

necessary municipal services for an essentially self contained and independent community. For a time the public function analysis encompassed labor camps, Peterson v. Tabersman Sugar Corporation, 478 F. 2d 73 (5th Cir. 1973), and shopping centers, Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968). However, this expanded applicability of the public function analysis was curtailed and reversed in Hudgens v. NLRB, 424 U.S. 507 (1976) and Flagg Bros. Marsh remained intact and was in effect restored as controlling law. In Marsh the owners of the company town performed and provided the full spectrum of traditional, exclusive, and necessary municipal functions. See also Flagg Bros. and Lloyd Corp. Ltd. v. Tanner, 407 U.S. 551, 569 (1972). Rose's apartment complexes are private residential subdivisions dependant upon the City of Lansing for municipal services. Rose's apartment complexes simply do not qualify as quasi-municipalities under the public function analysis as company town of Marsh.

The expansion of the Marsh public function analysis to shopping centers in Logan Valley, 391 U.S. at 318-319, was premised upon the shopping center's character as a "business block." As such it was freely open to the public for the exchange of goods, services, and ideas, and if publicly owned, would be a public forum. However, Rose's apartment complexes do not have "business blocks," nor are they open to the nonresident public. Moreover, Logan Valley was overruled by Hudgens, 424 U.S. at 518, and Flagg Bros., 436 U.S. at 159.

Plaintiffs further attempt to access Rose's property under the "accommodation theory" of Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551 (1972) where war protesters merely sought transient access inside a shopping mall to distribute handbills. These First Amendment speakers predicated their access on the inadequacy of alternative avenues of communication and the compatibility of their proposed use with the existing use. The lower courts granted and affirmed an injunction permitting handbill distribution in the mall. However, on appeal the Court reversed and remanded because the mall was not sufficiently dedicated to public use. In contrast, the facts of the present case are inapplicably dissimilar to Tanner. In the present case plaintiffs seek a permanent physical access and occupancy over Rose's private property and into private dwellings owned by Rose. Moreover, since the Court in Hudgens effectively undermined the accommodation theory considered in Tanner, this Court does not find it decisive or applicable to this present case.

Upon the materials submitted, this Court determines that Rose's apartment complexes do not possess sufficient quasi-municipal attributes to qualify under the public function analysis or any of its variations. Nor does this Court believe that the plaintiffs can plausibly present sufficient evidence in the course of further discovery to qualify the apartment complexes under the public function analysis. The disparity is simply too great between the character of the apartment complexes as apartment complexes and the requirements necessary to be

properly evaluated by the public function analysis.

#### Cable Communications Policy Act of 1984

Plaintiffs argue that the Cable Act grants them access to Rose's property along dedicated, compatible use easements. Defendants respond that the Cable Act does not provide the full access that plaintiffs require for their cable service. The Cable Act at 47 U.S.C. § 541 (a)(2) provides:

Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses . . . .

Under § 541 (a)(2) Continental acquires no rights to exceed public rights-of-way or dedicated, compatible use easements. Materials submitted to this Court indicate that the existing public rights-of-way and dedicated, compatible use easements do not provide Continental with the direct and extensive access to the individual apartments that it requires for its cable service. Although the Cable Act possibly grants Continental a right of action (which this Court does not here decide), the Cable Act definitely does not provide plaintiffs the relief which they request.

#### Michigan Consumers Protection Act

Plaintiffs argue that by substituting SMATV for CATV Rose will violate the Michigan Consumer Protection Act (MCPA) because plaintiff Shaber allegedly relied upon Rose's representations

that cable television services would be provided to tenants of the apartment complexes. Plaintiffs allege violation of Mich. Comp. Laws § 44.5903 (c), (s), (y); Mich. Stat. Ann. § 19 419 (3)(c), (s), (y) which provide:

Unfair, unconscionable, or deceptive methods, acts or practices in the conduct of trade or commerce are unlawful and are defined as follows:

(c) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has sponsorship, approval, status, affiliation, or connection which he does not have.

(s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer.

(y) Gross discrepancies between the oral representations of the seller and the written agreement covering the same transaction or failure of the other party to the transaction to provide the promised benefits.

Defendants maintain that the claims are frivolous and should be dismissed. This Court notes that the allegedly violated sections proscribe conduct that is in the nature of fraud. Further, this Court recognizes that both the Michigan Court Rules, 2.112 (B)(1), and the FRCivP 9(b) require that matters of fraud must be "stated with particularity." Upon review of the pleadings, this Court determines that insofar as the alleged violations of MCFA are in the nature of fraud, plaintiffs fail to state their claim with sufficient particularity.

CONCLUSION

In accordance with the preceding analysis, this Court grants defendants' motion for summary judgment and dismisses plaintiffs' complaint. This Court notes, however, that defendants' counterclaim is still pending and encourages the parties to address whatever issues remain.

Dated: April 27, 1988

  
ROBERT HOLMES BELL  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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CONTINENTAL CABLEVISION OF  
MICHIGAN, INC., d/b/a/  
Continental Cablevision of  
Lansing, Michigan Corporation,  
and DAVID SHABERG,

Plaintiffs.

v.

EDWARD ROSE REALTY, INC., a  
Michigan Corporation, and  
EDWARD ROSE ASSOCIATES, INC.,  
d/b/a FLINT BUILDING COMPANY,  
INC., a Michigan Corporation,

L'87-17 CA 5

Defendants.

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EDWARD ROSE REALTY, INC., a  
Michigan Corporation, and  
EDWARD ROSE ASSOCIATES, INC.,  
d/b/a FLINT BUILDING COMPANY,  
INC., a Michigan Corporation,  
and TRAPPERS COVE APARTMENTS,  
PHASE III, a Michigan Co-Part-  
nership,

HON. ROBERT HOLMES BELL

Counterplaintiffs.

v.

CONTINENTAL CABLEVISION OF  
MICHIGAN, INC., d/b/a/  
Continental Cablevision of  
Lansing, Michigan Corporation,

Countnderdefendants.

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ORDER

In accordance with the accompanying opinion, this Court grants defendants' motion for summary judgment and dismisses plaintiffs' complaint. This Court notes, however, that defendants' counterclaim is still pending and encourages the parties to address whatever issues remain.

IT IS SO ORDERED.

Dated: April 27, 1988

  
ROBERT HOLMES BELL  
UNITED STATES DISTRICT JUDGE

urge and for purposes of analysis, implicates the Fifth Amendment's taking clause and its due process safeguards. For example, in Loretto, supra, a private cable company installed its lines in an apartment building that it did not own pursuant to a state mandatory access statute. The Court held that such an installation was a permanent physical occupation of real property and constituted a taking to the extent of the occupation regardless of its beneficial social value or its de minimis impact. Under Loretto this Court determines that unless § (B) is construed and applied in tandem with § (C), § (B) is constitutionally infirm.

However, this Court is not even convinced that Ordinance 753, § (B), is actually a mandatory access statute. Textually, the ordinance does not create a substantive right of access for cable service grantees. Specifically, it prohibits a dwelling's owner from directly or indirectly prohibiting a tenant from receiving cable services. Any potential substantive right of the CATV grantee would be properly assessed and created in the eminent domain proceedings. Until the eminent domain proceedings properly determine the necessity, legitimacy, and conditions of Continental's occupancy of Rose's property, Continental has no substantive right of access to Rose's property. This close and literal reading comports with this Court's view that § (B) and § (C) should be read together. In the absence of any private contractual right to occupy Rose's property Continental must rely on the City of Lansing to exercise its rights of eminent domain.