STATE BAR OF MICHIGAN

Public Corporation Law Quarterly

Summer 2010, No. 3

c o n t e n t s

Labor/Management Issues During Times Of Fiscal Crisis: Layoffs, Bumping, Reorganization, Restructuring

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Adapted from a presentation delivered on February 5, 2010 at the Public Corporation Section of the State Bar of Michigan's 2010 Winter Seminar.

Municipal employers today must reduce expenditures because of declining property tax revenues. Because the majority of costs for public sector employers are labor-related, municipalities must examine every labor-related cost component, seeking to create greater efficiencies.

Complex legal issues arise, however, from managerial decisions to layoff, reorganize, and restructure in a union environment. Two sources of potential conflict for municipalities forced to cut labor costs are the collective bargaining agreement and the Public Employment Relations Act (PERA).[1]

When examining the collective bargaining agreement, the first question that must be answered is whether the collective bargaining agreement provides the municipality with the specific right to do that which is being contemplated. Alternatively, does the collective bargaining agreement preclude the municipality specifically from doing that which is contemplated. In its preliminary review of the collective bargaining agreement, the municipality should review, among others, the management rights, layoff, and maintenance of conditions clauses found in the applicable collective bargaining agreement.

PERA is an additional source that must be considered when determining a public employer's rights and obligations. Under PERA, there is a statutory duty for public employers to bargain collectively with its unionized workforce over mandatory subjects of bargaining, including, "wages, hours, and other terms and conditions of employment."[2] The failure to bargain collectively in good faith is an unfair labor practice.[3] The Michigan Employment Relations Commission (MERC), the administra-

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Public Corporation Law Quarterly

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

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Chairperson's Corner

By James E. Tamm of O'Connor, DeGrazia, Tamm & O'Connor, PC

It is hard to believe that a year has passed since I was sworn in as the Chairperson for the Public Corporation Law Section. It has truly been an honor to serve as Chair. During the past year, the Section has continued to further its mission of providing educational opportunities for its members and advancing the legal interests of public entities.

On June 25 and 26, 2010, the Public Corporation Law Section along with the Michigan Association of Municipal Attorneys concluded its 12th Annual Summer Educational Conference at the Grand Hotel on Mackinac Island. Incoming Chairperson, Eric Williams, put together a fabulous array of speakers and topics for the conference. Incoming Treasurer, Catherine Mish, provided an informative speech on medical marijuana - local regulatory options, and Don Schmidt lent his considerable expertise on the issue of the constructive quorum doctrine under the Michigan Open Meetings Act. Our dinner speaker, Tim Skubick, enlightened attendees on emerging issues in Michigan politics. As always, the Grand Hotel was a gracious host. Given current economic conditions and pressure on municipal budgets, the PCLS Council along with the MAMA Board are considering alternative venues for next year's seminar. In past years, seminar attendance has decreased when the event has been hosted outside of Mackinac Island. Please direct any comments you may have regarding alternative locations for the seminar to Eric Williams.

The Michigan Supreme Court recently issued two opinions which sided with the position taken in Amicus Briefs filed on behalf of the PCLS. In *Hendee v Putnum Township*, the Supreme Court considered a plaintiff's exclusionary zoning claim premised on the notion that, because a township's zoning map classified land for a mobile home park which was considered inappropriate for that use by the property owner, it was facially invalid and considered whether the exclusionary zoning claim was subject to the finality requirements. The Court held that because a variance application had never been submitted, plaintiff's claim was not ripe for judicial review. In *Kyser v Kasson Township,* the Supreme Court revisited the no very serious consequence rule established in *Silva v Ada Township***,** 416 Mich 153; 330 NW2d 663 (1982). The Court found that the rule in *Silva* was not a constitutional requirement and, in fact, violated the constitutional separation of powers doctrine. The Court went on to conclude that the rule expressed in *Silva* was superseded by the exclusionary zoning provisions established under the Zoning Enabling Act. Congratulations to Jerry Fisher and Carol Rosati on a job well done!

It has been a great honor to serve as Chairperson during the past year. Congratulations to all our speakers, contributors and brief writers who have contributed to making 2009-2010 a successful year for the Section.

Labor/Management. . .

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tive agency which enforces PERA, has broad remedial powers, including restoration of the status quo ante, should a public employer's actions be deemed an unfair labor practice.[4] Thus, it is imperative that the municipality consider whether there is a duty to bargain over the managerial decisions that are being contemplated. If there is such a duty, it must then be determined whether the municipality has already bargained over the issue, or whether the union "waived their right" to bargain over the issue. If there is no duty to bargain over the decisions, the municipality must still consider whether there is a duty to bargain over the effects of the decisions. If there is a duty to bargain over effects, then it must determine whether the municipality has bargained over the effects of the decisions, or whether the union has "waived its right" to do so.

Layoffs: Management Prerogative or Mandatory Subject of Bargaining?

A public employer's decision to layoff is not a mandatory subject of bargaining. Rather, this layoff decision is legally considered to be within the scope of management's prerogatives. The concept of management prerogative, which restricts the scope of bargaining, creates a "dichotomy between 'bargainable' issues, that is, those issues which affect the conditions of employment, and issues of 'policy,' which are exclusively reserved to government discretion and cannot be made mandatory subjects of bargaining.[5] In *Local 1277, AFSCME v. City of Center Line*, the Michigan Supreme Court held that the initial decision to layoff was not a mandatory subject of bargaining because it was properly within the scope of management prerogatives.[6]

Although the initial decision to layoff is within the scope of management prerogative, and thereby, not a mandatory subject of bargaining, the public employer may be required to bargain the impact of its decision to layoff. MERC found, in *City of Detroit*, that it is ultimately the union's responsibility to request bargaining.[7] However, to bargain the impact of the layoff effectively, "the public employer must give reasonable notice to the union of the employer's decision to layoff employees, and must afford the union adequate opportunity to bargain about the layoff decision on employees prior to the effectuation of the decision."[8] Nevertheless, the MERC later held, in *Kalamazoo County Sheriff*, that "the obligation to bargain the impact of a layoff is not required prior to the layoff."[9]

Layoffs: Seniority, Bumping

Most often, the issue of who should be laid off, once the decision to layoff is made, has already been bargained and is memorialized in the terms of the collective bargaining agreement. Layoff "by seniority" is commonly required by collective bargaining agreements. Seniority generally refers to an employee's length of service with an employer. The senior employee's rights to priority in getting, keeping, and returning to a job classification are typically based upon the labor contract.

Under a "strict seniority" approach, when the decision of whom to layoff is between a junior employee and a senior employee of lesser ability, the seniority claim of the latter will override both the needs of the employer and the interests of the public in its efficient operation.

However, layoff clauses in collective bargaining agreements are usually written to serve the basic aims of seniority while recognizing other factors, which "basically involve the 'fitness and ability' of the employee in determining preference in employment."[10] Layoff clauses found in municipal government collective bargaining agreements might resemble the following:

1. Layoffs shall be in accordance with seniority provided the remaining senior employee who is not laid off has the ability and skill to perform the remaining work.
2. An employee identified for layoff will be able to use his/her occupational group seniority to bump the lowest seniority employee within any classification within his/her occupational group which is listed in a direct line with or beneath his/her present classification excluding positions requiring a test. It is understood that if the employee has a bump beneath his/her present classification, s/he shall have the right to bump the lowest seniority employee on his/her shift provided s/he is qualified and has the ability to perform the work.
3. In no event may an employee gain a promotion through a layoff or assume a position currently listed under Article IV, Section 6(E) – Promotion to Certain Positions.
    a. If s/he cannot bump an employee on his or her particular shift, s/he may then bump the lowest seniority employee on another shift of choice provided s/he is qualified and has the ability to perform the work.

Examples 2 and 3, above, also include "bumping" rights. Bumping rights give the laid-off senior employee the ability to bump a junior employee into another position, generally into a lower-rated position.

Public employers should carefully follow the layoff and bumping provisions of applicable labor contracts. It does little good to a financially ailing community to layoff an employee,

only to have an arbitrator subsequently require the employee's reinstatement with back pay due to a violation of seniority principles contained in the layoff provision of a labor contract.

Employer Reorganizations

Like the managerial decision to layoff, a public employer's decision to reorganize is generally within the scope of management prerogatives. It is not a mandatory subject of bargaining. In *Ishpeming Supervisory Local 128 AFSCME v. City of Ishpeming*, the Michigan Court of Appeals held that the public employer's decision to legitimately reorganize is a permissive subject of bargaining, even when accompanied by the elimination of positions and the reassignment of job duties to other positions.[11] MERC has repeatedly recognized the principles articulated by the court in *Ishpeming*. In *Cass County Board of Commissioners*, MERC explained that the "restructuring of a department has been found to be a management prerogative which may be undertaken without bargaining."[12] Consistent with previous rulings from the State courts and Michigan Employment Relations Commission, MERC held, in *Schwartz Creek Community Schools*, that "an employer decision to reduce the size of its work force or to reorganize positions is within the scope of management prerogative and is not a mandatory subject of bargaining."[13]

However, the *Ishpeming* court held that although the initial decision to reorganize is not a mandatory subject of bargaining, the public employer had a duty to bargain over the impact of the reorganization decision.[14] For example, "if any employees are to lose their jobs because of the reorganization, the union can bargain concerning the specific individuals who are to be laid off."[15]

Reorganization and Reassignment of Work Outside of the Unit

Reassignment of work to employees of the municipality who are outside of the bargaining unit may be part of the public employer's reorganization. The Michigan Supreme Court held, in *Southfield Police Officers Ass'n v. City of Southfield*, that the City did not have a duty to bargain the removal of bargaining unit work because "the transferred work had not been performed exclusively by the bargaining unit."[16] According to the Court in *Southfield*, both the courts and MERC have repeatedly held that "in instances where job functions have been historically assigned interchangeably to both unit and non-unit employees…the mere fact that the employer assigns more of the work to one of these groups does not violate the PERA or give rise to a bargaining obligation."[17]

Even if the work is exclusive to the bargaining unit, MERC held in *Univ. of Michigan Hosp.*, that two additional elements must be present in order for a bargaining obligation to attach to the transfer of unit work to employees outside of the unit.[18] First, the transfer of work must have a significant adverse impact upon the bargaining unit.[19] Second, the dispute must be amenable to the collective bargaining process.[20] MERC held, in *Univ. of Michigan*, that where the work remained substantially the same, unilateral transfer of work outside the bargaining unit constituted an act outside of the management prerogative and was a violation of PERA.[21]

Reduction in the Hours of Work

In lieu of layoffs or reorganization, a public employer may consider the possibility of reducing the number of work hours per week for unionized employees. The collective bargaining agreement generally determines the ability of a public employer to make modifications to the hours of work. Many arbitrators have held that in the absence of specific language *guaranteeing* a given number of hours per week, standard contract references to "normal" or "regular" hours per day and/or week will not guarantee any minimum number of hours of work.[22]

An example of contract language under which the action of a public employer in reducing employees from full-time to part-time status has been sustained in arbitration is as follows:

> The *normal* work day for full-time employees shall be seven and one-half (7.5) hours excluding non-paid lunch periods. The *normal* work week for full-time employees shall consist of five (5) workdays in a thirty seven and half (37.5) work week (emphasis added).

In the same collective bargaining agreement, the management rights clause read as follows:

> The Employer…hereby retains and reserves unto itself, without limitation, all powers, rights, authorities duties, and responsibilities conferred upon and vested in it by the law and the Constitutions of the State of Michigan and of the United States. Further, all rights which ordinarily vest in and are exercised in this agreement, are reserved to and remain vested in the Employer, including the but without limiting the generality of the forgoing, the right to:
>
> …hire new employees, to assign and layoff employees, *to reduce the workweek or the workday or effect reductions in hours worked by combining layoffs and reductions in the workweek or workday;*
>
> *Determine* lunch and rest periods, starting and quitting times and *the number of hours to be worked*;
>
> *Establish and change work schedules*, work standards, and the methods, processes and procedures by which such work is to be performed… (emphasis added).

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With respect to the above cited language, in an unpublished decision rendered in 2009, Arbitrator William Daniel held as follows:

> …it is found then that the employer retained the right to manage its operations which included the assignment of hours of work as it saw necessary. The fact that in doing so employees were removed from regular full-time status to regular part-time status and became ineligible for benefits is not otherwise restricted or limited by terms in the contract. There is no guarantee of any hours of work to any employee and the definition of a normal work week does not constitute such. The employer has in exercising its discretion in this regard fairly and reasonably considered all of the circumstances, established a necessity to act to reduce budgetary expenditures and has chosen those employees to be affected in a fair and reasonable manner so as to the least impact on its public responsibility. *The decision made by the employer was within its authority under the contract and was not arbitrary or capricious*, nor has it been proven that it was discriminatory in any respect (emphasis added).

As Arbitrator Daniel's opinion suggests, there are secondary concerns for a public employer that may arise when it decides to reduce the hours of work. First, if the public employer decides to reduce the work week, employees who are subject to the reduced hours may no longer be eligible for full-time benefits. The applicable collective bargaining agreement governs whether these reduced hour employees are eligible for the benefits. Further, in the absence of contract language that specifically restricts the Employer's selection of positions for reduction, the decision need only be reasonable, and not arbitrary and capricious.

An additional concern that may arise is whether the employees whose hours have been reduced have effectively been "laid off," thereby making them eligible to bump other less senior employees whose hours have not been reduced. Generally, the reduction of hours is not considered to be a lay off, and therefore, the bumping provisions are not implicated.

Additionally, upon proper request by the union, a public employer could be required to bargain over the effects of the reduction of hours for unit members.

Absent a contract provision covering an employer's right to reduce hours, an employer's unilateral action in doing so would constitute a change in "wages, hours, and conditions of employment," and an unfair labor practice.[23] A labor contract provision, however, which gives the public employer the right to unilaterally reduce hours of work constitutes a "waiver" of the union's bargaining right. A trap awaits the unwary employer who seeks to argue "waiver" when the labor contract has expired and has not yet been replaced with a new one. MERC has held that the effect of a waiver contained in a collective bargaining agreement does not extend past the expiration of that agreement.[24] An Administrative Law Judge recently stated in *Bedford Public Schools*:

> Even if the agreement "covers" or contains a waiver of [the union's] right to bargain…a waiver of bargaining rights based on contract language does not continue after the contract expires. In other words, contract language by itself, is not a term or condition of employment, and does not survive the expiration of the agreement in which it is contained.[25]

Therefore, even when contract language supports a public employer's ability to reduce hours of work, it should not be attempted after expiration of the contract and before a new one has been implemented.

Mid-Term Contract Modifications

As an effort to help a public employer avoid the decision to layoff its employees, a union in rare circumstances may be willing to discuss modifications to wages and other terms and conditions of employment. Such modifications would require mid-term contract modifications. The Michigan Supreme Court held, in *St. Clair Intermediate Sch. Dist. v. MEA.*, that unilateral midterm modification of a collective bargaining agreement constituted as an unfair labor practice.[26] The Court found that:

> Section 8 of the NLRA, 29 USC 158(b)-(d) is analogous to the PERA provisions governing unfair labor practices in Michigan. Subsection 8(d) of the NLRA describes the duties of both employer and union when a party proposes a midterm modification of an existing agreement and includes notification, negotiation, and a prohibition of strikes and lockouts until the existing agreement expires. *It also grants to either party the right to refuse to discuss or agree to a midterm modification of the contract and rejects the duty to bargain over a modification of a collective bargaining agreement before it expires.* While the parties may agree to negotiate a change midterm during the effective term of the written agreement, bargaining is not required and is purely voluntary. Failure to meet the statutory requirements results in a violation of § 8 resulting in an unfair labor practice by the party implementing the modification.[27]

Thus, the mid-term modification of a collective bargaining agreement must be completely voluntary. Unless mid-term modifications are agreed to by the public employer and its bargaining unit, the public employer is bound by the terms of

the existing collective bargaining agreement with respect to the mandatory subjects of bargaining.

Early Retirement Incentive Programs (ERIPs)

Public employers may implement Early Retirement Incentive Programs (ERIPs) as another method to reduce its expenditures. The Michigan Court of Appeals held, in *West Ottawa Educ. Ass'n v. West Ottawa Public Schools Bd. of Educ.*, that "retirement incentive plans were mandatory subjects of bargaining when they affect an active employee's terms and conditions of employment." [28] Therefore, before ERIPS may be implemented, public employers must seek the approval of the union. Customarily, unions are not opposed to ERIPs due to their favorable incentives.

Because employees who are interested in ERIPs are usually close to eligibility for retirement in terms of age or service, the ERIP must be in compliance with the Age Discrimination in Employment Act (ADEA). Where the public employer offers a voluntary ERIP, it is first advised to:

1. Set a minimum age or minimum years of service, or both;
2. Offer the ERIP for a limited time period; and
3. Offer the ERIP to a subset of the Employer.

A public employer is also recommended to have its employees who choose to participate in the ERIP to sign a waiver. In the waiver, there should be a forty-five day consideration period, and a seven day period to rescind.[29]

Local Government Fiscal Responsibility Act

In circumstances in which a financial emergency within a local unit of government or a school district has been determined to exist, an emergency financial manager may be appointed. An emergency financial manager has extensive powers pursuant to state statute.[30] With respect to a municipality, a financial manager has all of the authority of the unit of local government "to renegotiate existing labor contracts and act as an agent of the unit of local government in collective bargaining with employees or representatives and approve any contract or agreement."[31] Like the municipality's financial manager's authority, the school district's financial manager may "act as an agent of the school district in collective bargaining and, to the extent possible under state labor law, renegotiate existing and negotiate new labor agreements.[32]

Conclusion

With efforts to reduce a municipality's expenditures come complex issues which require a careful legal analysis. No municipality is served by taking action to cut costs only to be faced with a remedial order from MERC or an arbitrator reinstating the status quo ante. Municipalities must be aware of these complex issues, and should consult with their labor counsel as such issues arise.

Endnotes

1 MCLA § 423.201 et seq.

2 MCLA § 423.215

3 MCLA § 423.216

4 *Id.*

5 *Local 1277, AFSCME v. City of Center Line*, 414 Mich. 642, 660 (1982) (citing Deborah Tussey, *Bargainable or Negotiable Issues in State Public Employment Relations*, 84 A.L.R.3d 242, 255-56.

6 *Id.* at 666.

7 *City of Detroit*, 7 MPER 25, 074.

8 *Ecorse Board of Education*, 1984 MERC Lab Op 615.

9 *Kalamazoo County Sheriff*, 1992 MERC Lab Op 63.

10 Elkouri & Elkouri, *How Arbitration Works* 872 (6th ed. 2003).

11 *Ishpeming Supervisory Local 128 AFSCME v. City of Ishpeming*, 155 Mich. App. 501, 511 n.5 (1986).

12 *Cass County Board of Commissioners*, 7 MPER 25, 001.

13 *Schwartz Creek Community Schools*, 7 MPER 25, 070

14 *Ishpeming*, *supra* note 11, at 511.

15 *Id.*

16 *Southfield Police Officers Ass'n v. City of Southfield*, 433 Mich. 168, 171 (1989).

17 *Id.* at 179.

18 *Univ. of Michigan Hosp.*, 8 MPER 26, 081.

19 *Id.*

20 *Id.*

21 *Univ. of Michigan.*, 7 MPER 25, 063.

22 *See*, *e.g.*, *Southwest Forest Industries, Inc.*, 80 LA 553 (Traynor, 1983); *Anchor Hocking Corp.*, 81 LA 502 (Abrams, 1983); *Scrupples, Inc.*, 111 LA 1209 (Evans, 1999), *City of Coquille*, 119 LA 762 (Hoh, 2004).

23 *36th Dist. Court*, 21 MPER 19 (2008) (citing *Ionia Co. Rd. Comm.*, 1984 MERC Lab Op 625, 627-628.

24 *See Ann Arbor Firefighters Association Local 1733*, 1990 MERC 528; *Wayne County*, 1985 MERC 168.

25 *Bedford Public Schools*, 19 MPER 10 (2006).

26 *St. Clair Intermediate Sch. Dist. v. MEA*, 458 Mich. 540, 542 (1998).

27 *Id.*, at 564-66 (emphasis added) (citations and footnotes omitted).

28 *West Ottawa Educ. Ass'n v. West Ottawa Public Schools Bd. of Educ.*, 126 Mich. App. 306, 329 (1983).

29 *See also*, EEOC Complaint Manual, Section 3, "Employee Benefits" for further information on this topic.

30 MCLA § 141.1221; MCLA § 141.1241.

31 MCLA § 141.1221(h)

32 MCLA § 141.1241(2)(f)

Approaches To Workforce Changes In Difficult Times: A Management Perspective

By John A. Entenman of Dykema Gossett PLLC

Adapted from an Address delivered February 5, 2010 at the Section's 2010 Winter Seminar. The below "External" portion of said presentation was there given by, and is here written.

On March 30, 2010, the *Detroit Free Press* published an opinion piece entitled "The choice for municipalities: share services or forfeit them." There, the paper argued that:

> Local government has embarked on an age of chronic austerity.
>
> Michigan municipalities can't afford business as usual if they hope to avoid even deeper cuts in core services like police and fire and further asset losses, as well as higher local taxes and user fees. Barring a revolutionary new way to finance local government, sharing functions such as police and fire protection offers the best hope of maintaining core municipal services.

Certainly, it is the conventional wisdom, supported by numerous studies,[1] that municipal governments must downsize, both in scope of services and composition of delivering such services, and that a preferred vehicle for so doing is to "consolidate" functions, services, and even employees with neighboring communities.

"Consolidation" can be either horizontal (e.g., community A and community B jointly provide dispatch services) or vertical (e.g., community A disbands its police department and contracts for the provision of police services with its county). More broadly construed, "consolidation" can also be understood to mean outsourcing, subcontracting, and/or privatization.

The objective is to *efficiently* provide *necessary* services in a *quality* way which *reduces* cost. The customary business-as-usual approach is, to use today's vernacular, an "unsustainable model." That communities must change how they operate is, to a greater or lesser degree, a given.

Are there formidable obstacles to effectuating change? Most certainly, yes. Political pressures, labor organizations, and citizens made anxious by the prospect of change all contribute to the frustration of what elected and appointed officials know needs to be done. Regrettably, so does the existing legal framework.

Outsourcing/Subcontracting/Privatization

It is a general rule of thumb that about 70% of a municipality's budget is devoted to paying for employee wages and benefits. That percentage is sufficiently high that some question whether the community exists to provide services, or exists to provide employment. And, with laws regulating residency,[2] that employment can't be guaranteed to be provided to the community's own residents.

Employees are a cost in more ways than compensation. They become sick and injured, and are absent from work. They create legal liabilities externally with third par-

ties, and internally by means of engaging in sex harassment, discrimination, and otherwise. If laid off or terminated, they may grieve and/or file suit. And there's always the prospect of worker's compensation and unemployment compensation. In this context, it is easy to posit that the fewer employees you have, the better.

Reducing the level of services should result in a reduction of the employee complement. But provision of services by non-employees has to be part of the mix. That means the municipality must engage in outsourcing, subcontracting, and privatization, largely synonymous terms which advance the concept that a given community contracts with the private sector to get certain work accomplished.

Trash pick-up is the clearest example of successful privatization. Landscape services, tax assessments, and legal services are also often contracted out. The key is defining which are the core services for which the governmental entity exists to provide, then deciding, as to non-core operations, which can better be done by others. Does Detroit really need to operate its own public lighting system? Does a city need to have its own automotive service facility to maintain its vehicle fleet? Could these services, and many others like them, be provided better, and cheaper, by private parties?

Let us assume that, in some cases, the answer is yes. Let us further assume that city X's employees, who are currently providing these services, are unionized. Now what?

First, examine the labor contract. It may permit outsourcing (in some cases, conditionally). If the contract permits outsourcing, simply follow the contract.[3] If the contract does not permit outsourcing, under most conditions[4] PERA will require collective bargaining both as to the decision to outsource, and as to the impact of such outsourcing, upon the affected employees. *See, e.g., Detroit Police Officers Association v. City of Detroit*, 428 Mich 79 (1987), and *Southfield Police Officers Association v. City of Southfield*, 433 Mich 168 (1989).

Bargaining in good faith either to agreement, or impasse, is not all that difficult. Once either terminal point has been reached, you have accomplished your outsourcing goal.

Consolidation of Services

Michigan has 83 counties, 533 cities and villages, and 1,242 townships, not to mention the number of public school districts, various public authorities, and the like. The possibilities for sharing services appear limitless. Even the formal combining of communities can appear both sensible and viable. But the legal framework, while initially promising, has proved to be a hindrance, and pending legislation is stalled in the Michigan legislature.

Michigan Constitution

Article VII, Section 28
Authority for Local Government Cooperation

Article VII, Section 28 was a new section to the Michigan constitution when it was added in 1963. This provision is designed to promote the solution of metropolitan problems through existing units of government rather than by creating a fourth layer of local government. The concept is that units of local governments would be allowed to join together in a variety of ways to address their joint problems.

> The legislature by general law shall authorize two or more counties, townships, cities, villages or districts, or any combination thereof, among other things to: enter into contractual undertakings or agreements with one another or with the state or with any combination thereof for the joint administration of any of the functions or powers which each would have the power to perform separately; share the costs and responsibilities of functions and services with one another or with the state or with any combination thereof which each would have the power to perform separately; transfer functions or responsibilities to one another or any combination thereof upon the consent of each unit involved; cooperate with one another and with state government; lend their credit to one another or any combination thereof as provided by law in connection with any authorized publicly owned undertaking.
>
> Any other provision of this constitution notwithstanding, an officer or employee of the state or any such unit of government or subdivision or agency thereof, except members of the legislature, may serve on or with any governmental body established for the purposes set forth in this section and shall not be required to relinquish his office or employment by reason of such service.

According to the Report, the provisions of Section 28 enable police and fire departments to create mutual aid agreements; individual units of government to contract with another to provide services, such as a township contract with a neighboring city for water and sewer provision; and two or more units to work together to provide services, such as a city and township creating a recreational authority to jointly serve the residents in both communities. Section 28 provides wide latitude for governmental units to cooperate and has been widely used for such purposes.

Article III, Section 5
Authority for Cooperation with Governments Outside of Michigan

This Section addresses such matters as flood control, navigation, water conservation, protection of wildlife and game, and harbor development and regulation.

> Subject to provisions of general law, this state or any political subdivision thereof, any governmental authority or any combination thereof may enter into agreements for the performance, financing or execution of their respective functions, with any one or more of the other states, the United States, the Dominion of Canada, or any political subdivision thereof unless otherwise provided in this constitution. Any other provision of this constitution notwithstanding, an officer or employee of the state or of any such unit of government or subdivision or agency thereof, may serve on or with any governmental body established for the purposes set forth in this section and shall not be required to relinquish his office or employment by reason of such service. The legislature may impose such restrictions, limitations or conditions on such service as it may deem appropriate.

The authority provided by Section 5 is narrower than is provided by Section 28 and there are fewer examples to illustrate its usefulness. Section 5 allows communities along Michigan's borders with Ohio, Indiana, and Wisconsin to cooperate with communities in those states. It also allows for cooperation with Canadian communities, most notably at the bridges between Detroit and Windsor, Port Huron and Sarnia, and the cities of Sault Ste. Marie in Michigan and Ontario. It allows municipalities and the State to participate in cooperative bodies such as the Great Lakes Commission that deals with Great Lakes watershed issues.

Article VII, Section 27
Authority to Establish Multi-Purpose Special Authorities

This section revised provisions that had appeared in the 1908 Constitution. These provisions recognize that many of the problems confronting local government do not conform to municipal boundaries and may be best dealt with by multipurpose regional bodies.

> Notwithstanding any other provision of this constitution the legislature may establish in metropolitan areas additional forms of government or authorities with powers, duties and jurisdictions as the legislature shall provide. Wherever possible, such additional forms of government or authorities shall be designed to perform multipurpose functions rather than a single function.

As stated in the Report, while the intent of Section 27 was to encourage the development of governmental units that could provide multiple services on a regional basis, there has been very little movement in that direction since the adoption of the 1963 Constitution. The laws that currently provide for multipurpose forms of cooperation – principally the Metropolitan District Act (Public Act 312 of 1929), the County Public Improvement Act (Public Act of 342 of 1939), and Joint Garbage and Rubbish Disposal (Public Act 179 of 1947) -- were all drafted to be consistent with intergovernmental cooperation provisions in the earlier 1908 Michigan Constitution. Instead, the prevailing vehicles for delivering regional services have been single-purpose interlocal agreements and special authorities.

Existing Legislation

1951: "Intergovernmental Contracts between Municipal Corporations" MCL 124.1 et seq.

This Act, generally regarded as beneficial, seeks to provide authority for the ownership, operation, or performance, jointly, or by any one or more on behalf of all, of any property, facility or service which community would have the power to own, operate or perform separately. It is applicable to counties, townships, cities, villages, school districts, metropolitan districts, court districts, public authorities, and drainage districts. It is implemented by means of an intergovernmental contract.

1961: "Contracts for Assessing Services." MCL 123.621.

1967: "Mutual Police Assistance Agreements Act." MCL 123.811 et seq.

1967: "Urban Cooperation Act." MCL 124.501 et seq.

This Act, generally regarded as <u>not</u> helpful due to its Section 5(g)(ii) (quoted below), is designed to provide for the joint exercise of any power, privilege, or authority that each public agency has the power to exercise separately. It is applicable to the state government; a county, city, village, township, charter township, school district, single or multipurpose special district, or single or multipurpose public authority; a provincial government, metropolitan government, borough, or other political subdivision of Canada; an agency of the United States government; or a similar entity of any other states of the United States and of Canada. A contract in the form of an interlocal agreement must be agreed to by the legislative bodies of each participating unit.

The problem is Section 5(g)(ii), which provides:

> No employee who is transferred to a position

> with the political subdivision shall by reason of such transfer be placed in any worse position with respect to workmen's compensation, pension, seniority, wages, sick leave, vacation, health and welfare insurance or any other benefits that he enjoyed as an employee of such acquired system.

This problematic section is proposed to be deleted by Senate Bill 1086, which passed the Senate February 10, 2010, but has not progressed further as of this writing.

1968: "Intergovernmental Transfers of Functions and Responsibilities Act." MCL 125.531 et seq.

This Act authorizes two or more political subdivisions to contract with each other for the transfer of functions or responsibilities to one another or any combination thereof. It is applicable to a city, village, other incorporated political subdivision, county, school district, community college, intermediate school district, township, charter township, special district or authority.

The problematic section of this Act is Section 4(d)(ii), which provides:

> No employee who is transferred to a position with the political subdivision shall be reason of such transfer be placed in any worse position with respect to workmen's compensation, pension, seniority, wages, sick leave, vacation, health and welfare insurance, or any other benefits that he enjoyed as an employee of such acquired system.

As with the foregoing statute, there is pending legislation, Senate Bill 1085, which vitiates this section. Said Bill passed the Senate February 10, 2010, but has not progressed further.

1988: "Municipal Emergency Services Act." MCL 124.601 et seq.

1990: "Local Government Fiscal Responsibility Act." MCL 141.1201 et seq.

Combining Communities

When asked, this writer tells inquirers that he lives in "Grosse Pointe." Actually, that is not true, for I live in Grosse Pointe Park, which is cheek-by-jowl with the City of Grosse Pointe, Grosse Pointe Farms, Grosse Pointe Shores, and Grosse Pointe Woods. Each community provides excellent, but duplicative, services to its residents. While some of the Grosse Pointes have dipped the proverbial toe in the water in terms of sharing services, the question can be validly asked, why not combine into one Grosse Pointe? Similarly, should at least some of the so-called downriver communities merge? How about Lansing and East Lansing?

Be advised that the legal process to merge municipalities is long and tangled. In cities, the process begins when someone collects petition signatures from registered voters equal to 5% of the total population of the affected municipalities and submits them to the State Boundary Commission. The commission has three members appointed by the governor and two people appointed locally after a petition is submitted.

If the commission approves, the petition goes to the voters and needs an affirmative majority vote in each municipality.

If voters approve, then each community must elect or appoint commissioners to write a new city charter, which must be approved by an affirmative majority in all affected municipalities. If approved, the merger takes effect.

In townships, the process begins when someone submits petition signatures of registered voters equal to 5% of the total population in each of the affected townships to the county board of commissioners.

Once the board approves the petition, it goes to voters and requires an affirmative majority vote in each township. If approved, the merger takes effect and elections for leaders of the new township are scheduled.

See, MCL 123.1001 et seq.

Not such an easy process, which may explain, at least in part, why perhaps only one (1) such combination has occurred in the State's history – that of Iron River, Stambaugh, and Mineral Springs in the western Upper Peninsula in 2001.

Endnotes

1 *See,* generally, "Authorization for Interlocal Agreements and Intergovernmental Cooperation in Michigan; Report #346, April, 2007, Citizens Research Council of Michigan. Cited herein as "Report."

2 MCL 15.601 et seq. *See*, *Lash v City of Traverse City*, 479 Mich 180 (2007).

3 If your contract does not permit outsourcing, negotiate a change in your next contract.

4 As MERC recently held in *City of Grand Rapids*, CO5 J-283 (July, 2009):

> An employer has a duty under PERA to bargain over the reassignment or transfer of work from unit employees to positions outside a union's bargaining unit only under certain conditions. First, the work must have been performed exclusively by members of the union's unit. Second, the reassignment must have a significant adverse impact on employees, e.g., because of the reassignment, laid off employees are not recalled. The commission has held that the loss of unit positions is not sufficient to give rise to a duty to bargain. Finally, the transfer decision must be based, at least in part, on either labor costs or general enterprise costs, making the dispute amenable to resolution through collective bargaining.

A Municipality's Potential Liability for the "Growing-Problem-Of-Wrongful-Convictions"[1]

By Marcia Howe of Johnson, Rosati, LaBarge, Aseltyne & Field, PC

The decision in *Connick v Thompson,* 130 S. Ct. 1880 (2009), will have a significant impact upon municipal resources and law enforcement operations throughout the nation. If the Plaintiff in *Connick* is successful, a plaintiff will be able to circumvent the absolute immunity afforded the lower level, assistant prosecutors by imposing liability for an assistant prosecutor's illegal acts unto the municipality based upon a theory of the Prosecutors' Office failure to train and supervise assistant prosecutors about their duty under *Brady v Maryland*[2] to disclose exculpatory evidence to the criminal defense attorney.

The difficulty of deciding this critically important issue is intensified in *Connick v Thompson* because it is likely to be highly publicized. Rumors are circulating that the movie rights have been sold to two prominent male actors/producers, even though the story's ending is not yet in sight. Also, the Defendant, Prosecutor Connick, who was the municipal official in charge of the Prosecutor's Office, is the father of Harry Connick Jr. and was responsible for the Office's training and supervising of the assistant prosecutors.

Most compelling, however, are the tragically dramatic facts of the case. The events occurred in New Orleans, Louisiana. In December, 1984, a young man, the son of a prominent business man, was robbed and murdered outside his home. Three weeks later, a second young citizen, who was driving a vehicle occupied by his two younger siblings, was the victim of an attempted robbery. The driver, who refused to surrender, struggled with the thief. During this struggle, the perpetrator's blood dropped onto the victim's pant leg, which was later recovered by the crime-scene technicians.

Within a few days, two suspects were arrested. The publicity surrounding these arrests was significant because the first armed robbery resulted in a death of a prominent resident of the community. Pictures of the men arrested in that crime appeared in the local paper and were seen by one of the second robbery victims, who identified one of the men as the same man that attempted to rob him. One of the two men arrested in January, 1985 was Mr. Thompson, who was tried, convicted and sentenced to death. For fourteen years, he fought his conviction while housed in solitary confinement in a six-by-nine foot cell until the final death warrant was issued in April, 1999, and his execution was set for May, 1999.

When the criminal file was forwarded to the Prosecutors' Office in 1985, the prosecution received an initial approval by the assistant district attorney, who made a note on the form recommending the assistant district attorney responsible for trying the criminal case consider having the pant-leg blood sample analyzed. At the criminal suppression hearing, the assistant district attorney stated on the record that he wanted to have the blood sample tested, and the Court approved the testing. Two days before Mr. Thompson's criminal trial, the crime-lab report test results were returned and revealed the blood on the pant-leg sample was Blood-type B. Mr. Thompson's blood-type was type O.

Even an attorney who does not practice criminal law, understands that the lack of a blood-type match is clearly exculpatory evidence and should have been disclosed to Mr. Thompson's attorneys. But, the assistant prosecutor handling the Thompson case failed to disclose the blood evidence to Thompson's attorneys. It remained hidden and resurfaced approximately ten years later, *April, 1999*, when an investigator for the *Habeas* hearing found a microfiche copy of the crime lab report showing the blood samples did not match.

During the subsequent investigation by the Prosecutor's Office, the investigator learned that an assistant district attorney had confessed to withholding this evidence to a fellow prosecutor as far back as 1994. However, the assistant prosecutor's misconduct was not divulged until five years after his initial admission, when the assistant prosecutor who was directly responsible for the misconduct became terminally ill and confessed his misdeed shortly before he passed on. Mr. Thompson sought to have his conviction vacated based upon the admitted prosecutorial misconduct, but the state court denied his request. Instead, it sentenced him to life in prison. This decision was vacated by the Louisiana Fourth Circuit Court of Appeals' panel, who also concluded that Mr. Thompson's constitutional rights were violated. Thompson was then retried and found "not guilty" in 2003.

The current appeal before the United States Supreme Court involves Mr. Thompson's civil action under 42 USC 1983 against the Prosecutor's Office, alleging a *Brady* violation. The Motion for Summary Judgment was granted, except for Thompson's claim against the Prosecutor's Office because, "absent a pattern of *Brady* violations, a jury could infer from a single violation that the District-Attorney Office's lack of training on *Brady* demonstrated deliberate indifference to Mr. Thompson's civil rights."[3] The parties stipulated that a *Brady*

violation had occurred. Based upon the above standard and the stipulation, the jury concluded that the City of New Orleans was responsible for the civil rights' violation. Although the violation was not a consequence of any official policy, the jury found the wrongful conviction was a result of the assistant district attorney's misconduct, which was the natural result of the Department's "deliberate indifference" by failing to establish policies and procedures."[4] The jury reached this conclusion based on a trial record that revealed a complete lack of training on the *Brady* requirements in the Prosecutor's Office. The jury awarded Mr. Thompson a fourteen million dollar verdict plus interest against the municipality.

The Judgment, entered against the District Attorneys Office, was appealed and affirmed by the Fifth Circuit Court of Appeals in December, 2008. In *Thompson v Connick*, 553 F2d 836(5th Cir, 2008), the appellate court upheld the verdict relying on the rule that liability for a "single incident" can exist where the injury was a consequence of a *total* lack of training of the assistant prosecutors.

In March, 2009, an equally split *En Banc* panel of the Fifth Circuit affirmed the verdict against the District Attorney. *Thompson v Connick*, 578 F3d 293(5th Cir, 2009)(Order Granting Rehearing, vacating the lower court decision). The dissenting opinion strongly encouraged the United States Supreme Court to clarify, if and when a municipal office is liable for a single act of misconduct by a prosecutor that allegedly resulted from his lack of training. The Petition to the Supreme Court states the issue as follows:

> I. The Court Should Clarify When District Attorney's Offices May Be Liable for Individual Prosecutor's Misconduct.[5]

This differs from the issue framed and heard by the *En Banc* panel, which asked the parties to address: "whether a single incident can give rise to failure-to-train liability, and whether a district attorney's culpability can be premised upon a failure by independently-trained prosecutors to follow *Brady*."[6]

Members of the rehearing panel arguing for reversal relied on the United States Supreme Court's decision in *Van De Kamp v Goldstein*, 129 S. Ct. 855(2009), which immunized a Prosecutor's Office from a claim based upon a failure to train and supervise assistant prosecutors on the duties under *Brady,* or for failing to institute and maintain proper informational-management systems as it related to the sharing of jailhouse informant information. There, the criminal defense attorney was not informed and did not have the opportunity to investigate prosecution witnesses, who had been a jailhouse informant.

In *Van De Kamp,* the Supreme Court recognized that a claim against the Office or Department was a mere transformation of the constitutional violation claim brought against an individual assistant prosecutor, who was entitled to absolute immunity, into an "administrative" claim against the Office. The Court in *Van De Kamp* was unwilling to shift the liability from the assistant prosecutor, who performed the "dirty deed," to the Prosecutor's Office because it would undermine, if not decimate, the broad protection and essential immunity of *Imber v Pachtman* , 96 S. Ct. 984(1976).[7]

In the *Connick* case, Petitioner Connick contends the various federal appellate court circuits rely on different or conflicting analyses when confronted with a claim of "single-incident liability based upon an alleged failure to train prosecutors or officers on *Brady.*"[8] In addition to the Second, Fifth, and Eighth Circuits, the attorney for the DA cites to two Sixth Circuit Court of Appeals' decisions addressing a municipality's failure to provide training on *Brady.* Those decisions, however, are not likely to be significantly helpful in this context. The panels in both *Moldowan v City of Warren,* 578 F3d 351(6th Cir, 2009) and *Gregory v Louisville*, 444 F3d 725(6th Cir, 2006), considered a police officer's duty and failure to disclose exculpatory evidence. Unlike prosecutors, police officers are not trained legal professionals. In *Moldovan,* Judge Clay recognized that, once a police officer gives exculpatory evidence to the prosecutor's office, that police officer/detective cannot be liable for a failure to disclose under *Brady.* This legitimate transfer of the evidence to the prosecutor broke the causal connection between the local police department and the Plaintiff's constitutional injury.

Instead, once this transfer occurs, the burden of disclosure falls squarely upon the Prosecutor's Office. District Attorney or Prosecutor Offices generally have policies requiring full disclosure of all evidence, exculpatory or otherwise, to defense counsel. Likewise, the Michigan Rules of Professional Conduct require prosecutors to disclose exculpatory evidence.[9] Notwithstanding, the municipal entity or official cannot guarantee the employee will abide by these duties and obligations due to the overwhelming case loads and responsibilities which prosecutors are faced with in the discharge of their duties. A District Attorney or Prosecutor cannot possibly be conversant with each case to the point that he or she has independent knowledge of each and every exculpatory fact contained in those cases. In *Connick*, the assistant district attorney who suppressed the evidence was not the actual trial attorney and appears to be the only district attorney aware of the evidence at issue. Without that level of knowledge of the individual cases, the District Attorney or Prosecutor, as the Official of that department, cannot be a guarantor or insurer for assistant district attorneys' or assistant prosecutors' intentional violation of internal policy or Rules of Professional Conduct. When that occurs, the constitutional violation from the failure to disclose exculpatory evidence is not a result of the lack of training, but the individual's willful act of ignoring his training and ethical responsibilities. There is no direct causal connection between the alleged lack of "training or a policy" and the

resulting harm. If the withholding is intentional, failure to disclose should not be imputed to the Official in charge of the department, especially if there is no prior history of any similar incidents. This travesty of justice was not brought about by any "municipal policy," but was a random, unlawful act of the two assistant prosecutors, who were or should have been fully aware of their obligations and duties under *Brady*.

Because the prosecutors have successfully completed their law school training and passed the State Bar Exam, which included a section on Professional Responsibility, their action of intentionally[10] hiding evidence cannot be seen as a result of some administrative failure in the Prosecutor's Office. In a recent opinion, District Court Judge Friedman recognized and relied upon that distinction. He opined that the lack of training of prosecutors is unlikely to create "an extremely high risk that a constitutional violation will occur." *Hatchett v City of Detroit,* __ F Supp ___, 2010 WL 538648, *17 (E.D. Mich., Feb., 2010).

> [A] municipality's duty to train arises in two circumstances. The first arises when (1) a clear constitutional duty governs particular employees (e.g., police officers) who are likely to face a certain situation and be called upon to act in a certain way (e.g., using deadly force while attempting to apprehend a fleeing felon), and (2) "it is ... clear that failure to inform [them] of that duty will create an extremely high risk that constitutional violations will ensue." *Id.* at 396. It is the second of these two requirements that is absent in the case of professionally educated employees-particularly prosecutors, who at the time they are hired presumably are already aware of their constitutional duties by virtue of the fact that they have graduated from law school and passed the bar examination. A municipality need not train prosecutors about that which they already know, including their duties under *Brady.*[FN6] As Judge Clement noted in her opinion in *Thompson v Connick,* 578 F3d 293, 304-305 (5th Cir, 2009):
>
> > Training is what differentiates attorneys from average public employees. A public employer is entitled to assume that attorneys will abide by the standards of the profession, which include both ethical and practical requirements. Thus, prosecutors are personally responsible as professionals to know what *Brady* entails and when to perform legal research to understand the "gray areas." To hold a public employer liable for failing to train professionals in their profession is an awkward theory. By analogy, it is highly unlikely that a municipality could be held liable for failing to train a doctor it employed in diagnostic nuances.
> >
> > Holding "a public employer liable for failing to train professionals in their profession" is not only an "awkward theory," but an impossible theory. If a municipality had a duty to train its prosecutors about *Brady,* the duty would have no logical end. A municipality could be held liable for failing to train its prosecutors about their duties not to excuse jurors based on race, not to vouch for witnesses, and not to authorize warrants that are unsupported by probable cause.

This Supreme Court should reach a similar conclusion in *Connick,* and refrain from imposing liability upon the municipality, the municipal official, or the department for the intentional misdeeds or mistakes of prosecutors to avoid weakening or undermining the Court's prohibition against *respondeat superior* liability. As noted in *Hays v Jefferson Co,* 668 F3d 869, 872 (6th Cir, 1982), "there must be a direct causal link between the acts of individual officers and the supervisory defendants." *Rizzo v Goode*, 423 US 362, 370-71(1976). It is essentially this same concept that requires that the implementation or execution of a governmental policy or custom be shown before liability can be imposed on a municipality. *Monell v Department of Social Services*, 436 US 658 (1978)". Where the prosecutors or district attorneys are trained professionals, neither their intentional violations or malpractice should be imputed to the public entity.

Consequently, neither the public entity nor the District Attorney's or Prosecutor's Official or Office should be "insurers" of justice, especially in this era of rapidly developing technological advancements and challenges. Old methods of investigation are being reevaluated, and, over time, may be found to be inadequate and inaccurate. But either way, the Court's decision in *Connick* may advance this country's review of, and if necessary, rethinking of its criminal justice investigative procedures.[11] The proper reaction, however, is not the imposition of liability upon the Prosecutor or District Attorney, their Offices, or the municipality for acts of its assistant prosecutors. An inappropriate reaction to a tragic story does not serve to further the interests of the society or the administration of justice. Balancing the policy for aggressive prosecutions and the right to a fair trial will be a difficult task. The public will be left with the feeling that something must be done to avoid future offenses and compensate the wrongfully convicted while being assured they will still be secure in their homes and justice is served. To address those concerns, some states are considering legislation to address both the criminal procedures and liquidated damages. This state-by-state search for an ap-

propriate remedy will not be easy, but appears to be necessary.

Endnotes

1 *http://readme.readmedia.com/State-Bar-Unveils-New-Legislation-To-Address-The-Growing-Problem-Of-Wrongful-Convictions-In-New-York/1340498*

2 373 U.S. 83; 83 S. Ct. 1194(1963)

3 The District Attorney's Office's Petition for a Writ of Certiorari to the U.S. Supreme Court, p.7

4 *Id.* at 6.

5 *Id.* at 1.

6 *Id.* at *8-9.*

7 *Thompson,* 578 F3d 293, citing *Van De Kamp.* 129 S Ct at 2.

8 *Id.* at *9.*

9 Disciplinary Rules of the Code of Professional Responsibility, Canon 7, DR 7-103(B).

10 But assuming for purposes of argument only that the non-disclosure was a result of bad professional judgment or a failure to adequately research the issue, immunity for the Office should be available nonetheless. Unlike this Sixth Circuit precedent referenced in *Thompson,* which involves the failure to train police officers, the Prosecutor or assistant prosecutors are educated in the law. By virtue of the their law school education and the successful completion of the Bar exam, they have the necessary tools and training to research the statutes and case law precedent, ferret out the rules of law, and apply the rules to specific facts. As trained professionals, they understand the nuances of the law and recognize the law is in constant flux.

11 *http://readme.readmedia.com/State-Bar-Unveils-New-Legislation-To-Address-The-Growing-Problem-Of-Wrongful-Convictions-In-New-York/1340498*

Kyser v Kasson Township: The Foundations Of Land Use Stability Under The Michigan Zoning Enabling Act

By Gerald A. Fisher, Professor, Thomas M. Cooley Law School

The Michigan Supreme Court's decision in *Kyser v Kasson Township* provides an important message to the Bench, Bar, and all interested parties in this State: the enactment and amendment of a zoning ordinance must be respected as a complex legislative function.

This message can be understood on two levels. First, the Opinion of the Court makes the clarifying point that there are no preferred uses in Michigan. Judicial review of duly-established zoning must focus on whether legislatively enacted classifications are *reasonable*, and in making this review, a basic premise is that no individual land use – including resource extraction – will be afforded an elevated status over other land uses.

The second message issued by the Court is the broader pronouncement that the zoning enabling act empowers local legislative bodies to consider widely different visions of the community's future, and widely varying attitudes toward 'quality of life' considerations, and then balance these views and interests in the process of authorizing land uses and establishing zoning district boundary lines. The product of this local legislative exercise is not to be second-guessed by the judicial branch.

Summary of Facts in the Case

Kasson Township is located roughly in the center of Leelanau County in Northern Michigan. It abuts Glen Lake at its northwest corner and has a population of roughly 1,500.

The Township is heavily underlain with gravel and sand, with more than 50% of the Township having soils suited for gravel mining. Reflective of the existence of such gravel deposits *there were seven gravel mines operating in the Township* as of 1988. As extensive as this gravel mining intensity was for a community of 1,500, between 1988 and 1994, there were seven new applications to amend the Township zoning ordinance proposing to rezone additional land for gravel mining. In those instances in which the Township Board denied rezoning applications, the property owner would sue and prevail, and when the Township Board approved applications, the public would overturn the approval by referendum, to be followed by successful lawsuits by aggrieved rezoning applicants. This six-year period can be fairly characterized as a time of land use confusion, rampant litigation, and consequential anxiety in the Township. Given the natural endowment of gravel resources in this community, the County Planning Director raised strong concerns about the future of the Township, expressing that, "if the township [is] going to get control of these rezonings they need to do it quickly and have a plan that will support their actions. It is imperative the situation be controlled immediately." The Township followed this advice.

Consistent with the purpose and intent of zoning as envisioned in the Michigan planning and zoning acts, Township officials proceeded with careful soils and other land use analysis, and held extensive public hearings, all culminating in detailed master plan and zoning ordinance provisions for the establishment of a *proactive gravel zoning district.*

By ultimate action of the Township Board, a new 3,100 acre gravel zoning district was established – an action of courageous leadership.

Indeed, the action of the Township in establishing the gravel zoning district had the effect of ushering-out the era of turmoil brought about by the ongoing succession of *ad hoc* applications for rezoning in the 1988 through 1994 era.

When the trial court made its findings at the conclusion of trial, it was noted that the Township was both "blessed and cursed with gravel," but concluded the *public interest in the Plaintiff's gravel is not high*, and the gravel remaining in the gravel district *would last into the latter part of the 21st century*. Thus, the court found that the plaintiff's land would add only "modestly" to the gravel available, noting that "[t]here's plenty of other gravel around, and if this gravel weren't ever mined we would survive just fine."

In 2003, plaintiff Kyser petitioned to amend the boundaries of the Township's legislatively created gravel zoning district so as to include 115.6 acres of plaintiff's adjoining property. Plaintiff intended to sell the land to an undisclosed gravel operator.

Three conditions prevailed in the Township at the time of plaintiff's rezoning petition: The Township Board obviously desired to avoid action that would re-open the era of episodic gravel rezonings and turmoil; there was considerable land in the gravel zoning district available for mining; and, there was no evidence of an unmet need for gravel resources in the region. In its review and recommendation on plaintiff's application, the County planning staff pointed out that, "If [plaintiff's land] is allowed to be rezoned outside of [the gravel zoning] district then the township is putting themselves back into the situation that they were in years ago where there is going to be issues brought forward again *where is this going to stop, which rezoning will happen next . . .*"

Accordingly, the Township Board rejected the enactment of new local legislation proposed by plaintiff to modify the boundaries of the gravel zoning district.

Lower Court Proceedings

While agreeing that unrest and litigation would follow from the approval of mining on plaintiff's land, the trial court nonetheless concluded that it had the authority to judicially supersede the extensive considerations of the Planning Commission and Township Board on where the ultimate boundaries of the gravel zoning district should be situated. Consistent with this conclusion, the trial court ordered the legislatively-established zoning district boundaries adjusted so as to include plaintiff's property, commenting in its opinion that:

> The Supreme Court has given special status in zoning disputes to mineral extraction operations, and that's *the only reason I'm here pretending to be a zoning person.*"

The trial court proceedings concluded with the court enjoining the Township from barring plaintiff's proposed gravel mining operation.

In the court of appeals, the majority opinion did not recognize the earlier tumultuous conditions in the Township that had been resolved by the creation of the gravel zoning district. Rather, the majority opinion found that "it is not at all clear that the gravel district is necessarily the ideal district," ruling that "[a]fter reviewing the entirety of the evidence presented at trial, we conclude that this finding was not clearly erroneous."

A dissenting opinion was filed by Judge Davis, who recognized that "the gravel district is the result of intensive planning efforts by [the Township], with widespread community participation, to arrest and avert its own destruction." The dissent further pointed out that "the Township has already gone to great lengths, with the involvement of its citizens, to *permit* gravel mining within its boundary in a managed and controlled manner. Under these circumstances, destruction or extensive disruption of the community itself – beyond harm to any particular parcel or parcels of property near the proposed mining – certainly constitutes a 'very serious consequence.'"

The Supreme Court Clarifies the Essence of Michigan's Zoning Jurisprudence

The case was accepted for consideration in the Supreme Court, and in addition to the briefs of the parties, *amicus* briefs were filed on behalf of plaintiff by the Michigan Aggregates Association, the Edward C. Levy Company and Michigan Paving & Materials, and on behalf of the Township by the State Bar Public Corporation Law Section, the American Planning Association and Michigan Planning Association, the Michigan Municipal League, and the Michigan Townships Association. The July 15, 2010, Opinion of the Court was written by Justice Markman and signed by Justices Corrigan, Young, and Hathaway. A Dissenting Opinion was filed by Chief Justice Kelly, joined by Justice Cavanagh (Justice Weaver did not participate in the decision).

The Opinion of the Court is a well-written affirmation that zoning is a legislative function, to be accorded meaningful deference by the judiciary. The Court held that the "no very serious consequences" rule of *Silva v Ada Township*[1] unconstitutionally violates the separation of powers requirement of the Michigan Constitution,[2] and in any event had been superseded by the enactment of the exclusionary zoning provision within the Zoning Enabling Act.[3] These legal conclusions were reached based on a careful analysis that can be understood to forcefully advance two related points, each having qualities of long term significance: (1) It is not for the courts to make policy determinations that prefer one land use over others which have been established by local legislative bodies; and (2) it is for local legislative bodies, acting in conformance with the de-

tailed requirements and transparent procedures in the zoning enabling act, to determine the public interest and make critical value decisions in authorizing land uses and drawing zoning district boundary lines – and such decisions and determinations are not to be second guessed by the judicial branch.

There are No Preferred Uses in Michigan

In undertaking a detailed analysis, the Supreme Court recognized that the "no very serious consequences" rule amounted to a "judicially created rule [that] established a statewide public policy that prefers natural resource extraction to alternative public policies."[4] The *Silva* holding had drawn a distinction between a *resource extraction* land use, which is to be afforded special judicial protection, and other land uses, which are to be treated with greater judicial deference. However, the Opinion of the Court in *Kasson Township* found that "there is simply no basis in the zoning laws of our state, or in our constitution, for judicially adopting such a distinction."[5]

The *Kasson Township* Majority confirmed by footnote[6] that the so-called "preferred use" rule had been expressly rejected in *Kropf v Sterling Heights,*[7] but that the "no serious consequences" rule effectively transformed natural resource extraction into a new "preferred land use." The Court in *Silva* had disavowed that it was elevating resource extraction to a preferred use status. However, the Opinion of the Court in *Kasson Township* recognized a rose for what it really is, and held that, "[by] preferring the extraction of natural resources to competing public policies, the 'no very serious consequences' rule usurps the responsibilities belonging to both the Legislature and to self-governing local communities."[8]

Broad Prerogative of Local Land Use Control

The *Silva* opinion identified what that Court found to be elements of public interest that would be advanced by the "no very serious consequences" rule. Glaringly omitted from the *Silva* consideration was the public interest of the numerous property owners situated in the area of proposed mineral mining operations who would be immediately and significantly impacted by the judicial injection of a heavy industrial use into their neighborhood. Likewise, the *Silva* majority undertook no realistic weighing of the impact of a court-ordered mineral extraction operation upon the community's comprehensive planning and zoning scheme for the community as a whole – another obvious public interest. In *Kasson Township,* the Majority recognized that there are many "public interests" that need to be weighed and balanced, and that "the proper consideration of these many 'public interests' is best left to the Legislature and local communities rather than the judiciary."[9]

In its ruling that adjusted the boundaries of the Kasson Township gravel zoning district in order to accommodate plaintiff's proposed extractive use, the trial court had read *Silva* to authorize (or compel) the exercise of judicial discretion to effectively second guess the conclusions the Planning Commission and Township Board had reached after extensive and transparent public deliberations. Again the Opinion of the Court in *Kasson Township* responded that, "the court's deliberations illustrate the kind of balancing of factors, line-drawing, policy judgments, and exercise of discretion that belong to legislative bodies exercising the constitution's 'legislative power,' unavoidably [requiring] a trial court to arrogate unto itself responsibilities akin to that of a super-zoning commission."[10] The *Sylva* approach undermines the efforts of local government to provide "stable land-use development."[11] It is just this kind of judicial interjection by second-guessing legislative decisions compelled by the "no very serious consequences" rule that led the *Kasson Township* Court to conclude that the rule is incompatible with the constitutional separation of powers.

Within it separation of powers analysis the *Kasson Township* Majority articulated a community planning and zoning principle in terms never better-stated by a court:

> "To assess the myriad factors that are relevant to land-use planning in hundreds of communities across the state requires a decision-making process for which the judicial branch is the least well-equipped among the branches of government. Such decision-making entails the solicitation of a broad range of disparate views and interests within a community, premised upon widely different visions of that community's future and widely varying attitudes toward 'quality of life' considerations, and then balancing of these views and interests in ways that are not easily susceptible to judicial standards."[12]

The Court further identified particularly relevant language in the zoning enabling act found in MCL 125.3201(1) and (3) as an empowerment of local legislative bodies to plan and zone for a broad range of purposes, noting that,

> "These provisions reveal the comprehensive nature of the ZEA. It defines the fundamental structure of a zoning ordinance by requiring a zoning plan to take into account the interests of the entire community and to ensure that a broad range of land uses is permitted within that community. These provisions empower localities to plan for, and regulate, a broad array of land uses, taking into consideration the full range of planning concerns that affect the public

health, safety, and welfare of the community."[13]

Conclusion

The *Kasson Township* Majority Opinion vividly articulates vital principles for Michigan zoning jurisprudence. Based upon a thorough analysis of the Michigan Constitution, the zoning enabling act, and case precedent, the Court identified the essential foundations of effective and efficient land use control envisioned for this State. The principles that emerged from the Court's analysis are that no individual land use may be afforded an elevated status over other land uses, and the indispensable proposition that local legislative bodies are to determine the ultimate vision for the community's future and translate that vision into the authorization of land uses and establishment of zoning district boundaries, and this legislative exercise is not to be second-guessed by the judicial branch.

About the Author

Gerald A. Fisher was lead counsel for Kasson Township in the Michigan Supreme Court. He is a Professor at the Thomas M. Cooley Law School, Auburn Hills, where he teaches Property Law, Constitutional Law, and Municipal Law, and he is a co-author of the ICLE publication entitled Michigan Zoning, Planning, and Land Use.

Endnotes

1 416 Mich 153; 330 NW2d 663 (1982).

2 Const 1963, art 3, § 2.

3 MCL 125.3207

4 Slip Opinion, pp 20-21.

5 Slip Opinion, p 16.

6 Footnote 11

7 391 Mich 139; 215 NW2d 179 (1974)

8 Slip Opinion, p 21.

9 Slip Opinion, p 17.

10 Slip Opinion, pp 22-23.

11 Slip Opinion, p 23.

12 Slip Opinion, p 22.

13 Slip Opinion, pp 25-26

The Michigan Supreme Court Decision: *Hendee v Township of Putnam*

By Carol A. Rosati of Johnson Rosati, LaBarge, Aseltyne & Field, PC

On July 15, 2010, the Michigan Supreme Court issued its decision in *Hendee v Township of Putnam*, Supreme Court Docket Nos. 137446, 137447, resulting in very significant rulings and/or clarifications of the law in land use matters.

The Hendee family owns approximately 144 acres of land which the family has farmed through the years. The land was in a predominately rural area that was not served by public utilities. The plaintiffs requested that Putnam Township rezone the property from AO (Agricultural/Open Space) to R1B (residential; one house per acre), and also sought corresponding approval of a Planned Unit Development (PUD) consisting of 95 single-family homes on one acre lots. The Township's Community Planner, the Township Planning Commission, the Livingston County Planning Commission, and County Planning Department Staff all recommended denial of the rezoning requests. In accordance with these recommendations, the Township Board denied the plaintiffs' rezoning and PUD. Plaintiffs then requested a use variance, which was likewise denied by the Township Zoning Board of Appeals.

The plaintiffs filed a Complaint challenging the AO zoning classification on several grounds. Even though plaintiffs had never applied for such use, plaintiffs requested that the court invalidate the zoning and allow them to use the property for development of a 900 unit manufactured housing community (MHC). Plaintiffs' Complaint included allegations that plaintiffs' constitutional rights to equal protection and substantive due process had been violated. Plaintiffs asserted that the current zoning denied any economically-viable use of the land resulting in a taking of property without just compensation. Lastly, plaintiffs claimed that the Township Zoning Ordinance was exclusionary under the Township Rural Zoning Act, MCL 125.297a because it prohibited the development of affordable housing in the form of a MHC. It should be noted that the Township's Zoning Ordinance permitted MHC uses in the R-6 district but no property had yet been zoned for a MHC. The Township's Master Plan designated a land area for a MHC, but plaintiffs' position was that the land selected was not appropriate.

After the case had been pending for some time, plaintiffs waived all damage claims and sought only injunctive relief. The Township filed a Motion for Summary Disposition arguing that plaintiffs claims were not ripe because plaintiffs never applied for a rezoning to a mobile home park, and had not received any decision, much less a final decision, on this issue. Plaintiffs also sought summary disposition in their favor on some of the claims. Both the plaintiffs and the Township then moved for sum-

mary disposition, which motions were denied. A bench trial was conducted over a period of ten days. The trial court ruled in May of 2006 in favor of the plaintiffs.

Specifically, the trial court held that the Township's AO, Agricultural/Open Space, zoning classification was unconstitutional "as applied" to the plaintiffs' property under all constitutional theories advanced by plaintiffs. The trial court further found that the total exclusion of manufactured housing communities by the Township constituted exclusionary zoning in violation of the Zoning Enabling Act, resulted in a violation of substantive due process and equal protection, and rendered the zoning "facially" invalid. The trial court determined that plaintiffs' proposed development and use of the subject property as a 498 unit MHC was reasonable, and entered an injunction permanently enjoining the Township from enforcing the AO zoning classification or interfering with plaintiffs' mobile home use. The Judgment did not exempt the plaintiffs from complying with all applicable federal, state and local regulations governing manufactured housing communities.

In an unpublished opinion *per curiam* issued August 26, 2008, the Court of Appeals reversed in part and affirmed in part in a 2-1 decision. The Court of Appeals unanimously reversed the trial court's findings of a violation of equal protection, substantive due process, and a taking. The majority found those claims ripe for review but reversed on the merits of the claims. Regarding the exclusionary zoning claim, the majority did not address whether that claim was ripe for review finding that the "futility exception" applied. The majority felt that since the Township had rejected a 95 unit development, it was reasonable to conclude that applying for an even greater number of units would be futile. Despite the fact that the plaintiffs had alleged a violation of the exclusionary zoning statute, MCL 125.297a, the majority of the Court of Appeals believed that there was no obligation to review and determine the various standards contained in that statute because plaintiffs had alleged a "constitutional" exclusionary zoning claim. In this regard, the Court of Appeals discussed and acknowledged that four standards would have to be proven by the plaintiffs to prevail under the exclusionary zoning statute. Noting that the Township had argued that it did not exclude mobile homes, that there was no total prohibition in the surrounding area as there were existing mobile home parks in the surrounding area (including 6 ½ miles from plaintiff's property), and that there was no demonstrated public need for a mobile home park, the majority disregarded those arguments because they felt that the demonstrated need analysis was not required as part of the constitutional analysis. Lastly, the majority affirmed the grant of relief given to the plaintiffs and the injunction prohibiting the Township from interfering with the mobile home use.

Judge Donofrio authored a dissenting opinion. Judge Donofrio disagreed with the majority, and believed that the exclusionary zoning claim was not ripe for review. In his analysis, Judge Donofrio noted that the issue of exclusionary zoning was complicated. He opined that, whether viewed as a constitutional or statutory claim, the exclusionary zoning claim must include a "demonstrated needs" analysis. The dissent would have remanded the case for entry of an order of dismissal in favor of the Township.

The Michigan Supreme Court accepted the case to address the following issues related to exclusionary zoning:

(a) Whether a rule of finality or ripeness applies to the plaintiffs' exclusionary zoning claim, see *Paragon Properties v City of Novi*, 452 Mich 568, 576, 550 NW2d 772 (1996), *Warth v Seldin*, 422 US 490, 508 n. 17, 95 S Ct 2197 (1975) ("[U]sually the focus should be on a particular project.");

(b) If so, whether the Court of Appeals majority properly held that the defendant township's previous denials of the plaintiffs' applications to rezone their property for less intensive uses excused the finality requirement under the futility doctrine;

(c) Whether the trial court erred in granting injunctive relief prohibiting the defendant township from interfering with the plaintiffs' proposed use of their property for a manufactured housing community when the plaintiffs had never proposed that use to the township, see *Schwartz v City of Flint*, 426 Mich 295, 327-28, 395 NW2d 678 (1986);

(d) Whether a claim that a zoning ordinance unconstitutionally excludes a lawful use is properly analyzed without regard to whether a demonstrated need for the use exists, as suggested by the Court of Appeals reliance on *Kropf v City of Sterling Heights*, 391 Mich 139, 155-156, 215 NW2d 179 (1974), or whether the enactment of 1978 PA 637, MCL 125.297a (now recodified in nearly identical language as MCL 125.3207) superseded the analysis of *Kropf* on which the majority relied; and

(e) Whether the trial court abused its discretion in awarding the plaintiffs their costs and expert witness fees.

Justice Weaver wrote the lead opinion, joined by Justice Hathaway The lead opinion concluded that the trial court and the Court of Appeals majority "(1) erred to the extent that they held that the township zoning ordinance was facially invalid because it unconstitutionally excluded a lawful use (MHC) and (2) erred by holding that the futility exception excused compliance with the finality rule and that the appropriate remedy was to enjoin the township from interfering with plaintiffs' development of a 498 unit MHC."

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The lead opinion began its analysis with a discussion on the zoning powers and the recognition that the pressures of competing land uses require the segregation of incompatible uses in order to protect the public interest. The Supreme Court found the fact that plaintiffs had never applied for a mobile home park, had never given the Township or its consultants an opportunity to review a proposed MHC development, and had never gone through the public processes on such a request, significant. In other words, plaintiffs had never given the Township any opportunity to consider whether a MHC use would be acceptable. The failure to make a meaningful application for a MHC deprived the Township of the ability to consider whether the zoning ordinance had failed to accommodate a lawful use and whether there was a demonstrated need for that use. The majority confirmed that the ripeness doctrine applied to all the constitutional challenges - takings, equal protection and due process. The Court also confirmed that a zoning ordinance need not authorize every conceivable land use.

Of importance is the finding by the Court that the exclusionary zoning claim was also subject to the ripeness doctrine. The Court noted the fact that the exclusionary zoning statute itself referred to "zoning decision", and that the statute itself contemplated consideration of a number of factors in determining whether exclusionary zoning existed. The Court felt, under those circumstances and without finding specifically that an exclusionary zoning claim was a facial versus as-applied challenge, that the ripeness doctrine applied. Because the ripeness doctrine resolved all the issues, the Court chose not to address the substance of plaintiffs' exclusionary zoning claims.

The lead opinion then turned to plaintiffs' claim that applying for a MHC development would have been futile because the lesser, 95-unit development had been soundly rejected by the Township. Again, the Court found the lack of a meaningful application for this use significant. The Court opined that "[w]ithout such an application, and a final decision by the township, it is impossible to say whether (1) the township would permit such a use of plaintiffs' property and (2) whether a denial of such a request would be reasonable in light of the township's efforts to channel future MHC development to its border with the village of Pinckney, which has the only public water and sewer systems in the area." The majority concluded that the trial court and Court of Appeals majority erred by finding the Township's zoning ordinance unconstitutional and erred in holding that the Township was enjoined from interfering with that use based on the ripeness doctrine. The Court further reversed the award to plaintiffs of their costs and attorney fees, reversed the Court of Appeals, and remanded for an order of dismissal consistent with the decision.

Justice Cavanaugh, joined by Chief Justice Kelly, concurred in the result reached in the lead opinion. He wrote separately because he continued to adhere to his dissenting opinion in *Paragon Properties v Novi* and *Electro-Tech Inc v HF Campbell Co*. Justice Cavanaugh agreed that it was necessary to obtain a final decision to establish whether an actual injury had occurred. He believed that the ripeness doctrine, however, had been improperly extended to apply to all constitutional claims, and felt the doctrine was more appropriate in the takings context. Justice Cavanaugh questioned extending the ripeness doctrine to an exclusionary zoning claim because such a claim applied to an entire geographical area and not a single parcel of land. He felt that, although the ripeness doctrine would be appropriate in a constitutional exclusionary zoning claim, it should not apply to the statutory claim by virtue of the inquiry required. Nonetheless, Justice Cavanaugh agreed that in the *Hendee* case, whether analyzed as a constitutional or statutory exclusionary zoning claim, plaintiffs' claims were not ripe based on the facts of the case, particularly since the Township's ordinance recognized a MHC zoning classification. Under these circumstance, although he felt that plaintiffs did not need to show that MHC uses had been excluded from every parcel in the Township, plaintiffs needed to at least demonstrate that a MHC use had been excluded from their land. Justice Cavanaugh concurred that plaintiffs had not presented any exclusionary zoning claim that was ripe for review because of the failure to apply for the use, and that dismissal was warranted. The futility argument was likewise rejected.

Justice Corrigan, joined by Justices Young and Markman, also concurred in the result, agreeing that plaintiffs' exclusionary zoning claim was not ripe for judicial review, but disagreeing with the reasons. Justice Corrigan believed the lead decision had erroneously concluded that it was unnecessary to determine whether the plaintiffs' exclusionary zoning claim constituted a facial or as-applied challenge, blurring the distinctions between the two types of claims and sidestepping a discussion of how ripeness would apply to each. After reviewing the legal differences between a facial and as-applied challenge, Justice Corrigan concluded that plaintiffs' exclusionary zoning claim was as-applied. This was because plaintiffs' exclusionary zoning claim alleged "a present infringement or denial of a specific right, namely plaintiffs' right to develop a 498-unit MHC on their property." Justice Corrigan emphasized that she did not want future litigants to try to avoid the ripeness doctrine by "masking an as-applied challenge as a facial challenge." She urged future courts to review the substance of the claims, and not the labels placed on those claims by plaintiffs.

Turning to the futility claim, Justice Corrigan indicated that it is unclear whether plaintiffs' submitting an application for a MHC would have been "little more than a formal step to the courthouse." But the plaintiffs' failure to submit a meaningful application for its intended MHC use deprived the Township of the opportunity to make a final decision on the intensity of development that would be permitted on the property. To put it simply, the Court could not determine

how the Township would have decided an application for a MHC, and thus, could not know whether the Township would exclude such a use.

The *Hendee* decision is a significant victory for municipal entities. First, the decision confirms the ripeness doctrine and the obligation of a landowner to apply for its intended use of the property before proceeding to court. Plaintiffs' attempt in *Hendee* to ripen their claims by applying for one use before the Township and then requesting from the court another use that the Township, consultants and public had never been given the opportunity to consider was soundly rejected. Second, the decision confirms the application of the ripeness doctrine to takings, equal protection and due process challenges to zoning ordinances and zoning decisions. Lastly, the decision clarifies a landowner's obligation to go through the processes to attempt to obtain approval for a land use before asserting an exclusionary zoning claim, an issue which had not been previously addressed head-on by the court.

Author's Note

Thomas R. Meagher of Foster, Swift, Collins & Smith, PC represented Putnam Township in the case. Carol A. Rosati of Johnson, Rosati, LaBarge, Aseltyne & Field, P.C. filed an Amici Curiae Brief in support of the Township's position on behalf of the Michigan Municipal League, the Michigan Municipal Risk Management Authority, and the Michigan Municipal League Liability and Property Pool. Please feel free to contact either of the attorneys for further information.

Opinions of Attorney General Mike Cox

By George M. Elworth, Assistant Attorney General

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

Downtown Development Authority Act

Taxing jurisdiction's ability to "opt out" of a tax increment financing district.

A taxing jurisdiction, the property of which is subject to the tax capture of a municipality's Downtown Development Authority Tax Increment Financing District, may "opt out" of the tax capture under MCL 125.1653(3) if the district's boundaries are altered or amended, but only with respect to property being added to the district.

Opinion No. 7246
March 29, 2010

Freedom Of Information Act

Access to ballots voted at an election under the Freedom of Information Act

Voted ballots, which are not traceable to the individual voter, are public records subject to disclosure under the Freedom of Information Act, MCL 15.231 *et seq*. The Secretary of State, in her role as the Chief Elections Officer, or the Director of Elections through the authority vested in that office, may exercise supervisory authority over local elections officials responding to a Freedom of Information Act request for voted ballots by issuing directions for the review of the ballots in order to protect their physical integrity and the security of the voted ballots.

A person must be allowed to inspect or examine voted ballots, which are not traceable to the individual voter, and to receive copies of the ballots upon request subject to reasonable restrictions prescribed by the Secretary of State. The public body may charge a fee for the copying of the voted ballots as provided for in section 4 of the Freedom of Information Act, MCL 15.234.

A person requesting access to voted ballots, which are not traceable to the individual voter, under the Freedom of Information Act, MCL 15.231 *et seq*, is entitled to a response from a public body granting or denying the request within 5 to 10 business days. MCL 15.235(2). However, the public body in possession of the voted ballots may not provide access to the ballots for inspection or copying purposes until 30 days after certification of the election by the relevant board of canvassers. 1979 AC, R 168.790.

Opinion No. 7247
May 13, 2010

Municipal Solid Waste Incinerator

Qualifications for renewable energy credits under the Clean, Renewable, and Efficient Energy Act

A gasification facility, including a plasma arc gasification facility, that uses municipal solid waste or biomass as feedstock may qualify as a renewable energy system eligible to receive renewable energy credits under Michigan's Clean, Renewable, and Efficient Energy Act, 2008 PA 295, MCL 460.1001 *et seq*, provided that the facility meets the other requirements of that Act.

Opinion No. 7248
May 26, 2010

Open Meetings Act

Public access to the minutes of a public body's open meetings

After receiving a request, a public body must make open meeting minutes available for inspection within the time periods specified in the Open Meetings Act, MCL 15.261 *et seq*. The public body may, under rules established and recorded by the public body, request advance notice of and require supervision of any inspection of the public body's record copy of open meeting minutes to protect the record from "loss, unauthorized alteration, mutilation, or destruction." MCL 15.233(3). Generally, neither advance notice nor supervision should be required for the inspection of copies of open meeting minutes.

Opinion No. 7244
March 3, 2010

State Law Update

By Ronald D. Richards, Jr. and Sterlin Mesadieu of Foster, Swift, Collins & Smith, PC

Two-Inch Rule Applies Only To Sidewalks Adjacent To County Highways

Robinson v City of Lansing, __ Mich__; __ NW2d__ (2010)

Recently, the Michigan Supreme Court held that the statutory two-inch rule (MCL 691.1402a(2)) does not apply to sidewalks adjacent to state highways. The two-inch rule only applies to sidewalks adjacent to county highways. *Robinson v City of Lansing*, __ Mich__; __ NW2d__ (2010). In *Robinson*, the plaintiff pedestrian was walking on a sidewalk adjacent to Michigan Avenue, a state highway, in Lansing. She stepped into a depressed area of the sidewalk, lost her balance, tripped on a raised and uneven area of bricks next to the depression, and fell. Consequently, she fractured her wrist. The defendant city maintained the sidewalk, and it was undisputed that the raised part of the sidewalk was less than two inches. The pedestrian sued the city under the highway exception to governmental immunity, alleging that defendant breached its duty under MCL 691.1402(1) to maintain the sidewalk in reasonable repair.

The city answered, raising the two-inch rule of MCL 691.1402a(2) as an affirmative defense. The trial court granted the plaintiff's motion to strike the two-inch rule as a defense and then denied the city's summary disposition motion, ruling that the two-inch rule only applied to sidewalks adjacent to county highways. The Court of Appeals reversed. It held that the rule is not limited to sidewalks that are adjacent to county highways.

The Supreme Court reversed the judgment of the Court of Appeals and reinstated the trial court's ruling, holding that the two-inch rule applies only to sidewalks adjacent to county highways. The Court first noted that the two-inch rule of MCL 691.1402a(2) provides that a defect of less than two inches in a sidewalk creates a rebuttal inference that the municipality maintained the sidewalk in reasonable repair. It then explained state and county road commissions are exempt under MCL 691.1402(1) from injuries resulting from defective sidewalks, but that municipalities are not exempt. So when MCL 691.1402(1) and MCL 691.1401(e) are read together, all government agencies except the state and county road commissions have a duty to maintain sidewalks in reasonable repair. The Court then reviewed the relevant statutes and concluded that the Legislature's intent was that the two-inch rule only applies in cases in which the defective sidewalk is adjacent to a county highway. The two-inch rule does not apply to sidewalks adjacent to state highways; it only applies to sidewalks adjacent to county highways. For those reasons, the Court reinstated the trial court's ruling granting the plaintiff's motion to strike the two-inch rule as an affirmative defense and denying the city's summary disposition motion.

Court of Appeals Rules Non-Residential Driveway Permit Ordinance Is Constitutional

Twp of Richmond v Rondigo,
__ Mich App__; __ NW2d__ (2010)

The Court of Appeals upheld the plaintiff township's non-residential driveway permit ordinance against a void-for-vagueness challenge. This case arose when the defendant company started building two access roads on its property for its composting business. The township disapproved of the new road construction, arguing that the company never obtained site plan approval for the road as required under the Township's ordinances. The township then sued the company for operating a nuisance. The trial court determined that the non-residential driveway permit ordinance was unconstitutionally vague.

The Court of Appeals reversed, and held that the ordinance was constitutional. The Court explained that the ordinance set forth constitutionally sufficient standards to determine whether to approve a non-residential driveway. The standards were reasonably precise in that ordinance mandates that consideration be given to three factors. Although the ordinance does not expressly specify how the three factors should be weighed relative to deciding a permit application, or detail the parameters of the factors, the Court determined that the factors are sufficiently descriptive such that a person of ordinary intelligence would be aware of the standards relevant to the decision-making process. The Court added that the ordinance does not fail merely because it does not provide a mathematical formula. Accordingly, the Court reversed the trial court's finding that the ordinance was unconstitutionally vague.

Court Rejects Exclusionary Zoning Claim Based On A Claim That The Designated Property Is Not Suitable

Anspaugh v Imlay Twp, unpublished per curiam opinion of the Court of Appeals (Docket No. 288010, dec'd 4/27/10).

The Court of Appeals recently rejected an exclusionary zoning claim that was based on the argument that property

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designated for I-2 (heavy industrial) uses was not suitable. *Anspaugh v Imlay Twp,* unpublished per curiam opinion of the Court of Appeals (Docket No. 288010, dec'd 4/27/10). In *Anspaugh*, the plaintiff landowner sought to rezone property to I-2. The township acknowledged that I-2 uses were allowed, but did not designate any land for such uses under the township's land use plan. The township denied the rezoning requests. The landowner sued, alleging various claims including exclusionary zoning theorizing that the township prohibited I-2 uses. The township later adopted a new master plan and zoning ordinance that provided for I-2 uses in an area of the township designated as the Graham Road Corridor. After various procedural rulings, the landowner sought summary disposition on the theory that the properties zoned I-2 are not actually usable since there is no direct route of travel to the Graham Road Corridor from the two highways serving the township and that an indirect route was inadequate due to poorer quality of the access roads. The trial court rejected the exclusionary zoning claim.

The Court of Appeals affirmed, and upheld the dismissal of the exclusionary zoning claim. The Court first rejected the landowner's claim that the property the township designated as I-2 zoned property is not suitable or appropriate for the designated use. The Court reasoned that at most, the landowner showed that the alternative access to the Graham Road Corridor is not as convenient as the route to the landowner's property. But there was no showing that the Graham Road Corridor (i.e., the I-2 zoned property) is inaccessible or unsuitable for I-2 development, or that it was selected as a subterfuge for excluding I-2 zoning. Although the Graham Road Corridor may not be the most optimal location for an I-2 zoning district, that does not make it an inappropriate area for such use. Thus, there was no exclusionary zoning.

Court Holds Alleged Technical Violation In Notice Does Not Invalidate Township's "Dangerous Building" Determination

Watertown Twp v Nordlund, unpublished per curiam opinion of the Court of Appeals (Docket No. 290117, dec'd 5/11/10)

The Court of Appeals recently validated a township's actions in declaring a building a "dangerous building" and seeking to have it destroyed without paying compensation. *Watertown Twp v Nordlund*, unpublished per curiam opinion of the Court of Appeals (Docket No. 290117, dec'd 5/11/10). In *Watertown Twp*, the township's dangerous building ordinance declared any building deemed unfit for human habitation to be a "dangerous building." The township issued several citations to the defendants for maintaining a home in violation of the township's ordinances – due largely to the home's lack of running water – but the defendants did not bring the property into compliance. After notice and a public meeting, the township board determined that the defendants' home was a dangerous building. The township then sued the defendants for an order to destroy the building. The trial court ruled in favor of the township.

The Court affirmed. The Court first held that the township's notice complied with due process rights. The defendants claimed a violation on the ground that the township's notice of its intent to hold a meeting on whether to declare the building a "dangerous" one was issued only to one of the defendants, not both. The Court explained that the township's actions did not violate due process rights since the township's notice was mailed to the defendants' home address, and both defendants attended the meeting and were given an opportunity to be heard. The Court also ruled that even if the ordinance was tantamount to a forfeiture statute, the technical violation (omitting one of the defendant's names from the notice) would not require relief since the defendants here did receive actual notice despite the technical error in the notice.

The Court then rejected the defendants' claim that the ordinance was unconstitutionally vague. The Court noted that the ordinance clearly stated the circumstances and time frame during which an impacted person may appeal a township board decision: within 21 days of the approval of the meeting minutes. That the township may not have notified the defendants of when the meeting minutes were approved does not show a violation particularly where the defendants took no action to file an appeal before the township filed its complaint.

Finally, the Court rejected the defendants' claim that the township was biased below. The defendants' claim was based on the notion that the township had allowed other similarly-situated owners additional time to bring their properties up to code, but the township bypassed allowing the defendants additional time and simply ordered that the home be demolished. The Court noted that the underlying circumstances to which the defendants referred were not similar. As to these defendants, the Court noted that the township issued numerous citations to the defendants for ordinance violations, and that the defendants failed to remedy the violations. Given the township's repeated and unsuccessful attempts to get compliance, it was reasonable to presume that similar efforts would be futile – especially where the defendants had no proposal as to how they would remedy the problems but simply asked for more time. As such, the Court upheld the decision below.

Federal Law Update

By Marcia Howe, Dan Klemptner, Holly Battersby, and Carlito Young of Johnson, Rosati, LaBarge, Aseltyne & Field, PC, and Crystal L. Morgan of Law Weathers

U.S. Supreme Court, Sixth Circuit Court of Appeals and Western District of Michigan

Racial Discrimination

Lewis v City of Chicago, Illinois,
___ US ___ (2010); 2010 WL 2025206

Beginning in July of 1995, the City of Chicago administered written examinations to applicants seeking positions as firefighters. In January of 1996, the City announced that its applicant pool would be comprised of candidates that scored at least 89 out of 100 on the examination because they were considered "well qualified" by the municipality. Candidates scoring between 65 and 88 were deemed "qualified," and those scoring below 65 were designated as "unqualified." "Well qualified" applicants were selected randomly to continue with the application process, including drug testing, background checks, a medical examination, etc. Although it was unlikely they would be hired, "qualified' applicants were told that the City would keep their names on an "Eligible List."

In May of 2006, the municipality utilized this system for the first time in selecting applicants, who would proceed to the next phase of the hiring process. The City continued this hiring practice, selecting those scoring above an 89 on the July 1995 examination for employment, for several years. When the pool of "well qualified" candidates had been exhausted, some "qualified" applicants were hired.

In March of 1997, several African American applicants who scored in the "qualified" range on the examination were not hired, and filed discrimination charges with the EEOC The EEOC issued right-to-sue letters on July 28, 2007 to all of them. The lawsuit alleged the practice of hiring only the "well qualified" applicants had a disparate impact on African Americans, in contravention to Title VII of the Civil Rights Act. The District Court certified a class of over 6000 African Americans, who scored in the "qualified range" on the examination, but were not hired by the City.

Defendant filed a Motion for Summary Judgment, based on the plaintiffs' failure to file EEOC charges within 300 days that "the alleged unlawful employment practice occurred". The trial court denied the motion because the City's "ongoing reliance" on the examinations administered in 1995 was a "continuing violation" of Title VII. After a bench trial, the parties stipulated that the examination had a disparate impact on African Americans. Not surprisingly, the judge ruled for the plaintiffs, ordering the City to hire 132 members of the class, selected at random, to reflect the number of African American applicants that would have been hired "but for" the Title VII violation.

Defendant appealed and the 7th Circuit reversed the lower court, holding that the suit was untimely because the 300 day period began running the day that the only discriminatory act occurred: i.e. when the city classified the applicants into "well-qualified," "qualified," and "unqualified" categories. "The hiring only of applicants 'well qualified' was the automatic consequence of the test scores rather than a product of a fresh act of discrimination." *Lewis v. City of Chicago*, 528 F.3d 488, 491 (2008).

The United States Supreme Court granted certiorari to consider the issue of whether a plaintiff, who fails to file a timely challenge to the *adoption of a practice,* is permitted to bring a timely disparate-impact claim to challenge the employer's later *application of the practice*. The City argued that the only actionable practice occurred in 1996 when it "used the examination results to create the hiring eligibility list, limited to the 'well qualified' classification and notified petitioners." Thus, after it conceded the initial decision was unlawful, the plaintiffs' suit was dismissed as untimely even though Plaintiffs argued that each time the City selected candidates from the "well-qualified" pool for employment, a new, actionable employment practice arose.

A plaintiff sets forth a prima facie disparate-impact claim by demonstrating the employer utilized a specific practice resulting in disparate treatment on one of the bases prohibited by Title VII. Subsection (k) sets forth the "essential ingredients" required to bring a disparate impact claim, stating: "a claim 'is established' if an employer 'uses' an 'employment practice' that 'causes disparate impact' on one of the enumerated bases." §2000e-2(k)(1)(A)(ii).

While Title VII does not define "employment practice," the Court determined that the process of excluding applicants, who scored below 89 from the City's hiring consideration, constituted an employment practice. The City "used" that "employment practice" each time it selected candidates. Although the January 1996 decision to utilize a score cut-off and compile a candidate list may have provided an independent disparate-impact claim, new violations occurred on each

occasion that the City "implemented the decision" thereafter. Consequently, the Court overturned the Seventh Circuit's ruling that the EEOC charges were not timely, and remanded the case for further proceedings.

Fifth Amendment, Due Process, Right to Remain Silent, Waiver

Berghuis v Thompkins,
___ US ___ (2010); 2010 WL 2160782

Plaintiff claimed detectives violated his Due Process when they utilized a statement procured from him after he received his *Miranda* warnings. In particular, Plaintiff claimed his silence during the majority of the three (3) hour police questioning directed at him clearly indicated he did not waive his *Miranda* rights and required suppression of his one admission. Because Plaintiff never made an unambiguous statement that he wished to remain silent during interrogation, Plaintiff's mere silence was insufficient notice and failed to invoke his right to remain silent, his admission was not suppressed, and his *Miranda* rights were not violated. The Court further held the fact Plaintiff made the statement after several hours of questioning did not overcome the fact Plaintiff's response constituted a "course of conduct indicating an answer." Finally, the Court found the detectives were not required to obtain a waiver of Plaintiff's Miranda rights before questioning him.

First Amendment/Patronage Claims

Summe v Kenton County Clerk's Office,
604 F3d 257 (6th Cir, 2010)

The plaintiff, Aline Summe, who was the Chief Deputy County Clerk in Kenton County, Kentucky, ran for the County Clerk, position in 2006, and was defeated by Rodney Eldridge. Shortly after the election, Eldridge wrote termination letters to Summe and several other deputy clerks involved in her campaign. Eldridge then replaced the former employees with thirteen individuals, who supported him in the election, even though many of them never filed an employment application.

Summe subsequently filed a §1983 suit against Eldridge and the County. She claimed that Eldridge's decision to discharge her violated the First Amendment's prohibition against unlawful patronage dismissals. She also claimed that Kenton County violated her privacy rights during the course of the election. She filed several state law claims, as well. Defendants' Motion for Summary Judgment was granted, but the Court declined to exercise pendent jurisdiction over Summe's state claims.

In his defense, Eldridge argued that he had not violated the First Amendment because Plaintiff and the other deputy clerks were fired because they "had attitude problems, were rude or disrespectful or had attendance problems," and not based on their political patronage. Although Summe applied for the position of Chief Deputy, Eldridge waited for two months before choosing to fill the position with someone who supported his campaign. Eldridge testified that "he wanted someone for the position who would be a confidential advisor." He chose this other candidate because he did not like Summe's "management style."

Patronage dismissals, or dismissals based on a failure to support a political figure or party, constitute violations of the First Amendment. *Elrod v. Burns*, 427 U.S. 347; 96 S. Ct. 2673 (1976). But, an exception is carved out for government employees, because "party affiliation may be an acceptable requirement for some types of government employment" if the employer can show it is "an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel*, 445 U.S. 507, 517; 100 S.Ct.1287 (1980). *Lane v. City of LaFollette Tenn.*, 490 F.3d , 410 419 (citing *Branti*, 445 U.S. at 515, 100 S. Ct. 1287).

Four types of government employment always constitute a patronage exception:

(1) those specifically named in a relevant statute authorizing the exercise of discretionary authority to carry out the law or other policy of political concern;

(2) a position to which discretionary decision-making of the first category has been delegated;

(3) confidential advisors, who spend a significant amount of their time advising category-one employees on how to exercise their statutory policy-making authority, or other employees, who control the lines of communications to category one employees; and

(4) positions filled to balance out party representation.

McCloud v. Testa, 97 F.3d 1536, 1557 (6th Cir. 1996). Once a plaintiff meets her initial burden of proof in patronage cases to show he or she was fired, or not re-hired, based on political affiliation, defendants must then demonstrate one of the exceptions to the general rule against patronage dismissals exists. *Id.*

Once plaintiff Summe established a *prima facie* case that she was not rehired because of her party affiliation, she then demonstrated the job qualified as a category-two position, a job "to which a significant amount of the total discretionary authority available to category one employees has been delegated." *See McCloud*, 97 F.3d at 1557. The former County Clerk's Affidavit confirmed he had "delegated a portion of his discretionary authority" to Summe as Chief Deputy Clerk. Her responsibilities had involved: instituting a cross-training program; reassigning personnel; changing employees' start times,

lunch breaks and vacations; and promoting and demoting staff. Assuming responsibility for running parts of the Clerk's Office on a daily basis, subject only to the County Clerk's final authority, the plaintiff qualified as a category-two employee, and, thus, was excepted from the general prohibition against patronage dismissals.

Likewise, the Chief Deputy County Clerk position qualified as a category-three position because it is an "inherently confidential" one. Under *McCloud,* category-three employees "spend a significant portion of their time on the job advising category-one employees on how to exercise their statutory authority with respect to enforcement of laws or the carrying out of some policy of political concern." Because the Chief Deputy County Clerk position existed "entirely at the whim of the County Clerk" and because the Chief Deputy served "if at all, at the behest of the County Clerk," both positions qualified as a category-three position. Consequently, the dismissal of Summe's First Amendment claim was affirmed.

Applicability of the Ministerial Exception to the Americans With Disabilities Act (ADA).

Sixth Circuit Court of Appeals

EEOC v Hosanna-Tabor Evangelical Lutheran Church & School, 597 F3d 769(6th Cir, 2010)

Plaintiff, Perich worked as a teacher for Defendant, Tabor Evangelical Lutheran Church & School until Defendant terminated her employment following an illness. She filed a charge of discrimination and retaliation with the EEOC, alleging Defendant discriminated and retaliated against her in violation of her rights under the ADA.

The sole issue before the court was whether the "ministerial exception" applied to allow Defendant to escape liability on Plaintiff's employment discrimination claim. The ministerial exception "precludes subject matter jurisdiction over claims involving the employment relationship between a religious institution and its ministerial employees, based on the institution's constitutional right to be free from judicial interference in the selection of those employees." For the ministerial exception to apply: 1) the employer must be a religious institution, and 2) the employee must be a ministerial employee (i.e. one whose primary duties are non-secular in nature). The parties did not dispute that Defendant was a "religious institution" under the first element.

In examining the second element, the court noted that Plaintiff devoted only 45 minutes of her 7-hour day work day to religious activities and used secular textbooks, without incorporating religion into the secular material. Thus, it was clear that her primary function was teaching secular subjects, not "spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." The fact that Plaintiff participated in and led some religious activities throughout the day did not make her primary function religious. Further, Defendant's generally religious nature, characterization of its staff members as "fine Christian role models," and reference to Plaintiff as a "commissioned minister" did not transform her *primary* responsibilities in the classroom from secular into religious activities. This is because the "primary duties analysis" requires objective examination of "an employee's actual job function, not her title, in determining whether she is properly classified as a minister." As a result, the court vacated the trial court's ruling of summary judgment in favor of Defendant.

First Amendment Retaliatory Discharge

Fox v Traverse City Area Public Schools Bd. Of Educ., __ F3d ___ , (6th Cir, 2010)

Plaintiff was hired to teach at an elementary school under a probationary contract for the 2005-06 and 2006-07 school years. Plaintiff had numerous, documented performance-related deficiencies that dated back to early 2006. As a result, in February 2007, the Defendant, School District, notified Plaintiff that her contract would not be renewed for the next year. Plaintiff denied that her performance was deficient. Instead, she contended that she was terminated in retaliation for voicing concerns to her supervisors that the size of her teaching caseload exceeded that allowed by law. To prevail on her claim of retaliatory discharge in violation of the First and Fourteenth Amendments, she had to show: (1) that her statements were protected under the First Amendment; (2) that she suffered an adverse employment action; and (3) that the adverse action was motivated at least in part as a response to the exercise of her protected speech.

The only issue on appeal was whether Plaintiff's statements were in fact protected under the United States Supreme Court's decision in *Garcetti v Ceballos*, 547 U.S. 410 (2006). In *Garcetti,* the United States Supreme Court ruled that speech, which "owes its existence to the speaker's professional responsibilities" is not protected under the First Amendment. Because Plaintiff's speech was "made not in her role as a 'public citizen' but as an employee," her claim failed. Her statements – made to her immediate supervisors and not to an outside agency or the general public – addressed only the conditions of her employment and were not a matter of "public concern." Because Plaintiff spoke as a public employee rather than a private citizen when she made her statement regarding the number of students assigned to her supervision, First Amendment protection did not apply, and her claim was properly dismissed.

Excessive Force, 8th Amendment Claim

Griffin v Hardrick, __ F3d ___ , (6th Cir, 2010)

A female prisoner, Ms. Griffin, who had been charged with

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disorderly conduct and resisting arrest, was taken for booking to a jail/correction facility, and housed in a holding cell. After being granted permission to see the nurse, she created a disturbance at the nurse's station, which required an Officer to intervene. She again refused to comply with the Officer's commands. To gain control, the Officer applied pain-control methods, which proved unsuccessful. He then performed a take-down maneuver, and accidentally fell on her leg causing it to break. Ms. Griffin conceded that she was not relying on the 4th Amendment's standard of whether the use of force was objectively unreasonable under the totality of the circumstances. Rather, she relied upon the 8th Amendment's standard for excessive force as a pretrial detainee.

To establish her claim, Ms. Griffin could not rely on her expert's opinion to create a fact question about whether the takedown was improper because his opinion was "conclusory" on the ultimate legal issue." Excessive force claims of detainees are plead either under the Due Process Clause of the 14th or the 8th Amendment claims. This Opinion notes that "the law is unsettled as to whether the analysis for each of those claims was the same." *Leary v Livingston Co,* 528 F.3d 438, 443 (6th Cir., 2008).

In the context of this case, however, the 8th Amendment standard as applied is strikingly similar or the same standard relied upon for the Due Process excessive force claims, which protects pretrial detainees against the use of excessive force that amounts to punishment." The issue is "whether the use of force could plausibly have been thought necessary" or "evinced such wantonness with respect to the unjustified infliction of harm . . . tantamount to a knowing willingness that it occur . . ." *Accord, Orem v Rephann,* 523 F3d 442 (4th Cir, 2008), (an intent to impose unnecessary and wanton pain and suffering, rather than maintaining order). This standard parallels the 8th Amendment excessive force test. *Griffin;* See also *Watkins v Evans,* 96 F3d 1449 (6th Cir, 1996)(whether the force was applied in a good faith effort to restore discipline; the actions were neither malicious nor sadistic to cause harm). Because the Officer's conduct did not appear on the video to be intentional, the Plaintiff could not support a claim under the 8th Amendment standard, and presumably would not have met the Due Process requirements either. The Officer was entitled to qualified immunity notwithstanding her significant injury.

Malicious Prosecution, Fourth Amendment, Excessive Force

Miller v Sanilac County(Mich), et al,
__ F3d ___ (6th Cir, 2010)

The Defendant Deputy stopped the Plaintiff when he drove his vehicle at 30 mph through a stop sign located on an icy road. Although the Deputy believed he detected a slight odor of alcohol emanating from Plaintiff's breath, he administered sobriety tests, and Plaintiff's blood tested out at 0.00% blood alcohol level. The results showed absolutely no controlled substances in Plaintiff's body at the time. When the prosecutor dismissed his reckless driving and drunk driving charges, Plaintiff filed 42 USC 1983 claim against the County and the individual Deputy Sheriff.

Although affirming the vast number of dismissal of the claims against the County Defendants, Plaintiff's Malicious Prosecution and 4th Amendment claims were resurrected at the appellate court, because questions of fact prevented dismissal as follows:

1) Plaintiff's 0.00% blood alcohol level cast doubt on the deputy's claim the Plaintiff smelled of alcohol and/or failed his sobriety tests;
2) The icy condition of the road also created a genuine issue of fact as to whether the Defendant had probable cause to arrest Plaintiff;
3) The Defendant Deputy ordered a drug test after receiving the clean-blood/alcohol test results; and
4) The Defendant Deputy allegedly slammed him against the patrol car, which may have subjected Plaintiff to "gratuitous violence," notwithstanding the lack of any physical injury.

Conversely, the Defendant Deputy's demand the Plaintiff perform sobriety tests in the cold weather did not constitute excessive force where Plaintiff admitted he neither informed the deputy he was too cold, nor complained about any medical concerns arising out of his exposure at any time during the booking process, which refuted his contention the deputy subjected him to "unnecessary detention in extreme temperatures."

Americans with Disabilities Act; Persons with Disabilities Civil Rights Act

Gergen v City of Kentwood, Western District of Michigan
May 18, 2010 (2010 WL 2010878)

The plaintiff was employed by the City of Kentwood as a clerk/cashier assigned to both the treasurer and assessor departments at City Hall. An important part of her job was servicing the customer counters and interacting face-to-face with the public. She was also required to answer telephones, open mail, and complete various tasks related to the City's finances. The plaintiff suffered from conditions known as reactive airways disease ("RAD") and perennial allergic rhinitis. Contact with cigarette smoke, including interacting with someone who has been smoking, triggered the symptoms of her conditions, including itching and burning eyes, dry throat, and chest pains.

The plaintiff's reactions to cigarette smoke became progressively worse and she was eventually informed by her physician that she could no longer work at the customer counters

located near the City Hall front entrance due to the possibility of exposure to smoke and interactions with customers that had been smoking. The plaintiff conveyed her doctor's opinion to her supervisors, who expressed concern that the plaintiff's aversion to cigarette smoke would prevent her from performing other aspects of her job such as touching money, working the teller tube, and transporting papers among departments. The plaintiff requested to be reassigned to a part-time position or an accounting position, but her requests were rejected because of the lack of availability of those positions. The plaintiff's doctor suggested that the City install a plexiglass window at the customer service desks, which would shield the plaintiff from exposure to cigarette smoke. The City rejected this proposal as not feasible due to the layout of the customer service desks and the nature of the clerk/cashier position.

After the plaintiff was terminated, she filed a complaint against the City defendants alleging claims for failure to accommodate and discrimination under the Americans with Disabilities Act ("ADA"), 42 USC § 12101 *et seq*., and the Michigan Persons with Disabilities Civil Rights Act ("PDCRA"), MCL 37.1101 *et seq*. She also alleged a claim of retaliation under the PDCRA. The Court granted summary judgment in favor of the defendants on all of the plaintiff's claims.

The Court first held that the plaintiff failed to establish that she was disabled within the meaning of the ADA because while breathing is considered a major life activity, the plaintiff failed to establish that her condition "substantially limits" her ability to breath. 42 USC § 12102. The court noted that "[m]any courts have held that sporadic episodes of breathing difficulty triggered by a specific noxious irritant, such as cigarette smoke, are not sufficient to qualify an individual as disabled within the meaning of the ADA when the individual is otherwise able to breathe without difficulty."

With regard to the retaliation claim, the plaintiff alleged that she was terminated because she attended a Kentwood City Commission meeting and requested an ordinance that would ban smoking in the City. The Court held that her participation in the meeting was not PDCRA "protected activity" and, even if it was, the plaintiff failed to establish a causal connection between her participation in the meeting and her termination. She also alleged that she was terminated because she provided her employer with information about her condition and requested an accommodation. Again, the court concluded that this was not "protected activity" recognized by the PDCRA. Because the plaintiff was not "disabled" within the meaning of the ADA, the defendants did not violate the ADA or PDCRA by refusing the plaintiff's requests for an accommodation. Therefore, the plaintiff's accommodation requests did not constitute opposition to a PDCRA violation, nor did they constitute making a charge, filing a complaint, or participating in a PDCRA investigation. "Any request that Plaintiff made was merely a request for an accommodation, and nothing more."

Title VII; ELCRA

Hinds v Grand Traverse County, Western District of Michigan March 12, 2010 (2010 WL 910705)

In June 2005, the plaintiff resigned from her position as a federal employee. After her resignation, she filed an Equal Employment Opportunity complaint ("EEO complaint") with the Federal Office of Civil Rights alleging that she was subject to discrimination during her federal employment. That same month, she filed an application with the County's human resources ("HR") department to be considered for County employment. During an interview for a County dispatcher position, the County's HR representative repeatedly questioned the plaintiff as to why she left her federal employment. After the interview, the representative allegedly told the plaintiff that she knew of the plaintiff's EEO complaint, that "it wasn't good," and that she wanted the plaintiff to admit at the interview that this complaint was the reason plaintiff resigned from the federal employment. The plaintiff replied that the EEO matter was confidential and that it should not matter in her quest for other employment. The plaintiff was not chosen for the dispatcher position. She applied for over 20 other County positions. While she was qualified for each of the positions, she was granted only two interviews. The plaintiff initiated an action against the County claiming that the County retaliated against her in violation of Title VII, 42 USC § 2000e-3, and Michigan's Elliott-Larsen Civil Rights Act, MCL 37.2701(a) ("ELCRA").

The Court granted summary disposition in favor of the County on the plaintiff's state law retaliation claim under the ELCRA. The Court noted the plaintiff's EEO complaint against her federal employer was based upon Title VII, not ELCRA. Indeed, as a federal employee, the plaintiff could not file a complaint against her federal employer under ELCRA, the state civil rights statute. And in the absence of a complaint filed under ELCRA, or some other action to enforce her rights under that statute, a plaintiff cannot meet the requirements to establish a retaliation claim under ELCRA. See MCL 37.2701(a).

The Court, however, denied the County's motion for summary judgment with regard to the plaintiff's Title VII claims for retaliation which were investigated by the EEOC. The Court found that the HR representative's statements, viewed in the light most favorable to the plaintiff, would require the trier of fact to conclude that retaliation was "at least a motivating factor" in the County's decision not to hire her. The Court further found that there was indirect evidence of discrimination under the burden shifting framework of *McDonnell Douglas Corporation v Green*, 411 US 792 (1973). In reaching that

conclusion, the Court held that a plaintiff can establish that she engaged in activity protected by Title VII based upon a discrimination action filed against a previous employer.

Further, the Court found that the County failed to articulate a non-discriminatory reason for the adverse employment action. The Court explained:

> Noticeably absent from the County's articulation of its legitimate business reasons are: the required qualifications for each of the three positions; the identity of the successful applicants; the relevant qualifications of the successful applicants; the interview evaluation scores for the successful applicants; the relevant qualifications of plaintiff; and the interview evaluation scores for plaintiff. . . . . While the County has stated reasons that could support its decision to hire applicants other than plaintiff, it has failed to "clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection." Genuine issues of material fact exist with respect to the circumstances surrounding the County's decision not to hire plaintiff. Accordingly, the County's motion for summary judgment with respect to the Title VII claims will be denied.

Legislative Update

By Kester K. So and Wendy R. Underwood of Dickinson Wright PLLC

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

Laws Enacted

- Renewable Energy. **HB 5555** amends the Michigan Renaissance Zone Act to modify the definition of renewable energy facility. Amends Section 3 of 1996 PA 376, MCL 125.2683.

Bills Passed by the Senate

- Brownfield. **SB 492** would amend the Brownfield Redevelopment Financing Act to revise the definition of eligible activities for a redevelopment authority. Amends Sections 2 and 13 of 1996 PA 381, MCL 125.2652 and 125.2663.
- Local Development Financing. **SB 1139** would amend the Local Development Financing Act to modify the application procedure for Department of Treasury approval for local development financing. Amends Section 11b of 1986 PA 281; MCL 125.2161b.
- Federal Bond Limitations. **SB 1324** would create and provide for procedure for allocation, reallocation and waiver of federal bond limitations under certain bond programs, and prescribe certain powers and duties of certain state agencies and public officers. Creates new act.

Bills Passed by the House of Representatives

- School Building. **HB 5271** would amend the Revised School Code to require certain activities to determine and eliminate environmental hazards before building a school or acquiring a site for a school. Amends 1976 PA 451, MCL 380.1 to 380.1852 by adding Section 1264. See also **HB 5991** for other portions of the package.
- Refunds. **HB 5550** would amend the Revised Municipal Finance Act to allow a municipality to issue a refunding security to refund all or any part of its outstanding securities before December 31, 2012 if those securities are not secured by the unlimited full faith and credit pledge of the municipality. Amends Section 611 of 2001 PA 34, MCL 141.2611. See also **HB 5552**, **5553** and **5554**, which would amend the Downtown Development Authority Act, the Tax Increment Finance Authority Act and the Local Development Financing Act, respectively, to provide for issuance of refunding obligations.
- Municipal Security. **HB 5551** would amend the Revised Municipal Finance Act to allow a municipal security to be sold, pursuant to a written debt management plan, at a discount exceeding 10% of the

principal amount of the municipal security if that municipal security is issued before December 31, 2012. Amends Section 305 of 2001 PA 34, MCL 141.2305.

- Clean Energy. **HB 5640** would create the Property Assessed Clean Energy Act to authorize financing for clean energy programs by loans from local units of government and provide for issuance of bonds. Creates new act.
- Federal Bond Limitations. **HB 6045** would create and provide for procedure for allocation, reallocation and waiver of federal bond limitations under certain bond programs, and prescribe certain powers and duties of certain state agencies and public officers. Creates new act.

Bills Introduced in the Senate

- Transportation Projects. **SB 1180** would amend the State Trunk Line Highway System Act to provide for allocation and use of funds on capital outlay projects for development and maintenance of the road system. Amends Section 13 of 1951 PA 51, MCL 247.663.
- Municipal Retirement. **SB 1239** would create a distressed municipal pension system. Creates new act. See also **SB 1240**, which would amend the Municipal Employees Retirement Act of 1984, for other portions of the package.
- County Budgets. **SB 1252** would amend the Transfers From General Fund To County Road Fund Act by removing certain restrictions on the transfer of surplus money from county general funds to the county road funds. Amends Section 1 of 1917 PA 253, MCL 247.121.

Bills Introduced in the House of Representatives

- Legal Notices. **HB 5916** would amend the General Law Village Act by providing for posting of legal notices as alternative to publishing. Amends Section 1 of Chapter II and Section 4 of Chapter VI, of 1895 PA 3, MCL 62.1 and 66.4, and adds Section 4 to Chapter XIV. See also **HB 5917**, which would amend the Home Rule Village Act, for other portions of the package.
- Municipal Pension. **HB 5976** would create a distressed municipal pension system. Creates new act. See also **HB 5982**, which amends the Municipal Employees Retirement Act of 1984, for other portions of the package.
- County Employment. **HB 6001** would amend the Optional Unified Form of County Government Act by suspending pension for county employment of individuals collecting a pension. Amends 1973 PA 139, MCL 45.551 to 45.573, by adding section 22a. See also **HB 6002** and **HB 6003**, which would amend the County Boards of Commissions Act and the Charter Counties Act, for other portions of the package.
- Revenue Sharing. **HB 6090** would amend the Glenn Steil State Revenue Sharing Act of 1971 to require revenue sharing distribution to be distributed evenly based on population. Amends Section 13 of 1971 PA 140, MCL 141.913.
- Renaissance Zone. **HB 6180** would amend the Michigan Renaissance Zone Act to create underdeveloped special assessment district zones. Amends Section 3 of 1996 PA 376, MCL 125.2683 and adds Section 8g.
- Special Assessments. **HB 6181** would create a revolving loan fund to pay bonds funded by delinquent special assessments. Creates new act.
- School Mills. **HB 6204** would amend the Revised School Code to allow levy of 3-mill enhancement millage at local school district level. Amends Section 1211c of 1976 PA 451, MCL 380.1211c.

Spread the news!

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

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

Mayhem

A regular feature submitted by Richard J. Figura of Simen, Figura & Parker, PLC

I'll bet you didn't know – or maybe you forgot – that the word "mayhem" is quite often misunderstood and misused. If you ask the average person what "mayhem" means to her or him, you will get answers such as: "rioting," "uncontrollable mob behavior," "mob violence," and similar definitions. In an article in USA TODAY following Hurricane Katrina, for example, a reporter used the term "mayhem" to refer to the widespread looting and burning going on in the City of New Orleans.[1] Even this morning a crossword puzzle I was working on used the word "havoc" as the clue for the answer word "mayhem." "Havoc" is defined by Merriam-Webster as "wide and general destruction."[2]

Such uses of the term "mayhem" are certainly consistent with my long held (but naive) understanding of the word. If you were to ask me last week what the word meant, I would have given you a response similar to the answers above. While recently researching an entirely different matter, however, I was quite surprised when I came across the statutory definition of "mayhem" in the Michigan Penal Code.

MCL 750.397 provides:

> Mayhem-Any person who, with malicious intent to maim or disfigure, shall cut out or maim the tongue, put out or destroy an eye, cut or tear off an ear, cut or slit or mutilate the nose or lip, or cut off or disable a limb, organ or member, of any other person, and every person privy to such intent, who shall be present, aiding in the commission of such offense, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years, or by fine of not more than 5,000 dollars.

Cut out a person's tongue? Put out an eye?[3] Tear off an ear (to aid a Van Gogh wannabe)? Slit a person's nose? Disable a limb, organ or member? (Ugh!) Only 10 years in prison max? Why not life? Ten years in prison with time off for good behavior doesn't sound like a severe enough penalty for cutting out a person's tongue, but that's my personal opinion.

Having been surprised to discover the real meaning of the word, I decided to do a little research on the term. I found that Black's Law Dictionary, 8th Ed., defines mayhem as "The crime of maliciously injuring a person's body, esp. to impair or destroy the victim's capacity for self-defense."[4] I found that last phrase about destroying the victim's capacity for self-defense particularly interesting. I can see where having an eye missing or a hand cut off would impair the ability to defend oneself, but what effect can a slit nose have on that capability?

Further research showed that mayhem was a serious crime in England in the18th century and it applied to actions which maimed a person in such a manner that his (or her, I suppose) ability to fight or defend himself was impaired. It was a crime against the king because the perpetrator did damage to the king's "property" thereby impairing the ability of the king's personal property to properly and capably fight for and defend the king.

A good description of mayhem's roots can be found at the following website: *http://www.umich.edu/~ece/student_projects/bonifield/mayhem2.html*, which provides as follows:

> The eighteenth-century crime of mayhem does not refer to simply "misbehaving" as it does in 21st century common speech. Under traditional English law, mayhem is "an assault whereby the injured person is deprived of a member proper for his defense in fight," e.g. an arm, leg, or front tooth; for instance, if Mike Tyson lost his front tooth, the man who knocked it out is guilty of mayhem. But the loss of a molar, ear, etc., was not considered mayhem under traditional English law because those appendages were not used in fighting; so, when Mike Tyson bit Alexander Holifield's ear, he would not be guilty of mayhem under traditional English law.
>
> The concept of English mayhem law is not to compensate the victim, but to compensate the King. At this time, the Crown ruled over and owned everything in England-- including the people. To commit mayhem against a subject of the king was to deprive the king of a potential soldier of war, and thus destruction of his personal property.

While, under the original English common law definition, cutting off a person's nose did not constitute mayhem, that has been corrected by the Michigan legislature. As seen above, under the Michigan Penal Code, cutting, slitting or

mutilating a person's nose constitutes mayhem. Though mayhem as described in MCL 750.397 is still a felony in Michigan, I don't recall ever hearing of an incident where a person was prosecuted for mayhem, but some would say that I live a sheltered life up here in Empire in the shadows of the Sleeping Bear Dunes.

Before I end, I would like to mention that the source of the above historical description of mayhem is, apparently, the result of a student project at the University of Michigan. The web address for home page for the project is at: *http://www.umich.edu/~ece/student_projects/bonifield/home.html*. It is entitled *Last Mile Tours* and states that it is sponsored by the Newgate Prison Death Row Education Society. It is an interesting, delightful piece of work which takes you on a tour of the Newgate Prison in 18th century England where you meet several nefarious characters and hear them describe the crimes they perpetrated. The following quote from the site describes the tour:

> Welcome, Welcome, Welcome! We here at the Newgate Prison Death Row Education Society (NPDRES) are very pleased that you've come. This tour will introduce you to some of our inmates who've been sentenced to death, usually by hanging, in England during the 18th century. You may be interested to know that the words you read before entering the prison were the same words that the criminals heard when the judges handed down their death sentences. As we visit each inmate, you will learn about the types of crimes they have committed that have earned them their places on Death Row. After visiting this sample of criminals, you will understand more about the English system of capital punishment in the eighteenth century, referred to as the Bloody Code.
>
> Enjoy the tour, and please do not stick your hands through the bars.

Endnotes

1 USA TODAY, September 2, 2005. http://www.usatoday.com/news/nation/2005-09-02-new-orleans-escape_x.htm

2 *http://www.merriam-webster.com/dictionary/havoc*

3 If you are my age, you probably remember your parent's saying you could not have a B-B gun because "you'll shoot someone's eye out!" If you are younger than me, you will recognize that old parental threat being marvelously recounted in the holiday classic, *"A Christmas Story,"* where Ralphie is told by his mother, his teacher, and even Santa Claus that he can't have a Red Ryder B-B rifle because he might shoot his eye out.

4 It also lists "violent destruction" as a secondary definition and "rowdy confusion or disorder" as a third tier definition, so it does recognize what most people think of when they see or hear the word.

SBM Announces 2010 Award Recipients

The State Bar of Michigan announces that the following individuals are the recipients of the 2010 SBM Awards, which will be presented at a banquet on September 29 at this year's Annual Meeting in Grand Rapids.

2010 State Bar of Michigan Award Recipients

Roberts P. Hudson Award: James C. Cotant

Frank J. Kelley Award: Hon. Donald A. Scheer, and Edward M. Zelenak

Champion of Justice Award: Charles W. Borgsdorf, John J. Conway, and Gerard Mantese (shared), John R. Nussbaumer, James M. Olson, Hon. Wendy L. Potts

Kimberly M. Cahill Bar Leadership Award: Ingham County Bar Association

John W. Cummiskey Pro Bono Award: Eric I. Frankie

Liberty Bell Award: Audrey Gray

The following individuals are the recipients of the State Bar Representative Assembly Awards, which will be presented at the Assembly's September 30 meeting in Grand Rapids.

2010 State Bar Representative Assembly Award Recipients

Michael Franck: Sheldon J. Stark, John Van Bolt

Unsung Hero: Kevin Moody

2010 Michigan State Bar Foundation Founders Award Recipient

The Michigan State Bar Foundation Board of Trustees has named John W. Cummiskey (posthumously) as the recipient of its 2010 Founders Award. MSBF provides leadership and grants to improve access for all to the justice system, including support for civil legal aid to the poor, law-related education, and conflict resolution. For more information about MSBF, visit *www.msbf.org*.

More information about each award recipient will be released prior to the SBM Annual Meeting, which will be held September 29-October 1 in Grand Rapids.