PUBLIC CORPORATION Law Quarterly

Newsletter of the Public Corporation Law Section of the State Bar of Michigan

Spring 2002, No. 2

PCLS/MAMA 2002 Annual Summer Educational Conference

June 28th—30th at Shanty Creek Resort

Now is the time to make the reservations for you and your family/friends for the PCLS/MAMA Summer Educational Conference, June 28-30, 2002, Shanty Creek Resort, Bellaire, Michigan. The program includes Affirmative Action (today in America) Curt A. Levy, Director of Legal and Public Affairs for the Center for Individual Rights, Washington DC, the plaintiffs' counsel in the two University of Michigan cases; Supreme Court Review Richard Ruda, Legal Counsel, State and Local Legal Center, Washington DC; Email Traps for the 21st Century, Mary Fales, Asst. City Attorney, Ann Arbor; Attorney's Critical Role in Public Meetings, Eric Williams, City Attorney, Big Rapids; Saving Face by Preparing for the Media, John S. Gilbreath, Attorney, Ypsilanti.

Friday, June 28, 2002

1:00 p.m.
Affirmative Action (today in America)
Curt A. Levey

Supreme Court Review
Richard Ruda, Legal Counsel, State and Local Legal Center, Washington, DC

6:00 p.m.
Evening Reception followed by a Family Barbecue Dinner
Sponsored by the Public Corporation Law Section of the State Bar of Michigan
We welcome attendees, their spouses, children and friends
Cost is included in registration fee

See pages 5 and 9 for more information

Saturday, June 29, 2002

8:30 a.m.
State Issues
Email Traps of the 21st Century
The City Attorney's Critical Role at Council (Public) Meetings
Saving Face by Preparing for the Media
Plus much more!

6:00 p.m.
Dinner & Speaker
All About Resolving Conflict: "I'm Sorry:" The Power of Apology
Carl D. Schneider, Ph.D.

Apology involves the acknowledgement of injury with an acceptance of responsibility, affect (felt regret or shame—the person must mean it), and vulnerability—the risking of an acknowledgement without excuses. It is repair work—work that is often necessary, but difficult. This is a technique used in successful negotiations and mediation in court, at work, and at home.

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Public Corporation Law Quarterly

The *Public Corporation Law Quarterly* is published by the Public Corporation Law Section of the State Bar of Michigan, Michael Franck Building, 306 Townsend Street, Lansing, Michigan 48933-2083.

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The views expressed in the publication do not necessarily reflect those of the Public Corporation Law Section or the State Bar of Michigan. Their publication does not constitute an endorsement of the views.

*Editor of this issue

Chairperson's Corner

By Gregory T. Stremers
in absentia of the chair

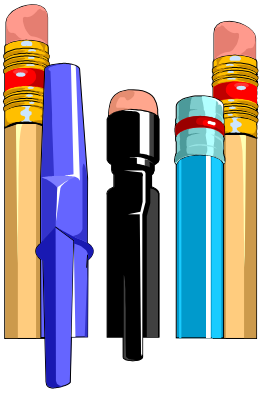
Unfortunately, the role of local government has been further defined by the agonizing events of September 11, 2001. As we know too well, local government bears the direct and immediate burden of providing services in times of peace and times of struggle. We are proud of New York and Washington DC in their response to the acts of terror on September 11, 2001.

The Public Corporation Section has and will continue to provide a forum to discuss the issues that affect local governments in this changing world. At the winter meeting, the Section sponsored a disaster preparedness round table that included law enforcement and State officials at the highest levels. The discussions surrounding the round table provided a valuable service by discussing preparedness as well as legal obligations that sets ours apart from other governments.

The Public Corporation Section is also looking to the future. The Public Corporation/Michigan Association of Municipal Attorneys Summer Conference will feature Curt Levy who will discuss the future of affirmative action in light of the University of Michigan litigation. The Conference will be held June 28-30, at Shanty Creek. The Section is also looking to the future of our downtown communities. On October 25-26, the Section is welcoming the American Bar Association—State and Local Government Section's fall meeting. The meeting will include insight from local government attorneys from across the country, as well as insight from the people responsible for the redevelopment of downtown Detroit. The program will conclude with a reception at the Tiger's Club in Comerica Park.

We look forward to seeing everyone at these events.

Mark Your



Events of Interest to Local Government Attorneys

Calendar!

June 28-30, 2002
PCLS/MAMA Summer Educational Conference
Shanty Creek, Bellaire, Michigan—
Keynote Speakers: Curt A. Levey, Director of Legal and Public Affairs for the Center on Individual Rights will discuss affirmative action in local governments.

Carl D.Schneider, Ph.D., Director of Mediation Matters speaking on the topic, "All About Resolving Conflict: I'm Sorry: The Power of Apology"

September 10-13, 2002
MAMA/MML Annual Meeting, Dearborn

September 25-27, 2002
PCLS/SBM Annual Meeting, Grand Rapids

October 20-23, 2002
IMLA Annual Conference, Denver Colorado

October 25 & 26, 2002
ABA state and local government section will hold it's meeting in Detroit
All day CLE class and reception at the Tiger Club afterward

January, 2003
Michigan Township Association/Township Attorneys Meeting, TBA

January 15 & 16, 2003
MAMA Winter Retreat, TBA

Winter/Spring 2003
PCLS Winter Meeting, TBA

Spring, 2003
MAMA Winter Institute (day prior to MML Legislative Conference) Lansing, MI

Spring, 2003
International Municipal Attorneys (IMLA) Mid Year Seminar, Washington, D.C.

June 27-29, 2003
MAMA/PCLS Summer Educational Conference, TBA

September 16-19, 2003
MAMA/MML Annual Meeting, Detroit

Fall, 2003
PCLS/SBM Annual Meeting, TBA

October 12-15, 2003
IMLA Annual Conference, Minneapolis, Minnesota

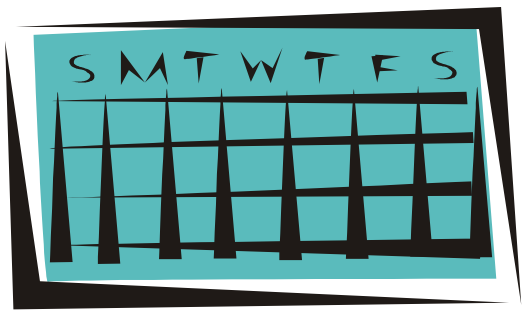
Early November 2003
Local Government Law and Practice in Michigan, version 2003, TBA

September 29-October 2, 2004
MAMA/MML Annual Meeting, Mackinac Island

October 3-6, 2004
IMLA Annual Conference, San Antonio, Texas

September 27-30, 2005
MAMA/MML Annual Meeting, Grand Rapids

September 26-9/29, 2005
Savannah GA, - Hyatt & Marriott



Federal Cases of Interest

Compiled by
Eric M. Kociba

First Amendment: Politically Based Preferences Void Act

Shortly after a state referendum authorized gambling in the City of Detroit, the defendant city set forth bidding procedures for those who wished to operate the three authorized casinos. The city's ordinance instructed the mayor to choose three casino operators. The ordinance explicitly sought to reward those developers that had worked to get casino gambling authorized. One part of the ordinance stated that it was in the best interest of the city to provide a preference to those who worked to get the state and local laws passed. Another part of the ordinance expressly favored "initiator[s] of a casino gaming proposal."

One of the bidders challenged the preference on First and Fourteenth Amendment grounds. The Sixth Circuit agreed that the bidder's preference penalized others for not championing a political position on casino legalization. The court applied a strict scrutiny test. The court held that the preference served a compelling governmental interest in promoting stability of political and tax systems.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

However, the court held that the preference still was not the least restrictive possible way to serve that interest. The city argued that the voters would not have voted for the ordinance without some certainty as to whom would likely receive the casinos. The court dismissed this argument, saying it was a mere political reason for the preferences, not a constitutional argument for their validity. The politically derived preference rendered the ordinance invalid. Judge O'Malley dissented, she did not agree that strict scrutiny should apply. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v Michigan Gaming Control Board*, 276 F3d 876 (6th Circuit: January 11, 2002).

Due Process: Overstated Penalties: Parking Tickets

Motorist brought a §1983 claim against the City of Detroit and attempted to certify a class action, alleging that the parking tickets and overdue notices issued by the city violated her due process rights. She argued that the notices given on the parking tickets and overdue notices were false and misleading. For one thing, they stated that a failure to respond would lead to additional penalty, late fees, or even result in the car being booted or otherwise immobilized. The tickets and notices also stated that a citation "will be filed in court" and that the owner's driver's license could be withheld. Plaintiff claimed that these notices were deceptive - the city hadn't brought a judicial offense for parking violations in five years, one has to have at least six offenses to get the 'boot', and the city is not authorized to withhold a driver's license. Plaintiff asserted that her due process rights were deprived by this deception, which coerced her into paying the parking fines without hesitation or appeal.

The Sixth Circuit rejected her claim. The notices were found to reasonably apprise plaintiff of the charges and that a procedure existed to challenge them. The mere presence of a misleading statement was not enough to constitute a due process violation. Moreover, the fact that the city had not sued on these traffic violations did not mean it was without legal authority to do so. Also, where the ticket and notices were allegedly misleading, they still did not mislead about the appeals process itself. Other cases establishing a due process violation referred to confusion over the plaintiff's options in gaining a meaningful appeal. As a contrast, the only misdirection here was a confusion over the penalty for failing to act. *Herrada v City of Detroit*, 275 F3d 553 (6th Circuit December 26, 2001).

Fair Housing Amendments Act: Variance Not Required

Plaintiff sued city because he wanted to put up a six-foot privacy fence, but the city would not provide a variance. He alleged that the Fair Housing Amendments Act of 1988, 42 USC 3604 (FHAA) mandated the variance in light of his handicap. Namely, plaintiff said he suffered from post-traumatic stress disorder and a heart condition, and could not be subjected to high levels of stress. He claimed the six foot fence was necessary to prevent the neighbors from spying on him, increasing his stress. He also wanted the fence to keep out leaves.

The Sixth Circuit disagreed with plaintiff's argument that the FHAA applied. Under the act, a city may not refuse to make reasonable accommodations in rules, practices or services if such accommodations are necessary to afford an equal opportunity to use and enjoy a particular dwelling. However, plaintiff did not allege facts sufficient to show the fence was a necessary accomodation. Plaintiff had lived at the house several hears without the fence. Moreover, plaintiff still had a choice to live at the location, the city's refusal to grant the variance did not prevent him from using the dwelling. *Howard v City of Beavercreek*, 276 F3d 802 (6th Circuit January 9, 2002).

First Amendment: "Sexually Oriented Business" licensing

An ordinance requiring licenses of all sexually oriented businesses and their employees was unconstitutional as an invalid prior

Continued on page 10

Little Lost Laws

I'll Bet You Didn't Know (or maybe you forgot)—
"Crime Does Not Pay - Really"

A regular feature submitted by Richard J. Figura
Simen, Figura & Parker, P.L.C., Flint, Michigan

Public Act 157 of 1941 [MCL 123.821, et seq; MSA 5.3322(1), et seq] provides for the payment of minimum annual salaries to police officers and policemen (are policemen not police officers?) in incorporated cities of this state. Obviously, the legislature was concerned that those who put their lives on the line for the protection of the public be adequately compensated for their efforts. The minimum pay required varies by the size of the city.

In cities having more than 500,000 population, police officers and policemen shall receive an amount not less than $2,640.00 per year (so long as they have more than three [3] years police service). In cities having a population of more than 75,000 but not exceeding 500,000, the minimum salary is $2,000.00 per year (again, three [3] years police service is required). In cities having a population of more than 25,000 but not exceeding 75,000, the minimum salary is $1,900.00 per year and only two [2] years police service is required. If the city has a population of more than 12,500 but not exceeding 25,000, $1,800.00 per year is the minimum if the officer has more than two [2] years of service. Finally, cities having a population of more than 5,000 but not exceeding 12,500 must pay their police officers and policemen at least $1,700.00 per year, but only if they have more than one [1] year police service.

As with all good laws, there is an exception. Here the exception is for cities having more than 40,000 population and which adjoin or lie within the boundaries of a city that has more than 500,000 population. In that instance, the higher salary ($2,640.00) of the larger city becomes the minimum in the smaller city as well. Please note, however, that MCL 123.824 [MSA 5.3322(4)] provides that these minimum salaries do **not** apply to "persons engaged in part time, emergency or special police service or to any person not actively engaged in said service."

Armed with this information, perhaps the next time you sit down to bargain with your police union, you can impress them with your city's magnanimity and generosity and offer them a salary "three times the minimum required by law." Alternatively, if you are a hard nose, you can bargain to have the union's members classified as performing "special police service" in which case the statutory minimums don't apply at all.

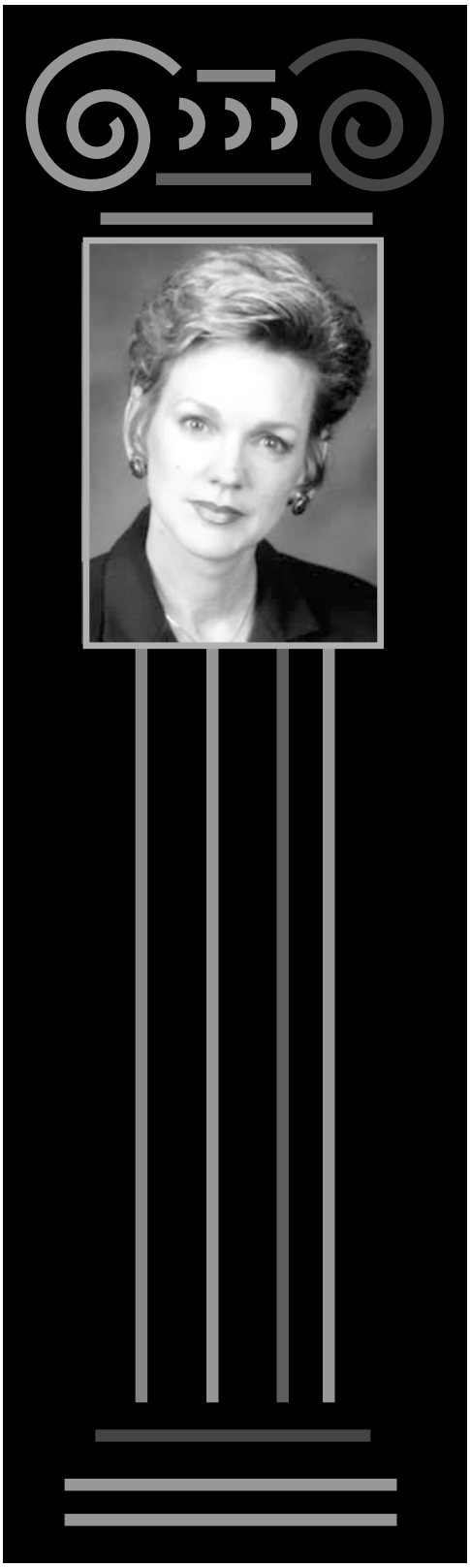
PCLS/MAMA Annual Summer Educational Conference 2002
Continued from page 1

About the Speakers

Curt A. Levey, J.D. is Director of Legal and Public Affairs for the Center for Individual Rights in Washington, DC. He is the plaintiffs' counsel in the two University of Michigan cases. Mr. Levey writes and speaks about a variety of legal issues, including racial and gender preferences, free speech, religious liberty, constitutional limits on federal power and sexual harassment. Since joining CIR in 1998, he has written about these issues in the *Wall Street Journal*, *USA Today*, the *Legal Times*, and the *National Law Journal*. And Mr. Levey has recently spoken at the American Bar Association annual meeting, the National Conference of State Legislatures assembly, as well as symposia at the University of Michigan, Yale University, and other law schools. In addition, he frequently appears on radio and television programs.

Mr. Levey received his juris doctor with honors from Harvard Law School in 1997. He then clerked for Hon. Richard Suhrheinrich of the United States Court of Appeals for the Sixth Circuit before coming to CIR. Mr. Levey also has an M.S. and B.A. in computer science from Brown University, and he worked in the field of artificial intelligence before attending law school.

Carl D. Schneider, Ph.D. has trained several thousand divorce mediators in the United States and abroad. Currently he is Director of Mediation Matters, Silver Spring, Maryland. Carl is a registered psychologist, marriage and family therapist, and fellow in the American Association of Pastoral Counselors. He is a certified mediator with the Maryland Council on Dispute Resolution and with the Association for Conflict Resolution (ACR). Carl is the former director (1981-1989) of Divorce Mediation Service, a group practice of 16 mediators in the Chicago area, and former Director of the Mediation Program of Woodbury College in Montpelier, Vermont. He has been on the Board of Directors of the National Academy of Family Mediators, the Mediation Council of Illinois, and the Family Mediation Association of Georgia. Carl is author of *Shame, Exposure and Privacy* (Norton, 1992) and has served on the editorial board of *Mediation Quarterly*. He holds a M. Div. degree from Union Theological Seminary in N.Y.C. and a Ph.D. from Harvard University.



Opinions of the Attorney General Jennifer Mulhern Granholm

Campaign Finance Act

Section 7b of the Michigan Gaming Control and Revenue Act prohibits an officer or managerial employee of a casino, a casino enterprise, or of a licensed casino supplier from making a contribution to an independent committee operated by a professional organization to which the officer or employee belongs.

An independent committee that receives a contribution prohibited by section 7b of the Michigan Gaming Control and Revenue Act is not subject to a penalty for failure to return the contribution unless the committee first receives a notice from the Secretary of State in accordance with section 30 of the Michigan Campaign Finance Act.

Opinion No. 7099, January 9, 2002

Counties

County's authority to adopt countywide noise control ordinance. A county board of commissioners in a noncharter county lacks authority to adopt a countywide noise control ordinance.

Opinion No. 7096, December 26, 2001

Motor Vehicles

A motor vehicle equipped with a rear-view camera and an in-vehicle monitor that operates and whose picture can be seen by the driver only when the vehicle is motionless or in reverse gear does not violate section 708b of the Michigan Vehicle Code.

Opinion No. 7104, April 12, 2002

Police

A police officer, including a reserve police officer, is exempt from the licensing requirements of the Concealed Pistol Licensing Act if the officer possesses the full authority of a peace officer and is regularly employed and paid by a police agency of the United States, this state, or a political subdivision of the state.

A police officer who is exempt from the licensing requirements of the Concealed Pistol Licensing Act, but who voluntarily obtains a concealed pistol license under that act, is not subject to the act's gun-free zone restrictions unless the officer is off-duty and is relying solely on the authority of that license.

Opinion No. 7098, January 11, 2002

A reserve police officer, by carrying a handgun in a holster that is in plain view, does not violate section 234e of the Michigan Penal Code, which prohibits brandishing a firearm in public.

Opinion No. 7101, February 6, 2002

Schools and School Districts

A state university may establish criteria for determining when academic credits will be granted by that institution for postsecondary courses taken by high school students under the Postsecondary Enrollment Options Act.

Opinion No. 7103, March 27, 2002

Sheriffs

A county sheriff has the authority to set the amount of the fingerprinting fee authorized by section 5b(9) of the Concealed Pistol Licensing Act.

Opinion No. 7102, March 5, 2002

Editor's note: Assistant Attorney General George M. Elworth of the Freedom of Information and Municipal Affairs Division and a member of the Publications Committee furnished the text of the headnotes of these opinions. The full text can be accessed at ***www.ag.state.mi.us.***

STATE COURT DECISIONS OF INTEREST

By Emily L. Dawson and Brendon R. Beer
Foster, Swift, Collins & Smith, P.C.

INVERSE CONDEMNATION—REGULATORY TAKING

Johnson v Oakland County Dept. of Human Services, Michigan Court of Appeals No. 229410 (Unpublished, April 23, 2002).

This case involves a residential lot in a Farmington Hills subdivision which has remained undeveloped for over 30 years. The property, which is zoned single-family residential, cannot be used without either an on-site or municipal sewage system. Since none of the property is serviced by a municipal sewage system, development of the property was contingent on the installation of an on-site sewage disposal system.

Plaintiff, despite his knowledge that the subject property had failed prior perk tests and that the previous owner's application for a permit for an on-site sewage disposal system had been denied, exercised an option to purchase the property at a discounted price. When the property was purchased, the Defendant had already required that there be 48 inches of separation between the natural grade and the water table for the installation of a septic system ("Separation Requirement"). Following his purchase, Plaintiff filed an application seeking a traditional on-site system to build a home on the property, but was denied. Plaintiff then retained an engineering firm to design an alternative system using sand filtration. Following the purchase, the Defendant promulgated guidelines which required four feet of separation between the ground water and this type of sand filtration system. Consequently, Plaintiff's third application, based on the use of sand filtration system, was denied.

Plaintiff filed a lawsuit seeking a writ of mandamus to require the Defendant to issue a permit for the sand disposal system. Alternatively, the Plaintiff sought damages of $82,000 on an inverse condemnation theory. The trial court granted summary disposition in favor of the Defendant.

On appeal, the Plaintiff argued that the Defendant's Separation Requirement rendered his property devoid of all economically beneficial uses. The Defendant argued that the Plaintiff was aware of the property restrictions when he purchased the parcel.

Generally speaking, a land use regulation can constitute a regulatory taking in two situations: (1) where the regulation does not substantially advance a legitimate state interest, or (2) where the regulation denies the owner of the economically viable use of his land. The Court of Appeals held that the Defendant's Separation Requirement served a legitimate government interest because the Defendant presented evidence that the Separation Requirement was necessary to prevent groundwater contamination.

The Court of Appeals correctly recognized that the second type of taking, which occurs when an owner has been denied the economically viable use of his land, must be further analyzed as either: (a) a "categorical" taking, which occurs when an owner is deprived of all economically beneficial use of his land, or (b) a taking which stems from the traditional "balancing test" established in *Penn Central Transportation Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978).

The Court of Appeals held that the Plaintiff had failed to demonstrate that the Defendant's regulation had deprived him of all economically beneficial use of his property. As a result, the Court determined that there had not been a categorical taking in this case.

Analyzing the case under the *Penn Central* balancing test, the Court of Appeals conducted a factual inquiry using three factors: "(1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations." *Penn Central*, 438 US 104, 124 (1978). Applying these factors, the Court held the Plaintiff could not prevail on the first two *Penn Central* factors because the Plaintiff failed to establish that the Separation Requirement was unreasonable or that the parcel was unmarketable. The Court also held that the Plaintiff failed to satisfy the third factor of the "balancing test" because when the Plaintiff purchased the property, the Separation Requirement was already in place and the fact that the Plaintiff purchased the property at a discounted price indicated that he was aware of the risks associated with developing the property.

The Court of Appeals affirmed the trial court's decision to grant the Defendant's motion for summary disposition.

MUNICIPAL ORDINANCE—DIRECT CONFLICT—STATE STATUTE

F & F All Seasons Inc v Milton Township, Michigan Court of Appeals No. 228669 (Unpublished April 19, 2002).

It is unlawful to sell or keep for sale, possess, furnish, transport, use, or explode certain fireworks, including what is generally defined as Class B fireworks under Michigan law. MCL 750.243a(2). Class B fireworks include:

> toy torpedoes, railway torpedoes, firecrackers or salutes that do not qualify as class C fireworks, exhibition display pieces, aeroplane flares, illuminating projectiles or bombs containing expelling charges but without bursting charges, flash powders in inner units not exceeding 2 ounces each, flash sheets in interior packages, flash powder or spreader cartridges containing not more than 72 grains of flash powder each and other similar devices.
>
> MCL 750.243a(1)(b).

Although Class B firewords are prohibited in Michigan, "[t]he

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State Court Decisions of Interest
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township board..., upon application in writing . . . . *may grant a permit* for the use of such fireworks otherwise prohibited by section 243a . . . . for public display . . . ." MCL 750.243(b)(1). [*Emphasis Added*.]

In *F & F All Seasons*, Defendant passed an ordinance prohibiting the use of Class B fireworks, including any display of such fireworks under any circumstances. According to the Defendant, this ordinance was passed to protect the safety of its residents.

Plaintiff filed a lawsuit alleging that the ordinance improperly usurped the township board's authority to grant or deny permits and that the ordinance conflicted with a state statute. The trial court granted summary disposition in favor of the Defendant and the Plaintiff appealed. The Court of Appeals held that the ordinance did not improperly usurp the township board's authority to grant or deny permits.

The Court also held that the ordinance did not directly conflict with MCL 750.243(b). A municipality may not enact an ordinance that is in direct conflict with a state statute, but a direct conflict exists only when the ordinance specifically allows conduct that the statute prohibits or the ordinance prohibits conduct that the state statute specifically authorizes. The court held that the Plaintiff erroneously assumed that Class B fireworks were permitted because the permit process is provided under MCL 750.243(b). MCL 750.243(a)(2) already prohibits the use of Class B fireworks, and MCL 750.243(b) simply grants a township permissive authority to grant permits. The court held that the Defendant was only further prohibiting what the state statute already deemed impermissible.

The Court of Appeals noted that an ordinance can only be invalidated when it does not promote the public health, safety, and welfare, and the power to legislate has been arbitrarily exercised. The Court held that because the ordinance promotes public safety, the power to legislate was not exercised arbitrarily, and the ordinance should not be invalidated.

PRIVATE ROAD EASEMENTS— LOT SIZE

Miller v County of Otsego & Otsego County Planning Commission, Michigan Court of Appeals No. 228097 (Unpublished, April 19, 2002).

Plaintiffs were denied a special use permit to subdivide property for a condominium development on the grounds that the lots were undersized. The issue raised on appeal was whether easements for a private road are included in the lot size when determining whether the parcel meets the minimum zoning size requirements.

The Plaintiffs argued that the zoning ordinance was not properly amended to change the term "zoning lot" to "lot area." A county may amend its zoning ordinance by following the same statutory procedures that are required to adopt a zoning ordinance. MCL 125.214. These requirements are mandatory and the failure to strictly adhere to them renders an amendment invalid. These requirements include adoption by a majority vote of the county board of commissioners, and submission to the Department of Commerce and Industry Services for their approval. MCL 125.210; MCL 125.211. The amendment is presumed to be approved unless the county clerk receives notice of the Department's disapproval within thirty days. MCL 125.211.

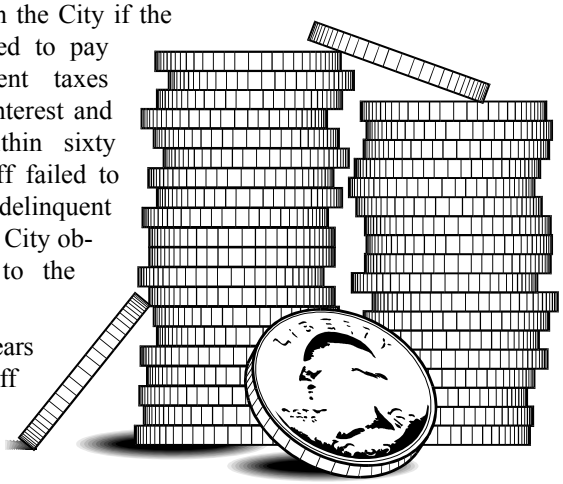
The Plaintiffs also argued that even if the ordinance was properly amended, the term "lot area" in the zoning ordinance did not exclude easements, and therefore, the easement should not have been excluded when calculating lot size. The real issue is whether a road is excluded from "lot area," not whether an easement is excluded.

The court held that the ordinance's definition of a "lot," which included having frontage on the road, implies that the road itself was not meant to be part of the lot. The Court held that it was clear that "lot area," as defined in the ordinance, was not meant to include the road upon which the lot is located. Therefore, the Court held that the planning commission properly denied the Plaintiffs' request for a special use permit and that the trial court did not err in granting the Defendants summary disposition.

SALE OF TAX FORFEITABLE PROPERTY— GENERAL PROPERTY TAX ACT

Mae Booker, Personal Representative of the Estate of Sanders Magee, Deceased v City of Detroit, Michigan Court of Appeals No. 219554 (For Publication, May 3, 2002).

Plaintiff was the owner of real property located in the City of Detroit. Plaintiff collected rental income from the property for many years, but failed to pay City or County property taxes on the property. The City filed a foreclosure action and obtained a default judgment. The court concluded that the property would vest in the City if the Plaintiff failed to pay the delinquent taxes along with interest and penalties within sixty days. Plaintiff failed to pay the delinquent taxes and the City obtained title to the property.



A few years later, Plaintiff collaterally attacked the City's default foreclosure judgment by filing a civil suit alleging claims for quiet title and inverse condemnation. The circuit court granted the City's motion for summary disposition; however, the Court of Appeals reversed and remanded for further proceedings to determine whether the City's sale of the property was executed in a way that conformed with the provisions set forth in the General Property Tax Act.

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Registration Form

Fourth Annual PCLS/MAMA Summer Conference
Friday, June 28 thru Sunday, June 30, 2002

When registered by May 30, 2002:
MAMA and PCLS Attorney $85;
Non-member attorney, $90.
After May 30, add $35 to the registration fee.

For more information please contact Michele Varley Hodgson
Mhodgson@mml.org or (800) 653-2483
Fax to: (734) 662-8083 or mail it to:
MML Education Service, PO Box 7409, Ann Arbor MI 48107

Municipality or Firm _____

Name _____

Spouse Name _____

Children: Name _____ Name _____ Name _____

Address _____

City/State/Zip _____

Daytime Phone _____ Fax _____

Dinner Tickets for Guests

Adults _____ at $ea. = $_____
Children _____ at $ea. = $_____
Total $_____

☐ Golf (reduced fee of: $110 for 18 holes)

☐ Master Card ☐ Visa
☐ Discover ☐ American Express

_____
Name on Card (Please print)

_____
Card Number Expiration Date

_____
Signature for Credit Card

State Court Decisions of Interest

Continued from page 8

On remand, the circuit court concluded that the City charter provisions were inconsistent with the provisions of the General Property Tax Act because the City had not utilized a "petition for sale" and did not pursue a "judicial sale" procedure when attempting to regain title to tax delinquent properties. The circuit court held a bench trial and awarded the Plaintiff $30,977.12 based upon the theories of promissory estoppel and unjust enrichment.

The promissory estoppel claim was based upon statements made by a City employee who told the Plaintiff that if he paid his taxes "he would not have to worry about his property being taken" by the City. On appeal, the defendant argued that the Plaintiff's evidence was insufficient to support a promissory estoppel claim because (1) the alleged statements by the City employee were insufficient to constitute a promise, (2) Plaintiff did not reasonably rely on the alleged statements, and (3) the employee's unauthorized statements could not bind the City.

The court concluded that the employee did not have knowledge that the City had already obtained a foreclosure judgment, or that the redemption period had already expired. Consequently, the employee's statements could not have been reasonably interpreted as promising that the Plaintiff could maintain his interest in the property, despite the City's foreclosure action and the expiration of the sixty-day redemption period.

In addition, the Court held that there was insufficient evidence to conclude that the Plaintiff reasonably relied on the statements made by the City employee. The court held that the Plaintiff failed to present evidence that the City employee was authorized to make the alleged representations. For the above-stated reasons, the Court concluded that the circuit court erred in entering a judgment in favor of the Plaintiff on the promissory estoppel claim.

Likewise, the Court of Appeals overturned the trial court's judgment in favor of the Plaintiff on the unjust enrichment claim. The Court based its decision on the well-established rule that a taxpayer can not recover a voluntary tax payment.

Brendon Beer is a summer associate at Foster, Swift, Collins & Smith, P.C. He will return to Thomas M. Cooley Law School in the fall and plans to graduate in January of 2003. He is planning on taking the February 2003 Michigan bar exam.

Federal Cases of Interest

Continued from page 4

restraint, but the licensing requirements themselves were not constitutionally invalid. (The ordinance also included a "no touch" three-foot buffer zone between patrons and entertainers, but that part of the ordinance had already been approved by prior court decisions.)

The city ordinance required all "sexually oriented businesses" to obtain a license from a Sexually Oriented Businesses Licensing Board before they could operate. Entertainers and establishments alike were required to get this license. The license requirement subjected applicants to several conditions. First, there was a civil disabilities provision - one could not be licensed if he or she had been convicted of a sexual misdemeanor in the last two years. If the sexual crime was a felony, one could not obtain a license for five years. Second, the license application required applicants to disclose the applicant's name, height, weight, hair color, eye color, date of birth, current residential address, and all prior addresses within the last three years. Third, applicants had to pay a fee of $500. If a permit or license was denied, the ordinance provided that the denial could be "immediately appealed" to the county circuit court.

The Sixth Circuit held that the term "sexually oriented" was overbroad. "Sexually oriented" was defined by the ordinance as anything that exhibited certain acts or displayed certain body parts. The court noted that a single shot of a person's nude or even partially clad buttocks could render a video or film "sexually oriented." Therefore, the ordinance purported to regulate conduct beyond that which involved the secondary effects the city aimed to curtail.

While the court agreed that the term "sexually oriented" was overbroad, the court did not find the term "sexually oriented *business*" unconstitutional. To be subject to licensing, one did not just have to be in a sexually oriented business, the other factors applied to reasonably narrow the range of activities within the application of the ordinance.

The court looked to the licensing requirements and found each of them constitutional under the test given in *United States v O'Brien*, 391 US 367 (1968). Each of the licensing requirements was found to further a substantial government interest, while only posing an incidental burden on First Amendment activity. For instance, the background checks, disclosure requirements, fees, and civil disabilities sections were appropriately targeted at incidental and secondary effects.

The entertainer plaintiffs argued that disclosure provisions constituted harassment for exercising constitutional rights. They reasoned that the disclosed information would have been subject to Tennessee's Open Records Act. This meant that in order to express themselves the entertainers had to have their names on a public list. The loss of unanimity would have made their description, actual identity, and address subject to inquiry by local organizations opposed to their trade. Therefore, they argued, the disclosure provisions subjected plaintiffs to a threat of possible exposure and intimidation as a deterrent to exercising constitutionally protected activity. The Sixth Circuit resolved this argument by declaring the records constitutionally protected information, thus creating a constitutional exemption from the State of Tennessee's Open Records Act.

After addressing all the provisions above, the Sixth Circuit still declared the ordinance unconstitutional. The ordinance's illusory appeals process was the achilles' heel. If a permit or license was denied, the ordinance provided that the denial could be "immediately appealed" to the county circuit court. The court reasoned that this did nothing to assure a prompt decision for an applicant desiring to exercise First Amendment activity. The ordinance was found to be an impermissible prior restraint, and the court enjoined its enforcement.

Judge Wellford concurred in part and dissented in part. He did not agree that the ordinance was an invalid prior restraint. He believed that the ordinance, in directing that a decision of the licensing board "may" be appealed to circuit court, was not limiting plaintiffs' appellate options to that venue. He also noted that the ordinance allowed existing businesses to continue to operate until a final adjudication. *Deja Vu of Nashville, Inc v The Metropolitan Gov't of Nashville and Davidson County, Tennessee*, 224 F3d 377 (6th Circuit December 6, 2001).

[1] Eric is currently a judicial clerk for Michigan Supreme Court Justice Marilyn Kelly.

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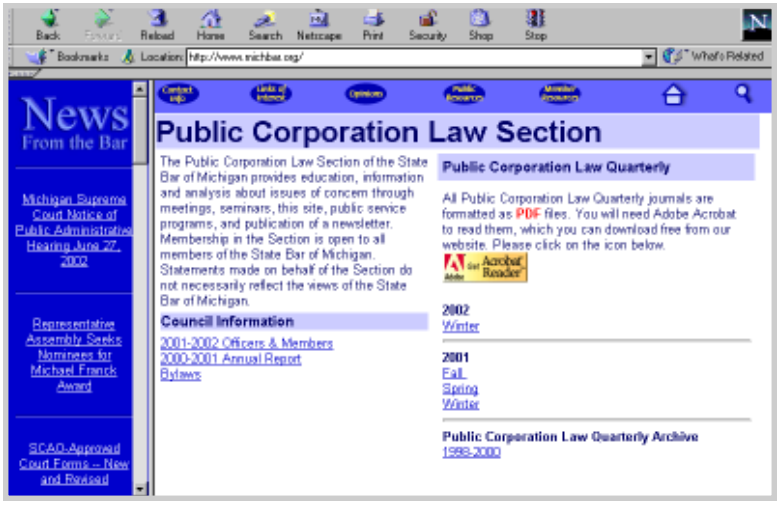

Meeting Notice

ABA Section of State and Local Government Law in cooperation with the State Bar of Michigan Public Corporation Section

also in cooperation with:
Michigan Municipal League
Michigan Association of Municipal Attorneys
American Planning Association

Friday, October 25, 2002

Marriott Detroit Renaissance Center

"Casino/Downtown Development"

The American Bar Association along with the State Bar of Michigan—Public Corporation Section, Michigan Municipal League, Michigan Association of Municipal Attorneys, and the American Planning Association are sponsoring a **"Casino/Downtown Development**" education program. This program will be useful to any municipal attorney or governmental official who has in interest in downtown redevelopment.

We will have a full day of CLE including sessions on land use/zoning, environmental law, ethics, and other significant topics. There will also be a bus tour of downtown with a staff person from the DEGC (Detroit Economic Growth Corporation) to tell us about the downtown redevelopment, with a particular emphasis on the new stadiums and spill over development from them. We will end the day with a reception at the Tiger Club in Comerica Park. We are hoping that municipal attorneys and other officials will take the opportunity to participate in this meeting.

Information and registrations can be made in advance by contacting the American Bar Association:
Lisa Allen, Section of State and Local Government Law
750 North Lake Shore Drive
Chicago, Illinois 60611

Attention

Articles and Volunteers Wanted

The Public Corporation Section is looking for articles to publish on areas of interest to governmental and municipal lawyers. The editorial staff is also soliciting volunteers with an interest in Public Sector law to help write and edit sections of the Public Corporation Section Quarterly. Interest should be directed to Gregory T. Stremers, Touma, Watson, Whaling, Coury & Castello, 316 McMorran Blvd., Port Huron, Michigan 48933-2083. E-mail gtstremers@advnet.net.

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