IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

Hon. Donald S. Owens, Presiding.

GEORGE H. GOLDSTONE,

Plaintiff-Appellant,

-vs- Docket No. 130150

THE BLOOMFIELD TOWNSHIP
PUBLIC LIBRARY, by and through
Its Board of Trustees,

Defendant-Appellee.
______________________________________/

ROBERT E. TOOHEY (P21500)
Attorney for Plaintiff-Appellant
1790 Hammond Court
Bloomfield Hills, MI 48304
(248) 540-3330

JOEL H. SERLIN (P20224)
BARRY M. ROSENBAUM (P26487)
Attorneys for Defendant-Appellee
2000 Town Center, Ste. 1500
Southfield, MI 48075
(248) 353-7620
______________________________________/

BRIEF ON APPEAL - APPELLEE

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TABLE OF CONTENTS

Index of Authorities…………………………………………………………………………. i

Jurisdictional Summary……………………………………………………………………… .v

Counter-Statement of Questions Presented for Review………………………………………….vi

Summary of Argument ………………………………………………………………………..1

Introduction…………………………………………………………………………….......3

Counter-Statement of Material Facts and Proceedings……………………………………………5

Argument………………………………………………………………………………….8

I. A public library is "available" within the meaning of Const 1963, art 8, §9, if it provides onsite access to its books and resources to all state residents……………………………………8

A. Standard of Review………………………………………………………..8

B. Court of Appeals Opinion…………………………………………………9

C. Definition of "available"……………………………………………………..9

D. Address to the People……………………………………………………….10

E. Constitutional Convention Debates……………………………………......12

F. Legislative Action………………………………………………………… 25

G. What "available" means under art 8, §9…………………………………28

H. Regulation by the local libraries…………………………………………30

II. Appellant abandoned his Equal Protection and First Amendment claims by failing to adequately brief and argue those claims in the Court of Appeals…………………………………34

A. Standard of Review…………………………………………….............34

B. Argument……………………………………………………………...34

III. A public library may limit the circulation of its resources to its residents without violating the Equal Protection clause in the federal and Michigan Constitutions or the First Amendment to the federal Constitution.....38

A. Standard of Review.....38

B. Equal Protection.....38

C. First Amendment.....45

Relief Requested.....48

INDEX OF AUTHORITIES

Cases

Andrews v Norton,
385 F Supp 672 (D Conn, 1974)……………………………………………………....39

Auto-Owners Insurance Company v Leefers,
203 Mich App 5; 512 NW2d 324 (1993)………………………………………...…10

Bay City Dredge Works v Fox,
245 Mich 523; 222 NW 747 (1929)…………………………………………………fn3

Board of Education of Presque Isle Township School District No. 8 v
Presque Isle County Board of Education,
364 Mich 605; 111 NW2d 853 (1961)……………………………………………...22

Cherry v Steiner,
543 F Supp 1270 (D Ariz, 1982)…………………………………………………...…39

Cole v Ladbroke Racing Michigan, Inc,
241 Mich App 1; 614 NW2d 169 (2000)…………………………………………...22

Committee for Constitutional Reform v Secretary of State of Michigan,
425 Mich 336; 389 NW2d 430 (1986) ……………………………………………..12

Crego v Coleman,
463 Mich 248; 615 NW2d 218 (2000)……………………………………………...41

Eastman v University of Michigan,
30 F3d 670 (CA 6, 1994)…………………………………………………………...39

Harvey v State of Michigan,
469 Mich 1; 664 NW2d 767 (2003)………………………………………………..40

Hertel v Racing Commission,
68 Mich App 191; 242 NW2d 526 (1976)…………………………………………44

House Speaker v Governor,
443 Mich 560; 506 NW2d 190 (1993)……………………………………….…13, 29

Jarrad v Integon National Insurance Company,
472 Mich 207; 696 NW2d 621 (2005)……………………………………………...27

Kreimer v Bureau of Police for the Town of Morristown,
958 F2d 1242 (CA3, 1992)……………………………...…………29, 30, 45, 46, fn6

{BMR NMH | SKGBS Client Files\010309\014727\00084310.DOC | Supreme court brief}

Ludtke v Kuhn,
461 F Supp 86 (SDNY, 1978)……………………………………………………..34-43

Martin v City of Struthers,
319 US 141; 63 S CT 862; 87 L Ed 1313 (1943)……………………………………..45

Martinez v Bynum,
461 US 321; 103 S Ct 1838; 75 L Ed 2d 879 (1983)……………………………...39-42

People v Nutt,
469 Mich 565; 677 NW2d 1 (2004)…………………………………………………..10

People v Waterman,
137 Mich App 429; 358 NW2d 602 (1984)………………………………………...…24

Peterson Novelties, Inc v City of Berkley,
259 Mich App 1 (2003)………………………………………………………………36

Regents of the University of Michigan v State of Michigan,
395 Mich 52; 235 NW2d 1 (1975)…………………………………………………..13, 24

Salsburg v State of Maryland,
346 US 545; 74 S Ct 280; 98 L Ed 281 (1954)………………………………………..38

Sands Appliance Services, Inc v Wilson,
463 Mich 231; 615 NW2d 241 (2000)……………………………………………...…35

Spielberg v Board of Regents, University of Michigan,
681 F Supp 994 (ED Mich, 1985)…………………………………………………..…39

Studier v Michigan Public School Employees' Retirement Board,
472 Mich 642; 688 NW2d 350 (2005)………………………………………………...8, 10

Sullivan v Finkelstein,
496 US 617; 110 S Ct 2658; 110 L Ed 2d 563 (1990)………………………………..22

Swartz v Dow Chemical Company,
414 Mich 433; 326 NW2d 804 (1982)……………………………………………...…36

Vlandis v Kline,
412 US 441; 93 S Ct 2230; 37 L Ed 2d 63 (1973)……………………………………39

Wilkie v Auto-Owners Insurance Company,
469 Mich 41; 664 NW2d 776 (2003)………………………………………………….10

Wilson v Taylor,
457 Mich 232; 577 NW2d 100 (1998)…………………………………………..…36

Statutes

MCL 397.151……………………………………………………………….………16

MCL 397.201……………………………………………………………….….fn2, 16

MCL 397.206…………………………………………………………………………fn2

MCL 397.213…………………………………………………………………………17

MCL 397.214(1)………………………………………………………………….... 27

MCL 397.214(2)………………………………………………………………….... 17

MCL 397.301…………………………………………………………………………17

MCL 397.305……………………………………………………………………..... 18

MCL 397.471…………………………………………………………………………18

MCL 397.472……………………………………………………………….………19

MCL 397.501……………………………………………………………….………25

MCL 397.509……………………………………………………………….…..…25

MCL 397.511…………………………………………………………………………25

MCL 397.551…………………………………………………………………….…26

MCL 397.552(d)………………………………………………………………………27

MCL 397.555(d)……………………………………………………………………27

MCL 397.560…………………………………………………………………………26

MCL 397.561…………………………………………………………………………27

MCL 397.561a…………………………………………………………………….28, 32

Court Rules

MCR 7.302(G)(1)………………………………………………………………………v

Miscellaneous

US Const, Am I……………………………………………………………………...…*passim*

US Const, Am XIV……………………………………………………………………*passim*

Const 1908, art 11, §14…………………………………………………………………….fn1

Const 1963, art 1, §2……………………………………………………………………..40

Const 1963, art 8, §9…………………………………………………………………….. *passim*

1 Official Record, Constitutional Convention 1961……………………………………...13, 20-21

2 Official Record, Constitutional Convention 1961……………………………..……….*passim*

Webster's Third New International Dictionary (2003 ed)……………………………………...9

Attorney General Opinion No. 5739……………………………………………………..23, fn3

JURISDICTIONAL SUMMARY

Appellant's Brief did not contain a Statement of the Jurisdiction of this Court. Appellant filed a timely application for leave to appeal from a decision by the Court of Appeals dated November 8, 2005 (73a). This Court granted the application for leave to appeal on November 1, 2006 (121a). Jurisdiction is proper in this Court pursuant to MCR 7.302(G)(1).

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. IS A PUBLIC LIBRARY "AVAILABLE" WITHIN THE MEANING OF CONST 1963, ART 8, §9, IF IT PROVIDES ONSITE ACCESS TO ITS BOOKS AND RESOURCES TO ALL STATE RESIDENTS, BUT LIMITS BORROWING PRIVILEGES TO RESIDENTS OF ITS SERVICE AREA AND COMMUNITIES HAVING A SERVICE AGREEMENT WITH THE LIBRARY?

The Trial Court answered "Yes"
The Court of Appeals answered "Yes"
Defendant-Appellee answers "Yes"
Plaintiff-Appellant answers "No"

II. DID APPELLANT ABANDON HIS EQUAL PROTECTION AND FIRST AMENDMENT CLAIMS BY FAILING TO ADEQUATELY BRIEF AND ARGUE THOSE CLAIMS IN THE COURT OF APPEALS?

The Court of Appeals answered "Yes"
Defendant-Appellee answers "Yes"
Plaintiff-Appellant answers "No"

III. MAY A PUBLIC LIBRARY LIMIT BORROWING PRIVILEGES TO RESIDENTS OF ITS SERVICE AREA AND COMMUNITIES HAVING A SERVICE AGREEMENT WITH THE LIBRARY WITHOUT VIOLATING THE EQUAL PROTECTION CLAUSE IN THE FEDERAL AND MICHIGAN CONSTITUTIONS OR THE FIRST AMENDMENT TO THE FEDERAL CONSTITUTION?

The Trial Court answered "Yes"
The Court of Appeals did not answer the question
Defendant-Appellee answers "Yes"
Plaintiff-Appellant answers "No"

SUMMARY OF ARGUMENT

A public library is available to nonresidents of the library's service area within the meaning of Const 1963, art 8, §9, if it provides onsite access to the library's books and resources. A public library is not required by the Michigan Constitution to extend borrowing privileges to nonresidents of its service area.

The plain and ordinary meaning of "available" is ambiguous in the context of library services, and does not clarify the intent of the people in ratifying the provision.

The Address to the People informs the people of the state that those residents of communities without a library will not be required to build a library, but will be allowed to use the public libraries of other communities, subject to the rules of those libraries. Although "available" is not defined in the Address, all state residents are put on notice that nonresidents may use any public library in the state, although the extent of that use is left to the legislature and the regulation of that use is reserved to the libraries themselves.

The debates of the Constitutional Convention reveal that the drafters of art 8, §9 intended to make libraries available to nonresidents by encouraging libraries to expand their service areas through the use of existing and future legislation. The delegates also intended that the local libraries retain control over the extent and cost of their services to nonresidents. There is no evidence that the delegates intended that public libraries be required to offer coextensive privileges to residents and nonresidents.

Since the adoption of art 8, §9, the legislature has enacted statutes that preserve the privileges provided to residents, while providing financial incentives to those libraries that are willing to expand their service areas voluntarily. This is an indication that the legislature does

not interpret art 8, §9 as requiring that public libraries provide equal services to residents and nonresidents.

Art 8, §9 should be read as requiring public libraries to provide onsite access to the library's books and resources to nonresidents, subject to the libraries' right to extend broader privileges, or to impose a reasonable charge for nonresident use. This interpretation of "available" is consistent with the plain meaning of the text of art 8, §9, the Address, the intention of the delegates that drafted the text, and the First Amendment right of all persons to receive information, without infringing upon the rights of the residents of the communities that built and maintain public libraries with their tax dollars or through service agreements.

INTRODUCTION

This is a case of first impression involving the interpretation of art 8, §9 of the Michigan Constitution of 1963 (26a):

> The Legislature shall provide by law for the establishment and support of public libraries which shall be available to all residents of the state under regulations adopted by the governing bodies thereof. All fines assessed and collected in the several counties, townships and cities for any breach of the penal laws shall be exclusively applied to the support of such public libraries, and county law libraries as provided by law.

Defendant-Appellee Bloomfield Township Public Library (hereinafter referred to as "BTPL") operates a public library created and supported by the residents of Bloomfield Township. Plaintiff-Appellant George Goldstone is a resident of the City of Bloomfield Hills. Bloomfield Hills does not have or support a public library.

The issue is an emotional one for everyone involved. The residents of Bloomfield Township have paid millions of dollars in property taxes over the past 42 years, specifically earmarked for the BTPL, and are understandably opposed to the concept that every state resident has the same library privileges as Bloomfield Township residents, for the price of a nominal borrowing fee. The BTPL works extremely hard to offer all of its patrons, both residents and nonresidents, the best possible library resources and services, on a limited budget, only a small portion of which is comprised of state aid. Mr. Goldstone feels strongly that as a resident of the state, he has a constitutional right to borrow a book from any public library in the state. Organizations such as the Michigan Library Association, the Michigan Municipal League and the Michigan Townships Association, as well as countless libraries throughout the state, large and small, including the Detroit Public Library, are concerned that public libraries will not be

able to survive if service agreements become obsolete because every state resident can obtain borrowing privileges from every public library.

When this case was first argued before this Court on October 12, 2006, public policy concerns were overshadowed by the Court's desire to define exactly what was intended by the adoption of art 8, §9 in 1963. Financial considerations and fundamental fairness are factors that play a role in determining what the drafters intended and the voters understood when the 1963 constitution was adopted. However, in the final analysis, art 8, §9 was intended to provide a level of library service to all state residents, either through existing or new legislation, and subject to local regulation.

BTPL submits that the drafters intended, and the people of Michigan understood, that they could receive service at any public library in the state. In other words, the doors of a public library cannot be closed to nonresidents of the library's community. However, it is just as certain that the drafters of art 8, §9, and the people of the state, understood that the extent of that service, including the cost, if any, was to be determined by the legislature and the libraries themselves.

COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

The following "Counter-Statement of Facts" is condensed from the factual statement in Defendant's Brief in Opposition to Plaintiff's Motion for Partial Summary Disposition, Entry of Declaratory Judgment and for Injunctive Relief (1b). These are the operative facts upon which the trial court and the Court of Appeals made their decisions and they are not in dispute.

BTPL is a free public library established by the voters of Bloomfield Township (hereinafter "Township") in 1964. BTPL is principally supported by taxes paid by the Township's residents (1b).

Residents of the Township enjoy full privileges at BTPL, including the right to borrow materials, utilize meeting rooms, access remote internet service and enroll in special programs. Nonresidents of the Township also enjoy access to nearly all of BTPL's materials and services (2b). However, nonresidents are not permitted to borrow materials. Remote internet access and meeting rooms are not available to nonresidents, and some programs are only available if space permits (2b).

Notwithstanding the foregoing, nonresidents of the Township can enjoy the same circulation privileges as residents under certain circumstances. BTPL is a member of a library cooperative of 90 community libraries and branches located throughout southeastern Michigan. The cooperative is called The Library Network. Residents of communities that support a library-member of The Library Network enjoy reciprocal privileges at the libraries in the cooperative, including BTPL (2b).

In addition, BTPL provides residential privileges to nonresidents on a contractual basis. Since 1964, BTPL and the City of Bloomfield Hills (hereinafter "City") shared a contractual relationship whereby the City made an annual payment to BTPL to enable the City's residents to

enjoy the same privileges as residents of the Township. Under the most recent contract, the City paid BTPL the sum of $664,278.00 over three years. The contract expired on November 13, 2003 (2b).

Under the last three-year contract, the City's residents had paid half of the amount, on a per housing unit basis, that the Township's residents paid in taxes to support the library. When the Township and City began to negotiate for a new three-year contract, BTPL asked the City to pay a fair and equitable amount per housing unit. BTPL asked the City to increase the amount it paid per household to an amount that was closer to what each Township's household was paying in tax dollars (2b).

The amount requested by the Township was $1,390,650.00 over three years. The City was only willing to pay $1,134,000.00 over three years before it broke off negotiations. Instead of providing library service to its residents, the City is now simply reimbursing its residents who purchase a nonresident library card from the Troy public library. According to Mr. Goldstone, the City spent only $25,000.00 from December, 2003 through March, 2005, to reimburse its residents for those library cards, compared to $300,000.00 in contract fees for the same number of months under the prior contract. BTPL is still open to reaching an agreement on a new contract with the City (3b).

Presently, BTPL has a reciprocal borrowing agreement with the Cranbrook Educational Community and Cranbrook Academy of Art which allows students, staff and faculty at the Cranbrook schools to have borrowing privileges at BTPL, and allows residents of the Township to have reciprocal access to their facilities ("Cranbrook Agreement") (3b).

Mr. Goldstone is a resident of the City. Although he has onsite access to nearly all of BTPL's materials and services, he wants to be able to borrow books as well. Since Mr.

Goldstone is a nonresident and does not have borrowing privileges from another library in The Library Network, or through the Cranbrook agreement, he was not permitted to borrow materials from BTPL. Furthermore, although Mr. Goldstone offered to purchase a nonresident library card or pay a nonresident borrowing fee, BTPL does not issue nonresident library cards or make borrowing privileges available to individual nonresidents at any fee, except through the cooperative or contractual arrangements (3b).

Mr. Goldstone states that prior to the termination of the service agreement between BTPL and the City, he had a nonresident library card issued by BTPL (Appellant's Brief, p. 1). While it is true that City residents lost their borrowing privileges at BTPL, they never had "nonresident" library cards. Under the service agreement, all City residents were treated as if they were residents of the Township and received the same library cards as were received by residents. BTPL did not issue special nonresident cards to City residents.

Mr. Goldstone admits that he was able to obtain a library card with full borrowing privileges from the Pontiac Public Library (Appellant's Brief, p. 5). It is undisputed that as a resident of Oakland County, and the state of Michigan, Mr. Goldstone also has borrowing privileges at the Oakland County Research Library and the state Library of Michigan.

Mr. Goldstone filed a complaint in the Oakland County Circuit Court seeking to force BTPL to issue him a nonresident library card with borrowing privileges (1a). The trial court decided the case on Mr. Goldstone's motion and ruled that neither the Michigan Constitution, the federal constitution nor any state statute required BTPL to issue a nonresident library card to Mr. Goldstone (67a). The Court of Appeals affirmed (73a).

ARGUMENT

I

A PUBLIC LIBRARY IS "AVAILABLE" WITHIN THE MEANING OF CONST 1963, ART 8, §9, IF IT PROVIDES ONSITE ACCESS TO ITS BOOKS AND RESOURCES TO ALL STATE RESIDENTS

A. Standard of Review

Mr. Goldstone correctly states that issues of constitutional interpretation are reviewed *de novo* by this Court. The actual standard to be applied was set forth in Studier v Michigan Public School Employees' Retirement Board, 472 Mich 642; 688 NW2d 350 (2005):

> The primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification. [*People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).] This rule of "common understanding" has been described by Justice Cooley in this way:
>
> "A constitution is made for the people and by the people. *The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it*. 'For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, *the intent to be arrived at is that of the people*, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, *but rather that they have accepted them in the sense most obvious to the common understanding,* and ratified the instrument in the belief that that was the sense designed to be conveyed.'" [*Traverse City School Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971) (emphasis in original), quoting 1 Cooley, Constitutional Limitations (6th ed), p. 81.]
>
> In short, the primary objective of constitutional interpretation is to realize the intent of the people by whom and for whom the constitution was ratified.
>
> In order to reach the objective of discerning the intent of the people when ratifying a constitutional provision, we apply the plain meaning of each term used therein at the time of ratification unless technical, legal terms were employed. *Phillips v Mirac, Inc,* 470 Mich 415, 422; 685 NW2d 174 (2004). Id at 652

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B. Court of Appeals Opinion

The Court of Appeals relied primarily on the debates of the delegates to the Constitutional Convention in concluding that art 8, §9 does not require public libraries to issue nonresident library cards or make accessible all services of local libraries to nonresidents (78a). The Court's opinion is clearly supported by the intention of the delegates as expressed in the debates. However, although the Court effectively decided the case by rejecting Mr. Goldstone's interpretation of art 8, §9, the Court did not attempt to establish the parameters of "available".

C. Definitions of "available"

"Available" is not a technical, legal term that would have been ascribed a particular meaning by those learned in the law at the time the Constitution was ratified. Id at 652. Therefore, the initial attempt to discern the intent of the people in ratifying art 8, §9 is to accord the term its plain and ordinary meaning at the time of ratification. Unfortunately, the plain and ordinary meaning of "available" does not resolve the question raised in this appeal.

Webster's Third New International Dictionary (2003 ed) defines "available" as:

1. present or ready for immediate use
2. accessible, obtainable

BTPL is readily accessible to all state residents. It does not restrict onsite access to its residents, nor has there been any evidence produced that other state public libraries refuse entry to nonresidents. However, the precise issue is not whether a public library is accessible to all state residents, but whether it must offer **all** of its services to all state residents, including borrowing privileges. The plain and ordinary meaning of "available" does not address this question.

Previous appellate decisions in Michigan have held that the term "available" is ambiguous, in the context of an insurance policy exclusion, because it is capable of being

defined in different ways. Auto-Owners Insurance Company v Leefers, 203 Mich App 5, 11; 512 NW2d 324 (1993) (See also Justice Kelly's dissenting opinion in Wilkie v Auto-Owners Insurance Company, 469 Mich 41, 77; 664 NW2d 776 (2003)).

In the context of library services, "available" can be considered ambiguous because of the multitude of services that can be offered. For example, a library offers not only onsite access to reading rooms and reference books, but also listening stations and internet services. Availability can be affected by rules that restrict the right to borrow books, compact discs, reference materials; the number of items that can be borrowed; or the length of time they can be kept. Monetary charges for access, borrowing or late fees can also impact availability.

Since the plain and ordinary meaning of the text of art 8, §9 does not clarify the intent of the people in ratifying the provision, it is necessary to resort to the rule of common understanding. Studier, supra at 652.

D. Address to the People

In People v Nutt, 469 Mich 565, 590; 677 NW2d 1 (2004), this Court placed the greatest significance on the Address to the People, 2 Official Record, Constitutional Convention 1961, p. 3355 in interpreting the Constitution. The Address is important because it explains to the people of the state the changes that were made to the Michigan Constitution. Therefore, it is perhaps the most authoritative indication of what the people of Michigan understood art 8, §9 to mean.

The section of the Address devoted to art 8, §9 states as follows:

> This is a revision of Sec. 14, Article XI of the present constitution which decrees that "the legislature shall provide by law for the establishment of at least one library in each township and city". This has never been adhered to as a matter of practice.
>
> The proposed new language emphasizes that "public" libraries will be "available" to residents without fixing how or where libraries shall be organized. Reasonable rules for the use and control of

> their facilities may be adopted by the governing bodies of the libraries.
>
> Penal fines for support of libraries are continued. County law libraries are also recognized. They have previously shared in penal fine collections through legislative enactment. (38b).

The Address makes two distinct points. First, it explains that the former constitutional requirement, that each township and city shall establish its own library, is to be eliminated.[1] Secondly, it tells the people that existing public libraries shall be "available" to state residents, but it does not say how that availability will be offered. Furthermore, the people are told that the libraries themselves will adopt rules for the "use and control of their facilities".

The Address speaks to **all** of the people of Michigan, including those who support a library and those who do not. It tells the "have-nots" that they are no longer required by law to build their own libraries. This relieves those residents of a significant potential tax burden.

The Address also tells the "haves" that they must share their libraries with the "have-nots" in some undefined manner. In addition, **all** of the people are told that the libraries themselves will have the right to make rules for the use and control of their facilities.

The people of the state, who voted in 1963 on the adoption of the new constitution, clearly understood from the Address that art 8, §9, was empowering the legislature and the libraries to adopt rules for the use of libraries **by nonresidents**. Any person who voted to abolish the requirement that each municipality build its own library understood that the rights of nonresidents to use an existing library were going to be addressed by the legislature or the libraries themselves. A person who lived in a municipality without a public library, having been relieved of the burden of paying to build a library, could not reasonably expect that art 8, §9 was going to provide him or her with the same rights and privileges enjoyed by state residents who

[1] Const 1908, art 11, §14.

were paying to build and maintain a public library.

The Address informs state residents that art 8, §9 does not fix **how** or **where** the "available" libraries shall be organized. State residents could have no expectation that **all** public libraries would offer all of the same services to all state residents. Otherwise, the Address would have been definitive in describing the new library system. The fact that libraries were specifically empowered to adopt rules for the use and control of their facilities suggests a possible disparity of treatment between residents and nonresidents. If such were not to be the case, there would have been no reason to provide public libraries with the right to adopt such rules. After all, there was no question that under the 1908 Constitution, public libraries already possessed the power to regulate themselves, subject only to the proviso that the use be free to their own residents.[2] Since availability was already provided free to residents of communities with a library, the power reserved to the libraries to regulate the use of their facilities had to be directed to nonresident use. The Address places all of the state's residents on notice that nonresident use will be subject to regulation by the libraries themselves.

E. Constitutional Convention Debates

Although the Address confirms that art 8, §9 permits public libraries to distinguish between residents and nonresidents in adopting rules for the use of their facilities, it does not provide the meaning of "available". Therefore, in order to clarify the meaning, the circumstances surrounding the adoption of art 8, §9 and the purpose to be accomplished may be considered. Committee for Constitutional Reform v Secretary of State, 425 Mich 336, 340; 389

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[2]Every library and reading room established under this act shall be **forever free to the use of the inhabitants where located, always subject to such reasonable rules and regulations as the library board may adopt**; and said board may exclude from the use of said library and reading room any and all persons who shall willfully violate such rules. (Emphasis added). MCL 397.206. This act applied to all libraries created by the residents of all cities, villages and townships. MCL 397.201 et seq.

NW2d 430 (1986). The most instructive tool for discerning the circumstances surrounding the adoption of the provision is the floor debates in the Constitutional Convention record. This Court has said that the debates are particularly helpful "when we find in the debates a recurring thread of explanation binding together the whole of a constitutional concept". House Speaker v Governor, 443 Mich 560, 581; 506 NW2d 190 (1993) (quoting Regents of the University of Michigan v State of Michigan, 395 Mich 52, 59-60; 235 NW2d 1 (1975)).

Some of the comments of the delegates were even used in the text of the Address to the People. Delegate Brown noted that the predicate for making service "available" throughout the state was the elimination of the requirement of having a library in every township:

> Now, because each county solves the library problem in its own particular way, the committee on education felt that it would be advisable to generalize the language in the first portion of our proposal, and that was simply to say that **because as a practical matter you are not having today a library in every township, we will simply say that we will extend library services so that they will be available throughout the state;** that this will encompass those areas where they want to have a small, independent library, and also take care of those problems where they think perhaps a group or area library would be better suited for their needs. (Emphasis added). 1 Official Record, Constitutional Convention 1961, p. 831 (19a).

Clearly, as was set forth in the Address, the delegates intended for existing libraries to fill the void in service created by the failure of so many local communities to build their own libraries.

Although this statement of intent was incorporated into both the text of art 8, §9 and the Address to the People, the delegates chose not to require existing public libraries to provide service to state residents in any particular manner or form. Instead, they left it to the discretion of the legislature to enact legislation to effectuate the statement of intent. Delegate Bentley, Chairman of the Committee on Education, stated as follows:

> **The present language emphasizes that 'public' libraries will be**

> **'available' to residents without fixing how or where the libraries themselves shall be organized. The committee presumes that legislation may be written so that each library may make reasonable rules for the use and control of its books**.
>
> Under this proposal present libraries will be retained. But to make libraries more available to the people their services may be expanded through cooperation, consolidation, branches and bookmobiles. (Emphasis added) Id at 822 (10a).

Delegate Bentley's statement on "availability" was also incorporated into the Address of the People.

It was suggested by another delegate that the "available" language be stricken so that the establishment of public libraries could be wholly covered by legislation (23a). Delegate Bentley reiterated the stance of the committee that drafted the language:

> I suppose that it is possible to cover a great many things by statute, but the committee on education felt that a broad, general statement of encouraging the extension of library services throughout the state to all its residents, through various media, would be helpful, useful and timely to place in the constitution. Id at 835 (23a).

There can be no question that "available", although undefined, was a term of encouragement, rather than a mandate, to the libraries of the state.

The debate on "available" focused on services to nonresidents. As stated above, library service was already available free of charge to residents of communities owning a library. The delegates debated whether the proposed language would require existing libraries to provide free service to nonresidents.

Delegate Andrus, the chairperson of the subcommittee on libraries, was adamant that the new language would not require free library service to nonresidents:

> Detroit is having certain of the communities nearby paying so much in to the Detroit library, and then the people there may have library cards. Birmingham is doing the same. **It would be done that way by the surrounding communities paying a certain**

> **amount to your library, and all could use it, or they can charge - as Mr. Bentley just said - to the individuals who will use it.**
>
> **One of the first problems that came up was, people said,** “**we don’t want to have to pay for our library and then have other people use it**.” **We don’t mean that by this language**. It is not considered, in any sense. That will be a matter to be worked out. As I said, there are 5 counties working together in the upper part of the state at the present time, all contributing to a common fund which can be utilized throughout that area. We want to get away from that township and city each having a library and having a broader base, which will be available.
>
> * * * * * * * * *
>
> **If it is available, but it doesn’t say free** (Emphasis added). Id at 835 (23a).

Earlier in the debate, Delegate Andrus provided numerous examples of how her subcommittee on libraries envisioned the future of library service under art 8, §9:

> Most of the townships have not been able to support a library and so we feel, let’s not ask each city and township to have a library in the future, as we have in the other constitutions, but we are asking for public libraries which shall be available to all residents of the state. Now, several people have asked us about this. **Does that mean if someone else doesn’t have a library, are they going to be able to use our books that we have had to pay for? So we have made this as clear as we can in speaking to people. The libraries will be kept as they are now or as you wish them, but near Detroit - perhaps some of you have read this in the Detroit papers - there are some small suburbs or communities which haven’t been able, they have felt, to support a library, and if they wanted to use books in the Detroit library they had to pay a very large fee. So Detroit has arranged for 3 of these communities that the community pays a certain amount to the Detroit library and then the Detroit library gives the residents of those areas library cards and they may use them. Birmingham is doing the same. I had a letter from the libraries in Birmingham and they are doing the same with neighboring communities who can’t afford to keep the library that they would like. I also had a letter from Petoskey, I think it was. There are 5 communities around the Muskegon area who have gone in together so that they can purchase these more expensive books and have them available for their people**. So it will be done in different ways but we hope by

> eliminating this particular provision - for instance, a village library can't get any state aid at present, it is just cities and township the way we have it - we have eliminated any particular locality so anyone who wishes may have a library of their own. **They may combine together the different ways in which they can do this**. (Emphasis added) Id at 823-824 (11a-12a).

From this portion of the debate, it is clear that the delegates intended three things; first, that it would be up to the existing libraries to make **themselves** available to nonresidents; second, that it could be done on a community or individual basis; and third, that the libraries could charge for services provided to communities or individual nonresidents.

The concept of service agreements between libraries and nearby communities was commonplace in 1963 and well-known to the delegates. The legislature had enacted numerous statutes that permitted libraries and nearby communities to enter into service agreements.

The Regional Library Act, MCL 397.151 et seq. (1931) provided that:

> The board of trustees of each regional library so established shall have the following powers:
>
> * * * * * * * * * *
>
> (f) To enter into **contracts to receive service** from or give service to libraries within or without the region and to give service to municipalities without the region which have no libraries. . . (Emphasis added). MCL 397.151.

The City, Village and Township Libraries Act, MCL 397.201 et seq. (1877) provided for service agreements and the authorization to pay for those services:

> (1) Notwithstanding a contrary city, village, or township charter provision, a township, village, or city adjacent to a township, village, or city that supports a free public circulating library and reading room under this act may **contract for the use of library services** with that adjacent township, village or city.
>
> (2) **A township, city, or village may pay for the use of library services contracted for** under subsection (1) by levying a tax not to exceed 2 mills of its state equalized valuation, by use of money from the municipality's general fund, or with money received

> under Act No. 59 of the Public Acts of 1964, being sections 397.31 to 397.40 of the Michigan Compiled Laws. A tax shall not be levied or increased under this section unless a majority of the electors of the municipality voting on the question vote in favor of the tax. (Emphasis added). MCL 397.213.
>
> * * * * * * * * * *
>
> (2) Notwithstanding any contrary provision in a township, city, or village charter, the library board of directors of a township, city, or village supporting and maintaining a free public circulating library and reading room under this act, or under any special act, **may enter into a contract with another township, city, or village to permit the residents of that other township, city, or village the full use of the library and reading room**, upon terms and conditions to be agreed upon between the library board of directors and the legislative body of the other township, city or village. A contract entered into pursuant to this subsection shall be executed for a term of 3 years, shall be automatically extended for an indefinite term after the initial 3-year period, and shall be terminable by either party only on the giving of 6 months' notice of the intent to terminate the contract. (Emphasis added). MCL 397.214(2).

The County Libraries Act, MCL 397.301, et seq. (1917) also provided that the county may enter into a service contract with a public library within the county:

> The board of supervisors of any county shall have the power to establish a public library free for the use of the inhabitants of such county and **they may contract for the use, for such purposes, of a public library already established within the county**, with the body having control of such library, to furnish library service to the people of the county under such terms and conditions as may be stated in such contract. The amount agreed to be paid for such service under such contract and the amount which the board may appropriate for the purpose of establishing and maintaining a public library shall be a charge upon the county and the board may annually levy a tax on the taxable property of the county, to be levied and collected in like manner as other taxes in said county and paid to the county treasurer of said county and to be known as the library fund. (Emphasis added). MCL 397.301.

Counties were also permitted to enter into service contracts with other counties or municipalities to secure library service for county residents:

> Any county possessing a county library or any board of trustees of a regional library **may enter into a contract** with 1 or more counties, township, villages, cities and/or other municipalities to secure to the residents of such municipality such library service as may be agreed upon, and the money received for the furnishing of such service shall be deposited to the credit of the library fund. Any municipality contracting for such library service shall have the power to levy a library tax in the same manner and amount as authorized in section 1 hereof for the purpose of paying therefore. Any municipality contracting for such library service may at any time establish a public library free for the use of its inhabitants, whereupon its contract for said service may be continued or terminated on such terms as may be agreed upon between the parties thereto. (Emphasis added). MCL 397.305.

Finally, the Public Libraries Act, MCL 397.471, et seq. (1952), permitted public libraries throughout the state to enter into agreements to share or provide library services:

> The officers, agency or other authority charged by law with the maintenance and operation of any library for general public use **may enter into and perform contracts or arrangements** with the officers, agency, or other authority likewise charged in respect of any other such library for cooperation and coordination in the maintenance and operation of the libraries to avoid unnecessary duplication and at the same time promote the widest public use of books, manuscripts and other materials and facilities and bring about the supplementing of the 1 library by the other, which may include the accumulating of books, manuscripts and other materials and facilities, to whichever library belonging, of the same general nature or pertaining to the same general subject in such library as will best facilitate access thereto and promote the best use thereof by the members of the public desiring so to do.
>
> The officers, agencies or other authorities, jointly or severally, may enter into contracts or arrangement to make available to political subdivisions of the state, including school districts, otherwise authorized by law to maintain libraries, such library service and facilities as will promote the widest public use of books and avoid unnecessary duplication and expense. MCL 397.471
>
> **Such contracts and arrangements may be made between and among any number of such libraries**. Any library supported in whole or in part by taxes or other public funds or competent in law to be so supported shall be eligible to be included in any such contract or arrangement by whatever authority such library may be

> maintained and operated. Residents of the territory subject to taxation for support of any library entering into any such contracts or arrangements shall have such rights and privileges in the use of the respective libraries entering into like contracts and arrangements as shall be provided therein. If the expenditures generally of such library shall by the law under which maintained and operated be subject to being budgeted and approved, any expenditure by such library required for carrying out any such contract or arrangement shall be likewise so subject.
>
> The provision hereof shall be broadly and liberally construed and applied and any provision in any contract or arrangement reasonably tending to effectuate in any part the intents and purposes hereto shall be deemed within the authority hereby granted. Any political subdivision of the state, including school districts, now or hereafter authorized by law to establish or maintain libraries or library services, may enter into contracts or arrangements for library services and facilities provided in section 1 and provide for the payments of obligations arising from such contracts or arrangements by resolution of the legislative body of the political subdivision or school district or in any other manner provided by law. (Emphasis added). MCL 397.472.

All of the foregoing statutes were in place and known to the delegates when they drafted art 8, §9. Under these statutes, library service was being provided to residents of communities without libraries all over the state. Moreover, the service being provided was not free. Even if a library was not charging nonresidents directly for service on an individual basis, the communities obtaining the service were paying for the service under the terms of the contract. Whether or not the cost of the service was passed along to the nonresident in the form of property taxes, the service was definitely not free. It was in this landscape that the delegates voted to encourage existing public libraries to extend their services throughout the state.

The delegates that sat on the Committee on Education, drafters of the original language of art 8, §9, were very clear in emphasizing to the other delegates that it would be up to the existing libraries and the municipalities to decide on the type of arrangement that would fit the needs of all parties. Delegate Brown gave the example of how a community could elect to have

its own small library, or join together with other communities to form a group or area library. 1 Official Record, Constitutional Convention 1961, p. 831 (19a). Delegate Andrus gave examples of the service contracts in Detroit, Birmingham and Petoskey, and indicted that it would be up to the libraries and communities to work out the details of broadening the population base of the library. Id at 823-824; 835 (11a-12a; 23a).

Not one delegate that sat on the Committee on Education expressed the view in the debates that "available" would **require** every public library in the state to offer residential privileges to every state resident, free or not. The clear intent of the delegates that drafted the text was to make a statement of encouragement, rather than mandatory action, as can be seen from the following dialogue between Delegates Bentley and Higgs:

> MR. BENTLEY: We think, Mr. Higgs, that a general statement of intent, such as we have included here, was desirable to show that the library services, whether intended through branch libraries, bookmobiles or what else you have, may be extended to those residents of the state who are not now adequately provided with library services. **But I repeat, that so far as working out the rules for individual libraries to govern the use and control of their books, the committee felt that this matter was and should be statutory**.
>
> MR. HIGGS: My question was whether or not this particular language which Delegate Leibrand seeks to strike ["which shall be available to all residents of the state"] is not possibly covered by statute. Isn't that perfectly possible to cover that by statute?
>
> MR. BENTLEY: I suppose that it is possible to cover a great many things by statute, but the committee on education felt that a broad, general statement of encouraging the extension of library services throughout the state to all its residents, through various media, would be **helpful, useful and timely** to place in the constitution. (Emphasis added). 1 Official Record, Constitutional Convention 1961, p. 835 (23a).

It is clear that Delegate Bentley did not intend for art 8, §9 to require mandatory action.

Although no delegate publicly advocated the mandatory offering of full residential

privileges to nonresidents, Delegate Higgs expressed concern that the original version of the text might be read to require that every public library offer full borrowing privileges to all state residents, free of charges or other restrictions. Id at 836 (24a).

The original text of art 8, §9 stated as follows:

> The legislature shall provide by law for the establishment and support of public libraries which shall be available to all residents of the state. All fines assessed and collected in the several counties, cities and townships for any breach of the penal laws shall be exclusively applied to the support of such public libraries as provided by law.

Although the delegates responsible for drafting the language disagreed with Delegate Higgs' broad interpretation, other delegates expressed concern that the Supreme Court would construe the language broadly and not consider the clear intention of the delegates as set forth in the record of the debates. Id at 836 (24a).

To diminish that possibility, an amendment was proposed to add the following language to the end of the first sentence of art 8, §9: "**under reasonable regulations**". Several delegates saw no reason to add the proposed language. Delegate Kuhn argued that just because libraries are "available" that does not mean there are no standards. Id at 836 (24a). However, in the end, the delegates wanted to take no chances that their intentions would be misinterpreted by this Court:

> MR. STEVENS: Mr. Chairman and fellow members, **it is crystal clear what the committee intends. What is not crystal clear is what the court will interpret**. The construction of the court, as has been pointed out, is based on the language. I see no objection to making it clear, even to the supreme court. (laughter). Id at 837 (25a).

Therefore, the amendment was adopted and the foregoing language was added to the text.

When the final version was presented to the full convention for approval, Delegate

Bentley reiterated the intention of his committee in proposing art 8, §9:

> . . . the intent of the committee on style and drafting would be that local governing bodies of these various public libraries would be able to pass reasonable regulations regarding the accessibility and the availability of their individual libraries to residents of the state; particularly, I suppose, in cases where the applicant for a book or a periodical was not an immediate resident of the locality. 2 Official Record, Constitutional Convention, p. 2561 (39b).

He later added that:

> **the question of who could use the library and regulations under which they could use it, was to be entirely left in the hands of the local governing boards and not to be a question of determination by any state authority**. (Emphasis added). Id at 2562 (40b).

The statement of the drafters' intent could not be any clearer. The libraries themselves were to retain complete control over who could use their libraries and under what conditions. The proposed text was then approved by the convention.

In his Appellant's Brief, Mr. Goldstone argues that if the delegates intended to give local libraries the final word on their borrowing policies, they would have simply said so in the text of art 8, §9 (Appellant's Brief, p. 15). It can be argued just as forcefully that the delegates could have **required** all public libraries to offer borrowing privileges to all state residents by simply stating so in the Constitution. The fact that art 8, §9 leaves regulation of "available" to the local libraries, confirms that the delegates did **not** intend to make borrowing privileges mandatory.

Furthermore, the personal opinions of delegates Higgs and Downs, as expressed in their affidavits and amicus briefs, are irrelevant to this discussion (82a-86a; 89a). Board of Education of Presque Isle Township School District No. 8 v Presque Isle County Board of Education, 364 Mich 605, 612; 111 NW2d 853 (1961); Cole v Ladbroke Racing Michigan, Inc, 241 Mich App 1, 12; 614 NW2d 169 (2000) (quoting Justice Scalia in Sullivan v Finkelstein, 496 US 617, 632;

110 S Ct 2658; 110 L Ed 2d 563 (1990): ". . . the views of a legislator concerning a statute already enacted are entitled to no more weight than the views of a judge concerning a statute not yet passed.").

Mr. Goldstone also relies heavily on Attorney General Opinion No. 5739, which supports his interpretation of the Constitution. However, the conclusion of the opinion is simply wrong. After reviewing the text of the Constitution and selected excerpts from the debates, the Attorney General reached the following conclusion:

> Clearly, under the constitutional mandate, and the Convention debates, the right of state residents to use the facilities of any public library includes not only the right to enter a public library and read books there, but the same right to borrow books that is offered to residents of the community in which the library is established subject to reasonable regulations.
> The framers of Const 1963, art 8, §9 did not intend to create, or perpetuate, a library system where library privileges are not provided to state residents on an equal basis (Citations omitted). OAG 1980, No. 5739, p. 874 (July 15, 1980) (29a).

There is absolutely no authority to support this erroneous conclusion.

The definition of "available" cited in the opinion is "capable of use" for a specific purpose.[3] As previously discussed, the library is capable of many uses, of which book borrowing is only one. In addition, the opinion makes the unsupported assumption that the drafters of art 8, §9 did not intend to provide unequal privileges between residents and nonresidents. In fact, not a single delegate can be quoted from the debates as supporting a system where residents and nonresidents are provided with the same privileges. To the contrary, the sole purpose for including the language allowing local regulation was to permit the libraries to make special rules for nonresident use. The Attorney General even concedes that the delegates contemplated that libraries could regulate nonresident privileges. Id at 875 (30a). The Attorney General's

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[3] Id at 874 citing Bay City Dredge Works v Fox, 245 Mich 523, 525; 222 NW 747 (1929) (29a).

conclusion is clearly at odds with the facts.

Not only is the opinion unpersuasive, it is not binding on this or any other court in Michigan. People v Waterman, 137 Mich App 429, 439; 358 NW2d 602 (1984). Although such opinions are binding on state agencies, Mr. Goldstone incorrectly claims that BTPL and its "allies" are "state agencies" (Appellant's Brief, p. 23). BTPL is an agency of Bloomfield Township, not the state. Nor are the Michigan Library Association, the Michigan Townships Association, or the Michigan Municipal League state agencies. Therefore, while the Attorney General's opinion on this matter is entitled to consideration, its persuasiveness is compromised by the lack of support for its conclusion.

There is a clear "recurring thread of explanation" in the debates that clarifies the meaning of "available". Regents of the University of Michigan, supra at 59-60. The drafters put language into the Constitution for the sole purpose of demonstrating to this Court and the people of the state that the local libraries were to have exclusive control over the use of their books and facilities by nonresidents. The debates could not have been clearer on this point.

The debates lead to the following conclusions on the meaning of "available":

1. The delegates were looking to fill the void in service, that existed in those communities without a library;

2. By relieving those communities without a library from the obligation of having to build their own, the delegates sought to encourage those communities to obtain library service from existing public libraries;

3. The delegates envisioned an expansion of the existing practice of library service agreements, regional libraries and multi-community libraries to fill the void in those communities without service;

4. The delegates expected that any service made available to nonresidents would be at a cost to either the individual or the community, as was the existing practice throughout the

state;

5. The delegates recognized that the local governing body of each public library would have the right to regulate the extent and cost of its service to nonresidents;

6. The delegates did not intend to require every public library to provide full library privileges to every state resident, even if permitted to charge for those privileges.

F. Legislative Action

Following the adoption of art 8, §9 in 1964, the legislature has passed two acts to encourage public libraries to expand their services to nonresidents. The first such statute was the State Aid to Public Libraries Act of 1965, MCL 397.501 et seq [now repealed] (41b).

Basically, this act created "library systems" and rewarded participating libraries by providing additional state aid. A library system was either a single library or a combination of libraries serving a large part of the state's population or geographic area. The act provided state aid to a library system based on the density of the population it served. This was in addition to the normal state aid awarded to any library that received a minimum amount of local tax support (43b).

While the act permitted all residents of the library system to use the facilities and resources of the member libraries, there was no requirement that the service provided to nonresidents of a member library be free. MCL 397.511 (43b). The library system board could not deprive any local library board of any of its powers or property. MCL 397.509 (42b).

The adoption of this statute established that the legislature did not interpret art 8, §9 to **require** all public libraries to provide full privileges to all state residents. There was a specific residency requirement which was inconsistent with an intention to eliminate residency preferences throughout the state. The statute retained the regulating power of the local library

boards, consistent with art 8, §9. It encouraged public libraries to serve larger populations and greater geographic areas by combining and by awarding additional state aid. Finally, the legislature did not repeal any of the existing statutes that provided for service agreements, all of which would have been superfluous if public libraries were required to provide full service to every state resident.

In 1977, the 1965 act was repealed and replaced with the State Aid to Public Libraries Act, MCL 397.551 et seq. The new act did not change the basic concept of encouraging existing libraries to expand their services to larger populations and geographic areas. Instead of library "systems", libraries were encouraged to form "cooperatives". Cooperative libraries were made up of individual libraries agreeing to share resources and services with the other libraries in the cooperative (44b).

As in the prior act, library privileges are restricted to the residents of the geographic areas served by the cooperative:

> Following establishment of a cooperative board, **residents** of the cooperative library's area are eligible to use the facilities and resources of the member libraries subject to the rules of the cooperative library plan. Services of the cooperative library, including those of participating libraries, are to be available at reasonable times and on an equal basis within the areas served **to schoolchildren, individuals in public and nonpublic institutions of learning, and a student or resident within the area.** An applicant refused service may appeal to the department, which shall review the operation of the cooperative library and may withhold state aid funds until the services are granted. (Emphasis added). MCL 397.560 (46b).

Additional state aid is granted to those libraries who participate in a cooperative.

Several aspects of the new act are noteworthy. First and foremost, a requirement of membership in a cooperative is that the participating library:

> Maintain an open door policy to the residents of the state as

> provided by section 9 of article VIII of the state constitution of 1963. MCL 397.555(d) (44b).

This is the first and only reference to art 8, §9 in any statute passed since 1963.

Although there is no definition for "open door policy" in the statute, it is clearly analogous to the "available" requirement of art 8, §9. This leads to two conclusions regarding the legislature's interpretation of "available":

First, if all public libraries were required to maintain an "open door policy", then there would be no need to make it a requirement for membership in a cooperative. Second, if an "open door policy" requires full privileges for all state residents, then the residency requirements in MCL 397.561 are meaningless.

The legislature understood that art 8, §9 did not require all public libraries to provide full residential privileges to all state residents. The legislature also drew a distinction between the service to be afforded state residents under the "open door policy" and the service offered cooperative residents. Courts must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory. Jarrad v Integon National Insurance Co, 472 Mich 207; 222-223; 696 NW2d 621 (2005). MCL 397. 555(d) and 397.561 would be rendered nugatory under Mr. Goldstone's interpretation of art 8, §9.

Although a library may be a member of a cooperative, there is nothing in the statute that requires a library to offer the same services to cooperative residents as are offered to the residents of the library's service area. The statute defines a "public library" as one established for **free** public purposes by a county, city, township, etc. MCL 397.552(d) (44b). By law, local libraries are free to the residents of the community that establishes them; e.g. MCL 397.214(1). Yet, a local library is entitled to charge a fee to nonresidents of the cooperative area if it chooses

to extend borrowing privileges to a nonresident of its community. MCL 397.561a (46b). Therefore, according to the legislature, an "open door policy" does not require a local library to offer full residential privileges to all state residents, even for a fee. Nor does it even require a library to offer the same privileges offered to cooperative residents.

G. What "available" means under art 8, §9

There is ample support for **rejecting** the proposition that art 8, §9 **requires** all public libraries to offer full residential privileges, including borrowing rights, to all state residents. There is nothing inherent in the word "available" that would require such a conclusion. The Address to the People does not suggest that art 8, §9 was intended to provide nonresidents with the same privileges provided to residents who support a local library, although clearly some level of service is not only encouraged, but expected.

The delegate debates from the Constitutional Convention reflect a desire to see libraries extend and expand their service areas, but not at the expense of local control over the library's resources and facilities. The distinction between residential and nonresidential service, including the cost of nonresidential service, is clearly articulated, as is the right of the local library to determine the extent of that service.

Finally, the legislature has accepted the mandate of art 8, §9 to adopt legislation to encourage local libraries to expand their service areas by offering additional state aid to do so. Yet the legislature treats compliance with art 8, §9 as voluntary and distinguishes between services that are provided to residents and nonresidents.

In the final analysis, if art 8, §9 is to be read as creating a level of service, it should only be read to require public libraries to open their doors to all state residents. It should guarantee **access** to the resources of every public library, so that no state resident is denied the

ability to obtain information and knowledge, otherwise available to every other state resident.

In construing "available" under art 8, §9, this Court must honor the rule that requires that a provision be interpreted to give reasonable effect to all, not just some, of its parts. House Speaker v Governor, supra at 579. Availability is subject to the regulations of the local governing body of each library. Therefore, the extent of access, including the right to borrow books and the cost of availability to nonresidents, is within the exclusive control of the libraries themselves, so long as the regulations are reasonable.

Requiring libraries to provide onsite access to all state residents is consistent with the plain meaning of the text, the Address to the People and the convention debates. It addresses the abolition of the former constitutional requirement that each township and city have its own library. It provides the expansion of library service to nonresidents, without requiring the residents of communities with libraries to subsidize that use.

Importantly, onsite access to all is consistent with the First Amendment right of public access to information and ideas. In Kreimer v Bureau of Police for the Town of Morristown, 958 F2d 1242 (CA 3, 1992) the Third Circuit Court of Appeals addressed a public library's policies against loitering and offensive conduct. The Court stated as follows:

> Our review of the Supreme Court's decisions confirms that **the First Amendment does not merely prohibit the government from enacting laws that censor information, but additionally encompasses the positive right of public access to information and ideas**. *Pico* [*Board of Education v Pico*, 457 US 853, 102 S Ct 2799, 73 L Ed 2d 435 (1982)] signifies that, consistent with other First Amendment principles, the right to receive information is not unfettered and may give way to significant countervailing interests. At the threshold, however, this right, first recognized in *Martin* [*v City of Struthens*, 319 US 141, 63 S Ct 862, 87 L Ed 1313 (1943)] and refined in later First Amendment jurisprudence, includes the right to some level of access to a public library, the quintessential locus of the receipt of information. Id at 1255.

The delegates to the Constitutional Convention did not discuss the implications of the First Amendment nor did they have the benefit of the Kreimer decision. Furthermore, even Kreimer acknowledges that the public library in question could be limited to the use of the residents of the community that created it. Id at 1260. However, in light of the fact that art 8, §9 states that public libraries shall be available to **all** residents of the state, requiring access that is minimally coextensive with the requirements of the First Amendment meets the expectations of the people that voted for it, without usurping the power of the local library boards to regulate that use. As Kreimer notes, even "the right to receive information is not unfettered". Id at 1255.

H. Regulation by the local libraries

The delegates did not intend to limit local regulation to the hours that the library would be open. As Delegate Bentley stated, the purpose of adding the section on regulations was to enable the library to regulate the accessibility of their library to nonresidents. 2 Official Record, Constitutional Convention, pp. 2561-2562 (39b). Since local libraries already possessed the exclusive right to control access and availability to their own residents, there was no other reason to add the regulatory language to the text of art 8, §9 other than to permit the libraries to exercise that same control over nonresident use as well.

It is the regulation of nonresident use by the BTPL that prompted Mr. Goldstone's lawsuit. The BTPL was exercising its constitutional right to limit Mr. Goldstone's access to provide him with onsite use of the library's resources, without denying him his constitutional right to receive information. The BTPL's policy of not issuing individual borrowing privileges to nonresidents does not deny availability under art 8, §9 and is a proper exercise of its discretion to regulate the use of its library by nonresidents.

There is nothing onerous or unreasonable about BTPL's policy of not permitting Mr.

Goldstone to remove books from the library. Borrowing privileges are not an inherent part of obtaining information. Reference books are often not available for removal, even to residents with privileges. There are budgetary, planning and administrative reasons why BTPL chooses not to issue borrowing privileges to individual nonresidents. One primary reason is that it would hamper the library's efforts to attract service agreements with other communities.

The relationship between service agreements and art 8, §9 cannot be overemphasized. Service agreements were the primary alternative to a community's obligation to build its own library. The majority of Michigan's libraries provide contractual service to other communities according to the Michigan Library Association (58a). The City of Bloomfield Hills received the same service as BTPL's residents for nearly 40 years under their service agreements.

The delegates to the Constitutional Convention and the legislature hoped to encourage the expansion of these agreements because they provide the "have-not" communities with a lower cost alternative to building a library, and they provide much needed revenue to existing libraries. Yet, it is obvious that if libraries are required to provide full service to every state resident that requests it, there will be no incentive for a community without a library to seek a service agreement. This is exactly what has happened in Bloomfield Hills, where the city has made an economic decision to forego pursuit of a service agreement, so that residents like Mr. Goldstone can obtain individual services. The delegates understood this and drafted art 8, §9 to permit libraries to take advantage of the existing legislation.

If an individual has a constitutional right to demand full library service as a nonresident, even at a cost, the individual's community can justify its refusal to seek a service agreement on the basis that only those residents who desire service will have to pay for it. Ironically, that choice is not available to the residents of a community who actually build and maintain a library

with their taxes because when the majority approves a millage to support a library, every household must pay its share, whether its residents use the library or not.

An amicus curiae brief was filed on behalf of the Michigan Library Association, Michigan Townships Association, and the Michigan Municipal League. BTPL adopts the arguments contained therein, especially with regard to the public policy discussion concerning the impact of Mr. Goldstone's interpretation of art 8, §9 on the existing system of library service in Michigan. The amicus brief presents a unique perspective from the standpoint of the rest of the state's libraries **and** from the communities that **have**, **and do not have**, public libraries. The arguments contained therein demonstrate that Mr. Goldstone's interpretation is completely inconsistent with the goals of the delegates that drafted art 8, §9. Mr. Goldstone's interpretation would spell the end of service agreements. Neither the delegates to the Constitutional Convention nor the legislature sought to achieve that possibility.

BTPL goes beyond what art 8, §9 requires by providing free onsite access to individual nonresidents. There is nothing in art 8, §9 or in any statute that requires a public library to provide any services to nonresidents free of charge. Residents who pay taxes to maintain their library are paying for far more than the direct cost of borrowing books. Any public library in the state could conceivably charge a nonresident fee just for access to the library, so long as the fee is reasonably related to the service provided. If a library can charge a fee to a nonresident for borrowing privileges, it can charge a fee for any other services it provides. MCL 397.561a.

Nor does the First Amendment prohibit a public library from charging a fee to nonresidents for access. People pay fees for access to information every day in the form of magazine subscriptions, cable television service, internet usage and movie theater admissions, to name only a few examples. By law, library access is free to local residents, but that is not the

case for nonresidents. BTPL provides an enormous amount of free services to nonresidents, notwithstanding its refusal to issue individual nonresident library cards.

Mr. Goldstone argues that if libraries are free to set their own fees for service, there will be no statewide uniformity (Appellant's Brief, p. 6). The Constitution does not require uniformity in fees, service agreements or taxes. Art 8, §9 expressly allows local library boards to regulate the usage of their library. Each local board is entitled to set a reasonable fee for nonresident use, or not, as it deems appropriate.

Charging for library privileges is **not** analogous to charging for police, fire, or recreational services. The Constitution does not require communities to provide police, fire or recreational services or facilities to all state residents. A city can charge any fee it wishes for nonresident use of a municipal golf course, or it can bar nonresidents altogether. No community is required to offer police or fire protection to any other Michigan community.

The decision not to issue individual library cards is no different than limiting the number of books or the type of materials a nonresident could borrow. These are all examples of local regulation that is expressly provided for in art 8, §9. The Address to the People and the debates leave no doubt that art 8, §9 permits local libraries to treat nonresidents differently from residents. So long as access is available onsite to all state residents, even at a reasonable cost, no court in this state should have to determine whether library service is "available" if residential and nonresidential privileges are not equal. Art 8, §9 does not require full equality in privileges between all state residents so long as access is available to all.

II

APPELLANT ABANDONED HIS EQUAL PROTECTION AND FIRST AMENDMENT CLAIMS BY FAILING TO ADEQUATELY BRIEF AND ARGUE THOSE CLAIMS IN THE COURT OF APPEALS

A. Standard of Review

BTPL agrees that the standard of review of constitutional questions is *de novo*, when the issue has not been abandoned in the Court of Appeals.

B. Argument

In the trial court, Mr. Goldstone claimed that BTPL's conduct violated the Equal Protection Clauses in both the federal and state constitutions. However, his argument was nearly invisible. He did not engage in the detailed analysis normally required when constitutional issues are raised. Mr. Goldstone cited only one case to the court, Ludtke v Kuhn, 461 F Supp 86 (SDNY, 1978), but failed to show how the case was even remotely analogous, factually or legally, to the case at bar. BTPL responded with citations to several cases establishing that residential restrictions on the use of governmental services do not violate the Equal Protection Clause. The trial court rejected Mr. Goldstone's equal protection arguments on the basis of the authority provided by BTPL.

Mr. Goldstone's argument on this issue in the Court of Appeals was equally vacuous. Not only did Mr. Goldstone fail to address the cases cited by the trial court, he offered nothing in the way of analysis or authority to support his claim. He did not even argue the merits of the only case he cited, Ludtke, but merely criticized the trial court for failing to address it.

Mr. Goldstone also failed to present any argument or support for his First Amendment claim. In the trial court, Mr. Goldstone mentioned the First Amendment, but made no argument

whatsoever as to its applicability in his Motion for Summary Disposition. In the Court of Appeals, Mr. Goldstone did not argue the First Amendment, but only mentioned it in the Statement of Questions Presented in his Appellant's Brief as being raised "by implication". No authority was provided as to why the First Amendment was applicable. The Court of Appeals held that Mr. Goldstone had abandoned his equal protection and First Amendment claims by failing to adequately provide citation to authority or argument (81a).

Mr. Goldstone argues that citation to authority and argument are not necessary as to these issues because BTPL has admitted that it was subject to both the Fourteenth and First Amendments (Appellant's Brief, p. 34). BTPL acknowledges that it is indeed subject to the First and Fourteenth Amendments, just like a citizen of the United States. However, the issue is not the applicability of the Amendments, but whether BTPL's actions have violated the rights of Mr. Goldstone guaranteed by those Amendments. The burden of proving a violation rests with Mr. Goldstone and that burden clearly requires the citation of authority and argument. The Court of Appeals properly deemed that Mr. Goldstone had abandoned his equal protection and First Amendment Claims (81a).

While there is no doubt that this Court can choose to hear and decide any issue that comes before it, such discretion is not exercised without limits. Ironically, Mr. Goldstone again fails to provide any authority describing the circumstances under which this Court may agree to decide an issue that was inadequately presented to the courts below.

When this Court has decided to consider an issue not argued in the trial court or Court of Appeals, it has done so if consideration of the issue is necessary to a proper determination of a case. Sands Appliance Services, Inc v Wilson, 463 Mich 231, 239; 615 NW2d 241 (2000);

Swartz v Dow Chemical Company, 414 Mich 433, 446; 326 NW2d 804 (1982). However, in those instances, the issue was never presented to the court below.

When the appellant has presented an issue in the court below, but failed to adequately argue or support that issue with any authority, then this Court, like the Court of Appeals, will not do the work for the appellant and has refused to address the issue. Wilson v Taylor, 457 Mich 232, 243; 577 NW2d 100 (1998). Mr. Goldstone attempted to gain some advantage in the lower courts by draping his cause in the First and Fourteenth Amendments, but he did not want to do the work required to present a cogent constitutional argument to the Court of Appeals.

The lack of authority and analysis to support a constitutional issue is fatal. The Court of Appeals has stated that it will not review an issue that an appellant fails to adequately present. In Peterson Novelties, Inc v City of Berkley, 259 Mich App 1; 672 NW2d 351 (2003), the Court stated as follows:

> Plaintiffs contend that defendant Anger was not a party to the original action and, thus, plaintiffs' claims are not be [sic] precluded. However, plaintiffs cite no authority for this contention. "A party may not leave it to this Court to search for authority to sustain or reject its position". *Magee v. Magee*, 218 Mich App 158, 161; 553 NW2d 363 (1996). An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003), nor may he give issues cursory treatment with little or no citation of supporting authority, *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984), after remand 211 Mich App 214 (1995). Argument must be supported by citation to appropriate authority or policy. MCR 7.212(C)(7); *Thomas v McGinnis*, 239 Mich App 636, 649; 609 NW2d 222 (2000); *Haefele v Meijer, Inc*, 165 Mich App 485, 494; 418 NW2d 900 (1987), remanded 431 Mich 853 (1988). An appellant's failure to properly address the merits of his assertion of error constitute abandonment of the issue. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Therefore, this issue is abandoned. *Id., Magee, supra* at 161. (Footnote omitted). Id at 14.

Mr. Goldstone effectively abandoned the equal protection argument in favor of his art 8, §9 claim when he stated in his Appellant's Brief that the Court of Appeals should look to the record on appeal to find the necessary facts and law to support his constitutional arguments. That is not the way that issues are presented to an appellate court. This Court should not allow Mr. Goldstone to do now what he should have done in the trial court and the Court of Appeals. This Court should consider his equal protection and First Amendment claims to have been abandoned.

III

A PUBLIC LIBRARY MAY LIMIT THE CIRCULATION OF ITS RESOURCES TO ITS RESIDENTS WITHOUT VIOLATING THE EQUAL PROTECTION CLAUSE IN THE FEDERAL AND MICHIGAN CONSTITUTIONS OR THE FIRST AMENDMENT TO THE FEDERAL CONSTITUTION.

A. Standard of Review

BTPL agrees that this Court reviews constitutional issues *de novo*.

B. Equal Protection

The Fourteenth Amendment to the United States Constitution states that "no state shall… deny to any person within its jurisdiction the equal protection of the law". The Michigan Constitution of 1963 states in art 1, §2 that no person shall be denied the equal protection of the law. Mr. Goldstone argues that BTPL, as a public institution, is prohibited by the Equal Protection Clauses of both constitutions from offering certain library privileges to residents of the Township and denying them to nonresidents. He also argues that the Cranbrook Agreement violates the Equal Protection Clause.

Mr. Goldstone is wrong because the Equal Protection Clause relates to equality between persons, rather than between areas. Salsburg v State of Maryland, 346 US 545, 551; 74 S Ct 280; 98 L Ed 281 (1954). In Salsburg, the United States Supreme Court held that Maryland had the right to prohibit the admission of illegally obtained evidence in certain counties, but not in others.[4] As the Court stated:

> There is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in

[4] Admission of illegally obtained evidence has since been held to be inadmissible throughout the United States under the Fourth Amendment to the United States Constitution.

> the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws. **It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances**.
>
> **The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right.** Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State. (Emphasis added) (Footnote omitted) Id.

Territorial uniformity is not a constitutional requisite. Andrews v Norton, 385 F Supp 672, 678 (D Conn, 1974); Cherry v Steiner, 543 F Supp 1270, 1280 (D Ariz, 1982).

Numerous jurisdictions have recognized that a state may provide certain services to its domiciled residents on a preferential basis without violating the Equal Protection Clause. Eastman v University of Michigan, 30 F3d 670, 673 (CA 6, 1994). States are permitted to charge preferential tuition rates to its own residents because a state has a legitimate interest in providing higher educational opportunities to its residents. Vlandis v Kline, 412 US 441; 93 S Ct 2230; 37 L Ed 2d 63 (1973); Spielberg v Board of Regents, University of Michigan, 681 F Supp 994, 1001 (ED Mich, 1985).

Residential restrictions on the use of public schools, parks, pools and golf courses have been uniformly upheld. In Martinez v Bynum, 461 US 321; 103 S Ct 1838; 75 L Ed 2d 879 (1983), Justice Powell stated:

> A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring

> that services provided for its residents are enjoyed only by residents. Such a requirement with respect to attendance in public free schools does not violate the Equal Protection Clause of the Fourteenth Amendment. [FN7] It does not burden or penalize the constitutional right of interstate travel, for any person is free to move to a State and to establish residence there. **A bona fide residence requirement simply requires that the person *does* establish residence before demanding the services that are restricted to residents**.
>
> > FN7. A bona fide residence requirement implicates no 'suspect' classification, and therefore is not subject to strict scrutiny. Indeed, there is nothing invidiously discriminatory about a bona fide residence requirement if it is uniformly applied. Thus the question is simply whether there is a rational basis for it. (Emphasis added). Id at 328-329.

The United States Supreme Court utilized the appropriate constitutional analysis in Martinez. It determined that a state has a "legitimate" and "substantial" interest in protecting and preserving the right of its own bona fide residents to attend its schools, colleges, and universities. Id at 327-328. Therefore, the rational basis test applies. In Martinez, the Court found that the test was satisfied because of the state's substantial interest in maintaining the quality of local public schools. Id at 329-330.

Mr. Goldstone presents a cursory review of the three tests utilized by the federal and Michigan courts when analyzing an equal protection claim. Although he cites the three tests, he fails to draw any conclusions as to which test should apply to the facts of this case.

This Court interprets the Equal Protection Clause in the Michigan Constitution to be co-extensive with its federal counterpart. Const 1963, art 1, §2; Harvey v State of Michigan, 469 Mich 1, 6; 664 NW2d 767 (2003). This Court also has held that interpretations of the Equal Protection Clause of the Fourteenth Amendment have accurately conveyed the meaning of Const 1963, art 1, §2 as well. Id.

In Crego v Coleman, 463 Mich 248; 615 NW2d 218 (2000), this Court described the three levels of review that accompany any equal protection challenge. The review is based on that conducted by the federal courts with regard to equal protection claims under the Fourteenth Amendment:

> When a party raises a viable equal protection challenge, the court is required to apply one of three traditional levels of review, depending on the nature of the alleged classification. The highest level of review, or "strict scrutiny", is invoked where the law results in classifications based on "suspect" factors such as race, national origin, or ethnicity, none of which are implicated in this case. *Plyler v Doe*, 457 US 202, 216-217; 102 S Ct 2382; 72 L Ed 2d 786 (1982). Absent the implication of these highly suspect categories, an equal protection challenge requires either rational-basis review or an intermediate, "heightened scrutiny" review. Id at 259.

Although Mr. Goldstone attempts to apply the "strict scrutiny" standard to BTPL's actions, it is obvious that the standard is not applicable here. BTPL is accused of providing services to its own residents that are not provided to the residents of a neighboring city. Mr. Goldstone also alleges that BTPL provides services to certain residents of the City that are not provided to other City residents through the Cranbrook Agreement. Since the alleged classifications are based on residency or an affiliation with the Cranbrook Institute, none of the "suspect" factors of race, national origin, or ethnicity are implicated. Therefore, as in Martinez, supra, the "strict scrutiny" standard is not relevant.

Neither is the "heightened scrutiny" standard review implicated herein. This standard has been applied to classifications based on illegitimacy and gender. Crego, supra at 260. Again, neither of these bases is implicated by BTPL's alleged classification of residents.

The final review is "rational basis" which was described by this Court as follows:

> Under rational-basis review, courts will uphold legislation as long as that legislation is rationally related to a legitimate government

> purpose. *Dandridge v Williams*, 397 US 471, 485; 90 S Ct 1153; 25 L Ed 2d 491 (1970). To prevail under this highly deferential standard of review, a challenger must show that the legislation is "arbitrary and wholly unrelated in a rational way to the objective of the statute". *Smith v Employment Security Comm*, 410 Mich 231, 271; 301 NW2d 285 (1981). A classification reviewed on this basis passes constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable. *Shavers v Attorney General*, 402 Mich 554, 613-614; 267 NW2d 72 (1978). Rational-basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with "mathematical nicety", or even whether it results in some inequity when put into practice. *O'Donnell v State Farm Mut Automobile Ins Co*, 404 Mich 524, 542; 273 NW2d 829 (1979). Rather, the statute is presumed constitutional, and the party challenging it bears a heavy burden of rebutting that presumption. *Shavers, supra*. Id at 259-260.

The United States Supreme Court utilized the "rational basis" standard when it reviewed the residence requirement adopted by the state of Texas which governed minors who wished to attend public free schools while living apart from their parents or guardians. The Court found that the residence requirement did not violate the Equal Protection Clause because a bona fide residency requirement furthers the substantial government interest in assuring that services provided for its residents are enjoyed only by its residents. Martinez, supra at 328.

In the case at bar, BTPL's residency requirement serves the same purpose. It ensures that the residents who support the library with their tax dollars will receive the full enjoyment of its services. There is nothing arbitrary about the classification because it is based on the situs of the taxpayers whose taxes support the library.

Nor does the Cranbrook Agreement require a different result. That contract was not made with certain residents of the City, but with an institution; the Cranbrook Educational Community and the Cranbrook Academy of Art. The contract provides for library services to be provided to students, staff and faculty of the Cranbrook Educational Community. The residency

of these persons is irrelevant to the contract. The fact that some of the contract beneficiaries are residents of the City does not create an equal protection violation because there is a rational basis for entering into the contract. The residents of the Township receive reciprocal privileges at certain of the Cranbrook facilities in exchange for providing library services to Cranbrook.

The Ludtke decision that Mr. Goldstone relies upon is completely distinguishable. Ludtke involved a female reporter's attempt to obtain locker room interviews following a sports event. The New York Yankees, with the approval of the commissioner of major league baseball, had adopted the policy of allowing only male reporters access to the locker room. The court, in striking down the policy, held that the policy, based on gender classifications, did not protect the privacy of the players so much as preserve an all-male locker room. Supra at 97.

Obviously, Ludtke fails to support Mr. Goldstone's position. It does not involve libraries, schools, or residency requirements. The decision is based on gender classifications, which are reviewed under the "heightened scrutiny" test and must serve important governmental objectives to withstand constitutional challenges. Supra at 97. Ludtke is completely irrelevant to the facts of this case.

Mr. Goldstone devotes pages of his brief to the plight of those City residents who cannot borrow books from BTPL. Yet he ignores the fact that he chose to live in the City, knowing full well that the City did not have its own library. Nobody forced Mr. Goldstone to live in the City. He could have chosen to live in the Township just so he could enjoy residential privileges at BTPL without being dependent on a service agreement to obtain those privileges. People frequently move to certain communities in order to send their children to a public school perceived as superior to one in another community.

Mr. Goldstone's reliance on the "plight" of Brent Mills, a City resident and student at the well-regarded, private Detroit Country Day School, is equally unpersuasive (Appellant's Brief, p. 3). Mr. Goldstone argues that Mills is at a scholastic disadvantage to his classmates who reside in the Township because they have access to the resources of the BTPL and he does not.

It is difficult to be sympathetic with Mills' position. He resides in one of the wealthiest communities in the country by choice. He attends an exclusive, private school by choice. He claims that there are no public schools in the City, but the website maintained by the Bloomfield Hills Schools lists 18 public schools available to the City's residents. Had Mills attended one of the City's public schools, he would have had access to the school library and would not be at a disadvantage to his classmates. Mills still enjoys access to all of BTPL's online data bases when he is onsite at BTPL. His disadvantage is one of convenience, and not substance.

Mills' complaint, and the complaint of every other resident of the City, including Mr. Goldstone, should be directed at the City and not BTPL. For 39 years, the City was able to provide full residential privileges for all of its residents at a fraction of the cost paid by the Township residents. When BTPL finally asked the City to pay its fair share (but not more than the share paid by Township residents) the City decided not to renew the contract. The City made an economic decision, just as it does every year when it decides what services it can afford to provide to its residents.

Mr. Goldstone has not been denied the equal protection of the laws under the Constitutions of the United States or Michigan. Like its federal counterparts, the Michigan Court of Appeals has held that legislation is not constitutionally invalid simply because it affects only one locality within the state. Hertel v Racing Commission, 68 Mich App 191, 198; 242 NW2d 526 (1976). BTPL is permitted by the United States and Michigan Constitutions to provide

preferential treatment to its own residents in the supply of library services. In the absence of a constitutional mandate that requires a public library to issue a library card to individual nonresidents, even at a fee, BTPL is entitled to deny individual nonresidents such as Mr. Goldstone, the privilege of borrowing materials from its public library.

C. First Amendment

Mr. Goldstone argues that the First Amendment guarantees a person's right to read and that any unreasonable limitation on that right violates the First Amendment.[5] Not surprisingly, he provides no authority to support his audacious statements.

Mr. Goldstone's "right to read" is actually classified by the United States Supreme Court as a freedom to receive speech. Martin v City of Struthers, 319 US 141, 146-147; 63 S CT 862; 87 L Ed 1313 (1943). In the context of public libraries, that freedom was given a thorough analysis in Kreimer v Bureau of Police for the Town of Morristown, supra.

Kreimer involved a public library which adopted rules governing patron conduct. A homeless person, who frequented the library, was expelled numerous times for violating these rules. The plaintiff brought suit seeking a declaration that the rules violated his constitutional rights under the First and Fourteenth Amendments.

The Court ultimately held that although the First Amendment guarantees a right to receive information, that right is not unfettered and may give way to significant countervailing interests. However, the right does require "some level of access to a public library". 958 F2d at 1255. Ultimately, the Court held that some of the library's policies on conduct within the library were unconstitutional.

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[5] "Congress shall make no law. . . abridging the freedom of speech. . ."

The major difference between the regulations in Kreimer and the residency requirement herein is that the BTPL does not deny nonresidents access to the library. The First Amendment freedom to receive speech and information is not restricted at all by BTPL. Any person, resident or nonresident, may come to BTPL and use its resources onsite. Nobody is denied the right to receive the information in BTPL's custody.

The restriction that BTPL imposes is on the ability to remove books from the library. That restriction was not discussed directly in Kreimer. However, the Third Circuit indirectly held that residency requirements do not constitute a violation of the First Amendment when it stated:

> Moreover, we do not face the more difficult scenario in which one individual possesses First Amendment rights and others do not. **Here, if the First Amendment protects the right to reasonable access to a public library, as we hold it does, this is a right shared equally by all residents of Morristown and Morris Township**. (Emphasis added). Id at 1264-1265.

By implication, the Court acknowledged that the First Amendment does not require the library to make its resources available to nonresidents, so long as it did not discriminate between its residents.[6]

Even if Kreimer cannot be read to support BTPL's residency requirement, it certainly establishes that the First Amendment is satisfied if some level of access is provided to the library's books and resources. It is undisputed that Mr. Goldstone and all other nonresidents have access. Mr. Goldstone has produced no authority to suggest that a restriction on the borrowing of books is an unreasonable limitation on the freedom to receive speech. Since Mr.

[6] The Third Circuit also rejected the equal protection claim of the plaintiff because its rules of conduct were not arbitrary. Id at 1269.

Goldstone's access to the books is not denied, he has failed to present a violation of the First Amendment.

RELIEF REQUESTED

For the foregoing reasons, Defendant-Appellee Bloomfield Township Public Library respectfully requests that this Honorable Court affirm the opinion of the Court of Appeals in this matter.

Respectfully submitted,

SEYBURN, KAHN, GINN,
BESS AND SERLIN, P.C.

By: __/s/ Barry M. Rosenbaum_________

Joel H. Serlin (P20224)
Barry M. Rosenbaum (P26487)
Attorneys for BTPL
2000 Town Center, Suite 1500
Southfield, MI 48075-1195
(248) 353-7620

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