

Public Corporation Law Quarterly

Blight in a Time of Foreclosures

By Susan M. Lancaster, Assistant City Attorney for Troy

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Today, the news reports bleak stories about the number of foreclosures, which has led to a decline in property values. Banks and corporations are now the owners of many of these foreclosed homes, and several of them are not occupied. These empty buildings are now maintained on a monthly or a quarterly basis, as opposed to the daily care and property maintenance that was provided by the previous owner/occupant of the home.

The existence of one poorly-maintained home frequently also negatively impacts the surrounding neighborhood as well. When there is already a decline in property values, and no peer pressure to keep up with the high standards set by our neighbors, there is a natural decline in the amount of time and energy exerted for private property maintenance. This, accompanied by limited financial resources in these tough economic times, leads to a downward spiral of property values in a community.

This decline in property values reduces the amount of local taxes that are collected, which in turn reduces the funding for municipal services. At the same time, most municipalities are hunkering down to ride out the storm of anticipated cuts in funding, and therefore services, including the loss of personnel through attrition or reassignment to different duties. These competing interests could create the perfect storm. Each municipality needs to recognize the potential danger, and take action to preserve the stock of existing private housing in the community.

The good news is that there are many tools to help combat blight. It is our charge, as municipal attorneys, to work with the elected and code enforcement officials to determine which tools should be introduced and/or used in each community. The Michigan Municipal League has taken a proactive role in creating a community assessment and response procedure, which has already been provided to local elected and code enforcement officials, and is also available on the website. It is titled *Restoring Michigan Communities, Building by Building*, and since it is such a great resource for the municipal attorney, it is also reprinted here with permission.

In this current climate, municipalities can best handle blight by realizing that they have limited time and resources. Therefore, it is essential that each community assess priorities. The priorities may be established by the number of neighborhood complaints that are received. Of course, the first priority should be the health, safety,

Chairperson's Corner

By Jeffrey V. H. Sluggett, Law Weathers & Richardson, PC

Public Corporation Law Quarterly

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The Winter Seminar approaches! Please plan to join us on Friday, February 8, 2008 for the section's annual Winter Conference. The seminar will be held at St. John's Inn at 44045 Five Mile Road, Plymouth, Michigan. Although some plans are still being finalized for the day-long program, the seminar will feature experts on interlocal governmental cooperation issues, practical advice for police officers' attorneys, zoning updates, and a primer on appellate practice and procedure. A continental breakfast and full buffet lunch will be served, and we hope you will join us for our traditional cocktail reception following the seminar beginning at approximately 4:00 p.m. A registration form for the seminar is in this issue of the *Quarterly*. In addition, the section has made arrangements for a limited number of rooms at reduced rates for those desiring to stay overnight. Simply contact the Inn directly at 734-414-0600 and ask for reservations or visit the Inn's website at www.stjohnsgolfconference.com, click on the reservations icon and access group reservations. The group access code for online reservations is SBAATT. Thanks to Phil Erickson, Marcia Howe, and Mike Watza for all their efforts in organizing what I am sure will be an informative and fun day.

On a related note, I encourage those of you who regularly attend our seminars to extend an invitation to join us to public sector attorneys who may not attend frequently. The council is making a concerted effort to focus its programs on the practical aspects of our practice, not just for city and village attorneys, but also for those who predominately represent townships, counties, and other public entities. It is a large "tent," or at least it can be, and I sincerely believe we can all benefit from the experiences of as large a group as possible. These are efforts all of us can make to be part of a larger community.

On a final note, please be sure to check out the section's website. Under Chuck McKone's able leadership, we have recently updated council minutes and related matters kept on the website to better use the site for its potential as an educational tool.

Thank you for all of your input over the course of the past several months. I look forward to seeing you in February. 🏠

Section Mission:

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



Blight . . .*Continued from page 1*

and welfare issues. If there is a home that is a haven for rodents, the community needs to take immediate action to address the infestation and prevent it from spreading to the neighboring homes. However, in our community this past year, we have had a significant increase in the number of aesthetic complaints, such as overgrown grass and vegetation, garbage and trash (including newspapers piling up on porches), and un-drained swimming pools, which were found mainly at unoccupied houses.

We also have an aging stock of existing houses, which can become dilapidated from neglect. Some of these homes have actually reached the point where there are so many repairs that need to be made that it is difficult to know where to start. Instead of allowing these homes to reach

this point of no return, a municipality should be doing inventories to identify these homes where the exterior of the property is evidently in need of some attention. If a community does not have the resources to conduct an extensive inventory, then it should explore methods of encouraging community participation in the battle against blight. Neighbors are usually in the best position to observe problems with property maintenance. Although the required municipal response to each complaint will initially consume our limited code enforcement resources, the long term impact of having an effective community reporting system will deter the downward spiral of decreasing property values. When a neighbor's concerns are taken seriously, apathy is reduced, and you have conveyed the message that property maintenance is important in the community.

On the basis of neighborhood complaints during this past year, the City of Troy code enforcement officials discovered two homes without working plumbing. We received complaints about the exterior of these homes, and in doing the inspection discovered sufficient grounds to justify an administrative search warrant for the interior of the home. Once we became aware of the deplorable condition of the interior of the home, we were able to address the emergency health, safety, and welfare concerns with equitable actions at the circuit court level.

As set forth in the attached publication, each community should review its current property maintenance ordinances. Unlike most construction codes that are now mandated by the State of Michigan, the State has allowed municipalities to assess their own individual needs regarding property maintenance and adopt ordinances outlining property maintenance regulations.

It is also necessary to look at enforcement mechanisms for violations of those ordinances. In 1994, the State of Michigan adopted the statute allowing municipalities to prosecute zon-

ing violations as municipal civil infractions (MCL 600.8701, et. seq.). Those communities that have rejected or failed to consider a conversion to municipal civil infractions are missing an opportunity to deal with blight in a reasonable manner. Municipal civil infractions do not involve imprisonment, a remedy which could

“Unlike most construction codes that are now mandated by the State of Michigan, the State has allowed municipalities to assess their own individual needs regarding property maintenance and adopt ordinances outlining property maintenance regulations.”

be viewed by the public as an overreaction to economic hard times. Rather, to the municipality's advantage, a court is empowered to fashion a remedy to deal with each specific situation. The court can impose fines, or it can order compliance by a certain date, or it can order reimbursement of a municipality's expenses, and this reimbursement can be with the imposition of liens on the property. As with any civil case, as opposed to a criminal case, the municipal-

ity can reach an agreement with the defendant property owner, which can be placed on the record and monitored by the court. As with other civil cases, default judgments can be entered for a failure to appear. When the court has maximized the amount of damages in granting such a default judgment, the City of Troy has been successful in getting the recalcitrant property owners to become compliant and cooperative, in the hopes of a reduction in the amount of damages. Property owners seem more than willing to correct a problem in exchange for a stipulated reduction in the court ordered judgment.

There are other possible property maintenance ordinances that are being used in other communities. Sterling Heights is considering an ordinance that would require a dumpster or other container on site to dispose of abandoned property. Dumpsters must be removed within 48 hours, unless they are being regularly used by the owner for disposal. Violations of this ordinance would be punishable by a fine. Detroit and Eastpointe have adopted similar ordinances.

A municipality should also take advantage of the advances in electronic capabilities, to make sure that all contacts with a specific property are accessible by all departments. For example, if your assessing department is notified that a house has been repossessed, then the assessing department should note the name and address of the entity taking control of the property. The identification of the new owner, as well as the contact information, will be helpful in any pre-enforcement efforts to obtain compliance, and if unsuccessful, will be necessary for any formal enforcement action.

The City of Troy is making strides in fighting blight in our community. Hopefully, your community will also be joining the cooperative effort, which will lead to a better Michigan. 🏠

Restoring Michigan Communities Building by Building

Note: This excellent resource was created by the Municipal Litigation Center of the Michigan Municipal League and originally published as a supplement to the November/December 2007 issue of the Michigan Municipal Review. The League has graciously allowed the Public Corporation Law Section Quarterly to reprint the publication in its entirety (we have removed the “tables of contents” from the article and the appendices for space reasons), and the Quarterly thanks the League for that and for assembling all this useful information in one place.

The Problem

In an attempt to revitalize Michigan on the local level, communities throughout Michigan are taking a fresh look at themselves—specifically, their downtowns and their neighborhoods. That “look,” in many instances, is a visual one. It’s a recognition that dangerous buildings and abandoned structures, litter, and overgrown weeds lower property values, increase crime and detract—in every way—from the well being of the community. They hinder the creation of a “sense of place”—the pride in where we live and work.

When you take a “fresh look” at your community, what do you see?

- A burned out house waiting to be torn down?
- An otherwise attractive neighborhood marred by a lot overgrown with weeds that attract rodents?
- An abandoned building accessible to children?
- A partially constructed house with no or little progress toward completion?
- An inoperable car parked on private property?
- A dead tree that presents a hazard to the public?
- An empty lot full of garbage?
- A stagnant pool of water allowed to remain on private property?
- An empty refrigerator left unattended outside of a house?
- An undrained swimming pool?
- A vacant, neglected building located next to the coffeehouse attempting to establish an outdoor café?

These are just a few examples of the types of community problems that detract from the goal to create vibrant communities—not only in retail districts but residential neighborhoods as well. The problems exist to one degree or another in all Michigan communities—large and small. As a community leader, you share the responsibility in identifying these hindrances and making sure that your municipality has the appropriate tools and enforcement procedures necessary to address the problems.

Communities are recognizing that it’s simply not enough to respond to problems piecemeal as they occur. Most likely, your community’s tools and enforcement procedures have been

developed over time with little thought as to how one tool interacts (or, worse, conflicts) with another tool. Quite frankly, your community’s tools and enforcement procedures may be a mish-mash of ineffective, outdated and unrelated procedures. Asking the municipal attorney to “prosecute” violators is not the long-term solution to these problems, either.

Rather, we would like to suggest that the long-term solution involves a four-step process:

- 1) Identify and evaluate those specific problems, conditions or eyesores that “hold back” your community from creating a vibrant downtown and attractive neighborhoods.
- 2) Make a list and review your municipality’s existing tools (i.e., the ordinances and statutes that your municipality relies on to address the problems) and enforcement procedures (i.e. whether your municipality prosecutes violations as crimes, municipal civil infractions, blight violations and the like).
- 3) Develop goals and an action plan for your community including recommended changes to existing municipal tools and enforcement procedures.
- 4) Put your plan in to action.

The Solution—Step by Step

Step #1—Identify the problems

Generally, this should be the easy step. You will find, however, that one person’s effort to “naturalize his lawn” may be viewed by his neighbor as nothing more than overgrown weeds. You need to come to some sort of consensus as to what is and what is not a problem for your community. As you do, you will be developing an overall policy and vision for how you want your community to look and feel.

Muskegon identified its problem houses in residential neighborhoods through the formation of an ad hoc “committee” consisting of a city commissioner, a fire department inspector, and a police officer. The group called themselves the “Traveling Trio.” Together they toured neighborhoods, inspected buildings, and talked with residents. “To do” lists were prepared—identifying those buildings subject to simple re-

pairs to those requiring demolition. Clearly, the success of this approach is due in large part to the coalition of policy makers and city staff with input and involvement from neighborhood residents. Picnics were held in the neighborhoods when action was taken—restoring a sense of community as progress was made. During this same time, renewed development vigor in the downtown area was taking place.

Step #2—Make an inventory of your existing tools and enforcement procedures

Certainly, no one can disagree that it is important to make a list of the tools and enforcement procedures your community has developed. But why, you ask, should you as a community leader be involved in reviewing those tools and enforcement procedures? Shouldn't that be left to your code enforcement officer and the municipal attorney? The answer is: Your code enforcement officer and municipal attorney can act more effectively and efficiently if you and other community policy makers have made thoughtful decisions and have clearly communicated your community's stated goals. And you can't make those decisions unless you know what tools and enforcement procedures are available.

The second reason why you, as a community leader, need an understanding of the tools and enforcement procedures is that there have been significant changes, on a statewide basis, on several key fronts. For example, since 1994, municipalities have had the ability to classify certain violations of ordinances as municipal civil infractions rather than as criminal offenses. The ability to decriminalize ordinances gives a municipality greater flexibility in how it chooses to enforce ordinances related to housing and zoning matters. Just as importantly, prosecuting violations as municipal civil infractions has the potential of funneling more revenue into the municipality, i.e., the distribution of fines and costs is directed to the municipality and not to other entities of government.

In addition, Michigan law has changed dramatically within the last decade with respect to construction guidelines and enforcement. Michigan is now governed by a statewide construction code that applies to all Michigan communities. Michigan communities no longer have the ability to adopt certain construction codes. The statewide construction code is divided into various "sub-codes" including the Michigan Building Code, the Michigan Residential Code, the Michigan Electrical Code, the Michigan Plumbing Code, and the Michigan Mechanical Code. Individual communities may choose to administer and enforce the basic construction codes—but the codes apply uniformly throughout the state.

A local property maintenance ordinance remains the province—and a key component—of a municipality's housing regulatory tool. You need to be aware of the policy considerations at the time of the adoption of your community's local property

maintenance ordinance and help to develop policy as to the specifics of that ordinance.

In addition, you need to be aware of the ordinances that your community needs to adopt—whether dealing with litter, or overgrown weeds, or dangerous buildings, or abandoned structures. You, as a community leader, need to be a part of the development of a well-thought out policy regarding these issues.

It bears repeating that the current state of your community's tools and enforcement procedures may be disjointed and ineffective to address today's concerns. For example, if your community has not considered whether abandoned structures need to be registered, maybe you should. If your community has not considered whether to decriminalize some of its ordinances, maybe you should. If your dangerous building ordinance is modeled after the State Housing Law definition of a dangerous building and has not been modified since 2003 reflecting the changes to the State Housing Law, maybe it should. If you do not currently have a dangerous building ordinance, maybe you should.

Now is the time to take that "fresh look." Appendix A, "Tools and Enforcement Procedures," is designed to give you an overview of the types of statutes and ordinances available and the techniques that you may choose to enforce your ordinances. For example, if you decide to adopt or modify your dangerous building ordinance, you will find references to possible definitions of a dangerous building throughout the Tools section of Appendix A. You will then need to pick a method of enforcement if a dangerous building (as you've defined it) exists in your community. The Enforcement Procedures section of Appendix A will help you decide the best enforcement procedure for your community's dangerous building ordinance.

You will also note that Appendix B outlines the State Housing Law. The State Housing Law, whether adopted by your community or not, is an extremely valuable guideline for 1) a plan of registry of rental units and 2) definition and procedures for dealing with dangerous buildings. Many communities use the dangerous building section of the State Housing Law as a guide for defining a dangerous building and/or for developing a procedure for enforcing the dangerous building ordinance.

Both Appendix A and Appendix B are "dry" reading—but hopefully they will give you guidelines for determining what's best for your municipality

Step #3—Develop a plan

OK—you've identified the problems and you've examined what tools and enforcement procedures are available. What's next? If you haven't done so yet, now is the time to pull in your code enforcement officers and the municipal attorney.

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You need to encourage an open and honest discussion as to what works and what doesn't. You need to ask whether the problems that you've identified in Step #1 can be adequately addressed with the current tools and enforcement procedures. At a minimum, you need to ask:

- Should your municipality administer the state construction codes? Or should you allow the state or county to enforce them?
- Can some tools be eliminated?
- Do you need to adopt a municipal civil infractions ordinance?
- Should you establish a municipal civil infractions bureau to process admissions (uncontested) violations?
- Do you have a dangerous building ordinance? Is it modeled after the definition of dangerous building found in the State Housing Law?
- Do you address the concern of abandoned—but not necessarily unsafe—structures?
- What problems can't you address? i.e., can you require uniformity in the color of exterior of houses in a neighborhood?

From a policy standpoint, you also need to make sure that your code enforcement team and municipal attorney know what is important to you, the policy makers of the community. They need to know that they have your support when they attempt to enforce violations of your ordinances. It's not fun to be a code enforcement officer and be told to "enforce" an ordinance when the officer has not been able to provide input and knows from experience that enforcement of that particular offense is impractical.

Just as importantly, make sure residents of your community have input. Finally, they need to know how you arrived at your policy and your thinking behind the policy.

Step #4—Put your plan in place

If you need modifications to your ordinances—determine who will make the drafts of the changes for presentation to the council or commission. Again, involve staff—and anyone who will be enforcing the ordinances. This also is a golden opportunity to "advertise" the policy and efforts you are making to members of your community. Your success can be measured from the level of "buy-in" by the public—you'll have greater success if you've involved your constituents from the beginning. But now's the time to showcase what's been accomplished to date.

Now, the fun part. Making things happen and seeing change for the better. As you put in place the tools and enforcement procedures and you begin to actually deal with the weeds, the vacant building, the standing water, etc., take before and after pictures. Show your residents what's been done to make where they live and work, a community of pride—a community that counts!

And, finally, make a conscious effort at least every six months to re-evaluate your progress. You'll find that some "successes" need an additional push. You'll also discover areas of concern that you previously overlooked that are now ready to be addressed.

The Big Picture

Should your community's plan of action in addressing dangerous buildings and blighted property correspond with condemnation procedures of the municipality?

Short answer: Yes.

Long answer: In 2006, Michigan voters passed an amendment to the eminent domain provisions of the Michigan Constitution of 1963. This constitutional amendment restricts the ability of public corporations or a state agency to take private property for transfer to a private entity. One of the stated exceptions is for private property that is selected on grounds of independent public significance or concern, including blight.

In response to the constitutional amendment, the Michigan legislature enacted amendments to various state statutes in order to provide a common definition of blight. Various redevelopment statutes affected by the common definition of blight include the following: Condemnation (1911 PA 236, MCL 213.1), the Blighted Area Rehabilitation Act (2006 PA 677, MCL 125.71); the Neighborhood Area Improvements Act (2006 PA 676, MCL 125.941); and the Obsolete Property Rehabilitation Act (2000 PA 146) MCL 125.2781 et seq.

Note: If you are interested in statutes that have been adopted to address problems of blight and other community problems on an area-wide basis, see Appendix C—Redevelopment tools available for community restoration on an area-wide basis.

Blighted property under the various statutes is property that meets any of the following criteria:

- a) has been declared a **public nuisance** in accordance with a local housing, building, plumbing, fire, or other related code or ordinance.
- b) is an **attractive nuisance** because of physical condition or use.

- c) is a **fire hazard** or is **otherwise dangerous** to the safety of persons or property
- d) has had the **utilities, plumbing, heating, or sewerage** disconnected, destroyed, removed, or rendered **ineffective for a period of 1 year or more** so that property is unfit for its intended use.
- e) is **tax reverted property** owned by a municipality, by a county, or by the state. The sale, lease, or transfer of tax reverted property by a municipality, a county or the state shall not result in the loss to the property of the status as blighted for purposes of the act.
- f) is **property owned or under the control of a land bank fast track authority** under the Land Bank Fast Track Act, 2003 PA 258. The sale, lease, or transfer of property by a land bank fast track authority shall not result in the loss to the property of the status as blighted for purposes of the act.
- g) is **improved real property** that has remained **vacant for 5 consecutive years and that is not maintained in accordance with applicable local housing or property maintenance codes or ordinances.**
- h) any property that has **code violations posing a severe and immediate health or safety threat and that has not been substantially rehabilitated within 1 year after the receipt of notice to rehabilitate** from the appropriate code enforcement agency or final determination of any appeal, whichever is later.

A universal definition of blighted property is now threaded throughout various Michigan state statutes. Local ordinances that deal with dangerous buildings, nuisances, abandoned structures, etc. should be patterned after the statutory framework and language of blighted property in order to provide a cohesive plan to remedy and restore Michigan communities on a building by building basis. 🏠

Appendix A—Tools and enforcement procedures

Tools—Sources of Authority

State law/regulations

- **Abandoned vehicle and registered abandoned scrap vehicle** (MCL 257.252)

Section 252 et seq. of the Michigan Vehicle Code (MCL 257.252 et seq.) outlines procedures for dealing with abandoned vehicles and registered abandoned scrap vehicles, including removal from public property and removal from private property at the direction of a person other than owner or police agency. The MVC provides that an abandoned vehicle may be taken into custody by the police and sold at public sale. MCL 257.252a.

- **Fire Prevention Code** (MCL 29.1 et seq.)

The Fire Prevention Code provides a tool to regulate certain hazardous substances, dangerous conditions to persons or property, fire hazards, etc.

- **State Housing Law** (MCL 125.401 et seq.)

The State Housing Law applies to certain local units of government by population. By its terms, a local unit of government is not required to enforce the State Housing Law. However, all municipalities (even those to which the State Housing Law does not specifically apply) may adopt the State Housing Law either 1) by reference or 2) by setting out its provisions, with or without amendment. See Appendix B—State Housing Law.

- **Stille-Derossett-Hale Single State Construction Code Act and Codes** (MCL 125.1501 et seq.)

All Michigan communities are governed by various state-wide construction codes promulgated pursuant to the Stille-Derossett-Hale Single State Construction Code Act. A Michigan community no longer has the ability to develop and adopt certain construction provisions that apply only to that community. The statewide construction code is divided into various “sub-codes” including the Michigan Building Code, the Michigan Residential Code, the Michigan Electrical Code, the Michigan Plumbing Code, and the Michigan Mechanical Code.

The state construction codes are promulgated by the Department of Labor and Economic Growth. The codes are set forth in the Michigan Administrative Code. All of the codes listed are administered through the Bureau of Construction Codes. Several of the codes listed below are sometimes referred to as the “pillar codes” as identified under the Act itself. Other codes, e.g., the Michigan Rehabilitation Code for Existing Buildings, have been adopted by DLEG pursuant to the general authority granted under the Act.

Michigan Building Code (R 408.30401) applies to construction, alteration of buildings or structures or any attached buildings except for detached one- and two-family dwellings and townhouses

NOTE: Although the Michigan Building Code adopts by reference the provisions of the International Property Maintenance Code; section 102.2 which indicates that “the provisions of this code shall not be deemed to nullify any provisions of local, state or federal law” has been upheld by the Michigan Supreme Court to permit a municipality to enforce its own property maintenance ordinance. *Azzar v City*

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of Grand Rapids, 725 NW2d 666 (2007). If a municipality enforces the Michigan Building Code but does not adopt its own local property maintenance ordinance, the municipality should recognize that the International Property Maintenance Code is incorporated and enforced as part of the Michigan Building Code.

Michigan Residential Code (R 408.30501) addresses the design and construction of one- and two-family dwellings and townhouses

Michigan Electrical Code (R 408.30801) regulates the installation and use of electrical systems or material

Michigan Mechanical Code (R 408.30901) regulates the design, installation, maintenance, alteration, and inspection of mechanical systems

Michigan Plumbing Code (R 408.30701) regulates the installation and use of plumbing systems or plumbing materials Michigan Rehabilitation Code for Existing Buildings (R 408.30551) addresses repair, alterations and additions to existing buildings. The MRCEB contains provisions re: unsafe buildings, § 115, 116, 117 and dangerous buildings, § 202.

Michigan Uniform Energy Code (R 408.31001) addresses energy requirements.

Premanufactured Unit Rules (R 408.31101) addresses rules for premanufactured units.

Government subdivisions may choose to administer and enforce any or all of the four code disciplines, i.e. building, electrical, plumbing and mechanical. See DLEG Application to Administer and Enforce (BCC-246). If a unit of government chooses to enforce a code, it must establish a Construction Board of Appeals. See BCC Technical Bulletin, Publication No. 9. Other requirements will also need to be followed, including qualifications of local personnel enforcing the codes.

If a city, village or township chooses not to enforce one of the codes, the state will provide enforcement, unless the county within which the governmental subdivision is located has agreed to administer and enforce the code. The Bureau of Construction Codes lists on its website all Michigan units of government and the enforcing agency for each particular unit.

A governmental subdivision that has assumed the responsibility for administering and enforcing a code may either:

- 1) issue a complaint and obtain a warrant for a violation of the code and prosecute in the same manner as it

- prosecutes a local ordinance violation , or
- 2) issue a citation or municipal ordinance violation notice pursuant of chapter 87 of the revised judicature act of 1961, i.e., MLC 600.8701-.8735 (municipal civil infractions statutory provisions).

The governmental subdivision may retain any fine imposed upon conviction or judgment. MCL 125.1508b; .1523.

- **Unattended icebox, refrigerator** (MCL 750.493d)
The statute provides than any person who knowingly leaves an unattended icebox, refrigerator, etc. in a place accessible to children without first removing the locking device is guilty of a misdemeanor.

Ordinances

- **Abandoned building or vacant structures** (blight prevention)

Within the past decade, many Michigan communities have adopted municipal ordinances to deal with the problems associated with abandoned buildings. Communities recognize that whether there was one or several vacant houses in a neighborhood, “any abandoned structure creates a blighted effect upon the area, lowering values, and causing a direct increase in crime and housing maintenance problems.” City of Grand Rapids’ website—Moving Beyond Blight: Anti-Blight Initiative.

Grand Rapids notes that it is fortunate to have very well-maintained properties—but that even a small number of abandoned houses is unacceptable. The Grand Rapids’ ordinance is part of its overall “Housing Code.” An abandoned residential structure is basically a residential structure that has been vacant for 30 days and meets one of the following criteria: 1) is a location for criminal activity, 2) has been boarded for at least 60 days, 3) has taxes in arrears for at least 365 days, 4) has utilities disconnected or not in use or 5) is not maintained in compliance with the Housing Code. Owners of abandoned residential structures are required to register such properties.

- **Abandoned possessions**
An ordinance may be modeled after state statute, MCL 750.493d with respect to refrigerators, freezers, etc. The ordinance may also include other abandoned personal belongings.
- **Dangerous building**
The State Housing Law is a standard resource for defining dangerous buildings and for outlining procedures address-

ing dangerous buildings in a community. Many municipalities have adopted ordinances patterned after the provisions in the State Housing Law. See Appendix B, State Housing Law.

- **Fire prevention**

A municipality may adopt its own fire prevention ordinance. Generally, a municipality will incorporate by reference either the International Fire Code (ICC) or the Uniform Fire Code (NFPA), with or without amendment, as the basis for its fire prevention ordinance.

- **Grass and noxious weeds**

Pursuant to MCL 247.61 et seq. a municipality is entitled to preserve the stability, harmony and appearance of its neighborhoods.

- **Housing**

Some municipalities develop their own housing ordinance. Others have adopted the State Housing Law as their housing ordinance either by reference or by adopting the provision of the State Housing Law, with or without amendment. See Appendix B—State Housing Law.

- **Inoperable vehicle**

If a municipality has adopted the Michigan Vehicle Code as an ordinance, a municipality may enforce provisions related to abandoned vehicle and registered abandoned scrap vehicle as ordinance violations in the same manner as other Michigan Vehicle Code violations.

Many municipalities have also adopted separate ordinances relating to inoperable vehicles. [See e.g., Grand Rapids Code of Ordinances, chapter 151, section 9.108(11), enumerated as one of “Nuisances Prohibited on Public and Private Property.”]

- **Litter**

Ordinances may be developed to regulate garbage, refuse and rubbish which, if thrown or deposited, tends to create a danger to public health, safety and welfare.

- **Nuisance**

Many municipalities adopt a general nuisance ordinance which commonly provides:

[W]hatever annoys, injures or endangers the safety, health, comfort or repose of the public; offends public decency; interferes with, obstructs or renders dangerous any street, highway, navigable lake or stream; or in way renders the public insecure in life or property is hereby declared to be a public nuisance. Public nuisances shall include, but not be limited to, whatever is forbidden by any provision of this chapter. No person shall commit, create, or maintain any nuisance. [Ann Arbor Code of Ordinances, chapter 108, section 9:1.]

Nuisance ordinances frequently also enumerate specific violations such as dangerous buildings, unoccupied structures, grass and noxious weeds, litter, abandoned possessions, abandoned vehicles, blight, etc. [See, e.g., Grand Rapids Code of Ordinances, chapter 151, section 9.108 “Nuisances Prohibited on Public and Private Property.”]

Nuisance provisions (and definitions) are also included in the State Housing Law and the International Property Maintenance Code (ICC).

- **Property maintenance**

Some Michigan municipalities have developed their own property maintenance ordinances. Others have adopted the International Property Maintenance Code as their property maintenance ordinance either by reference or by setting out the provisions of the International Property Maintenance Code, with or without amendment. If a municipality has not adopted a property maintenance ordinance and has chosen to administer and enforce the Michigan Building Code, and/or the Michigan Residential Code, the International Property Maintenance Code will be enforced through the Michigan Building Code and possibly the Michigan Residential Code. See, in general, “Local Property Maintenance Codes,” a publication of the Municipal Litigation Center.

- **Zoning**

A violation of a zoning ordinance may be prosecuted as a misdemeanor, municipal civil infraction, or blight violation. A violation of certain zoning ordinances is, by statute, a nuisance per se, subject to abatement by the court. MCL.125.3407 NOTE: MCL 125.3407 is, at the time of this printing, being revised to include the option to prosecute as a blight violation, an option which was inadvertently omitted at the time of enactment of the Zoning Enabling Act (2006).

Enforcement Procedures

Inspections

In order to effectively enforce building, housing, and other similar municipal ordinances to determine conditions of a building or structure, it is sometimes necessary to gain access to the building or structure and conduct an inspection.

The United States Supreme Court has issued two decisions relative to administrative searches (in contrast to searches conducted through criminal processes). In *Camara v Municipal Court*, 387 US 523 (1967) a tenant was arrested and charged with a violation of the San Francisco Housing Code for refusal to allow an inspection of his residence as authorized by the code of a living unit. The lower courts had upheld the

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right to inspect without a warrant. In a companion case, *See v City of Seattle*, the inspection involved commercial premises. The United States Supreme Court concluded, however, that administrative searches were significant intrusions upon the interests protected by the Fourth Amendment. Basically, the decisions hold that an inspection is unreasonable and impermissible unless conducted with consent, or in an emergency situation, or pursuant to a judicially authorized search warrant.

Under *Camara*, a reasonable search of private property within the meaning of the Fourth Amendment is made if probable cause to issue a warrant to inspect exists. The court stated that probable cause exists if reasonable legislative or administrative standards for conducting an area inspection are satisfied. According to the court, such standards, “which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building . . . or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling.”

In Michigan certainly “reasonable legislative or administrative standards” can be found in the State Housing Law (MCL 125.526(5), the state’s Building and Residential Codes, the State Health Code and similar municipal ordinances.

Requests for an administrative search warrant may be made by completion of the State Court Administrative Office (SCAO) form MC 231 (Affidavit and Search Warrant).

Agreements

Many communities have been successful in resolving various property violations by entering into agreements with the violators. An agreement may establish a time period for compliance, provide for a cash bond if compliance is not met and other enforcement and judicial proceedings. In addition, the agreement may contain terms of release of liability to the municipality. (See, e.g., Mount Clemens). An agreement may also be utilized as a method to resolve litigation. Muskegon has successfully used a special agreement, i.e., a consent judgment, in adding “teeth” to its agreements once litigation has begun.

Prosecution

Violations of ordinances are generally prosecuted as criminal misdemeanors unless a municipality has adopted a municipal civil infraction ordinance or has adopted a blight ordinance which provides for civil fines and sanctions. In general, see Chapter 18, Municipal Prosecutions, by Eric D. Williams, *Local Government Law and Practice in Michigan*, published

jointly by the Michigan Municipal League and the Michigan Association of Municipal Attorneys.

Misdemeanor

If the violation of an ordinance is a misdemeanor, action will be initiated by issuance of a complaint and warrant. Proceedings are conducted through district court/municipal court. MCL 600.8313. The penalty for such violation shall not exceed a fine of \$500 or imprisonment of 90 days or both. MCL 1174i (Home Rule City); MCL 89.2 (Fourth Class City); MCL 66.2 (General Law Village); MCL 78.24 (Home Rule Village); MCL 41.183 (Township).

Municipal Civil Infraction

A violation of certain ordinances may be prosecuted as a municipal civil infraction. Primarily, the types of infractions that may be designated as municipal civil infractions are related to zoning and building code violations, noxious weeds and related ordinances. Certain specific violations are precluded from being designated as municipal civil infractions. In order to prosecute a violation of an ordinance as a municipal civil infraction, the municipality must 1) adopt a municipal civil infraction ordinance and 2) specifically indicate that the violation of the ordinance is a municipal civil infraction.

The municipal civil infraction ordinance must indicate the municipal official(s) authorized to write and serve municipal civil infraction tickets. If the violation is indicated to be a municipal civil infraction, action will be initiated by issuance of a notice of violation. All proceedings will be conducted through the district court/municipal court unless a municipal civil infractions bureau has been established by the municipality.

Remedies available through district/municipal court violations of municipal civil infractions include the imposition of fees, liens, orders of expense reimbursement, fines and orders of compliance. No imprisonment may be ordered for a violation of a municipal civil infraction. See comments below regarding Abatement of nuisance.

Michigan Court Rule 4.100 (Civil Infraction Actions) should also be consulted. For more information, see the Michigan Municipal League’s One-Pager Plus, “Municipal Civil Infractions.”

[Optional] Municipal Civil Infractions Bureau

Municipal civil infraction ordinance may also establish a municipal civil infraction bureau pursuant to MCL 600.8396 to process admissions of responsibility.

If a municipal civil infractions bureau has been established by a municipality, the respondent may admit responsibility to a notice of violation at the municipal civil infractions bureau. If the respondent denies responsibility, a citation will be issued and further civil proceedings will be conducted through the district court/municipal court.

Blight Violation

A violation of certain types of ordinances may be prosecuted by cities meeting certain population thresholds as a blight violation. MCL 117.4l(4). The following types of ordinances may be designated as blight violations: zoning, building or property maintenance, solid waste and illegal dumping, disease and sanitation, noxious weeds and vehicle abandonment, inoperative vehicles, vehicle impoundment and municipal vehicle licensing. A blight violation may be enforced through an Administrative Hearings Bureau with the imposition of a fine not to exceed \$10,000.

[Optional] Administrative Hearings Bureau (blight court)

A city that has a population of 7,500 or more and is located in any county, or a city that has a population of 3,300 or more and is located in a county that has a population of 2,000,000 or more, may establish an administrative hearings bureau to adjudicate and impose sanctions for violations of the charter or ordinances designated in the charter or ordinance as a blight violation. MCL 117.4q. The bureau may accept admissions of responsibility for blight violations. Pursuant to a schedule of civil fines and costs, the bureau may collect civil fines and costs for blight violations. An administrative hearings bureau shall not have jurisdiction over criminal offenses, traffic civil infractions, municipal civil infractions, or state civil infractions. The bureau and its hearing officers shall not have the authority to impose a penalty of incarceration and may not impose a civil fine in excess of \$10,000. Appeal may be made to the circuit court. City may obtain a lien against property involved. City may also institute court action to collect the judgment.

Abatement of Nuisance

MCL 600.2940 provides that all claims based on, or to abate, nuisance may be brought in the circuit court. The statutory provision recognizes the traditional power and jurisdiction of circuit courts to grant injunctions to stay and prevent

nuisances. Michigan Court Rules 3.310 (Injunctions) and 3.601 (Public Nuisances) should also be consulted.

If a violation of a nuisance is classified as a municipal civil infraction, certain powers are granted to district courts under the Revised Judicature Act, chapter 87. MCL 600.8727 provides that the district judge or magistrate may issue a writ or order under MCL 600.8302. MCL 600.8302 grants equitable jurisdiction and authority to district courts in an action under chapter 87 (Municipal Civil Infractions). The section specifically states that the grant of equitable jurisdiction does not affect the jurisdiction of the circuit court to 1) hear and decide nuisance claims under MCL 600.2940 or 2) hear and decide actions challenging the validity or application of an ordinance and enjoining an individual from enforcing the ordinance in district court or municipal court pending the outcome in circuit court.

Condemnation

Condemnation by the municipality is a procedure available, generally, “if all else fails.” In short, it is the intentional acquisition of private property by a public entity. A full discussion is beyond the scope of this manual. For more discussion, however, see “The Big Picture” section of this manual and also Chapter 9, Eminent Domain, by James R. Lancaster and Clifford T. Flood, Local Government Law and Practice in Michigan, published jointly by the Michigan Municipal League and the Michigan Association of Municipal Attorneys.

Practice Points

An ordinance may not designate a violation as both a municipal civil infraction and a blight violation.

There seems to be no advantage in designating a violation of an ordinance as a blight violation if an administrative hearings bureau is not established.

Appendix B—State Housing Law

Applicability

MCL 125.401 et seq.

By its provisions, the State Housing Law applies to

- 1) cities and villages which have a population of 100,000 or more (**NOTE:** no affirmative action by municipality need be taken in order to enforce provisions of the act if the criteria of this provision apply.)
- 2) areas adjacent to cities and villages identified above that extend 2 ½ miles beyond their boundaries in all directions *
- 3) cities and villages which have a population of 10,000 or more *

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- 4) townships and charter townships that adopt the statute by ordinance **

NOTE: Cities and villages that have a population of 10,000 or less may adopt the provisions of the State Housing Law and enforce as an ordinance.

* provisions of act relating to private dwellings and 2-family dwellings shall not apply unless a city or village by resolution, and passed by a majority vote of the members elect of the legislative body, adopts the provision. MCL 125.401

** provisions of act relating to private dwellings and 2-family dwellings may be applied to those areas by ordinance of a township board. MCL 125.401

Areas covered by the State Housing Law

- **General – includes definitions.** NOTE: definition of nuisance. MCL 125.402(18)
The word “nuisance” shall be held to embrace public nuisance as known at common law, or in equity jurisprudence; and whatever is dangerous to human life or detrimental to health; whatever dwelling is overcrowded with occupants or is not provided with adequate ingress and egress to or from the same, or is not sufficiently supported, ventilated, sewerred, drained, cleaned or lighted, in reference to its intended or actual use; and whatever renders the air or human food or drink unwholesome, are also severally, in contemplation of this act, nuisances; and all such nuisances are hereby declared illegal.
- **Maintenance – minimum standards MCL 125.465-.488**
Public halls in multiple dwelling; lighting; exit lights
Water-closets in cellars
Water-closet accommodations
Basement and cellar rooms
Joint use of kitchens in multiple dwellings
Floors near water-closets and sinks
Repairs and drainage
Water supply
Catch-basins
Cleanliness of dwellings
Court walls in multiple dwellings
Walls and ceilings in multiple dwellings
Wall paper in multiple dwellings
Waste receptacles
Prohibited uses
Combustible materials

- Paint, oil or inflammable liquids; storage in multiple dwellings
- Fire prevention and safety requirements
- Smoke alarms in multiple dwellings
- Overcrowding
- Lodgers
- Infected and uninhabitable dwellings; order to vacate
- Illegal drug manufacturing site; protective measures
- Public nuisance
- Fire escape
- Scuttles, bulkheads, ladders and stairs in multiple dwellings

- **Improvements – minimum standards MCL 125.489-.497**

- Rooms; lighting and ventilation
- Public halls and stairs; lighting and ventilation
- Plumbing fixtures
- Privy vaults, school-sinks and water-closets
- Basements and cellars; protection
- Shafts and courts; openings
- Egress; above first story; fire escapes
- Additional means of egress
- Roof egress in multiple dwellings

- **General enforcement**

- generally, including registry of multiple dwellings or rooming houses of more than 2 units. MCL 125.523 -.537
- of dangerous buildings MCL 125.538 -.542

Enforcement provisions, detailed

Generally—administrative proceedings with judicial enforcement

- **Registry of multiple unit dwellings**
Registry of owners of multiple dwellings or rooming houses containing units offered for rent for more than 6 months of a calendar year. MCL 125.525
Inspection of leaseholds, multiple dwellings and rooming houses of more than 2 units. MCL 125.526
Frequency of inspections.
Permission required to enter premises unless emergency.
Enforcing agency may adopt ordinance to implement provisions of providing access to leasehold. MCL 125.526(7)
If demand made by owner or occupant, warrant may be obtained from court. No warrant is required if emergency. MCL 125.527

Record to be kept of all inspections, checklist of recurring violations. MCL 125.528

- **Certificate of compliance**

Necessary for multiple dwellings and rooming houses. MCL 125.529

Duty to pay rent if no certificate of compliance. MCL 125.530

Application. MCL 125.531

- **Violations**

If violation is found upon inspection, enforcing agency shall record violation in registry. MCL 125.532

Owner shall be notified. MCL 125.532

If violation constitutes a hazard to occupant's health or safety under circumstances where the premises cannot be vacated, enforcing agency shall order violation corrected within shortest reasonable time. MCL 125.532

- **Re-inspection.**

Compliance by owner and occupant (if applicable).

- **Judicial action to enforce provisions of act**

If owner or occupant fails to comply, enforcing agency may bring action to enforce act. (Owner or occupant may also bring action.) MCL 125.534

- **Grounds for motion for preliminary injunction.**

Owners, lienholders of record or ascertained with reasonable diligence shall be served with summons and complaint. Notice of pendency of action shall also be filed with Register of Deeds. MCL 125.534

Court may enjoin the maintenance of unsafe, unhealthy, or unsanitary conditions, or violations of the act and order defendant to make repairs or corrections necessary to abate the conditions. Court may authorize the enforcing agency to repair or to remove the building or structure.

Removal shall be ordered unless the cost of repair is greater than the SEV of building or structure except in urban core cities or local units of government that are adjacent to an urban core city that have adopted stricter standards to expedite the rehabilitation or removal of a boarded or abandoned building or structure that remains either vacant or boarded, and a significant attempt has not been made to rehabilitate the building for a period of 24 consecutive months.

Court may order approval of expense, place a lien on the real property, and establish priority of liens. Court may also specify time and manner for foreclosure of the lien if not satisfied. The phrase urban core cities is defined in section 2, Obsolete Property Rehabilitation Act, MCL 125.2782

Receivership. Court may appoint a receiver of the premises. MCL 125.535

Other remedies. Action by occupant. MCL 125.536

Dangerous buildings—
administrative proceedings with judicial enforcement

Maintaining a dangerous building

Maintaining a dangerous building is declared to be unlawful. Dangerous building is defined as having one or more of following defects:

- a) Door, aisle, passageway, stairway not conforming to approved fire code of city, village or township.
- b) Portion of building damaged by fire, wind, flood, deterioration, neglect, abandonment, vandalism, or other cause so that structural strength or stability is appreciably less than before damage and does not meet minimum requirements of State Housing Law or a building code of city, village or township.
- c) Part of building is likely to fall, become detached or dislodged or collapse and injure persons or damage property.
- d) Portion of building has settled to the extent that walls have materially less resistance to wind than required for new construction
- e) Building likely to collapse, or portion likely to fall.
- f) Building manifestly unsafe for purpose for which it is used.
- g) Building damaged by fire, wind, or flood is dilapidated or deteriorated and has become an attractive nuisance to children, harbor for vagrants, place for committing nuisance or unlawful act.
- h) Building intended as dwelling is unsanitary or unfit for human habitation, is in condition that health officer determines is likely to cause sickness, or is likely to injure the health, safety, or general welfare of people living in dwelling.
- i) Building is vacant, dilapidated and open at door or window leaving interior exposed to elements or accessible to trespassers.
- j) Building unoccupied for a period of 180 consecutive days, not listed for sale or rent with broker. This provision does not apply if either
 - a) owner has notified local law enforcement that building will remain unoccupied for 180 consecutive days (notice having been given not more than

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30 days after the building becomes unoccupied), and owner maintains exterior in accordance with municipal code or

- b) if secondary dwelling of owner regularly unoccupied for 180 days or longer each year, owner has notified local law enforcement that building will remain unoccupied for specified period of time.

Notice of dangerous condition

If found to be a dangerous building, enforcing agency shall issue a notice that structure is dangerous building

Notice given to owner, agent or lessee for registered properties. MCL 125.540(2)

Notice to specify time and place of hearing on whether building is a dangerous building. Person to whom the notice is directed shall have opportunity to show cause why hearing officer should not order building to be demolished, made safe, or maintained. MCL 125.540(3)

Hearing officer appointed by the mayor, village president or township supervisor. Hearing officer shall have expertise as defined by statute. MCL 125.540 Hearing officer may not be employee of enforcing agency.

Administrative hearing

Hearing officer shall take testimony. Within 5 days of completion of hearing, the hearing officer shall render a decision either closing the proceedings or ordering the building demolished, otherwise made safe or maintained.

If the owner fails to appear or comply with order, hearing officer shall file a report with the legislative body. (If legislative body has established a board of appeals under 125.541c, report should be filed with board of appeals.)

Legislative body (or board of appeals) shall conduct hearing not less than 30 days after the hearing officer's hearing. Legislative body may approve, disapprove, or modify order. Owner has 60 days after date of hearing to comply with order. An order of demolition may be appropriate is the legislative body or the board of appeals determines that building has been substantially destroyed by fire, wind, flood, deterioration, neglect, abandonment, vandalism, or other cause and the cost of repair will be greater than the SEV of the builder. Owner shall have 21 days to demolish.

Judicial action/money judgment

Enforcing agency may bring a judicial action against the owner for full cost of the demolition if owner fails to demolish and obtain a lien on the property. MCL 125.541(7).

Notification to owner by tax assessor

Judgment entered against owner pursuant to MCL 125.541(7) may be collected against assets of owner other than building. Lien by municipality for judgment obtained pursuant to MCL 125.541(7) shall be against all real property located in state owned in whole or in part by owner of building.

Criminal penalty

Person who fails to comply with order of legislative body or board of appeals is guilty of a misdemeanor.

Board of appeals

Board of appeals may be established to hear all cases and duties of legislative body under MCL 125.541(3) and (4).

Judicial appeal

Order of legislative body or board of appeals may be appealed to circuit court by filing a petition for an order of superintending control within 20 days of date of decision.

Practice Points

No city, village or township is required to adopt or enforce the provisions of the State Housing Law. MCL 125.543

A municipality that chooses to adopt and enforce the State Housing Law as an ordinance may do so by reference. MCL 125.523

A municipality to which the State Housing Law applies or a municipality which adopts the provisions of the act by reference shall designate a local officer or agency which shall administer the act (enforcing agency). If no officer or agency is designated, the local governing body shall be responsible for administration. It is recommended that the designation be made by ordinance. MCL 125.402a

Municipalities may, by agreement, provide for joint administration and enforcement if practicable. MCL 125.523

The State Housing Law contains minimum housing requirements and does not prohibit enactment of higher standards by ordinance.

The State Housing Law contains definition of nuisance. See MCL 125.402(18)

The State Housing Law contains definition of dangerous building. See MCL 125.539

The definition of dangerous building was amended in 2003 to add the words deterioration, neglect, abandonment, and vandalism to the subsection dealing with damage to a building. If a municipality has set out the provisions of the State Housing Law as the basis for its

dangerous building ordinance, the municipality should consider amending the definition of a dangerous building to include deterioration, neglect, abandonment, and vandalism.

Appendix C—Redevelopment tools available for community restoration on an area-wide basis

Tax Increment Financing Tools

- Downtown Development Authority (1975 PA 197, MCL 125.1651)
- Tax Increment Finance Authority (1980 PA 450, MCL 125.1801)*
- Local Development Finance Authority (1986 PA 281, MCL 125.2151))
- Brownfield Redevelopment Authority (1996 PA 381, MCL 125.2651)
- Historical Neighborhood TIFA (2004 PA 530, MCL 125.2841))
- Corridor Improvement Authority (2005 PA 280, MCL 125.2871)

Other Financing Tools

- Principal Shopping District (1961 PA 120, MCL 125.981)
- Business Improvement District (1961 PA 120, MCL 125.981)
- Business Improvement Zone (2001 PA 260, MCL 125.990)
- Economic Development Corporation (1974 PA 338, MCL 125.1601)
- Michigan Strategic Fund (1984 PA 270, MCL 125.2001)

Tax Abatements

- Industrial Facilities Tax Abatement (1974 PA 198, MCL 207.551)
- Neighborhood Enterprise Zones (1992 PA 147, MCL 207.771))
- Renaissance Zones (1996 PA 376, MCL 125.2681)
- Personal Property Abatement (1998 PA 328, MCL 211.9f)
- Obsolete Property Rehabilitation Abatement (2000 PA 146, MCL 125.2781)
- Commercial Rehabilitation Tax Abatement (2005 PA 210, MCL 207.841)

Other Resources

- Blighted Area Rehabilitation Act (1945 PA 344, MCL 125.71)
- State Housing Development Authority Act (1966 PA 346, MCL 125.1401)
- Land Reclamation and Improvement Authority Act (1992 PA 173, MCL 125.2451)
- Neighborhood Assistance and Participation Act (1980 PA 56, MCL 125.801)
- Urban Redevelopment Corporations Act (1941 PA 250, MCL 125.901)

*for existing TIFA

Financing tools and tax abatement lists provided by Michael McGee, Miller, Canfield, Paddock and Stone, P.L.C. For extensive discussion, see Survey of Economic Development Programs in Michigan, 2nd Edition, June 2007, Report 347 prepared by Citizens Research Council of Michigan.



Form-Based or Form-Emphasized Zoning?

By Richard K. Carlisle, AICP, PCP and Zachary G. Branigan, AICP

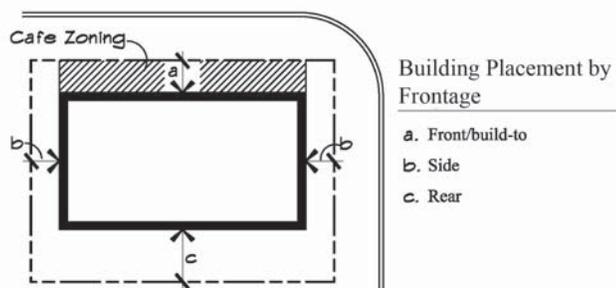
Demystifying Form-Emphasized Zoning

When you ask someone where his favorite place was on a vacation, he almost always describes a neighborhood, a street, or a business district. Rarely will someone describe a single building. In other words, he always tells you about the forest, not one memorable tree. Districts and neighborhoods are the great places we desire, not individual buildings. Form-based zoning turns the attention of Michigan communities away from single sites toward a community's overall character, and this is why it is so important to Michigan's future.

Form-based zoning is everywhere, but the term *form-based* may be misleading. The technique that everyone is talking about may be more accurately described as *form-emphasized*, and it's a new name for an old technique. The concept of a form-emphasized regulation is to reprioritize land use regulations to focus on physical elements, and provide some breathing room for land use. Zoning ordinances do not need to be thrown out altogether to allow for form-emphasized regulations, and in no way is such an ordinance *based* on anything new.

In most zoning ordinances, a schedule of regulations is established to set minimum lot size and width, limit building height, and require minimum setbacks. The schedule of regulations creates consistency, protects individual uses from the potential impacts of other uses, and drives the visual character of a district. Form-emphasized zoning does the same thing, but to a much higher degree, usually in the form of providing a minimum and a maximum, rather than one or the other. In some ways, zoning in an area subject to form-emphasized regulations is tougher on developers than conventional zoning, but it should also be more flexible in terms of use. Figure 1 illustrates a simple form-emphasized regulation requiring a *build-to* line instead of a *minimum front setback* line.

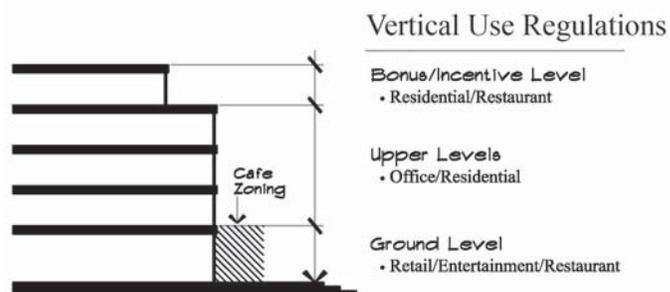
Figure 1



If the goal is to foster districts with a unique and memorable character, rather than a random collection of insulated uses and buildings, form-emphasized zoning may be an effective technique. Typically, this means form-emphasized zoning is best applied in traditional downtowns or areas where mixed-use development will have a positive impact.

Form-emphasized zoning allows for a wider range of uses by right, provided their external impacts are similar. For instance, in a traditional downtown, the upper floors of buildings have residences or offices. As long as a use isn't a nuisance, and its external effects are predictable and regulated, the use is considered to be acceptable. If done properly, building design and site arrangement contribute positively to the public image, and therefore have the greatest degree of impact on the character of the neighborhood. Figure 2 shows a form-emphasized regulation which opens upper floors to office or residential uses by right, and offers an incentive floor if that level is dedicated to residential uses or a restaurant. In this example, four stories is the minimum building height, and the building must be situated immediately adjacent to a build-to line along the right-of-way, leaving room for sidewalk cafés (*café zoning*) in the shaded area between the building and the public sidewalks. The collection of mixed uses is permitted by right, provided the form-emphasized elements are satisfied.

Figure 2



How can communities incorporate Form-Emphasized Zoning?

Form-emphasized zoning may be best introduced in an overlay district, particularly where the target neighborhood or district has more than one underlying zoning category. The overlay can be mandatory, or it could be used as incen-

tive, if the ordinance provides options that would entice a developer to participate.

Many traditional downtowns are similar in terms of built character in that they have consistent setbacks, are within a narrow range of heights, and were built in the same generation. Conventional zoning based almost exclusively on land use requires the use of multiple zoning categories. The overlay approach can be effective by applying form-emphasized regulations throughout the district without necessitating amendments to each zoning category, which could affect those districts elsewhere in the community.

Corridors could also be treated using an overlay. Similar to a traditional downtown, an overlay along a corridor could help unify a district, especially given that a wide range of uses along a given corridor would almost certainly require separate zoning under conventional means.

If the target area is already classified under one zoning district, and that district does not exist in other areas of the community where form-emphasized zoning would be inappropriate, it may be best to simply amend the regulations for that zoning district directly. This approach may also work for planned unit development (PUD). Principally in communities where a PUD is treated as a rezoning, form-emphasized regulations can easily be added to the PUD regulations. This is an especially effective approach when the community uses PUD to permit and encourage mixed-use development.

How must communities prepare Form-Emphasized Zoning?

In order to establish support for the form-emphasized approach, it is essential that decision makers realize the importance of the public spaces that otherwise may not have been considered. Streets and alleys, parks and plazas are places that define a district or neighborhood. Form-emphasized regulations are designed to frame those areas by encouraging the right mix of height and location. In other words, a community must begin thinking about how the massing and arrangement of buildings leads to defined spaces, often in a right-of-way, that characterize a place.

There is also a learning curve associated with form-emphasized zoning, particularly about specific urban design characteristics. When a typical planning commission considers setbacks, for instance, they are often motivated to do so by a perceived need to separate uses which could negatively impact one another. In a form-emphasized setting, however, the philosophy is more direct; if buildings are allowed to go anywhere behind a defined setback line, will they contribute to a cohesive district and a defined character? Will they help create vibrant, memorable places? In this spirit, a build-to line or minimum height may be more effective than a minimum setback and a maximum height.

There are established rules of thumb in urban design that typify successful downtowns, walkable areas, and mixed-use development. While they may not be applicable everywhere, these rules of thumb will help introduce officials to the form-emphasized philosophy. For instance, a common rule of thumb is that people will rarely walk more than one quarter of a mile in an open, low-density setting, but will walk all day in a compact, mixed-use environment. To see the best example of this concept in practice, watch visitors to a shopping center circle a parking area for 10 minutes looking for a space to get close to the entrance, even in summer. Once inside the high-stimuli environment of the mall itself, the same person will gladly walk for hours.

In creating a district, particularly one where there is a lot of compact development and shared elements, there are financial and liability concerns which deal with access and maintenance. The community must carefully plan for cross access arrangements, shared parking and refuse, and ensure that adequate maintenance will be consistent. These are hallmark issues with mixed-use projects generally, regardless of whether or not form-emphasized regulations are used. Downtown development authorities may play a key role in resolving these issues.

While conventional zoning takes only two dimensions into consideration, form-emphasized zoning can address three dimensions of development. By going beyond the simple relationships between uses on a horizontal plane, form-emphasized zoning looks at complex relationships between developments on the ground, and in terms of vertical space. This is important in that communities are vastly different in terms of physical appearance. Commercial zones in different communities may have similar zoning provisions, but share hardly any physical characteristics. Form-emphasized zoning is better suited to address the distinctive physical characteristics that make places unique.

Given that districts are very diverse visually and physically (far more diverse than their uses are from one to another), community leaders need to think about relationships in a much more complex manner to effectively develop form-emphasized zoning. Transitioning used to mean that a medium-intensity use, like multiple-family residential or office, should logically go between single-family areas and commercial areas. In the context of form-emphasized zoning, however, transitioning could demand consideration of how window locations and building height affect compatibility, especially where mixed-use development is proposed and traditional land use boundaries have evaporated. Leaders must seek education and assistance to analyze these issues in their own community.

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Form-Based or . . .

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Why bother with Form-Emphasized Zoning?

Imagine a successful, vibrant, traditional downtown. This is the kind of place Michiganders are talking about these days, and it's often impossible to replicate or even support them under conventional Euclidean zoning. Form-emphasized regulations can make them a reality.

Mixed-use, sustainable places made possible through new approaches to zoning represent some of the most valuable places in Michigan. The high quality of life they offer is appealing to the 21st century workforce, as evidenced by the relatively high demand for more urban housing in communities such as Grand Rapids, Ann Arbor, and Royal Oak. Mixed-use is *economically sustainable* in that it helps create 24-hour areas by incorporating residences and daytime uses in one location. Mixed-use helps new businesses survive by offering an around-the-clock customer base. Mixed-use is *environmentally sustainable* in that it allows for compact development and reduces urban sprawl. Living in a mixed-use area can eliminate commutes and reduce transportation demand. Mixed-use is *socially sustainable* in that it helps create dynamic, memorable places where events and interaction can occur naturally in a walkable, intimate, safe, and convenient setting.

While low-density, single-purpose suburbs will always have a significant role in Michigan cities and townships, they are plentiful today, and they do little to help Michigan retain young, educated workers.

Michigan zoning rarely allows for these good, vibrant places to emerge, but communities and the real estate community are catching on fast. Cities and townships need techniques that give them the opportunity to compete in the 21st century. The form-emphasized approach provides an open door to use existing zoning rules, with a new emphasis on physical planning and a leap of faith in terms of use, to allow the right kind of development at the right time. In the next 10 years, planning for diverse, mixed-use areas will not only be an advantage, neglecting them will become a liability. 🏠

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Cell Tower Backup Power Order

By John W. Pestle, Varnum, Riddering, Schmidt & Howlett, LLP

The Federal Communications Commission (FCC) has issued an order requiring backup power for cell towers. This may generate unusual activity and litigation for municipalities in the next year regarding (1) cell towers on municipal property, and (2) zoning permits and other regulations affecting cell towers on private property that have some unique requirements to comply with Federal law. The key points are as follows.

Order

On October 4 the FCC issued an order reinforcing and clarifying a prior order requiring cell phone (and landline) phone companies within one year of the effective date of the order to install backup power supplies at most sites (and have portable power supplies available for sites without permanent backup power). This is an outgrowth of Hurricane Katrina, a finding that telephone and cell phone companies there did not have adequate backup power supplies to keep the phones operating, and hence that backup power supplies need to be installed at key phone and cell phone locations nationwide.

See http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-177A1.doc

In its order, the FCC declined to exempt cell antennas in non-traditional locations, such as the small “distributed antenna” systems popularized by companies such as NextG, which are often located on utility poles, light poles, in the rights-of-way, or camouflaged in steeples and the like.

The FCC order by its terms expressly does *not* preempt state or local laws or leases which prevent backup power installations. Any statements by cell phone company representatives that the FCC order by its terms preempts state or local laws or leases are incorrect. But as set forth below, cell companies may claim that by other means Federal law preempts in any event, even as to lease terms that prohibit dangerous substances (e.g., gasoline) from being introduced on the municipal land or building being leased for a cell antenna.

The order will take effect when the reporting forms for it have been approved by the Office of Management and Budget. This is expected early in 2008, so the date when cell phone

companies will have to be in full compliance with the order will be in early 2009.

Municipal Sites

As a result of this FCC order, municipalities will likely see a lot of activity to put generators and battery backup systems at cell tower sites on private and public property, including those in the rights-of-way. This may cause problems for towers in sensitive municipal locations, such as those on the roofs of municipal or school buildings, or on water towers, because backup power systems typically involve gas, diesel, or propane powered generators (with accompanying fuel tanks) or batteries with lots of sulfuric acid. Lease terms often prohibit such dangerous substances or require municipal approval of changes from the initial installation, and either type of system is heavy, which may cause building or structural concerns.

Cell companies may seek lease amendments to allow them to install such backup power systems (in fact, the FCC said they should seek such amendments if their leases now preclude such systems). Cell companies may claim that lease provisions effectively preventing backup power systems violate Section 253 of the Federal Communications Act, which (in general, and subject to a number of requirements and exclusions) preempts state or local laws or other legal requirements that “may prohibit, or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” 47 U.S.C. Section 253(a). On the other hand, municipalities can have legitimate concerns if they have good reasons for not wanting such systems installed on particular properties, yet the lease does not clearly preclude them.

Zoning, Building Codes and the Like

The cell phone companies complained to the FCC that local zoning laws, building codes, or environmental restrictions may prevent backup power installations.

Municipalities should be aware that if this is the case, they may face challenges to such laws, not under the FCC order, but under the cell tower zoning provisions added by the Federal Telecommunications Act of 1996, which appears at 47 USC Section 332(b) and following. These provisions apply to all state and local laws that regulate the “placement, construction or modification” of cell towers--i.e. building codes, permitting and other local requirements, *not* just zoning. They require action by a municipality in “a reasonable time,” which here the carriers will argue is very short, given the FCC directive for backup power installations to be completed within a year. Carriers will likely argue that local requirements that they can’t comply with “prohibit or effectively prohibit” the provision of cell phone service, in violation of the statute.

And under these provisions, all denials have to “in writing” and based on “a written record.” Although these requirements sound simple, the courts have interpreted them in ways that local practices and procedures often may not meet. As a practical matter, this requirement can be the hardest part for municipalities to comply with, especially if they do not consult with their attorneys in advance on this. Failure to meet these procedural requirements is one of the common reasons local zoning decisions are found to violate the cell tower zoning requirements of the Federal Communications Act.

Most importantly, a violation of these sections of the Federal Act usually (under court decisions) leads to the permit or zoning approval in question being *granted as it was applied for*. Typically the courts do *not* send the case back to the municipality for it to redo in compliance with the Act.

Suggested Actions

Municipalities should examine the leases they have with cell companies to see if backup power supplies (batteries or generators) can be installed without municipal approval, especially as to locations where this would be a concern.

Municipalities should alert their zoning and engineering staffs to be prepared to respond promptly to the various types of local approvals (zoning, building codes, permits, environmental) that may be involved in likely new backup power installations at cell sites. They should make sure their procedures comply with the Federal Communications Act regarding zoning and other local regulations applicable to cell towers. If municipalities suspect that a given installation may become a contentious case, they should make sure to involve people with knowledge of the Federal Communications Act and comply with its procedural requirements regarding the form of any denial, what has to be in it, and the need for a written record.

We have a detailed paper on the Federal cell tower statute. If you would like a copy, either email me, or get a copy from our web site--go to www.varnumlaw.com/serviceGroups/cableTV/cellularwireless. 🏢

John W. Pestle is a partner with Varnum Riddering Schmidt & Howlett LLP in Grand Rapids. He is a former Chair of the Public Corporation Law Section and represents municipalities across the country on cable and telecommunications matters.

Legislative Update

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

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

Laws Enacted

- **PA 108 Local Government Health Care Benefits. SB 420, PA 108** Provides for municipal employee medical, optical, and dental benefits in accordance with public employees health care act. Amends section 5 of 1951 PA 35 (MCL 124.5).
- **Personal Property. SB 276, PA 115** Exempts new personal property in certain jurisdictions from personal property tax. Amends section 9f of PA 206, 1893 (MCL 211.9f) as amended by PA 79, 2004.
- **Jail Population Plan. HB 4725, PA 140** Implements a county jail population management plan and revises jail overcrowding procedures. Amends sections 1, 2, 3, 4, 5, 8, 9 and 10, PA 325, 1982 (MCL 801.51, 801.52, 801.53, 801.54, 801.55, 801.58, 801.59 and 801.60) as amended by PA 399, 1988 and by adding section 1a.

Bills Passed by the Senate and the House of Representatives

- **Emergency Telephone Fee. SB 410** Modifies funding system for emergency telephone service enabling act. Amends title and sections 101, 102, 201, 202, 203, 205, 301, 302, 303, 306, 307, 308, 312, 319, 320 and 401 of 1986 PA 32 (MCL 484.1101 et seq.) and adds sections 401a, 401b and 401c.
- **Urban Township. SB 455** Amends local development financing act to define urban townships. Amends section 2 of 1986 PA 281 (MCL 125.2152).
- **Brownfield Redevelopment. SB 534** Modifies requirements for projects under brownfield redevelopment authority.
- **Brownfield Redevelopment. SB 539** Provides amendments to brownfield redevelopment authority. Amends sec. 2 of 1996 PA 381 (MCL 125.2652).
- **Local Government Investment. SB 678** Requires quarterly reports from local governments investing surplus funds. Amends section 6 of 1943 PA 20 (MCL 129.96).
- **School Board Elections. HB 4506** Provides technical amendments to the revised school code relating to school board elections. Amends sections 4, 5 and 614 of 1976 PA 451 (MCL 380.4 et seq.).

- **Brownfield Redevelopment. HB 4711** Provides for brownfield redevelopment authority revisions. Amends sections 15 and 16 of 1996 PA 381 (MCL 125.2665 and 125.2666).
- **Brownfield Redevelopment. HB 4712** Provides for certain revisions to brownfield tax increment finance act. Amends section 13 of 1996 PA 381 (MCL 125.2663).
- **Detroit Income Tax. HB 5105** Eliminates Detroit income tax rate reductions to freeze rate at 2.5 percent on residents and 1.25 percent on nonresidents. Amends section 3, ch. 1 of 1964 PA 284 (MCL 141.503).
- **Revenue Sharing Freeze. HB 5217** Extends revenue sharing freeze for fiscal year 2008. Amends section 13 of 1971 PA 140 (MCL 141.913).
- **Municipal Loan. HB 5449** Expands eligibility for emergency municipal loan act. The amendments apply only to Highland Park. Amends sections 4 and 5 of 1980 PA 243 (MCL 141.934 and 141.935).

Bills Passed by the Senate

- **County Funds Transfer Authorization. SB 368** Requires notarized signatures on an order authorizing the transfer of county funds over a certain amount. Amends 1846 RS 14 (MCL 48.35 - 48.48) by adding section 40a.
- **Brownfield Redevelopment Authority Capture. HB 5539** Provides for reimbursement of certain tax capture reductions for brownfield redevelopment authorities. Amends 1996 PA 381 (MCL 125.2651 - 125.2672) by adding section 15a.
- **Local Development Finance Authority Tax Capture. HB 5540** Provides for reimbursement of certain tax capture reductions for local development finance authorities. Amends 1986 PA 281 (MCL 125.2151 - 125.2174) by adding section 11b.
- **Tax Increment Finance Authority Tax Capture. HB 5541** Provides for reimbursement of certain tax capture reductions for tax increment finance authorities. Amends 1980 PA 450 (MCL 125.1801 - 125.1830) by adding section 12b.
- **Downtown Development Authority Tax Capture. HB 5542** Provides for reimbursement of certain tax capture reduc-

tions for downtown development authorities. Amends 1975 PA 197 (MCL 125.1651 - 125.1681) by adding section 13c.

Bills Passed by the House

- **Neighborhood Enterprise Zones. HB 5101** Expands eligibility in neighborhood enterprise zones to include new families. Amends section 4 of 1992 PA 147 (MCL 207.774).

Bills Introduced in the Senate

- **Plant Rehabilitation Tax. SB 310** Revises calculation of plant rehabilitation tax levies. Amends sections 14 and 14a of 1974 PA 198 (MCL 207.564 and 207.564a).
- **Local Government Health Care Benefits. SB 420** Provides for municipal employee medical, optical, and dental benefits in accordance with public employees health care act. Amends section 5 of 1951 PA 35 (MCL 124.5).
- **Clerk Marriage Authority. SB 667** Allows county clerks to perform marriages in other counties. Amends section 7 of 1846 RS 83 (MCL 551.7).
- **New Construction Incentives. SB 917** Amends Commercial Rehabilitation Act to allow tax credits for new construction on blighted or vacant property. Amends section 2, PA 210, 2005 (MCL 207.842) as amended by PA 554, 2006.
- **Downtown Retail Incubators. SB 970** Allows downtown development authorities to establish and fund retail business incubators. Amends sections 1 and 7, PA 197, 1975 (MCL 125.1651 and 125.1657) as amended by PA 659 and PA 115, 2005.
- **Renaissance Zone Retail. SB 971** Creates retail redevelopment renaissance zones. Amends renaissance zone act to create retail redevelopment renaissance zones.
- **Retail Loans. SB 972** Allows downtown development authorities to provide low-interest loans; clarifies eligibility for loans. Amends section 7, PA 197, 1975 (MCL 125.1657).
- **Historic Preservation Credit. SB 973** Provides business tax credit for historic preservation. Amends section 435, PA 36, 2007.
- **Commercial Redevelopment. SB 974** Reauthorizes commercial redevelopment act for local governmental units. Amends sections 4, 12 and 18, PA 255, 1978 (MCL 207.654, 207.662 and 207.668) as amended by PA 243, 1998 and PA 342, 1984 and adds section 12a.
- **Neighborhood Zones. SB 975** Modifies number of parcels allowed in a neighborhood enterprise zone. Amends section 3, PA 147, 1992 (MCL 207.773) as amended by PA 339, 2005.

- **Neighborhood Zone Property. SB 976** Expands definition of a facility in a neighborhood enterprise zone to include rental property. Amends section 2, PA 147, 1992 (MCL 207.772) as amended by PA 661, 2006.
- **Recreational Trail Funds. SB 978** Provides funding for recreational trails. Amends section 1907, PA 451, 1994 (MCL 324.1907) as added by PA 60, 1995.
- **New Condo/Apartment Assessments. SB 979** Requires new condominium and apartment buildings to be assessed as vacant land until occupied. Amends PA 206, 1893 (MCL 211.1-211.155) by adding section 711.
- **Personal Property Tax Break. SB 980** Revises tax exemption for new personal property. Amends section 9f, PA 206, 1893 (MCL 211.9f) as amended by PA 116, 2007.

Bills Introduced in the House of Representatives:

- **Property Tax. SB 886** Maintains primary residence exemption for active duty military personnel who rent out property when on duty. Amends section 7dd of PA 206, 1893 (MCL 211.7dd) as amended by PA 114, 2006.
- **Neighborhood Enterprise Zones. SB 887** Allows exceptions to neighborhood enterprise zone requirements. Amends section 4 of PA 147, 1992 (MCL 207.774) as amended by PA 661, 2006.
- **Prefunded Retiree Health Care. HB 4451** Provides for bonding authority for prefunded retiree health care. Amends section 103 of 2001 PA 34 (MCL 141.2103) and adds sections 518 and 519.
- **In Person Registration. HB 4774** Expands elector registering to vote in person at any county, city and township clerk's office. Amends sections 509v and 509w of 1954 PA 116 (MCL 168.509v and 168.509w).
- **Zoning Referees. HB 5292** Provides referees for litigation zoning enabling act. Amends 1961 PA 236 (MCL 600.101 - 600.9947) by adding section 2977
- **Zoning Referees. HB 5293** Sets qualifications of individuals designated as referees for zoning litigation. Amends 1961 PA 236 (MCL 600.101 - 600.9947) by adding section 2978.
- **Neighborhood Investment Credit. HB 5311, HB 5312, HB 5313** Provides income tax credit for investments in neighborhood organizations and programs. Amends PA 281, 1967 (MCL 206.1-206.532) by adding section 253.
- **Retirement Forfeiture. HB 5339** Provides for the denial of pension and retirement benefits to public employees who have been convicted of or pled guilty to certain felonies. Amends sections 3 and 4, PA 350, 1994 (MCL 38.2703 and 38.2704) as amended by PA 467, 1996.

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- **Industrial Property. HB 5385** Provides exemption to transfer of ownership on conveyance of certain improved industrial property. Amends section 27a, PA 206, 1893 (MCL 211.27a) as amended by PA 446, 2006.
- **Renaissance Zones. HB 5410** Provides for recommendation of commission of agriculture for certain renaissance zones. Amends sections 8e, 9 and 10, PA 376, 1996 (MCL 125.2688e, etc.) as added by PA 270, 2006 and as amended by PA 164, 2005.
- **Tax Exempt Property. HB 5455** Revises taxation of lessees and users of tax exempt property. Amends section 1, PA 189, 1953 (MCL 211.81) as amended by PA 244, 1998.
- **Commercial Redevelopment. HB 5459** Expands eligibility for commercial redevelopment to include certain vacant or blighted properties. Amends section 2, PA 210, 2005 (MCL 207.842) as amended by PA 554, 2006.
- **Retiree Bonding. HB 5465** Provides for bonding authority for prefunded retiree health care. Amends 2001 PA 34 (MCL 141.2101 - 141.2821) by adding section 518.
- **Retiree Bonding. HB 5466** Provides for bonding authority for prefunded retiree health care. Amends 2001 PA 34 (MCL 141.2101 - 141.2821) by adding section 519.
- **Recording of Deeds. HB 5512** Revises recording of deeds and other documents by register of deeds. Amends sections 24, 25, 27, 28 and 43, Revised Statute 65, 1846 (MCL 65.24, 565.25, 565.27, 565.28, and 565.43) as amended by PA 526, 1996 and PA 212, 1992 and adds section 24a; repeals section 26, RS 65, 1846 (MCL 565.26).
- **Blighted Property Assessment. HJR CC** Provides for different level of assessment on value of blighted property. Amends section 3 of Article IX of the Constitution. 🏠

State Law Update

By Sarah J. Gabis and Christopher W. Braverman, Foster, Swift, Collins & Smith, PC

Renaissance Zone Property Exempt From Police & Fire Pension Taxes

Kinder Morgan Michigan, LLC v City of Jackson, __ Mich App __
(Issued Nov. 8, 2007)

Michigan's Renaissance Zone Act provides that real and personal property located in a designated "renaissance zone" is generally exempt from property taxes, except in certain circumstances. MCL 211.7ff(2). One of the exceptions includes "ad valorem property taxes specifically levied for the payment of principal and interest of obligations approved by the electors or obligations pledging the unlimited taxing power of the [municipality]." The Firefighters and Police Officers Retirement Act, MCL 38.551 *et seq.*, authorizes municipalities to collect property taxes to fund a pension system for such officers, which is called a "PA 345 pension." In 2005, the City of Jackson attempted to levy taxes for its PA 345 pension against Plaintiffs' properties, which are located in a renaissance zone. Plaintiffs appealed to the Tax Tribunal, which held that the properties were exempt.

The Court of Appeals first stated that the Legislature intended to grant significant tax relief to properties in renaissance zones, and the Renaissance Zone Act was intended to be liberally construed to effectuate that purpose. The Court then determined that the language of the exemption is ambiguous, in that reasonable minds could disagree about its meaning. The Court ultimately concluded that a PA 345 pension is not an obligation where a municipality pledges its unlimited taxing power as security for the repayment of a debt, so it does not fall within the Renaissance Zone Act exemption. Therefore, the Court concluded that taxes for PA 345 pensions could not be imposed on Plaintiffs' properties.

Township's SUP Upheld; Citizen Group Had Standing To Challenge SUP

Concerned Citizens of Acme Township v Acme Township,
Mich Ct App unpublished decision (No 264109, issued Sept. 20, 2007)

In 2004, the Acme Township Board approved a special use permit (SUP) for a "mixed-use planned development" that the applicants (Meijer, Inc. and Village at Grand Traverse, LLC) proposed to develop as a town center area with a Meijer store as its retail anchor. Specifically, the SUP provided that the development would consist of retail, civic, hotel, residential, and mixed uses.

After the Board issued the SUP, the Concerned Citizens of Acme Township (CCAT) filed a lawsuit seeking to overturn the Board's decision. The SUP applicants argued that CCAT lacked standing to challenge the decision. The trial court found that CCAT had standing and that the SUP was inconsistent with the Township's master plan. Therefore, the trial court vacated the Board's decision.

The Court of Appeals first held that CCAT met the three standing requirements as set forth by the Michigan Supreme Court: (1) an “injury in fact”; (2) a “causal connection” between the alleged injury and the conduct complained of; and (3) the alleged injury is redressable by a favorable decision. The Court found that affidavits from CCAT members, which involved claims that the environmental impact of the development could negatively impact property, aesthetics, and recreational activities in the surrounding area, established the injury in fact. These claimed injuries would be the direct result of the development, which satisfied the second standing requirement. Finally, a favorable decision would help preserve the environmental integrity of the area, meeting the last requirement.

The Court then held that the SUP should be reinstated, because the trial court erred in finding that it was inconsistent with the Township’s master plan and zoning ordinance. In doing so, the Court stated that the Township’s decision must be treated as a final administrative decision, which can only be overturned if it is contrary to law; unsupported by competent, material, and substantial evidence on the record; arbitrary and capricious; a clear abuse of discretion; or affected by substantial and material error of law. The Court found that the SUP incorporated a number of features outlined in the master plan, and given the high level of deference that must be given to the Board’s decision, the SUP should have been upheld.

Actions Did Not Create Prior Nonconforming Use; Zoning Amendment Required To Be Voted On By Township Electors

Soss v Whiteford Twp, Mich Ct App unpublished decision (No 278914, issued Oct. 4, 2007)

Upon a request by Gateway Fireworks, LLC (“Gateway”), the Whiteford Township Board approved a zoning change to allow certain property to be used for the retail sale of fireworks. Gateway then undertook a number of steps to further the project: it entered a purchase agreement for the property; obtained financing; closed on the sale; entered an engineering and architectural contract; acquired various permits; constructed an offsite building; began grading, fencing, curbing, and excavation work; obtained surveys and well-drilling services; and put \$1.4 million into the project. Plaintiff, a citizen of the Township, filed a petition under the Zoning Enabling Act, MCL 125.3402, to place the zoning change before township voters, and obtained the required number of signatures to do so. The Township clerk, however, found that the petition was inadequate, which made the zoning change effective. Plaintiff filed a lawsuit challenging the clerk’s determination. Gateway responded by arguing that its activities created vested rights to continue a prior nonconforming use.

The trial court issued a writ of mandamus ordering the clerk to find the petition adequate, and determined that the zoning change could not take effect without approval from the

majority of township voters. Furthermore, the trial court held that Gateway’s activities did not create a prior nonconforming use. The Court of appeals affirmed each decision.

The Court held that in order to establish a prior nonconforming use, the work on a specific piece of property must be of a substantial character in preparation of the intended use. Further, the actual nonconforming use “must be apparent and manifested by a tangible change in the land, as opposed to intended or contemplated change by the property owner.” Although Gateway had undertaken numerous steps, the actual activities did not reflect the intended use as a retail fireworks location. Instead, the activities could have been in furtherance of “any other type of store” permitted in that zoning district. The Court cited a number of other cases finding that similar activities were also insufficient. The fact that Gateway had received a building permit, by itself, was not enough to create a vested right.

Finally, the Court ruled that the clerk was required to find the petition adequate, given that it met the requirements under the statute: it was timely filed; signed by registered voters who resided in the township; and contained the required number of signatures. Outside of evaluating those requirements, the Court ruled that a clerk has no discretion to find a petition inadequate, as a clerk’s duties are strictly ministerial in nature.

Accessory Use Must Be On Same Lot As Principal Use; City Properly Denied Variance

Americorp Financial Group, Inc v City of Birmingham, Mich Ct App unpublished decision (No 270228, issued Sept. 13, 2007)

Plaintiff owned an office building in the City of Birmingham, and requested to use a parcel across the street from the building as a parking lot. The City’s zoning ordinance provided that a freestanding parking lot was not permitted in that zoning district, except as an accessory use. The City interpreted “accessory” to mean a use on the same parcel as the principal use. The Board of Zoning Appeals (BZA) therefore denied Plaintiff’s request, and also denied Plaintiff’s variance request. Plaintiff appealed to circuit court, which reversed the BZA’s decision, ruling that it erred in its interpretation of the zoning ordinance and in denying the variance request.

The Court of Appeals reversed, finding that the BZA’s interpretation was correct, and there was no basis for granting a variance. The zoning ordinance stated that an accessory use was “a subordinate use which is customarily incidental to the principal use on the same lot.” Plaintiff argued that “customarily incidental” meant that the accessory use did not always need to be on the same lot as the principal use. The Court disagreed, finding that Plaintiff’s interpretation contradicted

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the plain language of the ordinance. The Court also upheld the BZA's denial of a variance, ruling that Plaintiff was not suffering from any unique circumstances that would make the variance necessary. Plaintiff had argued that the sale and lease rates in the area would not allow for a sufficient return on investment for that property, but that reflected "general conditions in the local real estate market, not anything unique to plaintiff."

Overflowing Water From Storm Sewer Drain Not A De Facto Taking

Muskegon Conservation Club v City of North Muskegon,
Mich Ct App unpublished decision
(No 270643, issued Nov. 1, 2007)

In 1951, Plaintiff granted the City of North Muskegon an easement to install a storm sewer drain, which was extended in 1965 at Plaintiff's request. At that time, with approval from Plaintiff, the City installed a concrete sump to collect water during heavy rains. The sump was designed to discharge water into the surrounding area if filled beyond its capacity. Sometime in 2001, the sump began to discharge excessive amounts of water, which Plaintiff claimed eroded its property along the shoreline and undermined its seawall. Plaintiff brought an inverse condemnation action, claiming there had been a *de facto* taking of its property by the City. Plaintiff was awarded damages after a jury trial.

The Court of Appeals ruled that a directed verdict should have been granted in the City's favor. Acknowledging that there is "no exact formula for establishing a *de facto* taking," the Court stated there must at least be a showing that the government "abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property." The discharge of water from the sump was not an affirmative action taken by the City, but was instead the passive result of the design of the storm sewer extension, which Plaintiff itself had requested. Further, because there was no claim or evidence that the sump was defective, or that the system did not operate properly, "it cannot be reasonably concluded that defendant's placement of that structure . . . was an 'abuse' of its legitimate powers." The Court ordered the claims to be dismissed.

"Two-Inch" Rule For Sidewalk Liability Applies To Both Width And Depth Of Discontinuity

Semon v City of St. Clair Shores, Mich Ct App unpublished decision (No 274777, issued Oct. 30, 2007)

Plaintiff was injured when she tripped and fell as the result of an alleged defect in a crosswalk, and filed an action under the "highway exception" to governmental immunity. MCL 691.1402. The particular defect was apparently less than two inches deep, but more than two inches wide in certain places. The City moved for summary disposition under the so-called "two-inch" rule, which provides that a "discontinuity defect of less than 2 inches creates a rebuttable inference" that the City maintained the crosswalk in reasonable repair. MCL 691.1402a(2). The City argued that because the alleged defect



Looking for Articles

The Quarterly has been trying to publish at least three feature-type articles per edition. We are looking for articles for the Spring issue. Lots of topical things to write about these days, so feel free to call with suggestions or offers or, better yet, submit something for consideration. Articles must be in Word format, double-spaced, and e-mail to tschultz@secrestwardle.com. Articles are due on March 1, 2008.

was less than two inches deep, it was entitled to the inference that the crosswalk was kept in reasonable repair.

In an apparent issue of first impression, the Court of Appeals held that the statute's language, which refers simply to a "discontinuity" of less than two inches, applies to both the depth and width of the discontinuity. The Court relied on a dictionary definition of "discontinuity" to reach this conclusion. Therefore, because the width was greater than two inches in certain places, the City was not entitled to summary disposition.

Cause Of Action Exists For Drain System Overflow,
But Property Owners Failed To State Claim

Bosanic v Motz Development, Inc., __ Mich App __
(Issued Dec. 4, 2007)

In 2004, severe rainfall caused flooding that damaged Plaintiffs' homes. Plaintiffs alleged that the drain system was seriously undersized, in that the design failed to take into account all nearby acreage from which water would flow into the system. Plaintiffs sued the Clinton County Drain Commissioner, along with the developer and its engineers, and claimed that the Commissioner failed to properly review the plans and design of the system. The Commissioner argued that MCL 691.1417, which addresses governmental immunity in the context of storm water system overflows onto real property, did not create a cause of action for Plaintiffs. The Court of

Appeals disagreed, but held that Plaintiffs had not satisfied the statutory requirements.

The statute creates general governmental immunity from tort liability for the overflow or backup of a sewage disposal system, except in certain circumstances. Specifically, a person may seek compensation from a government agency for property damage if, at the time of the overflow, (1) the agency owned or operated the allegedly responsible portion of the system; (2) the system was defective; (3) the agency knew or should have known of the defect; (4) the agency, having legal authority to do so, failed to repair, correct, or remedy the defect; and (5) the defect was 50% or more responsible for the damage. The Court found that a "plain reading" of the statute demonstrated that it created a cause of action. In fact, "this statute constitutes the only exception to governmental immunity legally recognized in Michigan with respect to these kinds of actions."

Despite the cause of action created by the statute, the Drain Code requires at least five property owners within a drainage district to petition the Commissioner in writing for a repair if the system presents a problem. MCL 280.191. If a "board of determination" decides that a repair is necessary, the Commissioner may undertake the repair work. The Court found that the elements of MCL 691.1417 were not satisfied because a petition was not filed until after the flooding, meaning that the Commissioner "had no authority to address the defect in the drain system." Therefore, Plaintiffs failed to state a valid claim under the statute. 🏠

Federal Law Update

By *Phil Erickson, Plunkett & Cooney, PC*

United States Court of Appeals, Sixth Circuit

Due Process—Procedural

Sickles v. Campbell County, Case No. 06-6055; __ F.3d __
(September 5, 2007)

Inmates and non-inmates filed suit under the Fourteenth Amendment asserting that the policies of two counties in taking moneys from the canteen accounts of prisoners for the costs of booking and room and board without a pre-deprivation hearing violated their right to procedural due process. The district court dismissed the claims, and the Sixth Circuit affirmed. The court found that no pre-deprivation hearing was required, because 1) the private interests at stake were small in

both absolute and relative terms; 2) the risk of erroneous deprivation is minor; 3) the potential benefits of a pre-deprivation hearing or other safeguards are few; and 4) the governmental interest in "sharing the costs of incarceration and furthering offender accountability" are substantial.

Due Process—Substantive—Privacy

Bailey v. City of Port Huron, et al., Case No. 06-2375; __ F.3d __ (November 1, 2007)

Plaintiff was the wife of a St. Clair County deputy sheriff who worked undercover. Plaintiff and her husband were in a one-vehicle, alcohol related, rollover accident. In an apparent

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Federal Law Update . . .

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attempt to protect her husband, Plaintiff told police that she was driving when in fact her husband was driving. Plaintiff was charged with resisting and obstructing, and her husband was charged with impaired driving. The Port Huron Police Department issued a press release regarding the arrests which included Plaintiff's name, her hometown, her mug shot photo, an accident report which included her phone number and her husband's occupation. Plaintiff brought suit asserting a violation of her right to privacy. The district court granted summary judgment, and the Sixth Circuit affirmed. "As a matter of federal constitutional law, a criminal suspect does not have a right to keep her mug shot and the information contained in the police report outside of the public domain—and least of all from legitimate requests for information from the press."

First Amendment—Speech

Murphy v Cockrell, Case No. 06-5897; ___ F.3d ___
(October 4, 2007)

Murphy and Cockrell were both deputies to the Montgomery County Property Valuation Administrator (PVA) when he or she retired. Cockrell was appointed Interim PVA by the Governor. In the Fall 2004 election, Cockrell (Republican) and Murphy (Democrat) both ran for the office. During the campaign, Murphy attacked Cockrell for a lack of experience in property valuation. Cockrell won the election and promptly fired Murphy. Cockrell sent Murphy a letter stating only, "Your services are no longer required, effective immediately." Importantly, Cockrell admitted in her deposition that Murphy was fired for the way that she campaigned, rather than for simply being a candidate. On the basis of this deposition testimony, the Sixth Circuit distinguished prior precedent that there is no protected right to candidacy and a candidate may be terminated for the fact of the candidacy. The court found that where the candidate is fired for the content of his or her political speech, that speech is protected under the First Amendment. The district court's grant of summary disposition on Murphy's First Amendment claim was reversed on that basis.

First Amendment—Speech—Sign Ordinance

Midwest Media Property, LLC v. Symmes Township, Ohio,
Case No. 06-3828; ___ F.3d ___ (October 1, 2007)

The Plaintiff filed nine separate applications to erect a billboard in Symmes Township. Each of the applications requested to erect a 40-foot-high, 672 square foot sign, which exceeded the height and size restrictions in the township zon-

ing ordinance. When the applications were rejected, Plaintiff brought suit challenging other aspects of the ordinance, but not the height and size restrictions. The Sixth Circuit found that Plaintiff had no standing, where Plaintiff had failed to challenge the height and size restrictions. "The key problem with plaintiffs' claims is one of redressability. . . . Having chosen not to challenge the size and height regulations and having filed nine applications to post a sign in the township that violated these regulations, plaintiffs cannot tenably show that success in challenging *other* regulations of the sign ordinance will redress any injury caused by these regulations."

First Amendment—Speech—Qualified Immunity

See v. City of Elyria and Medders, Case No. 06-4195; ___
F.3d ___ (September 19, 2006)

Plaintiff Hetzel See was a police officer for the city. In early 2001, he made complaints to the FBI regarding alleged illegal and immoral practices within the city police department. In September 2001 and February 2002, he was disciplined by police chief Michael Medders. Plaintiff filed suit asserting that the discipline against him was in retaliation for his exercise of his First Amendment rights. The district court dismissed the claim against the city, but denied summary judgment to Chief Medders finding that issues of fact precluded summary judgment on the basis of qualified immunity. Chief Medders filed an interlocutory appeal, and the Sixth Circuit affirmed. "Medders argues that the district court erred when it inquired as to the truthfulness of the statements instead of determining whether Medders reasonably believed that See's allegations of wrongdoing were false or recklessly made. Because a genuine issue of material fact exists as to whether a reasonable official in Medders's position would have believed that See made the statements to the FBI knowing they were false, or with reckless disregard for their truthfulness, this Court affirms the district court's denial of summary judgment."

Fourth Amendment

Taylor v. Dep't of Natural Resources, Case No. 05-2732; ___
F.3d ___ (Sept. 14, 2007)

Sixth Circuit affirms summary judgment on Fourth Amendment case alleging illegal search. Conservation officer observed footprints leading toward a house that he knew was not occupied at the time. Thinking someone might have broken in, the officer walked up to the house, peered into the windows and checked to see if the doors were locked. He left his card on the front door of the house. The owner sued the

officer for a 4th Amendment violation. The Sixth Circuit affirmed summary judgment in favor of the officer, holding that the officer's conduct did not amount to a search. "Considering Officer Rose's limited methods of observation and the purpose of his conduct, we conclude that this 'property check' is not a Fourth Amendment search. In terms of methods, existing Fourth Amendment jurisprudence distinguishes between cases in which officers engaged in 'ordinary visual surveillance' and those in which the officers employ 'technological enhancement of ordinary perception.'" 🏠



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Nominations Open for 2008 Major State Bar Awards

Nominations are now open for major State Bar of Michigan awards that will be presented at the September 2008 Annual Meeting in Dearborn. Any State Bar member can propose a candidate for the following awards:

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

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

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

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

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

All award nominations except for the Liberty Bell Award are due Friday, April 4 at 5 p.m. The deadline for Liberty Bell Award nominations is Friday, May 2.

An awards committee co-chaired by State Bar President-Elect Edward Pappas and attorney Francine Cullari reviews nominations for the Roberts P. Hudson, Champion of Justice, Frank J. Kelley Distinguished Public Service, and Liberty Bell awards. The SBM Pro Bono Initiative Committee reviews nominations for the Cummiskey Award. The committee's recommendations are then voted on by the full Board of Commissioners at its June meeting.

Last year's non-winner nominations will automatically carry over for consideration this year. Nominations must be submitted on SBM forms and should include sufficient details regarding the accomplishments of the nominee to allow the committees to make a judgment. Application forms may be downloaded from www.michbar.org. Click on Media Resources, then Events and Awards.

Nominations can be submitted by mail to Ms. Naseem Stecker, State Bar of Michigan, 306 Townsend St., Lansing, MI 48933; via facsimile to (517) 482-6248; or online to nstecker@mail.michbar.org. Cummiskey Award nominations should be directed to Gregory Conyers at (517) 346-6358 or gconyers@mail.michbar.org. For more information, call (517) 367-6428 or (800) 968-1442.



Public Corporation Law Section

Winter Conference

St. John's Conference Center
Plymouth, Michigan

February 8, 2008

Agenda

8:15–9:00 a.m.: Check-in and continental breakfast serving chilled juices, fresh fruit, assorted yogurts, a variety of bagels, and house-baked pastries

8:45–10:00 a.m.: Inter-Local Governmental Cooperation: Issues and Answers (and a related comment on constitutional concerns in the area of public support for private entities)

Presenters: **Paul Tait** (SEMCOG director), **Maxine Berman** (Governor's Office), **Mike McGee** and **Pat McGrow** (attorneys from Miller, Canfield)

10:00–10:15 a.m.: BREAK

10:15 a.m.–noon.: In the Trenches: Practical Advice for the Police Officer's Lawyer; Advising Police Departments, Officials, and Officers

Mike Frayer previously served as the police chief for the City of Westland. Subsequently, he was employed as a law enforcement risk consultant for the Michigan Municipal Risk Management Authority. Currently, he is a private consultant and appears as a speaker on a variety of topics relating to law enforcement policies and procedures.

Michael E. Rosati, a shareholder with the firm, has over 20 years of experience in municipal litigation in both the state and federal courts. Mr. Rosati has handled complex civil rights matters in both state and federal court, including police civil rights cases, first amendment cases, privacy cases, discrimination cases, and general property rights cases. In addition, he has handled almost every type of municipal liability case arising under state law in the Michigan courts. Mr. Rosati has been a featured speaker at numerous seminars and training sessions, has appeared as a speaker on a number of training tapes which have been distributed nationwide regarding topics affecting municipal liability, and has also presented individual seminars to police departments regarding aspects of police reporting and procedure.

Margaret Bloemers, a current assistant city attorney, has served as police legal advisor to the City of Grand Rapids Police Department since 1996. In that role, she has assisted the GRPD with the implementation of a Police Civilian Appeal Board, the creation of a civilian Police Chief's Advisory Committee, and worked with the Department of Justice in drafting a mediation agreement to promote a positive relationship between the GRPD and the minority communities in the city. She is routinely called upon to advise, train, and provide other assistance to the GRPD police chief, the Internal Affairs Unit, and the Training Bureau, as well as individual officers who regularly seek advice on various law enforcement matters. Ms. Bloemers has been employed by the City of Grand Rapids since November 1991, representing the City and its employees in state and federal court. She also served at the Michigan Court of Appeals as a research attorney and as judicial clerk to the Hon. William B. Murphy. She is a 1987 graduate of Thomas Cooley School of Law, and holds a B.A. degree in English from Aquinas College.

Michael Bogren is the managing partner of the firm's Kalamazoo office and the leader of the firm's Regional Office Department. He is a member of the firm's board of directors, and has served as secretary of the board since 2003. He is the Chair of the firm's Governmental Law Practice Group. He has extensive experience representing municipalities in both state and federal court in police liability claims, First Amendment law, due process claims, Open Meetings Act claims, FOIA claims, zoning, civil rights, and employment law. He is currently the village attorney for the Village of Hopkins. He graduated cum laude from Western Michigan University and received his law degree cum laude from the University of Detroit School of Law in 1982.

12:00 p.m.: LUNCH—Healthy buffet lunch featuring marinated turkey breast, grilled salmon, Asian vegetable slaw with vinaigrette, and a variety of side dishes

1:00–2:30 p.m.: Secrets of Appeals for Municipal Attorneys

Shari Oberg, the current Michigan Supreme Court deputy chief commissioner, has been a commissioner since 2002. Shari began her career in private practice as an associate with the Detroit-based law firm of Dickinson Wright PLLC, which she joined in 1994, where she specialized in appellate litigation and was subsequently elected a member of the firm.

Kimberly S. Hauser has been the district clerk in the Detroit office of the Michigan Court of Appeals since January 1998. Previously, she was a research supervisor with the Michigan Court of Appeals and a staff attorney with the United States Court of Appeals for the Fifth Circuit. She received a bachelor’s degree in business administration from Eastern Michigan University in 1982 and her law degree from the University of Detroit in 1985.

2:30-3:00 p.m. BREAK—Cookies, brownies, homemade chips, dips, and tortilla chips and salsa

3:00–4:00 p.m.: ZEA and PEA Update
Presenter: **Mark Wykoff**

Immediately following and in back of the last meeting room will be the section-sponsored reception consisting of: cold smoked sirloin and Asian slaw in Chinese take-outs with chopsticks, marinated vegetables in a cucumber cup topped with a mini mozzarella slice, rosemary scented lamb chops, shrimp shooters, and beverages.

STATE BAR OF MICHIGAN | Public Corporation Law Section

Registration

Winter Conference, February 8, 2008

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- \$100 for government employees
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If you intend to make reservations at St. John’s Conference Center at the Section discount of \$119, use the code for the Public Corporation Section SBATT.

Reservations must be made by January 17, 2008.

Mail your check and completed registration form to:

Marcia L. Howe
Johnson, Rosati
34405 W. Twelve Mile Rd, Ste 200
Farmington Hills, MI 48331

The FOIA Privacy Exception: How Much is too Much?

By Susan M. Bisio, Assistant Corporation Counsel, Wayne County, Michigan

The debate about the public's access to information regarding public employees is heating up, both in the courts and in the legislature. At issue is whether the public is entitled to have access to the *home* addresses and *home* telephone numbers of public employees under the Michigan Freedom of Information Act ("MFOIA"). So far, the answer appears to be "yes"; however, the saga continues, at least for the time being.

In *State Employees Ass'n v Dept of Mgmt & Budget*, 428 Mich 104 (1987), the Michigan Association of Governmental Employees requested information from the State of Michigan regarding certain state employees, including each employee's name and home address. The specific issue in the case was whether the disclosure of a public employee's home address would constitute "a clearly unwarranted invasion of privacy under Michigan's Freedom of Information Act." Even though this case was a plurality decision with regard to whether a balancing test should be used in conjunction with the privacy exemption, five of the six participating justices agreed that a public employee's home address was not subject to the privacy exemption of the MFOIA.¹

Fast forward twenty years, when the Michigan Federation of Teachers made an MFOIA request for over twenty pieces of job-related information concerning all University of Michigan ("U of M") employees, as well as a request for each of their home addresses and home telephone numbers. The U of M granted the request for the job-related information, but denied the request in part, as it refused to provide the home addresses and home telephone numbers of university employees who had elected not to be listed in the university directory.

The union sued to obtain the missing addresses and telephone numbers and lost in the circuit court. The court of appeals reversed,² holding that in order for information to be of a "personal nature" under the MFOIA's privacy exemption, it had to be intimate or embarrassing, as determined by the customs, mores, or ordinary views of the community.³ Using this definition, a public employee's home address and home telephone number must be disclosed, despite the fact that the stated purpose of the MFOIA is to provide "full and complete information regarding the *affairs of government* and the *official acts* of those who represent them as public officials and public employees . . ." MCL 15.231(2) (emphasis added).

Recognizing that there are public employees who might be exposed to risk or danger if their addresses and telephone

numbers were disclosed, the Michigan Court of Appeals proposed a solution. On remand, U of M was asked to determine which of its employees had demonstrated "truly exceptional circumstances,"⁴ such that their personal information should not be disclosed on request.⁵

Justice Wilder, while concurring in the decision, suggested that the Michigan Supreme Court ought to revisit its definition of "personal," as the "intimate or embarrassing" requirement is inconsistent with the word's plain meaning. In addition, Justice Wilder suggested that perhaps the high court should also consider whether the "customs, mores, or ordinary views of the community" would support a release of home addresses and home telephone numbers, in light of the National Do Not Call Registry and the increasing prevalence of identity theft.

The *Michigan Federation of Teachers* opinion was issued on March 22, 2007. At some point shortly thereafter, the Lansing State Journal published a searchable online database of the names, titles, departments, counties of employment and salaries of many state employees obtained through use of the MFOIA.⁶ This prompted a response by Chief Justice Clifford Taylor, who wrote a scathing opinion letter to the Lansing State Journal on July 28, 2007.⁷ In that letter, Justice Taylor accused the paper of "invas[ing] the privacy of thousands of state workers, without good reason, and caus[ing] them and their families great anxiety and possibly serious harm." To say that Justice Taylor found the use of the MFOIA to provide fodder for a database offensive is an understatement. The Justice thought that the use of employee names, rather than just their work information, was particularly repugnant.

It was against this backdrop that the U of M appealed the *Michigan Federation of Teachers* case. And, perhaps not surprisingly, the Michigan Supreme Court agreed to take the case. In its order, issued on October 5, 2007, the Court requested that briefing include the following issues:

1. Whether the Court should reconsider its requirement that personal information be "intimate or embarrassing" before the MFOIA's privacy exemption applies (the *Bradley* test);
2. Whether there may be circumstances where information that might ordinarily be impersonal might take on an intensely personal character so that the MFOIA's privacy exemption applies; and,

3. If the *Bradley* test is not modified, then whether the advent of the National Do-Not-Call Registry, and issues concerning identity theft, could have an impact on how the disclosure of home addresses and home telephone numbers might be viewed within the “customs, mores, or ordinary views of the community.”

The legislature has also acted. On August 8, 2007, HB5090 was introduced by Representative John Stakoe. This bill would add a new exemption to MCL 15.231 and specifically allow a public body to exclude the home addresses and home telephone numbers of its public employees from an MFOIA response.⁸ The bill has remained in the Government Operations Committee since its referral there on August 8, 2007.

The Lansing State Journal ostensibly created its database to provide information to the public during the recent state budget crisis. But anyone can create an online database and publish personal information obtained through the MFOIA. Merely adding a salary field to names, home addresses, and home telephone numbers would create both an invitation and a roadmap for potential thieves. Alternatively, an unscrupulous requestor could sell the list to telemarketers or advertisers with a particular interest in soliciting government employees.

Absent protection from either the Legislature or the courts, much of the personal information of public employees is subject to disclosure under the MFOIA. The stated purpose of the MFOIA is to provide information about government operations and the activities of public employees in the performance of their jobs. Public employees should be entitled to the same degree of privacy that any other citizen enjoys once they step outside of their offices for the day.

Endnotes

- 1 The privacy exemption of the MFOIA allows a public body to exempt “[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual’s privacy.” MCL 15.243(1)(a). *See also* *Tobin v Michigan Civil Ser-*

vice Comm’n, 416 Mich 661 (1982). *Tobin* was a “reverse FOIA” case, where the plaintiffs sought to prevent their public employer from releasing their names and addresses. The court found that the MFOIA did not prevent disclosure of names and addresses; it did not decide whether such information must be produced. The court did find that there was no common or constitutional right of privacy that would protect home addresses from production.

- 2 *Michigan Federation of Teachers v Univ of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued March 22, 2007 (Docket No. 258666), 2007 WL 861185.
- 3 This result is consistent with the Michigan Supreme Court’s holding in *Bradley v Saranac Community Schools Bd of Ed*, 455 Mich 285 (1997).
- 4 Citing to *Tobin v Michigan Civil Service Com’n*, 416 Mich 661 (1982).
- 5 Carrying out this solution to its unworkable extreme, the court is suggesting that a public employer should broadcast an MFOIA request for personal information to potentially thousands of employees, sift through the responses, and then determine which employees have a meritorious enough reason to exclude their personal information from the MFOIA response. However, the matter wouldn’t stop there. Once the public employer denies the MFOIA request in part for employees who demonstrate “truly exceptional circumstances,” the requestor could file a lawsuit to obtain the information that has been withheld. This would force the public employer to litigate on behalf of each of the employees it seeks to protect.
- 6 *See* <http://db.lsj.com/community/dcl/som/index.php>
- 7 *What Is The Public Entitled To See? Justice Responds*, Lansing State Journal, July 28, 2007, page 5A.
- 8 The proposed bill would also modify MCL 15.243(f) (trade secrets), requiring all of the factors to apply.

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

"Mommas, don't let your puppies grow up to wear orange"

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

I'll bet you didn't know, or maybe you forgot, that those of us who try to protect our dogs during hunting season may be committing a misdemeanor. But, first, let me give you some personal history.

About nine years ago, my wife and I moved to a very rural area just outside of Empire, about 25 miles west of Traverse City and next to the Sleeping Bear Dunes National Lakeshore. After living in big cities (Detroit, Flint) throughout our lives, there was a certain amount of adjusting to do. We learned, for example, that when the power goes out, there is no running water (not the case in the big D). We also learned that there is a large and healthy coyote population still hunkered down in our woods and forests—and, yes, they do howl and yip at night. Whether it's a mating call or they're complaining to each other about us new folks moving into their territory, I don't know, but they regularly make their presence known. In my Detroit and Flint neighborhoods, the only "cry" at night was an ambulance or police car rushing to some emergency.

Now, of course, we live on 10 acres in the country surrounded by other 10 and 20 acre "lots," wide meadows and thick woods. The first year we lived there I was out walking our dog on a morning in late November when a car came speeding down the private road with its horn blowing. I stopped and looked. It was my wife. When she reached me she made some comments about my intelligence. "You dumb idiot," were the words I think she used. "Don't you know this is deer hunting season and here you are with a brown leather jacket on and NO ORANGE! Do you want to make me a widow?"

It never occurred to this city boy that I needed to wear something distinctive, like bright orange, so that some hunter wouldn't mistake me for a deer. I really didn't see how a hunter

could think I was Bambi's brother, even with my brown leather jacket on, but then deer hunters have been known to have unusual eyesight. This past fall, for example, a hunter not too far from here shot and killed a cow that he mistook for a coyote.

My wife then bought a blaze orange reflective collar for my dog, a yellow lab named Abby, and a similarly colored leash. She also got me a blaze orange pullover cap. So now, during hunting season, Abby and I walk safely through the countryside resplendent in our orange gear.

I have just learned, however, that when we do that, I am committing a misdemeanor! MCL 752.62 provides: "A person, except a person who is deaf, audibly impaired, or otherwise physically limited shall not use or be in possession of a dog that is wearing a blaze orange leash and collar or harness in any public place." MCL 752.63 provides: "A person who knowingly violates this act is guilty of a misdemeanor, punishable by a fine of not more than \$10."

I had no idea that my acts toward my own self-preservation and that of my dog were crimes, but you probably didn't know that either – or you may have forgotten it. In fact, a check of websites such as the one for Orvis¹ will show that there is a thriving market out there selling blaze orange dog collars and leashes to unsuspecting criminals such as me.

As to this misdemeanor stuff, however, I'm not too worried, because the fine is only \$10. Besides, I can always claim that I am at least "audibly impaired" if not deaf. My wife will testify to that. 🏠

Endnotes

- http://www.orvis.com/store/product_choice.asp?pf_id=5469&dir_id=1633&group_id=1930&cat_id=5743&subcat_id=7018&bhcp=1

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