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c o n t e n t s

Michigan's New Water Withdrawal Laws:

New Regulations for Water Suppliers

By Tim Lundgren, Varnum, Riddering, Schmidt & Howlett, LLP

Many Michigan municipalities have been watching with interest the recent controversies over water withdrawals in the state. A combination of political pressure to "do something" about proposed and actual withdrawals of Great Lakes water for the purpose of sale outside the Great Lakes basin, coupled with pressure brought to bear by regional water withdrawal agreements, have resulted in new legislation recently signed into law by the governor. This legislation consists of five bills (SB 850, 851, 852, 854, and 857). Of particular interest to municipalities are revisions to the Safe Drinking Water Act ("SDWA") made under SB 857. These changes, together with new provisions of the state's Natural Resources and Environmental Protection Act ("NREPA") enacted under SB 850, will mean municipalities may face new regulatory requirements when they seek to expand their water supply systems. These new laws also raise new considerations for how reporting should be done under the SDWA.

The most sweeping changes put in place by the legislation are new water withdrawal registration and permitting systems and procedures under NREPA. However, because municipalities already report their water withdrawals under the SDWA, they are not required to meet these new requirements. Nevertheless, the new legislation does make changes to the SDWA permitting and reporting requirements that municipalities should consider if they anticipate any expansions of the water supply system in the next several years.

No Adverse Resource Impact and Baseline Capacity

The first requirement that affects municipalities is the newly enacted Section 32721 of NREPA, which prohibits a new or increased "large quantity withdrawal" that causes an "adverse resource impact." For the first two years of the legislation, this restriction is limited to impacts on state-designated trout streams. After that time,

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Chairperson's Corner

By Kester K. So, Dickinson Wright PLLC*

Is the National Outcry over the Decision in *Kelo* warranted, or overkill?

At the section's Winter Seminar held recently in Troy, one of the hot topics of discussion was the subject of eminent domain—and the sources of power and restrictions on its exercise by the "public use" limitation found in the U.S. and state constitutions. The recent U.S. Supreme Court's decision in *Kelo v City of New London* has captured media attention, been the subject of great national debate, and has spurred unprecedented legislative activity throughout the United States in an attempt to restrict the ability of governmental entities to utilize their power of eminent domain for economic development purposes. In *Kelo*, the U.S. Supreme Court held that under certain circumstances, a governmental agency could condemn property for economic development purposes, because such use satisfied a "public purpose."

In the aftermath of *Kelo*, various state legislatures have seized the opportunity to quickly address the perceived derogation of personal "property rights" allowed by the *Kelo* Court, raising the specter that if unchecked, public corporations everywhere will rush to "condemn" property of private individuals and corporations and transfer it to private business.

In fact, Michigan became the fifth state in six months to react to the *Kelo* decision with either statutory or constitutional reform, following quickly after Alabama, Delaware, Ohio and Texas. *Senate Joint Resolution E* places on the ballot an amendment to Const 1963, art 10, section 2. The amendment would require that "private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." "Public use" is defined to preclude the "taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues." It would also require that compensation for an allowed public use be 125% of that property's fair market value if the private property taken consisted of an individual's principal residence. The proposed amendment then departs from typical constitutional construction by making a foray into a procedural morass by trying to delineate the burden of proof. The current constitutional provision is simple and clear--it provides that "[p]rivate property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law."

Many practitioners believe the Legislature's race to protect the sanctity of private property rights is either overkill at worst, or unnecessary at best. Given the Michigan Supreme Court's decision in *Wayne County v Hathcock*, which held that Wayne County's attempt to use its power of eminent domain for its Pinnacle Park project was violative of Const 1963, art 10, section 2, arguably, no additional changes need to be made to Michigan's constitution in order to prevent public bodies from exercising the power of eminent domain for the benefit of private entities. In so holding, the Court reversed *Poletown* and, in effect, adopted Justice Ryan's analytical construct contained in his dissent in *Poletown*. The Court in *Hathcock* also looked to the proper interpretation of the state

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the restriction applies to water bodies throughout the state, and a yet to be developed assessment tool will be used to determine when such impacts are likely. Under the new legislation, a "large quantity withdrawal" is defined as one or more cumulative withdrawals of over 100,000 gallons per day ("gpd") average in any consecutive 30-day period to supply a common distribution system. Thus, the critical number may be reached by summing several small wells which, taken alone, would not constitute a large quantity withdrawal. An "adverse resource impact" occurs when the level of a water body (or the flow of a stream) is decreased such that the water body's "ability to support characteristic fish populations is functionally impaired." What "functionally impaired" means is not clarified.

There is an exception to the above prohibition for large quantity withdrawals (or wells capable of making such withdrawals) if they are within their "baseline capacity" as established in an April 1, 2007 filing with the state. Reporting a baseline capacity to the MDEQ is discretionary, but appears to be a good idea because it would allow increased actual withdrawals in the future up to that baseline capacity to be treated as grandfathered under the new legislation. That is, if actual withdrawals increased by 200,000 gpd, but did not exceed the already reported baseline capacity by more than 100,000 gpd, then they would not constitute a new or increased large quantity withdrawal for purposes of this provision.

A municipal water system may establish its "baseline capacity" by reporting the total designed withdrawal capacity for the community supply under the Safe Drinking Water Act ("SDWA") by April 1, 2007 in a report to the MDEQ. Once that is done, that supply system is in effect grandfathered in for that capacity, which protects the system from challenges that new or increased withdrawals that are less than 100,000 gpd over that baseline capacity are causing an "adverse resource impact."

For municipal supplies that are considering expanding their supply capacity in the near future, there is some benefit to establishing as large a "baseline capacity" this year as possible and reporting that capacity on the April 2007 filing. This would effectively grandfather in a capacity which could allow for future increases in actual pumping based on growth in demand or expansion of the municipal system without triggering the limitations imposed on "new or increased large quantity withdrawals."

Review of New or Increased Withdrawals

When it is necessary to expand a water supply system, new or increased large quantity withdrawals may face new standards of review by the MDEQ under the amendments to the SDWA. Changes to the SDWA allow MDEQ to evaluate the environmental impacts of a proposed withdrawal for a water supply system which provides a new or increased total designed *withdrawal capacity* of more than 2,000,000 gallons of water per day from a source other than the Great Lakes and connecting waterways, or 5,000,000 gallons of water per day from the Great Lakes and connecting waterways. Under the new laws, systems proposing such new or increased withdrawal capacities shall be rejected if they are likely to cause an adverse resource impact, as defined above, or if all the following are not met:

- All water withdrawn, less any consumptive use,[1] is returned, either naturally or after use, to the source watershed[2];
- The withdrawal will result in no individual or cumulative adverse resource impacts;
- The withdrawal is consistent with local, state, and federal laws and legally binding regional agreements;
- Proposed use is reasonable under common law principles of water law in Michigan;
- The applicant has considered voluntary generally accepted water management practices,[3] or environmentally sound and economically feasible water conservation measures.[4]

Water Bottling

For municipalities who either bottle their water or sell water from municipal supply wells to privately owned water bottlers, the new legislation's carve-outs for bottled water may be of interest. As noted in footnote 1, bottled water is by definition a "consumptive use" which excludes it from being treated as a "diversion" of Great Lakes water. Diversions must be approved by a regional body made up of the eight governors of the Great Lakes states. The new laws also require the governor to establish a public comment period and notify the legislature.

There are also new permitting requirements under the SDWA for new or expanded water-bottling facilities withdrawing over 250,000 gpd. The new requirements are designed to ensure that the withdrawals are having no "adverse resource impact" and that any measurable hydrological impacts on aquifers or surface water bodies will be offset in some manner. Local government and interested community members must be consulted in the process.

Local Government Preemption

Finally, the new legislation preempts the ability of local governments to regulate large quantity withdrawals, except as

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constitution at the time of adoption, not unlike Justice Thomas' dissent in *Kelo*. Most instructive here is that the Court in *Kelo* makes it clear that "nothing in our opinion precludes any state from placing further restrictions on its exercise of the takings power. Indeed, many states already impose 'public use' requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law…" citing in footnote 22 specifically to *Hathcock*. In effect, the United State Supreme Court has explicitly recognized that state courts, like Michigan's, have not only the ability, but the authority, to interpret state constitutional provisions in a more restrictive fashion. That is to say, the protections sought by those proposing the amendment already exist under current law and cases, especially in Michigan. So why the rush? Is there a loophole in the *Hathcock* decision? Was the Michigan Supreme Court unclear in its decision? Does the proposed amendment make the eminent domain process clearer or procedurally more fair? There are many who don't think so.

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** The views expressed herein are those of the individual officer of the Section and not an expression of the position of the firm or any of its clients.*

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authorized by the Public Health Code. In other words, it does not prevent a local ordinance requiring connection to municipal water supplies under existing legal authority, but does prevent municipalities from attempting to regulate water withdrawals for other reasons.

Conclusions

The new water legislation recently passed in Michigan is likely to impact most municipalities only when it comes time to expand the municipal water supply. The possible effects of the new restrictions, as well as the potential for claims that the municipality's water withdrawals are having an adverse resource impact under the statute, are mitigated if the municipality can establish a large enough "baseline capacity" this year. This baseline capacity can be voluntarily reported to the state by April 2007 and can then provide the municipality with some room for increased actual withdrawals before the requirements of the new legislation are triggered.

Endnotes

1 "Consumptive use" is defined as that portion of the water not returned to the Great Lakes basin due to evaporation, incorporation into products, use as part of packaging of products, or other processes. Consumptive use includes a withdrawal that is packaged within the basin in containers of 20 liters or less. This latter provision is a carve-out specifically for bottled water.

2 Communities which withdraw water from one watershed and discharge to another may face some increased regulatory hurdles.

3 These are to be voluntarily developed by each water using "sector" under the new legislation.

4 This language is keyed to the Annex 2001 regional agreements that have been signed by the governors but not yet approved by the states or Congress. If they once become legally binding, this language may bring in further and more stringent review requirements for new withdrawals. However, that is a topic for another article.

Electronic Data Discovery in Litigation, and Why You Need to Prepare Now

By Laura Amtsbuechler, Mike Rosati, and Carlito Young, Johnson, Rosati, LaBarge, Aseltyne, & Field

You may have heard horror stories about defendants who have had to respond to requests for production of documents, and interrogatories regarding electronically-stored information. If you wait until you are sued to address this issue, you will have waited too long.

There are a number of issues that often arise with electronic data discovery requests, and there are no simple solutions. While this article does not address all of the issues, it should motivate you to start planning now to protect against accusations that your municipality has destroyed evidence. Plaintiff attorneys are now making sweeping requests for all electronic data that pertains to the litigation. This is done through broad interrogatories asking for detailed information regarding the municipality's electronic network, computers, and document retention policies. Electronic data document requests often include requests for e-mail and other documents which may be stored on hard drives, servers, CDs, hand-held devices, backup tapes, and other electronic media. Although the guiding parameters of electronic data discovery should be no different from those applied to paper discovery, the nature of electronic media presents a host of issues that the courts and legislators are only beginning to tackle.

As with paper documents, each party has the obligation to preserve and produce all documents (evidence) relevant to the litigation. Difficulties arise when electronic data that should have been preserved can't be located or has been destroyed. The search for electronic data that has not been preserved is an expensive process requiring the assistance of technological experts and attorneys. Similarly, the review of electronic data to see if any relevant information exits, or ever existed, requires the same time and technical assistance. Needless to say, there are often disputes regarding the scope of discovery and who should bear this expense.

The Southern District Court of New York has addressed many of these electronic discovery issues in a series of opinions in *Zubulake v UBS Warburg, LLC*.[1] Laura Zubulake was an employee of UBS Warburg who sued for discrimination after being terminated. Many courts have relied upon *Zubulake* for its ruling that a party to litigation has a duty to preserve evidence (including electronic data) when it "knows, or should know, that it may be relevant in future litigation." This preservation requirement may encompass a period of years before litigation is actually filed. The Court held that once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents.

If documents have not been preserved, the Court could issue monetary sanctions or order that the jury be given an adverse jury instruction in which the judge directs the jury that it can conclude that the missing evidence is unfavorable to the party unable to produce it. In fact, many electronic data discovery requests are sent to the Defendants for the purpose of finding documents that may have been destroyed, rather than those that exist. If a Plaintiff's attorney finds evidence of relevant electronic data that was destroyed, Plaintiff may allege "spoliation", leading to monetary sanctions and/or an adverse jury instruction.

There is currently no statute or court rule specifically regarding the duty to preserve and produce electronic data. However, there are proposed changes to the federal court rules that differ from the ruling in *Zubulake*. If approved, the revised court rules will take effect in December of 2006, and they would clarify a litigant's burden regarding disclosure of electronic evidence by drawing a distinction between information, which is "reasonably accessible" and that which is not.[2]

The proposed rules introduce new terminology regarding electronic data. The phrase "electronically-stored information" is added to Rules 26(a), 33 and 34. The proposed rules also amend Rule 16(b)(5) to include provisions for disclosure or discovery of electronically-stored information as an appropriate inclusion in the Court's scheduling order and add electronically-stored information to Rule 26's list of items to be included in the parties' initial disclosures.

If approved, the proposed rules will make accessibility to the electronic data the major determinate regarding disclosure. Under proposed Rule 26(b)(2), a responding party will not need to produce electronically-stored information from sources that it identifies as "not reasonably accessible" because of undue burden or cost. The burden will then be on the opposing party to move to compel production.

Importantly, the proposed amendments to Rule 37 provide a safe harbor

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provision for the failure to make or disclose electronically-stored information. In particular, the proposed rule adds a "safe harbor for sanctions when a party's electronically-stored information is lost because of the routine operations of a party's computer system." However, when a party's routine computer operations create a loss, the party will not have a safe harbor from sanctions if the party violated a court order to preserve the information, or if the party failed to take "reasonable steps" to preserve the information after it knew, or should have known, that the information was discoverable, i.e., institutes a "litigation hold."

Municipalities should systematically maintain and store all relevant data. Networks and computers retain information in various places, and not always where you might expect. Someone in your municipality should have at least an informed lay person's understanding of the system, including what information is generated, where it is stored, and how long it is retained until it is destroyed in the routine course of business.

For example, e-mail messages are a prime target for discovery in cases involving employment discrimination because they often contain discussions including employee performance, or even actual evidence of wrongdoing. In order to preserve an e-mail, one has to understand where it is located within the system. If individual computers are used on the network, it is likely that the e-mail is stored in more than one place. It could be found on the hard drives of both the sender's and recipient's computers, and possibly even on the network.

Your municipality should create a clearly-written data retention policy. This policy will need to be specific to your municipality's system and should address the preservation of data on computer systems, servers, backup tapes, or other media. It should then be someone's responsibility to follow-up to ensure the policy is implemented. This should include training and periodic follow-up. It is important to remember that it will be more harmful to your municipality to have a policy that is not followed than to not have one at all. An established policy that is not followed can be used by opposing counsel to establish your client's failure to take reasonable steps to preserve evidence. By following an established policy, a defendant in litigation may avoid an argument that evidence was intentionally destroyed when, in fact, the data was simply destroyed in the routine maintenance of the computer system and backup media.

Your municipality should have a separate plan for maintenance of electronic data when litigation is anticipated. When a lawsuit is anticipated, all data which might be relevant to the case must be preserved, including information routinely overwritten or destroyed under normal circumstances. If you have reason to expect litigation, you should err on the side of over-inclusiveness. You should have an established plan regarding what you will do to establish a "litigation hold."

An ounce of prevention is preferable to a pound of cure, and there may be no cure once you are in litigation and relevant information has been destroyed. If you follow the procedures outlined above, you can avoid future allegations of inadvertent or intentional destruction of evidence.

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Endnotes

1 *Zubulake v UBS Warburg, LLC*, WL 1620866 (SDNY July, 2004); *Zubulake v UBS Warburg*, 202 FRD 212 (SDNY October, 2003); *Zubulake v Warburg*, 216 FRD 280 (SDNY July, 2003); and *Zubulake v UBS Warburg*, 217 FRD 309 (SDNY May, 2003).

2 In June 2005, the Standing Committee on Rules of Practice and Procedure approved proposed amendments relating to electronic discovery. The Judicial Conference Subcommittee approved the Committee's proposed amendments in September of 2005.

A Primer on RLUIPA

By Daniel Dalton, Tomkiw Dalton, plc

The Religious Land Use and Institutionalized Persons Act ("RLUIPA" or "the Act"), that became law on September 22, 2000, was Congress's response to the Supreme Court's decision in *City of Boerne v. Flores,* 521 U.S. 507 (1997), where the Court ruled that Congress, in enacting the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb, *et seq.,* exceeded its enforcement power under Section 5 of the Fourteenth Amendment by "contradict[ing] vital principles necessary to maintain separation of powers and the federal balance." *City of Boerne,* 521 U.S. at 536. RLUIPA is Congress's second attempt to address the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990).

The basic language of RLUIPA, at § 2000cc, states as follows:

(a) Substantial burden
  (1) General rule. No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of person, including a religious assembly or institution, unless the government demonstrates the imposition of the burden on that person, assembly or institution;
    (A) is in furtherance of a compelling governmental interest; and
    (B) is the least restrictive means of furthering that compelling governmental interest.
  (2) Scope of application. This subsection applies in any case in which…
    (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

RLUIPA § 2000cc-2 provides for judicial relief to an aggrieved person, and sets forth burdens of persuasion and other trial considerations. RLUIPA § 2000cc-3 sets forth extraordinary broad rules of construction, while § 2000cc-5 provides a list of definitions applicable to the Act. Congress provided, in § 2000cc-4, that RLUIPA does not affect the First Amendment's Establishment Clause. RLUIPA specifically defines a "land use regulation" as:

> [A] zoning or land marking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest. 42 U.S.C. § 2000cc-5(5).

Under this definition, a government entity or agency implements a land use regulation when it acts pursuant to a zoning law that limits the manner in which a claimant may develop or use property in which the claimant has an interest. *See Prater v. City of Burnside,* 289 F.3d. 417, 434 (6th Cir. 2002).

The jurisdictional element of RLUIPA is found at 42 U.S.C. § 2000cc-2(a)(2)(c). One component of this element is a finding of individualized assessment by a community. *Living Water Church of God v. Charter Township of Meridian,* 384 F.Supp.2d 1123, 1130 (W.D.Mich. 2005); 42 U.S.C. 2000cc(a)(2)(C). Zoning ordinances by their nature impose individual assessment regimes. *Freedom Baptist Church v Township of Middleton,* 204 F.Supp.2d 857, 868 (E.D.Pa.2002). Thus, the City of Jackson's denial of rezoning request to build an assisted living center was an "individualized assessment" under the act. See *Greater Bible Way Temple of Jackson v. City of Jackson,* Nos. 250863, 255966, 2005 WL 3036527 (Mich.App. Nov. 10, 2005) As Judge Posner recently noted, "because these discretionary systems run the risk of religious discrimination, RLUIPA appropriately subjects burdens imposed pursuant to systems of individualized assessment to strict scrutiny." *Sts. Constantine and Helen Greek Orthodox Church v. City of New Berlin,* 396 F.3d 895, 900 (7th Cir.2005).

Once the jurisdictional requirements of [the] RLUIPA have been satisfied, [the] plaintiff must establish a substantial burden on religious exercise. 42 U.S.C. § 2000cc2(a)(1). *Shepherd Montessori Center v. Ann Arbor Charter., Twp.,* 259 Mich.App. 315, 329, 675 N.W.2d 271 (2003). The Act defines religious exercise as "any exercise of religion whether or not compelled by, or central to, a system of reli-

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gious belief." 42 U.S.C. § 2000cc-8(7)(A). Under RLUIPA, courts no longer need to analyze whether a claimed religious activity is an integral part of one's faith. *Living Water,* 384 F.Supp.2d at 1129; See also *Midrash Sephardi v. Town of Surfside,* 366 F.3d 1214, 1225 (11th Cir.2004) (holding that places of assembly are needed to facilitate religious practice, and that challenges to zoning ordinances preventing congregations from using their place of assembly concern religious exercise). In *Living Water,* the Court concluded that the church's use of the proposed facility for a religious-oriented school constituted religious exercise. *Id.* at 1130.

Substantial burden is not defined in the RLUIPA. However, the legislative history indicates that is to be interpreted by reference to the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-2000bb-4 and First Amendment jurisprudence. At a minimum, the contrasting circuits have agreed that a "substantial burden" requires something more than an incidental effect on religious exercise:

> [A] "substantial burden" must place more than an inconvenience on religious exercise; a "substantial burden" is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct. *Midrash v. Shepherdi,* 366 F.3d at 1225.

In the *Greater Bible Way Temple of Jackson,* the Court stated Jackson's denying the church use of its property as an apartment complex for elderly persons, as part of the Church's mission constituted substantial burden. *Id.* at 4. *See also Elsinore Christian Center v. City of Lake Elisnore,* 291 F.Supp.2d 1083, 1091 (C.D.Cal.2003) (a municipality's denial of a church's request for conditional use permit to operate church on property in a substantial burden because use of land for religious exercise is itself religious exercise under the RLUIPA). Further, in *DiLaura v. Ann Arbor Twp.,* 112 Fed. Appx. 445, 1, Case No. 00-1846 (6th Cir., Feb. 25, 2002), the Sixth Circuit held that defendants designation that the plaintiff's religious retreat was a bed and breakfast "would have effectively barred plaintiffs from using the property in the exercise of their religion, and, hence, the defendants' refusal to allow a variance constituted a substantial burden on that exercise."

In *Living Water,* 384 F.Supp.2d at 1132-1133, the Western District of Michigan adopted the definition of burden set forth by the 7th Circuit in *Sts. Constantine,* where the Court of Appeals held that the refiling of applications with the city constituted a substantial burden. The court stated there is substantial burden upon religious exercise if the government regulation imposes delay, uncertainty, and expense. "That the burden would not be insuperable would not make it unsubstantial." *Living Water,* 384 F.Supp.2d at 1133. The court held that the township's requirement that this church must reapply for a special use permit (which had previously been granted) to expand its church was a substantial burden. *Id.* at 1133. The court stated that plaintiff was a small church with limited funds and the reapplication process might not guarantee that the church will receive permission to build a church anywhere in the township. *Id.* The church would have encountered delay, expense and complete uncertainty. *Id.*

Other courts, such as the Michigan Court of Appeals, have looked to practical alternatives that may help determine if the government regulation has created a substantial burden. *Shepherd Montessori Center v. Ann Arbor Charter. Twp.,* 259 Mich.App. at 330. In *Shepherd Montessori,* the court noted factors such as alternative locations, alternative property, the proximity of participants, and economic burden to determine if the church has suffered more than a mere inconvenience. *Id.*

The next area to analyze is whether the local government's actions rise to the level of a compelling state interest. 42 U.S.C. § 2000cc-2(a)(1)(A-B). The compelling interest test has been extensively developed in Supreme Court jurisprudence. In articulating the high level of interest that must be shown by the government to substantiate a compelling interest, the Supreme Court stated, "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" *Sherbert v. Verner,* 374 U.S. 398, 406 (1963) (avoiding possible fraudulent unemployment claims not compelling interest) (quoting *Thomas v. Collins,* 323 U.S. 516, 530 (1945)). After a municipality demonstrates a compelling interest, it must then establish that its decision to completely deny the Congregation's use of its property for worship was not the least restrictive means to further any such interest. 42 U.S.C. § 2000cc-2(a)(1)(B). Under strict scrutiny, "[i]f a less restrictive alternative would serve the government's purpose, the [government] *must* use that alternative. *United States v. Playboy Entertainment Group,* 529 U.S. 803, 813 (2000) (emphasis added). To meet this burden, "it is the government's obliga-

tion to prove that the alternative will be ineffective to achieve its goals." *Id. at 816.* In general, municipalities fail strict scrutiny when they restrict fundamental rights rather than remedy secondary effects directly. See, e.g., *Grove v City of York, Penn.,* 342 F.Supp.2d 291, 304 (M.D.Pa. 2004) (city could have addressed asserted safety interest by adding policemen rather than restricting free speech rights).

What has been described herein is the basic framework of raising and defending a cause of action under RLUIPA. There are many other nuances to the Act, all of which require a great deal of care and analysis when considering a site plan of a religious institution.

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I'll Bet You Didn't Know (or maybe you forgot):

"Giving Tongue"

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

I'll bet you didn't know – or maybe you forgot – that the legislature has provided for the protection of fur-bearing animals kept in captivity for breeding purposes, and has done so since 1915. That's when the Legislature enacted 1915 PA 85 (the "Act") which provides, in section 1 thereof:

> "Any person or persons who, without the consent of the owner or caretaker of a ranch or enclosure where fur-bearing animals are kept in captivity for breeding purposes, shall approach or enter upon the private grounds of the owner or owners of the said animals within which the pens or dens of the said animals are located, and upon the fence or enclosure of which notices forbidding trespassing on the said premises are kept posted, so as to be plainly discernible at [a] distance of not less than twenty-five [25] yards, shall be guilty of an offense and liable to the penalty hereinafter provided." [MCL 317.61]

Likewise, section 2 of the Act makes it unlawful to *"pass within the said fence or such enclosure or climb over, break or cut through the same for the purposes of entering the said enclosure."* [MCL 317.62]

The penalty for a human violator is 90 days or $100 – unless the violator is a dog. Not even man's best friend can escape the effect of the Act as our canine pals are singled out for the ultimate penalty under the Act – being shot on sight – but only if the dog "gives tongue" or otherwise terrifies the animals, and provided that the dog is not muzzled or under the control of a person. MCL 317.63 provides:

> "Any owner or caretaker may kill any dog found wandering within forty [40] feet of any enclosure in which fur-bearing animals are kept, and there giving tongue or otherwise terrifying such animals: Provided, That the dog so killed is neither muzzled nor accompanied by the owner or by a person having charge or care of such dog."

Being raised in the big city where there was a real scarcity of ranches or enclosures in which fur-bearing animals were kept in captivity for breeding purposes, I always thought that "giving tongue" was something engaged in by humans during a make out session (which, as I think about it, was a typical first step toward another form of breeding purpose).

In my case, there were probably many young lasses who found me "otherwise terrifying," even without "giving tongue." So I am ever grateful that the legislature limited the effect of MCL 317.63 to dogs, because I still remember that night in 1960, while parked with that cute girl who was bearing – er, wearing—a fur scarf and—oh never mind. You get the terrifying picture.

Opinions of the Attorney General

By George M. Elworth, Assistant Attorney General

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 of these opinions may be accessed at *www.mi.gov/ag*.

Campaign Finance Act:

Political Action Committees – payroll deduction plans

A payroll deduction plan in the state classified civil service under which state personnel and other resources are used to record, collect, and disburse employee contributions to a political action committee would violate section 57 of the Michigan Campaign Finance Act, MCL 169.257, which prohibits the use of public resources to make a political contribution. A labor union's offer to reimburse the State for the expenses involved in administering a payroll deduction plan to facilitate employee contributions to a political action committee would neither obviate the violation nor permit the implementation of an otherwise prohibited plan.

Section 57 of the Michigan Campaign Finance Act, MCL 169.257: (a) is a valid exercise of legislative authority to regulate the use of public resources and to "preserve the purity of elections" under Const 1963, art 2, § 4; (b) does not infringe upon the plenary authority granted the Civil Service Commission under Const 1963, art 11, § 5; and (c) precludes the Civil Service Commission from approving provisions of a collective bargaining agreement that would require the State to administer a payroll deduction plan facilitating state employee contributions to a political action committee.

Opinion No. 7187
February 16, 2006

Cities:

Enforceability of charter provision declaring office vacant

A city charter provision that renders vacant an office held by an elected city officer who also becomes a candidate for another city office does not conflict with the requirements of section 5(d) of the Home Rule City Act, MCL 117.5(d), concerning the shortening of a public official's term of office. That act allows a shortened term where an officer is removed for cause. Running for a second office while serving in the first constitutes such a cause when so specified in the city charter.

Opinion No. 7186
January 27, 2006

Counties:

Authority of counties to regulate outdoor advertising signs

The Highway Advertising Act preempts counties from regulating the size, lighting, and spacing of signs and sign structures that are located within an "adjacent area" as defined by MCL 252.302(*o*). Within the limitations of the County Zoning Act, a county may otherwise regulate signs and sign structures.

Opinion No. 7188
February 17, 2006

Elections:

Authority of municipalities to regulate placement of political signs on private property

Municipalities may not, consistent with the First Amendment to the federal constitution, impose a permit and fee requirement with respect to political signs posted on private property.

A municipality may impose reasonable size restrictions with respect to all signs, including political signs, on private property, provided that the regulation preserves the effective exercise of First Amendment rights.

Opinion No. 7185
January 13, 2006

Firearms:

Possession and transfer of a machine gun

A person in Michigan may only possess a machine gun if it was lawfully possessed before May 19, 1986, and is properly registered under federal law. A person in Michigan may only transfer possession of a machine gun if authorized to do so by the federal Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives.

Opinion No. 7183
December 27, 2005

Incompatibility:

County commissioner serving as head of village public works department

The Incompatible Public Offices Act does not prohibit a person from simultaneously serving as a member of the county board of commissioners and the head of a general law village's public works department, when that village's council has submitted an annexation petition to the county board of commissioners for review and approval under MCL 74.6, absent facts demonstrating that the person cannot protect, advance, or promote the interests of both offices simultaneously.

Opinion No. 7184
January 12, 2006

Federal Public Law Decisions of Interest

By Colleen S. Pacler, Assistant Corporation Counsel, Office of Wayne County Corporation Counsel

McQueen v
Beecher Community Schools, et al
433 F3d 460 (CA 6, 2006)

In *McQueen v Beecher Community Schools et al*, the plaintiff, Veronica McQueen, sued the defendant, Beecher Community Schools ("the school district"), teacher Alicia Judd ("Judd") and principal Jimmie Hughes ("Hughes") after a fellow first-grade classmate ("the assailant") shot her daughter. The shooting took place when Judd left plaintiff's daughter, the assailant, and other students alone in a classroom to escort other students to a nearby classroom.

Plaintiff sued pursuant to 42 USC §1983 claiming that her daughter's substantive due process rights were violated. Specifically, plaintiff pursued claims against Judd on the basis of a state-created-danger theory, against Hughes on the basis of supervisory liability and against the school district pursuant to municipal liability. After the district court granted summary judgment to all three parties, plaintiff appealed to the United States Court of Appeals for the Sixth Circuit.

In reviewing the district court's grant of summary judgment in favor of Judd, the court recognized that plaintiff had met the first element of a § 1983 claim, establishing the deprivation of a right secured by the Constitution or the laws of the United States. However, the court determined that plaintiff did not demonstrate sufficient evidence to create a genuine issue of material fact to justify the invocation of the state-created-danger doctrine. Drawing from the three elements of a state-created-danger theory of due process liability elucidated in *Kallstrom v City of Columbus*, 136 F3d 1055, 1063 (CA 6, 1998) the Court concluded that plaintiff failed to demonstrate sufficient evidence to raise a genuine issue of material fact with regard to two of the three requirements.

The *McQueen* court first observed that evidence sufficient to create a genuine issue of material fact did not exist with regard to the requirement that the state must have performed affirmative acts that created or increased the risk to plaintiff's daughter of private acts of violence. In other words, the court concluded that Judd's action in leaving the student that caused plaintiff's daughter's injury unsupervised did not constitute an affirmative act that created or increased the risk of private violence to plaintiff's daughter.

In contrast, the court agreed with plaintiff that where Judd left five children in a classroom with an armed classmate, the evidence was sufficient to create a genuine issue of material fact concerning the existence of a special danger, the second requirement for plaintiff's state-created-danger theory.

However, the Court found that sufficient evidence was not presented with regard to the third requirement of state culpability, which requires a finding of deliberate indifference. Specifically, the Court agreed with the district court's assessment that Judd could not have foreseen that the assailant would use a firearm to harm plaintiff's daughter, and that there was no evidence that Judd was aware that the assailant had brought a weapon to the school.

The *McQueen* court also rejected plaintiff's claims against the school district and principal Hughes. McQueen had argued that Hughes was liable for his failure to expel the assailant, who had displayed violent behavior with other students before the day that plaintiff's daughter was killed, the failure to train teachers to deal with violent students, or to adopt policies and procedures that would protect students from violent assaults. The court found that a prerequisite for supervisory liability under § 1983 is "unconstitutional conduct by a subordinate of the supervisor." Where the record did not support plaintiff's assertion that Judd violated plaintiff's daughter's substantive due process rights, the court concluded that the claim of supervisory liability against Hughes must fail.

Finally, the court also rejected plaintiff's claim that the school district should be held liable under a theory of municipal liability for failing to supervise students, failing to expel the assailant, and failure to properly train teachers to handle violent students. The Court concluded that where the record did not support plaintiff's allegations of unconstitutional conduct on the part of Hughes and Judd, her claims against the school district should also be dismissed. Accordingly, the Sixth Circuit affirmed the district court's grant of summary judgment in favor of Judd, Hughes and the school district.

Teresa Caudill & Lynn Butler v
Doris Hollan
431 F3d 900 (CA 6, 2005)

In *Caudill v Hollan*, four plaintiffs filed suit against the defendant Doris Hollan ("Hollan"), the Boyd County, Kentucky, county clerk. Three plaintiffs,

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Teresa Caudill, Cheryl Fields and Patty Conlin, were three former deputy court clerks ("the deputy county clerk plaintiffs") who were not reappointed to their positions after defendant Hollan won election in 2002. Plaintiff Lynn Butler ("Butler") was the former Boyd County, Kentucky, county clerk, who had been appointed to that office after the death of the previously elected County Clerk.

Plaintiffs filed suit pursuant to 42 USC § 1983, alleging that they were not rehired in violation of their First Amendment rights of free speech and free association, because they supported Hollan's opponent in the election for county clerk. The district court dismissed Plaintiff Butler's claims against Hollan, ruling that as a former County Clerk she did not possess an expectation of being rehired or of continued employment. The district court also dismissed all claims against Hollan in her personal capacity. In a later opinion, the district court dismissed all claims against Hollan in her official capacity, concluding that the deputy county clerk plaintiffs had not presented evidence that the county clerk's office retained final authority to establish county policy concerning hiring. Plaintiffs appealed to the Sixth Circuit Court of Appeals.

After dispensing with jurisdictional matters, the Sixth Circuit noted that since the United States Supreme Court's decision in *Elrod v Burns*, 427 US 347 (1976), patronage dismissals have been generally held to be unconstitutional, subject to the *Branti v Finkel*, 445 US 507 (1980) exception "where party affiliation may be an acceptable requirement for some types of government employment." The *Caudill* Court also recognized that in the Sixth Circuit, *McCloud v Testa*, 97 F3d 1536 (CA 6, 1996), enumerated four different types of positions that fall within the *Branti* exception. These include (1) positions set forth in relevant federal, state, county or municipal law to which discretionary authority to enforce the law or some other policy of political concern is granted ("Category One"); (2) positions to which a significant portion of total discretionary authority available to Category One holders has been delegated ("Category Two"); (3) confidential advisors who spend the majority of their time on the job advising Category One or Two position-holders on how to exercise their policymaking authority ("Category Three"); and (4) positions that are part of a group of positions "filled by balancing out political party representation . . ."

Noting that the deputy county clerk plaintiffs had made out a prima facie case that they were discharged because of their political affiliations, the court, relying on *Branti*, held that the burden shifted to defendant to show that the deputy county clerk plaintiffs' positions fell within the *Branti* exception. Ultimately, the *Hollan* court concluded that the position of deputy clerk did not fall within one of the categories set forth in *McCloud* because the position was essentially clerical, and the position did not require the exercise of discretion authority that is the hallmark of the positions enumerated in *McCloud*. The court, after considering various Kentucky statutes, also dismissed defendant's argument that the *"Rice [v Ohio Dep't of Transportation*, 14 D3d 1133 (CA 6, 1994)] *Cannon*," which requires the Court to accord the Legislature deference in determining whether a job is political, applied.

After concluding that patronage dismissals of Kentucky deputy county clerks violated the U.S. Constitution, the Court also held that Hollan was not entitled to qualified immunity. Hollan had argued that she was entitled to qualified immunity where the governing law concerning patronage dismissals of deputy county clerks was not clear. The court rejected this argument, concluding that prevailing Sixth Circuit jurisprudence gave Hollan sufficient notice that patronage dismissals in Kentucky were "constitutionally suspect." The court also noted that the Boyd County Attorney had circulated a memorandum to all newly elected county executives warning them of the potential constitutional problems with patronage dismissals. Put simply, the court held that a reasonable official would be on notice that patronage dismissals would implicate constitutional concerns in the discharge of county employees in most circumstances.

Accordingly, the court reversed the district court's holding to the extent that it determined that qualified immunity barred the deputy county clerk plaintiffs' claims against Hollan in her personal capacity. Conversely, the Sixth Circuit, concluding that the deputy county clerk plaintiffs had failed to establish that Hollan had the authority to establish county policy with respect to hiring, upheld the district court's dismissal of the claims against Hollan in her official capacity. Finally, the Sixth Circuit agreed with the district court's assessment that plaintiff Butler, holding the political position of former county clerk, did not possess an expectation of being rehired.

Carroll et al v City of Detroit
___ F. Supp2d ___ (2006 WL 148760)
(ED Mich, 2006)

In *Carroll v City of Detroit*, the United States District Court for the Eastern District of Michigan was presented with the Magistrate's Report and Recommendation regarding the Plaintiffs' Motion for Summary Judgment concerning liability. The plaintiffs were all individuals charged with violating

the City of Detroit's anti-scalping ordinance. Although the court had occasion to consider two versions of the ordinance at issue, it noted that both versions were similar to the extent that they prohibited the sale of tickets for sports or entertainment events at certain locations within Detroit, regardless of price. As relevant to this matter, the ordinance was amended on April 7, 2004. The plaintiffs brought a class action against the City of Detroit, challenging the amended ordinance on First Amendment grounds, and challenging the original ordinance on First Amendment, due process and equal protection grounds. However, the court specifically pointed out that plaintiffs were not challenging the Michigan law or a separate Detroit ordinance that precluded the sale of tickets at prices that exceeded face value.

After the court granted plaintiffs' motion to certify the class action, it considered whether the original ordinance violated the First Amendment by unduly limiting commercial speech. In this vein, the court recognized that "law restricting commercial speech . . . need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny." The court also recognized the four-part test developed by the United States Supreme Court in *Central Hudson Gas & Electric Corp v Public Service Comm'n of NY*, 447 US 557 (1980) to use in analyzing commercial speech claims. Indeed, the court recognized that as a threshold matter, to come within the ambit of the First Amendment, commercial speech "must concern lawful activity and not be misleading." In considering this first element, the court agreed with the magistrate that the original ordinance, precluding the offer of sale and purchase of tickets at any price, restricted speech that concerned lawful activity, since Michigan law allows the sale of tickets at face value or below.

Moreover, the court found that the original ordinance failed to meet the second element of *Central Hudson*, which requires the court to inquire whether the asserted governmental interest is substantial. Observing that the original ordinance did not contain any statement of the government interest that led to its enactment, and that the city presented no extrinsic evidence of its alleged interest in limiting the sale of and offer to sell tickets, the court reasoned that the second element of the *Central Hudson* test was not met, and therefore, the original ordinance is unconstitutional. The court further held that the City of Detroit did not meets its burden of establishing that the third and fourth elements of the *Central Hudson* test – "whether the regulation . . . directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest" were met.

The court also agreed with the magistrate's opinion that the original ordinance violated the Equal Protection clause where it permitted individuals to sell tickets outside venues such as Joe Louis Arena but did not allow sales outside other venues such as Ford Field. Observing that the city did not object to the magistrate's conclusion, and that it did not put forth a substantial governmental interest or a rational basis for distinguishing between those that sold tickets at the different venues, the court concluded that the original ordinance violated the Equal Protection clause.

The court next considered constitutionality of the amended ordinance on First Amendment grounds. In doing so, the court noted the amended ordinance was similar to the original ordinance except for its statement of purpose and the fact that it eliminated the exception for civic center entertainment facilities. Recognizing that the first element of *Central Hudson*, that the speech contained lawful activity, was met, the court went on to hold that the "broad statement of purpose" included in the amended ordinance did not sufficiently enable the court to decipher the city's true purpose in enacting the amended ordinance. More specifically, the court rejected the city's argument that it had presented sufficient evidence to demonstrate that the amended ordinance addressed legitimate traffic and safety concerns. Consequently, the court concluded that the second prong of the *Central Hudson* test, that the asserted government interest is substantial, was not met.

Finally, as with the original ordinance, the court concluded that the city did not demonstrate that the amended ordinance "directly advance[d] the state interest involved" because sufficient evidence was not presented to support the city's argument that the amended ordinance, with what the court characterized as "a broad reach," directly advanced the city's interest in ensuring traffic safety and security. The court therefore granted Plaintiffs' motion for Summary Judgment on liability, and set the matter of damages for trial.

Keeton v Flying J, Inc.
429 F3d 259 (CA 6, 2006).

In *Keeton v Flying J, Inc*, the defendant Flying J, Inc. ("Flying J") appealed to the Sixth Circuit from a jury verdict finding it liable for supervisory sexual harassment that culminated in a tangible employment action. Flying J operated travel plazas catering to interstate travelers. Plaintiff Kyle Keeton ("Keeton") worked for Flying J as an assistant restaurant manager. When he hired in with Flying J, Keeton lived in Georgia but willingly relocated to Tennessee for training and was eventually placed at Flying J's Walton, Kentucky store ("the Walton store").

After Keeton began work at the Walton store, his immediate supervisor, Judy Harrell, began making unwanted sexual advances toward him. Keeton was subsequently discharged by Harrell in December 2001 on the basis that he was "not supporting [Harrell]." After Keeton contacted the district manager of another district in Kentucky complaining that the termination stemmed

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from sexual harassment, his termination was changed to a two-week suspension, then a one week-suspension, and then Keeton was transferred to Flying J's Cannonsburg, Kentucky, store, 120 miles away from the Walton store. Keeton maintained not only his title of assistant restaurant manager, but also the responsibilities, salary and benefits that he had at the Walton store. Because his wife suffered from a back problem, she was unable to accompany him to Cannonsburg, and Keeton therefore had to maintain two residences.

After subsequently leaving Flying J for a position with another restaurant chain, Keeton filed a lawsuit against Flying J alleging sexual harassment, retaliation, and constructive discharge under Title VII and Kentucky state law. Specifically, he alleged that he was the victim of sexual harassment resulting in a tangible employment action and that the sexual harassment led to a hostile work environment. After Flying J's motion for summary judgment was rejected, the parties agreed to the jurisdiction of a magistrate judge for a trial by jury. Following a trial, the jury found Flying J liable for sexual harassment resulting in a tangible employment action and awarded Keeton $15,000 for compensatory damages for emotional suffering, but no back pay. The trial court also awarded Keeton attorney fees and costs in the amount of $36,573.86.

On appeal, the majority determined that the jury's finding that Keeton's termination, which was rescinded within hours, did not constitute a tangible employment action, was reasonable. Moreover, the majority recognized the well-settled principle from United States Supreme Court precedent in *Faragher v City of Boca Raton*, 524 US 775 (1998) and *Burlington Industries, Inc v Ellerth*, 524 US 742 (1998) that "[i]f proven sexual harassment by the supervisor did not result in a tangible employment action, then the employer may not be liable if it engaged in preventative or corrective measures and the plaintiff unreasonably failed to utilize the measures the employer provided." Accordingly, the dispositive issue before the court was whether Flying J's transfer of Keeton to a location 120 miles away from his original location while he retained his same benefits, responsibilities, and salary constituted a tangible employment action. Although Flying J argued that the transfer 120 miles away from Keeton's original location, absent a change in status, benefits or salary was not a tangible employment action, the court did not accept this assertion. Indeed, the court, after reviewing applicable precedent, held that "[the case law] ha[s] not precluded the possibility that a transfer not rising to the level of a constructive discharge might nonetheless constitute a tangible employment action." Likewise, the majority observed that although the jury had not found that Keeton was constructively discharged, the jury "could reasonably have found that Keeton's transfer, which increased his commute to the extent that he needed to consider relocation, was an adverse employment action." Accordingly, because the majority concluded that the jury could have reasonably found that Keeton suffered an adverse employment action, it affirmed the jury's verdict.

Circuit Judge Gilman dissented, manifesting his disagreement with the majority that a transfer to another work location with an increased commute time renders an otherwise legal transfer into an adverse employment action.

State Public Law Decisions of Interest

By Ronald D. Richards, Jr. and Sarah Gabis, attorneys with Foster Swift Collins & Smith, P.C., and Jessamy Barnes, law clerk with Foster Swift Collins & Smith, P.C.

Billboard Use Does Not Create Claim for Adverse Possession Against Township

Adams Outdoor Advertising, Inc v Charter Township of Canton, ___ Mich App ___; ___ NW2d ___ (Docket No. 256791, issued Jan. 10, 2006)

In 1959, Central Advertising erected two billboards on property, and until 1978 paid rent to the property owner for the property's use. At some point after 1978, the Michigan Department of Natural Resources acquired the property, and conveyed it to the defendant township in 1982. A year later, the plaintiff company acquired the assets of Central Advertising, including its billboards, and maintained them on the subject property without the township's permission and without paying rent for the right to maintain them. In 2002, the township asked the company to remove the billboards.

In response to this request, the company sued the township, claiming that it adversely possessed the property. The township retorted the claim was barred under MCL 600.5821(2), which states that "[a]ctions brought by any municipal corporations for the recovery of the possession of any public highway, street, alley, or any other public ground are not subject to the period of limitations." The sole issue before the Court was whether the property was "public ground" within the meaning of the statute and therefore immune from adverse possession claims.

The Court of Appeals concluded the property was "public ground," and in doing so adopted its analysis from an earlier unpublished decision. The Court held that the phrase "public ground" is "a broadly construed term used to refer to publicly owned property open to the public for common use," and that the Legislature intended to provide broad protection to municipalities from adverse possession claims. That protection extended to the property in this case, as it was "so obviously open and accessible to the public." Notably, the court refused to limit the application of the earlier unpublished decision, which only concerned a recreational park. Therefore, the same analysis will be used for all publicly owned property.

City May Bar By Ordinance the Discharge of Weapons Within Its Boundaries

Czymbor's Timber, Inc v City of Saginaw, ___ Mich App ___; ___ NW2d ___ (Docket No. 263505, issued Jan. 26, 2006)

The City of Saginaw enacted two ordinances related to the discharge of weapons within its city limits. The first prohibits the discharge of "any arrow, metal, ball, pellet, or other projectile by use of any bow, long bow, cross bow, slingshot, or similar device." The second prohibits the discharge of all firearms but lists four specific exceptions. Neither ordinance provides an exception for hunting activities.

The plaintiffs challenged the validity of the ordinances. They claimed the ordinances interfered with lawful hunting activities and were preempted by the DNR's authority to regulate hunting under the NREPA, citing Section 41901 of the NREPA, MCL 324.41901 (which empowers the DNR to "regulate and prohibit hunting, and the discharge of firearms and bow and arrow").

The court held that Section 41901 of the NREPA did not preempt the city's ordinances. The court first found no direct conflict between the ordinances and the NREPA. The court then found that the ordinances were not preempted under a theory of "completely occupying the field the ordinance attempts to regulate," since (1) hunting regulation is distinct from firearm control; and (2) the Legislature has specifically authorized cities to regulate the discharge of firearms, and the NREPA did not repeal that authority.

Pre-Condemnation Appraisal is Not Binding During Trial on Just Compensation

Dep't of Transportation v Frankenlust Lutheran Congregation, ___ Mich App ___; ___ NW2d ___ (Docket No. 257206, issued Jan. 31, 2006)

MDOT deemed it necessary to acquire part of the defendants' property for state highway purposes. When MDOT's real estate appraiser valued the property at $589,900, MDOT sent a "good faith offer" of $592,523 to defendants; the defendants rejected it. MDOT sued to condemn the property and estimated that the amount of the offer represented just compensation. Just before the trial on just compensation, MDOT received a second appraisal valuing the property at only $409,777.

After learning of the second appraisal, the property owners sought to exclude the lower amount, claiming MDOT was bound to its earlier determination of just compensation as contained in the appraisal and its good faith offer. MDOT argued that it was allowed to change its estimate.

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The Court of Appeals agreed with MDOT and held that MDOT is not bound by its pre-condemnation determination of value and may contest just compensation by offering evidence of a different value at trial. The Court reasoned that awarding just compensation is intended to restore an injured party to its rightful financial position and should not enrich that party or the government. As a result, evidence of the condemning authority's offer and appraisal are admissible to determine just compensation. The court concluded that a condemning authority is free to offer a different valuation of just compensation at trial but noted that when it does so, the landowner may present evidence of any higher pre-condemnation valuations.

Mere Decrease in Property Value After a Rezoning is Not a Taking

Dorman v Twp of Clinton, ___ Mich App ___; ___ NW2d ___ (Docket No. 256362, issued Feb. 7, 2006)

The plaintiff purchased property that was bordered on all sides by residential land. Although the subject property was originally zoned "Residential Multiple," it was later rezoned to "Light Industrial" to permit an Elks Club lodge without amending the master plan. It was still zoned as light industrial when the plaintiff purchased it, and he proposed opening a public storage business on the property.

After buying the property, the plaintiff began preparing to reconstruct the building on the property. Later, though, the township voted to rezone the property back to its original residential classification. The plaintiff sued the township, claiming that the rezoning (1) amounted to a taking; and (2) violated his substantive due process rights as arbitrary.

The court first rejected the plaintiff's taking claim, for several reasons. The court initially noted that the taking claim rested on the alleged reduction in the property's value due to the rezoning; however, mere diminution in value is not a taking, since there are always disparities between residential and commercial uses, and a municipality must be able to choose between them. The court then stated that the plaintiff could not show that his property was either unsuitable or unmarketable as zoned, particularly given that plaintiff's own witness stated that there was a market for residential homes in that area. Third, the plaintiff's prepatory actions in removing interior walls for the lodge did not grant him a protected right to the continuation of a particular zoning classification; that work was not of a "substantial character."

The court next rejected the substantive due process claim. The court dismissed the notion that the rezoning was done solely due to the treasurer's personal motives, since the record lacked support for that claim. The court then stated that the record showed the township removed the prior classification to avoid spot zoning issues and to allow the property to conform to the remainder of the neighborhood. Given this, and given that preserving the residential nature of a neighborhood and limiting traffic for the safety of local residents are legitimate interests, the court concluded that the substantive due process challenge failed.

Building Inspector Owes No Duty to Homeowner's Guest Against Defective Structure

Rakowski v Sarb, ___ Mich App ___; ___ NW2d ___ (Docket No. 261255, issued Feb. 7, 2006)

The plaintiff was injured when a railing gave way on a handicap ramp at her parents' home. The plaintiff sued the local building inspector, alleging negligent or grossly negligent conduct in inspecting and approving the ramp a mere six months before the accident.

The court held that the building inspector owed no duty to the plaintiff. In applying the factors used to determine if a common law duty exists, the court concluded that no such duty exists here. The court relied heavily on the minimal and attenuated connection between the inspector and the plaintiff: the plaintiff neither lived in nor owned the house on which the ramp was built; she and the inspector had never met; she was not present for the inspection; the inspector made only a visual inspection and played no role in the construction process. In addition, the court noted, there was no moral blame to impose on the inspector, and public policy opposed imposing such a duty in that imposing such a duty might cause municipalities to stop performing building inspections. For those reasons, the Court found the plaintiff's claim untenable.

Combining Parcels From Separate Lots in Platted Subdivision to Create Condo Project Does Not Violate Land Division Act

Williams v City of Troy, ___ Mich App ___; ___ NW2d ___ (Docket No. 263366, approved for publication Feb. 14, 2006)

A developer purchased three parcels of vacant land in two separate lots located within a platted "one family residential" subdivision. The developer than proposed, under the Condominium Act, to combine the parcels into one condominium project consisting of six detached units. The city approved the proposal. The plaintiffs, landowners in the subdivision, sued to prevent the development. The trial court granted sum-

mary disposition for the developer, and plaintiffs appealed.

The plaintiffs claimed that under the Land Division Act ("LDA"), the developer was required to file an action to vacate the existing subdivision plat and submit a "replat" before it can divide the land into a condominium development. The "replat" would exclude the proposed condominium development. The Court of Appeals, however, disagreed and held that the Condominium Act states that the LDA "shall not control divisions made for any condominium project." Because the development at issue fell within this language, the LDA did not apply. The court noted that administrative rules issued under the Condominium Act recognize that a proposed development might overlap with a platted subdivision, but neither the Act nor the rules require the plat to be vacated. The court also stated that even if the LDA applied, the developer would not need to vacate the plat, because the proposed development would not change the boundaries of the plat.

The court further found that the city's zoning ordinance did not require the developer to vacate the plat, and that the plaintiffs' substantive due process rights were not violated because the city considered whether the development would be compatible with the community.

Legislative Update

By Kester K. So and David P. Massaron, Dickinson Wright PLLC

Over the course of the last several months, the Michigan Senate and House of Representatives have considered numerous bills of municipal interest. The following are summaries of some of those bills.

Laws Enacted

- Drainage Board Member. **HB 5281, PA 16** Provides for representation of communities on intercounty drainage boards. Amends section 514 of PA 40, 1956.
- Inmate Medical Care. **SB 736, PA 20** Requires sheriffs to draw on an inmate's health care policy before the county is charged. Amends sections 4 and 4a of RS 171, 1846 (MCL 801.4 and 801.4a).
- MEGA Definition. **HB 5559, PA 21** Modifies the definition of the Michigan Economic Growth Authority.
- Brownfield Development. **HB 5471, PA 32** Creates a definition of an economic recovery zone in Brownfield Development Finance Act. Amends section 2 of PA 381, 1996 (MCL 125.2652), as amended by 2005 PA 101.
- Water Supply. **SB 857, PA 37** Considers impacts of public water supply systems on natural resources. Amends section 4 of PA 399, 1976 (MCL 325.1004).
- Utility User Tax Proceeds. **HB 4737, PA 197** Modifies the use of utility user tax proceeds. Amends section 2 of PA 100, 1990 (MCL 141.1152).
- Land in Cities Inventory. **HB 4729, PA 198** Allows municipal employees to purchase land in a city's inventory. Amends section 4 of PA 317, 1968 (MCL 15.324).
- Law Enforcement Recertification. **HB 4335 PA 239** Waives certain recertification requirements for law enforcement officers that return from duty after military service. Amends section 9 of PA 203, 1965 (MCL 28.609).
- Municipal Sewer Discharge. **HB 4860, PA 241** Exempts municipalities from liability for unauthorized discharges into municipal sewer systems. Amends section 3109 of PA 451, 1994 (MCL 324.3109).
- Concealed Weapons Permit. **HB 4978, PA 242** Revises the requirements for obtaining a concealed weapons permit to include the requirement of meeting certain federal eligibility standards.
- County Board of Auditors. **SB 657, PA 246** Repeals the county board of auditors. Amends section 4a of PA 275, 1913 (MCL 47.4a).
- Plant Rehabilitation Extension. **HB 5050, PA 251** Provides for the extension of property tax abatements under the plat rehabilitation act for certain property. Amends section 9 of PA 198, 1974 (MCL 207.559).
- Water Quality Fund. **SB 789, PA 253** Allows the Strategic Water Quality Initiatives Fund to be used for grant programs.
- Sewage Grants. **HB 4572, PA 254** Provides for use of the Great Lakes Water Quality Bonds for sewage treatment project grants.

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- Water Pollution Fund. **SB 799, PA 255** Allows municipalities to borrow money for the construction of sewage projects from the state water pollution control revolving fund.
- Sewage Grants. **HB 4573, PA 256** Transfers certain Great Lakers Water Quality bond revenue to the Wastewater Application Grant Fund.
- Water Quality Fund. **SB 790, PA 257** Allows the Strategic Water Quality Initiatives Fund to be used for grant programs.
- Public Property Purchase. **SB 654, PA 265** Enacts sentencing guidelines for the crime of unlawful purchase of public property by a public servant. Amends section 11 of PA 175, 1972.
- Certificates. **HB 4027, PA 267** Revises the industrial facilities exemption certificates under plant rehabilitation district act. Amends section 287 of PA 108, 1974 (MCL 207.552 and 207.557).
- Corridor Improvement Authority Act. **SB 34, PA 280** Establishes a corridor improvement authority.
- Rezoning Notice. **SB 252, 253 and 254, PA 284, 285 and 286** Requires the street address of properties that are up for rezoning to be included in published public notices.
- Parking Violations. **SB 341, PA 287** Allows parking violations bureau to be operated by a downtown development authority. Amends section 8395 of PA 236, 1961 (MCL 600.8395).
- L.E.I.N. Policy. **SB 648, PA 308** Revises reference to the LEIN Policy Council Act in the Law Enforcement Information Network Act to the Criminal Justice Information Systems Policy Council Act. Amends sections 4 and 5 of PA 163, 1979 (MCL 28.214 and 28.215) and repeals certain sections.
- LEIN Revisions. **HB 5275, PA 309** Revises the Law Enforcement Information Network LEIN Policy Council Act. Amends sections 1-3 of PA 163, 1974.
- Judge Salary. **SB 448, PA 326** Revises the salary for judges and establishes concurrent jurisdiction for probate judge and district judge and provides other amendments. Amends multiple sections of PA 236, 1961.
- Neighborhood Enterprise Zones. **SB 529, PA 338** Creates and modifies the homestead facilities and duration of tax abatement for neighborhood enterprise zones.
- Eminent Domain. **SJR E** Prohibits the use of eminent domain takings for benefit of private entities.

Bills Passed in Senate and House of Representatives

- Historic Preservation Tax Credit. **SB 569** Eliminates the population requirement for the historic preservation income tax credit. Amends section 266 of PA 281, 1967 (MCL 206.266).
- Historic Preservation Tax Credit. **SB 570** Eliminates the population requirement for the historic preservation single business tax credit. Amends section 39c of PA 288, 1975 (MCL 208.39c).
- Tax Collection. **SB 839** Revises disposition of tax collection. Amends multiple sections of PA 167, 1933 (MCL 205.75).

Bills Passed by Senate

- Renovation and Addition Tax Credit. **SB 52** Allows renovations and additions to qualify for a tax credit. Amends section 2 of PA 146, 2000 (MCL 125.2782).
- Detroit Regional Water. **SB 372** Provides for regionalization of Detroit water and sewer system.
- Electronic Filing Advisory Board. **SB 477** Eliminates the campaign finance electronic filing advisory board. Amends section 18 of 1976 PA 338 (MCL 169.218).
- Eminent Domain. **SB 693** Prohibits the use of eminent domain to benefit private entities. Amends section 3 of PA 149, 1911 (MCL 213.23).
- Judges. **SB 883** Increases number of judges in 17th Circuit Court.
- Judges. **SB 907** Revises the number of judgeships in various circuits and districts. Amends sections 507, 508, 517, 518, 549a, 549g, 803, 8314, and 8135, PA 236, 1961 (MCL 600.507, 600.508,600,517,600.518,600.549a, 600.549g, 600.803, 600.8134 and 600.8135), as amended by PA 252, 2001, PA 253, 2001, PA 715, 2002, PA 256, 2001, PA 182, 1981 and PA 16, 1982.
- Dams. **SB 1040** Provides for general permits for removal of small dams.

Bills Passed by the House of Representatives:

- Municipal Land Use. **HB 4398** Codifies zoning and growth management by counties, townships, cities and villages.
- State-Owned Property Tax. **HB 4536** Creates a property tax classification for state-owned real property.
- Financial Institution Emergency Closure. **HB 4976** Revises commissioner authority over emergency closure of financial institutions.
- Airport Parking Funds. **HB 5154** Clarifies distribution of airport parking funds.

- Tax Appeals. **HB 5313** Allows township boards to appoint alternate members to property tax board of review.

Bills introduced in the Senate

- Write-In Candidates. **SB 462** Revises the filing deadline for write-in candidates to the Tuesday before the election. Amends section 737a of PA 116, 1954 (MCL 168.737a).
- Billboard Permits. **SB 567** Creates a moratorium on the issuance of billboard permits. Amends PA 106, 1972 (MCL 252.201-252.325) by section 7a.
- Billboard Permits. **SB 568** Revises procedures for permits for billboards. Amends multiple sections PA 106, 1972 (MCL 252.325).
- Land Bank Fast Track. **SB 867** Revises citation in property tax law for land bank fast track act. Amends section 7, PA 258, 2003 (MCL 12.4757).
- Tax Reverted Revenue. **SB 868** Expands distribution of property tax revenue generated from tax reversion process. Amends section 59, 78, 78m, 87b, 87c and 87d, PA 206, 1893 (MCL 211.59 et. seq.).
- Downtown Road Use. **SB 869** Allows commercial use of trunk line highway rights-of-way in downtown areas. Amends section 676a, PA 300, 1949 (MCL 257.67a).
- Road Fund Reporting. **SB 870** Modifies revisions to reporting requirements for cities regarding transportation funds. Amends sections 14 and 15, PA 51, 1951 (MCL 247.664 and 247.665).
- Tax Notices. **SB 871** Removes printing requirements for property tax collections where information is available on a computer database. Amends section 42a, PA 206, 1893 (MCL 211.42a).
- Local Budgets. **SB 872** Revises process for adoption by local governments of budgets. Amends section 3, PA 43, 2nd Ex Sess of 1963 (MCL 141.413).
- GPS Remonumentation. **SB 873** Allows use of global positioning system standards in remonumentation process. Amends section 8, PA 345, 1990 (MCL 54.268).
- Pooled Financing. **SB 875** Allows local government pooled financing investment programs. Amends section 1, PA 20, 1943 (MCL 129.91) as amended by PA 196, 197.
- Notary. **SB 908** Eliminates requirement for notary public to indicate county within which he or she is acting.
- Forest Tax. **SB 913** Creates a qualified forest property recapture tax.
- Forest Mills. **SB 914** Provides exemptions for operating mills under the qualified forest property tax.
- Sixth Circuit Judges. **SB 946** Provides for additional judgeship in the Sixth Judicial Circuit Court. Amends section 507, PA 236, 1961 (MCL 600.507) as amended by PA 252, 2001.
- Private Youth Prisons. **SB 948** Prohibits the operation of a youth facility by private contractor. Amends sections 20g, 29, 34, 63, 63a, 65, 69a and 70, PA 232, 1953 (MCL 791.220g, 791.229, 791.234, 791.263, 791.263a, 791.265, 791.269a) as amended by PA 211, 200, PA 512, 1998 and PA 218, 2004.
- Private Prisons. **SB 949** Prohibits the operation of state correctional facilities by a private vendor. Amends PA 232, 1953 (MCL 791.201 to 791.283) by adding section 220j.
- Emergency Management. **SB 954** Requires emergency management plan for municipalities with over 100,000 residents. Amends sections 9 and 10, PA 390, 1976 (MCL 30.410) as amended by PA 132, 2002.
- Residential Speeds. **SB 964** Provides for increased penalty for speed violations in residential area. Amends section 601b, PA 300, 1949 (MCL 257.601b) as amended by PA 314, 2003.
- Revenue Sharing. **SB 965 and SB 966** Provide for revenue sharing of counties for distribution to authorities. Amend sections 11 and 12a, PA 140, 1971 (MCL 141.911 and MCL 141.912a).
- Millage Calculation. **SB 968** Revises property tax calculation of millage reduction fraction. Amends section 34d, PA 206, 1893 (MCL 211.34d) as amended by PA 476, 1996.
- Ballot Language. **SB 973** Revises duties of Board of State Canvassers and Director of Elections regarding ballot question language. Amends section 32, PA 116, 1954 (MCL 168.32); repeals section 22e (MCL 168.223).
- Ballot Petitions. **SB 974** Revises duties of Board of State Canvassers and Director of Elections regarding ballot question petitions. Amends section 474, PA 116, 1954 (MCL 168.474).
- Ballot Petitions. **SB 975** Revises duties of Board of State Canvassers and Director of Elections regarding ballot question petitions. Amends section 474a, PA 116, 1954 (MCL 1689.474a) as amended by PA 219, 1999.
- Ballot Petitions. **SB 976** Revises duties of Board of State Canvassers and Director of Elections regarding ballot question petitions. Amends section 476, PA 116, 1954 (MCL 168.476) as amended by PA 71, 2005.
- Property Transfer. **SB 1004** Revises definition of the transfer of ownership. Amends section 27a of PA 206, 1893 (MCL 211.27a).
- Judge Campaign. **SB 1009** Provides for public campaign financing for certain Supreme Court candidates. Amends sections 3, 5, 7, 10 and 11, PA 388, 1976 (MCL 169.203, 169.205, 169.207, 169.210 and

Continued on the next page

Legislative Update
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169.211) as amended by PA 95, 1989, PA 237, 1999, PA 250, 2001, PA 590, 1996, and by adding section 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 103, 105, 107, 108, and 109.

- Public Transit Tax. **SB 1011** Allows taxes to be levied up to 25 years for public transit authority. Amends section 18, PA 196, 1986 (MCL 124.468).
- Petition Fraud. **SB 1036** Increases penalties for filing nominating or ballot question petitions with fraudulent signatures. Amends section 544c of PA 116, 1954 (MCL 168.544c) as amended by PA 431, 2002.
- Land Donation. **SB 1038** Provides tax credit for the donation of land for certain conservation purposes. Amends PA 228, 1975 (MCL 208.1-1.145) by adding section 36e.
- Enterprise Zones. **SB 1047** Includes a development in Ecorse among neighborhood enterprise zones. Amends section 4 of PA 147, 1992 (MCL 207.774) as amended by PA 339, 2005.
- Property Rehabilitation. **SB 1062** Expands definition of qualified local governmental unit to include certain cities under the Obsolete Property and Rehabilitation Act. Amends section 2 of PA 146, 2000 (MCL 125.2782).
- Apportionment Process. **SJR I** Clarifies Legislature apportionment and the process for redistricting plan. Amends sections 2, 3 and 6, art. IV of the State Constitution.

Bills Introduced in the House of Representatives:

- Headlee Amendment. **HJR R** Provides a constitutional amendment requiring spending limits on state government. Amends State Constitution of 1963 by amending section 26 of Article IX.
- School Operating Millage Exemption. **HB 4125** Allows certain school districts to exempt principal residences and qualified property from certain school operating millage. Amends section 1211 of PA 451, 1976 (MCL 380.141).
- Permanent Absentee Voters. **HB 4228** Requires local clerks or secretaries of school boards to maintain a list of permanent absentee voters. Amends sections 495, 500a, and 759 of PA 116, 1954 (MCL 168.495).
- Easement Granting. **HB 4622** Revises the policy for granting easements across state-owned land. Amends sections 2123 and 2124 of PA 451, 1994.
- Traffic Laws on Private Roads. **HB 4807** Omits the need for owner consent and contract to confer the authority of local law enforcement to enforce traffic laws on certain private roads. Amends section 1 of PA 62, 1956 (MCL 257.951).
- Renaissance Zone Revocation. **HB 4818** Provides for revocation of renaissance zone designation by local units of government at certain times.
- Absent Voter Deadline. **HB 5017** Revises deadline for applying for absent voter ballot. Amends section 759 and 761 of PA 116, 1954 (MCL 168.759).
- Absent Voter Penalties. **HB 5018** Makes technical changes to sentencing guidelines related to applications for absent voter ballots. Amends sections 11d of PA 175, 1927 (MCL 777.11d).
- Municipal Forests. **HB 5114** Removes deed restrictions on municipal forest property conveyed by the state. Amends section 52706 of PA 451, 1994 (MCL 324.52706).
- Foreign Waste. **HB 5177** Sets penalties for dumping solid waste from a foreign municipality in Michigan. Amends section 11549 of PA 451, 1994 (MCL 324.11549).
- Foreign Waste. **HB 5178** Sets sentencing guidelines for violating importation of solid waste from a foreign municipality. Amends section 13c of PA 175, 1927 (MCL 277.13c).
- Property Tax Alternative Dates. **HB 5358** Allows municipal boards to adopt a resolution or ordinance with alternative dates for the collection of property taxes. Amends section 53b, PA 206, 1893 (MCL 211.53b) as amended by PA 105, 2003.
- Community College Reorganization. **HB 5400** Provides procedures for reorganization of community college districts. Amends section 144 of PA 331, 1996 (MCL 389.144).
- Stun Gun. **HB 5435** Allows possession and operation of electrical devices designed to temporarily incapacitate persons for certain civilian detention officers. Amends section 224a of PA 328, 1931 (MCL 750.224a).
- Ordinance Violation. **HB 5464** Allows delayed sentencing for ordinance violations. Amends section 1 of Chapter XI, PA 175, 1927 (MCL 771.1) as amended by PA 219, 2004.
- Preliminary Evidence. **HB 5468** Allows drug analysis field test as evidence in preliminary hearings. Amends PA 175, 1927 (MCL 760.1 to 777.69) by adding section 11b to chapter VI.
- School Plans. **HB 5479** Allows for local input into school site plans. Amends PA 451, 1976 (MCL 380.1263), as amended by 1990 PA 159.
- Property Taxes. **HB 5481** Revises assessment formula for county property taxes. Amends PA 206, 1893 (MCL 211.44a) as amended by 2005 PA 357.
- Revenue Sharing. **HB 5482** Bases county 2005 revenue sharing formula on summer taxes. Amends sec 11 of PA 140, 1971 (MCL 141.911), as amended by 2004 PA 356).

- Pole Authority. **HB 5488** Establishes utility pole attachment authority. Amends section 6g, PA 3, 1939 (MCL 460.g) as added by PA 470, 1980.
- Government Vehicle Use. **HB 5521** Requires local units of government to report the use of taxpayer-funded vehicles. Amends PA 140, 1971 (MCL 141.901).
- Government Vehicle Use. **HB 5523** Provides for public access to records which document the use of taxpayer funded vehicles. Amends section 213 of PA 431, 1984.
- Meeting Pay. **HB 5529** Modifies compensation rate for board members who attend public service meetings. Amends section 11, PA 33, 1951 (MCL 41.811) as amended by PA 464, 2004.
- Airport Parking. **HB 5536** Decreases airport parking tax. Amends section 3, PA 248, 1987 (MCL 207.373), as amended by 2002 PA 680.
- Township Fire Ordinance. **HB 5553** Empowers township fire authorities to pass ordinances. Amends title and sections 5 and 9, PA 57, 1998 (MCL 124.605 & 124.609) as amended by PA 167, 1999.
- Transit Authority Tax. **HB 5560** Allows taxes to be levied up to 25 years for public transit authority. Amends section 18, PA 196, 1986 (MCL 124.468).
- Resident Land Sales. **HB 5561** Allows residents' right of first refusal in auctioned land sales within their municipality.
- Emergency Building Maps. **HB 5563** Creates public building mapping information system for first responders. Amends section 4, PA 230, 1972 (MCL 125.1504) as amended by PA 584, 2004.
- Township Mixed Use Zoning. **HB 5565** Expressly allows zoning and growth management in mixed use zoning in townships. Amends section 1, PA 184, 1943 (MCL 125.271) as amended by PA 47, 1996.
- County Mixed Use Zoning. **HB 5566** Expressly allows zoning and growth management in mixed use zoning in counties. Amends section 1, PA 183, 1943 (MCL 125.201) as amended by PA 46, 1996.
- Municipal Mixed Use Zoning. **HB 5567** Expressly allows zoning and growth management mixed use zoning in cities and villages. Amends section 1, PA 207, 1921 (MCL 125.581) as amended by PA 36, 1995.
- Nominee Information. **HB 5580** Allows county board of commissioners or county clerk to request information from board of county canvasser nominees. Amends sections 24c and 24d, PA 116, 1954 (MCL 168.24c and 168.24d).
- Inmate Reimbursement Cost. **HB 5643** Extends time for filing civil action for reimbursement by inmates to the county for cost of imprisonment and care. Amends PA 118, 1984 (MCL 801.87) as amended by PA 544, 1996.
- Canvassers' Authority. **HB 5648** Revises duties of state board of canvassers and director of elections concerning ballot question petitions. Amends section 478 of PA 116, 1954 (MCL 168.478).
- Ballot Reviews. **HB 5649** Revises election decisions to include court review of determination made by state director of elections. Amends section 479, PA 116, 1954 (MCL 168.479).
- Ballot Duties. **HB 5650** Revises duties concerning ballot question petitions to state board of canvassers and director. Amends section 477, PA 116, 1954 (MCL 168.477) as amended by 1999 PA 219, 1999.
- Voter Registration. **HB 5659** Expands authority of local clerks to confirm and cancel voter registrations. Amends sections 509bb and 510, PA 116, 1954 (MCL 168.509bb and 168.510) as added by PA 441, 1994 and by adding sections 515a and 764c.
- City Income SBT Credit. **HB 5681** Provides for credit in the single business tax for a portion of overpayment of city income taxes for 2006 and 2007. Amends PA 228, 1975 (MCL 208.1-208.145) by adding section 36e.
- Home Downsizing Tax Break. **HB 5694** Revises the assessment of home value when transferred when it is purchased by a senior citizen. Amends section 27a, PA 206, 1893 (MCL 211.27a) as amended by PA 23, 2005.
- Local Ballot Wording. **HB 5704** Amends the time frame to certify ballot wording for local, school district, or county ballot question. Amends sections 312 and 646a, PA 116, 1954 (MCL 168.312 and 168.646a), as amended by PA 71, 2005 and PA 295, 2004.
- Absent Voter Name. **HB 5705** Requires space to print name on return envelope of absent voter. Amends section 761, PA 116, 1954 (MCL 168.761) as amended by PA 71, 2005.
- Property Tax. **HB 5717** Establishes funding for the tax-reverted land process. Amends PA 206, 1893 by amending sections 59 as amended by PA 97, 2001 (MCL 211.59) and 78n as added by PA 123, 1999 (MCL 211.78n).
- Local Fund Distribution. **HB 5718** Provides for per capita distribution of funds to local municipalities. Amends PA 156, 1851 by amending section 11 (MCL 46.11) as amended by PA 94, 2003.
- Firefighter Badges. **HB 5719** Prohibits the sale or possession of firefighter or emergency medical service providers' uniforms, patches, and badges. Amends PA 328, 1931 (MCL 750.1 to 750.568) by adding sections 217g and 217h.

ABA Section of State and Local Government Law Spring Meeting
Wyndham San Diego◆San Diego, California
March 31 – April 2, 2006

Friday, March 31, 2006

8:00 a.m. – 5:00 p.m. **Registration & Section Office**
Topaz Room, 2nd Floor

8:30 a.m. - 10:00 a.m. **The "Official" Headache: Legal and Practical "Headaches" Involving Elected/Appointed Officials**
Opal Room, 2nd Floor

Speakers will address three legal and practical problems of representing entities with elected and appointed officials: employees running for elected office, the legal and practical issues involved with elected/appointed officials who have conflicts of interest, and the impact Sarbanes Oxley may or should have on public entities.

Speakers:
Paul Koster, Hall, Booth, Smith and Slover, PC, Atlanta, Georgia
Jo Anne Sawyer Knoll - Mayor's office, San Diego, California
James Hanks - Ahlers & Cooney, P.C., Des Moines, Iowa

Moderators:
Daniel P. Dalton - Tomkiw Dalton plc, Royal Oak, Michigan
Ronald J. Kramer - Seyfarth Shaw, Chicago, Illinois

10:15 a.m. -11:45 a.m. **Truth and Consequences in San Diego: Charting a New Fiscal Course for the City**
Opal Room, 2nd Floor

In San Diego, all is not well with the commonweal. Sunshine has begun to reveal fundamental fissures. The public finance program will center on problems besetting the City of San Diego in its fiscal practices and governance structures. Speakers prominent in local affairs will address securities disclosure and pension funding issues that have effectively locked the City out of the bond market and triggered a bevy of official inquiries. Credit ratings have been suspended, and financial statements are non-existent. Public questions of ability and willingness to pay for public services and facilities are emerging. Investors and voters are forming dual constituencies advancing their respective interests. Federal securities and criminal investigations are underway. Law and accounting firms are analyzing problems and fashioning potential resolutions. The public finance program will focus on these facets. It will feature the municipal government's chief legal officer, Michael Aguirre, City Attorney of San Diego, elected in November 2004, a leader in investigative and reform efforts. The program will also feature Patrick C. Shea, a noted San Diego lawyer and previous candidate for mayor, and John M. McNally, a partner at Hawkins, Delafield & Wood LLP in Washington, D.C. It will be moderated by section Chair Steve Weinstein and Vice-Chair Ken Bond and shaped to provide practitioners from around the country insight into municipal financial matters of broad applicability.

Speakers:
Michael Aguirre - City Attorney of San Diego, San Diego, California
John M. McNally - Hawkins, Delafield & Wood LLP, Washington, DC
Patrick C. Shea - San Diego, California

Moderator:
Stephen J. Weinstein - Finance Committee Chair, New York, New York
Kenneth W. Bond - Finance Committee Vice-Chair, Squire, Sanders & Dempsey, New York, New York

10:15 a.m. – 11:45 a.m. **Executive Committee Meeting**
Boardroom, 3rd Floor

12:00 p.m. - 1:30 p.m. **Luncheon**
Pearl Room, 3rd Floor

Speaker:
Terry Tamminen, Governor Schwarzenegger's cabinet secretary and former head of CalEPA

1:45 p.m. - 3:15 p.m. **Storm Water Permitting and Enforcement: Alice Visits Wonderland**
Opal Room, 2nd Floor

Storm water regulation and enforcement is a stated priority for the U.S. Environmental Protection Agency (EPA). As a result of this increased focus, the EPA has initiated numerous enforcement actions seeking millions of dollars in civil penalties from developers and builders for failing either to secure a storm water permit or to comply with its terms. In 2004, for example, the U.S. Department of Justice and the EPA, along with the U.S. Attorney's office for the District of Delaware, and the states of Tennessee and Utah reached a settlement for storm water violations at Wal-Mart store construction sites across the country. As a result, Wal-Mart agreed to pay $3.1 million civil penalty and reduce storm water runoff at its sites

by instituting better control measures. States are also actively involved in the storm water arena. The program should be lively and informative."

Speakers:
S. Wayne Rosenbaum - Foley Lardner LLP, San Diego, California
Elizabeth Miller Jennings - Staff Counsel IV, State Water Resources Control Board, Sacramento, California
John H. Minan - University of San Diego School of Law, San Diego, California

Moderator:
Krista S. Stearns - Boyd, Chandler & Falconer, LLP, Anchorage, Alaska

3:30 p.m. – 5:00 p.m.	Comparative Land Use: China China's Cities, Globalization and Sustainable Development: Some Comparative Thoughts on Urban Planning, Energy, And Environmental Policy in the Emerging Middle Kingdom Opal Room, 2nd Floor

Sustainable development issues related to the growth of China's modern cities. This provocative and fascinating presentation is based on Professor Ziegler's recently published works on China's cities and on his recent travels and speaking in China. The presentation focuses on comparative smarth growth issues related to the development, preservation, property rights and takings, NIMBYISM, affordable housing and increasing automobile use, as well as, China's "city green" campaign, building architecture and design, planning and zoning controls, regional satellite edge cities, new urbanist development, and snob zoning – all with Chinese characteristics. The presentation provides a look at how China's urban planning, energy, and environmental policies may affect life in the United States and throughout the world in the years ahead.

Speaker:
Professor Ed Zeigler, Denver, CO

5:30 p.m. – 7:00 p.m.	Welcome Reception University of San Diego Hosted by the University of San Diego College of Law

Saturday, April 1, 2006

8:00 a.m. - 5:00 p.m.	Section Hospitality Room & Office Topaz Room, 2nd Floor
7:30 a.m. - 9:00 a.m.	Executive Committee Breakfast Meeting Boardroom, 3rd Floor
9:15 a.m. - 10:45 a.m.	All Committee Business Meetings Pearl Room, 3rd Floor
9:15 a.m. - 10:45 a.m.	Land Use Planning Business Meeting Coral Room, 3rd Floor
11:00 a.m. - noon	Hot Topics - Homeland Security Ivory Room, 3rd Floor
11:00 a.m. - noon	Hot Topics - Condemnation Law Coral Room, 3rd Floor
12:00 p.m. - 1:30 p.m.	Hot Topics - Land Use Planning Law Diamond I Room, 2nd Floor Box Luncheon
1:45 p.m . - 2:45 p.m.	Hot Topics - Government Operations and Liability Coral Room, 3rd Floor
1:45 p.m. - 2:45 p.m.	Hot Topics - Environmental Law Ivory Room, 3rd Floor
3:00 p.m. - 4:30 p.m.	Publications Oversight Board Meeting Opal Room, 2nd Floor
5:00 p.m.	Walking Tour/wine stop
6:30 p.m.	Group Dinner, Gaslight Quarter Trattoria La Strada ($80.00 Ticketed)

Sunday, April 2, 2006

7:30 a.m.–8:30 a.m.	Urban Lawyer Advisory Board Meeting Boardroom, 3rd Floor
8:30 a.m.–11:00 a.m.	Council Breakfast Meeting Diamond Room, 2nd Floor

The Right of Self-incrimination in a Civil Infraction Case

By Thomas M. Donnellan

Occasionally the prosecutor in a civil infraction matter wishes to prove an essential part of his own prima facia case with the testimony of the defendant. It is a little known fact that Michigan possesses a statute that specifically prevents this approach.

Objection to Questions Exposing Defendants to Penalty and Brief in Support of Objection

> General Rule Privilege: MRE 501. Privilege is governed by the common law, except as modified by statute or court rule.

The privilege to control one's personal honor, dignity and integrity possessed by witnesses asked questions that could cause them to be incriminated, disgraced or exposed to a penalty was traditionally three privileges. The most important privilege is the privilege against self-incrimination. This does not concern us because a civil infraction is not a crime. *People v. Ferency*, 133 Mich. App. 526, 351 NW2d 225 (1984). The second is the privilege against self-infamation or answering questions under oath that would tend to bring disgrace upon the speaker. *Brown v Walker*, 161 U.S. 591 (1896); see *In Re Vince*, 2 N. J. 443, 67 A. 2d 141 (1949). This privilege is no longer recognized in Michigan. *Jennings v. Prentice*, 39 Mich. 421 (1887). The third privilege is the privilege the Defendants possess against being required to answer questions that will expose them to a penalty sought by the government in court. *State v Burton*, 163 W. Va 40, 254 S. E.2d 129 (1977). This privilege is part of the common law and has been codified in statute in Michigan since 1846.

The Statute

Any competent witness in a cause shall not be excused from answering a question relevant to the matter in issue on the ground merely that the answer to such question may establish, or tend to establish, that such witness owes a debt or is otherwise subject to a civil suit, but this provision shall not be construed to require a witness to give any answer which will have a tendency to accuse himself of any crime or misdemeanor, or to expose him to any penalty or forfeiture, nor in any respect to vary or alter any other rule respecting the examination of the witnesses. MCL 600.2154

This statute is unchanged from R.S. 1846, Chapter 102, section 84, and the formulation of the evidentiary rule appears to extend back to Tudor times. It became established in every part of the early United States.

Origin of Privilege

The statutory privilege against questions exposing witnesses to penalties has a similar history as the constitutional privilege against self-incrimination that was placed by the first Congress in the Bill of Rights. However, the Fifth and Sixth Amendments which were submitted to the states were limited to criminal procedure which is unrelated to this case. There is no indication that the Fifth Amendment was intended to abolish other privileges that are not necessarily related to crimes, even privileges that had similarities to self-incrimination privilege.

A self-accusation is not necessarily limited to a self-accusation of a crime. It can also be a self-accusation of infamous behavior or a self-accusation of something that could cause the imposition of a penalty. While there is a self-incrimination privilege everywhere in the United States, we must look to the law of the various states to determine whether the related privileges have been preserved. The privilege against being required to take an oath in court and being required to expose oneself to a penalty has been preserved in Michigan by MCL 600.2154.

Only responses (or accusations) subjecting the individual to criminal penalties (that is, self-incriminatory statements) made it into the Fifth Amendment. However, each of these types of responses was recognized as privileged at common law. See 98 *C.J.S. Witnesses*, 540, p. 513 (West Publishing Co., Minneapolis, 2002) and John H. Wigmore, *A Treatise on the Anglo American System of Evidence in Trials at Common Law*, Vol. III Sec. (Boston, 1940, 3rd ed. 10 vols.) sec.987, pp.572-617.

The self-infamation privilege came to an end in Michigan with *Jennings v. Prentice*, 39 Mich. 421 (1887). The case went to the Supreme Court on the claim that the question that the trial court refused to make the plaintiff answer was not merely an impeachment question but went directly to one of the key issues in the case, whether the plaintiff had sufficient character and responsibility to be fit to be selected as an assignee for the benefit of creditors. The trial judge did not require the defendant to testify about a matter that discredited him when the trial judge indicated, "I did not think this was an age of inquisition." 39 Mich. at 422, 423. The Supreme Court (Cooley, J.) refused to allow the question to a party witness about his dishonesty or fraud in another matter to be used as a justification for not answering the question put to him in this case. It is not clear

from the report that the trial judge's action was firmly grounded in the common law if the question was presented merely to impeach the witness. *Brown v Walker*, 161 U.S. 591 (1896). The trial judge in *Jennings* expressed a reasonable and learned opposition to inquisitorial questions that did not refer to criminal behavior. The Supreme Court of Michigan concluded that the question went to the opposing party's major proofs and not merely impeachment. In addition, the Supreme Court made the following ruling concerning questions of the witness himself, ". . . when they are relevant, it is no excuse for his refusal to testify concerning them that they may exhibit him in a light that is not creditable. His dishonesty or fraud, when not criminal, may as properly be proved by him as by any other person." 39 Mich. at 423. In other words, it does not matter if the question is asked about a witness himself or someone else.

Jennings v. Prentice, supra., was cited in the 1984 case of *People v. Ferency*, 133 Mich. App. 526, 351 NW2d 225 (1984), even though the defendant in that case did not invoke the same alleged self-infamation privilege as brought up 100 years earlier. In 1984, the Defendant in *Ferency* invoked only the privilege against self-incrimination under the federal constitution. Zoltan Ferency chose not to invoke the similar Michigan constitutional privilege against self-incrimination nor the statutory privilege in MCL 600.2154 against exposing himself to any penalty. This statutory privilege is therefore completely unaffected by the *Ferency* case.

Obviously, the decision in *People v. Ferency*, supra, can not be used to discredit a statute which was specifically never part of the defendant's trial defense or appeal in that case. The *Ferency* decision does not purport to strike down or alter MCL 600.2154.(The statute is quoted, but no reason is given for the quotation). Any such argument would be the weakest possible dictum.

The statutory privilege against involuntary exposure to penalties goes back to the earliest days of this state. The people may abolish the privilege whenever they want. Until then, the privilege must be recognized and given effect by the courts of the state.

New Office Supply Partner

The State Bar of Michigan is pleased to announce that Staples Business Advantage has been selected as a new member benefit for State Bar of Michigan members.

Staples Business Advantage offers readily available office supplies, friendly customer support, lower product costs, and increased program flexibility. With the Staples program, SBM members will receive special contract pricing established for the State Bar of Michigan, up to 60% off list prices on thousands of items found in Staples "The Catalog."

With Staples web-based ordering system, StaplesLink.com®, your business will have instant access to real-time data and unprecedented control over every aspect of the ordering process. Imagine how convenient it will be to place orders, track orders, get a spending analysis, and much more. If ordering online is not for you, you may still receive the same discounts when ordering by phone, fax, or in-store via Convenience Card (card application available after you have signed up for the program).

To sign-up for the program and begin placing orders, simply:

- Complete the registration form online (*https://linkregistration.stapleslink.com/webapp/wcs/stores/servlet/emailreg/emlcustomerreg?RegFormId=295115&storeId=10101&langId=-1*), or
- If you would prefer, download the registration form (*http://www.michbar.org/programs/pdfs/StaplesRegForm.pdf*) and fax it to Staples

Your Company ID and User ID will be e-mailed or mailed to you, as well as helpful information about the program. This will allow you to begin placing orders on StaplesLink.com! Your password will default to "Staples"; please be sure change this once you log in.

To see how partnering with Staples can make a real difference, please contact the State Bar of Michigan account manager, Julie Copits, at SBM@Staples.com. We're excited about this new member benefit, and we hope you are, too!

Upcoming Events

March 31, 2006 - April 2, 2006
ABA/Section of State & Local Government Law, Midyear Meeting, San Diego, CA. *www.abanet.org/statelocal/*

April 23 to 25, 2006
IMLA 2006 Mid-Year Seminar, Omni-Shoreham Hotel Washington, D.C. Program includes: "Bringing a Sports Facility to Your Community," "Personnel Law for Public Attorneys," "Land Use Law," "Telecommunication Update," "Ethics and Public Law Practice," "Federal Update," "Disaster Preparedness," "Disaster Response," a Washington Nationals/Atlanta Braves baseball game and more. *www.imla.org*

June 22, 2006
Pre 2006 MAMA/PCLS Summer Education Conference, Little Traverse Bay (Harbor Springs). Cruise, reception and dinner. Reception and cruise sponsored by Plunkett & Cooney. Dinner, "Dutch-treat" at the Pier Restaurant (dockside). Lodging at the Colonial Inn. RSVP Peter Letzmann at *letzmann@voyager.net* or (616) 949-8232.

June 23 & 24, 2006
2006 MAMA/PCLS Summer Education Conference, Mackinac Island, Grand Hotel. Educational program includes, "Update on Telecommunications and Franchising Law," "Bankruptcy in the Public Sector," "Section 1983 Panel Discussion Based on Sexual Harassment Fact Patten, Focusing on Employment, FOIA and OMA Issues," "Legislative Attack on Home Rule in Michigan," "What has the US Supreme Court Done this Term," "Preparing for Catastrophic Health and Other Emergencies," "Election Management and Legal Rights at the Polls," a presentation by Michigan Supreme Court Justice Stephen J. Markman and more.

August 3 - 8, 2006
ABA Annual Meeting, Hawaii

September 17 - 20, 2006
IMLA 71st Annual Conference
Portland, Oregon. *www.imla.org*

September 28 & 29, 2006
2006 MAMA/MML Annual Meeting Marquette, Norther Michigan University Conference Center.

Debate: "Whether the Proposed Constitutional Amendment Banning Affirmative Action Should Be Approved;" Programing Includes, "Ethics, the Big Three: Conflict of Interest, Gifts and Gratuities, Improper Disclosure of Confidential Information, and Other Ethical Considerations," "Protecting the Public Funds - the Laws of Local Government's Management of Money and Other Assets," and "When the Eeoc (Equal Employment Opportunity Commission) Comes Knocking at Your Door."

October 24, 2006
The ABCs for New Municipal Attorneys (A MAMA program) Frankenmuth, Bavarian Inn Lodge. The Program Includes: "Who Is the Client / Who Is the Attorney?" "Writing Opinions, Ordinances and Other Documents," "Dealing with the Media," "Herding Cats or Keeping the Council in Check," and " Resources Available and Where to Go for Help." Time of questions and answers has been allotted.

October 25 & 26, 2006
A two-day MAMA Workshop - "Local Government Law and Practice." Frankenmuth, Bavarian Inn Lodge. Most of the 19 authors of the chapters written for "The Book," will make presentations. Several updated, revised and new chapters will be presented.

Events for 2007

February 7 - 13, 2007
ABA Section of State & Local Government Law Midyear Meeting, Miami, FL

March 20, 2007
MAMA 21st Annual Advanced Institute, Lansing

Spring, 2007
IMLA 2007 Mid-Year Seminar
Washington, D.C.

June 23 & 24, 2007
2007 MAMA/PCLS Summer Education Conference, Friday & Saturday, Mackinac Island, Grand Hotel

August 9 - 14, 2007
ABA/Section of State & Local Government Law Annual Meeting, San Francisco, CA

Fall 2007
MML Annual Meeting / MAMA Legal Track, Grand Traverse Resort, Acme

October 28-31, 2007
72nd Annual Conference,
Nashville, Tennessee, *www.imla.org*

Events for 2008

February 6 - 12, 2008
ABA/Section of State & Local Government Law Midyear Meeting, Los Angeles, CA

August 7 - 12, 2008
ABA/Section of State & Local Government Law Annual Meeting
New York, NY

Fall 2008
MML Convention
Grand Hotel, Mackinac Island

Nominations Open for Major State Bar Awards

The State Bar of Michigan is seeking a few outstanding lawyers and judges to be the recipients of major awards to be presented during the September 2006 Annual Meeting in Ypsilanti. Nominations are now open and any member of the State Bar can propose a candidate for the following awards:

The Roberts P. Hudson Award goes to a person whose career has exemplified the highest ideals of the profession. This award is presented periodically to commend one or more lawyers for their unselfish rendering of outstanding and unique service to and on behalf of the State Bar given generously, ungrudgingly, and in a spirit of self-sacrifice. It is awarded to a member of the State Bar of Michigan who best exemplifies that which brings honor, esteem, and respect to the legal profession. The Hudson Award is considered the highest award conferred by the Bar.

The Champion of Justice Award is given for extraordinary individual accomplishments or for devotion to a cause. Not more than five awards are given each year to practicing lawyers and judges who have made a significant contribution to their community, state, and/or the nation.

The Frank J. Kelley Distinguished Public Servant Award recognizes extraordinary governmental service by a Michigan attorney holding elected or appointive office. Created by the Board of Commissioners in 1998, it was first awarded to Frank J. Kelley for his record-setting tenure as Michigan's chief lawyer.

The John W. Cummiskey Pro Bono Award, named after a Grand Rapids attorney, recognizes a member of the State Bar who excels in commitment to pro bono issues. This award carries with it a cash stipend to be donated to the charity of the recipient's choice.

The Liberty Bell Award recipient is selected from nominations made by local and special-purpose bar associations. The award is presented to a non-lawyer who has made a significant contribution to the justice system.

The deadline for Liberty Bell Award nominations is **Tuesday, May 2, 2006**. All other award nominations are due on **Wednesday, April 5 at 5:00 p.m**.

An Awards Committee, co-chaired by State Bar President-elect Kimberly Cahill and attorney Francine Cullari, reviews nominations for the Roberts P. Hudson, Champion of Justice, Frank J. Kelley Distinguished Public Servant, and Liberty Bell awards. A committee of the Bar's Pro Bono Initiative reviews nominations for the Cummiskey award. The committees' recommendations are then voted on by the full Board of Commissioners at its June meeting.

Nominations must be submitted on SBM forms and should include sufficient details about the nominee's accomplishments to allow the committees to make a judgment. Application forms may be downloaded from *www.michbar.org*. Click on Media Resources, then Events and Awards.

Nominations can be submitted by web, e-mail, facsimile, or mail to Ms. Naseem A. Stecker, State Bar of Michigan, 306 Townsend St., Lansing, MI 48933 or nstecker@mail.michbar.org. For more information, call (517) 367-6428 or (800) 968-1442, facsimile (517) 482-6248. Submit Cummiskey Award nominations to Ms. Tomika Horne at thorne@mail.michbar.org or call (517) 346-6396.

Nominations Open for Representative Assembly Awards

Nominations are now open for two State Bar of Michigan Representative Assembly awards. **The Michael Franck Award** is given annually to an attorney who has made an outstanding contribution to the improvement of the legal profession. **The Unsung Hero Award** will be presented to a lawyer who has exhibited the highest standards of practice and commitment for the benefit of others.

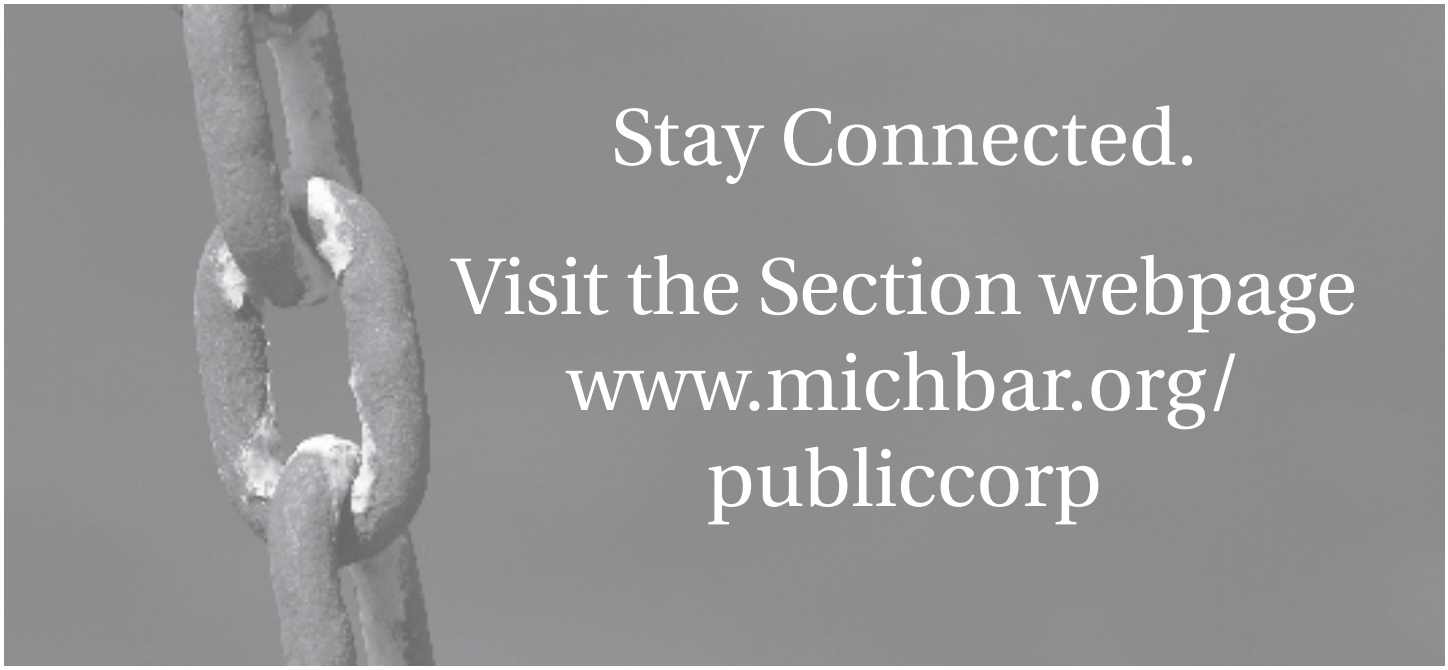
Recipients of both awards must be members in good standing with the State Bar of Michigan. The recipient's contribution may have been made during the past year or by virtue of cumulative effort or service.

The Representative Assembly, chaired by Lori Buiteweg, is the final policy-making body of the State Bar. The Assembly's Nominating and Awards Committee chaired by Carl Chioini, will make the final selection. Nominations should include sufficient details about the nominee's accomplishments.

The deadline for all nominations is Wednesday, April 5, 2006. For more information, visit www.michbar.org. Click on Media Resources, then Events and Awards. Send nominations to:

Ms. Anne M. Smith
Representative Assembly Awards
State Bar of Michigan
306 Townsend Street
Lansing MI 48933-2083

For more information, call (517) 346-6374 or (800) 968-1442 ext. 6374.



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