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The "Finality Rule" of *Paragon v City of Novi*: The Achievement of Fairness in Land Use Jurisprudence

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c o n t e n t s

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We are all familiar with the competing responses that invariably follow nearly any judicial recognition of rights or responsibilities. Some engage in hand-wringing, proclaiming that the glass is half empty, describing why so many people will die of thirst due to the lack of sufficient water. Others recognize that the glass is at least half full, and discuss the manner in which the available water represents a utilitarian blessing. The 1996 decision of the Michigan Supreme Court in *Paragon Properties v City of Novi*[1] has inspired this type of reaction. *Paragon* confirmed the applicability of the "finality rule" in this state, holding that a party who desires to challenge the constitutional validity of a zoning ordinance "as applied" must first obtain a *final decision* from the community before being entitled to seek relief in court.[2] Until such "finality" is achieved, a case is considered "unripe" for adjudication.

This article will offer an optimistic view of the holding in *Paragon*, sketching its consistency with a basic and widely accepted principle of fairness, as well as its opportunities for public and private stakeholders alike.[3]

This discussion will proceed under the following headings:

- The finality rule is consistent with a basic jurisprudential principle of fairness.
- The doctrine of fairness meets the finality rule: a confluence of compatible jurisprudence.
- The need for serious effort in the implementation of the finality rule by public and private stakeholders.

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Chairperson's Corner

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

As we enter a new decade, it is important to consider the role of the Public Corporation Law Section in servicing attorneys who represent governmental entities throughout the State of Michigan and the role of individual section members in advancing the concerns of municipal lawyers. With over 700 members, the Section strives to promote the interests of municipal lawyers through this publication, educational seminars, public service programs, filing Amicus Briefs, and other activities. The Section is frequently called upon by the Michigan Supreme Court to file Amicus Briefs on issues affecting governmental entities. During 2009, the Section provided funding for Amicus Briefs in *Gadigian v Taylor* (Supreme Court No. 138323), a case involving sidewalk liability and the two-inch rule, ***Kyser v Kasson Township*** (Supreme Court No. 136680)**,** a case involving zoning for mining operations and the "no very serious consequences" rule, and ***Oneida Charter Township v Grand Ledge*** (Supreme Court No. 138520)**,** a case dealing with a city's ability to establish a water rate structure for other municipal entities. These briefs were prepared by Section members Gerald Fisher, Carol Rosati and Don Schmidt, all of whom provide their considerable expertise and legal analysis to the issues before the court. I applaud Carol, Don and Gerald for the excellent effort on behalf of the Section. The Supreme Court's decisions in these cases will likely impact the advice municipal lawyers provide to their clients on a daily basis.

The Section is also sponsoring its annual Winter Seminar which will be held on February 5, 2010, at the St. John's Conference Center in Plymouth. Conference chair, Carol Rosati, has put together a talented array of speakers to address new issues on the horizon for municipal lawyers, including the impact of the newly enacted Medical Marihuana Act, recent decisions dealing with governmental immunity, and approaches to work force changes in the currently difficult economic climate. Through its Amicus Briefs, educational events, and publications, the Section relies on the time and talents provided by Section members. Without Section members volunteering their time to educate and assist their colleagues, the Section could not carry out its mission. While the Section serves a large number of lawyers, very few actually devote any time in service to the Bar. Serving as a speaker, author, or brief writer for the Section is a deeply rewarding experience. In addition to the professional fulfillment you will enjoy in assisting other lawyers, it allows you the opportunity to meet interesting people, many of whom are recognized experts in municipal law.

I would like to encourage all members of the Section to actively participate in Section activities during the upcoming year. There is always a need for articles for the Public Corporation Law Section. If you have dealt with any new or interesting legal issues recently or have an interest in publishing on a particular topic, please contact our editor, Steve Joppich or Tom Schultz. Also, please plan to attend our annual Summer Seminar, co-sponsored by the Michigan Association of Municipal Attorneys. This year's conference will take place on June 25 and 26 at the Grand Hotel on Mackinac Island. Please join us at one of our educational seminars or participate in Section activities during the upcoming year.

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The Finality Rule Is Consistent With a Basic Jurisprudential Principle of Fairness

The finality rule announced in *Paragon* rests on a sturdy precedential foundation in case law, a subject discussed in greater detail below. At least as important is that the finality rule is independently and solidly supported by *a basic jurisprudential principle of fairness* that is widely applicable in Michigan jurisprudence.

To introduce this point, consider for a moment the vantage of those public officials who represent the general public in connection with a claim by a private property owner that applicable zoning regulations unreasonably intrude upon his or her property. There should be no serious quibble that zoning restrictions, by their very nature, permit very few properties in the community to be developed for their "highest and best use." For the most part, properties are restricted to residential use. Thus, the question that public officials face when confronted with the allegation of inappropriate zoning is whether challenged zoning regulations *unreasonably restrict* a property's use.

Considering all of the technical rules governing zoning reasonableness,[4] most public officials will not be exposed to the necessary information with which to evaluate whether regulations are "unreasonable" as applied to the use of a particular property until a lawsuit has been filed, discovery has been taken, and the community's attorney has provided a status report or settlement evaluation. Until that point, in the typical scenario, officials are generally without notice with regard to the nature and degree to which applicable zoning regulations impact a particular property. As a result, these *officials have insufficient motivation or justification to compromise zoning restrictions enacted in accordance with comprehensive planning*. It is fair to say, then, given such circumstances, that until officials are provided with adequate information, they have no *meaningful opportunity to cure* an unreasonable zoning impact. Nonetheless, the general public may be penalized by having to pay the costs of litigation and suffer the land use and budgetary consequences of an adverse judgment. *Not only does this circumstance represent unwise policy, it's patently unfair to the general public*.

Fortunately, it is well-recognized in the law that a party should not be punished in the absence of a *knowing failure* to cure a defect. Indeed, there is a broadly applied principle, based in fundamental fairness, requiring a party claiming a "breach" to provide notice to the breaching party, and afford such party a reasonable opportunity to cure. This fairness principle is widely recognized, and will be discussed below within the contexts of constitutional law, statutory law, and common law applicable in Michigan and elsewhere. When this principle applies, and the breaching party fails to cure, it can then—*and only then*—be said that a breaching party is engaged in an *affirmative abuse of power* that might permit the imposition of a remedy.

Constitutional analysis

In *Daniels v Williams*,[5] the United States Supreme Court considered a claim that a property deprivation resulted in a due process violation. The Court reviewed the merits of Justice Powell's concurring opinion in an earlier case entitled *Parratt v Taylor*.[6] Such review led to the following analysis and conclusion:

> Justice Powell, concurring in the result, criticized the majority for 'passing over' [the] important question of the *state of mind required to constitute a 'deprivation' of property*….He agreed that *negligent acts* by state officials, *though causing loss of property, are not actionable under the Due Process Clause*. . . . Not only does the word 'deprive' in the Due Process Clause connote more than a negligent act, but we should not 'open the federal courts to lawsuits where there has been *no affirmative abuse of power.'* See also *Id.*, at 545; 68 L Ed 2d 420; 101 S Ct (1908) (Stewart, J., concurring) ('to hold that this kind of loss is a deprivation of property within the meaning of the Fourteenth Amendment seems not only to trivialize, but grossly to distort the meaning and intent of the Constitution'). Upon reflection, we agree and overrule *Parratt* to the extent that it states that mere lack of due care by a state official may 'deprive' an individual of life, liberty, or property under the Fourteenth Amendment. (Emphasis supplied).

The holding in *Daniels* clarifies directly for Due Process Clause purposes and, by extension, for Fourteenth Amendment Takings Clause purposes, that an *unintentional deprivation does not form the basis for an actionable constitutional claim.*[7] This proposition was recognized again in *County of Sacramento v Lewis,*[8] in which the Court cited *Daniels* for the proposition that "[h]istorically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property" (emphasis in original).

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As clarified above, public officials cannot fairly be said to have ***deliberately*** imposed an unreasonable zoning restriction on a property in the absence of some meaningful notice of such fact, followed by a reasonable opportunity to provide a cure.

Statutory analysis

There are a number of statutes that recognize that an actionable claim should only arise after notice and opportunity to cure by the governmental entity alleged to have responsibility. This legislative recognition could be interpreted as conveying the same message as that announced in *Daniels:* liability should not exist until there has been an ***affirmative abuse of power.*** Prior to notice and an opportunity to cure, an affirmative abuse of power will not be present. Examples of a statutory embodiment of this fairness policy follow:

1. In connection with suits brought against a governmental agency for defective highways, unless it is demonstrated that the agency knew or should have known of the existence of the defect and had a reasonable time to repair, the governmental agency shall not be liable for money damages. MCL 691.1403.
2. A party claiming that a local tax assessment is too high must first protest such assessment before the board of review of the local municipality as a condition precedent to the existence of jurisdiction for the initiation of a case before the Michigan Tax Tribunal. MCL 205.735(1).
3. A party seeking to recover against a governmental entity for a sewage disposal event is required to comply with MCL 691.1417, including the following:

* * *

(3) If a claimant…believes that an event caused property damage or physical injury, the claimant may seek compensation for the property damage or physical injury from a governmental agency if the claimant shows that all of the following existed at the time of the event:

(a) The governmental agency was an appropriate governmental agency.

(b) The sewage disposal system had a defect.

(c) The governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect.

(d) The governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect.

Common law analysis

The well recognized treatise, McQuillin, *Municipal Corporations*, §48.02, p 48, points out the purpose of requiring the presentation of certain kinds of claims to the local government as a condition precedent to burdening the court with them:

> The principal purposes of the requirement that claims be presented or filed are to provide the city with full information of the rights asserted against it, to enable it to make proper investigation concerning the merits of the claim, and to settle those of merit without the expense of litigation.

To the same effect in the non-governmental arena is the equitable policy applicable to contract claims:

> § 18:15. Principle of cure and its implications upon materiality
>
> A breach cannot be said to be material if it is curable, notice to cure is given, and prompt steps are taken to cure or to offer assurances of cure. The right of a breaching party to be given an opportunity to cure its own material breach is an ancient equitable principle intended to (1) prevent forfeiture by termination, (2) allow the breaching party to mitigate damages, (3) avoid similar future deficiencies in performance, and (4) promote the informal settlement of disputes. Cure is relevant to materiality by virtue of its focus on elimination of the breach and its implied assurance of intent to render adequate future performance.[9]

These authorities reflect a broad and clear jurisprudential principle of fairness: the public should not be responsible for unintended private deprivations, and the appropriate policy is to impose liability only after a breaching party has notice and a reasonable opportunity to cure. Embodied in the finality rule is an implementation of this policy.

The Doctrine of Fairness Meets the Finality Rule: A Confluence of Compatible Jurisprudence

The analysis explored above addressed the principle of fairness that compels notice and an opportunity to cure as a condition to imposing liability. The next logical question is: What is the appropriate means of providing public officials with notice and an opportunity to cure an alleged constitutional breach in the application of zoning regulations? The response to this question is offered by asking another question: In the real world, if a property owner seeks a full understanding of what use or uses may be made of particular property under a zoning ordinance, what steps need to be taken?

General ordinance interpretation

The rules for interpreting zoning ordinances mandate a reading of the ordinance as a whole, and, specifically

> The general principles relating to construction of ordinances apply to the construction of zoning ordinances. The basic requirement is that intent be discovered and given effect. *Dearborn Fire Fighters Association v. City of Dearborn* (1949), 323 Mich. 414, 35 N.W.2d 366. To accomplish this purpose, the entire ordinance must be read together:
>
> 'A zoning ordinance must be construed reasonably with regard both to the objects sought to be attained and to the general structure of the ordinance as a whole.' *Fass v. City of Highland Park* (1948), 320 Mich. 182, 186, 30 N.W.2d 828, 830, on rehearing (1948), 321 Mich. 156, 32 N.W.2d 375.[10]

The starting point for the "real world" property owner in pursuit of an understanding with regard to zoning ordinance use authorization would be an examination of the uses permitted "as of right" within the zoning district in which the property is situated. Assume this process is undertaken, but the property owner is unable to find a use considered to be reasonable. Examination of other portions of the ordinance then becomes necessary.

The next step in the process of ordinance interpretation would be to determine whether any "special land uses" are available in the zoning district. Assume that this step results in the property owner's remaining unsatisfied that he or she has found a reasonable use for the property. Fortunately, in the real world, the property has a further avenue to find relief under the ordinance. The Zoning Enabling Act[11] and the zoning ordinance itself will make provision for the ability of the property owner to seek additional aid from the zoning board of appeals—typically, aid that may be sought in an efficient and expeditious manner.

It is rational to say, then, that formulating a full picture of the uses permitted and regulations applicable to a property under a zoning ordinance must encompass a pursuit to completion all of the express procedures provided under the Zoning Enabling Act and zoning ordinance for determining the use and regulations applicable to particular property. This includes an exploration of relief from the zoning board of appeals, the body that has the authority to "vary" the terms of the ordinance if a practical difficulty or unnecessary hardship would result from a strict application of its provisions.[12] Until it is known whether, and the extent to which, the zoning board of appeals will grant variance relief, it is not possible to determine whether the ordinance, construed as a whole, permits development that is reasonably adapted and economically viable for a particular property.

Federal requirement for a real world ordinance interpretation model

The real world zoning ordinance interpretation analysis described above has been recognized by the United States Supreme Court to be a necessary analysis to apply in ascertaining whether a zoning ordinance provides a reasonable use. In 1981, that Court decided *Hodel v Virginia Surface Mining and Rec Association, Inc.*,[13] in which there was discussion of a plaintiff's failure to pursue administrative variance and/or waiver procedures under the Surface Mining and Reclamation Act, 30 USC §1201, et. seq. The Court found that such failure rendered the plaintiff's claim that the Act effected a taking of property *unripe for review*, because

> Under these procedures, a mutually acceptable solution might well be reached with regard to *individual properties*, thereby obviating any need to address the constitutional questions. The potential for such *administrative* solutions confirms the conclusion that the taking issue simply is *not ripe for judicial resolution.*[14] (Emphasis supplied.)

Some four years later, in *Williamson County Regional Planning Commission v Hamilton Bank*,[15] the Supreme Court formalized the requirement for a property owner within the zoning context to undertake that which the real world owner must do in the normal course, as described above. Specifically, the Court held that, before initiating litigation, an owner must seek *all administrative relief available* in order to satisfy the

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"finality" requirement. The analysis in *Williamson* unfolded as follows:

> It appears that variances could have been granted to resolve at least five of the Commission's eight objections to the plat. The Board of Zoning Appeals had the power to grant certain variances from the zoning ordinance, including the ordinance's density requirements and its restriction on placing units on land with slopes having a grade in excess of 25%.... The Commission had the power to grant variances from the subdivision regulations, including the cul-de-sac, road-grade, and frontage requirements. Indeed, the Temple Hills Committee had recommended that the Commission grant variances from those regulations.... Nevertheless, respondent did not seek variances from either the Board or the Commission.[16] (Emphasis supplied).

The thrust of comprehensive zoning contemplates the division of a community into various use districts. The intent is to establish *compatible* use districts adjacent to one another, and maintain a separation between use districts which are *incompatible*. Thus, one residential neighborhood would quite nicely adjoin another. However, an industrial plant should not be located in the midst of a residential neighborhood. In *Village of Euclid, Ohio v. Ambler Realty Co.,*[17] the Supreme Court upheld the authority to exercise the zoning authority, reasoning that modern pressures on land use have created sufficient public interest in the segregation of incompatible land uses to justify a diminution in property values.[18]

Within this grand scheme of establishing land use districts, each and every property simply could not fit into the comprehensive zoning mold. Due to size, shape, or other circumstances, including use, certain properties are bound to be "square pegs" which do not fit into the round holes contemplated as part of the community-wide plan. As noted above, it is the "variance" mechanism that is designed to provide accommodation for the "square peg" properties. For purposes of analyzing what use an owner may make of his or HER property, the authorization and availability of variance relief is a straightforward matter of ordinance interpretation—an *inseparable part of the zoning classification and regulation applicable to each property in the community*.

There are "non-use," or "dimensional," variances, which provide relief to individual properties that fail to fit into the larger scheme as a result of the lack of necessary lot width, lot area, and other dimensional requirements. These variances may be granted to a Michigan property owner who demonstrates that it would be a *practical difficulty* to fit into the generally applicable regulations of the particular zoning district.[19]

In addition, there are so-called "use" variances available in many communities,[20] which actually allow a *use* of property not otherwise permitted within a zoning district. The grant of a use variance is part of the *administration* of the zoning ordinance, and does not contemplate a legislatively adopted amendment to the zoning ordinance.[21] In order to be entitled to this extraordinary remedy, a property owner must demonstrate "unnecessary hardship," which requires a showing that, absent the grant of a use variance, the ordinance would not permit a reasonable use of the property.[22]

The grant of complete relief to a property owner may require a non-use variance, or a use variance, or a combination of use and non-use variances. The critical point is that the architects of the zoning process provided the necessary mechanism for avoiding unintended arbitrary applications of land use control, and for avoiding an unintended regulatory *taking* of private property. That is, within the context of this statutory and ordinance framework, as noted above in connection with the pursuit by a "real world" property owner, where a final determination from the zoning board of appeals has not yet been made, it cannot be concluded that application of a zoning ordinance results in an arbitrary deprivation, or that property has been "taken."[23]

It is critical that, under both state and federal standards, the test is whether *application of the ordinance* results in a preclusion of property usage. Based upon Zoning Enabling Act and corresponding zoning ordinance provisions authorizing the grant of variances, the determination whether such relief is available amounts to an inseparable part of the "application of the ordinance." Thus, under the holding in *Williamson,* the pursuit of variance relief is necessary in order to obtain a "final" decision, which, in turn, is required in order to seek judicial intervention.

Michigan follows *Williamson* in adopting the finality requirement

In *Electro-Tech, Inc. v H. F. Campbell Company,*[24] the Court made reference to the Supreme Court's decision in *Williamson* with regard to the "finality" requirement.[25] Reference in *Electro-Tech* is made to the *Williamson* requirement that, as a condition to seeking money damages for a regulatory "taking," (in the federal "taking" action at issue in that case), a plaintiff must "obtain a final decision regarding the applica-

tion of the zoning ordinance and subdivision regulations to its property."[26] Further, *Williamson* was quoted by the Michigan Supreme Court for the proposition that, "[t]his Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the (zoning and subdivision) regulations at issue to the particular land in question."[27] The opinion of the Court in *Electro-Tech* ultimately reached the conclusion that

> In the instant case, because the conditional approval of the plaintiff's site plan was not the city's final disposition of the matter, we hold that the plaintiff's action under 42 U.S.C. § 1983 was not ripe for adjudication.[28]

Thus, a property owner has the right and obligation to proceed to the zoning board of appeals to seek variance relief. Until such relief has been sought, there remains an opportunity that a reasonable use will be granted under the express administrative procedure provided in the Zoning Enabling Act, and pending such pursuit, there is no basis for yet concluding that *the ordinance* has "taken" an owner's property. The process of seeking an available use under the zoning ordinance as a whole is not complete until available relief is sought from the zoning board of appeals.

Building on this jurisprudential foundation, *Paragon* removed all doubts regarding the Michigan position on the finality rule within the zoning context. The *Paragon* opinion observed that

> The City of Novi's denial of Paragon's rezoning request is not a final decision because, absent a request for a variance, there is no information regarding the potential uses of the property that might have been permitted, nor, therefore, is there information regarding the extent of the injury Paragon may have suffered as a result of the ordinance. While the city council's denial of rezoning is certainly a decision, it is not a final decision under *Electro-Tech* because had Paragon petitioned for a land use variance, Paragon might have been eligible for alternative relief from the provisions of the ordinance.[29]

This conceptual premise established a foundation for the Court's conclusion that "[a] challenge to the validity of a zoning ordinance 'as applied,'[30] whether analyzed under 42 U.S.C. § 1983 as a denial of equal protection, as a deprivation of due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment, is subject to the rule of finality."[31] The practical effect of this holding is that cases should not be considered "ripe" for adjudication by the courts until the problem-solving effort at the local community has come to an end. Accordingly, the *Paragon* case was resolved by the Court's directive to the effect that, "[b]ecause Paragon failed to obtain a final decision from which an actual or concrete injury can be determined, its constitutional claim is not ripe for [judicial] review."[32]

The Need for Serious Effort in the Implementation of the Finality Rule by Public and Private Stakeholders

There is broad jurisprudential support for the policy that the general public should not be held liable for an alleged property deprivation unless and until the claimant has first given the government notice and has afforded a reasonable opportunity to cure. This policy is grounded in fundamental fairness, based on the policy that the general public should only be responsible for a deprivation that represents an affirmative abuse of power.

The finality rule, as expressed in *Paragon,* is an important vehicle for implementing the notice and opportunity to cure policy within the land use control context. That is, before a party can ask the general public to suffer the effects of equitable and money damage relief based upon the application of a land use regulation as applied, such party must first give the community notice of the alleged constitutional shortcoming of the regulation, and request available administrative relief that will provide a reasonable cure.

In considering the reality of the underlying policy of notice and opportunity to cure, and the potential for a successful application of the finality rule, one thing is clear: both the property owner and the governmental entity must take seriously the mission of searching for a win-win result.

A recent article on the *Paragon* holding would appear to suggest some reluctance on the part of property owners to pursue a realization of the fruits of finality rule application.[33] That article relied upon an underlying foundation of "type-casted" characters, with the property owner and the government being firm and irreconcilable enemies. This approach has the unfortunate potential of a self-fulfilling prophecy of a failure to resolve differences in the absence of a lawsuit. If the property owner who seeks relief—the party that must put into motion the wheels of finality—fails to treat the process with seriousness, there can be no realistic hope of success. On the other hand, if the property owner would provide a sufficient factual basis to enable the community's public officials to understand his or her plight, and to justify a compromise in regulation, the chances of success would be greatly enhanced. Action by the

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property owner in this regard is likely to require an economic or other analysis, with sufficient back-up material capable of being meaningfully scrutinized.

Of course, this would only begin the process on the right foot. The next step would be for the community to take advantage of the potential inherent in the finality rule. Taking this next step would likely require the community to employ an expert to undertake a review of the property owner's submissions—a step that a community is likely to take only if the property owner's submissions are serious.

Sight may not be lost of the fact that a typical Michigan township contains 36 sections, with each section being a square mile in area. In those areas of Michigan which are metropolitan in character, a township may have been divided into two or more cities or villages, with each having large areas subject to zoning ordinance classification. In some instances, an entire township may have been incorporated as a single city, potentially yielding a city with some 36 square miles of area. In all events, absent the submission of property-specific information, public officials have no realistic opportunity to make a complete assessment of the impact of its zoning regulations on a particular parcel. For example, it is unlikely that there will be meaningful knowledge with regard to the nature of the soils on each of the properties. Similarly, it is certain that there will be inadequate information concerning topography and drainage on each piece of property. Many of these factors will influence the ability to develop the land for productive purposes given the generally applicable regulations.

When a typical petition is filed seeking a *rezoning*, very rarely will a petitioner have invested sufficient money in planning and engineering to be in a position to provide municipal officials with full information relating to the ability to develop the property. Without *substantiating facts*, the petitioner may throw out the *conclusion* that the property cannot be reasonably developed as zoned. While a developer's expertise may be sufficient to render such a conclusion reasonably accurate, no basis is presented on which public officials can reasonably justify to constituents a compromise of the applicable ordinance regulations. Typically, it is not until *after a lawsuit has been filed*, and experts have been retained, that officials begin to receive a *meaningful* picture concerning the ability to develop the property. Yet, waiting until *after suit is filed* to obtain useful and necessary information for making decisions *is totally inefficient* for all involved, including the landowner, the municipality, and the judicial system.

Thus, a serious application to and review by the zoning board of appeals on the merits of a variance case can provide the municipality with an opportunity to understand the nature and extent of the regulatory intrusion caused by applicable zoning—prior to the institution of a lawsuit seeking money damages. Well established policy holds that basic fairness dictates that the municipality should be entitled to meaningful information providing notice of an alleged infringement, and afforded an opportunity to cure, before it is placed in money damage jeopardy. In the interest of the property owner, and fundamental fairness to the general public, the requirement for "finality" will provide the much needed opportunity for a *property-specific* review of the regulations at issue.

It is recognized that an expectation that a serious attempt will be made to seek a resolution *before litigation* would require a sea-change on all sides of the land use control culture—including the private property owner and the community. Yet, severe financial strain has paid an uninvited visit upon all stakeholders, and this could make a difference in attempting to more agreeably succeed in finding solutions to genuine land use problems. The finality rule should be viewed as a tool to be employed in this process.

About the Author

A professor at the Thomas M. Cooley Law School, Gerald A. Fisher teaches property law, constitutional law, secured transactions, municipal law, and zoning and land use law. For a number of years he was a senior partner and manager of the Municipal Practice Group at Secrest Wardle in Farmington Hills. As a practitioner, Prof. Fisher's experience focused on general and special counsel services for cities, villages, and townships, with particular expertise in land use regulation, environmental preservation, zoning, wetland, woodland, inland lake, and storm water management regulation, including proactive planning and zoning strategy. Prof. Fisher prepared an *amicus* brief in the 1996 *Paragon Properties v City of Novi* case on behalf of the Public Corporation Law Section of the State Bar, and is a co-author of the ICLE reference text entitled *Michigan Zoning, Planning, and Land Use.* In 2000, he became city attorney for the City of Novi, and negotiated a settlement of the *Paragaon* case which, at that point, had been pending for more than 15 years.

Endnotes

1 452 Mich 568; 550 NW2d 772 (1996).

2 Id., at 576.

3 For the pessimistic view, see Hyman, *Ripe or Overripe? The Ripeness Defense Under Michigan Law,* Spring 2009 Michigan Real Property Review.

4 See *Kropf v City of Sterling Heights*, 391Mich 139; 215 NW2d 179 (1974).

5 474 US 327; 88 L Ed 2d 662; 106 S Ct 662 (1986).

6 451 US 527, 68 L Ed 2d 420; 101 S Ct (1981).

7 See, also, *Florida Prepaid Postsec. Educ. Expense Bd v College Savings Bank,* 527 U.S. 627, 645, 119 S.Ct. 2199, 2209,144 L.Ed.2d 575 (1999). ("We have also said that a state actor's negligent act that causes unintended injury to a person's property does not "deprive" that person of property within the meaning of the Due Process Clause.")

8 523 U.S. 833, 849, 118 S.Ct. 1708, 1718, 140 L.Ed.2d 1043 (1998).

9 5 *Bruner & O'Connor Construction Law* § 18:15.

10 *Prevost v Macomb Township,* 6 Mich.App. 462, 466, 467, 149 N.W.2d 453 (1967).

11 MCL 125.3604.

12 In order to be entitled to "variance" relief, an applicant must demonstrate several elements, as spelled out in the Zoning Enabling Act, which specifies in relevant part that, "[i]f there are practical difficulties for nonuse variances as provided in subsection (8) or unnecessary hardship for use variances as provided in subsection (9) in the way of carrying out the strict letter of the zoning ordinance, the zoning board of appeals may grant a variance in accordance with this section, so that the spirit of the zoning ordinance is observed, public safety secured, and substantial justice done. The ordinance shall establish procedures for the review and standards for approval of all types of variances. The zoning board of appeals may impose conditions as otherwise allowed under this act." MCL 125.3604(7).

13 452 US 264: 69 L Ed 2d 1; 101 S Ct 2352 (1981).

14 452 US at 297

15 473 US 172; 105 S Ct 3108, 878 L Ed 2d 126 (1985).

16 473 US at 187-188.

17 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

18 *Id.* at 386-390, 47 S.Ct. at 117-119. This was expressly referenced in *Paragon,* 452 Mich at 573.

19 *National Boatland v City of Farmington Hills*, 146 Mich App 380; 380 NW2d 472 (1985).

20 The Zoning Enabling Act provides in MCL 125.3604(8)–(11) with regard to the authority for granting use variances:

(8) The zoning board of appeals of all local units of government shall have the authority to grant nonuse variances relating to the construction, structural changes, or alteration of buildings or structures related to dimensional requirements of the zoning ordinance or to any other nonuse-related standard in the ordinance.

(9) The authority to grant variances from uses of land is limited to the following:

(a) Cities and villages.

(b) Townships and counties that as of February 15, 2006 had an ordinance that uses the phrase "use variance" or "variances from uses of land" to expressly authorize the granting of use variances by the zoning board of appeals.

(c) Townships and counties that granted a use variance before February 15, 2006.

(10) The authority granted under subsection (9) is subject to the zoning ordinance of the local unit of government otherwise being in compliance with subsection (7) and having an ordinance provision that requires a vote of 2/3 of the members of the zoning board of appeals to approve a use variance. (11) The authority to grant use variances under subsection (9) is permissive, and this section does not require a local unit of government to adopt ordinance provisions to allow for the granting of use variances.

21 Id.

22 *Puritan-Greenfield Association v Leo*, 7 Mich App 659; 153 NW2d 162 (1967).

23 The conclusion that private property has been "taken" requires a demonstration that, "if the *ordinance* is enforced the consequent restrictions on . . . (the) property preclude its use for any purpose to which it is reasonably adapted." Under the corresponding federal standards, the required demonstration is that application of *the ordinance* to a particular property denies the owner economically viable use of (the) land. *Nollan v California Coastal Commission*, 483 US 825; 107 S Ct 3141, 3146; 97 L Ed 2d 677, 687 (1987).

24 433 Mich 57; 445 NW2d 61, 72-73 (1989).

25 It is important to clarify that there are actually two finality requirements. Only one of them is relevant to this present discussion, although some have apparently confused the two requirements. The second "finality" factor relates to the requirement that a party must seek just compensation relief in ***state court*** in order to determine whether there is a violation of the Fourteenth Amendment. The author in Hyman, *Ripe or Overripe? The Ripeness Defense Under Michigan Law,* Spring 2009 Michigan Real Property Review, footnotes 2, 5, and 39, and accompanying text, purports to support a criticism of the first finality requirement (the requirement to seek all administrative relief available from the regulating agency) by referring to a concurring opinion of Justice Rehnquist in *San Remo Hotel v City and County of San Francisco,* 545 U.S. 323, 125 S. Ct. 2491, 162 L.Ed.2d 315 (2005). A close examination reveals, however, that the *San Remo* case, as well as Justice Rehnquist's concurring opinion, refers only to the **second** finality requirement relating to the necessity of seeking relief in state court.

26 433 Mich at 72.

27 Id., at 82.

28 Id, at 92.

29 452 Mich at 580.

30 Finality does not apply to facial challenges to ordinances.

31 Id., at 576.

32 Id., at 583.

33 See, Hyman, *Ripe or Overripe? The Ripeness Defense Under Michigan Law,* Spring 2009 Michigan Real Property Review.

"Ethics in Local Government" Initiative in the Michigan Attorney General's Office

By George M. Elworth, Assistant Attorney General, Michigan Department of Attorney General

While Michigan has several statutes governing the various aspects of ethics in government at both the state and local levels, local governmental entities may, by ordinance, establish and enforce ethics regulations for local public officials and public employees to the extent provided by law and/or charter. Closely related to concerns about standards of conduct of public officials are concerns about the legal requirement for decision making by the members of public bodies of governmental units in this state.

To assist local units of government and citizens concerned about the standards of conduct applicable to public officials as well as the requirements for conducting public meetings of the governing bodies of their local units of government, the website of the Michigan Department of Attorney General recently added an "Ethics in Local Government" section that provides a model ethics ordinance and an Open Meetings Act Handbook together with parliamentary procedures.

The model ethics ordinance is proposed as a means of assisting local officials in evaluating their existing ethics ordinance or any proposed ethics ordinance for their local unit of government. While the adoption of such an ordinance is not required by state law, the information set forth in the model ethics ordinance is designed to provide guidance to local officials seeking to adopt an ethics ordinance. The various chapters and standards of conduct in this model ethics ordinance are offered as suggestions and options for the governing body of a local unit to consider when drafting its own ethics ordinance. The governing body of each governmental unit should seek the advice of its municipal attorney when drafting its ethics ordinance.

The role of municipal attorneys in the process of developing and implementing an ethics ordinance cannot be overstated. While it is hoped that this model ethics ordinance will be a helpful resource for local officials as a potential starting point for a new ordinance and as a checklist for evaluating a current ordinance, each municipality has responsibility for its actions regulating the conduct of its own officials and employees. In addition to advising a municipality's governing body as to appropriate provisions for any proposed ethics ordinance, once the ordinance is adopted the municipal attorney is likely to be called upon to provide legal opinions regarding the ordinance's implementation and to file civil and criminal actions to enforce the ordinance when such actions are requested by either the ethics board, if one is established by the ordinance, or by the governing body of the local unit. These enforcement actions would be requested after an investigation and a public hearing on an ethics complaint, provided that it is determined that there is a reasonable basis to believe that there has been a violation of the requirements of the ethics ordinance.

In developing this model ethics ordinance, the Michigan Department of Attorney General consulted many existing local ethics provisions in charters and ordinances of Michigan municipalities, including those of Bangor, Battle Creek, Bay City, Detroit, DeWitt, Farmington Hills, Flushing, Garden City, Harper Woods, Mason, Midland, Riverview, Rochester, Royal Oak, Sterling Heights, Ypsilanti, Warren, and Wyan-

Court Amends Disqualification Rule

On November 25, 2009, the Michigan Supreme Court entered an order amending MCR 2.003. The amendments apply the disqualification rule to justices of the Michigan Supreme Court and include the procedure to be followed when a disqualification issue is raised about a justice by either a party or the justice himself or herself. Language added to the grounds for disqualification clarifies that the listing is not exclusive. Two new grounds for disqualification include 1) a reference to the due process rights addressed in *Caperton v. Massey*, and 2) failure to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct. Additional language clarifies that campaign speech protected by *Republican Party of Minn v. White* is not alone grounds for disqualification so long as it does not demonstrate bias or prejudice or an appearance of bias or prejudice for or against a party or attorney involved in the action.

View the Full Text of the Court's Order at http://courts.michigan.gov/SUPREMECOURT/Resources/Administrative/2009-04-112509.pdf.

dotte. The model ethics ordinance developed by the Illinois Attorney General for local units in that state was also consulted and proved to be very helpful.

Since the launch of this initiative, the Michigan Department of Attorney General has received a copy of the Ethics Handbook for Michigan Municipalities (2008) – which is available on the Michigan Municipal League's website. The Michigan Townships Association's website has added a link to the Attorney General's website for this initiative.

Many of the standards of conduct in the model ethics ordinance are taken from Section 2 of the State Ethics Act, MCL 15.342. While the standards of conduct in the State Ethics Act apply to local officials, the Act does not impose sanctions on local officials for violations of its standards, nor does it provide any role for the State Ethics Board with respect to local officials. See OAG No 6005 (11/15/1981) and OAG No 5916 (6/8/1981). Notwithstanding the limited scope of the State Board of Ethics, the decisions and advisory opinions of that board may be of assistance to those interested in how the standards of conduct listed in MCL 15.342 have been interpreted and applied. The database of these opinions and decisions is part of the Ethics Board website, which is included in the website of the Michigan Department of Civil Service, www.mi.gov/mdcs.

Concerns about public corruption involving violations of the state's criminal laws should be directed at the county level to the county's prosecuting attorney and sheriff, and at the state level to the Office of Special Investigations of the Michigan Department of Attorney General's Criminal Division and the Michigan Department of State Police. Concerns about violations of federal criminal statutes should be directed to the U.S. Attorney's Office.

About the Author

George M. Elworth is an Assistant Attorney General in the Finance Division in the Michigan Department of Attorney General. This article reflects the views of the Michigan Department of Attorney General, which is headed by Attorney General Mike Cox.

2010 Nominations Open for Major State Bar Awards; Deadline is April 2

Nominations are now open for major State Bar of Michigan awards that will be presented at the September 2010 Annual Meeting in Grand Rapids.

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 Kimberly M. Cahill Bar Leadership Award was established in memory of the 2006-07 SBM president who passed away in January 2008. This award will be presented to a recognized local or affinity bar association, program or leader for excellence in promoting the ideal of professionalism or equal justice for all, or in responding to a compelling legal need within the community during the past year or on an ongoing basis.

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.

All SBM award nominations are due on Friday, April 2, 2010 at 5 p.m.

The Liberty Bell Award recipient is selected from nominations made by local and special-purpose bar associations. The award is presented to a non-lawyer who has made a significant contribution to the justice system. The deadline for this award is Monday, May 3, 2010.

An awards committee co-chaired by State Bar President-Elect W. Anthony Jenkins and attorney Thomas Cranmer reviews nominations for the Roberts P. Hudson, Champion of Justice, Frank J. Kelley, Kimberly M. Cahill, and Liberty Bell awards. The Bar's Pro BonoInitiative Committee reviews nominations for the Cummiskey Pro Bono award. These 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 should include sufficient details about the accomplishments of the nominee to allow the committees to make a judgment.

Any State Bar member can propose candidates for SBM Awards. To apply online or download application forms visit www.michbar.org/programs/eventsawards.cfm. Cummiskey Award nominations can be directed to Dionnie Wynter at dwynter@mail.michbar.org; all other nominations can be submitted to Joyce Nordeen, State Bar of Michigan, 306 Townsend St., Lansing, MI 48933 or jnordeen@mail.michbar.org. For more information call (517) 346-6373 or (800) 968-1442, or fax (517) 482-6248.

Tax Deduction For Energy Efficient Buildings

By Daniel Shirey, Esq., Kitch, Drutchas

The Emergency Economic Stabilization Act signed by President Bush on October 3, 2008, extended the tax deduction available for expenses related to the design and installation of "energy efficent commercial building" systems until December 31, 2013. (Internal Revenue Code section 179D).

The deduction is an incentive to building owners to upgrade their energy systems or to design new buildings to be energy efficient.

The deduction is available if the "energy efficient commercial building property" expenditures reduce the total energy and power costs of the building by 50 percent or more, as compared to a "reference building."

The deduction is available if the 50 percent or more of total energy or power cost reduction is attributable to one or more of the following systems:

- Interior lighting systems
- Heating, cooling, ventilation, hot water systems, and/or
- Building envelope systems

Energy reductions derived from another source do not qualify for inclusion in the calculation to determine availability of the deduction.

The "reference building" is a building located in the same climate zone as the taxpayer's building and is otherwise comparable to the taxpayer's building, which meets the minimum requirement of the American Society of Heating, Refrigeration, and Air Conditioning Engineers, ASHRAE Standard 90.1—2001.

Building owners can claim a tax deduction up to $1.80 per square foot of building area for the installation of qualifying systems, over the aggregate amount of the deduction with respect to the building for all prior taxable years. The basis of such property shall also be reduced by the amount of the deduction allowed. Lobbying activities seek to increase the deduction to $2.25 per square foot, but the proposal has not yet obtained congressional approval.

Thus, for example, if a new 100,000-square-foot office building meets the energy reduction requirements, is placed into service, and no prior EECG deductions have been taken in prior years, a deduction is available of up to $180,000 ($1.80 x 100,000 square feet). There is no overall per-building dollar limit on the deduction.

Using this formula, commercial building owners may choose to negotiate contracts with energy system designers to include incentives aimed at obtaining the full energy efficiency deduction.

Methods of calculating energy reductions have been promulgated. Certified computer software is also available to perform the calculations. Methods for calculating energy efficiencies are fuel neutral. Thus, for example, energy efficiencies will qualify whether the method of heating is gas, oil furnace or boiler, or electrical.

Partial credit may also be available if total energy savings do not meet or exceed the 50 percent requirement.

Application to Public Buildings

A tax deduction is also available on energy savings systems installed in new or existing public buildings. The deduction applies to federal, state or local government buildings. Allocation of the deduction will be to the person primarily responsible for designing the energy efficient system. The allocation is made by the owner of the building. The deduction will be allowed to the designer for the taxable year that includes the date the energy efficient system is placed into service. A designer may be an architect, engineer, contractor, environmental consultant, or energy services provider who creates the technical specifications. If more than one designer is responsible for creating the technical specifications, the owner may allocate the deduction to the designer primarily responsible, or may allocate the deduction among several designers. The maximum amount of the deduction to be allocated is the amount of the costs incurred by the owner to place the energy efficient system into service. The designer does not include in income any amount of the allocated deduction.

Public building owners may thus likewise choose to negotiate contracts with energy system designers to include incentives aimed at obtaining the full energy efficiency deduction. Public building contracts could include allocation of the deduction to the designer.

To claim the deduction, the taxpayer must have a certified document of the energy savings signed by a "qualified individual," at a minimum an engineer or contractor who is licensed in the jurisdiction where the building is located, and is not related to the taxpayer. The IRS has set forth detailed requirements that must be contained in the certification. Before claiming the deduction, the taxpayer must obtain certification that required energy savings will be achieved.

Opinions of Attorney General Mike Cox

By George M. Elworth, Assistant Attorney General

Editor's note: Assistant Attorney General George M. Elworth of the Finance Division and a member of the Publications Committee furnished the text of the headnotes of these opinions. The full text of these opinions may be accessed at www.mi.gov/ag.

General Property Tax Act

Whether the post-mortem creation of a conservation easement exempts property burdened by the easement from uncapping for real property tax purposes otherwise occasioned by the death of the owner

The General Property Tax Act (GPTA), MCL 211.1 et seq, mandates that the taxable value of real property shall be uncapped when a "transfer of ownership" occurs. For purposes of the GPTA, a "transfer of ownership" that results in uncapping includes transfers by will to the deceased owner's devisees or by intestate succession to the deceased owner's heirs. Title to a decedent's real property passes at the time of his or her death, whether by will or by intestate succession. If, however, the land that passes at the time of death is, at that time, subject to a "conservation easement" as defined by section 2140 of the Natural Resources and Environmental Protection Act, MCL 324.2140, or is eligible for a deduction as a "qualified conservation contribution" under section 170(h) of the Internal Revenue Code, 26 USC 170(h), that transfer of land, but not buildings or structures located on the land, is exempt from uncapping. But a "conservation easement" or a deduction for a "qualified conservation contribution" that is not created until after the death of a property owner will not avoid uncapping of the property's taxable value for the transfer that occurred at death. Finally, qualified agricultural property is exempt from taxes levied for school operating purposes under MCL 211.7ee, and a transfer of such property is exempt from the uncapping of its taxable value under MCL 211.27a(7)(n).

Opinion No. 7233
June 16, 2009

Revised School Code

Whether a community college may authorize a charter school within the boundaries of the Detroit Public Schools if it no longer meets the threshold pupil membership count required to qualify as a "first class school district"

If a community college with geographic boundaries located within the boundaries of the Detroit Public Schools, or a federal tribally controlled community college, submits a contract to the Michigan Department of Education in which the college's governing board has authorized a public school academy to operate within the boundaries of the Detroit Public Schools, the Department must assign the academy a "district code," enabling it to receive state school aid. While section 502(2)(c) of the Revised School Code, MCL 380.502(2)(c), precludes a community college's governing board from authorizing public school academies in a first class school district, community colleges with geographic boundaries located within a general powers school district's boundaries and federal tribally controlled community colleges may authorize public school academies and compete for students in a general powers school district. Because the Detroit Public Schools' pupil membership on the most recent pupil membership count day did not reach the threshold required of a first class school district under section 402 of the Revised School Code, MCL 380.402, the Detroit Public Schools does not qualify as a first class school district under the Code and is, therefore, a general powers school district.

Opinion No. 7234
July 20, 2009

State Law Update

By Ronald D. Richards, Jr. and Patricia Scott, Foster, Swift, Collins & Smith, PC

Statutory Annexation Voting Scheme Held to be Constitutional

Charter Twp of Meridian v Ingham County Clerk, ___ Mich App ___; ___ NW2d ___ (2009)

The Michigan Court of Appeals has held constitutional the annexation voting scheme set out in MCL 42.34(5). That statute allows a township to be annexed to an adjoining city if (a) a petition signed by 20 percent of the registered electors in the affected area to be annexed is presented to the county clerk, and (b) the annexation is approved by a majority of the registered electorates in the part of the township affected by the proposed annexation, and a majority of the electorates in the city to which the property is to be annexed.

In August 2006, the Ingham County clerk received a petition to annex property from Meridian Township to the City of East Lansing. The clerk determined the petition was valid and set it for an election. Meridian Township sued, requesting declaratory and injunctive relief. The Township alleged that MCL 42.34(5) was unconstitutional because it barred all Township electors from voting. The referendum was held and it passed in the City of East Lansing by a substantial number of votes, and it passed in the affected part of the Township by the sole two votes cast. Subsequently, the trial court granted summary disposition against the Township and dismissed the case.

The Court of Appeals first addressed the constitutionality of § 42.34(5). The Township argued that § 42.34(5) violated constitutional voting rights since it only allows electors registered to vote in the *affected* part of the township to be annexed to vote on the referendum. In other words, the Township claimed that the statute was infirm because it did not allow all electors of the entire Township to vote, citing to Const 1963, art 2. The Court of Appeals disagreed. The Court first noted that the plaintiff's argument relied on the Supreme Court's interpretation in *Renne v Oxford Twp*, 380 Mich 39; 155 NW2d 852 (1968), of the phrase "district or territory affected" in Const 1963, art 2. The Court determined that *Renne* was inapposite since it did not address the unique nature of annexation proceedings.

Next, the Court rejected the Township's argument that the Home Rule City Act establishes that the phrase "district or territory affected" includes the entirety of the township affected by a proposed annexation. The Court disagreed that MCL 117.9(1) supports the Township's argument, reasoning that the legislature did not use the terms "district" and "territory" interchangeably in MCL 117.9(1). As a result, the Township's assertion that the ratifiers of Michigan's Constitution intended the phrase "district or territory affected" in Const 1963, art 2, § 6 to mean the "entirety of a township whose boundaries were proposed to be changed" fails. The ratifiers' language in Const 1963, art 2, § allows the legislature to limit the electors who can vote on a proposed annexation to those in the territory affected, i.e., the part of the township to be annexed.

Next, the Court rejected the argument that § 42.34(5) violated the "liberally conferred" right to vote in Const 1963, art 2, § 1. The Court held that the legislature has the right to change municipal boundaries as a legislative function without the consent of the electorate; because it has this right, it is constitutional for the legislature to permit only qualified, affected electors to vote on the proposed referendum.

Finally, the Court of Appeals rejected the Township's claim that § 42.34(5) violated equal protection guarantees. The Township argued that there is no rational basis for prohibiting all residents of the township to vote when the annexation would affect the entire township. The Court disagreed. It held that the fixing of municipal boundaries is a legislative function, and that § 42.34(5) furthers a legitimate governmental purpose by providing a means to resolve disagreements concerning annexing within a territory to a city. The Court held that the classification of potential electorate voters of those living within the annexation area rationally relates to achieving that interest; therefore, the equal protection claim failed.

Traditional Three-part Standing Test Applies to OMA Suits

Myerscough v Chippewa County Board of Comm'r, ___ Mich App ___; ___ NW2d ___ (2009)

In this matter, the Michigan Court of Appeals held that a plaintiff who seeks to sue for an Open Meetings Act (OMA) violation must meet traditional standing requirements.

In *Myerscough*, the plaintiff sued the Chippewa County Board of Commissioners for alleged OMA violations. The plaintiff claimed the County violated the OMA in various ways: he was denied the opportunity to make public com-

ments at general meetings; that one meeting in particular was not convened and administered in compliance with the OMA; and that minutes of the meetings were not made and kept. The trial court granted summary judgment to the County, ruling that the plaintiff lacked standing to bring the OMA claim. The plaintiff appealed, arguing he did not need to meet traditional standing requirements since the OMA provides that "a person" may file a civil action.

The Court of Appeals rejected the appeal, and affirmed the dismissal on standing grounds. It noted the longstanding rule, as the United States Supreme Court delineated and the Michigan Supreme Court adopted, that any person who sues must prove three requirements to establish standing: (1) an injury in fact; (2) a causal connection between injury and conduct complained of; and (3) redressability.

Next, the Court explained that this three-part test is an "irreducible constitutional minimum." The legislature *may not* confer standing to persons who do not meet the three-part standing test as any attempt to do so would violate separation of powers. Therefore, to bring an action under the OMA, a person must meet the three-part standing test.

ZBA's Decision to Permit Six-Foot Fence up to Required Setback Line Upheld

Simon v City of Norton Shores, et al, ___ Mich App ___; ___ NW2d ___ (2009)

In this case, the Michigan Court of Appeals upheld a Zoning Board of Appeals' (ZBA) decision permitting a six-foot fence on a property owner's lakefront lot as a reasonable interpretation of the Zoning Ordinance.

In *Simon*, the plaintiffs owned a lakefront lot adjacent to the Sipovics, who had applied for a permit to erect a fence. The Zoning Ordinance, § 15.100(2), stated that a fence must not exceed six feet and must not extend beyond "the required minimum front yard." There was no definition of "required minimum front yard." The city community development director granted the permit. The plaintiffs appealed to the ZBA, raising the issue of whether § 15.100(2) means fences may extend to the setback line as defined in § 4.102(1)(A) of the zoning ordinance (which provides that no structure may be built closer to a lake than an adjacent principle structure) or whether fences cannot extend into the front yard at all, as defined in § 2.281 ("an open space extending the full width of the lot between the principal building and the front lot line, unoccupied and unobstructed, from the ground upward"). The ZBA reviewed multiple definitions in the zoning ordinance, and approved the issuance of the permit. It found that it was not the spirit or intent of the zoning ordinance to bar a fence as proposed.

The trial court ruled that the ZBA erred. It determined that the zoning ordinance clearly prohibits a fence from extending from a side yard into a front yard. It therefore reversed the ZBA.

The Court of Appeals reversed. It first addressed where the front yard begins for the purpose of determining where the six-foot high fence must stop. It noted that the trial court's ruling essentially read the words "required minimum" out of § 15.100(2). Contrary to the trial court's ruling, § 15.100(2) does not completely bar a six-foot fence from extending into any part of the actual front yard. Rather, where the fence may extend depends on how "required minimum front yard" is defined.

As to that issue, the Court noted that the ordinance did not define "required minimum front yard." It noted that the ZBA and director considered other parts of the zoning ordinance, including § 4.102(1)(A). The City marked that as the beginning of "the required minimum front yard." The Court found that to be a reasonable interpretation. As a result, the trial court's decision was reversed.

Court Order Requiring Landowners to Partially Remove and Fill In an Unfinished Structure was Reasonable to Abate a Nuisance

City of Mackinac Island v Webster, ___ Mich App ___; ___ NW2d ___ (2009)

In this matter, the Michigan Court of Appeals held that the City's order to abate a nuisance was reasonable when it required the defendant landowners to partially remove and fill in an unfinished basement, which had been in an unfinished state for nine years and in violation of the City's zoning ordinance for the bulk of that time.

In 1999, the defendants obtained proper permits to begin constructing a home on a vacant lot they owned on Mackinac Island. As of 2001, they had excavated and poured a concrete foundation with walls that extended three to four feet above grade and installed a septic pit. Later, due to lack of progress, the City required the defendants to build an eight-foot fence to enclose the foundation work. Subsequently, the defendants were not able to continue construction, leaving the home in an unfinished condition.

The City then sued the defendant landowners, alleging the condition of their property constituted a nuisance. For relief, the City sought an order requiring the defendants to partially remove and fill in the unfinished structure. The trial court granted the relief that the City requested.

The Court of Appeals affirmed. The Court noted that generally in an abatement-nuisance action, the remedy should be no greater than necessary to abate the nuisance. The Court opined that the remedy ordered met this requirement given that (1) the abatement order did not require the defendants to completely destroy the unfinished

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State Law Update

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structure; (2) the remedy was not too drastic where the defendants were repeatedly given opportunities to obtain financing to cure the blight but did not do so; and (3) there was no evidence the defendants could obtain financing in the foreseeable future. Thus, absent the court-ordered remedy, the unfinished structure would have remained indefinitely.

Next, the Court rejected the notion that the trial court failed to consider an alternative, less drastic measure available. The Court noted that before the trial court issued its order, it gave the defendants many chances to alleviate the blighted condition by finishing the construction.

Finally, the Court affirmed the trial court's finding that the defendants' alternative proposal was inappropriate. The alternative proposed by the defendants, to cause the unfinished structure to look like land in its natural state, was unreasonable because it would not remedy the nuisance nor comply with the City's ordinances.

ABA Techshow March 25-27, 2010

The 24th annual American Bar Association Techshow is set for March 25-27, 2010, in Chicago. Lawyers and legal professionals will have many opportunities to learn, update their skills, and network over the three days of CLE sessions and the two-day expo. Attendees can pick up tips that cover the range of basic through advanced legal technology from fifteen dedicated tracks. The expo will feature the latest products from over 100 vendors, including LexisNexis, Thomson West, Fujitsu, Dell, and many more.

As a member of the State Bar of Michigan, you can save $150 off the standard registration rate if you register by February 19, 2010.

* Register online using Event Code EP1022 (https://www.abanet.org/lpm/nosearch/eventpromoterregistration.htm)
* Register using mail/fax form (http://www.michbar.org/news/releases/archives09/techshow_reg.pdf)

Visit the Techshow website (http://www.techshow.com/) for a complete schedule, hotel information, and CLE credits.

Federal Law Update

By Crystal L. Morgan, Law Weathers and Marcia Howe, Johnson Rosati, LaBarge, Aseltyne & Field, PC

U.S. District Court, Western District of Michigan

Fourth Amendment, Unreasonable Searches, Suppression of Evidence

United States v Peoples, October 29, 2009 (Reconsideration Denied November 9, 2009); 2009 WL3586564

On April 21, 2009, the United States Supreme Court held that a warrantless search of a car incident to arrest violates the Fourth Amendment unless "the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Arizona v Gant,* ___ US ___; 129 S Ct 1710 (2009). In this case, the defendant moved suppress evidence discovered during a search that occurred before the *Gant* decision was issued. The government conceded that the search did not meet the *Gant* standard, but argued that the search was valid because the police relied in good faith on pre-*Gant* case law in conducting the search. Specifically, the government argued that the good-faith exception to suppression articulated in *United States v Leon,* 468 US 897 (1984), and its progeny, excused suppression in this case.

The Court concluded that the police violated the Fourth Amendment when they searched the defendant's vehicle incident to his arrest in violation of *Gant.* However, that conclusion did not automatically require suppression of the evidence because the only question on which the Supreme Court granted certiorari in *Gant* was whether the search violated the Fourth Amendment. "The Supreme Court did *not* hold that the evidence discovered as a result of the unreasonable search had to be suppressed." Thus, the Court went on to address the question of whether good-faith reliance on case law (prior to a change in the law) can excuse application of the exclusionary rule, a question that had not yet been addressed by the Sixth Circuit

The Court explained the history of the good-faith exception to the exclusionary rule, noting that it has operated to excuse suppression of illegally obtained evidence if the officers relied in objectively reasonable good faith on a warrant that was later found unsupported by probable cause. It has also been extended to objectively reasonable good-faith reliance on a state statute, or on warrants that were invalid for reasons other than lack of probable cause. The Court noted that while the good faith doctrine has been extended, "the Supreme Court

has been careful to preserve the bedrock protections of the Fourth Amendment when it has crafted exceptions to the warrant requirement and expansions of the good-faith doctrine."

The Court concluded that "[e]xpanding the good faith doctrine to permit reliance on case law would take the exception in a new and untenable direction" because it "would for the first time permit use of illegally obtained evidence based on the good faith of the officer alone, unchecked by the judgment of either the legislature…or the judiciary…." In reaching this conclusion, the Court noted that good faith reliance on case law is materially different from good faith reliance on a warrant. While a warrant is specifically addressed to the particular facts and targets at issue and is issued in advance of the actual search, case law is "inherently retrospective and focused on a situation other than the one at hand." The Court stated that permitting a police officer to rely on case law as an excuse to suppression would circumvent the process of obtaining a reliable probable cause determination from a magistrate. It would entrust the unilateral power to make probable cause determinations to police officers who are "poorly positioned to make probable cause determinations and interpret case law" because they lack "the detached scrutiny of a neutral magistrate." Thus, the Court granted the defendant's motion to suppress the evidence obtained during the unlawful search.

Americans with Disabilities Act, Notice of Disability, and Request for Accommodation

Moore v Hexacomb Corporation, November 6, 2009
2009 WL 3756906

The plaintiff filed a complaint against his former employer alleging that the employer violated the Americans with Disabilities Act ("ADA") and the Michigan Persons with Disabilities Civil Rights Act ("PWDCRA") by refusing to make a reasonable accommodation and by terminating him based on a disability that was unrelated to his ability to perform his job with a reasonable accommodation. The employer argued in part that at the time the plaintiff requested the accommodation, there were no open positions available that would accommodate his disability. The Court found, however, that another employee (a supervisor) had earlier requested the accommodation for the plaintiff. And the fact that the supervisor, rather than the plaintiff himself, notified the employer of the need for the accommodation was irrelevant "because someone other than the disabled person may request an accommodation on behalf of the disabled person." Quoting a decision from the Third Circuit, the Court stated that "[w]hat matters under the ADA are not formalisms about the manner of the request, but whether the employee or a representative for the employee provides the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and the desire for an accommodation." Based on the supervisor's testimony (that he told the employer about the plaintiff's physical disability and his need for an accommodation), a jury could conclude that the employer was aware of the plaintiff's disability and his need for a specific accommodation and that the employer failed to engage in the good faith interactive process required under the ADA. For this reason, and the fact that other genuine issues of material fact existed, the court denied both parties' motions for summary judgment.

Eleventh Amendment Immunity, Waiver

Fox v Smith, 2009 WL 3102035

A state prisoner brought a civil rights action pursuant to 42 U.S.C. § 1983 against various defendants, including the "Hillsdale County Judicial System," which the parties interpreted to mean the Hillsdale County Circuit Court. The plaintiff claimed that the defendants conspired and worked together to fraudulently obtain a conviction against an individual named Thomas Sawyer by having another prisoner posing as the plaintiff testify at Sawyer's criminal trial. The plaintiff claimed to have learned of the fraud when he was served with a complaint in which Sawyer alleged that plaintiff gave false and slanderous testimony at Sawyer's trial. The complaint against the plaintiff was ultimately dismissed.

The Circuit Court moved to dismiss the claims against it, and the magistrate recommended that the motion be granted, in part because the Circuit Court was entitled to Eleventh Amendment immunity, which bars suit in federal court against a state and its departments or agencies unless the state has waived its sovereign immunity or unequivocally consented to be sued. The plaintiff objected, arguing that the Circuit Court never raised Eleventh Amendment immunity as a defense, thereby waiving the defense, and that the Court could not raise Eleventh Amendment immunity on its own.

The Court disagreed, stating that a court "may sua sponte raise the issue of lack of jurisdiction because of the applicability of the Eleventh Amendment." The Court further noted that 28 U.S.C. § 1915(e)(2) authorizes a federal court to "dismiss the case at any time if the court determines that…the action…seeks monetary relief against a defendant who is immune from such relief." Thus, the Court dismissed the claims against the Circuit Court on the grounds that it was entitled to Eleventh Amendment immunity, even though the Circuit Court had not specifically raised Eleventh Amendment immunity as a defense.

Debano-Griffin v. Lake County,
2009 WL 3321510, No. 282921 (Mich. App. 2009)

In October of 2009, in *Debano-Griffin v. Lake County*, 2009 WL 3321510, No. 282921 at *2 (Mich. App. 2009), the Michigan Court of Appeals considered the requirement that

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Federal Law Update

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a plaintiff bringing a claim under the Whistleblower's Protection Act ("WPA") must be reporting, "a violation or a suspected violation of a law or regulation." (Citing MCL 15.362). In *Debano*, the plaintiff, a former Director of Lake County 911, claimed she engaged in a protected activity when she complained to the County Board of Commissioners regarding various safety violations allegedly committed by her employer. *Id.* at *1. The Court of Appeals remanded the case for entry of an order granting summary disposition in favor of the employer because the plaintiff could not identify a single law or regulation purportedly violated. *Id.* at *3. The Court held that it was not enough that plaintiff reported a violation of what she *subjectively suspected* was a law or regulation, explaining:

> We hold that the word "suspected" in the statute modifies only the word "violation" and not the word "law." To interpret the WPA as allowing a whistleblower to report a suspected violation of a suspected law, rule or regulation unduly expands the parameters of WPA . . . .Therefore, **the WPA does not protect an employee who reports or is about to report a suspected violation of a suspected law.**
>
> *Id.* at *3. (Emphasis added).

The Court of Appeals' interpretation of the "reporting" element of a WPA claim makes it more difficult for plaintiffs to establish a prima facie case. The *Debano-Griffin* Court found this result to be just in light of the public policy behind the WPA, noting: "[T]he purpose of the WPA is the protection of the public, not the protection of employment….The public does not benefit from giving WPA protection to those who report activities or suspected activities that they subjectively believe violate nonexistent laws, rules or regulations." *Id.* at *3.

Legislative Update

By Kester K. So and Wendy R. Underwood, 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

- Wetland Regulation. **SB 785** amends the Natural Resources and Environmental Protection Act to allow conservation districts to regulate certain categories of wetlands. Amends sections 1301, 30105, 30301, 30303, 30306, 30306b, 30311, 30312, 30317, 32512a and 32513 of 1994 PA 451, MCL 324.1301 *et seq*.; adds sections 30303b, 30303d, 30304b, 30305b, 30311a, 30311b, 30311d, 30312b, 30312d, 30325, 30327 and 30329.
- Road Projects. **HB 5072** would amend the Transportation Economic Development Fund Act to modify allocation for economic development road projects in any targeted industries. Amends section 11 of 1987 PA 231, MCL 247.911.

Bills Passed by the Senate

- Shut-Off Rules. **SB 535** would amend the Michigan Public Service Commission Act to require municipally-owned utilities to comply with rules regarding service shut-off. Amends 1939 PA 3, MCL 460.1 to 460.11, to add section 9T. See also **SB 554** and **557**, which would further amend the Michigan Public Service Commission Act to establish shut-off notice requirement for municipally-owned utilities and provide an enforcement mechanism for violations by municipally-owned utilities, respectively.

Bills Passed by the House of Representatives

- Energy Efficiency and Renewable Energy Projects. **HB 5375** would create an energy efficiency and renewable energy revolving loan fund to provide loans, grants and other forms of assistance to public or private entities for energy efficiency and renewable energy projects.

Bills Introduced in the Senate

- Consolidated Elections. **SB 888** would amend the Michigan Election Law to limit elections to August and November. Amends sections 4, 302, 321, 322, 381, 641, 644e, 644g, 646a and 821 of 1954 PA 116, MCL 168.4 *et seq*. and repeals sections 500f, 642 and 642a of 1954 PA 116, MCL 168.500f *et seq*.
- Schools of Excellence. **SB 925** would amend the Revised School Code to provide for the establishment of "schools of excellence." Amends sections 5 and 6 of 1976 PA 451, MCL 380.5 and 380.6 and adds part 6E. See also **SB 926**, which would amend the State School Aid Act of 1979, for other portion of the package.
- Retiree Health Care. **SB 927** would amend the Revised Municipal Finance Act to provide bonding authority for prefunded retiree health care. Amends section 103 of 2001 PA 34, MCL 141.2103 and adds section 518.
- Local Elections. **SB 937** would amend the Michigan Election Law to provide cities the option to hold even-year general elections. Amends section 642a of 1954 PA 116, MCL 168.642a.
- Land Banks. **SB 979** would amend the Land Bank Fast Track Act to modify certain jointly operated land bank authorities. Amends sections 3, 4 and 23 of 2003 PA 258, MCL 124.753 *et. seq*.
- Failing Schools. **SB 981** would amend the Revised School Code to provide for certain measures to identify and restructure failing schools. Amends sections 449 and 507 of 1976 PA 451, MCL 380.449 and 380.507 and adds sections 11c, 1280c and 1280d. See also **SB 925**, **926**, **965**, **982** and **983** for other portions of the package.
- Road Patrols. **SCR 26** recognizes local law enforcement cuts as due to economic conditions and allows local units to receive secondary road patrol funds despite reductions in size of force.

Bills Introduced in the House of Representatives

- School Spending. **HB 5500** would amend the Revised School Code to require school districts to publish information on the percentage of general operating budget expended for instruction. Amends 1976 PA 451, MCL 380.1 to 380.1852, to add section 1209.
- Kindergarten Eligibility. **HB 5509** would amend the Revised School Code to modify eligibility to start kindergarten. Amends section 1147 of 1976 PA 451, MCL 380.1147. See also **HB 5510**, which would amend the State School Aid Act of 1979, for other portion of the package.
- Refunds. **HB 5550** would amend the Revised Municipal Finance Act to allow a municipality to issue a refunding security to refund all or any part of its outstanding securities before December 31, 2012 if those securities are not secured by the unlimited full faith and credit pledge of the municipality. Amends section 611 of 2001 PA 34, MCL 141.2611. See also **HB 5552**, **5553** and **5554**, which would amend the Downtown Development Authority Act, the Tax Increment Finance Authority Act, and the Local Development Financing Act, respectively, to provide for issuance of refunding obligations.
- Municipal Security. **HB 5551** would amend the Revised Municipal Finance Act to allow a municipal security to be sold, pursuant to a written debt management plan, at a discount exceeding 10 percent of the principal amount of the municipal security if that municipal security is issued before December 31, 2012. Amends section 305 of 2001 PA 34, MCL 141.2305.
- Renewable Energy. **HB 5555** would amend the Michigan Renaissance Zone Act to modify the definition of renewable energy facility. Amends section 3 of 1996 PA 376, MCL 125.2683.
- Downtown Development. **HB 5584** would amend the Downtown Development Authority Act to modify the filing deadline for certain downtown development authorities. Amends section 13c of 1975 PA 197, MCL 125.1663c.
- Tax Authorities. **HB 5585** would amend the Tax Increment Finance Authority Act to modify the filing deadline for certain tax increment financing authorities. Amends section 12b of 1980 PA 450, MCL 125.1812b.
- Road Patrols. **HCR 30** recognizes local law enforcement cuts as due to economic conditions and allows local units to receive secondary road patrol funds despite reductions in size of force.

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

Michigan vs. Ohio State

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

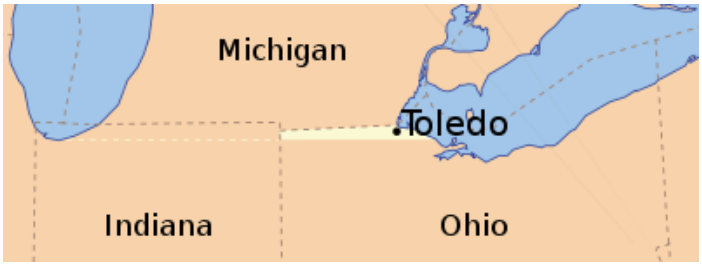
I know you all know (but maybe want to forget) that on Saturday, November 21, Ohio State defeated Michigan 21-10, the 9th win in 10 tries for Ohio State coach Jim Tressel against the Maize and Blue. Aside from the score, it was a good day for football in Ann Arbor. While mostly cloudy until it turned clear by the end of the game, the temperature was around 50 degrees and the wind speeds were under 5 miles per hour.

These weather conditions were a far cry from the "Snow Bowl" game of 1950 when the 4–3–1 Wolverines beat the 6–2 Buckeyes to win a trip to the 1951 Rose Bowl game. Ohio State had played in the Rose Bowl the previous year, and the Big Ten had a "no repeat" rule. Had Michigan lost, Wisconsin would have gone to the Rose Bowl. As you will see later, sometimes when Michigan and Ohio do battle, whether on the football field or in court, Wisconsin has a stake in the outcome, and loses.

Michigan won the Snow Bowl game, 9-3, despite never getting a first down and failing on all nine pass attempts. The teams punted 45 times, sometimes on first down. That strategy was based on the weather in that both teams felt it better to have the ball in the hands of their opponents near the end zone and hope for a fumble of the slippery ball. The game became famous because of the weather and the difficulty of playing football when the players can't see the lines on the field.[1]

The annual Michigan–Ohio State football game is, however, just one of many rivalries between the two neighboring states, one of which resulted in a war and also a U.S. Supreme Court decision.

The Toledo War (1835–1836), also known as the Ohio–Michigan War, was a one-casualty conflict in which the only blood drawn came from a knife thrust into the leg of a Michigan sheriff. Varying interpretations of state and federal legislation passed between 1787 and 1805, and a poor understanding of the geographical features of the Great Lakes at that time caused the governments of Ohio and Michigan to both claim sovereignty over a 468-square-mile region referred to as the "Toledo Strip." Michigan sought to include the Toledo Strip within its boundaries when it sought statehood in the early 1830s. Like a Buckeye linebacker blitzing Michigan's quarterback for a loss, Ohio's congressional delegation was able to halt Michigan's admission to the Union.



Map of the "Toledo Strip," the disputed region

Beginning in 1835, both sides passed legislation attempting to force the other side's capitulation. Both states raised militias and instituted criminal penalties for citizens submitting to the other's authority. The militias were mobilized and sent to positions on opposite sides of the Maumee River near Toledo, but other than mutual taunting there was little interaction between the two forces. The single military confrontation of the "war" ended with a report of shots being fired into the air, incurring no casualties. Another source, however, reports the war as being even less confrontational, stating: "The two armies struggled for a soggy week to find each other in the wilderness and swamps surrounding the region, but never did come in contact."

The war did, however, feature a battle—the *Battle of Phillips Corners.* The battle occurred in April 1835 when a group of Ohio surveyors were attacked by 50 to 60 members of the Michigan militia. The Ohio surveyors reported that while observing "the blessings of the Sabbath," Michigan militia forces advised them to retreat. In the ensuing chase, "nine of our men, who did not leave the ground in time after being fired upon by the enemy, from thirty to fifty shots, were taken prisoners and carried away into Tecumseh." There were no casualties.

The only casualty of the war occurred in July 1835, when a Monroe County deputy sheriff went into Toledo to arrest an officer in the Ohio Militia. The officer and his three sons resisted the deputy's attempts, and one of them stabbed the deputy in the leg with a pen knife. The deputy survived.

On December 14, 1836 (175 years ago this month), the Michigan territorial government, facing a dire financial crisis, surrendered the land under pressure from Congress and

President Andrew Jackson. The compromise called for Michigan to give up its claims to the Toledo Strip in return for being granted statehood. Michigan also received approximately three-quarters of the Upper Peninsula.

Michigan was finally admitted to the Union on January 26, 1837, as the 26th state, with its new territory in the Upper Peninsula. While the U.P. land was first thought to be worthless, it later proved to be very valuable with plentiful timber and a thriving copper and iron mining industry. The loser? Wisconsin. Had the U.P. not been given to Michigan as part of the compromise for ceding the Toledo Strip to Ohio, the U.P. would be part of the state of Wisconsin today.

There were still differences of opinion regarding the exact boundary location between the two states, however, until a definitive re-survey was performed in 1915. That survey even "cheated" slightly to prevent certain residents near the border being subject to changes in state residence, or land owners having parcels on both sides of the border.

Michigan and Ohio were still in disagreement, however, on the path of the border extending east in Lake Erie. That matter was finally resolved in 1973 by the United States Supreme Court in *Michigan v. Ohio*, 410 U.S. 420, 93 S.Ct. 1407, 1974 A.M.C. 529, 35 L.Ed.2d 397. The Supreme Court upheld a special master's report and ruled that the boundary between the two states in Lake Erie was angled to the northeast, as described in Ohio's state constitution, and not a straight east-west line. This meant that Turtle Island in Lake Erie just beyond Maumee Bay, originally wholly within Michigan, was now split between the two states.

This should give all you Wolverines out there some added incentive when next November comes around and the Maize and Blue try to get only their second win against Jim Tressel. In addition to school and state pride, be sure to "Remember Turtle Island" when you engage the evil scarlet and grey.

Endnote

1 http://en.wikipedia.org/wiki/Sno_Bowl_(1950)

2010 Winter Seminar Agenda

8:30 a.m. Registration/Continental Breakfast

Morning Session

9:00-9:45 a.m. **Governmental Immunity: The Times They are a Changin'?**

Speaker: **Michael E. Rosati**; Johnson, Rosati, LaBarge, Aseltyne & Field, P.C.
Farmington Hills, Michigan

9:45-10:30 a.m. **Constitutional, Statutory and Burden of Proof Issues in Exclusionary Zoning and Mining Cases: Michigan Supreme Court Decisions on the Horizon**

Speaker: **Thomas R. Meagher**; Foster, Swift, Collins & Smith, P.C.
Lansing, Michigan

Speaker: **Gerald A. Fisher**, **Professor of Law**
Thomas M. Cooley Law School

10:30-10:45 a.m. **Break**

11:15-11:45 a.m. **The Medical Marihuana Act: Issues and Unanswered Questions**

Speaker: **Melanie B. Brim**, **MHA, Director**
Bureau of Health Professions, Michigan Department of Community Health
Lansing, Michigan

The Medical Marihuana Act and Local Control: A Municipality's Ability to Regulate Caregivers, Dispensaries, Grow Operations and Other Related Uses

Speaker: **Christopher J. Forsyth**, Assistant City Attorney
Troy, Michigan

11:45-12:00 p.m. **Questions**

12:00-1:00 p.m. **Lunch**

Afternoon Session

1:00-4:00 p.m. **Approaches to Workforce Changes in Difficult Times– a Management Perspective**

Speakers: **John A. Entenman**; Dykema
Detroit, Michigan

Craig W. Lange; Roumell & Lange, PLC
Troy, Michigan

For additional information, please contact Carol A. Rosati at (248) 489-4100 or crosati@jrlaf.com.

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