Summer 2007, No. 2

STATE BAR OF MICHIGAN

Public Corporation Law Quarterly

The Lawyer and The Bridge

How a Public Corporation Lawyer Saved the Mackinac Bridge

By John F. MacArthur and Michael P. McGee

This summer, we celebrate the 50th anniversary of our magnificent Mackinac Bridge. There'll be fireworks and fanfare, parties and parades, historic exhibits, and feature articles recounting the great engineering feat. But few people today remember a key part of the story: The Mackinac Bridge came close—within just a few hours, in fact—to not having been built.

Photo from MDOT

It is inconceivable today to imagine Michigan without the Mackinac Bridge. Fifty years after its completion, it spans the Straits, linking our state's two peninsulas, and connecting tourists, travelers, manufacturers, and merchants to the world beyond.

Beginning as a farfetched dream in the late 1800s, the concept of a bridge morphed from floating tunnels to other island-skipping contraptions until the state highway department established ferry service across the five-mile stretch in the 1920s.

But bridge backers never abandoned their cause—through the Great Depression (when the Public Works Administration nixed the plan), into the '40s (when WW II halted action), until the proposal was resurrected again in 1951, only to be met with a Korean War-related steel shortage.

Finally, in 1952—after favorable feasibility studies, geologic borings, traffic analyses, and consultations with the world's premier engineers—enabling legislation was adopted as Public Act 214, and the newly created Mackinac Bridge Authority, chaired by former U.S. Senator Prentiss M. Brown, was given a green light.

If it seemed bridge supporters had overcome adversity, their prior challenges would pale against a roadblock waiting ahead: financing the project.

Continued on page 7

Summer 2007, No. 2

c o n t e n t s

chairperson's corner–2

proposed amendments to section bylaws–3

the complete technophobe's guide to electronically-stored information–9

9th annual summer educational conference registration form–12

opinions of the attorney general–13

state law update–14

federal law update –18

city of mt. pleasant v. state tax commission–25

legislative update–28

i'll bet you didn't know–31

Public Corporation Law Quarterly

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

Correspondence and submissions should be directed to Thomas R. Schultz, Secrest Wardle Lynch Hampton Truex & Morley PC, 30903 Northwestern Hwy, PO Box 3040, Farmington Hills, MI 48333, phone (248) 851-9500. Articles must be in Word format, double-spaced, and e-mail to *tschultz@secrestwardle com*

Chairperson's Corner

By Lori Grigg Bluhm, City Attorney, City of Troy, MI

For my last Chairperson's Corner, I wanted to say a special thank you to everyone who helped to make this a fantastic year. This includes Vice Chair Jeff Sluggett and Secretary-Treasurer Bill Beach. The Section will be well served by their leadership in the coming years. I also wanted to say thank you to all of the members of the Public Corporation Section Council, who are so dedicated to the mission of the Section. The Section Mission is to "provide education, information and analysis about issues of concern through meetings, seminars, (the web) site, public service programs, and publication of a newsletter." In order to further the Section Mission, the Council members give up a Saturday a month for the Section meetings in Lansing. They also willingly contribute their time and talents to plan the great seminars, share their expertise as speakers, and/or author articles for the PCLS *Quarterly*.

Speaking of the PCLS *Quarterly*, I also want to extend heartfelt gratitude to Dan Dalton, who donated several hours of his time, as well as his talent, in contributing informative articles, and also in serving as the editor for the PCLS *Quarterly*. After several years under Dan's leadership, Tom Schultz and Steve Joppich have assumed this demanding job. Their unwavering commitment to excellence has already been demonstrated in their first two issues, and we know that they will continue the tradition of providing the Section members with relevant information. The transition to electronic distribution is also an added benefit, since the *Quarterly* is now easily saved, retrieved, and searched.

Thank you to all who participated in the location survey for the 2008 Joint Public Corporation Section/ Michigan Association of Municipal Attorney's Summer Seminar, which will be held on Drummond Island. The planning for this event is already underway, and we hope you will plan to attend.

The information about the 2007 Joint PCLS/ MAMA seminar is included in this edition of the *Quarterly*, and it will be held on June 22- 24, 2007 at the Grand Hotel on Mackinac Island. The topics for the seminar have been carefully selected to cover a variety of different areas in public sector law. The speakers are experts who are committed to providing practical and useful information for public sector attorneys. The networking and social activities are just as important in obtaining innovative ideas and approaches to our practice, and we are fortunate to have Justice Marilyn Kelly as our keynote speaker for the Saturday dinner. Please consider joining us, and see what you have been missing.

The Section Annual Meeting will be held on Friday, June 22, 2007. In addition to the annual election of Council members, the agenda will also include a possible ratification of by-laws amendments. Committee Members Mary Fales, Dan Matson, and Don Schmidt reviewed the current by-laws, which were last amended in 2003. They have streamlined some of the provisions, and explicitly provided authority to file amicus briefs and to attend by teleconference when necessary. Thank you to these Council members for going above and beyond. The complete red line version of the by-laws revisions is included in this edition of the PCLS Quarterly, just in time for the proposed ratification at the Annual meeting.

Thank you for the opportunity to serve as the Chair of the prestigious Public Corporation Section of the State Bar of Michigan. In my experience, the Section contains the best and brightest attorneys, who are able to master several different practice areas. Section members are dedicated public servants that are a credit to the profession, since they are diligent, perseverant, informed, caring, and committed to the pursuit of knowledge. To each member of the Section, I challenge you to increase your involvement in Section activities, and also to participate in the continuing legal education opportunities. Your efforts will be rewarded!

Proposed Amendments to Section Bylaws

ARTICLE 1

NAME AND PURPOSES

Section 1.1 NAME. The Section shall be known as the Public Corporation Law Section of the State Bar of Michigan.

Section 1.2 PURPOSES. The purposes of the Section shall be to

(a) Study the laws and procedures relating to public law as they relate to the activities of government corporations, agencies, departments and boards, including townships, counties, villages, cities, schools, and charter or special authorities;

(b) Promote the fair and just administration of public law;

(c) Study, report upon, and recommend necessary legislation;

(d) Promote the legal education of members of the Bar and the public concerning public law by sponsoring meetings, institutes and conferences, distributing pamphlets and brochures, and preparing, sponsoring and publishing legal writings in the field.

(e) File amicus curiae briefs in cases involving issues significant to public corporations in Michigan.

ARTICLE 2

SECTION MEMBERSHIP

Section 2.1 QUALIFICATIONS. Memberships shall be limited to members of the State Bar of Michigan and to members of the Law Student Section.

Section 2.2 MEMBERSHIP DUES. Membership dues shall be established from time to time by the Council subject to approval by the Board of Commissioners and shall be payable in advance. Any member of the Section whose annual dues shall be more than ~~six (6)~~ **three (3)** months past due shall automatically cease to be a member of the Section.

ARTICLE 3

COUNCIL MEMBERSHIP

Section 3.1 NUMBER. The Council shall consist of twenty-one (21) elected members. ~~In addition, if the Chairperson is not a member of the Council, he/she shall automatically become a member of the Council for his/her term in office with all the rights, powers and privileges of a member of the Council~~.

Section 3.2 QUALIFICATIONS. Each member of the Council must be an active member of the Bar and a member in good standing of the Section.

Section 3.3 TERMS OF OFFICE. Seven (7) members of the ~~Council~~ **Section** shall be elected **to the Council by the members of the Section** at ~~each~~ **the** annual meeting ~~of the Section~~ to serve for three (3) years with terms commencing at the close of the annual meeting at which they ~~shall~~ have been elected and ending at the close of the third succeeding annual meeting of the Section.

Section 3.4 PAST CHAIRPERSON. The immediate ~~P~~past chairperson ~~chairpersons~~ can ~~shall~~ be an ex officio member ~~members~~ of the Council**, or may be elected to the Council with full voting rights.**

ARTICLE 4

COUNCIL OFFICERS

Section 4.1 ~~NUMBER~~. **OFFICES.** The Council shall elect a Chairperson, a Vice-Chairperson, a Secretary-Treasurer and such other officers as it shall determine necessary for the proper conduct of its business.

Section 4.2 QUALIFICATIONS. An officer must be an active member of the Bar and a member in good standing of the Section ~~but need not be~~ **and** an elected member of the Council.

Continued on next page

Proposed Amendments . . .

Continued from page 3

Section 4.3 DUTIES OF OFFICERS.

Section 4.3.1 CHAIRPERSON. The Chairperson shall preside at all meetings of the Section and of the Council. The Chairperson shall, if requested, formulate and present at each Annual Meeting of the State Bar of Michigan a report of the work of the Section. The Chairperson shall perform such other duties and acts as usually pertain to the office and shall perform such additional duties as may be from time to time assigned by the Council.

Section 4.3.2 VICE-CHAIRPERSON. The Vice-Chairperson shall perform the duties of the Chairperson when required by the absence or inability of the Chairperson to act. The Vice-Chairperson shall in addition perform such additional duties as may be from time to time assigned by the Chairperson or by the Council.

Section 4.3.3 SECRETARY-TREASURER. The Secretary-Treasurer shall:

(a) Attend all meetings of the Council and of the Section and ~~shall~~ prepare minutes of ~~of the proceedings of alll~~ such meetings;

(b) Give all notices of meetings;

(c) Be the custodian of the official records of the Council and of the Section;

(d) Cause to be maintained **at the State Bar offices** a record of the members of the Section who are eligible to vote and the members and term of office of each member of the Council; and

(e) Be responsible for **a record of** all of the funds of the Section;

(f) Cause to be maintained full and accurate books of account;

~~(g) If required by the Council, give a bond for the 1 discharge of his duties in such sum and with such surety or sureties as the Council shall determine, the cost of such bond to be paid from the funds of the Section;~~

~~(h)~~(g) Prepare or cause to be prepared an annual financial report for the Council to be completed promptly after the close of the calendar year; and

~~(i)~~(h) In general, perform all of the duties incident to the office of Secretary- Treasurer and such additional duties as may be from time to time assigned by the Chairperson or by the Council.

Section 4.3.4 OTHER OFFICES. The duties of any other office established by the Council shall be specified at the time of the creation of such office.

ARTICLE 5

DUTIES AND POWERS OF THE COUNCIL

Section 5.1 GENERAL POWERS. The Council shall have the general supervision and control of the affairs of the Section.

Section 5.2 COMMITTEES. The Council shall have such standing and temporary committees as it shall from time to time establish. The purpose, composition, and term of a **standing** committee shall be specified **in these By Laws; those of temporary committees** at the time of ~~its~~ **their** establishment. No committee, except a Committee of the Whole, shall include more than six (6) members of the Council. Except as The Council shall otherwise direct, the recommendations of each committee shall be submitted to the Council in writing. The Chairperson and the Vice-Chairperson of the Council shall be ex officio members of each committee but shall not have the right to vote.

Section 5.3 ELECTION OF OFFICERS. Officers shall be elected for a one (1) year term **by the Council** at ~~a~~ **its organizational** meeting **held** ~~of the Council~~ immediately following the ~~Spring~~ **Annual** Meeting~~.; provided, however, that the first officers elected under these bylaws shall be elected at the annual meeting at which these bylaws are approved.~~ The term of office of each officer shall commence at the conclusion of the ~~Annual~~ **Organizational** Meeting of the ~~Section~~ **Council**.

Section 5.4 VACANCIES. If an office or a position on the Council ~~shall~~ become**s** vacant, it shall be filled by the Council ~~until the next annual meeting~~ **for the remainder of the term.**

Section 5.5 QUORUM. Eight (8) members of the Council ~~shall~~ **present in person at a duly called meeting** or participating by telecommunications as provided in Section 6.2.4, constitute a quorum for the transaction of business. If a quorum is not present, a majority of those present may adjourn the meeting from time to time until a quorum is present.

Section 5.6 VOTING. No act ~~shall be~~ **is** valid unless approved by at least a majority of the members of the Council present at a regular or special meeting, except as otherwise expressly provided by these bylaws. A roll call vote shall be ~~shall be~~ taken upon the request of any three (3) members.

Section 5.7 ATTENDANCE. Any member or officer who shall be absent without having been excused by the Chairperson at three (3) consecutive meetings of the Council shall be deemed to have resigned, and the vacancy thereby created shall be filled as herein above provided.

Section 5.8 MINUTES. Copies of proposed minutes shall be furnished to each member of the Council prior to the meeting at which they are to be approved. The minutes shall include the names of those persons present, those excused and those absent without an excuse together with all action taken. The proposed minutes shall be fil~~l~~ed at the principal office of the Sta~~t~~te Bar of Michigan within eight (8) days following the meeting **at which they are approved**. The approved minutes shall be placed with the official records of the Council and shall be available for inspection at the principal office of the State Bar of Michigan.

ARTICLE 6

MEETINGS

Section 6.1 SECTION MEETINGS. The Annual Section Meeting shall be held at the same time and place as the Annual Meeting of the State Bar of Michigan, or, upon at least thirty (30) days written notice to the Section members, at such other place or time as may be approved by the Council. A second Section meeting may be held at such time and place as the Council shall specify. The Council may authorize such additional meetings of the Section as it ~~shall~~ determine**s** necessary. A quorum shall be those Section members present and voting **at a duly called meeting**.

Section 6.2 COUNCIL MEETINGS.

Section 6.2.1 ORGANIZATIONAL AND REGULAR MEETINGS. An organizational meeting of the Council shall be held immediately following the adjournment of the annual Section meeting. The Council shall at the organizational meeting **elect its officers and** approve a schedule of regular meetings for the year, which schedule shall provide for not less than nine (9) monthly meetings. The business which may be conducted shall not be limited by the business set forth in the ~~call~~ **notice** of the meeting.

Section 6.2.2 SPECIAL MEETINGS. Special meetings of the Council may be called by the Chairperson or by any five (5) members of the Council. No business shall be conducted which was not included in the ~~call~~ **notice** of the meeting except on the approval of two-thirds (2/3) of the members of the Council elected and serving.

Section 6.2.3 NOTICE OF MEETINGS. The notice of a meeting shall be in writing and may be given in person, by mail, by electronic mail (e-mail), by facsimile (fax), or in an official publication of the Section or of the State Bar.

Section 6.2.4 MEETING BY TELECOMMUNICATIONS DEVICES. The Council may hold its regular and special meetings with its members present at a designated location, or by telephone conference, or by other telecommunications or technological means, or a combination of them, at which all members in attendance may fully participate in the meeting, as provided in the notice of meeting.

ARTICLE 7

STANDING COMMITTEE

Section 7.1 NOMINATIONS COMMITTEE. The officers of the Section constitute a Nominations Committee. The Committee shall report its recommended nominees to fill Council positions at the Section annual meeting. The Committee shall recommend nominees for officers positions to the Council at its organizational meting following the Annual Meeting.

Continued on next page

Proposed Amendments . . .

Continued from page 5

~~ARTICLE 7~~
ARTICLE 8

FISCAL PROVISIONS

~~Section 7.1~~**Section 8.1** FISCAL YEAR. The fiscal year of the Section shall be the same as that of the State Bar of Michigan.

~~Section 7.2~~**Section 8.2** COMPENSATION. No member of the Council or any officer shall receive any compensation for the performance of duties for the Council, the Section, or any committee, except as expressly authorized by the Council in advance.

~~Section 7.3~~**Section 8.3** FISCAL MANAGEMENT. The Council shall control all of the funds of the Section; and it shall not authorize the expenditure of funds in excess of its current funds~~deposits~~.

~~ARTICLE 8~~
ARTICLE 9

GENERAL PROVISIONS

~~Section 8.1~~**Section 9.1** SUBORDINATION. These bylaws and all acts of the Council or of the Section shall be subject and subordinate to the applicable rules of the Supreme Court and the bylaws and rules of the State Bar of Michigan.

~~Section 8.2~~**Section 9.2** RULES OF ORDER. The rules contained in the then current edition of "Roberts Rules of Order, Newly Revised" shall govern the Section and the Council in all cases to which they are applicable and in which they are not inconsistent with these bylaws or any special rules of order which may be adopted.

~~ARTICLE 9~~
ARTICLE 10

ADOPTION AND AMENDMENT

~~Section 9.1~~**Section 10.1** ADOPTION. These **amended** bylaws shall be adopted upon the approval of the Commissioners of the State Bar of Michigan and ratification by the majority of the members of the Section present and voting **at a meeting of the Section**.

~~Section 7.2~~**Section 10.2** AMENDMENTS. These bylaws may be **further** amended upon the recommendation of the Council, approval by the Commissioners of the State Bar of Michigan and ratification by a majority vote of the members of the Section voting on such question.

~~Current as of 8/10/93~~
Version as of 8/10/1993
Revised as of 12/20/~~1~~94
Revised as of 3/2000
Amended 9/14/2001
~~Current as of~~ Amended 6/27/2003

Amended 6/27/2003

The Lawyer . . .
Continued from page 1

Prospective lenders spoke bluntly: they were skeptical. The Mackinac Bridge was too big. Too costly. Too risky to build. It couldn't be done.

Empowered to issue $99,800,000 in bonds (about $800 million in today's dollars), the Authority engaged world-renowned bridge engineer David B. Steinman to design what would be the longest suspension bridge yet constructed anywhere in the world. Less well known was the Authority's selection as counsel: John H. Nunneley, son of a prominent Mount Clemens family and then head of Miller Canfield Paddock and Stone's bond practice. Nunneley had established a reputation as an experienced bond counsel, having successfully handled several large issues—interstate highway systems, university buildings, and southeastern Michigan drainage and sewer projects among them. He possessed a keen intellect, and would prove to be a tireless ally and tenacious lawyer when things got tough. And get tough they did.

> "Actual construction of the Mackinac Bridge was by far the most spectacular part of the entire work, but it failed to surpass in sheer drama, disillusioning developments, and heartbreaking setbacks the long, active struggle for the authorization and financing of the bridge."
>
> –David B. Steinman
> World-renowned bridge engineer &
> chief designer of the Mackinac Bridge
> from his book, *Miracle Bridge at Mackinac*

The bridge project from the outset met none of the criteria common to most bond issues.

Act 214, which had given a "go" to the Authority, stipulated that the structure would have to be built and paid for without *any* financial backing from the State. Absent a good-faith pledge of taxes to back the bonds, interest rates would be higher and financing would cost more. Lenders, already questioning the perilous nature of the structure, demanded a solid revenue stream to offset the cost of construction, operation, and maintenance. Everything about the proposed bridge seemed to fall outside the usual parameters.

By June 1953, Steinman had completed an innovative bridge design, and the Authority secured construction bids. All that was needed was money. As the Authority again approached the New York investment banks, the market turned soft. No takers came forward. Pleading their case before the Legislature, the Authority asked for a token demonstration of confidence to make the bonds more attractive to investors and—after a good bit of haggling—received an annual appropriation of $417,000.

But there was a catch, put in by bridge opponents: bonds had to be sold by December 31 or the appropriation would lapse.

The market remained tight through autumn, interest rates were trending upward, and financial institutions and insurance companies remained uncommitted. The clock was ticking. If financing could not be found soon, the Mackinac Bridge was doomed.

With year's end approaching, and at the advice of investment bankers, Nunneley restructured the bond issue, dividing it into two types of bonds to make the deal more attractive. First-lien bonds totaling almost $80 million would carry one interest rate, and $20 million in second-lien bonds a higher rate. With that novel change, plus the promise of the $417,000 appropriation, a syndicate of bankers, insurance companies, and other individuals was tentatively formed to bid on the bonds.

On December 9, 1953—just one day prior to publication of the required bond sale notice—Nunneley and Bridge Authority secretary Lawrence Rubin flew to New York to confer-

Continued on page 8

Four men—
Prentiss Brown, a former US Senator and near-President, as well as a lifelong champion of a bridge across the Straits; David Steinman, the world's leading bridge architect and engineer of his time; Lawrence Rubin, a tireless supporter and secretary of the Bridge Authority; and Michigan's Governor, G. Mennen ("Soapy") Williams–are generally acknowledged as essential players in the Mackinac Bridge saga.

But there's another man who played a key role at critical moments of the drama, when the future of the Mackinac Bridge was hanging by a thread: bond lawyer John H. Nunneley.

The Lawyer . . .
Continued from page 7

"It took just four years to build the Mackinac Bridge. But it required more than 20 years to get the project up and going."

ence with investors. The issue on the table was simple and decisive: Was it enough? Would the underwriters buy the bonds? Would the bridge be built?

After hours of tense negotiations, agreement was reached. The syndicate would submit its bid for first-lien Class A bonds at four percent; and second-lien Class B bonds at 5.25 percent. The State Administrative Board, chaired by Michigan Governor G. Mennen Williams, was scheduled to open the bids in special session on December 17.

Just when it appeared the deal was done, State Senator Haskell Nichols—a naysayer from the start—filed a petition with the Michigan Supreme Court on December 16 asking the Court to restrain the Administrative Board from approving the bond sale until a full hearing on Act 214's legality could be held. In bypassing the lower courts, Nichols had raised the ante. If the State's highest court issued even a temporary restraining order, the appropriation would expire and everything that had been accomplished over the prior months and years would be lost. At risk were engineering and construction contracts and finance agreements. Even if the bridge ever got back on track, costs might well prove prohibitive.

Nichols' request sounded reasonable, for there were few precedents for the legal structure, and certainly none involving projects of this magnitude. But it was perfectly timed to thwart the bond sale—thereby scuttling the bridge.

By chance, Nunneley was in Lansing when Nichols filed his petition. Nunneley, accompanied by Prentiss Brown, sprung into action, requesting an immediate meeting with members of the Court, four of whom remained in Lansing, preparing to head home for the holidays.

In a shrewd move, Nunneley *agreed* to Nichols' request for a Court hearing—but insisted that a fair contest, with full arguments from both sides of the issue, be held *after* December 17 (the bid opening date) and before February 17, 1954, when the bridge bonds were scheduled for delivery. That way, the bond sale process could continue on schedule. If the Court then ruled against Nichols' petition, nothing would be lost. If Nichols' petition were upheld, the Bridge Authority would be prevented from delivering the bonds.

This calm, sensible request was granted. In the afternoon of December 16, less than 24 hours before the scheduled bond sale, the Court refused to grant the restraining order. (In fact, a month later, the Court would unanimously uphold the Bridge Authority's position; *Nichols v. Williams*, 338 Mich 617 (1954).)

At 10 a.m. the next morning, the syndicate's bid was opened and accepted. The sale of bonds was approved. A long and arduous struggle ended. No doubt, members of the Bridge Authority, along with John Nunneley, celebrated.

Prentiss Brown would always give Nunneley credit for saving the bridge. And Nunneley himself considered the challenging Mackinac Bridge bond work his finest legal accomplishment, joking that he really earned his fee.

Just short of four years later, on November 1, 1957, the beautiful Mackinac Bridge officially opened to traffic. The last of the bonds were retired in 1986. John Nunneley, the masterful bond attorney who helped steer the project through a legal maze, remained at Miller Canfield and continued making his mark on other high-profile, publicly financed projects. In 1971, he retired and moved to California, where he died eight years later.

Most importantly, the Mighty Mac has become Michigan's icon. Its image on license plates, postcards, stamps, and souvenirs, the picturesque expansion is known the world over.

And what of Haskell Nichols, whose eleventh-hour maneuvering almost put the brakes on the bridge? He's remembered too. A portion of Michigan highway US-127 from Jackson County's north line, south to the intersection of I-94, is known as the Haskell L. Nichols Memorial Highway. No doubt some of the traffic on Nichols Highway is headed north–to the Mackinac Bridge.

The State Bar will dedicate it's 32nd Michigan Legal Milestone to honor Prentiss Brown, former chairman of the Mackinac Bridge Authority on September 28 in Grand Rapids. The dedication will coincide with the Bar's Annual Meeting. A plaque honoring Brown for his role in overseeing the construction of the bridge will be placed permanently up north at a later date.

About the Authors

John F. MacArthur is a practicing lawyer in Mount Clemens, and is the grandson of John H. Nunneley. Michael P. McGee is a bond attorney with Miller, Canfield, Paddock and Stone, PLC.

Photo from MDOT

The Complete Technophobe's Guide to Electronically-stored Information

By Michael E. Rosati, Johnson, Rosati, LaBarge, Aseltyne & Field, P.C.

Editors' Note: This article was written for the Oakland County Bar Association's Laches *publication. While not strictly a "public corporation law" piece, it contains useful information that is relevant to nearly every lawyer's practice these days, and struck us as worthy of broader distribution.*

Introduction

Attorneys have had a reputation in the business world for being unreconstructed Luddites. Our relationship with computers and the technology which facilitate the practice of law is uneasy and superficial. We just want our technology to work, and we don't understand it enough to fix any of the small problems that may arise in normal use of this technology.

Events are quickly overtaking those who cling to this relationship with technology. By now, you have probably read numerous articles about the amendment of the Federal Rules of Civil Procedure to include reference to electronically-stored information (ESI). Attorneys involved in litigation now not only have to deal with the 19th century technology that they know and love, but also have to be responsible for collecting, protecting and ultimately producing ESI in a host of circumstances. Yet, the Luddite is ill-equipped to deal with ESI on a practical level. At the risk of over-simplifying the process, this article is designed to assist those of you who are now being dragged, kicking and screaming, into our brave new world.

Despite what you may believe, there is little to no "magic" involved in computer technology and ESI. The difficulty in dealing with ESI is to understand where it might be found in the first place, and what type of electronic information you should look for when confronted with an ESI request. As to the location of information, on a practical level, electronic information is stored only in a limited number of places and ways with current computer technology.

Inside every computer device today is a repository of electronic information, called a "hard drive". The hard drive is nothing more than a magnetic recording device that uses spinning platters and the equivalent of a high-tech phonograph needle floating above these platters to read or write that magnetically-stored information. When confronted with an ESI request, an attorney should not lose sight of the fact that any device that has a hard drive in it is a possible repository for ESI. Thus, any computer, including laptops, desktop computers, and servers (which are nothing more than computers serving a specific purpose on a network), can and will contain data of possible interest in the collection of ESI.

Because of the way that hard drives are used by computers, the information on the hard drive can be lost by continued use of the computer. You have probably heard by now that clicking on the "delete" button that appears on the screen while you are using your computer does not wipe the information off the hard drive. Rather, that information remains stored on the hard drive until the computer thinks that it has either run out of room on the hard drive, or decides that this is a good place on the hard drive to write over the deleted information. Since many ESI requests involve situations where information has been "deleted" but remains on the hard drive, the continued use of the computer risks overwriting and thus losing the information. This, in turn, leads to request for jury instructions regarding the spoliation of evidence, and arguments that cannot be countered because the information on the disk was not preserved in the state it was in when the ESI request was first made. As you can see, the nature of ESI lends itself to inadvertent destruction of evidence in a way that paper files could never match.

Because of these difficulties in locating and preserving ESI, the attorney must consult with his client's IT professional immediately upon receiving an ESI request in an effort to locate and preserve relevant ESI. The IT professional should know the technological "lay of the land" so that he or she can describe to the attorney what computers or networks might contain information which would be responsive to the ESI request. This IT professional ought to be able to explain the possible locations of ESI material which would be responsive to the request. Nonetheless, it is not uncommon to encounter people in these positions who are less than qualified, or are unused to the rigorous thought required to think of all the eventualities that might be encountered in preserving electronic evidence in its many forms and locations. Thus, it behooves the Luddite to shed his belief system and to gain a rudimentary understanding of the operation of certain of these systems. With that in mind, let's look at two types of ESI that an attorney will have to deal with in discovery situations.

Continued on next page

The Technophobe. . .
Continued from page 9

E-mail

Email is the bane of the modern litigation attorney. People write things in email that they would never think of writing in a letter or memo which would appear somewhere in a paper file. When a person sends an email, they hardly ever know where it goes or where the traces of that email are lurking.

On a computer network with a server, one should always look to the server to see if there are traces of email. Ask the IT professional how email is handled within the organization, and if it is centrally stored on the server by default. The central storage of email can occur on some of the most widely used enterprise email systems, including Microsoft Exchange Server and Novell Groupwise. Thus, all the organization's email can exist as a file or database on the hard drive which is located in the server, and steps must be taken to preserve that server hard drive.

Even if email is centrally stored on the server, that does not rule out the possibility that there are other repositories of email within the organization's computer network. It is common that email programs such as Outlook save copies of emails which are sent by the user locally on that user's computer hard drive. Email may also be copied or sent to local hard drives by users even under circumstances where the email is administered, and stored, centrally. It is a prudent approach to assume that email will be found on users' machines, even if the organization centrally stores email on the server, and to take steps to preserve the hard drives on those machines so that that email will not be lost.

In smaller organizations, and those organizations without a centralized email repository, one must assume that email is stored on the computers of the various email users. In order to preserve email, the hard drives of each of the users' computers must be preserved. The trick here is to identify the users which may have email which is relevant to the inquiry. The attorney should be prepared to supply this information to the IT professional, which requires prompt investigation of the situation and identification of the individuals involved.

Email may also appear in other places besides computer and server hard drives. The most likely place that one will find traces of email that are deposited during the regular use of technology in the company are devices like smart phones and personal digital assistants, such as Blackberries or Palm Pilots (PDAs). Even if you are a Luddite, you probably know that cell phones exist which are capable of sending and receiving email. Likewise, there are PDAs which have the capability of receiving, sending or storing email. An attorney should not overlook these devices in an attempt to collect all email evidence when presented with an ESI request. The IT professional should be able to tell the attorney what phones or PDAs are used within the organization, and whether they might contain ESI.

Documents

In order to understand where electronic documents are stored, an attorney has to understand the basic work process of the organization. On networks with servers, it is likely that there is a central repository for electronic documents. Computer users within the organization are often instructed to save their documents to the central repository on the server hard drive. Again, by preserving that hard drive, one could theoretically preserve the entire organization's store of electronic documents in one fell swoop.

However, things are never as neat and tidy as this in practice. It is likely that computer users within the organization will save electronic documents to their personal computers. When they do so, there will be no standard location on that computer as to where that information will be stored or organized. Only by preserving the entire hard drive of the personal computer can one be assured that the electronic documents on that computer have been preserved.

It is also likely that electronic documents exist in other places besides the server and personal computer hard drives in the system. Unless the organization has "locked down" access on personal computers, it will not be an uncommon occurrence for the users of those computers to copy electronic files, and possibly even email, onto recordable devices, such as recordable CD, DVD or flash drives. A flash drive is a thumb-sized device which plugs into a personal computer and contains solid state memory which is capable of recording and containing ESI. An attorney should inquire as to whether users have the capability to transfer ESI onto these types of devices, and then inquire of the users whether any such transfers have occurred. It may also be possible to determine whether such devices have been used on a computer by looking at log information stored on the computer itself, and the attorney should inquire about this in discussions with the IT professional.

Another likely place one will find electronic documents stored is on the data backup system employed by the organization. Electronic data is subject to easy destruction, and, thus, most organizations try to copy that data onto other storage media, mostly in the form of cassette-style tapes, as a backup of the data should the original data be destroyed. The tape recorder itself is usually built into the server, and the backup copy onto the tape is automated through that server. Because an organization does not want to buy a limitless amount of tapes, those tapes are reused, and the data on those tapes is recorded over on a regular basis. This system leads to regular de-

struction of ESI on backup tapes in the normal course of business. Obviously, an attorney should inquire as to whether a backup system is being used, how it works, and immediately preserve any backup tapes or other devices in order to avoid destruction of ESI from the normal course of rotating and overwriting the backup media.

It should be noted here that none of these possible repositories of ESI are discriminating about what type of ESI they can contain. You will likely find email on backup tapes, and you could find electronic documents on phones and PDAs. Thus, the attorney involved in an ESI response should look to all these devices or locations and rule them out one by one in the process of collecting and preserving all types of ESI.

Conclusion

The identification, collection and preservation of ESI can be understood, even by a Luddite. This article is not meant to be an exhaustive explanation of all inquiries that should be made to collect and preserve electronic data, but merely a starting point. By taking a practical approach to the problem and using a basic understanding of current technology, an attorney can effectively deal with any ESI requests.

About the Author

Michael E. Rosati is a Principal Shareholder with Johnson, Rosati, LaBarge, Aseltyne & Field, P.C. and has over 20 years of experience in municipal litigation in both the state and federal courts, including police civil rights cases, first amendment cases, privacy cases, discrimination cases and general property rights cases.

ESI, E-Mail, and Statutory Record Retention Requirements for Public Agencies

Michael Rosati's article about electronically stored information ("ESI") inspires a reminder that taking advantage of useful technology and fairly searching for information in the litigation context are not the only things that public corporation lawyers need to keep in mind on that subject. Under Michigan's public record retention law, found primarily at MCL 18.1285, municipalities are required to list and keep certain public records on a retention and disposal schedule. In an age where correspondence is often exchanged more frequently in an electronic format, than in a paper one, and documents are increasingly stored on computer networks, rather than in manila folders, it is important that we help our municipal clients understand that, even though hard copies might not exist, these communications and documents might still constitute "public records" that are required to be listed on their respective record retention and disposal schedules.

The State of Michigan Record Management Services, Department of History, Art and Libraries has prepared a model electronic mail retention policy, available on-line at *www.mml.org*. The draft policy is contemplated to be an amendment to a public agency's existing record retention and disposal schedule, and specifically addresses retention of e-mail communications in accordance with that schedule. It suggests that personal communications be deleted with some regularity, but that extreme caution be utilized when making determinations concerning municipal-business related e-mails. The policy, as proposed, places the obligation to make this differentiation on each employee; however, a municipality would certainly have the option to place a greater responsibility on its IT professional in this process. The model policy also places certain obligations on the FOIA and litigation coordinator to notify appropriate municipal employees if and when a FOIA or discovery request is received to help ensure preservation of necessary electronically stored information.

In general, adoption of this kind of a policy should help a municipal client think and look beyond its filing cabinets when considering retention and disposal of public records. Adoption of such policy should also assist a municipal client respond to Freedom of Information Act requests that seek ESI, as well as complying with the newly revised Federal Rules of Civil Procedure, which address discovery of ESI.

—Kristin Bricker Kolb, Secrest Wardle, PC.

9th Annual Summer Educational Conference

MAMA and PCLS are pleased to offer a slate of programs with practical, applicable content, certain to be of use in municipal and public corporation law practices.

This conference presents current highlights of legal developments and issues facing public corporation and municipal attorneys in Michigan. Both experienced attorneys and those new to the field will participate in sessions with experts on the session topics. At the conclusion of the program, attendees will be able to discuss current issues in public law practices, describe the impact of recent state and federal cases to public entities, and identify unique characteristics of municipal contracts.

Ample time has been built into the conference to network and to discuss the challenges attorneys are facing in communities and public corporations, large and small. There will also be plenty of time for family activities at one of America's premier summer destinations: the Grand Hotel on Mackinac Island! For more details go to *http://www.michbar.org/publiccorp/pdfs/summer_reg.pdf*

9th Annual MAMA/PCLS Summer Educational Conference

Friday and Saturday, June 22-23, 2007 – Grand Hotel, Mackinac Island

To Register

MAIL registration form and payment to MML Education Services, PO Box 7409, Ann Arbor, MI 48107-7409. (Before mailing your registration please fax a copy of the form to 734-662-6939.)

FAX registration form with credit card information to 734-662-6939.

_____
Name

_____
First Name for Badge

_____
Municipality or Firm

_____
Billing Address

_____
City/State/Zip

_____
Daytime Phone

_____
Fax Number

_____
Email (so we can confirm your registration)

_____
Guest's Name for Badge

_____
Child's Age and Name for Badge

_____
Child's Age and Name for Badge

Bocci Ball Tournament

If you are interested in entering the Saturday afternoon Bocci Ball Tournament ✓ the line below and indicate the number of players you wish to register. (Spouses and children welcome)

___ I/we wish to participate in the Bocci Ball Tournament

___ Number of players

❒ **Special Needs**

_____
Please indicate arrangements required

Saturday night dinner if staying at the Grand Hotel

___ Number of adults attending the dinner

___ Number of children attending the dinner

Conference Registration

❒ **$110** if received **by June 8** $ _____

❒ **$145** if received **after June 8** $ _____

Saturday night dinner if not staying at the Grand Hotel

___ Adult $75 per ticket $ _____

___ Children 12-17 yrs. old $40 per ticket $ _____

___ Children 5-11 yrs. old $25 per ticket $ _____

Total $ _____

Payment

❒ Check, made payable to Michigan Municipal League

_____
Check Number

❒ Charge (circle one)
Master Card/Visa/Discover/American Express

_____
Card Number Expiration Date

_____
Cardholder's name as it appears on the card

_____
Billing Street Address

_____
City/State/Zip

_____
Telephone Number

_____
Signature

07F-01

Opinions of the Attorney General

By George M. Elworth, Assistant Attorney General

Editor's note: Assistant Attorney General George M. Elworth of the Opinions 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.

Const 1963, Art 1, § 26

Constitutionality of City's construction policy that provides bid discounts on the basis of race or sex

Const 1963, art 1, § 26 prohibits the implementation or application of the City of Grand Rapids' bid discount process set forth in Section 5.1(A)(1) of the Administrative Guidelines promulgated pursuant to City Policy 600-12 because the process grants preferential treatment to persons or groups based on race, sex, color, ethnicity, or national origin. Art 1, § 26 does not, however, prohibit the City from maintaining a bid discount process as long as the City amends the process to remove reliance on the unconstitutional factors of race, sex, color, ethnicity, or national origin.

Opinion No. 7202
April 9, 2007

Const 1963, Art 5, § 20

Reduction of funds in the Automobile Theft Prevention Program by Executive Order 2007-3

The Governor, having gained the approval of both the House and Senate appropriations committees, may use her Const 1963, art 5, § 20 powers to reduce the spending authority for the Automobile Theft Prevention Authority. The $4,000,000 for which spending authority was removed by Executive Order 2007-3, however, remains in the Automobile Theft Prevention Fund until new authority to spend is obtained pursuant to legislative appropriation; it does not lapse to the General Fund and thus does not result in a direct increase of $4,000,000 to the General Fund.

Opinion No. 7203
April 25, 2007

Public Officers and Employees

Length of term of office of Executive Director of Michigan Gaming Control Board and manner of appointment to office

The Governor is authorized to appoint the Executive Director of the Michigan Gaming Control Board to serve a six-year term under section 4(8) of the Michigan Gaming Control and Revenue Act, MCL 432.204(8).

An individual appointed by the Governor as Executive Director of the Michigan Gaming Control Board under MCL 432.204(8) may not assume the duties of the office immediately upon executing the oath of office required by Const 1963, art 11, § 1 but rather must wait to assume the duties of the office until after the appointment is approved by the Senate by a record roll call vote.

Opinion No. 7200
February 23, 2007

Zoning (Michigan Zoning Enabling Act)

The requirement in section 601(3) of the Michigan Zoning Enabling Act, MCL 125.3601(3), that a member of the zoning or planning commission be appointed to the zoning board of appeals does not require that a current member of the zoning board be removed to create a vacancy that may then be filled to satisfy the requirement. The city or village council may amend its zoning ordinance to increase the number of members on the zoning board of appeals either temporarily or permanently and fill the newly created position with the required zoning or planning commission member.

A member of a city or village zoning board of appeals who also serves as a member of the local unit's planning or zoning commission must abstain from voting on a matter being considered by the zoning board of appeals that he or she voted on as a member of the zoning or planning commission where the facts and circumstances associated with the particular decision under review make abstention necessary to satisfy the due process requirement of impartial decision making.

A city or village council may appoint a successor to the zoning board of appeals after the expiration of a member's term notwithstanding the passing of the one-month deadline imposed by section 601(9) of the Michigan Zoning Enabling Act, MCL 125.3601(9), but the council should complete the appointment process as soon as practicable thereafter. Where a city or village council fails to timely appoint a successor to the zoning board of appeals after the expiration of a member's term under MCL 125.3601(9), that member may continue to serve beyond the expiration of his or her term as a holdover member until a successor is appointed and qualified.

The requirement in section 601(9) of the Michigan Zoning Enabling Act, MCL 125.3601(9), for appointment of a successor on the zoning board of appeals within one month

Continued on next page

Opinions of the Attorney General
Continued from page 13

after the term of the preceding member has expired has no application to the filling of a mid-term vacancy by appointment to the zoning board of appeals by the city or village.

In order to comply with the 30-day deadline for appealing to the circuit court from a decision of a zoning board of appeals set forth in section 606(3) of the Michigan Zoning Enabling Act, MCL 125.3606(3), a party must file the appeal within 30 days of the date on which the zoning board of appeals certifies its decision in writing or the date on which it approves the minutes of the meeting at which its decision was made, whichever is earlier.

Appeals to the Court of Appeals from decisions by a circuit court on review of a decision of the zoning board of appeals may only be taken by application for leave to appeal to that court in accordance with MCR 7.203 and not as a matter of right.

The provisions as to the effective date of a zoning ordinance and for the publication of notice of its adoption set forth in section 401(6) and (7) of the Michigan Zoning Enabling Act, MCL 125.3401(6) and (7), will control over different requirements for the effective date of a city ordinance or for the publication of notice of its adoption set forth in a city charter.

A municipality may comply with the requirements in section 103(2) of the Michigan Zoning Enabling Act, MCL 125.3103(2), for giving notice to the occupants of structures within 300 feet of a property subject to certain zoning actions for which this type of notice is required, by either delivering a written notice in person to an occupant of each unit in such a structure, or by mailing a letter to one or more occupants of each unit in such a structure by name if known or addressed to the "occupant" if the name of an occupant is not known.

Opinion No. 7201
March 21, 2007

State Law Update

By Ronald D. Richards, Jr., Sarah Gabis, and Amanda K. Garcia-Williams, Foster Swift Collins & Smith, P.C.

Michigan Supreme Court

Land Used for Economic Development Purposes Exempt from Property Tax

City of Mt Pleasant v State Tax Commission, 477 Mich 50 (issued March 28, 2007)

The City of Mt. Pleasant acquired over 320 acres of vacant land for the purpose of widening and extending streets, providing land for needed housing, and platting and preparing the land for sale to developers to increase the City's tax base. The issue arose, however, whether the land was exempt from property tax. The General Property Tax Act ("Act") states that in order for property owned by a municipality to be tax-exempt, it must be "used for public purposes." MCL 211.7m. The Court noted that economic development, such as creating jobs and stimulating private investment and redevelopment, constitutes a "public purpose." The City's purposes in acquiring the land satisfied this definition.

The larger question was whether the City "used" the land for these public purposes, which the Act requires in order to be exempt. To satisfy the use requirement, the City "must have made a present use of the land that qualifies as a 'public purpose'" during each tax year in question. The Court concluded that the City did use the land during each year, primarily because the City took steps to implement its overall economic development plan. The City actively prepared, improved, marketed, and sold the land as part of its plan. Therefore, based on these actions, the Court found that the land was presently used for public purposes, and was exempt from taxation.

Michigan Court of Appeals

City Liable for Monetary Damages for Unlawfully Demolishing Building

Jundy v City of Detroit, Mich Ct App unpublished decision (No 264039, issued March 29, 2007)

In 1998, plaintiffs' store was substantially damaged in a fire. The City determined that the building needed to be demolished, pursuant to City ordinance, when it remained unoccupied and unrepaired for nearly two years. After the City demolished the building, plaintiffs filed an action seeking damages, alleging trespass and trespass-nuisance. An earlier Court of Appeals decision involving the property had affirmed that the demolition was in fact unlawful, and that the City was liable (*see* Docket No 248389, issued July 27, 2004). The only issue involved in the present case concerned the appropriate amount of damages.

The jury awarded over $500,000 to plaintiffs, representing the value of the contents of the building ($40,000), lost income ($79,000), and loss of the building ($389,000). The City challenged all three amounts, but the Court upheld each. With respect to the value of the contents and the lost income, the Court found that both were supported by the evidence, and that the precise

amounts were within reason. The Court rejected the City's argument that there were no lost profits due to the business being closed for over two years. Plaintiffs demonstrated that they planned to reopen the business, and the demolition interrupted that process.

The primary point of contention was the formula used to calculate the damages for the loss of the building. The jury adhered to, and the Court affirmed, the following rule: the measure of damages to real estate where the property is irreparable is the difference in market value before and after the damage. The Court stated that in this situation, the market value is determined by comparing the cost of repairing the building (value before demolition) to the cost of constructing an entirely new building (value after demolition). The Court noted that the jury was free to reject the City's proposed method for valuing the building, and that the method used was reasonable.

Wastewater Treatment Plant Not a Proprietary Function; Governmental Immunity Applies

RJ Inn, Inc v City of Howell, Mich Ct App unpublished decision (No 271852, issued March 6, 2007)

After the City of Howell expanded its wastewater treatment plant to accept waste from a neighboring township, plaintiffs filed an action seeking damages for trespass-nuisance. Plaintiffs claimed that increased odors from the expanded plant caused one of their businesses to close and the other to suffer significant losses. The City asserted governmental immunity. The trial court denied the City's motion for summary disposition, but the Court of Appeals reversed.

The primary issue before the Court was whether the plant constituted a proprietary function. Municipalities are generally immune from tort liability for *governmental* functions, but not *proprietary* functions. MCL 691.1407(1). As used in the statute, "proprietary" means "primarily for the purpose of producing a pecuniary profit for the governmental agency." MCL 691.1413. In determining the primary purpose of the activity, the Court looks at whether a profit is generated and, if so, where it is deposited and how it is spent. If the profit is deposited in the municipality's general fund or used to finance unrelated activities, it may be considered a "general revenue-raising device" intended primarily to produce profit. On the other hand, if the profit is only used to pay current and long-range expenses for that particular activity, it is more likely that the primary purpose is not to produce a pecuniary profit. The exception for proprietary functions is not intended to penalize "self-sustaining" activities.

Applying the above principles, the Court found that the wastewater treatment plant was not a proprietary function, because the fees it collected were not (1) placed in the City's general fund; or (2) used to fund any activities other than operation of the plant. Furthermore, under the City charter and its contract with the township, the City could not use the funds for any other purpose than the operation and maintenance of the plant. Because the plant was not operated primarily for pecuniary gain, the City was entitled to governmental immunity on this claim.

"Highway Exception" Applies to Unnatural Accumulation of Snow & Ice On Sidewalk

Estate of Buckner v City of Lansing, __ Mich App __ (issued March 15, 2007)

In this case, a City of Lansing sidewalk was obstructed by an accumulation of snow and ice, due to the City's snow-plowing on the adjacent street. Plaintiffs, unable to use the sidewalk, walked in the adjoining street and were struck by a car. Plaintiffs sued the City for damages, and the City moved for summary disposition, asserting governmental immunity. Plaintiffs argued that the "highway exception" to governmental immunity applied.

Although municipalities are generally entitled to tort liability when engaging in a governmental function, an exception requires municipalities with jurisdiction over a highway to keep it "in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1). A sidewalk

Continued on next page

Section Mission:

The Public Corporation Law Section of the State Bar of Michigan provides education, information and analysis about issues of concern through meetings, seminars, the section webpage, public service programs, and publication of a newsletter. Membership in the section is open to all members of the State Bar of Michigan. Statements made on behalf of the section do not necessarily reflect the views of the State Bar of Michigan.

State Law Update

Continued from page 15

is included in the definition of "highway." Since the statute imposes a duty on the City, a claim under the highway exception must allege the remaining elements of negligence (breach, causation, and damages). In determining whether plaintiffs alleged sufficient facts to support this theory, the Court applied the "natural accumulation" doctrine.

Under this doctrine, when a public body fails to remove a natural accumulation of snow and ice from a public highway, it generally may not be deemed negligent. When the accumulation is the result of unnatural causes, however, the public body may be liable for injuries proximately caused by the accumulation. In order to be liable, there must be an "unusual or exceptional" interference with travel on a particular highway that exceeds the inconvenience related to a natural accumulation. The Court found that plaintiffs sufficiently alleged facts that the City's plowing created the unnatural accumulation, which forced them to use the street where the accident occurred. Therefore, summary disposition was not appropriate absent further discovery regarding the reasonableness of the City's efforts to keep the street clear.

Township, City, & County May Not Alter Airport Zoning Plan; No Inverse Condemnation

Frenchtown Charter Twp v City of Monroe, __ Mich App __ (issued March 22, 2007)

A group of landowners submitted a request to the Township to have their property rezoned to single-family residential. The property was located in the Township, adjacent to a City-owned airport. The Township planning commission recommended approving the rezoning, but the County recommended denial, based on an "airport approach plan" approved by the Michigan Aeronautical Commission in 2002. This plan, adopted pursuant to the Airport Zoning Act, classified the property as within "accident safety zone 5," which prohibits residential uses. The Township filed a declaratory action to determine the impact of the airport zoning plan. The landowners filed an inverse condemnation claim against the Township, City, and County, alleging that the airport zoning classification rendered the property economically worthless.

The Court found that the airport approach plan was properly drafted and implemented under the Airport Zoning Act. Accordingly, the applicable zoning enabling acts prohibit local units of government from altering the zoning classifications designated by an airport approach plan. MCL 125.3203(4). Because the regulations were not promulgated by the Township, City, or County, and these municipalities were obligated to comply with them under state law, the landowners were not entitled to any relief from these defendants.

NREPA Allows Citizen Suit Where State Has Not Filed Civil Suit

Cairns v City of East Lansing, __ Mich App __ (issued March 29, 2007)

At issue in this case was the proper interpretation of the word "action" in Part 201 of the Natural Resources and Environmental Protection Act (NREPA). Plaintiffs filed a suit against the City after various residential lots were contaminated by hazardous substances derived from the City's nearby landfill.

Part 201 of the NREPA encourages prompt cleanup of hazardous substances by allowing administrative or private action against the responsible entity. Under MCL 324.20135(3)(b), however, private citizens may only file an action where the "state has not commenced and is not diligently prosecuting an action" under Part 201. The City argued that "action" includes administrative actions, such as the compliance requirements imposed by the MDEQ. Plaintiffs argued that "action" refers specifically to a civil lawsuit in circuit court, which had not been filed at the time of their suit. The Court determined that, when viewed in the context of the statute, "action" refers "only to legal, rather than administrative, proceedings." Therefore, the circuit court erred in holding that it did not have subject-matter jurisdiction over plaintiffs' claims.

ZBA Required to Decide Variance Request Under Proper Section of Zoning Ordinance

Blue Lake Fine Arts Camp v Blue Lake Twp Zoning Bd of Appeals, Mich Ct App unpublished decision (No 265782, issued March 22, 2007)

Blue Lake Township amended its zoning ordinance to create several Forest Recreation-Residential (FRR) districts and a Forest Recreation-Institutional (FRI) district. The amended ordinance prohibited dwellings in the FRI district. Two months after the ordinance was amended, certain landowners applied for a non-use variance to allow them to build homes on undersized property. The applicants and the Zoning Board of Appeals (ZBA) mistakenly assumed, however, that the property was still zoned FRR, when in fact it had been changed to FRI. Because dwellings were prohibited in the FRI district, a use variance was required, not a non-use variance.

The trial court affirmed the ZBA's decision, finding that the ZBA would have granted a use variance, making the issue moot. The Court of Appeals reversed, finding that the trial court should not have speculated about what the ZBA would have done if it had applied the appropriate law. Furthermore, the insufficient factual record did not support the trial court's assumptions. The Court remanded the case to the ZBA to apply the amended zoning ordinance.

Entire Parcel of County Property, Not Just Building, Exempt from Township Zoning Ordinances

Herman v Berrien Co, __ Mich App __ (issued April 26, 2007)

Berrien County owned property in Coloma Charter Township, and selected this property as the site of a law enforcement training facility. The facility included indoor and outdoor firearms training space and associated buildings and parking. Residents of the Township objected to the prospect of outdoor shooting activities and brought an action against the County. Conceding that Supreme Court precedent immunized County *buildings* from township zoning ordinances, plaintiffs insisted that the *activities* were not so immunized.

The Circuit Court granted summary disposition to the County. The Court of Appeals affirmed, holding that when a county exercises its statutory grant of authority under MCL 46.11(b) and (d) to "site" its buildings, the entire property is immune from township zoning ordinances regulating use of the property. The Court relied on an earlier Supreme Court holding that it "is the Legislature's policy determination that when it comes to 'siting' county buildings, counties do not have to comply with any township ordinances. Rather, the county has sole discretion on where to locate its buildings without regard to local use regulation." The Court interpreted this holding to apply to the entire "site," that is, to the entire parcel of land on which a county building exists. As a result, the County's outdoor shooting exercises were immune from the Township's zoning ordinance, even though the actual buildings were put in after the outdoor shooting range was completed.

Actual Prejudice Not Required to Trigger Notice Provision for "Highway Exception"

Rowland v Washtenaw Co Road Comm, 477 Mich 197 (issued May 2, 2007)

In *Rowland v Washtenaw Co Road Comm*, the Supreme Court overruled prior decisions and held that the notice provision of MCL 691.1404(1), which requires potential plaintiffs injured by defective highways to provide notice of the injury to the responsible governmental agency within 120 days, is not subject to an "actual prejudice requirement." The Supreme Court previously held that unless the lack of notice actually prejudiced the governmental agency, the action was not time-barred, despite the 120-day notice requirement in the statute.

In this case, Plaintiff served notice of her injury on the 140th day after the incident and then filed suit under the "highway exception" to governmental immunity. Defendant argued that the past cases requiring actual prejudice were wrongly decided. The trial court and Court of Appeals refused to contravene these prior precedents.

The Supreme Court reversed the decisions of the trial court and Court of Appeals and overruled its own precedent. The Court relied on the "plain language" of the 120-day notice provision. It rejected prior reasoning implicating potential due process or equal protection infirmities. The majority and dissents engaged in a rigorous debate on the propriety of when cases should be overruled, the applicability of *stare decisis*, and the role of the judiciary in statutory interpretation vis-à-vis the Legislature, particularly in the face of "Legislative acquiescence" to judicial holdings the current Court finds wrongly-decided.

Easements By Necessity Are Tied to Uses Contemplated by the Original Grantor, Not Local Zoning Ordinances

Schumacher v Dep't of Natural Resources, __ Mich App __ (issued April 3, 2007)

A series of grants to and from the State in the late 19th and early 20th centuries created a landlocked parcel, which plaintiff eventually acquired. After being denied a permit to clear a trail across State land to reach this parcel, he brought suit against the State, contending that he enjoyed an easement by necessity across the State's parcel.

The trial court first held that while he enjoyed such an easement, it was confined to non-motorized vehicles, since those were the only vehicles that could have been comprehended when the conveyances were originally made. The Court of Appeals reversed, holding that while plaintiff did not enjoy "unfettered access" to the property, he should enjoy an easement in light of "the uses reasonably contemplated by the original grantor . . . considering both anticipated evolutionary change and the isolated, wild condition of both properties. The easement must be limited to what is necessary for reasonable enjoyment of the property, with minimum burden on the servient estate."

On remand, the trial court granted an easement providing for ingress and egress "in the least intensive manner" consistent with local zoning ordinances, along with "access to improve the private road." Defendant appealed, arguing that the trial court linked the nature of easement to local zoning ordinances, instead of the original intent of the grantors, and that the trial court left open the question of the scope of the easement necessary for "reasonable enjoyment of the property," instead of specifying what was appropriate. The Court of Appeals vacated the trial court's opinion on both matters and remanded (again) for further clarification.

Police Union President May Not Disseminate Internal Memo to Union Attorney Without Authorization When Other Mechanisms Exist to Formally Request It

Ingham Co v Fraternal Order of Police, __ Mich App __ (issued April 3, 2007)

The Ingham County Sheriff disseminated a memo requiring all detectives to wear pagers both on and off duty. The

Continued on next page

State Law Update

Continued from page 17

President of the relevant lodge of the Fraternal Order of Police forwarded the memo to the union attorney. The Sheriff's Department charged the President with violating work rules by faxing an internal document to an outside party without prior authorization, and attached a disciplinary note to her file. The union filed a grievance with the Michigan Employment Relations Commission (MERC), accusing the Sheriff of violating the Public Employment Relations Act (PERA). The MERC concluded that the Sheriff infringed on the President's "right to engage in 'concerted activities,'" specifically seeking the opinion of a union attorney as to a condition of employment.

The Court of Appeals reversed the MERC decision, and applied a 3-prong test: (1) whether the employer's action adversely affected the employee's protected right to engage in lawful concerted activities under the PERA; (2) whether the employer met its burden to demonstrate a legitimate and substantial business justification for instituting and applying the rule; (3) balance the diminution of the employees' right because of the rule against the employer's interests protected by the rule.

First, the Sheriff's behavior did not adversely affect the President's ability to engage in protected activities, because she could have told the union attorney about the memo without faxing it to him. The union could have formally requested it and, if denied, filed a FOIA request, which would have provided "appropriate avenues for resolution of disputes." Although cumbersome, the Court found these procedures adequate. Thus, it was not necessary for the President to fax the internal memo to the attorney. The employer also had a very strong interest in being able to count on the security of its internal communications. Even though this particular communication was not directly tied to the security of officers or public safety, the Sheriff has a right to expect that, generally speaking, its internal communications will not be shared publicly. As a result, the Court held that the substantial business justification for the rule outweighed the President's interests in engaging in protected activity in this fashion.

Federal Law Update

By Marcia L. Howe, Johnson Rosati LaBarge Aseltyne & Field PC and Phil Erickson, Michael Bogren, Edward Dubendorf, and B.I. Stanczyk, Plunkett Cooney, PC

United States Supreme Court

Commerce Clause, Interstate Commerce, Solid Waste, Flow Control Ordinances, Public Health, Safety and Welfare

United Haulers Association, Inc v Oneida-Herkimer Solid Waste Management Authority, 550 US ____ (2007)
(US S Ct Case No. 05-1345)

County "flow control" ordinances requiring solid waste haulers to obtain permits to collect and deliver waste to public processing facilities did not discriminate against interstate commerce for purposes of the dormant Commerce Clause. Any burden from ordinances was incidental and outweighed by public benefits, and traditional core governmental function of garbage collection and disposal fell within general responsibility to protect and promote the health, safety and welfare of citizens, thus, justifying different treatment from local laws favoring private rather than public businesses.

Fourth Amendment-Excessive Force-Police Pursuit

Scott v Harris, 127 S Ct 1769 (2007)

Motorist brought § 1983 action against deputy alleging excessive force during a high-speed chase. The deputy struck the motorist in the rear with the patrol vehicle's front bumper to end the chase. The officer's conduct left the motorist a paraplegic. In its ruling favoring the deputy, the Court held an officer's attempt to terminate a dangerous high-speed car chase does not establish liability, even if it places the fleeing motorist at risk of serious injury or death. Proper analysis requires looking at the claim in the light depicted on the officers' patrol vehicle camera.

42 USC 1983, Fourth Amendment, Statute of Limitations (SOL)

Wallace v. Kato, ___ U.S. ___, 127 S. Ct. 1091 (2007)

Although the statute of limitations for a §1983 claim is based on state law, federal law, not state law, decides the accrual date of a §1983 claim. Plaintiff was convicted of murder in 1994 based, primarily, on his confession. He was sentenced to 26 years in prison. On appeal, the Appellate Court of Illinois held that the plaintiff's arrest was without probable cause. In subsequent appeals, decided in 2001, the Court ruled his confession inadmissible. The prosecution dropped all charges against him on April 10, 2002. He filed suit on April 2, 2003 against the City of Chicago and several police officers. The Supreme Court held that his suit was barred by the two year statute of limitations, because the claim accrued not when he was released from prison, but when he was brought before a judicial officer and bound over for trial. The plaintiff had two years from the time a judicial officer found probable cause

to bring suit for his "wrongful" detention that lasted from the time he was arrested without a warrant until the judge made the probable cause determination.

United States Court of Appeals, Sixth Circuit

Fourth Amendment, Fourteenth Amendment, Qualified Immunity

Revis v. Meldrum, ___ F.3d ___, 2007 WL 1146460 (6th Cir. 2007)

While personal property may be levied upon through seizure, a writ of execution for real property is generally levied by formally noting on the writ a legal description of the property and giving notice to the owner and the public that the property is subject to sale. In the underlying case, the plaintiff obtained a money judgment in a sexual harassment lawsuit against her former employer (judgement debtor). The plaintiff subsequently sought and obtained two writs of execution for the judgment debtor's real and personal property to satisfy the judgment. The Sixth Circuit held that the underlying litigation and judgment did not provide constitutionally adequate process for summary eviction. The court noted that eviction has traditionally involved greater procedural safeguards than those related to less severe deprivations. However, the deputy was entitled to qualified immunity, because he acted under a reasonable misapprehension of the law.

First Amendment, Fourth Amendment, Fourteenth Amendment, Qualified Immunity

Center for Bio-Ethical Reform, Inc. v. Springboro, 477 F.3d 807 (6th Cir. 2007)

A pro-life public policy and advocacy group, which engaged in self-described educational programs to promote their cause, was stopped by the police while driving box trucks, which displayed large, colorful pictures depicting graphic images of first-term aborted fetuses. The group alleged that the police made them wait for three hours. The appellate court, viewing the facts in the light most favorable to plaintiffs, could not definitively say that the defendants stopped and detained plaintiffs without regard to their protected expression. The otherwise unobjectionable *Terry* stop ripened into an unconstitutional seizure in light of the undue and unjustifiable length of the stop.

However, with respect to plaintiff's Fourth Amendment claims, the Sixth Circuit ruled that the plaintiffs validly consented to the search of the trucks, the escort vehicle, and their personal belongings. Additionally, the plaintiffs did not allege that the defendants acted with discriminatory animus based on a constitutionally protected classification. The district court's grant of summary judgment on plaintiffs' § 1985(3) conspiracy claim was also affirmed, because the plaintiffs did not allege that the defendants acted with discriminatory animus based on a constitutionally protected classification and did not set forth specific allegations supporting their conspiracy claim. Similarly, the Sixth Circuit affirmed the district court's grant of summary judgment to the municipalities and the federal official on the official capacity claims against them.

First Amendment, 42 U.S.C. 1983, Probable Cause, Qualified Immunity

Leonard v. Robinson, ___ F.3d ___, 2007 WL 283832 (6th Cir. 2007)

An arrest for obscenity, vulgarity, or disturbing the peace, when based upon speech and not conduct, is valid when it occurs during a democratic assembly where there is no evidence that the individual arrested was out of order and some evidence of improper motive by the arresting officer. Citizen sued police officer under §1983, alleging that officer retaliated against him on basis of speech and violated his Fourth Amendment rights by arresting him at township board meeting after he uttered phrase "God damn." No reasonable officer would find that probable cause exists to arrest a recognized speaker at a chaired public assembly based solely on the content of his speech (albeit vigorous or blasphemous) unless and until the speaker is determined to be out of order by the individual chairing the assembly.

Governmental Immunity

Livermore v. Lubelan, ___ F.3d ___, 2007 WL 397000 (6th Cir. 2007)

Mother and personal representative of shooting victim brought federal civil rights and state tort suit challenging officers' use of deadly force during a police standoff. The Sixth Circuit reversed denial of summary judgment in favor of the sergeant and his supervisor. As to the sergeant, the Court held that the sergeant acted reasonably in firing at the suspect. *Dickerson* instructs to disregard these events and to focus on the "split-second judgments" made immediately before the officer used allegedly excessive force. The only force used against deceased during the standoff was the two shots that killed him, and it is undisputed that the only officer to shoot him was the supervisor. Under *Dickerson*, the preceding decisions made by the supervisor are immaterial and not a sufficient basis for a claim under the Fourth Amendment.

Finally, with regard to the state law claim of gross negligence, the Court held that the claim was not viable under Michigan law. Although her complaint was articulated in terms appropriate for a negligence claim (e.g., "failing to un-

Continued on next page

Federal Law Update

Continued from page 19

derstand"), the plaintiff's gross negligence claim against the supervisor was undoubtedly premised on the intentional tort of battery. The Michigan courts have consistently "rejected attempts to transform claims involving elements of intentional torts into claims of gross negligence." Plaintiff's claim of gross negligence against the supervisor is therefore not cognizable under Michigan law, and the district court's denial of defendant's motion for summary judgment with respect to this claim is reversed.

Governmental Immunity

Bouggess v. Mattingly, ____ F.3d ____ (6th Cir. 2007)

Officer was not entitled to qualified immunity in deadly force case. Officer made two decisions: (1) he decided to arrest plaintiff; and (2), after plaintiff broke free, he decided to shoot plaintiff. The question of whether officer's second decision was reasonable was the nub of this case. The relevant time for the purposes of this inquiry is the moment immediately preceding the shooting. The court focused on whether the officer had probable cause to believe that plaintiff posed a serious danger to officer's custody or if he posed an imminent danger of serious physical harm to him or to others. Examining the information available to officer at the time, binding precedent, and viewing the facts in the light most favorable to the plaintiffs, it was clear that officer did not have probable cause sufficient to open fire. Plaintiff's only crimes, so far as officer suspected, were dealing crack and physically resisting arrest. If an officer seeks to arrest someone for dealing crack cocaine and the suspect resists, using his hands, and then flees, the officer cannot legally shoot the suspect. Officers cannot open fire in such circumstances absent more evidence that the suspect poses a danger to officers or to the public.

Rooker-Feldman Doctrine, Habeas Exception to § 1983, Retaliation

Thomas v. Eby, 481 F.3d 434 (6th Cir. 2007)

The *Rooker-Feldman* doctrine did not apply to inmate's complaint of injury resulting from alleged retaliation by a corrections officer. The inmate alleged that the correction officer's retaliation violated his First Amendment rights. The inmate sought to restore "good-time credits" which were forfeited after he received a misconduct conviction. The inmate filed a petition for judicial review of his misconduct conviction in the Ingham County Circuit Court. However, the state court dismissed the inmate's petition because he failed to pay his initial partial filing fee. The Sixth Circuit ruled that the *Rooker-Feldman* doctrine did not apply, because the inmate complained of an injury resulting from alleged retaliation by the corrections officer, not from state court's dismissal of his suit. The court also held that when the relief sought in a § 1983 claim has only a potential effect on the amount of time a prisoner serves, habeas bar does not apply. Thus, the district court's *sua sponte* dismissal of the inmate's complaint was unwarranted.

ADA Discrimination

Macy v. Hopkins County School Bd. of Educ., ___ F.3d ___, 2007 WL 1080370 (6th Cir. 2007)

Physical-education teacher brought suit against county school board alleging that it violated the Americans with Disabilities Act (ADA) and Kentucky Civil Rights Act by firing her because she was disabled and in retaliation for protected activities. The teacher filed a Complaint with the EEOC and the Kentucky Commission on Human Rights, which dismissed her Complaint on the finding of no probable cause. The district court entered summary judgment for school board. The Sixth Circuit held that school board's proffered reason for terminating teacher was a legitimate, nondiscriminatory ground. The court also held that the teacher was collaterally estopped from rebutting school board's legitimate reason for termination.

Age Discrimination, Evidence of Settlement

Stockman v. Oakcrest Dental Center, P.C., 480 F.3d 791 (6th Cir. 2007)

Older dentist sued dental center and dentist that terminated him alleging violation of Age Discrimination in Employment Act and Michigan's Elliott-Larsen Civil Rights Act. The district court ruled that letters between the parties' attorneys, which it had read as an offer of reinstatement in exchange for settlement of the entire action followed by a rejection and counteroffer, were admissible under "another purpose" exception to federal evidentiary rule, FRE 408. The court found that defendants had "opened the door" to inclusion of settlement evidence by offering evidence of plaintiff dentist's failure to mitigate. The Sixth Circuit held that the district court abused its discretion in admitting the settlement offer.

Title VII, Statute of Limitations (SOL)

Leffman v. Sprint Corp., 481 F.3d 428 (6th Cir. 2007)

Former employee brought action against employer alleging that employer violated Title VII by denying her, in calcu-

lating her years of service at the time of her termination, credit for time that she spent on maternity leave. In 1976, plaintiff took maternity leave. At that time Title VII did not contain any language prohibiting discrimination on the basis of pregnancy. Plaintiff was forced to take an unpaid leave of absence instead of paid maternity leave. She was notified on her return to work that this time of three months and three days had been deducted from her accredited service time. Following her termination, the plaintiff filed a charge of discrimination with the EEOC, alleging that any denial of service credit time for the 1976 maternity leave was discriminatory. The district court, on cross motions for summary judgment, found that plaintiff's claim was time-barred. Plaintiff argued, on appeal, the continuing violation doctrine and claimed that *Bazemore v. Friday*, 478 U.S. 385 (1986) supported her position. The Sixth Circuit relied on *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977), and in its conclusion that plaintiff's claims were time barred.

Age Discrimination, FMLA, Counsel's Conduct and Arguments, Privileged Communications

Maday v. Public Libraries of Saginaw, 480 F.3d 815 (6th Cir. 2007)

Former employee brought suit against a public library under federal and state law for age discrimination as well as violations of the Family and Medical Leave Act. The jury found in favor of the library. Plaintiff appealed the jury verdict on the basis of attorney misconduct during the course of trial. Plaintiff claimed that counsel for defendant, in opening statements and closing arguments, disparaged plaintiff's attorney. Plaintiff also claimed that in a conference at the bench during the course of the trial, defense counsel made a claim that plaintiff's counsel had lied and that the jury heard this comment. Plaintiff eventually made a motion for mistrial. The district court, finding that the case involved nothing more than a verbal and non-verbal exchange between trial attorneys, denied the motion. The Sixth Circuit affirmed. The court also ruled that by putting her emotional state at issue, employee waived any psychotherapist-patient privilege that otherwise might have applied to her conversations with a social worker.

Equitable Tolling, Retaliation

Dixon v. Gonzales, 481 F.3d 324 (6th Cir. 2007)

The 45-day limitations period to initiate contact with the Equal Employment Opportunity (EEO) counselor, which is a prerequisite to filing a Title VII claim, is subject to equitable tolling, waiver, and estoppel. The 45-day limitations period is not a jurisdictional requirement. An African-American former agent for the FBI sued the Attorney General, alleging retaliation in violation of Title VII for complaining of racial discrimination. The Sixth Circuit affirmed the district court's ruling on equitable tolling, holding that the equitable tolling doctrine does not delay the start of the limitations clock, but rather halts its ticking after the claim had accrued. The court cited the fact that the plaintiff did not become aware of the fact that he was not reinstated until two years after the FBI made its decision.

The Sixth Circuit did not follow the district court's rationale, but held that the circumstances were beyond plaintiff's control due to the lack of any response by the FBI to his FOIA request that triggered the equitable tolling. On the issue of whether or not plaintiff made out a *prima facia* case, the court found that the plaintiff had failed to establish the causation element of his *prima facia* case, because he had not proffered sufficient evidence to raise the inference that his supervisor's negative recommendation caused the denial of his reinstatement, or that it was even retaliatory in nature.

Subject Matter Jurisdiction

Village of Oakwood v. State Bank and Trust Co., 481 F.3d 364 (6th Cir. 2007)

Intervention by the Federal Deposit Insurance Corporation (FDIC) in a suit between nondiverse parties raising only state law claims cannot create federal jurisdiction, because the FDIC was not a party in state court prior to removal. The only exception to this general rule is where the intervening party brings separate claims, and the district court has an independent basis to exercise jurisdiction over those claims. The Sixth Circuit noted that its holding directly conflicts with the Fifth Circuit's holding that "the FDIC's attempt to intervene conferred on it sufficient 'party' status to bring this case within the federal court's jurisdiction under § 1819(b)(2)(A)." *Heaton v. Monogram Credit Card Bank*, 2975 F.3d 416, 426 (5th Cir. 2002).

Discretionary Jurisdiction

Adrian Energy Associates v. MPSC, 481 F.3d 414, 2007 (6th Cir. 2007)

District courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit otherwise satisfies subject matter jurisdictional prerequisites. Initially, eight small, non-utility, power companies requested that the Michigan Public Service Commission (MPSC) determine whether the utility was properly construing the contracts and paying the plaintiffs the correct amount. Subsequently, the small, non-utility, power companies brought a diversity action against the MPSC seeking declaratory and injunctive relief regarding the MPSC's order concerning the power purchase agreements. The utility

Continued on next page

Federal Law Update

Continued from page 21

company intervened. The only issue to be decided on appeal was whether the district court properly declined to exercise its discretionary jurisdiction under the Declaratory Judgment Act. The Sixth Circuit ruled that rather than dismissing the complaint without prejudice, the district court should have stayed the plaintiffs' claims until the conclusion of the state court proceedings.

Defamation

Nichols v. Moore, 477 F.3d 396 (6th Cir. 2007)

James Nichols filed a federal lawsuit, based on diversity of citizenship, against documentary film producer, Michael Moore, alleging that Moore defamed him in his movie, *Bowling for Columbine*. Nichols asserted that a narration in the movie defamed him because it falsely stated that he made practice bombs before the Oklahoma City bombing and because the narration falsely implied that he was arrested and charged in connection to the Oklahoma City bombing. The Sixth Circuit affirmed the district court's order, dismissing Nichols' complaint, because the statements regarding Nichols in *Bowling for Columbine* were substantially true and because Nichols was a limited public figure and did not satisfy the *New York Times v. Sullivan* standard of "actual malice."

Federal District Court–Eastern District

Substantive Due Process, Evidence of Custom Policy and Practice, Certificate of Occupancy

Door v City of Ecorse, 2007 WL 1308684 (ED Mich 2007)

Owner of non-conforming residence presented sufficient evidence to support jury's finding of violation of owner's substantive due process rights based on City's custom, policy or practice of strict enforcement of zoning code used to deny owner a certificate of occupancy. Plaintiff also presented sufficient evidence of Mayor's malicious intent to retaliate against owner to support jury's finding of punitive damages award.

Procedural Due Process, Substantive Due Process, Equal Protection, Fundamental Rights

Chupa v Moceri, 2007 WL 1059113 (ED Mich 2007)

Plaintiff attorneys filed suit claiming city and individual officials unlawfully obstructed payment for court-appointed criminal case work and interfered with rezoning requests as retaliation for comments regarding city's ethics policy by plaintiffs' father who was also a city councilman. Although plaintiffs had protected property interest in payments for court-appointed work, court summarily dismissed procedural due process claim on basis that plaintiffs failed to pursue other available processes. Plaintiff failed to establish any fundamental right on which to assert their substantive due process claim, and City's discussion of legitimate concerns regarding public health, safety and welfare regarding rezoning petitions and good faith interpretation of anti-nepotism policy were not unreasonable, arbitrary or capricious. Court also summarily dismissed plaintiffs' equal protection claim for lack of a fundamental property interest and failure to establish membership in a suspect class.

Property Interest, Procedural Due Process, Collateral Estoppel

Kircher v City of Ypsilanti, 2007 WL 1343705 (ED Mich 2007)

City determined rental property lacked certificate of compliance and was unfit for human occupancy, evacuated occupants and secured property against unauthorized access by boarding it up and terminating water services, and plaintiff asserted Section 1983 claims for violation of Fourth Amendment and procedural due process rights. Court held plaintiff was collaterally estopped from asserting Fourth Amendment claim due to conviction for violation of city ordinances. Court found plaintiff lacked property interest in rental occupancy of the premises or in continuing water services, but Court found plaintiff had property interest in the property itself, therefore, court denied city's motion for summary judgment without prejudice to allow discovery on fact issues regarding process afforded to plaintiff, qualified immunity and municipal liability.

First Amendment Retaliation, Due Process

Lawrence-Webster v City of Saginaw, 2007 WL 1287960 (ED Mich)

Former City treasurer and financial director brought First Amendment retaliation and Due Process claims against the City. Ruling on the City's motion for reconsideration, the Court found no palpable defect as to the plaintiff's First Amendment claim. Applying *Garcetti v Ceballos*, -- US --; 126 S Ct 1951, 1960 (2006), the Court held that plaintiff spoke at the city council meeting on her own initiative and not pursuant to her official duties; there was no evidence that her supervisor directed or approved of her attendance. With respect to plaintiff's due process claim, the Court found that under

McClain v Northwest Community Corr. Center Judicial Corr. Bd, 440 F3d 320 (CA 6, 2006), plaintiff, as an at-will employee subject to discretionary termination by the city manager, was not entitled to federal due process rights even though defendant disregarded certain procedural protections against loss of employment.

PWDCRA, Wrongful Discharge, Due Process

Howart v Byron Area School District, 2007 WL 1174885 (ED Mich)

Plaintiff, a former bus driver, brought PWDCRA, wrongful discharge, and due process claims against defendants claiming that they wrongfully terminated her because she has muscular dystrophy. The Court denied defendants' motion for summary disposition as to the PWDCRA claim, finding a factual dispute as to whether defendants knew about her condition or premised her termination on that basis. There was evidence of workplace rumors that her condition affected her driving, and one of the supervisors had expressed concern about the rumors. The Court also found a genuine issue as to whether plaintiff was treated differently than other frequently absent bus drivers by being required to provide a doctor's excuse for future absences. The Court upheld the defendants' motion as to wrongful discharge, finding no express or implied agreement providing for a graduated disciplinary process. Plaintiff's due process claim failed because, as an at-will public employee, she had no property interest in employment.

Fourth Amendment-False Arrest-Excessive Force-Interfering with Police

Houston v Buffa, 2007 WL 1005715 (ED Mich)

District court dismissed plaintiff's claim alleging false arrest due to jury verdict in state criminal proceedings. Plaintiff's guilty verdict on the charge of interfering with police indicated the jury accepted the officers' versions of the incident; thereby, precluding any subsequent civil claim alleging the officers' acted in an unlawful manner and/or utilized unreasonable force. To allow claim would invalidate state court conviction and violate the Supreme Court's ruling in *Heck v Humphrey*, 512 US 477 (1994).

Federal District Court–Western District

Intervention

New Par v. Lake Township, 2007 WL 128944 (W.D. Mich. 2007)

A property owner that owned real property adjacent to the site of a proposed wireless tower sought to intervene in a lawsuit, which was brought by Verizon Wireless against the municipality. Verizon alleged that the municipality denied Verizon's application to build a wireless telecommunications tower in violation of procedural due process and the Telecommunications Act of 1996. The district court denied the property owner's motion to intervene, because the motion was untimely, the property owner did not have a substantial legal interest in the lawsuit, and the municipality adequately represented her interests in the lawsuit.

Governmental Immunity, Mandamus

Waldron v. Lifecare Centers of America, 2007 WL 851662 (W.D. Mich. 2007)

In order to state a claim under Whistleblowers' Protection Act, the plaintiff must complain of conduct that, if true, would violate an actual law. Plaintiff admitted that destroying incident reports, which are stored electronically, is not a violation of a Michigan statute or regulation, nor is "leaving a gap" in a medical record to insert information later.

Spread the news!

Back issues of the *Quarterly* can be found at

http://www.michbar.org/publiccorp/quarterly.cfm


9th Annual
Summer Educational
Conference
June 22-23, 2007
Grand Hotel, Mackinac Island
Presented by
Michigan Association of Municipal
Attorneys and
Public Corporation
Law Section
See page 12 for details.

City of Mt. Pleasant vs. State Tax Commission

The final chapter in a tale of two cities

By Richard J. Figura, Simen, Figura & Parker, P.L.C.

With apologies to Charles Dickens, I view the decision of the Michigan Supreme Court in *City of Mt. Pleasant vs. State Tax Commission*, 477 Mich 50, 729 NW2d 833, decided March 28, 2007, as the long-awaited final chapter in a property tax version of *A Tale of Two Cities*. The two cities are Mt. Pleasant and Traverse City, both of whom are now the nameplates for two key decisions regarding the exemption of municipally-owned property under MCL 211.7m. The Traverse City case is *Traverse City vs. Township of East Bay*, 190 Mich 327 (1916). At 91 years old, it is the learned elder statesman while *Mt. Pleasant* is the brash new kid on the block. Together, however, they define what constitutes use of property for purposes of an exemption under MCL 211.7m. But, first, some background.

> " . . . they define what constitutes use of property for purposes of an exemption under MCL 211.7m."

Numerous municipalities throughout the state have acquired land in one manner or another. Oftentimes that land is acquired through the tax reversion process. On occasion the property is donated to the municipality. But more often than not, municipalities acquire land in an attempt to place that land in the hands of developers to increase the community's tax base, create jobs and, overall, enhance economic development in the municipality. The land may be acquired as part of a blight clearance project and at other times it is acquired simply as part of a concerted plan to stimulate development.

When municipalities engaged in such activities, the land acquired was usually considered to be exempt from *ad valorem* property taxation under section 7m of the General Property Tax Act [MCL 211.7m] which provides that, "Property owned . . . by a county, township, city, village, or school district used for public purposes . . .is exempt from taxation under this act." Wayne County, for example, starting in the late 1990s, acquired numerous acres of property near Metropolitan Airport for the purpose of transferring that land to other private owners for development of a 1300-acre business and technology park with a conference center, hotel accommodations, and a recreational facility, the entire development to be known as the Pinnacle Project. That property was exempt under MCL 211.7m while owned by the county for that purpose.

The City of Mt. Pleasant had its own land acquisition project designed to increase its tax base, create jobs, and spur economic development in the City. In 1990, the City embarked upon a project generally referred to as "Project 2000." It purchased and then annexed approximately 320 acres of vacant land adjacent to its boundaries. The City purchased this land for two primary reasons: 1) to extend streets to connect with a proposed ring road system around the community; and 2) to have sufficient land for new development to expand its tax base.

After it acquired the property and laid out the streets, the City platted, marketed, developed, and sold the property to various developers, investors, or governmental agencies. By 2002, the City's efforts resulted in five subdivisions, one condominium development, three apartment developments, a soccer field and park, a county emergency center, a state police post, a 138-acre industrial park, an optometrist's office, and three commercial uses. When the City first acquired the property it was listed as exempt pursuant to MCL 211.7m.

Things changed in 1993 after the City had platted two subdivisions on part of the acquired property. Upon the advice of the Michigan State Tax Commission (STC) the city assessor placed the subdivisions on the 1993 tax roll. After the assessor's decision was upheld by the board of review, the City appealed the taxable status of the property to the Michigan Tax Tribunal.

Another appeal to the Tax Tribunal was filed by the City when the city assessor, again acting at the direction of the STC, placed 35 residential parcels on the 1996 tax roll.

The Tax Tribunal held those three cases in abeyance pending a determination by the STC as to whether additional properties owned by the City should be placed on the assessment roll pursuant to the provisions of section 154 of the General Property Tax Act (MCL 211.154). That provision allows the STC to add property to the tax rolls for the current year and two previous years when it finds that such property has been incorrectly "omitted" from such tax roll. The STC decided that the remaining parcels acquired by and still owned by the City should be taxable and directed the city assessor to place

City of Mt. Pleasant . . .
Continued from page 25

those properties on the tax rolls. Those decisions were also appealed to the Tax Tribunal in four new petitions.

The seven cases were consolidated and heard by the Tax Tribunal on September 26, 2002 when the matter was submitted on stipulated exhibits and the testimony of the city assessor and the city manager.

Following the submission of post-hearing briefs, the Tax Tribunal, on October 31, 2003, issued its Opinion and Judgment. It decided that the City's ownership and use of the subject property was not "presently used for a public purpose" as required by *City of Traverse City v. Township of East Bay*, 190 Mich 327 (1916) and, therefore, was not entitled to an exemption under MCL 211.7m.

After its Motion for Reconsideration was denied, the City appealed the Tax Tribunal's decision to the Court of Appeals. On June 21, 2005, the Court of Appeals affirmed the tax tribunal's decision. *City of Mt. Pleasant vs. State Tax Commission*, 267 Mich App 1 (2005).

It is worth noting that prior to the filing of the STC's brief in the Court of Appeals, the Michigan Supreme Court issued its decision in *Wayne County v. Hathcock*, 471 Mich 445 (2004) which held that a public body can only exercise the power of eminent domain to acquire property for a public use. In so holding, however, the Supreme Court specifically acknowledged that the activities of Wayne County in acquiring land for the Pinnacle Project in an effort to increase its tax base and create jobs was a public purpose.

In its reply brief and in its oral argument, the City argued that since *Hathcock* clearly acknowledged that such land acquisition activities constituted a public purpose, the City of Mt. Pleasant was using the acquired land for a public purpose and, therefore, the property should be exempt. In its decision, however, citing *Hathcock*, the Court of Appeals stated, "It is true that economic development is a public purpose," but it also cited *Traverse City* for the proposition that, "If a public purpose use is a prospective use rather than a present use, it will not be tax exempt." The Court of Appeals decided that, while the City's activities with respect to the subject property were for a public purpose, those activities did not constitute a "use." It said, "Because the property here was not actively, actually used by petitioner, we conclude that the tribunal did not make an error of law or apply a wrong legal principle in holding that petitioner's land was not exempt from ad valorem taxes while being marketed to private users." *Mt. Pleasant*, 267 Mich App 5

The Supreme Court granted leave to appeal and heard oral arguments in October, 2006. On March 28, 2007, the Court issued its decision reversing the Court of Appeals and remanding the case to the Tax Tribunal for entry of a judgment in favor of the City.

The Supreme Court cited its decision in *Hathcock* to hold that "economic development constitutes a 'public purpose.'" As stated by the Court on pages 4 and 5 of its opinion:

> "This Court stated that creating jobs for Michigan's citizens and stimulating private investment and redevelopment to ensure a healthy and growing tax base are examples of goals that advance a public purpose. Drawing commerce to an area promotes prosperity and the general welfare. While these goals did not meet the narrow constitutional requirements at issue in *Hathcock*, the definition of what constitutes a 'public purpose' does not change merely because this Court is reviewing the phrase in the context of developing property under MCL 211.7m as opposed to condemning property."

After deciding that the City's activities were for a public purpose, the Court considered whether those activities constituted a "use" of the property. In doing so, it said on page 7 of its opinion:

> "In this case the city conducted numerous activities that lead to the conclusion that the city 'used' the land for a public purpose. The city engaged in a number of activities, such as expanding and installing streets and public utilities, to indicate that it purposefully moved toward implementation of its development plan for the land and did not delay in reasonable activities to prepare the land to attract economic development that would create jobs, stimulate investments, and ensure a sound and growing tax base. The reality of economic development is that acquiring and improving land for resale is not done in a day. It takes time to assemble and prepare land. Consequently, the city's ongoing actions in annexing, assembling, marketing, and preparing the land for resale to attract economic development indicate that the land was indeed 'used for public purposes.'"

The Court distinguished the *Mt. Pleasant* case from *Traverse City* by pointing out that in *Traverse City* the land was not being held as part of any plan. The land there was undeveloped and no attempts were made or contemplated to change that condition. A city commissioner had testified at trial that while the land could be used in the future, there was no plan to do so, and there was no time line when the land might be used. The

Mt. Pleasant Court said, at page 8 of its opinion, "The land in *Traverse City* was being held for pure speculation—there was not even a vague plan regarding when or if the land would be used in the future."

The Court went on to detail the fact that the City of Mt. Pleasant had a plan for acquiring the property, annexing it, seeking proposals for its development and then followed its plan and "purposefully moved toward implementation of its plan by actively improving the land for resale." (*Mt. Pleasant*, p. 9) The Court found that, "The city's efforts with regard to the land indicate its active and purposeful engagement in using the land for the public purpose of economic development." (*Mt. Pleasant*, p. 11)

It is significant that the Supreme Court in *Mt. Pleasant* did not overrule *Traverse City*. Therefore, it is still the law that merely owning land without making any use of it will not qualify a municipality for an exemption under MCL 211.7m. What the Court has done in *Mt. Pleasant* is clarify that the "use" required does not have to be a specific ultimate use of the property, but rather the acquisition, assemblage, development and marketing of the property for an ultimate user is, in and of itself, a "use" for purposes of the exemption, and where that "use" is for economic development purposes, it constitutes a use for public purposes.

Constitution Hall is New Home for Michigan Legal Milestone Plaque

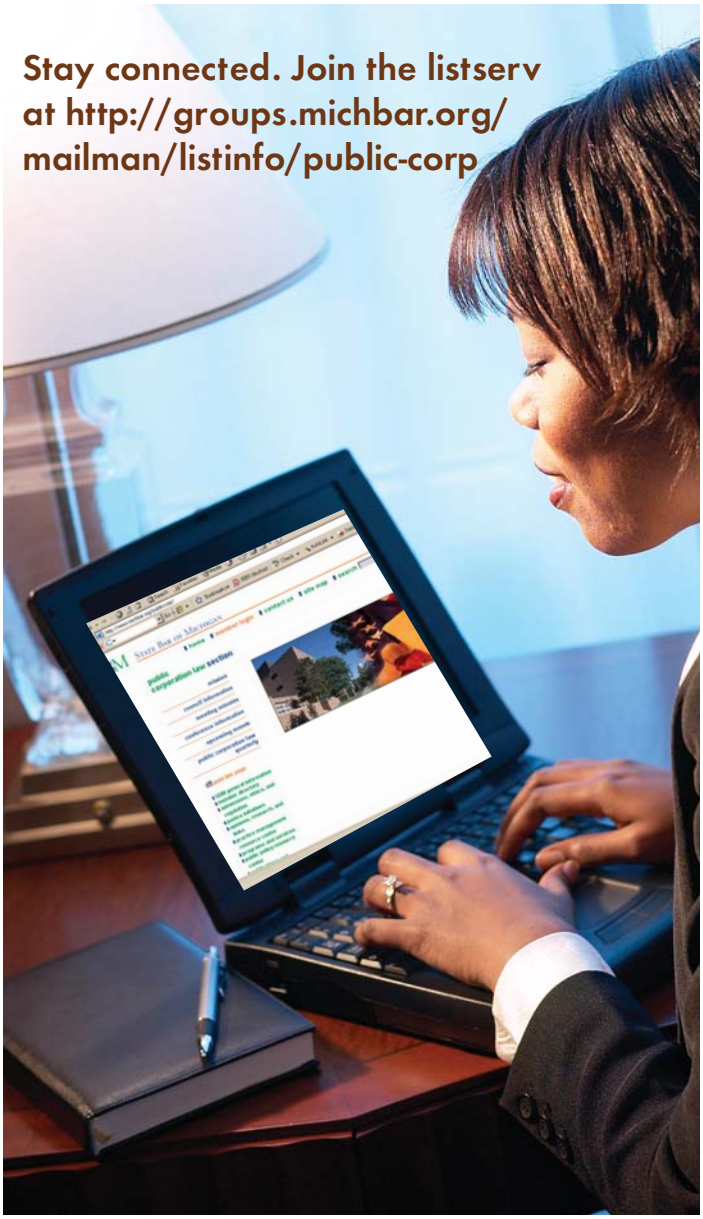
The State Bar of Michigan will rededicate a plaque Friday, June 15, commemorating the convention of 1961-62 that resulted in our state's constitution. The bronze marker's new home will be Constitution Hall, located at 525 West Allegan Street in Lansing.

The Michigan Legal Milestone plaque was first dedicated in 1989 at the Lansing Civic Arena at the corner of Walnut and Washtenaw streets where the constitution was written. That building has since been demolished.

Kimberly M. Cahill, the State Bar president, will serve as master of ceremonies at the rededication. Other speakers include Robert A. Sedler, distinguished professor of law at Wayne State University, Eugene G. Wanger, a Lansing-area attorney, and Hon. Richard D. Ball, the incoming president of the Ingham County Bar Association.

The event will begin at 3 p.m. in the Constitution Hall atrium. Light refreshments will be served. To attend, please RSVP to Joyce Nordeen at (517) 346-6373 or e-mail jnordeen@mail.michbar.org. Space is limited. For parking information please visit *http://www.deq.state.mi.us/documents/deq-exec-mapch.pdf*.

The SBM Public Outreach Committee chaired by Miles Postema undertakes plaque placement to commemorate important events in Michigan's rich legal history through its Legal Milestones program. To date, 31 milestones have been placed throughout the state. Visit *http://www.michbar.org/programs/milestones.cfm* for more information on these milestones.



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:

Bills Passed by the Senate and the House

- Plant Rehabilitation. **SB 400** Modifies definition of industrial property in plant rehabilitation act. Amends section 2 of 1974 PA 198 (MCL 207.552).

Bills Passed by the Senate

- Water Tax Authority. **SB 47** Provides for establishment of water improvement tax increment finance authorities.
- City Fund Contribution. **SB 53** Provides for state income tax check off for contribution to city funds. Amends 1964 PA 284 (MCL 141.501 - 141.787) by adding section 10 to chapter 1 and section 36 to chapter 2.
- Road Funding Task Force. **SB 59** Creates alternative road funding task force. Amends 1951 PA 51 (MCL 247.651 - 247.675) by adding section 9c.
- Neighborhood Improvement Tax. **SB 69** Provides for tax increment financing for neighborhood improvement authorities.
- Planning Commission. **SB 115** Provides for phased transfer of powers and duties to joint planning commission. Amends sections 5 and 7 of 2003 PA 226 (MCL 125.135 and 125.137).
- Land Use Planning. **SB 206** Provides for consolidation of land use planning laws.
- Property Tax Appeals. **SB 209** Provides for alternative start dates for board of review. Amends section 53b of 1893 PA 206 (MCL 211.53b).
- Volunteer Emergency Vehicles. **SB 265** Regulates emergency lights on vehicles of volunteer members of emergency management units. Amends sections 2 and 698 of 1949 PA 300 (MCL 257.2 and 257.698).
- Social Security. **SB 298, SB 299, 300, 301, 303** Requires that Social Security numbers be redacted from documents submitted to register of deed unless otherwise required. Amends section 1 of 1836 PA 25 (MCL 565.581), section 1 of 1937 PA 103 (MCL 565.201), section 1 of 1867 PA 20 (MCL 565.491), section 1 of 1873 PA 5 (MCL 565.401), section 2 of 1915 PA 123 (MCL 565.452) and section 1 of 1875 PA 54 (MCL 565.551).
- Plant Rehabilitation. **SB 345** Modifies plant rehabilitation eligibility requirements. Amends section 9 of 1974 PA 198 (MCL 207.559).
- Local Projects. **SB 360** Extends the deadline for projects eligible for funding through local match grant programs. Amends sections 11e and 11f of 1951 PA 51 (MCL 247.661e and 247.661f).

Bills Passed by the House

- Landfill Moratorium. **HB 4047** Provides a moratorium until 2012 on construction of new landfills and limits on expansions of existing landfills. Amends 1994 PA 451 (MCL 324.101 - 324.90106) by adding section 1511c and repeals section 11511c of 1994 PA 451 (MCL 324.11511c).
- Elected County Executive. **HB 4068** Clarifies procedure for filling county executive vacancy. Amends section 9 of 1973 PA 139 (MCL 45.559).
- Convention and Tourism Promotion. **HB 4261** Creates the Convention and Tourism Promotion Act.
- Delinquent Taxpayers. **HB 4271** Creates a disclosure program to allow names of major delinquent taxpayers to be published. Amends section 28 of 1941 PA 122 (MCL 205.28) and adds section 3b.
- Off-Road Vehicles. **HB 4323** Allows local jurisdictions to approve and create a fund for enforcement and environmental remediation of operation of off-road vehicles on road shoulders. Amends sections 81129, 81131 and 81133 of 1994 PA 451 (MCL 324.81129 et seq.).
- Acceleration of Tax Tribunal Process. **HB 4433, HB 4434, HB 4435, HB 4436, HB 4437** Lessens Tax Tribunal's caseload, reduce Tax Tribunal costs and help citizens get their cases solved more quickly. Amends sections 3, 31 and 32 of 1973 PA 186 (MCL 205.703 et seq.) and adds section 47.
- School Board Election Consolidation. **HB 4506, HB 4507** Requires school board elections to be held in November. Amends sections 4, 5 and 614 of 1976 PA 451 (MCL 380.4 et seq.). Amends sections 302 and 644g of 1954 PA 116 (MCL 168.302 & 168.644g) and adds section 642c.
- MI Deal Purchasing. **HB 4588** Allows local government purchasing in Department of Management and Budget's MI Deal Plan. Amends section 263 of 1984 PA 431 (MCL 18.1263).

Bills Introduced in the Senate

- Police Immunity. **SB 88** Provides immunity for police officers for injuries caused while rendering assistance outside of jurisdiction. Amends section 7 of 1964 PA 170 (MCL 691.1407)
- Pop-Up Tax. **SB 363** Excludes increased taxable value of property due to transfer of ownership from the millage reduction fraction calculation. Amends section 34d of 1893 PA 206 (MCL 211.34d).
- Economic Development. **SB 364** Modifies corridor improvement authority act. Amends sections 2, 5, 6, 9, 18, 20, 22, 23 and 27 of 2005 PA 280 (MCL 125.2872 et seq.).
- Sinking Funds. **SB 367** Revises requirements for ballot language for school district sinking funds. Amends 1976 PA 451 (MCL 380.1 - 380.1852) by adding section 1212a.
- County Funds Transfer Authorization. **SB 368** Requires notarized signatures on an order authorizing the transfer of county funds over a certain amount. Amends RS 14, 1846 (MCL 48.35 to 48.48) by adding section 40a.
- Police/Fire Residency. **SB 381** Modifies residency provisions for local police and fire department employees. Repeals 1999 PA 212 (MCL 15.601 - 15.603).
- County Road Commission. **SB 390, SB 391** Provides for four-year terms for members of county road commissions. Amends section 264 of 1954 PA 116 (MCL 168.264) and amends sections 6 and 7, Chapter IV of 1909 PA 283 (MCL 224.6 and 224.7).
- Emergency Telephone Fee. **SB 410** Modifies funding system for emergency telephone service enabling act. Amends title and sections 101, 102, 201, 202, 203, 205, 301, 302, 303, 306, 307, 308, 312, 319, 320 and 401 of 1986 PA 32 (MCL 484.1101 et seq.) and adds sections 401a, 401b and 401c.
- Emergency Telephone Fee. **SB 411** Modifies funding system for emergency telephone service enabling act. Amends sections 402, 403, 404, 405, 406, 407, 408, 410, 412, 413, 502, 504, 506, 601, 602, 605, 712, 714, 716 and 717 of 1986 PA 32 (MCL 484.1402 et seq.) and repeals several sections.
- Local Government Health Care Benefits. **SB 418, SB 419, SB 420, SB 421** Provides for municipal employee, optical, and dental benefits in accordance with public.
- Historic Neighborhoods. **SB 467** Revises historic neighborhood tax increment financing authority. Amends sections. 2, 3, 15, 19, 20, 21 and 22 of 2004 PA 530 (MCL 125.2842 et seq.) and repeals sections 11, 12, 14 and 23 of 2004 PA 530 (MCL 125.2811 et seq.).
- Unpaved Road Speed Limits. **SB 468** Revises procedures for establishing speed limits for county gravel roads.
- County Fines. **SB 470** Allows charter counties to establish limit on fines. Amends section 15a of 1966 PA 293 (MCL 45.515a).

Bills Introduced in the House of Representatives

- Delinquent Taxes. **HB 4286** Modifies delinquent tax notice and redemption process. Amends sections 1a, 59, 78b, 78c, 78f, 78g, 78i and 78k of 1893 PA 206 (MCL 211.1a et seq.).
- County Multiyear Plans. **HB 4310** Requires township review of county multiyear plans.
- Private Competition. **HB 4398** Requires financial disclosure for public entities with private competition for public services.
- Library Districts. **HB 4421** Expands the levying of taxes for libraries districts to include nonallocated county taxes to pay principal and interest. Amends section 8, 1988 PA 265 (MCL 397.288) as amended by 1989 PA 25.
- Public Road Marinas. **HB 4463** Requires issuance of permit to operate a marina at a public road under certain circumstances. Amends section 30106 of 1994 PA 451 (MCL 324.30106) and adds section 30106a.
- Lake or Stream Roadway. **HB 4464** Clarifies intention of a plat donation of a road, street or alley terminating at a lake or stream contiguous to a shoreline. Amends section 253 of 1967 PA 288 (MCL 560.253).
- Local Match Grant. **HB 4478** Extends deadline for transportation projects eligible for funding through local match grant programs. Amends sections 11e and 11f of 1951 PA 51 (MCL 247.661e and 247.661f).
- Inclusionary Zoning. **HB 4479** Creates an inclusionary zoning act.
- Marriage Fees. **HB 4488, HB 4489** Allows county board of commissioners to determine fees for marriages performed by district judges or magistrates.
- Pop-Up Tax Phase-In. **HJR J** Provides for three-year adjustment to taxable value of property when ownership is transferred.
- Township Revolving Fund. **HB 4565** Increases interest rate on township improvement revolving funds . Amends section 15a of 1954 PA 188 (MCL 41.735a).
- Pop-Up Tax Phase-In. **HB 4567** Implements three-year adjustment to increase taxable property value when ownership is transferred. Amends section 27a of 1893 PA 206 (MCL 211.27a).
- Golf Course Liquor License. **HB 4572** Provides a population requirement allowing tavern licensees for publicly-owned golf courses. Amends section 515 of 1998 PA 58 (MCL 436.1515).

Continued on the next page

Legislative Update
Continued from page 25

- Storm Water Permit Waiver. **HB 4574** Provides waiver of permits for municipal separate storm water sewer systems. Amends section 3112 of 1994 PA 451 (MCL 324.3112).
- County Copy Fee Increase. **HB 4582** Increases fee to copy materials issued by local register of deeds. Amends section 2567 of 1961 PA 236 (MCL 600.2567).
- Assessment Roll Assistance. **HB 4589** Provides for assistance by State Tax Commission of preparation of local assessment roll. Amends section 24 of 1893 PA 206 (MCL 211.24).
- Drain Commissioner. **HB 4641** Authorizes the county board of commissioners to change the name of the office of county drain commissioner to office of the water resources commissioner and increases the amount of the bond. Amends section 21 of 1956 PA 40 (MCL 280.21).
- Drain Visibility. **HB 4642** Provides for definition of the term "visibility of existence" in the drain code. Amends section 6 of 1956 PA 40 (MCL 280.6).
- Drainage District. **HB 4643** Clarifies liability for certain legal expenses of a drainage district. Amends section 247 of 1956 PA 40 (MCL 280.247).
- Drain Obstructions. **HB 4644** Increases enforcement power for removing obstructions or interferences with drains. Amends section 421 of 1956 PA 40 (MCL 280.421).
- Election Recounts. **HB 4669** Increases deposit to conduct election recounts; provides for payment of actual costs when fraud or mistake is not found. Amends sections 867 and 881 of 1954 PA 116 (MCL 168.867 and 168.881).
- Property Tax Officers. **HB 4686** Provides for the Department of Labor and Economic Growth to prepare and give examinations for property tax assessing officers. Amends sections 10c and 10d of 1893 PA 206 (MCL 211.10c and 211.10d).
- Drain Maintenance. **HB 4688** Increases the amount that a drain commissioner can spend on maintenance of a drain. Amends section 196 of 1956 PA 40 (MCL 280.196).
- Border Ren Zone. **HB 4709** Provides for the designation of a border crossing renaissance zone. Amends section 8a of 1996 PA 376 (MCL 125.2688a).
- Neighborhood Enterprise Zone. **HB 4710** Expands the eligibility of neighborhood enterprise zones.
- Brownfield Redevelopment Authorities. **HB 4711, 4712, 4713** Provides for a significant expansion of brownfield redevelopment authority powers and areas where they can be incorporated.
- Emergency Telephone Service. **HB 4726** Provides for amendments to the emergency telephone service enabling act. Amends section 102 of 1986 PA 32 (MCL 484.1102) and adds section 408a.
- Rural Township Consolidation. **HB 4780** Creates the rural township services consolidation act.
- Township Consolidation Reference. **HB 4781, 4782, 4783, 4784, 4786, 4788** Provides for various references to the township services consolidation act in the various other statutes to implement the township services consolidation act.
- Pension Benefits. **HB 4800, HB 4801, HB 4802** Requires freeze of employee retirement benefits of reemployed of retired government employees while reemployed and implements an income tax on certain pension benefits.
- Local Government Health Plans. **HB 4804** Provides for participation in state health plan by local governments for their employees.
- Government Health Plans. **HB 4805** Provides limitations on the health benefits of public employees and officers of the state.
- Municipal Retirement. **HB 4807** Modifies municipal employees retirement health system.
- Municipal Health Care Benefits. **HB 4809** Limits certain public employees and officers health benefits.

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

"Animal Comforts, or Pigs is Pigs"

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 MCL 750.51 makes it a misdemeanor to confine animals on railroad cars without providing them with certain creature comforts, including "proper space and opportunity for rest."

The statute prohibits a railroad company, when transporting animals, from confining them in cars for a period in excess of 36 hours without unloading them *"for rest, water, and feeding, for a period of at least 5 consecutive hours."* In estimating the time of confinement, the railroad company must include the time the animals have been confined without rest *"on connecting roads from which they are received."* Obviously, the drafter of the legislation never spent 40 hours packed in a car with 5 other students trying to get to Mexico on spring break.

When the animals are unloaded for their 5-hour resting period, the statute provides that they *"shall be properly fed, watered, and sheltered,"* and the owner of the animals is the person responsible for the cost of providing these comforts. The statute gives the railroad company a lien on the animals *"for food, care and custody furnished."* Any railroad company, owner or custodian who fails to provide these basic comforts *"shall, for each and every such offense, be liable for, and forfeit, and pay a penalty of not less than 100 dollars nor more than 500 dollars."* Presumably, the fine is for the total offense regardless of how many animals are involved, but imagine the cost if it were assessed per animal.

As with all laws, there is an exception. The penalties do not apply if the railroad company is *"prevented from so unloading by storm, or other accidental causes."* Likewise, there is no duty to unload the animals for rest when they are *"carried in cars in which they can and do have proper food, water, space and opportunity for rest."* Just how much rest does any animal need if it has been standing still, lying down, or whatever, for 36 hours? Isn't that enough rest? And how much space is proper for, say, 30 head of cattle? And what if there is enough space when they are loaded, but newborns appear along the way causing a crowded situation?

All of which reminds me of a story which was a favorite of my young children many years ago—*Pigs is Pigs*. The story involved a man who went to the train station to pick up a crate of two guinea pigs he had ordered, but the station clerk would not release them to him until he paid the proper freight charge. The station clerk couldn't find guinea pigs in his rate book and insisted on charging the rate for a regular pig – 30 cents each. After all, he said, "Pigs is pigs." The guinea pigs' owner objected to the higher rate, and argued that the guinea pigs were to be charged as "pets, domestic, if properly boxed—25 cents each."

They argued, and argued, and argued some more, the clerk continuously chanting, "Pigs is pigs!" Unable to resolve the dispute, the customer went home empty handed, but wrote to the company. The company's headquarters were abuzz for many weeks as they researched the proper rate to charge. They wrote back and forth to the station clerk who advised them that there weren't just two guinea pigs. There were now eight, and later 16, and on and on. Finally, the audit department decided that the clerk should just charge the customer 50 cents and deliver the guinea pigs to him. He tried to do that, but the customer had moved so he was advised to simply send all of the pigs to the main officer – and he did – and what a surprise for the main office as cases of guinea pigs arrived there each day – several hundred cases before it was over.

The story is a classic and was written by Ellis Charles Butler. It is a favorite of children of all ages and can be found at: http://www.ellisparkerbutler.info/epb/pigsispigs_html.asp.

SBM

State Bar of Michigan

michael franck building
306 townsend street
Lansing, MI 48933-2012

www.michbar.org