

# Briefly

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## Municipal Law Case Summaries

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### ***Dougherty v City of Detroit***

In *Dougherty v City of Detroit* (December 21, 2021), the Michigan Court of Appeals held that the trial court erred by denying defendant-firefighter summary disposition of plaintiff's action alleging defendant negligently caused her son's (M) death and inflicted emotional distress upon her by failing to locate M after a house fire on the basis of governmental immunity. The Court of Appeals agreed with defendant that he was entitled to governmental immunity as he owed no legal duty to plaintiff or M. The Court reasoned, "there existed no special relationship between the parties that imposed a duty on defendant to protect" M or plaintiff. Additionally, while Defendant "certainly would be able to foresee that someone in a house could be harmed or killed by a fire, there is no evidence indicating [he] knew that anyone was in the house at the time of the fire." Furthermore, it is "too heavy a burden to impose an affirmative duty on firefighters to ensure the survival of individuals that are unobservable at the scene of a fire." Finally, even if he owed a legal duty and his conduct was grossly negligent, he still would have been entitled to governmental immunity because his conduct could not have been the proximate cause of M's death as "it was not a 'but-for cause' or 'the one most immediate, efficient and direct cause' of his death, even if it was a contributing factor."

### ***American Civil Liberties Union of MI v Calhoun Cnty. Sheriff's Dep't***

In *American Civil Liberties Union of MI v. Calhoun Cnty. Sheriff's Dep't* (February 4, 2022), the Michigan

Supreme Court held that a regulation cannot serve as the basis for exempting from disclosure public records under MCL 15.243(1)(d) because a regulation is not a statute. The Michigan Supreme Court found the Court of Appeals "erred by holding that 'exempted from disclosure by statute' in MCL 15.243(1)(d) really means 'exempted from disclosure by statute or regulation.'" It noted the Court of Appeals "relied on the fact that a federal regulation has the legal force of a federal statute. But it does not logically follow that a federal regulation therefore is a federal statute. More importantly, the Court of Appeals holding is at odds with the plain language of MCL 15.243(1)(d). When this statute was enacted, the relevant definition of 'statute' was '[a]n act of the legislature declaring, commanding, or prohibiting something; a particular law enacted and established by the will of the legislative department of government; the written will of the legislature, solemnly expressed according to the forms necessary to constitute it the law of the state.' A regulation promulgated by an executive-branch agency is therefore not a statute." The court noted that an "exemption that only uses the word 'statute' is plainly different from an exemption that uses the words 'statute or regulation' or 'statute or court rule.'"

### ***Fraser v Haney***

In *Fraser v Haney* (February 8, 2022), the Michigan Supreme Court held that plaintiff-township's nuisance-abatement action for injunctive relief to enforce its zoning ordinance was timely under MCL 600.5813 because the alleged wrong – defendants maintaining hogs on their commercially zoned property – was ongoing.

ing when plaintiff filed the action. The wrong alleged in plaintiff's complaint is defendants' keeping of hogs on their property. The presence of the hogs on the property constitutes the wrong, and that wrong, along with the attendant harms it causes, is being committed as long as the piggery operates." MCL 125.3407, part of the Zoning Enabling Act, "states that a 'use' of land in violation of a zoning ordinance is a nuisance per se. 'Use' means '[t]he application or employment of something; esp., a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession and employment that is merely temporary or occasional . . . .' It sought injunctive relief "to remedy only present violations, which occurred within" the limitations period. The court noted that *Garg*, in which it abrogated the continuing-wrongs doctrine, "did not operate to immunize future wrongful conduct." In this case, defendants were "not free to continue committing zoning-ordinance violations simply because plaintiff did not bring an action against their first zoning violation."

### ***Mickens v Meemic Ins Co.***

In, *Mickens v Meemic Ins Co.* (December 21, 2021), the Michigan Court of Appeals held that the trial court erred by finding a genuine issue of material fact existed as to defendant-bus driver's allegedly negligent conduct and causation, and thus, defendant-SMART was entitled to governmental immunity. Plaintiff's vehicle came into contact with a SMART bus as the two vehicles drove side-by-side. Plaintiff sued SMART, the bus driver, and her insurer for her injuries. On appeal, the court agreed with SMART that the trial court should have found that the motor-vehicle exception to governmental immunity, MCL 691.1405, was inapplicable and that it was therefore entitled to governmental immunity. Specifically, SMART argued the trial court erred by holding that there were genuine issues of material fact as to whether the bus driver operated the bus negligently and as to the proximate cause of the accident. "[T]here was no genuine issue of material fact regarding whether, as plaintiff asserted, the SMART bus had side-swiped plaintiff's stopped vehicle while running a red light." Video footage established that the bus driver violated neither MCL 257.636(1) nor MCL 257.643, and that the bus driver's conduct bore no causal connection to the accident, as Plaintiff claims.

### ***Coeus, LLC v City of Walled Lake***

In, *Coeus, LLC v City of Walled Lake* (January 20, 2022), the Michigan Court of Appeals held that the trial court did not err by granting summary disposition for defendants-city, mayor, city manager, city development manager, and city clerk on the basis of governmental immunity. It also held that the trial court properly dismissed plaintiff's due process and promissory estoppel claims. Plaintiff sued defendants alleging a variety of torts after his application for a license to open a medical marijuana facility was denied. On appeal, the court rejected plaintiff's argument that the city was not entitled to governmental immunity, noting "[t]he implementation of the ordinance was expressly authorized by the MMFLA, and the processing of applications for licenses was authorized by the city's ordinance. The court next rejected plaintiff's contention that the trial court erred by ruling that city manager was absolutely immune from liability, holding that, "as the highest appointive executive official in the city, [he] is absolutely immune from tort liability under the GTLA with respect to actions performed 'within the scope of his . . . executive authority,'" Finally, the court rejected plaintiff's argument that its claims alleging a violation of due process and promissory estoppel were legally sufficient. First, "plaintiff did not have a recognized property interest because it never had a license to begin with." Second, "because the promise on which plaintiff relies for its claim of promissory estoppel is not clear and definite, the claim fails as a matter of law."

### **About the Author**



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# Legislative Update

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*A number of bills of public sector interest currently are under consideration in the Michigan Legislature. The following are summaries of a number of the most pertinent bills.*

## Enacted Legislation

- **Counties. Public Act 121 of 2021** specifies that, instead of terms concurrent with that of State representatives, a county commissioner's term would be for four years, for each county commissioner elected at or after the November 2024 general election. Also, the Act specifies that if a vacancy occurred in the office of commissioner more than seven days before the nominating petition deadline for the general November election that was not the election in which a successor would be elected if there were no vacancy, the individual appointed would hold office only until a successor was elected at the next general November election. The Act would also eliminate a provision prohibiting a person who has been convicted violating certain prohibitions related to a classified service examination from being eligible for appointment to the office of county commissioner for 20 years after conviction. The Senate Bill was also tie barred to SB 242 which specifies that a requirement that members of a county board of commissioners serve terms concurrent with those of State representatives would apply only until December 31, 2024 and that terms for members of a county board of commissioners would be as specified in Public Act 261, beginning January 1, 2025.
- **Sales Tax. SB 0256 (2021 PA 38)** amends the General Sales Tax Act to change the distribution of sales tax revenue by distributing a portion of the sales tax collected on the sale of motor vehicles, motor fuels and motor vehicle parts and accessories currently distributed to the Comprehensive Transportation Fund (CTF) to the Transportation Administration Collection Fund (TACF). Amends sec. 25 of 1933 PA 167 (MCL 205.75).
- **School Aid. SB 0118 (2021 PA 15)** amends the State School Aid Act to modify the penalty for employing a person who does not comply with state certification and credentialing requirements for teaching, counseling, or serving as a substitute teacher by lowering, and in some circumstances eliminating, the penalty against a school district or intermediate school district who employs such a person. Amends sec. 163 PA 1979 PA 94 (MCL 388.1763).
- **Taxation. HB 5502-5506 (2021 PA 157)**, tie-barred, amends the General Property Tax Act, State Essential Services Assessment Act, the Alternative State Essential Services Assessment Act and Public Act 198 of 1974, which governs plant rehabilitation districts and industrial development districts in local governmental units, to modify the eligibility for certain industrial facilities exemption certificates. Amends secs. 9m and 9n of 1893 PA 206 (MCL 211.9m); amends sec. 7 of 2014 PA 92 (MCL 211.1057); amends sec. 7 of 2014 PA 93 (MCL 211.1077); amends sec. 6 of 1974 PA 198 (MCL 207.556).
- **Veterans. HB 4122 (2021 PA 34)** amends 1953 PA 192, which created the County Veteran Service Fund, to modify the distribution and expenditure of grants from the County Veteran Service Fund. The amendments provide revised grant eligibility requirements to expand access for Counties to participate in the grant program, and allow counties to use grants for allowable expenditures as determined by the Michigan Veterans Affairs Agency (MVAA) and for an emergent need relief program to provide direct financial assistance through county veteran service operations. Amends sec. 3a of 1953 PA 192 (MCL 35.623a).

- **Water Supply.** **HB 4123 (2021 PA 45)** amends Part 53 (Clean Water Assistance) and Part 54 (Safe Drinking Water Assistance) of the Natural Resources and Environmental Protection Act (NREPA) to allow certain projects eligible for clean water assistance and safe drinking water assistance loans under those parts to include energy and resource efficiencies as described in sections of law that address governmental energy conservation improvements. Amends secs. 5301, 5403 & 5405 of 1994 PA 451 (MCL 324.5301 et seq.).
- **Civil rights.** **HB 5693** provides for the duties of FOIA coordinator regarding confidentiality of record requests. Amends sec. 6 of 1976 PA 442 (MCL 15.236).
- **Civil rights.** **HB 5699** revises the remedies for violations of the Open Meetings Act. Amends sec. 11 of 1976 PA 267 (MCL 15.271).
- **Civil rights.** **HB 5710** include medical condition and vaccine status as categories that are protected under the Elliott-Larsen Civil Rights Act. Amends secs. 102, 202, 203, 204, 205, 206, 207, 209, 302, 302a, 402, 502, 504, 505 & 506 of 1976 PA 453 (MCL 37.2102 et seq.).

### Pending Legislation

- **Appropriations.** **HB 5054** contains appropriation adjustments for the Department of Treasury. The bill appropriates a total of \$1.5 billion General Fund-General Purpose monies to provide support to local government retirement systems for eligible local units and the State Police Retirement System.
- **Cities.** **HB 5645** amends the Home Rule Cities Act to authorize ranked-choice voting. Amends 1909 PA 279 (MCL 117.1 - 117.38) by adding sec. 4v. Tie-barred with HB 5644 and HB 5646.
- **Civil procedure.** **SB 0856** creates a new act entitled the extreme risk protection order act to provide for the issuance of a restraining order prohibiting certain individuals from possessing or purchasing firearms, the surrender and seizure of a restrained individual's firearms, and the powers and duties of certain state and local governmental officers and entities. Tie-barred with SB 0857.
- **Civil rights.** **SB 0818** and **SB 819** make meetings of certain art institute service providers and zoological institutions subject to the open meetings act and freedom of information act. Amends sec. 2 of 1976 PA 267 (MCL 15.262) and sec. 2 of 1976 PA 442 (MCL 15.232). See also HB 5802 and HB 5803.
- **Civil rights.** **SB 0854** modifies procedures for electronic meetings of public bodies, and expands eligibility due to a medical condition. Amends sec. 3a of 1976 PA 267 (MCL 15.263a).
- **Civil rights.** **SB 0936** makes education management organizations subject to freedom of information act requests. Amends sec. 2 of 1976 PA 442 (MCL 15.232). See also HB 5849.
- **Controlled substances.** **HB 5877** amends the Public Health Code to remove classification of marijuana and pharmaceutical-grade cannabis as a controlled substance. Amends multiple sections of 1978 PA 368 (MCL 333.1101 *et seq.*).
- **Counties.** **SB 0525** modifies election schedule for election of county executive in a charter county to the presidential election years. Amends 1966 PA 293 (MCL 45.501 - 45.521) by adding sec. 14b.
- **Counties.** **HB 5687** modifies the term of appointment for a county medical examiner. Amends sec. 1 of 1953 PA 181 (MCL 52.201).
- **Counties.** **HB 5711** provides for removal of local health officer by county board of commissioners. Amends sec. 11 of 1851 PA 156 (MCL 46.11). Tie-barred with HB 5355.
- **Courts.** **SB 0869** creates a new act to enhance personal information and physical safety protections for judges, their families, and household members.
- **Crime victims.** **HB 4798** and **4974** codify practice of redacting victim's contact information by prosecuting attorney from certain court documents and allow disclosure of personal information to defense counsel only upon order of the court. Amends 1985 PA 87 (MCL 780.751 - 780.834) by adding sec. 8a and amends 1927 PA 175 (MCL 760.1 - 777.69) by adding sec. 40b to ch. VII.
- **Crimes.** **HB 4256** requires public accommodations to permit use of service animals for training or socializing. Amends sec. 502c of 1931 PA 328 (MCL 750.502c).

- **Economic development.** **SB 0562** provides for definition and program changes for certain qualified facilities for brownfield redevelopment authorities. Amends sec. 2 of 1996 PA 381 (MCL 125.2652).
- **Economic development.** **HB 5753** and **5752** create a local revitalization pilot program for economic development corporations and provides for an individual income tax credit for investments under such program. Amends 1984 PA 270 (MCL 125.2001 - 125.2094) by adding sec. 88u.
- **Economic development.** **HB 5768** modifies the permitted use of excess or surplus tax increment finance funds for purposes that further the tax increment financing plan or development plan before reverting to taxing jurisdictions. Amends secs. 215 & 413 of 2018 PA 57 (MCL 125.4215 & 125.4413).
- **Education.** **SB 0937** requires monthly board meetings for all public schools. Amends sec. 1201 of 1976 PA 451 (MCL 380.1201).
- **Elections.** **HB 4127** through **4135** make various amendments to the Michigan Election Law to provide for procedures to remove electors listed on qualified voter file under certain circumstances, to provide for posting a list of clerks not current with continuing education by the Secretary of State, to create certain felonies involving absent voter ballot applications, and to increase the size of precincts, allow precinct consolidation at certain elections, and require clerks to maintain a permanent absent voter list. Amends various sections of 1954 PA 116 (MCL 168.1 *et seq.*) and sec. 11d, ch. XVII of 1927 PA 175 (MCL 777.11d).
- **Elections.** **SJR L** and **HJR P of 2022** revise voting age for school district elections to 16 years of age under certain circumstances. Amends sec. 1, art. II of the state constitution.
- **Local Government.** **SB 0821** allows municipalities to incorporate authorities for the provision of emergency services, allow an authority to purchase real or personal property for public purposes, to be paid for in installments over a period of up to 15 years or the useful life of the property acquired, whichever was less and provide an authority to borrow and issue negotiable bonds or notes to finance certain acquisitions for authority purposes. Amends title & sec. 9 of 1988 PA 57 (MCL 124.609) & adds sec. 9a.
- **Legislature.** **HB 0918** creates a school and local government financing commission which would review and investigate the funding of local units of government and school districts to make recommendations to the legislature.
- **Home Rule Cities.** **HB 5650** would require a home rule city to serve a person either personally or by first class mail when initiating a blight violation and provides that the city may, but need not, also serve by email with a read receipt required.
- **Local Government.** **HB 5090** would eliminate the sunset on the enabling legislation for social districts and allow patrons of social district permittees to use the common area at the same time an organization is sponsoring a special event in the same area. The bill also would allow local governmental units to set operating hours for a social district that could be different from the regular operating hours of its permittees. Amends sec. 551 of 1998 PA 58 (MCL 436.1551).
- **Local Government.** **HB 5633** would prohibit a local unit of government from passing an ordinance that would require a person to use a particular hauler of solid waste or recyclables. Amends 1994 PA 451 (MCL 324.101 - 324.90106) by adding sec. 11527c.
- **Local Government.** **SB 0820** would prohibit a local unit of government from passing an ordinance that would impose a ban on the use of natural gas or installation of natural gas infrastructure.
- **Local Government.** **HB 5761** would amend the PACE Act to prohibit a local unit of government from issuing bonds or notes to finance energy projects under a PACE program. The bill is tie-barred to HBs 5011 and 5012. HB 5011 would amend provisions pertaining to the PACE program, add and revise defined terms, and apply the PACE program to agricultural and certain multifamily residential property. HB 5012 would require new construction energy projects to exceed Uniform Energy Code requirements.
- **Local Government.** **HB 5866** would prohibit any local unit of government and any person when entering into an agreement on any project in the state that is subject to tax incentives, payment in lieu of taxes, tax abatements, bonds, notes, loans, grants, rebates, or any other financial or economic assistance from this state or a political subdivision of this state, from entering into a nondisclosure agreement or otherwise

providing for the confidentiality of the terms of that economic development agreement.

- **Marihuana. HB 5766** would add a requirement that would prohibit a marihuana establishment from being within 1000 feet of a school unless the school's governing body approves (in addition to the current requirement that the local municipality adopts an ordinance allowing a lesser distance). Amends sec. 9 of 2018 IL 1 (MCL 333.27959).
- **Open Meetings. SB 0792** would extend the dates for remote and electronic meetings and thereafter allow them under any circumstances. Amends sec. 3a of 1976 PA 267 (MCL 15.263a).
- **Property Tax. HB 4534** would eliminate appeals to a board of review for principal residence exemption cases where a deadline was missed and instead provide that an owner may merely file an affidavit with the local tax collecting unit claiming an exemption for the current calendar year or the immediately preceding three calendar years. The bill would also modify certain reporting requirements of assessors for denial of exemptions. Amends secs. 7cc & 53b of 1893 PA 206 (MCL 211.7cc & 211.53b).
- **Property Tax. HB 5764** would allow county treasurers to waive delinquent taxes, fees and interest in certain circumstances including poverty and unemployment thresholds. Amends secs. 78a & 78g of 1893 PA 206 (MCL 211.78a & 211.78g).
- **Public Employees and Officers. SB 0040** would prohibit a public employee or officer from holding more than 1 elected position under any circumstances. Amends secs. 78a & 78g of 1893 PA 206 (MCL 211.78a & 211.78g).
- **Public Employment. SB 0898** prohibits a local unit of government from ceasing or subcontracting its operations less than 1 year after its employees elect a bargaining representative. Amends sec. 10 of 1947 PA 336 (MCL 423.210). See also HB 5815 and SB 0899.
- **Retirement. HB 4188 and 4733**, tie-barred, would amend The Public School Employees Retirement Act of 1979 to provide annuity options for employees and retirees in the Michigan Public School Employees' Retirement System (MPERS) defined contribution retirement plans and require certain employer contributions to be paid from the state school aid fund. Amends secs. 41, 59 and 84b of 1980 PA 300 (MCL 38.1341 et seq.); amends sec. 58 of 1943 PA 240 (MCL 38.58).
- **State financing and management. HB 5867** creates a new act that would prohibit certain nondisclosure agreements entered into by state government.
- **Taxation. HB 4237** would repeal the Michigan Estate Tax Act, which currently imposes a tax on the transfer of the estate of every person who at the time of death was a Michigan resident, or on every generation-skipping transfer in which the original transferor is a Michigan resident on the date of the transfer. Repeals 1899 PA 188 (MCL 205.201 - 205.256).
- **Townships. HB 5386** would authorize township boards to create a special assessment district for the maintenance or improvement of a private road (which was already allowed) and apportion the cost based on road frontage or equally among the property owners benefiting from the maintenance or improvement of the road. Amends sec. 2 of 1972 PA 139 (MCL 247.392). See also HB 5606 and HB 5607.
- **Townships. HB 5386** would amend 1972 PA 139, which authorizes township boards to create a special assessment district for the maintenance or improvement of a private road. The law currently provides for the cost of that maintenance or improvement to be apportioned among property owners based on how much road frontage their properties have. The bill would allow the cost to be allocated equally among the property owners benefiting from the maintenance or improvement of the road as well. Amends sec. 2 of 1972 PA 139 (MCL 247.392).
- **Villages. HB 4788** would amend the General Law Village Act to place term limits on elected village officers, if petitioned for and approved by village electors. Amends 1895 PA 3 (MCL 61.1 - 74.25) by adding sec. 5b to ch. II.
- **Water Utility. SB 0751** would require that any person providing water or sewerage service shall ensure that each permanently installed water pump or power source under that water utility's jurisdiction automatically switches to an alternative power source if the primary source of power fails and ensures that an alternative power source is able to operate continuously for at least 72 hours. Failure to do so is a violation with a fine of \$1,000 per day.