

Fadwa Hammoud (P74185)
Solicitor General
Counsel of Record

/s/ B. Eric Restuccia

B. Eric Restuccia (P49550)
Deputy Solicitor General

Attorneys for the Attorney General
Department of Attorney General
Solicitor General Division
P.O. Box 30212
Lansing, MI 48909
(517) 335-7628

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/s/ B. Eric Restuccia

B. Eric Restuccia (P49550)
Deputy Solicitor General

Attorneys for the Attorney General
Department of Attorney General
Solicitor General Division
P.O. Box 30212
Lansing, MI 48909
(517) 335-7628