

EXAMINERS' ANALYSIS OF QUESTION NO. 10

Under Michigan law, "[i]njunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8 (2008) (citations and internal quotation marks omitted).

In determining whether to grant a preliminary injunction, the court must consider four factors: "whether (1) the moving party made the required demonstration of irreparable harm, (2) the harm to the applicant absent such an injunction outweighs the harm it would cause to the adverse party, (3) the moving party showed that it is likely to prevail on the merits, and (4) there will be harm to the public interest if an injunction is issued." *Detroit Fire Fighters Ass'n, IAFF Local 344 v City of Detroit*, 482 Mich 18, 34 (2008).

Applying the preliminary injunction factors, the court should deny Pax's motion. The focus of the analysis should be on factors (1) and (2), as the Michigan Supreme Court has held that "[a] particularized showing of irreparable harm" is "an indispensable requirement to obtain a preliminary injunction." *Pontiac Fire Fighters*, 482 Mich at 9 (quotation omitted). Without such a showing, a plaintiff's likelihood of success on the merits is irrelevant. *Id.* at 13 n 21. To establish irreparable injury, a plaintiff must demonstrate "a noncompensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty." *Thermatool Corp v Borzym*, 227 Mich App 366, 377 (1998).

Here, Pax arguably cannot show irreparable harm. Pax argues that if Delta's restaurant is allowed to open, Pax's revenues will decline, its property will lose value, and it will eventually go out of business. These are economic injuries that can be remedied by money damages. See *Pontiac Fire Fighters*, 482 Mich at 10 ("Granting extraordinary equitable relief to remedy these economic injuries is unnecessary and inappropriate because they can be remedied by damages at law."); *Thermatool Corp*, 227 Mich App at 377 ("Economic injuries are not irreparable because

they can be remedied by damages at law."). Moreover, Pax's asserted harm is speculative. "The mere apprehension of future injury or damage cannot be the basis for injunctive relief." *Pontiac Fire Fighters*, 482 Mich at 9. Instead, "[t]he injury must be both certain and great, and it must be actual rather than theoretical." *Thermatool Corp*, 227 Mich App at 377.

Any claimed harm to Pax would also be outweighed by the potential of irreparable harm to Delta. Delta had already begun construction of its new restaurant and entered into contracts with subcontractors and suppliers. Not only would Delta lose anticipated revenue if construction were delayed, it would be at risk of breaching contracts with other parties.

Factor (3) also weighs against granting preliminary injunctive relief. Under the facts as given, the Dakota City Planning Commission had authority to grant a variance, and found a variance was justified under the circumstances. The planning commission found that the variance was consistent with other similar variances that had previously been granted, that the location of Delta's proposed restaurant would not cause traffic problems, that allowing the restaurant to be built would put the property to productive use, and that the building was set back as far as possible and was situated so as to allow for efficient drive-through operations. There is no indication in the facts that Pax has any basis for challenging the planning commission's decision.

Regarding factor (4), issuance of a preliminary injunction would arguably be against the public interest. A preliminary injunction would result in a partially finished construction site, whereas completion of construction would provide for the creation of a viable business on formerly vacant land. Halting completion of Delta's restaurant would also stifle healthy business competition, which Michigan's public policy favors. See *Michigan Beer & Wine Wholesalers Ass'n v Attorney General*, 142 Mich App 294, 303 (1985) (recognizing the "express state public policy of competition in the market place"). Finally, public policy supports enforcement of a duly-issued zoning variance. See *Dingeman Advertising, Inc v Algoma Twp*, 393 Mich 89, 98 (1974) ("Once a city or township issues a valid permit to an applicant, that applicant has every reason and right to rely thereon in his business dealings.").

While not necessary to achieve a perfect score, some credit may be given for also recognizing that laches weighs against granting Pax's requested preliminary injunction. "The doctrine of laches applies where the passage of time combined with a change in condition makes it inequitable to enforce a claim." *City of Jackson v Thomson-McCully Company, LLC*, 239 Mich App 482, 494 (2000). It requires a showing of "a lack of due diligence on the part of the plaintiff resulting in prejudice to the defendant." *Id.* Here, Pax waited more than two months after construction began to seek injunctive relief. That lack of diligence further supports denial of Pax's motion. See *City of Hancock v Hueter*, 118 Mich App 811, 818 (1982) (applying laches to bar the city's action to enjoin the defendants' use of a house as a three-family residence in violation of the city's zoning ordinance because the city "failed to take any action for an undue length of time").

With respect to the four-factor preliminary injunction test, some credit may be given for well-reasoned arguments contrary to the above analysis.