

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

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THE CHARTER TOWNSHIP OF OAKLAND, Case No. 2021-187654-AW  
a Michigan municipal corporation,

Plaintiff,

Hon. Phyllis C. McMillen

v

BIRCH GROVE PROPERTIES, LLC,  
a domestic limited liability company,

Defendant.

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Daniel J. Kelly (P41315)  
Brittney K. Ellis (P82898)  
THE KELLY FIRM, PLC  
2825 University Drive  
Auburn Hills, MI 48326  
248.655.7025  
dan@kellyfirmplc.com  
brittney@kellyfirmplc.com

*Attorneys for Plaintiff*

David C. C. Eberhard (P53324)  
Matthew K. Casey (P43952)  
WARNER NORCROSS + JUDD LLP  
45000 River Ridge Drive, Suite 300  
Clinton Township, MI 48038-5582  
586.303.4100  
deberhard@wnj.com  
mcasey@wnj.com

Gaëtan Gerville-Réache (P68718)  
WARNER NORCROSS + JUDD LLP  
150 Ottawa Avenue, NW, Suite 1500  
Grand Rapids, MI 49503  
616.752.2000  
greache@wnj.com

*Attorneys for Defendant*

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**BIRCH GROVE PROPERTIES, LLC'S  
ANSWER TO VERIFIED COMPLAINT**

Defendant Birch Grove Properties, LLC, in answer to Plaintiff The Charter Township of Oakland's Verified Complaint states as follows:

## **PARTIES, JURISDICTION, AND VENUE**

1. Plaintiff, THE CHARTER TOWNSHIP OF OAKLAND, is a Michigan municipal corporation located in the Charter Township of Oakland, Oakland County, Michigan.

**ANSWER: Admitted.**

2. Defendant, BIRCH GROVE PROPERTIES, LLC, is a domestic limited liability company, with its registered place of business listed as 27101 Schoenherr Road, Suite 100, Warren, Michigan 48088 and who regularly conducts business in Oakland County.

**ANSWER: Admitted.**

3. This Court has jurisdiction to grant the equitable relief requested herein pursuant to MCR 3.310.

**ANSWER: Admitted.**

4. This Court has jurisdiction under MCL 600.605, and venue is proper because the Defendant's construction activities are taking place in the Charter Township of Oakland, Oakland County, Michigan.

**ANSWER: Admitted.**

## **GENERAL ALLEGATIONS**

5. Birch Grove Preparatory Academy is a proposed private school being constructed by Defendant on a 45-acre parcel (Parcel No. 10-15-400-014) located within two zoning districts (Medium Residential Density ("MRD") and Very Low Residential Density ("VLRD")) within the Charter Township of Oakland.

**ANSWER: The name of the school entity is currently Birch Grove University Prep. Birch Grove Preparatory Academy is a name reserved with the State, which will eventually be an assumed name/dba for Birch Grove University Prep after Birch Grove University Prep is converted from an unincorporated nonprofit association to a nonprofit corporation. This will occur after the new school building is open and the fire alarm system is approved by the Michigan Department of Education. The rest of the allegations of this paragraph are admitted.**

6. The Township Zoning Ordinance regulates all schools as “educational facilities,” which require a Special Land Use permit to operate in the MRD (“**Exhibit 1**”: MRD Matrix of Uses) and VLRD zoning districts.

**ANSWER: The allegations of this paragraph contain a statement of law to which no response is necessary.**

7. On October 14, 2021, the Township’s Zoning Enforcement Officer, the Township Building Director, issued a Stop-Work Order and violation Notice to Defendant, as Defendant had begun construction prior to obtaining a Special Land Use permit from the Township.

**ANSWER: Defendant denies that a Stop-Work Order and violation Notice were issued to Defendant on October 14, 2021, because this allegation is untrue. Defendant admits that it began construction prior to obtaining a Special Land Use permit from the Township, but did so only after it received a building permit from the State of Michigan’s Bureau of Construction Codes. The Township lacks authority to regulate construction under a state-issued building permit or to issue a stop-work order for construction authorized by the State of Michigan. Further, its zoning ordinance does not prohibit construction prior to**

**obtaining a Special Land Use permit when a building permit has already been issued by the State of Michigan.**

8. As of this date, Defendant has failed to obtain Special Land Use approval in violation of the Township's Zoning Ordinance, the Zoning Enabling Act, and the Stop-Work Order issued by the Township on October 14, 2021.

**ANSWER: Defendant admits that it has not yet received Special Land Use approval.**

**Defendant denies the remainder of this paragraph as untrue.**

9. Plaintiff declined to withdraw its Stop-Work Order as Defendant has not obtained a Special Land Use permit, and there is nothing in land records, or otherwise, that would give evidence to the actual use of the construction undertaken within the Charter Township of Oakland in perpetuity.

**ANSWER: The allegations contained in this paragraph are vague and ambiguous, and thus incapable of response. To the extent that a response is required, Birch Grove lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph, and therefore denies the same.**

## **COUNT I – STATUTORY VIOLATIONS**

10. Plaintiff restates and incorporates by reference all allegations in the preceding paragraphs as though fully set forth herein.

**ANSWER: Defendant restates and incorporates by reference all answers to the above allegations as though fully set forth herein.**

11. The Michigan Zoning Enabling Act declares that any structure built in violation of a zoning ordinance is a nuisance per se and instructs that the court "shall order the nuisance abated." MCL 125.3407.

**ANSWER: The allegations of this paragraph contain a statement of law to which no response is necessary.**

12. Defendant's structure represents a nuisance per se in that it is being constructed in violation of the Township's Zoning Ordinance because Defendant has not obtained Special Land Use approval.

**ANSWER: Defendant denies the allegations in this paragraph as untrue.**

13. The Michigan Court of Appeals has ruled Michigan schools may be regulated to the same extent as any other land use. *Lutheran High School Ass'n v Farmington Hills*, 146 Mich App 641, 650 (1985). In this case, Defendant's Birch Grove Preparatory Academy is an "educational facility" as provided in the Township's Zoning Ordinance.

**ANSWER: The allegations of this paragraph contain a statement of law to which no response is necessary.**

14. Accordingly, Defendant Birch Grove's construction is subject to regulation regarding Special Land Use approval and otherwise. *Id.*

**ANSWER: The allegations of this paragraph contain a statement of law to which no response is necessary. To the extent that a response is required, Defendant denies the allegations in this paragraph as untrue.**

15. For the reason that once the subject development is currently being constructed without the developer having obtained a special land use permit, the use and occupancy of this building would be in violation of the aforementioned statutes and case law.

**ANSWER: The allegations of this paragraph contain a statement of law to which no response is necessary.**

## **COUNT II – ZONING ORDINANCE VIOLATIONS**

16. Plaintiff restates and incorporates by reference all allegations in the preceding paragraphs as though fully set forth herein.

**ANSWER: Defendant restates and incorporates by reference all answers to the above allegations as though fully set forth herein.**

17. Pursuant to the Charter Township of Oakland Zoning Ordinance, Article IV, Section 16-403 and Article IV, Section 16-406 an “educational facility” requires a Special Land Use permit from the Township to be constructed in either District.

**ANSWER: The allegations of this paragraph contain a statement of law to which no response is necessary. To the extent that a response is required, Defendant denies the allegations in this paragraph as untrue.**

18. A zoning permit is required and “shall be obtained” before any structure is built. *Claybanks Twp v Feorene*, 2015 Mich App LEXIS 2258, \*3 (2015).

**ANSWER: The allegations of this paragraph contain a statement of law to which no response is necessary. To the extent that a response is required, Defendant denies the allegations in this paragraph as untrue.**

19. Defendant has failed to obtain the required zoning permit prior to beginning construction and to date has no application for Special Land Use permit pending.

**ANSWER: Defendant admits that it did not obtain a Special Land Use permit prior to commencing construction but denies that a Special Land Use permit is required to commence construction under a building permit issued by the State of Michigan, which Defendant had already received. Defendant admits that it did not have a Special Land Use application on the agenda of the Township’s Planning Commission or Township Board at**

**the time this complaint was filed, but denies that it had not submitted a Special Land Use application at the time the complaint was filed. Defendant has been seeking Special Land Use approval since around March of 2020, when it first filed a special land use application.**

20. Defendant Birch Grove was required to obtain Special Land Use approval from Oakland Township prior to beginning construction of its proposed private school building. *Claybanks Twp v Feorene*, 2015 Mich App LEXIS 2258, \*3 (2015).

**ANSWER: The allegations of this paragraph contain a statement of law to which no response is necessary. To the extent that a response is required, Defendant denies the allegations in this paragraph as untrue.**

21. Defendant's failure to obtain Special Land Use approval violates the Township's Zoning Ordinance and Stop-Work Order.

**ANSWER: Defendant denies the allegations in this paragraph as untrue.**

22. "If an order to stop construction is not obeyed, the enforcing agency may apply to the circuit court for the county in which the premises are located for an order enjoining the violation of the stop-construction order. This remedy is in addition to, and not in limitation of, any other remedy provided by law or ordinance, and does not prevent criminal prosecution for failure to obey the order." MCL § 125.1512 (emphasis added).

**ANSWER: The allegations of this paragraph contain a statement of law to which no response is necessary.**

23. MCL 125.1512(3) authorizes Plaintiff, as the enforcing agency, to undertake the enforcement actions taken in this instance, including seeking an injunction.

**ANSWER: Defendant denies the allegations in this paragraph as untrue. The Township is not the enforcing agency under MCL 125.1512(3).**

24. In light of the above, the Township meets the requirements for a preliminary injunction because: (1) the Township will suffer irreparable injury if the relief is not granted due to Defendant's continuing violations of State law and the Township's Ordinances; (2) it is likely the Township will prevail on the merits because Defendant continues to violate State law, the Township's Stop-Work Order, and the Township's Zoning Ordinances; (3) there will be no harm to the public if the injunction issues; and (4) the harm to the Township absent temporary relief outweighs the harm to the Defendant if relief is granted. *Thermatool Corp v Borzym*, 227 Mich App 366, 376 (1998), as further discussed in the Motion and Brief in Support of Motion for Temporary Restraining Order and/or Preliminary Injunction and Brief in Support, filed contemporaneous with this Verified Complaint.

**ANSWER: Defendant denies the allegations in this paragraph as untrue. In short, the Township has presented no evidence that it will be irreparably harmed if construction is not enjoined prior to final adjudication of the merits of this case. The Township is not likely to succeed because it is not the "enforcing agency" authorized to issue a stop-work order (the Bureau of Construction Codes is the "enforcing agency"), and nothing in the Township's zoning ordinance precludes construction pursuant to the building permit issued by the State of Michigan to Defendant without first obtaining Special Land Use approval. Enjoining construction will harm the public because (a) the school's lease at the church it occupied for the last two years has expired, (b) the school has doubled in size and can no longer use the church even if it could renew the lease, and (c) stopping construction will mean 80 students and 15 faculty and staff will have no facility to use for their education when they return to school for the fall semester. Finally, the harm to the Township does not outweigh the harm to the Defendant, as enjoining construction will force the**

students and staff to find other educational institutions and employment in the fall and break apart the school community that was to be served by the facility being built.

## **AFFIRMATIVE DEFENSES**

Defendant asserts the following affirmative or other defenses to the claims set forth in Plaintiff's complaint. By identifying these affirmative or other defenses, Defendant does not assume any burden of proof that is otherwise assigned to Plaintiff:

1. Plaintiff's complaint fails, in whole or in part, to state a claim upon which relief may be granted.
2. Plaintiff's applicable ordinances and authority are preempted, in whole or in part, by the Stille-Derossett-Hale Single State Construction Code Act, MCL 125.1501 et seq.
3. Plaintiff's requests for equitable relief are barred by the doctrines of laches and/or unclean hands.

Defendant reserves the right to assert additional affirmative defenses as they are discovered in the course of this litigation.

Respectfully submitted,

Dated: June 9, 2021

WARNER NORCROSS + JUDD LLP

By /s/ Gaëtan Gerville-Réache  
Gaëtan Gerville-Réache (P68718)  
150 Ottawa Avenue, NW, Suite 1500  
Grand Rapids, MI 49503  
616.752.2000  
greache@wnj.com

Attorneys for Defendant

21765936