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Sexual Harassment: An Unhealthy Workplace

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A recent search of major news sources disclosed that in one week forty-two articles had been published about sexual harassment. The articles included a headline stating "Sexual Harassment Email Policy Is Not Enough To Limit Employer Legal Liability", a plethora dealing with President Clinton, Monica Lewinsky and Paula Jones, and a discussion of the U.S. military efforts to avoid sexual harassment. This, and three recent cases, one from the Michigan Supreme Court and two from the United States Supreme Court, should serve as a warning to every private and public employer to review and strengthen its sexual harassment policies and more closely supervise the practices of its executives, supervisors and employees.

Everyone agrees, sexual harassment is undesirable in society. It is considered crude, in bad taste and injurious. In recent years this concept has escalated from being merely undesirable to being illegal.[2] Sexual harassment in simple terms is generally the repeated and unwelcome conduct of a sexual nature. There are two categories of this conduct; *quid pro quo* and hostile work environment.

First, the *quid pro quo;* you give me something and I'll give you something in return. The term *quid pro quo* is "[u]sed in law for the giving one valuable thing for another."[3] If you will have sex with me you then may keep your job, get a raise or get a promotion.

Several years ago the Michigan Supreme Court held[4] that some conduct in this area is so outrageous or egregious that everyone would know that the conduct was unwelcome. And, therefore, the "repeated" requirement is not always necessary; a first time rape or attempted rape could be the basis of a lawsuit. Because of the nature of the *quid pro quo* cause of action, the truth of the allegations and consent seem the only issues in recent litigation.

The second category of sexual harassment is creating, contributing to or permitting a hostile work environment. A hostile work environment exists where there is repeated and unwelcome conduct of a sexual nature. This conduct may be any of the following or combination of the following types.

Visual: Visuals are the pictures, cartoons, and writings or other means of conveying meaningful content. Certain manufacturers of tools distribute calendars that, if not X-rated, are R-rated. These calendars might be found displayed in the work, office and public areas of many departments of public works, fire stations or privately owned facilities. Cartoons with overt sexual themes, usually photocopies of photocopies, appear in the office, are circulated and then are re-photocopied for even further distribution in the work place. Some explicit photographs and display of anatomical parts have also been seen in the work place.

Recently, an Oakland County lawsuit was settled for seventy thousand dollars. The suit was based on a hostile work environment created, by among other things, "visuals." Over a period of time, the plaintiff made copies of and collected more than fifty obscene and nearly obscene cartoons that her colleagues and supervisor circulated in the office. The copies became plaintiff's proposed exhibits.

Verbal: Verbal conduct includes comments or description of anatomical parts, jokes, poems, limericks, email messages, recordings, telephone, or other means of conveying meaningful content. It seems that some people have a quest to find and broadcast off color jokes. The more off color the better, no matter who overhears them. The detailed description of body parts, functions and activities are the topics of discussion by some.

In *Burlington*,[5] discussed below, the plaintiff, when told she was being promoted, was also told that, "you're going to be out there with men who work in factories, and they certainly like women with pretty butts/legs." Later, when the plaintiff objected to the remarks her boss made about her breasts, he said to her, "loosen up" and warned her, "[y]ou know, Kim, I could make your life very hard or very easy at Burlington." And, the boss told her, "I don't have time for you right now, Kim– unless you want to tell me what you're wearing." Finally the boss said, "are you wearing shorter

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Public Corporation Law Quarterly

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CHAIRPERSON'S CORNER

The Public Corporation Law Section completed a successful year in 1997 - 1998. A continuing and major objective of the Section has always been education. This has been accomplished through such activities as a Winter Seminar, a Spring Seminar, an annual meeting program, monthly meetings of the Section council in Lansing and publication of the Public Corporation Law Quarterly. In addition, the Section filed an amicus brief in the Supreme Court in the case of the *Harold Company, d/b/a the Bay City Times* v *The City of Bay City.*

The Winter Seminar, co-chaired by Debra Walling and Marcia Howe was held February 13, 1998 at Greenfield Village in Dearborn. This exciting program was highlighted by a presentation by the Honorable Maura D. Corrigan, Chief Judge, Court of Appeals on the Court of Appeals Facilitated Settlement Program. She was ably assisted by James N. McNally, Chief Settlement Attorney for the Court of Appeals. Other presenters were:

Paul R. Levy, and George B. Davis - Municipal Civil Infraction Update;

James I. DeGrazia, Mary Massaron Ross and Michael E. Rosati - Police Liability Update;

John J. Martin, III - Condemnation Law Update

The Spring Seminar, co-chaired by James I. DeGrazia and Steven O. Schultz, was held June 4 - 6, 1998 at McGuire's Resort in Cadillac. The theme was "From the Internet to the Courtroom," presented by:

Hurticene Hardaway - Use of the Internet for Public Sector Attorneys; and the Year 2000 Issue and the Public Sector: What you need to know and do know;

Steven O. Schultz - Recent Developments in Public Sector Labor Law;

James I. DeGrazia - Governmental Immunity Update.

On Saturday of the Spring Seminar, we were fortunate to have a presentation on "Trial Techniques" by a dynamic and extraordinary teacher of trail advocacy, James W. Jeans, Sr. This one half day long program on advocacy techniques from one of America's premiere teachers was the highlight of the Spring Seminar.

The Section filed an amicus brief in the Bay City case in the Supreme Court because the case involved significant issues regarding the Open Meetings Act and Freedom of Information Act, two acts which are particularly relevant to public corporations in Michigan.

An important vehicle of the Section in promoting education has been and continues to be the Public Corporation Law Quarterly published under the supervision of the publications committee, ably chaired by Clyde Robinson. The articles presented in the review are too numerous to recite but were prepared by various members of the Section. I wish to personally thank each and every author who has taken the time and effort to prepare and submit an article for publication in the Quarterly.

This Section, under the direction of Michael Grover, installed a home page for access by internet users. Through links to other resources on the internet, this home page should be a valuable research tool. With suggestions and assistance from the Section members, the council expects this home page will be of significant assistance to Section members in their everyday practice.

I want to thank each and every member of the council, the officers and former chairpersons of the Section for all their help, guidance and support without whose efforts we would not have had such a successful year.

Finally, good luck to Debra A. Walling who I know will lead the Section to another successful year.

–John J. Martin III

Sexual Harassment: An Unhealthy Work Place

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skirts yet, Kim, because it would make your job a whole heck of a lot easier."

Physical: Physical includes touching of the breasts, buttocks, or genital area, the "bathing suit areas," also contributes to the hostile work environment. Other "protected areas" may include hair, cheeks, back or even the arms. Unfortunately, the criminal courts see cases of teachers, instructors and coaches who have been charged with criminal sexual contact, including, "French kissing,' fondling of breasts and genitalia," and "defendants who caused male officers to perform body searches of women prisoners that include pat-downs of their breasts and genital areas."

In addition to the above specific types of conduct, other miscellaneous conduct may include elevator eyes (moving the eyes up and down the victim and ending in leering at the "bathing suit area" of the victim) and the display of sexual novelties or toys. In a Wayne County lawsuit involving a female police dispatcher, police officers brought bear genitals into the station to "show" the dispatcher. The jury awarded more than three hundred thousand dollars to the plaintiff.

For some employers this has created a paranoia. The supervisor who would put an arm around a distraught employee for comfort, now hesitates for fear of misinterpretation. The colleague who wishes to compliment a co-worker's new sweater doesn't because of some unknown consequence. Because of the lack of clear guidelines from the Legislature, the courts, and the employers there is an element of the unknown and an insecurity that has changed the dynamics between men and women in the work place.

Heightening this paranoia is the fear of retaliation for a wrong or a perceived wrong. The disciplined or disgruntled employee seeking revenge has numerous opportunities to give "pay backs." The employee in Michigan has a "privilege" of making complaints, unless the complaint is made knowingly false.[6] One of the obvious, not so new and not so rare, is the complaint of sexual harassment.

This calls for the second warning of this article. Public and private employers also owe the accused a full and fair investigation and an impartial determination regarding accusations of discrimination. At the University of Pennsylvania, three professors were fired on sexual harassment charges. Two different arbitrators ruled that no credible evidence existed against them and ordered the university president to reinstate them. So far, legal fees, back wages and settlement awards to three of the alleged victims of sexual harassment have cost Pennsylvania taxpayers about $1.5 million. Meanwhile, two of the professors are preparing lawsuits of their own for wrongful termination.[7]

The private, as well as public, employer and employee face several areas of liability for sexually harassing behavior. In Michigan, criminal charges may be brought against the perpetrators alleging violation of Criminal Sexual Conduct in the fourth degree (wrongful touching), a misdemeanor, or Ethnic Intimidation (assault based on gender), a felony. The Michigan Court of Appeals held that a pinch is sufficient force for a fourth degree criminal sexual conduct charge.[8] In the federal system, the Civil Rights Act[9] penalizes, with prison and fines, the intentional deprivation of civil rights. A wrongful touching, it could be argued, is cruel and unusual punishment or a deprivation of due process.[10]

A civil action may be brought in the Michigan courts alleging a violation of the Michigan Civil Rights Act.[11] In federal court the plaintiff may bring an action alleging violations of Title VII of the Civil Rights Act.[12] The judgments in these cases have run into the millions. A Massachusetts pharmaceutical company recently agreed to pay $10 million to settle a harassment lawsuit, restructured its personnel department and implemented sexual harassment training. "Sexual harassment charges filed with the Equal Employment Opportunity Commission rose from 6,883 in 1991 to 15,889 last year, while settlements paid to victims leaped from $7 million seven years ago to nearly $50 million last year."[13] And, no one is immune; not local government, not businesses, not the military, and not any employer. Insurance companies have declined legal representations to individuals in such cases claiming that the insurance policies for the home owner, public official and others exclude willful and wanton conduct. Those that do provide insurance, charge fees up to $500,000 for $25 million in coverage.[14]

Additionally, a perpetrator accused of violating sexual harassment policies and procedures, administrative memorandums or workplace rules and regulations, will face discipline up to and including discharge from employment. This is theoretically the fifth court or tribunal setting in which the accused may have to defend himself.

Finally, the perpetrator and the employer will suffer the negative publicity and public relations as the accusation, the trial and the verdict are reported in the media. Just imagine the headlines: "Employer Sued for Sexual Harassment." Or, even worse, "Employer Jailed for Sex Charge." This creates apprehension of the prospective employees and erodes the confidence of the current employees. The work place becomes an undesirable and an unhealthy place to work and to do business.

Three recent cases, *Koester v City of Novi*,[15] *Burlington Industries Inc. v Ellerth*,[16]and *Beth Ann Faragher, Petitioner v City of Boca Raton*[17] further define the issues of sexual harassment.

In *Koester*, the plaintiff sued alleging violations of the Michigan Handicappers' Civil Rights Act (HCRA)[18] and the Michigan Civil Rights Act.[19] The plaintiff claimed that the city police department's failure to accommodate her, by assigning her to light duty, constituted a violation of the HCRA. She also claimed that she was harassed on the basis of her sex because of her pregnancy, which the plaintiff argued, constituted sexual harassment. The Michigan Supreme Court held that pregnancy is not a handicap under the HCRA.

But, the Michigan Supreme Court went on to say, "Under the express language of the Michigan statute, analogous federal law, and the legislative history of the Michigan Civil Rights Act, we hold that harassment on the basis of a woman's pregnancy is sexual harassment." In other words, conduct and words which harass (unwelcome and repeated) dealing with her pregnancy is sexual harassment. After the *Koester* decision, the definition of sexual harassment in the employer's policies must be broadened to prohibit unwelcome and unwanted acts and comments based on pregnancy.

In *Faragher v City of Boca Raton,* the plaintiff was subjected to uninvited, offensive touching, and lewd remarks, which was alleged to create a sexually hostile atmosphere. The plaintiff asserted such was a violation of Title VII of the Civil Rights Act[20] and the City had knowledge of those actions. The Court held that an employer, the City of Boca Raton, is vicariously liable for actionable discrimination, in this case sexual harassment caused by a supervisor; but employer liability is subject to an affirmative defense looking to the reasonableness of the employer's conduct and the reasonableness of the plaintiff victim's actions.

Employers must recognize, that if the victim persuades the court or the jury that they were sexually harassed while in the workplace, the employer will also be liable, unless it can show that it had a viable sexual harassment policy in place and that the policy was rigorously enforced.

The burden has shifted to the defendant employer to show that it is not liable by this two part affirmative defense. The employer may also assert as an affirmative defense that the victim's actions were unreasonable, *i.e*. no report or complaint was ever made or that the victim was a willing participant.

In *Burlington Industries v Ellerth,* the plaintiff alleged that she was sexually harassed by repeated boorish and offensive remarks and gestures. The facts also disclosed that she suffered no tangible retaliation and was, in fact, promoted once. The conduct, it was alleged, is in violation of Title VII of the Civil Rights Act. The United States Supreme Court held that an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, may recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's action, but the employer may assert an affirmative defense, *i.e*. viable policy in place and that the policy was being rigorously enforced or that the plaintiff was unreasonable in her actions.

Some suggested solutions:

Articulate an understandable "acceptable conduct" test in your sexual harassment policy. I offer the following, "Would you like to have someone treat your spouse, daughter or significant other in this manner?" Or, "Would you like to see film of your conduct broadcast on the eleven o'clock news"? Or, "Would you hang this picture in your living room?"

In addition, consider the following: policies and procedures, work rules or administrative memoranda. A written policy is mandatory. Although, there is no specific statutory requirement, this is the rule that is reinforced by the three new cases. There are several model policies that are available from the Michigan Municipal League, the Michigan Townships Association, or from your labor or human resources attorney. Remember to review the policy periodically or whenever you hear of a new twist in the law. You have been made aware of several here. Check your client's policy to see if it warrants a modification or amendment to your policy. Maintain the policies for documentation if needed at a future time.

In addition to establishing a policy, the policy must be distributed and rigorously enforced. To establish the affirmative defenses, mentioned in *Burlington* and *Boca Raton*, the employer must be able to show that it acted reasonably. Not to have a policy or to have an ineffective policy or not to enforce the policy that is "on the books" will certainly be considered unreasonable on the employer's part. Additionally, be sure the actions of the employer in enforcing the policy are documented.

A person to whom the violations of the sexual harassment policy must be reported has to be clearly identified. Also, consider to whom violations should be reported, if the alleged perpetrator is the employer supervisor or the chief executive.

Periodic awareness and sensitivity training should be undertaken and can be offered as an affirmative defense. The Michigan Municipal League, the Michigan Township Associations and other groups or the labor attorney can identify training programs to attend and instructors to teach at your work place.

And finally, as an employer, executive or supervisor, setting the example will be the best technique in working towards a healthy work environment.

[1] Peter A. Letzmann, is an attorney, consultant and professional speaker on legal and leadership topics for government officials and others. He was city attorney of Troy, Michigan for seventeen years. He lives in West Traverse Township (Harbor Springs), Michigan, where his wife is the township treasurer.

[2] MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*. and 42 USC sec. 2000e-2(a)(1).

[3] Black's Law Dictionary, 4th Ed. (1968), West Publishing Co., Minneapolis, Minn.

[4] Radtke v Everett, 442 Mich 368 (1993).

[5] United States Supreme Court No. 97-569, June 26, 1998.

[6] Whistleblower's Protection Act, MCL 15.361 *et seq*.; MSA 17.428 *et seq*.

[7] Detroit Free Press, April 14, 1998, page 6c.

[8] People v Premo, 213 MA 406 (1995) #21567

[9] 18 USC 241 and 242

[10] Detroit Free Press, April 14, 1998, page 6c.

[11] MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq.*

[12] 42 USC sec. 2000e-2(a)(1).

[13] Detroit Free Press, April 14, 1998, page 6c.

[14] Detroit Free Press, April 14, 1998, page 6c.

[15] 458 Mich 1 (1998).

[16] United States Supreme Court No. 97-569, June 26, 1998.

[17] United States Supreme Court No. 97-282, June 26, 1998.

[18] MCL 37.1101, *et seq*.; MSA 3.550(101) *et seq*.

[19] MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*.

[20] 42 USC sec. 2000e-2(a)(1).

State Court Decisions of Interest

By Anne M. Skilton, John P. Seurynck and Claire V. Groen[1]
Foster, Swift, Collins & Smith, P.C.

CONTRACTS—ORDINANCE AS IMPAIRMENT OF CONTRACT RIGHTS

S.D. Warren, et al v County of Muskegon, et al, Michigan Court of Appeals No. 211893 (Unpublished, *per curiam*, July 24, 1998).

The County of Muskegon contracted with several municipalities and industries in 1970 to provide for the creation of a water treatment district. Several of the industries entered into service agreements with the County. The service agreements governed the operation of and participation in the construction and funding of the system.

The service agreements regulated the discharge of wastewater by imposing particular limits on discharge into the system; however, the contract did not provide specific numeric discharge levels. In practice, the system users were allowed to discharge in excess of the target levels established by the contract so long as the overall treatment capacity was not exceeded. In addition, the service agreements provided that provisions of the agreements may be amended or repealed in order to assure that the water treatment system functions properly. In fact, subsequent amendments were made in 1980 to design specific restrictions on discharge. However, until 1989, users were routinely allowed to exceed the limits, provided they did not cause interference to the system.

In addition to the regulations on discharge of wastewater, the service agreement also contained a provision that the purpose of the system was to "provide the maximum possible service" to each party to the contract.

In 1992, both the state and federal governments required the County to establish numerical discharge limits for large industrial users; however, neither government set specific limits or established procedures for the implementation and enforcement of the limits. Due to increasing force from both the state and federal governments, the County enacted an ordinance that expressly superseded the agreement and replaced the contractual limits with discharge levels far below what had been readily allowed under the agreement. To arrive at the levels in the ordinance, the County calculated the system's treatment capacity, then deducted (1) a 10% safety factor, (2) a 10% reserve for future growth, and (3) a 20% additional service factor. As a result, less than half of the system's maximum treatment capacity was left for plaintiffs.

The plaintiffs, industries that were parties to the service agreements, filed suit in 1995 to enjoin the enforcement of the ordinance. The plaintiffs argued that the effect of the ordinance was to convert what had previously been a contractual right to a "mere privilege" subject to the County's discretion. The trial court found that the ordinance failed to preserve the plaintiff's right to maximum possible service. Thus, the ordinance unconstitutionally impaired the contract rights of plaintiffs.

On appeal, the Court examined the contract at issue. The County argued on appeal that the circuit court's conclusion—the plaintiff deserved maximum possible service—will take to mean that each single user of the system has the right to exhaust all capacity. However, the Court of Appeals disagreed with the County and determined that the need for establishing specific discharge limits can be met, while at the same time protecting the plaintiff's unambiguous contractual rights to use the system's available capacity. The Court of Appeals agreed with the circuit court's conclusion that, while the 1994 ordinance complied with federal regulatory requirements to have a specific enforceable numerical limit on discharges, the County's duty to implement such limits does not include the right to set the limits at a such a conservative level that the plaintiff's contractual right to maximum use of the system was impaired. Further, the Court of Appeals agreed with the trial court's assessment that the County had no contractual right to reserve capacity for unidentified future needs. The reservation of capacity would prevent the plaintiffs from their maximum possible service to accommodate the rights of unknown parties. Finally, the County argued that the ordinance deserved due deference from the courts. Finding that the County exceeded its discretion, the Court of Appeals stated the County deserved no deference from the circuit court. Thus, the circuit court decision was affirmed.

ZONING—ESCROW POLICY—UNREASONABLE FEE

Cornerstone Investments, Inc v Cannon Township, Cannon Township Planning Commission, and Andy Sparks, ___ Mich App ___ (1998).

In December 1991, Defendant Cannon Township Planning Commission (the "Commission") adopted an Escrow Application Policy which Defendant Cannon Township (the "Township") approved. The policy was created to shift the cost of processing applications for Commission action from the Township to applicants. The policy required an application fee designed to cover the costs of the Commission meetings and legal notices. In addition, the policy required the applicant to fund an escrow account to cover any additional costs incurred with the application. Costs associated with subcommittee meetings, public hearings, and application reviews by Township attorneys, planners or engineers would all be paid directly from the escrow account. An initial deposit of $1,000 was required and additional funds could be requested by the Commission at its discretion. After all expenses were paid, any excess funds would be returned to the applicant without interest. In July 1993, the Township adopted a planned unit development ("PUD") application process incorporating the 1991 escrow application policy.

In October 1993, Plaintiff Cornerstone Investments, Inc. ("Cornerstone") applied to the Commission to have a parcel of its property in Cannon Township rezoned as a PUD district. Plaintiff paid the application fee and made the initial $1,000 deposit into an escrow account under protest. The Commission approved Cornerstone's application but subsequently notified Cornerstone that additional funds were needed. Cornerstone refused to pay the additional funds and the Township informed Cornerstone that the Township would not issue a building permit for the property until the additional funds were deposited.

Cornerstone then filed a complaint seeking: (1) a declaratory judgment that the escrow policy was illegal and unenforceable; (2) an injunction enjoining the Township from enforcing the escrow policy and from withholding Cornerstone's building permit; and (3) restitution of the escrow funds the Township required Cornerstone to pay into the escrow fund, interest and attorney fees. The trial court granted the defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). Cornerstone appealed and the Court of Appeals reversed the trial court's decision.

The Court of Appeals found that the Township's escrow policy was invalid because it was not authorized by any statutory or constitutional grant of power. The Township's zoning powers are based on the Township Rural Zoning Act ("TRZA"), which grants townships the power to pass zoning ordinances and gives townships broad authority to zone. Section 25 of the TRZA sets forth the permissible methods for funding township zoning actions. Section 25 authorizes townships to charge "reasonable fees for zoning permits" and "levy a sufficient tax" upon the real and personal property subject to taxation in the township. Only the first method of funding, charging reasonable fees for permits, was at issue in this case.

Cornerstone argued that the term "zoning permit" in Section 25 of the TRZA actually refers to building permits. Since the Township already charged a fee for building permits, Cornerstone argued that additional fees for zoning permits violates the TRZA. The Court rejected this argument, finding that the TRZA specifically authorizes zoning permits, apart from building permits, since the TRZA grants the Township the authority to "locate" buildings. The Court still found, however, that the Township's policy overstepped its legislative grant of power. The Court found that the phrase "reasonable fees for zoning permits" did not encompass open-ended escrow accounts as the Township required under its policy. The term "fee" limited the Township to fixed or established charges. Since the Township's policy gave the Commission unfettered discretion in determining the ultimate costs of an application and rendered the application's costs unpredictable, the Court held that the policy was not authorized by a statutory or constitutional grant of power. Thus, the Court of Appeals reversed the trial court and remanded for entry of an order granting Cornerstone's motion for summary disposition.

DISCRIMINATION—HARASSMENT ON THE BASIS OF PREGNANCY

Koester v City of Novi, et al, 458 Mich 1 (1998).

The plaintiff was a female police officer assigned to the City of Novi's road patrol. She was only the second female officer in the history of the police department. She filed suit against the City for discrimination and harassment based on the following events. In 1984, the City adopted a city-wide "no light duty" policy that prohibited disabled employees from returning to work until they were able to perform their regular duties. In a meeting with the Assistant City Manager to discuss pregnancy leave, the plaintiff was told the "no light duty" policy applied to pregnancy leave as well. The Assistant City Manager stated that the policy should apply to someone who made a conscious decision to raise a family as well as someone who was accidentally injured.

In 1988, when she informed the Chief of Police she was pregnant, the Chief told the female officer that women should stay home with their children and should not work while pregnant. Soon after, the plaintiff experienced problems with her pregnancy and took a leave of absence, as she admittedly could not fulfill the duties of her present job. Plaintiff claims that she was ordered off work; however, members of the police department state that she voluntarily left. After she went on leave, the female officer saw an opening for a crime prevention officer, a more sedentary job, and requested the position. However, it was eventually filled by another officer, as the city claimed that training the female officer for the position would be too costly.

Further, in order to receive a day shift position upon her return to work, the female officer put in a bid for the day shift in October of 1988. The Department's normal practice was to give officers who had seniority, such as the female officer, their choice of shifts upon returning from disability. The police lieutenant, however, did not immediately accommodate the female officer's choice of shift. He stated that he would put her on the night shift or any other shift where she was needed. She did ultimately receive the day shift spot in April, 1989.

Upon returning to work in April of 1989, the plaintiff testified she was "singled out" and reprimanded on several occasions for failing to write enough moving violations, using the restrooms at the fire station and Twelve Oaks Mall, and failing to have her badge number on her uniform pants. The female officer also received a written reprimand for what the City claimed was a violation of a direct order by not working at the "Fifties Festival," despite her contention she was not required to work. The female officer stated she had never been reprimanded prior to becoming pregnant. The City claimed she was not treated any differently from other officers. Soon after the reprimands, the plaintiff became pregnant again. The police sergeant responded "Gee, thanks" when she notified him of the pregnancy. The police department refused to accommodate her requests for pants suitable for pregnancy. Instead, the department instructed her to ask officers for used pants. In September of 1990, the female officer's doctor again restricted her activities. The female officer requested to be transferred to a desk job that had been posted. However, the police notified her that the temporary position posting was a "mistake." She further asked to be reassigned to an assistant court officer position on a temporary emergency basis, but a written and oral exam was required. She was unable to take the written portion of the exam because it was scheduled for two days after she was to give birth in April. Therefore, the position went to another officer. After she returned from work in October of 1991, she filed suit against the city alleging pregnancy discrimination, sex discrimination, and sexual harassment.

The trial court granted summary disposition on the two handicap discrimination claims. On appeal, the Court of Appeals affirmed the trial court's grant of summary disposition regarding the two Handicap Civil Rights Act ("HCRA") claims. On appeal to the Supreme Court, the plaintiff alleged that she was discriminated against in violation of the HCRA on the basis of her pregnancy. The defendant police department alleged that the pregnancy was not a handicap. In order to determine whether a pregnant person is "handicapped" under the definition contained in the HCRA, a reviewing court must examine the particular facts and circumstances of the

pregnancy to determine whether it substantially limits one or more major life activities of the employee. The Court of Appeals determined that the restriction of limiting plaintiff's activities to 25 pounds is not a substantial impairment to a major life activity. The Supreme Court affirmed the Court of Appeals' determination that she failed to state a claim under HCRA.

Plaintiff also claimed on appeal that she was harassed on the basis of her sex because of her pregnancy. Under the Michigan Civil Rights Act ("MCRA"), harassment on the basis of a woman's pregnancy is sexual harassment. The MCRA prohibits discrimination "because of sex." The Act was amended in 1978 and provided "sex" included pregnancy. Evaluating both the federal case law and the legislative history, the Michigan Supreme Court stated that harassment does not have to be motivated by sexual desire; instead, discrimination because of sex could include harassment motivated by general hostility to the presence of a woman in the workplace. Evaluating the facts in this case, the Supreme Court reversed the Court of Appeals' decision and upheld the jury verdict at the trial court level. The jury evaluated all the facts including the reprimands, comments, and department actions and found in favor of the female officer. The Court held that on the basis of the facts, the plaintiff presented an issue for the jury regarding whether she was harassed on the basis of her sex and reinstated the verdict.

SEXUAL DISCRIMINATION

Stewart v White Lake Township, Richard Rayburn, James Thompson & Terry Lilley, Michigan Court of Appeals No. 202660 (Unpublished, June 9, 1998).

Plaintiff Stewart sued Defendants White Lake Township, Richard Rayburn, James Thompson, and Terry Lilley, alleging sexual harassment, sex discrimination, and defamation arising out of Stewart's employment as an on-call firefighter for the Township. The trial court granted the defendants' Motion for Summary Disposition and the Court of Appeals affirmed.

To establish a claim of sexual harassment in the form of a hostile work environment, a plaintiff must prove: (1) that the plaintiff belongs to a protected group; (2) that the plaintiff was subjected to communication or conduct on the basis of sex; (3) that the plaintiff was subjected to unwelcome sexual conduct or communication; (4) that the unwelcome sexual conduct or communication was intended to or did in fact substantially interfere with the plaintiff's employment or created an intimidating, hostile or offensive work environment; and (5) respondeat superior. The court defined sexual harassment as "unwelcome sexual advances, request for sexual favors, and other verbal or physical conduct or communication of a sexual nature." An employer may avoid liability for sexual harassment if the harassment is adequately investigated and the employer takes prompt and appropriate remedial action upon notice of the alleged hostile work environment.

On appeal, Stewart argued that she provided sufficient evidence to establish a prima facie case of sexual harassment due to a hostile work environment. Defendant Rayburn had filed charges against Stewart for alleged misconduct at the fireman's banquet. Rayburn received complaints that Stewart exposed her breasts, danced inappropriately with fellow firefighters and created cleavage for a picture at the banquet. As a result of the complaints, Rayburn conducted an investigation and filed charges related to the conduct. Further, Defendant Thompson had suspended Stewart for insubordination for threatening and yelling at him. Stewart claimed that the defendants' accusations of misconduct, her suspensions, and continuing false allegations by fellow firefighters constituted sexual harassment and eventually forced her to resign.

Stewart claimed she was also upset by "firehouse talk" by her fellow firefighters. Stewart admitted, however, that she did not report this talk to Rayburn or anyone else at the fire department or Township. Consequently, neither the Township nor fire department supervisors could be liable to Plaintiff under a theory of respondeat superior.

Stewart also asserted that men harassed her simply because she was a woman. The court specifically stated that the definition of sexual harassment did not include all conduct or communication based on gender since such an encompassing definition would be inconsistent with the examples given in the statute.

Second, Stewart claimed that she produced sufficient evidence of sex discrimination based on disparate treatment. To establish a prima facie case of sex discrimination under the disparate-treatment theory, a plaintiff must show that she was a member of a protected class and for the same or similar conduct or performance, she was treated differently than a man. Stewart argued she was treated differently than similarly situated males who engaged in similar conduct at the banquet without consequence. Several males were investigated for their alleged behavior at the banquet but the charges against these males were dropped. Stewart, however, engaged in more egregious conduct than the males and this egregious conduct was the basis for the charges against her. Stewart also claimed that males were allowed to bring children on fire calls but when she brought children along, she was suspended. Defendant Thompson, however, indicated that she was suspended for threatening and yelling at him. Further, Stewart admitted that other women brought children on fire calls without suffering any negative consequences. Therefore, Stewart was unable to establish that sex was the motivating factor behind Thompson's decision to suspend her.

Third, Stewart contended that governmental immunity did not bar her defamation claim. Governmental agencies are immune from tort liability in all cases where the governmental agency is involved in the exercise or discharge of a governmental function. A governmental function is an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law and includes the maintenance of a fire department. Further, Michigan courts have extended absolute immunity to include governmental officials while acting within their executive authority. An official's motive need not be considered when determining whether an official is acting within the scope of his executive authority. In this case, the Township was immune from liability for Stewart's defamation claim since the maintenance of a fire department is a governmental function. Further, Lilley, as the Township Supervisor, enjoyed absolute immunity from tort liability. Defendant Rayburn was also entitled to absolute immunity from tort liability as the Fire Chief. Finally, Stewart failed to allege that Defendant Thompson made any false or defamatory statements.

Summary disposition was appropriate in this case despite the fact that discovery was incomplete. Stewart had over nine (9)

months of discovery and yet failed to uncover factual support for her claims. In addition, Stewart had initiated two (2) federal court actions in which extensive discovery had taken place regarding the same allegations against Defendants.

Finally, the Court stated that the trial court did not abuse its discretion in denying Stewart's request to amend her complaint since a court need not give a party the opportunity to amend if the amendment would be futile.

GOVERNMENTAL IMMUNITY—PUBLIC HIGHWAY EXCEPTION—DEFECTIVE STREET LIGHTS

Ridley v Collins, et al,____Mich App____(1998).

In July 1992, at approximately midnight, Plaintiff decedent was attacked on Jefferson Avenue in the City of Detroit by a group of between eight and ten men. Subsequent to the beating, Plaintiff attempted to stand but was hit by a car driven by Defendant Collins. After a few minutes, Plaintiff was then struck by another automobile. Several witnesses testified at trial that the street lights along Jefferson Avenue were not functioning the night of the incident. The Plaintiff brought suit against the City of Detroit, arguing that the lack of lighting created an unreasonably unsafe condition. After a bench trail, the trial court found in favor of the Plaintiff.

On appeal, the City argued that the trial court erred in concluding that the City was not entitled to governmental immunity because of the highway exception. The Governmental Tort Liability Act (GTLA) provides governmental agencies immunity from torts except in certain situations, including highway exception where the injury arises from that agencies' failure to maintain a highway in a reasonably safe condition. Specifically, the City argued that it was immune because street lights are "utility poles" which are excluded from the highway exception to governmental immunity and because the lack of lighting did not create an "unreasonably unsafe" condition. The Court of Appeals affirmed the trial court's decision, holding that the plain language of the highway exception, limiting liability to the "improved portion of the highway designed for vehicular travel," applied only to state and county road commissions, not to municipalities. The Court also found that street lights, unlike "utility poles," are not within the specific exclusion to the highway exception because the street lights "are intended to improve highway safety by providing adequate illumination." Finally, the Court found that the inadequate illumination was an "unreasonably unsafe" condition for which the city may be held liable. The Court reasoned that the street in this case is a "heavily traveled road in a densely populated area" and that the street lights had been broken for at least two months. Thus, a municipality may be held liable for inadequate illumination of a street that presents an unreasonably unsafe condition.

GOVERNMENTAL IMMUNITY—RECREATIONAL USERS ACT—NO EXCEPTION TO GOVERNMENTAL IMMUNITY

Ballard v Ypsilanti Township, 457 Mich 564 (1998).

The estates of two boys who drowned in a man-made lake owned and operated by the defendant Township brought suit against the Township under the Recreational Land Use Act (RUA). The boys drowned when they waded into the lake at a point where a 1983 study noted the existence of a hazardous drop-off. The RUA, enacted in 1953, provides "no cause of action shall arise for injuries to any person who is on the lands of another without paying to such other person a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, site seeing, motorcycling, snowmobiling, or any other outdoor recreational use, without permission against the owner, tenant, or lessee of said premises unless the injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee." The RUA was intended to promote tourism by "opening up and making available vast areas of vacant but private lands to the use of the general public, by limiting the landowner's liability." Plaintiffs argued that the RUA creates an exception to the governmental immunity created by the Governmental Tort Liability Act (GTLA).

After the trial court denied defendant's motion for summary disposition based on the Township's lack of governmental immunity, the jury awarded damages of one million dollars and four hundred thousand dollars to the respective estates of the two boys. The Court of Appeals reversed the trial court's denial of summary disposition holding that the Township was immune from liability. The Court of Appeals ruled that the GTLA controlled because it had been enacted more recently than the RUA. The Court of Appeals reasoned that the legislature did not intend to waive the states immunity pursuant to the RUA because it did not make specific exception for it in the GTLA.

The Supreme Court granted leave to appeal to determine whether the RUA creates an exception to the governmental immunity created by the GTLA. The Supreme Court upheld the decision of the Court of Appeals but on different grounds. The Supreme Court held that the GTLA limits liability on government owned property and the RUA limits liability on privately owned property. The Court reasoned that the RUA applies only to owners, tenants, or lessees of land but does not include an express waiver of governmental immunity for municipalities. The RUA was intended to limit the liability of private landowners - not government owned property.

[1]Claire Groen is an associate at Foster, Swift, Collins & Smith, P.C. She is a 1998 graduate of the Indiana University School of Law and is awaiting the results of the July 1998 Michigan bar exam.

Opinions of Frank J. Kelley, Attorney General

CONSTITUTIONAL LAW

Validity of section 606 of 1997 PA 112 under Const 1963, art 4, § 25

Section 606 of 1997 PA 112, the Department of Natural Resources 1997-1998 fiscal year appropriations act, violates Const 1963, art 4, § 25, which prohibits the Legislature from altering or amending a law unless the law is reenacted and published at length.

Opinion No. 6980
April 20, 1998

Legislator serving as director or officer of county agricultural society

Const 1963, art 4, § 8, does not prohibit a state legislator from simultaneously serving as a director or officer of a county nonprofit agricultural society established under the agricultural society act, 1855 PA 80.

The incompatible public offices act, 1978 PA 566, does not prohibit a state legislator from serving as a director or officer of a county nonprofit agricultural society established under the agricultural society act, 1855 PA 80.

Opinion No. 6983
May 28, 1998

Use of public funds for private driver education courses

Section 811(3) of the Michigan Vehicle Code, which gives students participating in an approved driver education course a certificate for use in payment of fees charged for courses provided by licensed driver training schools, does not violate Const 1963, art 8, § 2, which prohibits the use of public monies to support nonpublic schools.

Opinion No. 6984
June 1, 1998

Legislature's authority to require greater vote than authorized by constitution and Legislature's authority to restrict itself and subsequent Legislatures

The Legislature may not, by statute, require a three-fifths vote to enact legislation for which the constitution otherwise requires a simple majority vote.

The Legislature may not, by statute, restrict the ability of itself and subsequent Legislatures to adopt, amend and repeal statutes.

Opinion No. 6990
August 10, 1998

OCCUPATIONAL CODE

Person collecting parking ticket fines for municipality

A person engaged in collecting or attempting to collect fines due and owing from delinquent parking tickets, on behalf of municipalities, is not required to be licensed under the occupational code.

Opinion No. 6981
May 6, 1998

BUILDING AUTHORITY ACT AND ZONING AND PLANNING

Application of State Construction Code Act to county building authorities and application of city and village zoning ordinances to county building authority

A county building authority incorporated under the building authority act is subject to local zoning ordinances enacted under the city and village zoning act.

A county building authority incorporated under the building authority act is subject to the building permit and occupancy certificate requirements of the State Construction Code Act of 1972.

Opinion No. 6982
May 12, 1998

MARRIAGES

Authority of mayor *pro tem* to solemnize marriages

A city charter provision which authorizes its mayor pro tem to act in the mayor's stead during the mayor's absence, includes the authority to solemnize marriages.

Opinion No. 6985
June 8, 1998

ADULT FOSTER CARE FACILITIES

Application of Michigan Do-Not-Resuscitate Procedures Act to adult foster care facilities

The Adult Foster Care Facility Licensing Act does not require that an adult foster care facility resuscitate its resident whose heart and breathing have stopped and who has executed a valid do-not-resuscitate order pursuant to the Michigan Do-Not-Resuscitate Procedure Act.

Opinion No. 6986
June 16, 1998

SHERIFFS

Sheriff simultaneously serving as village police chief

A county sheriff may not simultaneously serve as a village police chief.

Opinion No. 6987
June 24, 1998

REAL ESTATE

County real estate transfer tax applicable to sheriff's mortgage forclosure deed

A sheriff's deed given in foreclosure of a loan is not exempt from the tax imposed by the county real estate transfer tax act unless the underlying mortgage loan is made, guaranteed or insured by the United States, the state, its political subdivisions, or an officer thereof.

Opinion No. 6988
August 4, 1998

LAND DIVISION ACT

Application of Land Division Act to building authorities incorporated under building authorities act

A building authority incorporated by a county under the building authorities act is not exempt from the plat filing and other land division requirements imposed by the Land Division Act.

Opinion No. 6989
August 11, 1998

SOIL CONSERVATION DISTRICTS

Voter eligibility in soil conservation district elections

Section 9301(h) of the Natural Resources and Environmental Protection Act, which requires a person to own or occupy land within a soil conservation district to be eligible to vote in district elections, does not violate the Equal Protection Clause of US Const, Am XIV, § 1.

Section 9301(h) of the Natural Resources and Environmental Protection Act, which requires a person to own or occupy at least

continued on page 19

Federal Decisions of Interest

By Gregory K. Need
Adkison, Need, Green, Allen & Schneider P.L.L.C., Bloomfield Hills, Michigan

DEMOLITION: DUE PROCESS/"TAKINGS"

The City of Detroit demolished a vacant building owned by Plaintiff. Despite the fact that the City made several attempts to purchase Plaintiff's property and corresponded with Plaintiff at his Dearborn address, the City sent all of the notices of the various dangerous building hearings for demolition to Plaintiff at the vacant building address. The City did not receive any certified mail, return receipts acknowledging receipt of the notices by anyone. The Court found that the Plaintiff was unaware of any hearings concerning his property and that the City, without written notice to Plaintiff, demolished the property in June of 1994.

The Federal District Court granted summary judgment as to liability in Plaintiff's favor indicating that the matter would proceed to trial on the issue of damages. The Court first found that the City Ordinance required that the City make a diligent search for the property owner prior to taking action. Given the fact that the City was aware of the Plaintiff's correct address and failed to send any of the required notices to him there, and given the fact that the City failed to even provide evidence that they had posted the property in accordance with the Ordinance, the Court held that the City denied Plaintiff due process by failing to observe its own regulations.

The Court granted summary judgment with regard to Plaintiff's 42 U.S.C. 1983 claim for violations of procedural due process as well as Plaintiff's State law claims of trespass and taking/inverse condemnation. On the inverse condemnation claim, the Court held that Plaintiff had demonstrated that the actions of the City substantially contributed to and accelerated the decline in value of Plaintiff's property. The City also argued that it was justified in acting under its police powers to insure the health, safety, and welfare of the public in demolishing the building. However, the Court held that the building was not abandoned, but rather Plaintiff vacated the building in reliance upon the City's agreement to purchase it, as to which the City subsequently reneged.

Fruman v City of Detroit, 1 F. Supp. 2d 665 (1998).

CIVIL RIGHTS: HIGH SPEED CHASES/DUE PROCESS

Two Sacramento County sheriff's deputies engaged in a high speed pursuit of a motorcycle after the motorcycle failed to respond to a command to stop. The chase took place for about 75 seconds over a course of about 1.3 miles in a residential neighborhood reaching speeds up to 100 miles an hour. The chase ended after the motorcycle tipped over and one of the officers slammed on his brakes, and hit a passenger, causing his death. The estate of the passenger brought a 42 U.S.C. 1983 claim alleging a deprivation of the passenger's Fourteenth Amendment substantive due process right to life.

The United States Supreme Court, reversing the Ninth Circuit, held that only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct "shocking to the conscience" necessary for a due process violation. Thus, notwithstanding the fact that the officer apparently disregarded the Sacramento County sheriff's general order on police pursuits, since the officer had no intent to cause harm, there was no due process liability. The majority opinion was delivered by Justice Souter in which five justices joined, although there were several concurring opinions.

County of Sacramento, et al. v Lewis, 118 S.C. 1708, 140 L. Ed. 2d 1043 (1998).

FAIR HOUSING ACT: ATTORNEY FEES

This case arose out of a 42 U.S.C. 1993 and Fair Housing Act action brought by a rabbi against the Village of Airmont alleging a conspiracy to discriminate against Plaintiffs on the basis of their Orthodox Jewish religion. The thrust of the Plaintiffs' complaint was directed at zoning ordinance amendments adopted by the Village which was designed to curb the establishment and operation of home synagogues. The Court apparently found that the City had not yet taken any action to apply the code provisions.

Plaintiffs' sought attorney fees. The Village argued that the individual Plaintiffs had not, in fact, been prevented from attending religious services, and because the Plaintiffs did not obtain an order directing a total dissolution to the Village as requested, they failed to obtain the degree of success to be determined that they had "prevailed".

The Second Circuit, reversing the District Court, held that Plaintiff was entitled to attorney fees and remanded for the calculation of a reasonable attorney fee consistent with its opinion. The Court held that, although the Plaintiffs had received only nominal monetary relief, they had obtained significant injunctive relief. The Court held irrelevant the fact that the Village had not previously enforced the challenged ordinance or that the relief granted Plaintiffs did not extend beyond the injunctive relief granted to the government in a parallel action.

LeBlanc-Sternberg, et al., v Fletcher, et al., 143 F.3d 748 (2nd Cir. 1998).

FAIR HOUSING ACT: ZONING ORDINANCES

Three Defendant communities adopted ordinances as part of the Housing Code which limited the total number of occupants in an apartment on the basis of minimum square footage per person and identified square footage based on habitable space. Plaintiff, a nonprofit fair housing association, brought suit claiming that the ordinances discriminated against large families in violation of the Fair Housing Act. The Plaintiff contended that none of the municipalities conducted or reviewed any studies or reports to determine the existence of overcrowding or what would constitute a reasonable occupancy standard before enacting the ordinances.

The District Judge, holding in favor of the Defendants, held that although Plaintiff showed some evidence tending to show that the

ordinances had disproportionate impact on large families seeking rental housing in these communities, the Plaintiff had failed to overcome the burden of showing that the ordinance was unreasonable. The Court noted that the Fair Housing Act provides that it did not limit the application of any reasonable local, federal, or state restrictions regarding the maximum number of occupants permitted to occupy a dwelling.

Fair Housing Advocates Assn. v City of Richmond Heights, et al., 998 F. Supp. 825 (Northern District of Ohio 1998).

ORDINANCES: ADULT ENTERTAINMENT

The City of Kansas City enacted an ordinance regulating viewing booths located in adult bookstores. The City had determined that regulation of such facilities was necessary to prevent the spread of sexual transmitted diseases. Among other things, the ordinance stated that each arcade booth must have at least one side completely open to adjacent public rooms, and adjacent hallways must be sufficiently illuminated.

The Eighth Circuit, affirming the District Court, held that the ordinance was not an unconstitutional time, place, and manner restriction on protected speech.

Scope Pictures, of Missouri, et al. v City of Kansas City, 140 F.3rd 1201 (Eighth Circuit 1998).

ORDINANCES: FIRST AMENDMENT

The City of Lincoln enacted an ordinance prohibiting any person to engage in the business of fortunetelling, mind reading, and similar practices. The Court of Appeals, affirming the District Court, held that the ordinance was a content-based regulation of speech, and as such, was valid if only supported by compelling state interest, which the City failed to demonstrate. The Court held that citizens are at liberty to believe "that the earth is flat, that magic is real, and that some people are prophets". In short, government may not prohibit certain kinds of speech simply because it disagrees with it. The ordinance was held invalid.

Agrello v City of Lincoln, 143 F.3rd 1152 (Eighth Circuit 1998).

ORDINANCES: FIRST AMENDMENT

The City of Menlo Park, California adopted an ordinance regulating posting and displaying of signs on public property or in the public right-of-way. There were several exemptions to the ordinance, including an exemption for signs on vehicles that are *not* parked to attract attention and picket signs.

Plaintiffs were individuals who were engaged in anti-abortion demonstrations, among other things, and posted several signs on one of the Plaintiff's cars. The ordinance in question also had exemptions for temporary open house real estate signs and various public informational signs.

The Ninth Circuit, reversing in part and remanding, held that the ordinance in question violated the First Amendment. With regard to the vehicle regulation, the Court held that it was "quite frankly somewhat odd" noting that the ordinance does not prohibit signs on parked cars but only if the sign was designed to attract attention. The Court held that this regulation, which related to the intent of the driver, "although creative", was unconstitutionally vague.

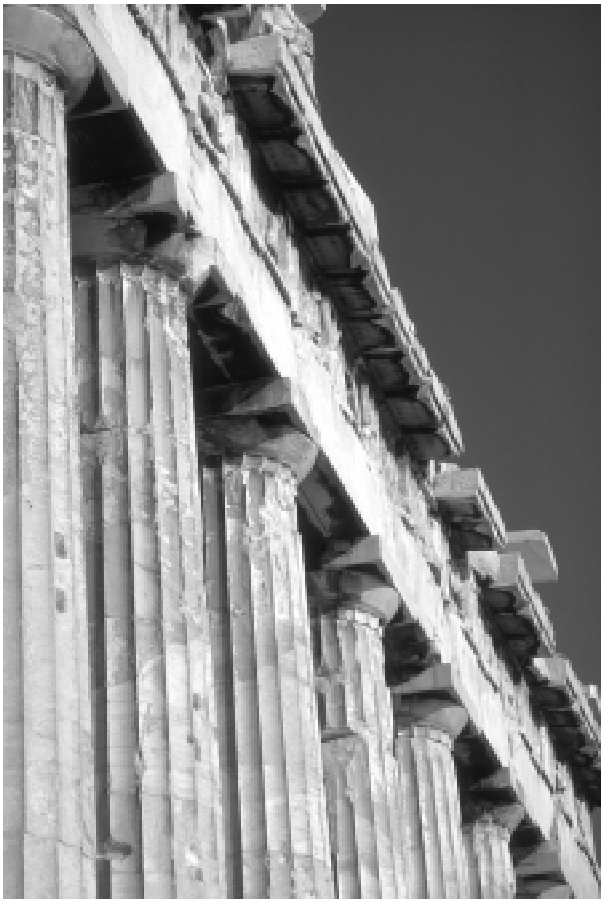
Foli, et al., v City of Menlo Park, 1998 U.S. App Lexis 17149; filed July 29, 1998.

PUBLIC EMPLOYMENT: DUE PROCESS/PROMOTIONS

Plaintiffs were three Los Angeles police department officers who had taken examinations for a promotion to lieutenant, and who had the required supervisory experience required by the City's policy. Plaintiffs alleged that several applicants lacking supervisory experience sat for the exam, received the top scores, and eventually became lieutenants. Plaintiffs filed a 42 U.S.C. 1983 suit alleging that they had a property interest in the promotion to lieutenant and asserted two liberty interests, including the right to engage in one's chosen profession and the right to be free from wholly unreasonable and arbitrary conduct.

The Court held that until someone actually receives a promotion or at least a binding assurance of a forthcoming promotion, he cannot claim a property interest in the promotion. The Court also indicated that every Court that had previously considered this issue rejected the claim that denial of a promotion constitutes a deprivation of liberty.

Nunez, et al., v City of Los Angeles, 118 U.S. App. Lexis 11720 (Ninth Circuit April 9, 1998).



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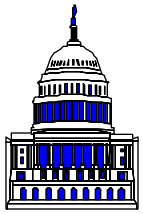

LEGISLATIVE UPDATE

By Kester K. So and Dana M. Lach[1]
Dickinson Wright PLLC

Over the course of the last several months, the State Senate and House of Representatives have introduced numerous bills of municipal interest. Some of these bills have been enacted into law. The following is a summary of select legislation.

A. LEGISLATION ENACTED

■ Public Act No. 97 of 1998 (formerly House Bill No. 4503) amends 1851 PA 156, relating to the regulation of county boards of commissioners. The Bill would allow a county board of commissioners to require the votes of two thirds of the greater of members present or a majority of the members elected and serving for final passage or adoption of a non-agenda item. This requirement would not apply if Section 11 or any other provision of law imposes a higher voting requirement.

The Bill would lessen, and in certain instances, eliminate the restrictions related to the acquisition, sale or lease of property, and would repeal the county board of commissioners' authorization to do the following: (1) purchase, for the use of the county, real estate necessary for the erection of buildings for the support of the poor of that county; (2) remove or designate a new site for a county building required to be at the county seat if the new site is not outside the limits of the village or city in which the county seat is located, or remove or designate a new site for a county infirmary or medical care facility; (3) abolish or revive the distinctions between township and county poor; and (4) authorize a township to borrow or raise by tax upon the township money to build or repair roads or bridges in the township, or for a use in which the township is interested, prescribe the time for the repayment of the loan, determine the portion that a township shall contribute to the building and repairing of a road or bridge if the road or bridge is located partly in one township and partly in another, or on the line between townships, or if a township has a particular local interest in the construction or repair of a bridge.

The Bill would delete the requirement that the proportion a township must contribute to the building and repairing of a road or bridge be assessed and collected in the same manner as other township taxes are assessed and collected. Finally, the Bill would require a county board of commissioners that borrows or taxes to subject such borrowing or taxing to any voting requirement provided by the law authorizing the borrowing or tax if different from the voting requirement under Section 3. House Bill No. 4503 was approved by the Governor on May 14, 1998, filed with the Secretary of State on May 15, 1998 and ordered to take immediate effect.

■ Public Act No. 100 of 1998 (formerly House Bill No. 5250) amends the Revised Judicature Act, 1961 PA 236, by adding Section 821a. The Bill requires the state to reimburse counties for amounts paid as the employer's share of the Social Security and Medicare taxes of probate judges. 1998 PA 100 was approved by the Governor and filed on June 2, 1998, and ordered to take immediate effect.

■ Public Act No. 101 of 1998 (formerly House Bill No. 4447) amends Section 4 of the Charter Township Act, 1947 PA 359. The Bill requires that the primary election held in a township at which township officers are to be elected be conducted "as near as may be" pursuant to Michigan Election Law, 194 PA 116. By so enacting, the Bill eliminates the Act's petition requirement for candidates seeking a place on the primary election ballot of the township. 1998 PA 101 was approved by the Governor and filed on June 2, 1998, and ordered to take immediate effect.

■ Public Act 210 of 1998 (formerly House Bill No. 4363) introduced on February 20, 1997 amends the Natural Resources and Environmental Protection Act, 1994 PA 451, by adding Section 503b. The Bill requires the Department of Natural Resources to conduct a public hearing in the county in which access is proposed before establishing a public lake access for the launching of boats in an inland lake. The Bill also requires the Department to determine, based upon the preponderance of testimony at the hearing and the Department's independent investigation, all of the following: (1) acquiring access to the lake is consistent with all applicable policies and criteria of part 19 of the Act; (2) more intense use of the lake will not result in degradation of the ecological integrity of the lake; and (3) more intense use of the lake by boaters will not result in the endangerment of the public. 1998 PA 210 was approved by the Governor and filed on July 1, 1998, and ordered to take immediate effect.

■ Public Act No. 214 of 1998 (formerly known as House Bill No. 5043) introduced July 15, 1997 would amend Section 2 of 1970 PA 73. The Bill would require that an airport authority board consist of three members from each county having a city with a population of over 100,000 persons and located primarily within the boundaries of the county. 1998 PA 214 was approved by the Governor and filed on July 1, 1998, and ordered to take immediate effect.

■ Public Act No. 228 of 1998 (formerly House Bill No. 5114) amends sections 30306, 30307 and 30317 of the Natural Resources and Environmental Protection Act, 1994 PA 451. The Bill requires that a permit application for use of wetlands be accompanied by a drawing describing the proposed use or development. In addition, the Bill establishes a fee scale for permit applications based on the proposed use of the wetlands, eliminating the previous $25 filing fee. The Bill allows the Department of Environmental Quality (the "DEQ") to accept a permit from an applicant who has violated the permit requirements if a fee equaling two times the filing fee is received. The DEQ is required to return all filing fees received from an applicant if it determines a permit is no longer required. The Bill also imposes requirements on local units of government, providing that those that adopt ordinances regulating wetlands must forward a copy of the application fees to the DEQ. The Bill eliminates the requirement that application fees be forwarded to the State Treasurer, instead providing that fees must be deposited in the land and water management permit fee fund and used to support guidance for property owners applications, permit processing, compliance inspections, and enforcement activities. 1998 PA 228 was approved by the Governor on July 2, 1998, filed on July 3, 1998 and ordered to take immediate effect.

■ Public Act No. 239 of 1998 (formerly Senate Bill No. 583) amends Section 10 of the Renaissance Zone Act, 1996 PA 376; Public Act No. 242 of 1998 (formerly Senate Bill No. 587) amends Enterprise Zone Act, 1985 PA 224; and Public Act No. 243 of 1998 (formerly Senate Bill No. 590) amends the Commercial Redevelopment Act, 1978, PA 255. The Bills would provide that a casino located in a renaissance zone or enterprise zone could not avail themselves of benefits under the Enterprise Zone Act, the Renaissance Zone Act and the Commercial Redevelopment Act, respectively. The Bills were approved by the Governor on July 2, 1998, filed with the Secretary of State on July 3, 1998 and ordered to take immediate effect.

■ Public Act No. 287 of 1998 (formerly Senate Bill No. 902) amends the Natural Resources and Environmental Protection Act, 1994 PA 451, by adding part 88. The Bill authorizes the Department of Environmental Quality to establish a nonpoint source pollution prevention and control grants program to provide grants to local units of government for nonpoint source pollution prevention projects that do one or more of the following: (1) implement the physical improvement portion of watershed plans that are approved by the Department under Section 8805; (2) reduce specific nonpoint source pollution as identified by the Department; and (3) support large-scale watershed programs consistent with the physical improvement portion of watershed plans approved by the Department under Section 8805.

The Bill requires a local unit of government to contribute 30% of the total project's cost from other public and private funding sources in order to receive a grant under the Act. The Bill allows the Department to approve in kind services to meet all or a portion of the match requirement. In addition, the Department may waive the match requirement if the grant applicant enters into a contract providing for maintenance of the project or practices funded under terms acceptable to the Department.

The Bill also establishes procedures for applying for a grant under the program. A local unit of government that wishes to apply for a grant must submit a grant application to the Department in a manner prescribed by the Department and containing the information required. The grant application must also include the following: (1) a detailed description of the project for which the grant is sought; (2) a discussion of how the project is consistent with an improved watershed plan, if applicable; and (3) a description of the total cost of the project and the source of the local government's contribution to the project. The Bill also outlines Department procedure for determining whether a grant application will be accepted or denied. Upon receipt of a grant application the director must consider the projects proposed and the extent that money is available for grants. The director must issue grants only for projects that he or she determines will assist in the prevention or control of pollution from nonpoint sources. The Bill also provides for the procedure for review and approval of a watershed plan. The Department must review and approve or disapprove a watershed plan that has been submitted to the Department. If the Department determines that approval will be issued, that approval must address all of the following: (1) the beneficial uses affected by nonpoint source pollution; (2) the pollutants affecting the beneficial uses; (3) the sources of the pollutants; and (4) the selected methods of controlling the pollutants, including physical improvements, institutional changes, and an information or education campaign. The Department must give public notice of its intent to approve a watershed plan and must consider comments on that intent for a 30-day period. If two or more local units of government submit watershed plans for the same watershed, the Department must return the plans with the direction to the local units of government to work together to develop a single watershed plan submitted by one local unit of government. 1998 PA was approved by the Governor and filed on July 27, 1998, and ordered to take immediate effect.

■ Public Act No. 288 of 1998 (formerly Senate Bill No. 904) amends 1994 PA 451, adding part 196. The Bill would implement the Clean Michigan Initiative by providing for the distribution of $550 million in general obligations bonds.

The Bill would also allocate proceeds of the bonds as follows: (1) not more than $335,000,000.00 must be used for response activities at facilities; (2) not more than $50,000,000.00 must be used for waterfront improvements; (3) not more than $25,000,000.00 must be used for remediation of contaminated lake and river sediments; (4) not more than $50,000,000.00 must be used for nonpoint source pollution prevention and control projects or wellhead protection projects; (5) not more than $90,000,000.00 must be used for water quality monitoring and water resources protection and pollution control activities; (6) not more than $20,000,000.00 must be used for pollution prevention programs; (7) not more than $5,000,000.00 must be used to abate lead hazards; (8) not more than $50,000,000.00 must be used for state park infrastructure improvements; and (9) not more than $50,000,000.00 must be used for local recreation projects.

The Bill requires that money in the fund allocated above must be used solely for the following purposes: (1) money allocated under Section 19607(l)(a) must be used by the Department to fund all of the following: (a) corrective actions undertaken by the Department to address releases from leaking underground storage tanks pursuant to part 213; (b) response activities undertaken by the Department at facilities pursuant to part 201 to address public health and environmental problems or to promote redevelopment; (c) assessment activities undertaken by the Department to determine whether a property is a facility; (d) not more than $20,000,000.00 must be used to provide grants and loans to local units of government and brownfield redevelopment authorities created under the Brownfield Redevelopment Financing Act, for response activities at known or suspected facilities with redevelopment potential; and (e) not more than $12,000,000.00 must be used for grants pursuant to the municipal landfill grant program under Section 20109a; (2) money allocated under Section 19607(l)(b) must be used for waterfront redevelopment grants pursuant to part 795; (3) money allocated under Section 19607(l)(c) must be used for response activities for the remediation of contaminated lake and river sediments pursuant to part 201; (4) money allocated under Section 19607(l)(d) must be used for nonpoint source pollution prevention and control grants or wellhead protection grants pursuant to part 88: (5) money allocated under Section 19607(l)(e) must be deposited into the clean water fund created in part 88; (6) money allocated under Section 19607(l)(f) must be expended as follows: (a) $10,000,000.00 must be deposited into the retired engineers technical assistance program

fund created in Section 14512; (b) $5,000,000.00 must be deposited into the small business pollution prevention assistance revolving loan fund created in Section 14513; (c) $5,000,000.00 must be used by the Department to implement pollution prevention activities other than those funded under subparagraphs (a) and (b); (7) money that is allocated under Section 19607(l)(g) must be used by the department of community health for remediation and physical improvements to structures to abate or minimize exposure of persons to lead hazards; (8) money allocated under Section 19607(l)(h) must be used for infrastructure improvements at Michigan state parks as determined by the department of natural resources with installation or upgrade of drinking water systems or rest room facilities must be the first priority; (9) money allocated under Section 19607(l)(i) must be used to provide grants to local units of government for local recreation projects pursuant to part 716; (10) of the money allocated under Section 19607(l)(a), not less than $40,000,000.00 or more than $60,000,000.00 must be used for facilities that pose an imminent or substantial endangerment to the public health, safety, or welfare, or to the environment, including, but are not limited to, those facilities where public access poses hazards because of potential exposure to chemicals or safety risks and where drinking water supplies are threatened by contamination.

The Bill restricts the department from making a grant for a project located at any of the following: (1) land sited for use as a gaming facility or a stadium or arena for use by a professional sports team; (2) land or other facilities owned or operated by a gaming facility or by a stadium or arena for use by a professional sports team; (3) land within a project area described in a project plan pursuant to the Economic Development Corporations Act. In addition, the Bill would prohibit the administering state department from making a grant or a loan with money from the fund unless all of the following conditions are met: (1) the applicant demonstrates that the proposed project is in compliance with all applicable state laws and rules or will result in compliance with state laws and rules; (2) the applicant demonstrates to the administering state department the capability to carry out the proposed project; (3) the applicant demonstrates to the administering state department that there is an identifiable source of funds for the future maintenance and operation of the proposed project, if appropriate; (4) within the last 24 months, the applicant has successfully undergone an audit conducted in accordance with generally accepted auditing standards; and (5) within the last 24 months, the applicant has not had a grant from the administering state department revoked or terminated or had the administering state department determine that the applicant demonstrated an inability to manage a grant.

The Bill would also place the following conditions on the funds used for grants and loans: (1) a recipient of a grant must receive not more than 1 grant per year not to exceed $1,000,000.00 per grant; (2) a recipient of a loan must receive a maximum of 1 loan per year not to exceed $1,000,000.00 per loan; (3) a grant must be awarded only if the Department determines that both of the following apply; (4) the property is a facility as defined in Section 20101; (5) the proposed development of the property will result in measurable economic benefit in excess of the grant amount requested by the applicant; (6) a loan must be awarded only if the Department determines that both of the following apply; (i) the property is a facility as defined in Section 20101 or is suspected of being a facility; and (ii) the property has economic development potential based on the applicant's planned use of the property. Public Act No. 288 of 1998 was approved by the Governor and July 27, 1998, and ordered to take immediate effect.

B. LEGISLATION PENDING

■ House Bill No. 5078 introduced September 23, 1997 would amend sections 200 and 643 of the Michigan Election Law, 1954 PA 116. The Bill would allow a county board of commissioners to either combine or separate by resolution the offices of the county clerk and register of deeds. The Bill would require that before such a resolution is adopted, the county board of commissioners as a whole study the question. In addition, the Bill would require the county board of commissioners as a whole hold at least one public hearing on the question pursuant to the Open Meetings Act. The board of commissioners may then vote on the question at least ten days but no more than 30 days after the public hearing. The Bill would require this vote occur no later than the sixth Tuesday before the deadline for filing the nominating petitions for office of the clerk, register or clerk-register. The Bill provides that a 2/3 vote by the commissioners elected and currently serving is necessary for the board of commissioners to combine or separate the two offices. House Bill No. 5078 was introduced and referred to the Committee on Local Government on September 23, 1997, which reported with substitute on May 19, 1998. The House passed the Bill, with substitute, on June 2, 1998 and referred the Bill to the Senate Committee on Local, Urban and State Affairs on June 3, 1998.

■ House Bill No. 5386 introduced November 3, 1997 would amend 1913 PA 380, relating to the regulation of gifts of real and personal property to cities, villages, townships and counties. This Bill authorizes a city, village, township or city to transfer any gift of intangible personal property or proceeds of such gift to a community foundation. House Bill No. 5386 was introduced and referred to the House Committee on Local Government, who reported with recommendation with substitute on May 19, 1998. The Bill was passed with substitute by the House on June 10, 1998. House Bill No. 5389 introduced December 2, 1997 and passed with substitute by the House on June 10, 1998 would amend Section 1 of 1921 PA 136 (gifts made to public libraries) in a similar manner.

■ House Bill No. 5407 introduced December 4, 1997 would amend the Home Rule City Act, 1909 PA 279, by adding Section 4n. The Bill would allow a city charter to authorize the city or one or more of its public corporations to join as a member or joint owner with a private nonprofit corporation in a separate private nonprofit corporation that will establish, operate or maintain a medical facility for a public purpose. House Bill No. 5407 was referred to the House Committee on Health Policy and passed by the House on July 2, 1998.

■ House Bill No. 5465 introduced January 14, 1998 would amend Section 31 of the Charter Township Act. The Bill would allow charter townships to levy a special assessment to defray the cost of separating storm water drainage from sanitary sewers on privately owned property for a public purpose. House Bill No. 5465 was referred to the Committee on Tax Policy on January 14, 1998 and

passed by the House on May 20, 1998. The Bill was referred to the Senate Committee on Local, Urban and State Affairs on May 21, 1998.

■ House Bill No. 5702 introduced March 17, 1998 would create the "Anti-Gang Assistance Act". The Bill would require an anti-gang assistance program to be created within the Department of the Treasury. This program would be intended to provide a local community additional money to employ local police officers to work with local schools and the community to reduce gang violence. The Bill would require that grant funds provide 100% of the matching money necessary for the local community to receive money under the federal community oriented policing services program. In addition, the Bill would require the State Treasurer to determine grant allocation. The State Treasurer would be authorized to receive funds from any source for deposit into the anti-gang assistance fund and direct the fund's investment. The Bill would require that other funding come from money appropriated by the legislature from money appropriated from the community policing program. In addition, the Bill would require the State Treasurer to expend money from the anti-gang assistance fund based on the availability of money at the beginning of each fiscal year and subject to the following limitations: (1) the amount of money in each grant must be equal to the local community's matching amount required by the community oriented policing services grant; and (2) the money must be for the cost of annual salaries of additional police officers hired to work in local schools and communities to reduce gang violence. The Bill would allow a local community to use grant funds to hire one or more local police officers or sheriff's patrol officers. However, if grant funds are used to hire sheriff's patrol officers, it is the sheriff's responsibility to hire additional officers. The Bill would prohibit a local community from using grant funds for the local communities maintenance police force or to hire a police officer whose primary function is administrator. Finally, "program" would be defined as the state anti-gang assistance. House Bill No. 5668 was introduced and referred to the House Committee on Education on March 17, 1998, which reported with recommendation on May 7, 1998. The Bill was passed by the House on June 17, 1998 and referred to the Senate Committee on Judiciary on June 25, 1998.

■ House Bill No. 5777 introduced April 23, 1998 would amend 1909 PA 283, by adding Section 20c to chapter 1. The Bill would allow, notwithstanding any other provision of the Act, the board of commissioners of any county with a population greater than 700,000 persons to submit the question of establishing toll road facilities to the electorate of the county at any general or special election. In addition, the Bill would require revenues collected from these toll road facilities to be expended by the board exclusively for the administration and operation of toll collection and for the repair, resurfacing and maintenance of the highways from which the tolls are collected. House Bill No. 5777 was introduced and referred to the House Committee on Appropriations on April 23, 1998.

■ House Bill No. 5796 introduced March 11, 1998 would amend the Metropolitan Council Act, 1989 PA 292. The Bill would authorize a metropolitan district to create a metropolitan arts council to develop or enhance cultural institutions and facilities within the geographic boundaries of the council. A metropolitan district would be defined as a county with not less than two state public universities or a population of not more than 100,000 individuals and a boundary contiguous to a county with not less than two state public universities. The Bill sets out the requirements for the metropolitan arts council's articles which must include the name of the council; the purposes for which the council is formed; the powers, duties, and limitations of the council and its officers; the qualifications, method of selection in terms of office of the delegates sitting on the council and the council officers; and the general method of amending the articles. The articles would be required to be adopted and amended by an affirmative vote of the majority of county commissioners. Before amendment or adoption the county clerk must endorse and publish the articles at least once in a newspaper generally circulated within the county. The Bill would also require that articles be filed with the Secretary of State.

In addition to the creation of a metropolitan arts council, the Bill imposes certain requirements on the creation of a metropolitan area council under the Act. The Bill would provide that if a majority of the electors voting on the question of whether to become part of a metropolitan area council vote "no", the local governmental unit may not become a participating local government unit in a metropolitan area council for a period of not less than one year following the date of the vote. The Bill would also redefine "metropolitan area" to mean a metropolitan statistical area with a population of less than 1.5 million people, as defined by the United States Department of Commerce or a successor agency. The Bill would require that the articles of a metropolitan area council not authorize a tax levy under subsection (3) unless each delegate serving on the council holds an elected office in a local government unit that he or she represents on the council. The Bill would define "facilities and programs" to mean structures, facilities, and activities provided by a tax-exempt entity that has been in existence for at least 18 consecutive months before becoming eligible for funding under sections 67 - 79. This would include a public broadcast station; a museum or historical center; a performing arts center; an orchestra; chorus; chorale; opera theater; and a ballet, dance, or theater company. Exempted from the definition of facilities and programs are professional sports arenas or stadiums, labor organizations, political organizations, libraries, or public, private or charter schools. The Bill would further define "tax-exempt entity" to mean any of the following: (1) an organization exempt from taxation under Section 501(c) of the Internal Revenue Code of 1986; and (2) an entity or division owned by an organization described in subparagraph (1). House Bill No. 5796 was introduced and referred to the House Committee on Tax Policy on April 29, 1998, which reported with recommendation on May 7, 1998. The Bill was once again referred to the House Committee on Tax Policy on May 12, 1998 which reported with a recommendation on substitute on May 27, 1998. The Bill was passed by the House with substitute on June 4, 1998 and referred to the Senate Committee on Financial Services on June 9, 1998.

■ House Bill No. 5801 introduced April 29, 1998 would amend Section 39 of the General Property Tax Act, 1893 PA 206. The Bill would authorize the assessor to round down the tax rate to four decimal places in order to avoid fractions in computation. The Bill was introduced and referred to the Committee on Tax Policy on April

29, 1998, where it was reported with recommendation with substitute. The House passed the Bill, with substitute, on July 1, 1998.

■ House Bill No. 5868 introduced May 19, 1998 would amend the City and Village Zoning Act, 1921 PA 207. The Bill would add Section 14a to the Act to allow a development rights ordinance to provide for a TDR program. Under a TDR program, only a willing landowner's development rights may be transferred. A development rights ordinance for a TDR program must specify the following: (1) the public benefits that the city or village may seek through the transfer of development rights; (2) the development rights to be authorized to be transferred; (3) the procedures to be followed by the legislative body of the city or village for establishing the precise location of each sending zone and receiving zone; and (4) limiting the development rights that may be transferred to each receiving zone. House Bill No. 5868 was introduced and referred to the House Committee on Agriculture on May 19, 1998.

■ House Bill No. 5869 introduced May 19, 1998 would amend the County Zoning Act, 1943 PA 183. The Bill would add Section 32a to the Act to allow a development rights ordinance to provide for a TDR program. Under a TDR program, only a willing landowner's development rights may be transferred. A development rights ordinance provided for a TDR program must specify the following: (1) the public benefits that the county may seek through the transfer of development rights; (2) the development rights to be authorized to be transferred; (3) the procedures to be followed by the legislative body of the county for establishing the precise location of each sending zone and receiving zone; and (4) limiting the development rights that may be transferred to each receiving zone. House Bill No. 5869 was introduced and referred to the House Committee on Agriculture on May 19, 1998.

■ House Bill No. 5870 introduced May 19, 1998 would amend the City and Village Zoning Act, 1921 PA 207. The Bill would add Section 14a to the Act to allow a development rights ordinance to provide for a TDR program. Under a TDR program, only a willing landowner's development rights may be transferred. A development rights ordinance provided for a TDR program must specify the following: (1) the public benefits that the township may seek through the transfer of development rights; (2) the development rights to be authorized to be transferred; (3) the procedures to be followed by the legislative body of the township for establishing the precise location of each sending zone and receiving zone; and (4) limiting the development rights that may be transferred to each receiving zone. House Bill No. 5870 was introduced and referred to the House Committee on Agriculture on May 19, 1998.

■ House Bill No. 5871 introduced May 15, 1998 would create the Homestead Assistance Act. This Bill would allow a local government unit to convey its interest in real property to a nonprofit organization at less than fair market value if certain enumerated requirements are met. The Bill would require a public hearing on the proposed conveyance be held in accordance with the Open Meetings Act. The Bill would also require that a conveyance agreement set forth the purpose for the conveyance, limited to those purposes enumerated by the Act, including: (1) constructing new or rehabilitated housing designed to increase the supply of senior and affordable housing within the local government unit; (2) encouraging economic development within the local government unit; (3) constructing a facility as defined in the State Building Authority Act which will benefit the citizens of the local government unit; and (4) constructing a project as defined in the Economic Development Corporations Act. House Bill No. 5871 was introduced and referred to the Committee on Urban Policy and Economic Development on May 19, 1998. The House passed the Bill with amended substitute on July 1, 1998.

■ House Bill No. 5878 introduced May 20, 1998 would amend Section 4545 of the Revised Judicature Act of 1961, 1961 PA 236. The Bill would provide that an action for material fraud or error committed in an election be brought within thirty days after the final certification of the election by the board of canvassers. The Bill would provide that final certification includes any certification that occurs after the initial certification due to recount or the holding of a special mail election pursuant to Section 831 to 839 of the Michigan Election Law. House Bill No. 5898 was introduced and referred to the Committee on Local Government on May 20, 1998.

■ House Bill No. 5912 introduced on June 4, 1998 would amend the Township Zoning Act, 1943 PA 184. The Bill would require a township to incorporate an airport layout plan or airport approach plan into the plan required under subsection (1) promptly after its filing with the township zoning board. The Bill would also place requirements on zoning ordinances. A zoning ordinance adopted after the effective date of the Bill would be required to be consistent with any airport zoning regulation, airport layout plan, and airport approach plan. However, any zoning ordinance amendment adopted or variance granted after the effective date of the Bill must not increase any inconsistency that may exist between the zoning ordinance or structures or uses and any airport zoning regulations, airport layout plan, or airport approach plan. In addition, the Bill would require a zoning ordinance be made with reasonable consideration of the environs of an airport within a district as well as comments received at or before a public hearing from the airport manager of any airport. House Bill No. 5913 was introduced and referred to the House Committee on Local Government on June 4, 1998. House Bill No. 5913 introduced on June 4, 1998 would amend the County Zoning Act, 1943 PA 184, in a similar manner. House Bill No. 5913 was introduced and referred to the House Committee on Local Government on June 4, 1998.

■ House Bill No. 5947 introduced June 18, 1998 would amend Section 113 of the Land Division Act, 1967 PA 288. The Bill would authorize a township to adopt an ordinance to assume the powers and duties of a county road commission for purposes of review and approval of the placement of roads within a subdivision. The Bill would require the authorizing ordinance to provide for the township's indemnification of the county road commission for claims arising out of the township's approval and review. House Bill No. 5947 was introduced and referred to the Committee on Local Government on June 18, 1998.

■ House Bill No. 5948 introduced June 18, 1998 would amend the Condominium Act, 1978 PA 59, by adding Section 171b. The Bill would require the developer of a proposed condominium project including or abutting roads under the jurisdiction of the county road commission to submit three copies of the project to the engi

neer or chairperson of the county road commission. In addition, the Bill authorizes the county road commission to request a topographic map showing direction of drainage and proposed widths or roads which are or will be as well as private roads in unincorporated areas. The Bill would require the county road commission note its approval of the project or reject the project within thirty days after receipt of the project plan. If it chooses to reject the project plan, the county road commission must submit to the developer in writing the reasons for rejection and requirements for approval. The Bill would also authorize a township to adopt an ordinance to assume the power of the county road commission with respect to approval and review of the placement of roads within a proposed condominium project. The Bill would require the authorizing ordinance to provide for the township's indemnification of the county road commission for claims arising out of the township's approval and review. House Bill No. 5948 was introduced and referred to the House Committee on Local Government on June 18, 1998.

■ Senate Bill No. 809 introduced November 13, 1997 would amend 1851 PA 156, relating to the powers and duties of county boards of commissioners. The Bill would increase the signature requirement necessary to initiate proceedings for consolidation of two or more townships within the same county from at least 5% to not less than 15% of the total population of each of the affected townships. In addition, the Bill authorizes proceedings for consolidation of two or more townships to be initiated by a resolution passed by majority vote of the members of the township board of each of those townships to submit the consolidation proposition to a vote of the electors of the affected townships. Finally, the Bill requires that this resolution specify an election date. Senate Bill No. 809 was introduced and referred to the Senate Committee on Government Operations on November 13, 1997. The Bill was passed by the Senate and referred to the House Committee on Local Government on May 28, 1998.

■ Senate Bill No. 878 introduced February 17, 1998 would amend the Elliott-Larsen Civil Rights Act, 1976 PA 453. The Bill, if enacted, would amend the title to expand the purpose of the Act to include prohibiting certain discriminatory practices relating to employment. The Bill would also amend Section 202 to prohibit an employer who is a political subdivision from interfering with the residency choices of an employee or applicant by requiring the employee or applicant to reside within this political subdivision as a condition of employment or promotion. The Bill would exclude from this prohibition the employment of an individual that results from the individual's election to office. Senate Bill No. 878 was introduced and referred to the Senate Committee on Local, Urban and State Affairs on February 17, 1998.

■ Senate Bill No. 1008 introduced March 10, 1998 would amend Section 1 of 1964 PA 70, relating to governmental immunity. The Bill expands the definition of governmental function to include any activity whose expense was charged to or reimbursed by a private entity. Senate Bill No. 1008 was introduced and referred to the Senate Committee on Governmental Operations on March 10, 1998, which reported favorably with amendments on May 5, 1998 and again on May 13, 1998. The Bill was passed by the Senate and referred to the House Committee on Judiciary on May 14, 1998.

■ Senate Bill No. 1128 introduced May 12, 1998 would amend the Urban Redevelopment Corporation Law, 1941 PA 250. The Bill would amend Section 12 to extend the authorization conferred upon cities by the Act to include townships. The Bill would increase the exemption period established by appropriate action of cities or townships for real property owned by a redevelopment corporation or qualified entity to not more than 40 years from any increase in assessed value over the maximum assessed value. In addition, the Bill would increase the exemption period on improvements made on the property after the beginning of the maximum exemption period to not more than 40 years. The Bill would define "development plan" to include property located within a township if previously used as a state facility. The Bill would also define "qualified entity" to include: (1) a Michigan nonprofit corporation or partnership if one of the following conditions are present: (1) the sole general partner is a nonprofit corporation; (2) a majority of each class of stock is held by the redevelopment corporation; (3) the redevelopment corporation has the authority to elect and remove a majority of the members of the board of directors of the nonprofit corporation; and (4) the sole member of the nonprofit corporation is the redevelopment corporation; and (2) a for-profit corporation, partnership or limited liability company formed by the redevelopment corporation solely to syndicate tax credits in connection with property owned by the redevelopment corporation if the redevelopment corporation maintains oversight responsibility for the property for which taxes were syndicated. The Bill would add Section 12A to authorize a redevelopment corporation to form nonprofit corporations, for-profit corporations, partnerships and limited liability companies, to serve as a member or shareholder of a qualified nonprofit corporation organized under Michigan law and to fill documents necessary to form one or more nonprofit corporations. The Bill would also add Section 12B to authorize redevelopment corporations to receive loans or grants from a city or township, the State of Michigan, the federal government or any agency or political subdivision of the State of Michigan or the federal government. The Bill would allow the local legislative body of the city or township to condition its loan or grant on an agreement that the redevelopment corporation will reimburse the city or township as soon as possible. Finally, the Bill would allow redevelopment corporations to solicit and receive funds from other public or private sources, including participation in any federal or state program relating to the purpose for which the redevelopment corporation was formed. Senate Bill No. 1128 was introduced and referred to the Senate Committee on Finance on May 12, 1998, which reported favorably without amendment on May 13, 1998 and May 20, 1998. The Bill was passed by the Senate and referred to the House Committee on Commerce on May 21, 1998.

■ Senate Bill No. 1136 introduced on May 19, 1998 would amend the Metropolitan Council Act, 1989 PA 292. The Bill would amend Section 5 to allow two or more qualified counties in combination with one another and with one or more qualified cities to form a metropolitan council to develop and enhance regional cultural institutions and local recreation and cultural facilities. The Bill would define a "qualified city" as a city which is located in a participating qualified county and owns two or more regional cultural institutions. In addition, the Bill would define "qualified county" as a

county that has a population of not less than 700,000 and has a qualified city within its geographical boundaries, or is contiguous to a county with a qualified city. "Regional cultural institution" would also be defined as a structure, a fixture or activity provided by a tax-exempt entity that has been in existence for at least eighteen consecutive months before becoming eligible for funding under the Act. A professional sports arena or stadium; a labor organization; a political organization; a library; a public, private or charter school; or an exhibition, performance, or presentation that is obscene would be exempt from the definition of "regional cultural institution". The Bill would provide for the creation of a metropolitan council board composed of three representatives appointed by the chief executive officer of each of the participating qualified counties and qualified city. However, should a participating qualified county have a population greater than 2,000,000, the Bill would provide that a representative be appointed by each of the three largest geographical conferences established in the county before January 1, 1999 under the Urban Corporation Act of 1967, 1967 PA 7.

The Bill would authorize the metropolitan council to levy on all the taxable real and personal property within the council area and ad valorem tax of not to exceed .5 mils of the taxable value of the taxable property, if placed on the ballot by resolution of the council and approved by a majority of the voters residing in the council area. The articles of the metropolitan council may authorize each participating qualified county to receive up to 1/3 of any net taxes levied under Section 7 of the Act to be expended for finding cultural and recreational programs and facilities. However, the Bill would prohibit a participating qualified county with a population of more than 2,000,000 according to the most recent federal census from receiving any net revenues collected within that county. The Bill instead provides that one third of these net revenues collected in each city, village, or township be retained and spent by it to fund cultural and recreational programs and facilities. Senate Bill No. 1136 was introduced and referred to the Senate Committee on Financial Services on May 19, 1998, which reported favorably with substitute on May 21, 1998. The Bill was passed, with substitute, by the Senate on June 10, 1998 and referred to the House Committee on Tax Policy on June 11, 1998.

■ Senate Bill No. 1198 introduced June 9, 1998 would amend the Aeronautics Code of the State of Michigan, 1945 PA 327. The Bill would amend Section 151 to require the manager of a licensed airport to properly file all of the following with the commission appointed to recommend zoning regulations to any township, county, village or city located in whole or in part within the approach protection area: (1) a copy of the airport approach plan if applicable; (2) a copy of the airport layout plan, if applicable; and (3) a registration of the airport's name and mailing address for the purposes of a receipt under Section 4(1) of the City and Village Zoning Act, 1921 PA 207, Section 9(2) of the County Zoning Act, 1943 PA 183, or Section 9(2) of the Township Zoning Act, 1943 PA 184. Senate Bill No. 1198 was introduced and referred to the Committee on Local, Urban and State Affairs on June 9, 1998.

[1] Dana Lach will be a third-year law student at the University of Wisconsin beginning the fall of 1998. She was a summer associate in the Lansing office of Dickinson Wright PLLC.

Opinions of Frank J. Kelley, Attorney General

continued from page 9

3 acres of land within a soil conservation district to be eligible to vote in district elections, constitutes an unreasonable and arbitrary classification and, therefore, violates the Equal Protection Clause of US Const, Am XIV, § 1.
Opinion No. 6991
August 12, 1998

ENVIRONMENTAL PROTECTION

Local government's authority to adopt air pollution control ordinances

A township, city, village or charter county when authorized by its charter may adopt air pollution control ordinances, provided that such ordinances are reasonably related to public health, safety and welfare and are no less stringent than corresponding requirements of federal and state air pollution control laws. Noncharter counties may not adopt air pollution control ordinances.

A township, city, village or charter county air pollution control ordinance (a) may regulate the construction or operation of a municipal solid waste incinerator if the local ordinance is part of or consistent with an approved county solid waste management plan; and (b) may prohibit the construction or operation of any other combustion source, including a wood-fired power plant, provided that the ordinance is reasonably related to public health, safety, or welfare and does not contravene state or federal law.

The Department of Environmental Quality may not deny a permit to install an air emission source pursuant to Part 55 of the Natural Resources and Environmental Protection Act, on the ground that the proposed activity fails to comply with local zoning ordinances.
Opinion No. 6992
August 13, 1998

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