STATE BAR OF MICHIGAN

Public Corporation Law Quarterly

Cable Developments Update

By John W. Pestle

The following is a brief update on major developments in cable law affecting Michigan.

Summer 2006, No. 2

c o n t e n t s

Cable Class Actions

The Michigan Supreme Court on May 4 denied leave to appeal in the proposed class actions that had gotten a lot of publicity and which challenged cable franchise fees as an illegal tax. The rulings let stand last summer's Michigan Court of Appeals decisions, which tossed out the cases and thus ends this litigation.

Specifically, from a legal standpoint, the ruling lets stand two "for publication" opinions in which the Michigan Court of Appeals affirmed circuit court rulings dismissing the cases on both substantive and statue of limitations grounds and did not find it necessary to reach some of the other major defenses raised by the municipalities being sued. *Kowalski v City of Livonia*, 2005 WL 1753628, ___ Mich App ___, ___ N.W. 2d, ___ (Mich Ct App, July 26, 2005); *Morgan v. City of Grand Rapids*, 2005 WL 1753311, ___ Mich App ___, ___ N.W. 2d, ___ (Mich Ct App, July 26, 2005).

The Michigan Supreme Court's rejection of the petitions for leave bring to an end several years of litigation by plaintiff's class action attorneys. They preserve what is currently approximately $70 million per year paid to Michigan cities, villages, and townships by cable companies as rent for use of the public rights of way.

Legally, the Court of Appeals cases held that cable franchise fees, and more generally the contract price for a governmentally owned commodity (such as space in the rights of way or utility charges), are not a tax under Michigan law and could not be a tax. A key statement in this regard upheld municipalities' argument that there were other, permissible categories of municipal revenues than just fees and taxes. But even under a fee/tax analysis, the Court of Appeals held that on the facts of one of the cases, cable franchise fees were voluntary, proportionate to the cost of service, served a

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Public Corporation Law Quarterly

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Correspondence and submissions should be directed to Daniel P. Dalton, Tomkiw Dalton plc, Royal Oak, Michigan 48067, phone (248) 591-7000, or 5256 Pte. Tremble Road, Clay Township, MI 48001, phone (810) 794-0355. Articles must be in Word or WordPerfect format, double-spaced, on a 3.5 computer disk, or e-mail to *ddalton@tomkiwdalton.com.*

Chairperson's Corner

By Kester K. So, Dickinson Wright PLLC

Since this will be my final Chairperson's Corner before the fiscal year ends, I would like to take this opportunity to thank the members of the section and the council members for your support this past year. I have always been impressed with the section and its members. The section members have been extremely active in a variety of ways, by using the listserv to address issues common to the municipal practitioner, attending, and in some cases serving as speakers or panelists at the section's seminars—and by simply serving the public good, as many of you do, day in and day out. I can also say your Council members are a hard working bunch and serve the section well. I would like to thank them for their effort and their commitment to the section. They give freely of their time (including time for weekend meetings) and put in a great deal of effort in organizing seminars, tracking legislation and addressing issues (as party litigants or as amicus) in various cases at the state, as well as the federal level.

We accomplished a lot this past year. The section co-sponsored two seminars with ICLE, one on land use last fall and one this spring, where we learned about the establishment clause, religious free speech, employment issues, FOIA and Open Meetings Act issues, qualified immunity defense, and eminent domain. And of course, our summer seminar will once again be co-sponsored with MAMAs at the Grand Hotel. Under the guidance of Clyde Robinson and Don Schmidt, the Council did an online survey of our members seeking their input on topics for and the preferred location of the Summer Seminar. The members' views were interesting and your feedback will be used in planning and programming future summer seminars.

We also implemented an announcement listserv, which is intended to complement the group listserv that is used on a voluntary basis to discuss relevant and timely topics of interest. As we become a little more techno-savvy, we will be using it more and more to better and more efficiently communicate with members about topics and opportunities of interest.

And finally, we continued to publish the *Public Corporation Law Quarterly*, which is edited by Dan Dalton. The *Quarterly* generally includes a feature article and updates on recent cases, attorney general opinions and legislation of interest to the public sector lawyer. Thanks goes to those who contribute to the *Quarterly on* an ongoing basis. Under Dan's tutelage, it continues to be a great resource for the section's members.

The section is in very good hands, and I look forward to an even better year for the section next year!

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Cable . . .

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regulatory purpose, and thus were a fee, not a tax. Finally, the Court of Appeals cases held that if the person challenging a claimed "tax" is not the person paying the "tax," then a one-year statute of limitations applies, which starts to run when the claimed tax is first approved by the unit of government in question, and thus the cases were not timely filed.

State Franchise Legislation

Senate Bill 1157 and the identical House Bill 5895 have been introduced in the Michigan Legislature. They are part of a three-part attack (state legislation, federal legislation, FCC rulemaking) on cable franchising by the phone companies. As with the other two parts of the attack, the bills would take cable franchising away from cities, townships, and villages and give it to the state. Franchises would be issued essentially automatically by the Secretary of State (interestingly, not by the Public Service Commission). So called "buildout" requirements, i.e., provisions currently in cable franchises requiring the cable company to serve everyone in a municipality or everyone where there is sufficient population density (e.g., 20 homes per mile), would be prohibited.

Existing cable companies could convert to a state franchise when their existing franchise expires.

Municipal groups are strongly opposed to the bills, because among other things, they will hurt Michigan's economic development (broadband is essential for economic development, and it is the requirement in cable franchises to serve everywhere there is an adequate population density that has made cable modem service available to around 90% of Michigan) and without an obligation to serve, some portions of communities may end up with no cable service at all.

Among many other problems with the bills, there is no requirement on a cable company to obtain and carry channels for local government, schools, and the public, and the funding to support such channels in many instances is reduced below that which communities are currently receiving; there are no provisions for free service to municipal or school buildings such as those in franchises currently; right of way and other powers of municipalities over cable companies are minimized; and franchise fees are significantly reduced (by reducing the revenue base on which franchise fees are currently paid and providing an offset for Metro Act fees paid to communities).

As of early June, two hearings have been held in the House.

Federal Cable Legislation

As of early June, the U.S. House was poised to act on H.R. 5252, which would nationalize cable franchising by shifting it to the FCC, again with no "buildout" requirements, a minimal role for municipalities and right of way disputes with cable companies going to the FCC. Existing cable companies would be allowed under the bill to abandon their current franchise and go to a federal franchise when a phone company or other entities obtain a national franchise for their service area.

The Senate Commerce Committee is holding hearings on S. 2626, which also effectively nationalizes cable franchising by requiring communities within 30 days to adopt a standard national form of franchise promulgated by the FCC. In addition, the FCC would become the national right of way management agency with local right of way management provisions having to pass six legal tests (including not delaying the construction of a cable system) to be valid. Senate leaders have promised to rewrite the bill somewhat in response to municipal criticisms on these and other points.

Under both bills, phone companies could argue that their Metro Act payments are reduced. There are other cable bills in Congress, but these two are currently the main ones.

FCC Rulemaking

Finally, the FCC last fall started a rulemaking (MB Docket 05-311) on making it easier for phone companies to get cable franchises. Among many suggestions were short time periods (e.g., 30 days) for municipalities to issue a cable franchise to a phone company, eliminating the buildout requirements that phone companies object to, and many other points.

Comments and reply comments were filed in the proceeding in the late winter, and a ruling from the FCC is likely this summer.

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*.

Counties

Concealed Weapon Licensing Board

The Concealed Pistol Licensing Act, MCL 28.421 *et seq,* does not confer on a county concealed weapon licensing board the power to make its own medical diagnosis of mental illness in the course of determining an applicant's eligibility for licensure under that act. However, a county concealed weapon licensing board has the authority to review records and other evidence in the course of fulfilling its responsibility to determine whether an applicant for a concealed pistol license has been diagnosed with a mental illness at the time the application is made.

Opinion No. 7189
March 15, 2006

Highways and Roads

Determining life-cycle costs of pavement used in highway projects

Under MCL 247.651h(1), the Michigan Department of Transportation is required to design and award certain paving projects "utilizing material having the lowest life-cycle cost." A municipality may not alter the selection of the material to be used on a state highway project by paying the difference between the cost of the material having the lowest life-cycle cost and the more expensive material desired by the municipality.

Opinion No. 7194
May 16, 2006

Schools

Revised School Code

The school board of the Detroit Public Schools must next elect its president and vice president in January 2007.

Opinion No. 7192
March 29, 2006

Taxation:

Application of millage reduction fraction to renewed multi-year, voter-approved millages

In the case of municipalities seeking authorization to levy "renewed" millages, the millage reduction fraction specified in section 34d of the General Property Tax Act, MCL 211.34d, is calculated on an uninterrupted basis for each succeeding year as if the voter-approved millage it replaces had never expired. Under MCL 211.34d(11), the calculation of the millage reduction fraction does not commence at 1.0 for the first year of the "renewed" millage but with the fraction utilized for the millage levied in the last year of the millage it replaces.

Opinion No. 7193
March 30, 2006

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

"You say tomato. I say toh-mah-to."

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 it is a misdemeanor in Michigan to sell tomatoes that aren't vine ripened unless the tomatoes are labeled properly. Specifically, section 1 of Act 113 of the Public Acts of 1939 113 [MCL 752.751] provides that *"it shall be unlawful to sell, or offer to sell, any domestic or foreign grown tomatoes which are not vine ripened, unless the wrappings and containers shall be labeled 'not vine ripened' or 'artificially ripened by ethylene,' or any other process."*

MCL 752.752 provides that anyone selling or offering to sell non-vine ripened tomatoes *"shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished as provided by the laws of this state."*

I didn't realize that non-vine ripened tomatoes were such a problem, but I have been enlightened. I have learned that in the U.S., more than half of all tomatoes are harvested and shipped green and then artificially ripened upon arrival at their final destination. *University of Minnesota Extension, College of Agricultural, Food, and Environmental Sciences, Volume 10, Issue 12, December 2002.*[1]

Upon learning this, I couldn't recall having seen the kinds of labels referred to in the statute in the produce departments of my favorite stores – so I went back to check. After all, if one-half of the tomatoes have been artificially ripened, I should find some of those required labels around. So I went back to the stores.

An unannounced inspection of the produce aisle at Deering's Market in beautiful downtown Empire (pop. 378) revealed four kinds of tomatoes on display. One kind was specifically labeled "vine ripened" while another was labeled "hydroponic." The other two had no labels whatsoever. Knowing my good friend Phil Deering would never break any laws, I decided that the two kinds that were unlabeled must have been vine ripened and didn't require a label. This, of course, runs afoul of the University of Minnesota's "more than half" proposition.

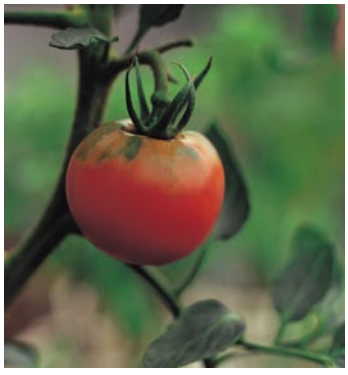
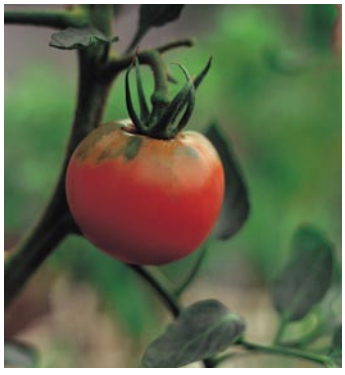
A similar undercover inspection of the produce department at the Meijer's store in Traverse City found nine different kinds of tomatoes offered for sale. One brand said they were hydroponic and two said they were vine ripened (and even had the vines still attached). The other six had no labels whatsoever, presumably meaning they were all vine ripened – but how do we know? Is the University of Minnesota extension way off base? Is Meijer's skirting around the law?

How is such a law enforced? How do we tell whether an unlabeled tomato was vine ripened or aged with ethylene? Do we need to hire tomato inspectors to make sure this law is not blatantly ignored? It doesn't seem to me that will work. All we'll do is nab the sellers, while the big guys – the kingpins and the ethylene cartels – will get off scot-free.

But then, living an a small town in northern Michigan, I probably don't see all the tomato busts going on in the larger cities down state. You guys down there probably even have special crackdowns periodically – like whenever the tomato gangs have turf wars and cover the streets with blood – or is that tomato juice?

Endnote

1 See: *http://www.extension.umn.edu/newsletters/sustainableagriculture/FD1993.html*


Federal Public Law Decisions of Interest

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

Supreme Court Holds that County is Not Entitled to Sovereign Immunity

Northern Insurance Co of New York v Chatham Co, Georgia, 126 S Ct 1689
(decided April 25, 2006)
(unanimous decision)

In *Northern Insurance Co of New York v Chatham Co, Georgia*, petitioner Northern Insurance Company of New York ("hereinafter "Northern") sued respondent Chatham County, Georgia (hereinafter "Chatham County") in federal district court, seeking damages arising from the allegedly negligent behavior of Chatham County's employees in operating a drawbridge. Northern's insured, James Ludwig, owned a boat that was damaged after a drawbridge over the Wilmington River malfunctioned. Northern paid out in excess of $130,000 in damages as a result. After Northern filed suit in admiralty in federal district court, Chatham County moved for summary judgment, arguing that Northern's claims were barred by sovereign immunity. The federal district court granted Northern's motion, holding that sovereign immunity will extend to counties and municipalities that "exercise[ ] power delegated from the State." The Eleventh Circuit affirmed, and the case proceeded to the United States Supreme Court.

Justice Thomas, writing for a unanimous Court, acknowledged that Supreme Court jurisprudence has recognized that the States' immunity from lawsuit "is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution . . ." (citations omitted). Justice Thomas went on to observe that, as a result of the Court's recognition of States' pre-ratification sovereign immunity, States, and only arms of the State, enjoy sovereign immunity from lawsuits under federal law. Chatham County argued that United States Supreme Court jurisprudence allowed a "residual immunity" that facilitates a broader test than that applied in the Eleventh Amendment context, to allow the determination of whether a municipality is acting as an arm of the State in order to enjoy immunity. However, the Court rejected this argument, limiting its use of the term "residual" and holding that it referred only to the "States' residuary and inviolable sovereignty that survived the Constitution." (Citations omitted).

Rather, the Court held that Chatham County was not entitled to immunity on the basis of its status as a county, or under a broad "arm-of-the-State" test, but would have to establish that it was acting as an arm of the State when operating the drawbridge to enjoy immunity. Because the Court determined that the County had conceded it was not acting as an arm of the State when operating the drawbridge, the United States Supreme Court reversed the judgment of the Eleventh Circuit Court of Appeals, holding that Chatham County was not entitled to immunity from Northern's suit.

In Tax Foreclosure Case, Supreme Court Holds Additional Steps Must be Taken by State to Satisfy Due Process

Jones v Flowers et al, 126 S Ct 1708
(decided April 26, 2006)
5-3 decision
(Alito, J., did not participate).
Thomas, Scalia and Kennedy, JJ., dissenting.

In *Jones v Flowers*, the United States Supreme Court granted leave to consider whether due process requires that the government take additional reasonable steps to provide notice when notice of a tax sale is mailed to the owner of real property and returned undelivered. The petitioner, Gary Kent Jones (hereinafter "Jones") resided in the subject property from 1967 until 1993 when he and his wife separated. Petitioner's wife continued to reside in the subject property. After his mortgage was paid off, the real property taxes, which had previously been paid by the mortgage company, became delinquent.

Respondent Mark Wilcox, the Arkansas Commissioner of State Lands (hereinafter "Commissioner") sent certified notice to petitioner at the subject

property, which was returned to the Commissioner marked "unclaimed." The Commissioner also published notice of the impending tax sale of the subject property in a newspaper. Because the property was not redeemed, the Commissioner negotiated a private sale to respondent Linda Flowers (hereinafter "Flowers") and sent an additional notice of the impending sale by certified mail to the subject property. After that notice was returned as unclaimed, the property was sold to Flowers, and petitioner became aware of the sale after an unlawful detainer was delivered to the property and served on petitioner's daughter.

After petitioner filed a lawsuit against the Commissioner and Flowers in Arkansas state court asserting that his property was taken without due process, the trial court rejected this argument, granting summary judgment in favor of respondents. After petitioner appealed to the Arkansas Supreme Court, it affirmed the trial court's judgment. The United States Supreme Court granted certiorari to resolve the question "whether the Due Process Clause requires the government to take additional reasonable steps to notify a property owner when notice of a tax sale is returned undelivered."

Recognizing United States Supreme Court precedent establishing that due process does not require that a property owner receive actual notice, the Court reiterated that due process only requires the government to provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (Citations omitted). However, the Court recognized that the instant case presented a "new wrinkle" in that it was required to consider whether due process imposes an additional obligation on the government when the government becomes aware before the taking of the subject property that its efforts at notice have been unsuccessful.

The Court found that one desirous of informing a real property owner of an impending tax sale would not sit idly by when it is clear that a certified letter sent to the owner of the real property is returned unclaimed. In other words, the Court held, in line with prior U.S. Supreme Court precedent, that "the government's knowledge that notice pursuant to the normal procedure was ineffective triggered an obligation on the government's part to take additional steps to effect notice." These "additional, reasonable steps," the Court observed were to resend the notice by regular mail, to post notice on the front door of the real property itself, or to address the otherwise undeliverable mail to "occupant." However, the Court rejected the petitioner's argument that the government should have searched the Little Rock, Arkansas phonebook and other government records as "an open-ended search for a new address," especially where Arkansas state law required the petitioner to keep his address updated, because it would "impose[] [a] burden on the State significantly greater" than the other "reasonable" options the Court already enumerated. Accordingly, holding that the notice that the respondent Commissioner provided to petitioner was insufficient to satisfy due process under the particular facts of the instant case, the United States Supreme Court reversed the judgment of the Arkansas Supreme Court.

Supreme Court Holds That Where Public Employees Make Statements In the Course of Their Official Duties, the First Amendment Will Not Protect Their Communications from Employer Discipline

Garcetti et al v Ceballos, ___ S Ct ___
(2006 WL 1458026,
decided May 30, 2006).
(5-4 decision)
Souter, Stevens, Ginsburg, Breyer, JJ.,
dissenting

In *Garcetti et al v Ceballos*, the United States Supreme Court granted leave to consider whether the First Amendment insulates a government employee from discipline on the basis of speech that the employee makes in the course of performing his official duties. Respondent Richard Ceballos (hereinafter "Ceballos") filed suit against petitioners pursuant to 42 USC 1983, alleging that petitioners violated the First and Fourteenth Amendments by retaliating against him on the basis of a memo he had drafted.

A deputy district attorney, Ceballos had been employed by the Los Angeles District Attorney's office since 1989. As a calendar attorney in the office's Pomona branch, part of Ceballos' duties were to oversee and supervise other lawyers in the office. After initially being contacted by a defense attorney who complained of inaccuracies in an affidavit supporting a search warrant, Ceballos visited the subject property and examined the affidavit. Ceballos determined that the warrant contained serious misrepresentations and contacted the affiant, a deputy sheriff with the Los Angeles County Sheriff's Department (hereinafter "Sheriff's Department"), from whom he did not receive a satisfactory explanation. Ceballos then relayed his findings and concerns to his supervisors and followed up with a disposition memorandum explaining his concerns, and recommending dismissal of the case.

A meeting was held between Ceballos and his supervisors, which also included staff from the Sheriff's Department, one of whom criticized Ceballos for his handling of the case. In spite of Ceballos' concerns, his supervisors decided to proceed with the case, and at the hearing on the defense's motion to challenge the warrant, Ceballos was called to testify about his findings concerning the warrant. The trial court ultimately upheld the warrant.

Ceballos claimed that he experienced a series of retaliatory events following the drafting of the disposition memo, including reassignment from

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his calendar deputy position to a trial deputy position, transfer to another courthouse, and the denial of a promotion. When Ceballos filed a lawsuit in the United States District Court for the Central District of California, petitioners moved for summary judgment, arguing that, among other things, Ceballos' memorandum was not protected speech under the First Amendment. The district court granted the motion. The Ninth Circuit Court of Appeals reversed, concluding that "Ceballos's allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment."

The United States Supreme Court initially recognized that public employees do not give up their First Amendment rights by virtue of becoming public employees, and that the First Amendment will protect, in certain circumstances, a public employee's right to comment on matters of public concern. The Court also held that, on the basis of existing precedent, there are two inquiries to be made to determine the constitutional protections in the context of public employee speech. Initially, it must be decided whether the employee spoke as a citizen on a matter of public concern. If the answer is in the negative, then an employee will not have a First Amendment cause of action. If the answer is in the affirmative, then a First Amendment cause of action is possible, and the question is whether the governmental entity had an "adequate justification for treating the employee differently from any other member of the general public." (Citations omitted).

With regard to Ceballos' case, the Court noted that the "controlling factor" was that his expressions were made as part of his employment duties as a calendar deputy. Specifically, the Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Such cases are to be distinguished from those where employees make public statements outside the course of performing their official tasks, where some possibility of First Amendment protection is retained "because that is the kind of activity engaged in by citizens who do not work for the government."

In summary, the Court concluded that proper application of United States Supreme Court precedent led to its holding that the First Amendment does not prohibit managerial discipline on the basis of an employee's expressions made pursuant to official responsibilities. Accordingly, because Ceballos' communications were made pursuant to his official responsibilities, the Court found that his allegations of constitutional retaliation could not succeed, and reversed the judgment of the Ninth Circuit Court of Appeals.

United States District Court Ultimately Concludes that Valid Content-Neutral Regulation Does Not Pass Constitutional Muster Because It is Overbroad

Jo-Bet, Inc d/b/a/ Henry the Eighth South v City of Southgate
415 F Supp 2d 725 (ED MI, 2006)

In *Jo-Bet Inc v City of Southgate*, plaintiff Jo-Bet Inc (hereinafter "plaintiff") initiated a lawsuit against the City of Southgate (hereinafter "defendant"), arguing that defendant's Ordinance 695, which banned all nudity and certain sexual conduct was unconstitutional. After discovery was completed, plaintiff and defendant filed cross-motions for summary judgment. The United States District Court for the Eastern District of Michigan granted summary judgment in favor of plaintiff and denied defendant's motion for summary judgment.

Initially, the Court recognized that the ordinance at issue was very similar to the ordinance at issue in the United States Supreme Court's decision in *Erie v Pap's AM*, 529 US 277 (2000), where the U.S. Supreme Court acknowledged that the First Amendment protects conduct such as exotic dancing. The Court further found that Ordinance 695 generally prohibited public nudity, and simply regulated conduct alone, not erotic messages containing nudity. Moreover, the Court determined that defendant had presented sufficient evidence demonstrating that it enacted Ordinance 695 to counteract the detrimental secondary effects intertwined with exotic dancing establishments. Accordingly, the Court recognized that under *Erie*, where a public nudity ordinance is content-neutral, it is subject to intermediate scrutiny under *United States v O'Brien*, 391 US 367 (1968).

After concluding that Ordinance 695 was a valid content-neutral regulation under *O'Brien*, the Court also observed that Ordinance 695 did not violate equal protection guarantees where plaintiff could not demonstrate that defendant treated other similarly-situated adult establishments in a different manner from plaintiff. Moreover, the Court found that defendant did present a rational basis for selective enforcement of Ordinance 695.

However, the Court ultimately concluded that Ordinance 695 did not pass constitutional muster on the basis that it was overbroad "because it chills possible future protected conduct (i.e., nudity in plays or other high culture entertainment)." Quoting Sixth Circuit precedent, the Court found that defen-

dant did not "present evidence linking expressive nudity in high-culture entertainment to harmful secondary effects" and also determined that Ordinance 695 did not contain a limiting provision that would exclude constitutionally protected activity from its prohibition.

United States District Court Concludes That Even if Title II of the ADA Were Held to Apply to Employment Claims Against Public Entities, These Claims are Subject to Title I's Requirements Pertaining to Exhaustion of Administrative Remedies

Dean v City of Bay City et al, 415 F Supp 2d 755 (ED MI, 2006)

In *Dean v City of Bay City*, plaintiffs Eric Carlyle Dean (hereinafter "Dean") and Elizabeth Dean (together referred to as "plaintiffs") filed suit against the City of Bay City (hereinafter "City"), asserting that the City improperly terminated Dean's employment as the director of the city's electric department. At one point during the underlying litigation, plaintiffs sought to amend the complaint to include a wrongful termination theory under Title II of the Americans with Disabilities Act ("ADA"). After the Court denied plaintiffs' motion to amend the complaint, granted in part the defendants' motions for summary judgment, dismissing plaintiffs' federal claims with prejudice and their state law claims without prejudice, plaintiffs filed a motion for reconsideration, asserting, among other things, that the Court improperly denied plaintiffs' motion to amend the complaint.

Plaintiffs did not contest the fact that Dean did not exhaust his administrative options before filing suit in the district court. Because Title I of the ADA requires an employee to exhaust his administrative remedies before bringing an action in court, plaintiffs sought to avoid the administrative exhaustion requirement of Title I by pursuing their action under Title II of the ADA. In resolving plaintiffs' claim, the district court acknowledged that the pivotal issue was whether Title II applies to employment cases.

Recognizing that the United States Supreme Court, the United States Court of Appeals for the Sixth Circuit, and the United States District Court for the Eastern District of Michigan have not decided this question, the Court found it noteworthy that the Sixth Circuit has rejected Title III of the ADA's application to employment cases. The Court also determined that other circuits were split on the issue of whether Title II is applicable in the employment context. Putting aside the question whether Title II of the ADA applies to employment actions, the Court then found it useful to review a pertinent administrative rule, Title 28, section 35.140 of the Code of Federal Regulations, in determining whether the administrative exhaustion requirements of Title I could be avoided. The Court found that the plain language of this rule mandated that employment claims against public entities brought pursuant to Title II be subject to Title I's requirements pertaining to exhaustion of administrative remedies.

The Court ultimately concluded "it is unlikely that the Sixth Circuit would hold that Title II of the ADA applies to employment cases, which are covered explicitly by Title I. Moreover, even if Title II applies to employment cases, the administrative rule requires a claimant to abide by the exhaustion requirements stated in Title I."

Accordingly, where Dean had failed to exhaust his administrative remedies, the Court concluded there was no basis to reconsider the order denying the motion to amend the complaint where a claim under Title II of the ADA would be "futile."

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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.

Village Does Not Need Prior Approval from "Downstream" County When Discharging Into Drain Located Solely Within the "Upstream" County

Jackson County Drain Comm'r v Village of Stockbridge, ___ Mich App ___;___ NW2d ___ (Docket No. 258008, Approved for Publication March 16, 2006)

When the Village of Stockbridge determined that its current method of wastewater discharge (spraying on crop fields) was insufficient to handle all of its excess, it adopted a proposal to discharge into the Jacobs Lake Drain during cold weather. Both the village and the drain are located in Ingham County. The village received a discharge permit from the DEQ and entered into an agreement with the Ingham County Drain Commissioner allowing the discharge. The village agreed to pay a one-time tie-in fee and annual maintenance fees to the drain.

Plaintiffs, consisting of the Jackson County Drain Commissioner, various townships, and individuals, brought an action seeking an injunction to prevent the discharge. Plaintiffs argued that the village needed to pay a fee and receive approval from the intercounty drainage board prior to the discharge, because under the drain code, the water was being discharged into an "intercounty" drain. They argued that because the Jacobs Lake Drain empties into subsequent "downstream" drains, which eventually flow into Jackson County and are classified as "intercounty" drains, the whole system constituted an intercounty drain. They argued that the added flow resulting from the discharge would increase flooding in areas of Jackson County.

The court first found that MCL 280.433, which relates to the expansion of drainage districts, was inapplicable, as it only concerns agreements with landowners, not municipalities. Instead, the court applied MCL 280.423, which requires payment and approval from the "appropriate commissioner or . . . drainage board" prior to connecting to a county or intercounty drain. One of the key issues, therefore, was whether the Jacobs Lake Drain qualified as an intercounty drain, which would require approval of the intercounty drainage board and not just the Ingham County Drain Commissioner. The Drain Code, MCL 280.511, defines an intercounty drain as one that carries "water or sewage originating in more than one county."

Applying these provisions of the drain code, the court found that the village only needed approval from the Ingham County Drain Commissioner (which it received) to discharge the wastewater. The Jacobs Lake Drain only carries water and sewage originating in Ingham County. It connects to the Wild River Drain in Ingham County, and this drain then extends into Jackson County. As such, the Jacobs Lake Drain is merely an intra-county drain, and no approval was needed from the intercounty drainage board.

The court also analyzed whether the village and the other defendants were entitled to governmental immunity on Plaintiffs' trespass-nuisance count. Plaintiffs argued that because they were seeking only equitable relief (abatement of the nuisance), the immunity statute did not apply. The court held that the "plain language of the statute" does not limit immunity to situations where the plaintiff is seeking damages; therefore, it applies to claims for equitable relief unless a statutory exception applies. One exception to immunity is where there is a backup of a sewage disposal system onto real property, and the defendant is an "appropriate governmental agency." The court found that none of the named defendants met the statutory definitions of appropriate agencies, and were therefore all immune from liability.

Sport Shooting Range Act Does Not Preempt Township Regulation of Ranges

Fraser Twp v Linwood-Bay Sportsmans Club, ___ Mich App ___; ___ NW2d ___ (Docket No. 258601, Issued March 16, 2006)

Plaintiff Fraser Township filed a suit seeking to enjoin the Defendant Club from operating an outdoor pistol or rifle range on its property, alleging that the Club had begun with plans to construct such a range. The Club argued that the Sport Shooting Range Act, MCL 691.1541 et seq, authorized its activities, despite contrary zoning regulations. The issue before the court was "whether the Act preempts all township regulation of sport shooting ranges" or whether it simply bars nuisance actions based on activities that they were engaged in when the Act was passed.

The court stated that under Michigan law, preemption may be established in the following ways: (1) where the state law is expressly preemptive; (2) by analysis of legislative history; (3) based on the pervasiveness of the state regulatory scheme; or (4) the nature of the subject matter regulated demands exclusive state regulation to achieve uniformity. After an analysis of these methods, the court found that the act is not preemptive.

The Act does not expressly preempt all local regulation, but instead expressly leaves such local regulation intact, except where it is limited by the Act itself. Therefore, the Act does not occupy the entire field of sport shooting regulation. Furthermore, the court stated that the legislative history was "neither authoritative nor convincing" that the legislature intended to occupy the field entirely. In addition, the court stated that the nature of shooting ranges does not require the state's exclusive control.

Consequently, the court held that the Act "does not free sport shooting range operators from local zoning controls regarding construction of new facilities." The Act instead merely provides that ranges are protected from nuisance actions and regulations related to noise, as well as subsequent changes to local regulations. In essence, the Act protects uses that were in compliance with local regulation at the time the range was formed. Because the outdoor range represented a new facility and not a modification of an existing one, it could not fall under the protection of the Act and was subject to enjoinment by the Township.

High-Ranking Public Officials Cannot be Compelled to Oral Deposition Without a Showing That it is Necessary to Prevent Prejudice or Injustice

Hamed v Wayne County, (Unpublished Opinion, 2006 Mich. App. LEXIS 1648)(Docket No. 256806, dec'd 05/16/06)

In *Hamed v Wayne County*, the Court of Appeals held that high-ranking public officials may not be compelled to oral deposition unless a showing is made that the deposition is necessary to obtain relevant information that cannot be obtained through other discovery sources.

The plaintiff alleged that a Wayne County sheriff deputy sexually assaulted her while she was incarcerated in the Wayne County Jail. As part of her claim, the plaintiff alleged that the Wayne County Sheriff's Department failed to implement proper policies to prevent sexual assaults against female inmates. Accordingly, plaintiff noticed discovery depositions of the current sheriff and his predecessor. Plaintiff argued that the predecessor's deposition was necessary because he was the sheriff when the accused was disciplined 14 previous times, and the current sheriff's deposition was necessary because he was aware of sexual improprieties that occurred subsequent to plaintiff's alleged assault. The defendants replied by arguing that such depositions would impose an undue burden on these high-ranking officials. The circuit court granted defendants' motion to quash and the plaintiff appealed. The Court of Appeals reversed the circuit court's finding that Wayne County's motion to quash, the depositions should be denied.

Following its holding in *Fitzpatrick v Secretary of State*, 176 Mich App 615; 440 NW2d 45 (1989), the court reaffirmed the requirement that plaintiffs must seek alternate discovery sources before subjecting high-ranking officials to oral depositions. The *Fitzpatrick* court found it necessary to limit the intrusions that would burden the public officials' efforts to advance effective and efficient operation of the public agency.

In the present case, the court rejected the plaintiff's claims that the current sheriff and his predecessor are the only persons with relevant information and that their depositions are necessary to prevent prejudice or injustice. The court held that the plaintiff failed to establish that the information sought cannot be obtained through other discovery sources or mechanisms. For example, the plaintiff failed to show that lower ranking officials, like the Wayne County Director of Jails, have been deposed. Accordingly, because the plaintiff failed to make a preliminary showing that the requested depositions are necessary to prevent prejudice or injustice, these officials may not be compelled to oral deposition.

Attorney Fees Will Not be Awarded for Excessive Charges under Section 10 of Michigan's FOIA

Detroit Free Press, Inc. v State, (Unpublished Opinion, 2006 Mich. App. LEXIS 1666) (Docket No. 256806, dec'd 05/16/06)

In *Detroit Free Press, Inc. v State of Michigan, Dept. of Attorney General*, the Court of Appeals held that attorney fees will not be awarded for challenges under Section 10, MCL 15.231 of Michigan's Freedom of Information Act ("FOIA").

The plaintiff requested documents from the defendant pertaining to wine shipments into Michigan. The defendant complied with this request, but required the plaintiff to pay for labor, copying, and mailing. Specifically, the attorney general's office stated it would charge $20 per hour for 3 hours of labor, in addition to 25 cents per page for copying costs. Plaintiff argued that the Attorney General's fees "constructively denied" its request for documents due to the "excessive" nature of the labor and copying charges. The circuit court granted summary disposition to the plaintiff for the labor charges, but denied the same motion for copying fees. Thereafter, the circuit court granted the plaintiff $15,989.75 in attorney fees. The Attorney General appealed, and the Court of Appeals reversed the circuit court's award for attorney fees.

Attorney fees are available under Section 10 of the FOIA if the public body denies an information request and a court orders production of the requested documents. Section 4 of the FOIA allows a public body to charge fees for public record searches but requires the public body to provide sufficient evidence to show fees are necessary to avoid an unreasonably high cost to the depart-

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ment. However, Section 4 contains no provision to award attorney fees.

The plaintiff attempted to persuade the court that the Attorney General's fees "constructively denied" its request for documents, thus entitling plaintiff to attorney fees under Section 10, MCL 15.240 of the FOIA. The court found that Section 10 applies to failures to deliver requested documents, whereas here, the plaintiff's challenge to copying and labor costs was more applicable to Section 4. The court held that plaintiff did not prevail under Section 10 because the Attorney General did not *deny* the plaintiff's request for information but rather, the plaintiff prevailed under Section 4 and therefore is not entitled to attorney fees.

Township May Not Authorize Seasonal Moorings and Boat Hoists at Road Ends Abutting Lake

Lyon Township v Higgins Lake Property Owners Ass'n, Mich Ct App Unpublished Decision (Docket No. 265152, Issued April 11, 2006)

The court of appeals has again ruled on the appropriate use of road ends terminating at the edge of navigable inland waters. Plaintiff Lyon Township enacted an ordinance attempting to regulate certain activities at road ends abutting Higgins Lake. The ordinance specifically permitted the use of seasonal (May 1 to September 30) watercraft mooring on boat hoists at the road ends. It also provided for certain other uses of the road ends, including a launch ramp; ingress and egress; a non-exclusive dock; swimming; fishing; and water access for the fire department. Lakefront property owners opposed the allowance of the moorings and hoists, and the Township filed a declaratory action seeking a determination as to the ordinance's validity. The trial court invalidated the entire ordinance.

The Township argued on appeal that as the owner of the road ends, the Michigan Constitution authorized the approval of moorings and hoists. Specifically, the Township relied on sections 29 and 34 of Article 7, which state that municipalities have the right of "reasonable control" of streets and public places, and that such right shall be liberally construed in the municipality's favor. The court noted, however, that the Township's interest in the road ends arose from the subdivision plats dedicating them to public use. Accordingly, the "use of the road ends is limited by the intended scope of the dedication." The general rule is that dedicated streets terminating at the edge of navigable waters are deemed to provide public access to water. The dedication at issue did not grant the Township absolute fee ownership, meaning that the Township's right of "reasonable control" only extended to "activities associated with public access." Because boat moorings and hoists are not associated with public access, the Court found that the Township had no authority to permit these uses at the road ends, since they were not within the scope of the plat's dedication.

The Court of Appeals consequently determined that only the provisions relating to the moorings and hoists were invalid, but that the rest of the ordinance, which did in fact relate to public access, was valid. The court ordered that the invalid sections be severed from the ordinance, leaving the remainder intact.

Landowners' Claims Against Township, Township Supervisor, and Road Commission Barred by Res Judicata or Governmental Immunity

Merry v Tyrone Township, Mich Ct App Unpublished Decision (Docket No. 265122, Issued April 11, 2006)

In this case, the landowner plaintiffs sought approval from Tyrone Township to split their 10-acre parcel of land into two parcels, with the intent to have a shared driveway. Pursuant to Township ordinance, approval was conditioned on plaintiffs' obtaining a shared driveway permit from the Livingston County Road Commission. The Commission denied the permit because the shared driveway would not conform to its sight-distance standards. Plaintiffs brought an action against the Commission appealing the denial and adding additional claims. The trial court in that action granted the Commission's motion for summary disposition and dismissed the claims.

Plaintiffs then brought the action at issue here against the Commission, the Township, and the Township Supervisor. Plaintiffs raised several specific claims: (1) the Township's land use ordinance violated the Land Division Act; (2) the Township violated their constitutional rights to due process and equal protection; (3) the Township and Supervisor were both negligent; and (4) the sight-distance regulations were invalid because they were arbitrary and unreasonable. The defendants argued that each claim was barred by either res judicata, collateral estoppel, or governmental immunity.

The court laid out the elements of res judicata, which bars a subsequent action when (1) the prior action was decided on the merits; (2) both actions involve the same parties or their privies; and (3) the matter in the second case was, or could have been, resolved by the first.

With respect to the claims against the Commission, the court found that they were all barred by res judicata because they "could or should have been raised in the prior action." The court also found that claims against the Township relating to the sight-distance regulations were barred by res judicata,

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because the Township was in privity with the Commission regarding these claims. The court noted that privity generally requires that the parties in the different actions be "substantially identical," and there must be "a substantial identity of interests and a relationship in which the interests of the nonparty were presented and protected by the litigant." The court held that the Township was only in privity with the Commission to the extent that plaintiffs' claims related to the sight-distance regulations. Therefore, the negligence claim against the Township and the equal protection claim were both barred by res judicata.

The court also held that the Supervisor was entitled to the governmental immunity afforded under MCL 691.1407(2), because his conduct (handling plaintiff's application) was within the scope of his authority, and plaintiffs did not plead facts amounting to gross negligence. Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Plaintiffs presented no more than a subjective belief that he was grossly negligent, which was insufficient.

With the majority of the claims disposed of by res judicata or governmental immunity, the only remaining claims were that the Township's land division ordinance was unconstitutional. The court found that this claim failed as a matter of law. The Act requires that the parcels resulting from a division be "accessible," meaning that a driveway "meets all applicable location standards of the . . . county road commission." The court held that the Township's ordinance, which requires a shared driveway permit from the Commission, did not conflict with the Act or impose excess requirements. As a result, all of plaintiffs' claims failed.

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

- Write-In Candidates. **SB 462**, **PA 87** Revises the filing deadline for write-in candidates to the Tuesday before the election. Amends section 737a of PA 116, 1954 (MCL 168.737a).
- Inmate Costs. **SB 208, PA 88** Provides for reimbursement to municipalities for costs of housing inmates.
- Judges. **SB 883**, **PA 99** Increases the number of judges for the 17th Circuit Court.
- Judges. **SB 907**, **PA 100** Revises the number of judges in various circuits and districts.
- 16th Circuit Court. **SB 925**, **PA 101** Provides for an additional judge for the 16th Circuit Court.
- 55th Circuit Court. **SB 955**, **PA 102** Provides for an additional judge for the 55th Circuit Court.
- Sixth Circuit Judges. **SB 946**, **PA 103** Provides for an additional judge for the 6th Circuit Court.
- Municipal Land Use. **HB 4398, PA 110** Codifies zoning and growth management by counties, townships, cities and villages.
- Property Tax. **SB 859, PA 114** Provides for a property tax exemption for the principal residence of certain individuals under revocable trusts. Amends section 7dd of PA 206, 1893 (MCL 211.7dd).
- Village Candidate Deadlines. **HB 5813, PA 122** Sets the twelfth Tuesday before the November general election as the deadline for candidates for village offices to file nominating petitions. Amends section 381, PA 116, 1954 (MCL 168.381) as amended by PA 71, 2005.
- Tax Appeals. **HB 5313, PA 143** Allows township boards to appoint alternate members to the property tax board of review. Amends section 28 of PA 206, 1893 (MCL 211.28).
- Local Budgets. **SB 872, PA 154** Revises the process for adoption of budgets by local governments. Amends section 3 of 1963 (2nd Ex Session) PA 43 (MCL 141.413).
- Notary. **SB 908, PA 155** Eliminates the requirement for a notary public to indicate county within which he or she is acting. Amends section 27 and 47 of PA 238, 2003 (MCL 55.287 and 55.307) and repeals section 29 of PA 238, 2003 (MCL 55.289).
- Tax Tribunal. **HB 5854, PA 174** Modifies the appeals process for tax tribunal decisions. Amends section 35 and 37 of PA 186, 1973 (MCL 205.735 and 205.737) and adds section 35a.

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Bills Passed in Senate and House of Representatives:

- Eminent Domain. **SB 693** Prohibits use of eminent domain to benefit private entities. Amends section 3 of PA 149, 1911 (MCL 213.23).
- Detroit Regional Water. **SB 372** Provides for the regionalization of the Detroit water and sewer system. This bill was vetoed by the Governor.
- Pooled Financing. **SB 875** Allows local government pooled financing investment programs. Amends section 1 of PA 20, 1943 (MCL 129.91).

Bills Passed by Senate:

- Donated Fire Equipment. **SB 689** Limits liability for fire departments donating equipment to other departments. Amends PA 170, 1964 (MCL 691.1401 - 691.1419) by adding section 7c.
- Road Fund Reporting. **SB 870** Modifies reporting requirements for cities regarding transportation funds. Amends sections 14 and 15 of PA 51, 1951 (MCL 247.664 and 247.665).
- Forest Development. **SB 912** Provides tax incentives for managing forestland through a development rights agreement. Amends section 53b of PA 206, 1893 (MCL 211.53b); adds section 7jj and repeals part 513 of PA 451, 1976 (MCL 324.51301 - 324.51312).
- 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. Amends section 1211 of PA 451, 1976 (MCL 380.1211).
- Forest Tax. **SB 917** Modifies taxation on commercial forests subject to conservation easements.
- Drain Commissioner. **SB 945** Allows a county to decide whether to elect or appoint its drain commissioner. Amends sections 200 and 209 of PA 116, 1954 (MCL 168.200 and 168.209).
- Land Plats. **SB 1107** Revises the method county commissioners use to approve land plats. Amends section 183 of PA 288, 1967 (MCL 560.183).
- Special Assessments. **SB 1120** Increases to 40 from 30 the number of installments of special assessments authorized by local governments. Amends sections 13 and 25 of PA 185, 1957 (MCL 123.743 and 123.755).
- 911 Service. **SB 1172** Extends sunset on 911 emergency service districts. Amends sections 201, 301, and 717 of PA 32, 1986 (MCL 484.1201, 484.1301 and 484.1717) as amended by PA 78, 1999, PA 29, 1994, and PA 70, 1999.
- Streets. **SB 1182** Increases local limitation on transfer of funds from major street system to local street system. Amends section 13 of PA 51, 1951 (MCL 247.663).
- Bicycles. **SB 1224** Clarifies the right of bicyclists to operate on public roads and sidewalks. Amends section 612 and 660 of PA 300, 1949 (MCL 257.612 and 257.660) as amended by PA 33, 1990 and PA 494, 2002 and added sections 660a, 660b, 660c and 660d.
- Bicycles. **SB 1225** Requires drivers training on safety of bicyclists. Amends section 11 of PA 369, 1974 (MCL 256.611) as added by PA 70, 2004.
- New Police Agencies. **SB 1233** Requires sheriff's approval of creation of law enforcement agencies by public bodies for any county in which the public body owns property. Amends section 4 of PA 378, 2004 (MCL 28.584).

Bills Passed by the House of Representatives:

- November School Board Elections. **HB 4755** Requires school board and village elections to be held in November. Amends sections 302 and 381 of PA 116, 1954 (MCL 168.302 and 168.381) and adds sections 642c & 642d.
- Traffic Laws on Private Roads. **HB 4807** Omits the need for owner consent and contract to confer for authority of local law enforcement to enforce traffic laws on certain private roads. Amends section 1 of PA 62, 1956(MCL 257.951).
- D.D.A. Board Members. **HB 5056** Allows officers, members, trustees, principals, or employees of a legal entity having interest in the downtown development district to be members of the board of downtown development authorities. Amends section 4 of PA 197, 1975 (MCL 125.1654).
- Eminent Domain. **HB 5060** Prohibits use of eminent domain by state or local government to take private property for the primary benefit of a private entity. Amends section 3 of PA 149, 1911.
- Dog License I.D. **HB 5278** Requires local governments when issuing a dog license to provide information to owners regarding microchip implantation and tattoo identification. Amends PA 339, 1919 (MCL 287.261 - 287.290) by adding section 14a.
- School Plans. **HB 5479** Allows for local input into school site plans.

Amends section 1263 of PA 451, 1976 (MCL 380.1263).

- Property Tax Alternative Dates. **HB 5538** Allows municipal boards to adopt a resolution or ordinance with alternative start dates for the collection of property taxes. Amends section 53b of PA 206, 1893 (MCL 211.53b).
- Township Fire Ordinance. **HB 5553** Empowers township fire authorities to pass ordinances. Amends title and sections 5 and 9 of PA 57, 1988 (MCL 124.605 and 124.609).
- Nominee Information. **HB 5580** Allows the county board of commissioners or the county clerk to request information from board of county canvasser nominees. Amends sections 24c and 24d of PA 116, 1954 (MCL 168.24c & 168.24d).
- Local Ballot Wording. **HB 5704** Amends time frame to certify ballot wording for local, school district, or county ballot question. Amends section 312 and 646a of PA 116, 1954 (MCL 168.312 and 168.646a).
- Forced Move Reimbursements. **HB 5817** Increases maximum reimbursements to residents who move due to condemnation of property. Amends section 2, PA 40, 1965 (MCL 213.352) as amended by PA 21, 1991.
- Condemnation Witness Fees. **HB 5818** Provides for reimbursement of witness fees in condemnation actions. Amends section 16, PA 87, 1980 (MCL 213.66) as amended by PA 474, 1996.
- Condemnation Payments. **HB 5819** Revises timing of compensation payments for condemnation actions. Amends section 9, PA 87, 1980 (MCL 213.59) as amended by PA 474, 1996.
- Condemnation Compensation. **HB 5820** Revises provisions regarding escrowed compensation dedicated to cost of environmental remediation. Amends section 8, PA 87, 1980 (MCL 213.58) as amended by PA 474, 1996.
- Condemnation Compensation. **HB 5821** Revises procedures regarding just compensation and notice to occupants of property in condemnation actions. Amends section 5, PA 87, 1980 (MCL 213.58) as amended by PA 474, 1996.
- Municipal Plans. **HB 5885** Shortens county review of municipal plans. Amends section. 7b, 8 and 8a, PA 285, 1931 (MCL 125.37b, 125.38 and 125.38a), as amended by PA 265, 2001.
- Township Plans. **HB 5886** Shortens county review of township plans. Amends sections 7b, 8 and 9, PA 168, 1959 (MCL 125.327b, 125.328, 125.329) as amended by PA 263, 2001.
- Emergency Telephone Service. **HB 5917** Amends emergency telephone service enabling act. Amends section 401, 407, 408, 412 & 717 of PA 32, 1986 (MCL 484.1401 et seq.).
- Inland Lakes. **HB 5960** Authorizes townships to regulate public access sites on inland lakes and streams. Amends section 78101, PA 451, 1994 (MCL 324.78101) as amended by PA 587, 2004 and by adding section 78117.
- S.B.T. Brownfield Credit. **HB 6070** Provides for effective date for brownfield credit assignment. Amends 1975 PA 228 (MCL 208.1 - 208.145) by adding section 35e.

Bills Introduced in the Senate:

- Land Bank Fast Track. **SB 867** Revises citation in property tax law for land bank fast tract act. Amends section 7 of PA 258, 2003 (MCL 124.757).
- Tax Reverted Revenue. **SB 868** Expands the distribution of property tax revenue generated from tax reversion process. Amends section 59, 78, 78m, 87b, 87c and 87d of PA 206, 1893 (MCL 211.59 et seq.).
- Traffic Signals. **SB 1098** Allows use of unmanned traffic monitoring devices at intersections. Amends sections. 204a, 320a, 628, 629, 732 and 907 of PA 300, 1949 (MCL 257.204a), section 204a as amended by PA 362, 2004, sections 320a and 732 as amended by PA 495, 2004, section 628 as amended by PA 65, 2003, section 629c as amended by PA 320, 1996 and section 907 as amended by PA 1, 2005, and adds section 615a and 649a and repeals sections 615a and 649a.
- Cable Regulation. **SB 1157** Creates new state authority to provide cable and video services and provide for competition in providing cable and video services.
- Water T.I.F.A. **SB 1159** Creates tax increment financing for water improvements.
- County Development. **SB 1206** Allows counties with 1.8 million or more persons to form downtown development authority. Amends section 1, PA 197, 1975 (MCL 125.1651).
- Metro Telecommunications Funds. **SB 1211** Revises eligibility date to opt into Metropolitan Extension Telecommunications Rights-Of-Way funds. Amends section 13, PA 48, 2002 (MCL 484.3113).
- Joint Planning Commission. **SB 1271** Provides for phased transfer of powers and authority to joint planning commission. Amends sections 5 and 7, PA 226, 2003 (MCL 125.135 and 125.137).

Bills Introduced in the House of Representatives:

- Neighborhood Improvement Authority. **HB 4181** Creates a neighborhood improvement authority.
- Building Trade Inspectors. **HB 4206** Provides for inspectors of standards and administrative process regarding

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conflict of interest in building trades. Amends section 10 of PA 54, 1986 (MCL 338.2310).

- Permanent Absentee Voters. **HB 4228** Requires local clerks or secretaries of a school board to maintain a list of permanent absentee voters. Amends sections 495, 500a and 759 of PA 116, 1954 (MCL 168.495 et seq.).
- Township Mixed Use Zoning. **HB 5565** Expressly allows zoning and growth management in mixed use zoning in townships. Amends section 1 of PA 184, 1943 (MCL 125.271).
- Municipal Mixed Use Zoning. **HB 5567** Expressly allows zoning and growth management mixed use zoning in cities and villages. Amends section 1 of PA 207, 1921 (MCL 125.581).
- Voter Registration. **HB 5659** Expands election authority of local clerks to confirm and cancel voter registrations. Amends sections 509b and 510 of PA 116, 1954 (MCL 168.509bb and 168.510) and adds sections 515a and 764c.
- Local Fund Distribution. **HB 5718** Provides for per capita distribution of funds to local municipalities. Amends section 11 of PA 156, 1851 (MCL 46.11).
- State Land Purchase Approval. **HB 5814** Provides for local governmental approval of state purchase of lands. Amends section 2152, 2153 & 2154 of 1994 PA 451 (MCL 324.2152 et seq.).
- Special Election Costs. **HB 5852** Requires state to pay for costs of special elections for state senate and state house districts. Amends PA 116, 1954 (MCL 168.1-168.992).
- Constitutional Convention. **HB 5892** Provides for ballot question in November 2006 on whether to call a constitutional convention.
- Historical Building Preservation. **HB 5897** Modifies use of tax increment financing for historical building preservation projects. Amends section 26, PA 450, 1980 (MCL 125.1826).
- Fine Limitations. **HB 5898** Allows counties to establish limitations on certain fines. Amends section 15a, PA 293, 1966 (MCL 45.515a) as amended by PA 37, 1996.
- D.D.A. Obligations. **HB 5901** Modifies eligible obligations under downtown development authorities. Amends section 1, PA 197, 1975 (MCL 125.1651) as amended by PA 115, 2005.
- Storm Water Utility. **HB 5906** Allows for the establishment of a tax levy on a storm water utility system.
- Property Tax Ownership. **HB 5907** Revises transfer of ownership of principal residence to certain senior citizens. Amends PA 206, 1893 by amending section 27a (MCL 211.27a) as amended by PA 23, 2005.
- Property Tax Transfer. **HB 5910** Revises property tax assessment to exclude transfer of principal residence to a senior citizen. Amends PA 206, 1893 by amending section 27a (MCL 211.27a) as amended by PA 23, 2005.
- Ballot Identity. **HB 5944** Exempts candidates who have undergone gender reassignment surgery from having to list prior legal name. Amends sections 558 and 560b, PA 116, 1954 (MCL 168.558, 168.560b) as amended by PA 163, 2002.
- Intergovernmental Transfers. **HB 5946** Revises contracts for intergovernmental transfer of functions and responsibilities. Amends section 4 of PA 8, 1967 (Ex Sess) (MCL 124.534).
- Property Tax Exemption. **HB 5949** Exempts property subject to an agricultural security district compact from property taxes. Amends PA 206, 1893 by adding section 7jj.
- Ad valorem Exemption. **HB 5950** Allows local units of government to create agriculture security districts and exempt the property from ad valorem taxes. Amends PA 451, 1994 by adding Part 363.
- Recall Procedures. **HB 5965** Amends election law to revise procedures for recalls. Amends sections 951, 952 and 957, PA 116, 1954 (MCL 168.951, etc.).
- Government Commercial Activity. **HB 5975** Requires governmental entities to provide financial statements regarding its commercial activity.
- Government Competition Ban. **HB 5976** Prohibits governmental entities from competing commercially against private companies.
- Fund-Raising Restrictions. **HB 5983** Prohibits soliciting and accepting campaign contributions in public buildings. Amends PA 388, 1976 (MCL 169.201 to 169.282) by adding section 57a.
- Personal Property Tax Exemption. **HB 5988** Expands availability of exemption for certain new personal property to all local units. Amends section 9f, PA 206, 1893 (MCL 211.9f), as amended by PA 79, 2004.
- Community List. **HB 5989** Modifies application of CORE community list. Amends sections 2, 3, 4, 5, 6, 7, 8, 9, 12, 13, 14, 15, and 17, PA 146, 2000 (MCL 125.2782, 125.2783, 125.2784, 125.2785, 125, 2786, 125.2787, 125.2788, 125.2789, 125.2792, 125.2793, 125.2794, 125.2795, and 125, 2797) as amended by PA 70, 2006.

- Brownfields. **HB 5990** Expands eligibility in brownfield development authority. Amends section 2 of PA 38, 1996 (MCL 125.2652) as amended by PA 32, 2006.
- Brownfields. **HB 5991** Provides for Single Business Tax credit for brownfield development. Amends section 38g of PA 228, 1975 (MCL 208.38g) as amended by PA 112, 2006.
- Neighborhood Enterprise Zone. **HB 5992** Expands eligibility in neighborhood enterprise zoning act. Amends section 2 of PA 147, 1992 (MCL 207.772) as amended by PA 396, 2004.
- Downtown Development. **HB 6005** Validates certain development plans and tax increment financing plans of downtown development authorities. Amends section 3b, PA 197, 1975 (MCL 125.1653b), as amended by PA 323, 1993.
- School Board Elections. **HB 6026** Provides technical amendments regarding school board elections. Amends section 4, 5 and 614, PA 451, 1976 (MCL 380.4, 380.5 and 380.614) as amended by PA 61, 2005 and PA 419, 2004.
- School Workers' Home Tax Exemption. **HB 6028** Provides a residential property tax exemption for property owners who as employees of boarding schools must live on campus during academic year. Amends section 7cc, PA 206, 1893 (MCL 211.7cc) as amended by PA 247, 2003.
- Local Land Discount. **HB 6045** Requires the Department of Management and Budget to provide that land for public sale be offered to local units of government for less than the fair market value. Amends section 251, PA 431, 1984 (MCL 18.1251) as amended by PA 8, 1999.
- Local Land Purchase. **HB 6046** Allows a municipality to purchase land under the jurisdiction of the department of natural resources. Amends section 2131 of PA 451, 1994 (MCL 324.2131).
- In-Ground Water. **HB 6048** Allows an individual to use an in-ground water system if the residence has an inadequate supply or the community supply is not available. Amends PA 368, 1978 by adding section 12703a.
- Taxpayer Appeal. **HB 6049** Removes the requirement for a municipality to establish an ordinance or resolution allowing a taxpayer to file a protest in written format without an appearance before the board of review. Amends section 30, PA 206, 1893 (MCL 211.30) as amended by PA 194, 2003.
- Marriage Fee. **HB 6050** Allows a county board of commissioners to determine the fee charged for performing a marriage ceremony. Amends section 874, PA 236, 1961 (MCL 600.874).

Public Policy Updates

Receive the FREE weekly public policy electronic journal from the State Bar of Michigan by signing up at *http://capwiz.com/michbar/mlm/*.

Mark Your Calendar!

Events of Interest to Local Government Attorneys

Please submit your additions and corrections to Peter A. Letzmann at *letzmann@voyager.net* or 231 526-7629
Recurring meeting: PCLS Council generally meets on the first Saturday of the month in the Lansing area

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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 for 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, 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

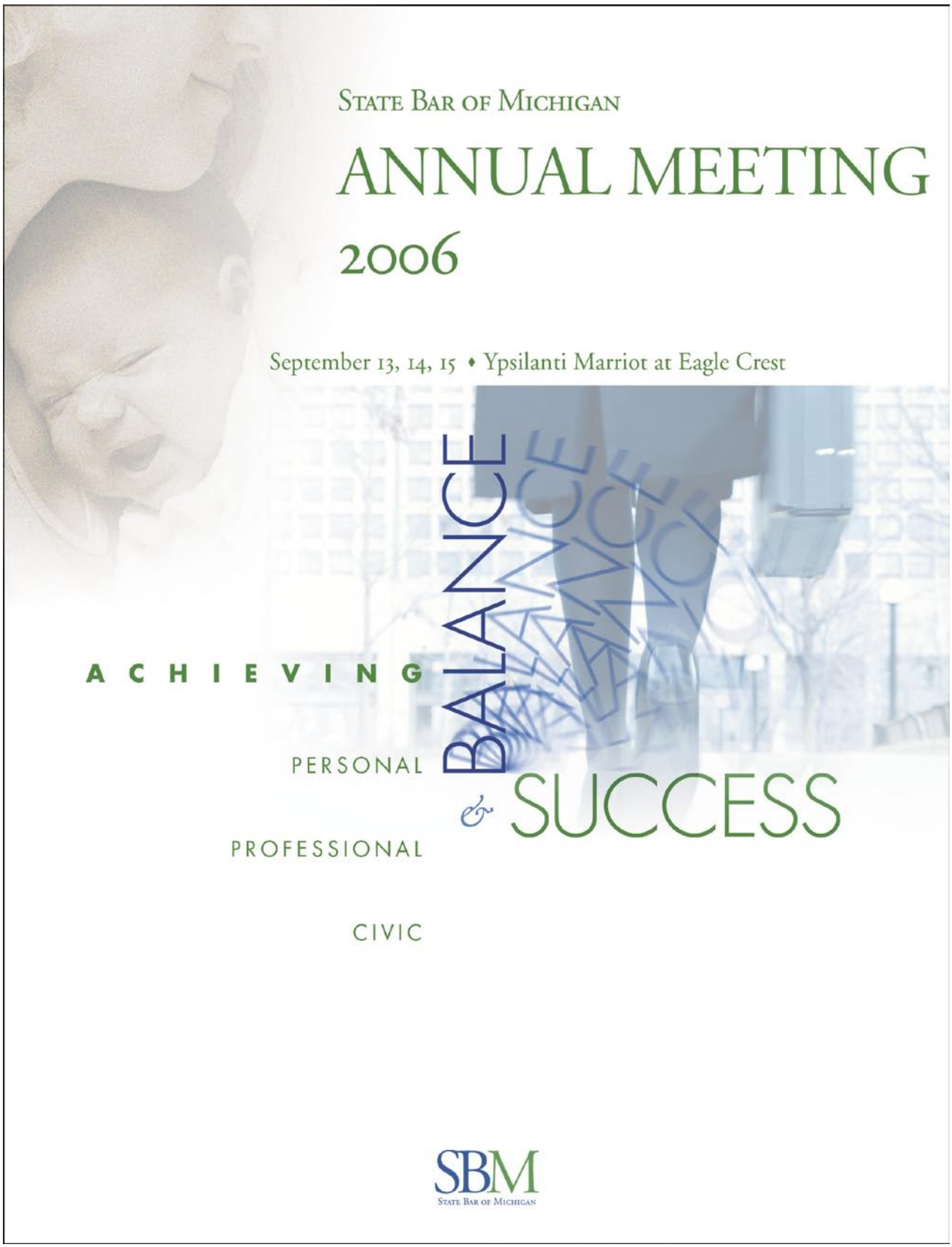
Fall 2008
MML Convention, Grand Hotel, Mackinac Island

Events for 2009

February 2009
ABA/Section of State & Local Government Law, Midyear Meeting, Boston MA

August 2009
ABA/Section of State & Local Government Law, Annual Meeting, Chicago, IL

Fall 2009
MML Annual Convention TBD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