STATE BAR OF MICHIGAN

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Chair's Column

By Michael F. Matheson

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Table of Contents

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Over the last year, acting as the Chair for the Section Council has proven to be a richly rewarding and educational experience. Much of what was accomplished by the Section Council this year could not have been possible without the hard work and dedication of the Council members. My heartfelt appreciation is extended to everyone who helped with the organization of the Section's programs and other council functions.

2014 Annual Business Meeting and Program

The 2014 Annual Meeting for the Section is scheduled for September 18, 2014 at the DeVos Place in Grand Rapids. I encourage everyone to look for opportunities to get involved in Section activities. As a member of the Section's Council and its Chair this year, I was able to realize first-hand how many educational opportunities and networking possibilities exist; however, these opportunities only exist to those who engage and participate in the Section. I look forward to seeing everyone at the Annual Meeting.

The featured speaker at the Annual Meeting will be Jon Bursch from Warner, Norcross and Judd. John Bursch is the accomplished former Solicitor General for the State of Michigan. This highly anticipated program will be geared around John's recounting of his recent experiences arguing several different high-profile cases before the U.S. and Michigan Supreme Courts. John's unique insight into the practice of law will surely be informative.

Section Council Vacancies

Due to the Section Council's own term limits, the Council will be losing two (2) valued members in Michael Ashton and Michael Watza. I want to extend a special thanks to Michael Ashton for his loyal service as the Treasurer for the Council.

The Council openings present an opportunity for other Section members to become more involved. Council members are often uniquely situated to participate on the front lines of emerging issues in the area of administrative and regulatory law. Your participation is encouraged.

continued on next page

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Chair's Column

Continued from page 1

Events

In March, the Section hosted a luncheon program at the Kellogg Center in East Lansing with the Commissioners from the Michigan Liquor Control Commission. Chairman Andy Deloney made a well received presentation regarding current and noteworthy events impacting the MLCC.

The Section also hosted the annual Michigan Public Service Commission luncheon program with the Commissioners, Administrative Law Judges and staff of the MPSC. This program is a must for section members that have a practice involving regulated industries like energy and telecommunications. The program is always insightful and has historically been an opportunity to hear first hand about emerging issues from the Governor's office regarding regulated industries. This year included another informative presentation from Valerie Brader, Governor Snyder's deputy legal counsel and senior policy advisor.

A new program titled "Effective Presentations in Administrative Hearings" was also recently offered to practitioners in the area of administrative law. Administrative Law Judge Sharon Feldman and William Fulkerson led a well received discussion surrounding best practices in administrative hearings. Due to the overwhelming interest in the program, it is expected that it will again be offered. Keep watching for notices of the date and time for the next program.

Whether you are interested in hearing more about Section programs, or just want to provide feedback to the Section Council, feel free to correspond with me via email at *mfmatheson@loomislaw.com* or by telephone at 517-318-9294.

Michigan's Liquor Laws: 2013-2014 Year in Review

By J. Patrick Howe, Howard & Howard Attorneys PLLC

Following the recommendations published by the Michigan Office of Regulatory Reinvention regarding liquor control in July 2012, the 2013-2014 legislative session has had a significant impact on Michigan's liquor laws. These changes did not come without significant debate, which will undoubtedly continue in the next legislative session as our legislature, industry leaders, and MLCC continue to work together to reform and update Michigan's liquor laws. We have taken a look back on the liquor laws that were implemented this past year, which are categorized and summarized below.

Licensing Laws

House Bill 4277; Act 236 of 2013

Creates a Conditional License, which may be issued to: (i) an applicant seeking to transfer ownership of or interest in an existing license at the same location to sell alcohol for consumption on or off the licensed premises, or (ii) an applicant seeking a new SDM liquor license at a new location. The MLCC must issue a Conditional License within 20 business days after receipt of a completed application for a permanent license, and a completed application for a Conditional License. The Conditional License application must include: (a) LCC Form 3021 (for transfer of ownership), or LCC Form 3022 (for new SDM), (b) an executed property document (i.e. lease or deed granting the applicant the exclusive right to occupy the proposed license premises), and (c) an acceptable proof of financial responsibility form. A Conditional License is valid for one (1) year, but expires twenty (20) business days after the MLCC issues an order of approval of the permanent license that serves as the basis for the Conditional License. The application procedures for a Conditional License are further explained in a bulletin posted on the MLCC's website at *http://www.michigan.gov/documents/lara/Conditional_License_Information_457179_7.pdf*]. Effective 5/22/14.

House Bill 5140; Act 237 of 2013

Authorizes the transfer of SDD liquor licenses anywhere in a county in which the SDD license is located in the same manner that Class C liquor licenses are transferrable anywhere in the county in which the license is located. Effective 12/26/13.

Beer Laws

Senate Bill 27; Act 101 of Public Acts of 2013

Allows an "eligible merchant" to fill and sell growlers with a capacity of 1 gallon or less, with beer for consumption off of the licensed premises. An "Eligible Merchant" is an entity that holds an SDM license in conjunction with an on premise liquor license (eg. Class C, B-Hotel, Club). Effective 7/2/13.

Senate Bill 650; Act 50 of 2014

Authorizes self-distribution by a qualified micro brewer or an out of state entity that is the substantial equivalent of a qualified micro brewer. A qualified micro brewer is a micro brewer that produces less than 1,000 barrels per year. In order to self-distribute, the qualified micro brewer must: (i) not have granted exclusive sales rights to a wholesaler in the territory in which the qualified micro brewer seeks to distribute, (ii) deliver the beer by an employee of the qualified micro brewer in a vehicle owned by the qualified micro brewer; and (iii) comply with all state and federal laws applicable to the pricing and distribution of beer to retailers. Effective 3/25/14.

House Bill 4709; Act 42 of 2014

Increases the number of barrels that a micro brewer can manufacture in a given year from 30,000 per year to 60,000 per year. Effective 3/24/14.

House Bill 4710; Act 43 of 2014

Increases the number of Brewpubs that an entity can have an interest in from two (2) additional Brewpubs to five (5) additional Brewpubs, provided that the combined production of beer manufactured at all Brewpubs under common ownership does not exceed 18,000 barrels per year. Effective 3/25/14.

continued on next page

House Bill 4711; Act 44 of 2014

Increases the number of locations in which a licensed Brewery may sell its beer for on-premises consumption from 1 licensed brewery location to 2 licensed brewery locations. Also, authorizes a micro brewer that manufactures less than 30,000 barrels per year to sell its beer for on premise consumption at all of its licensed micro brewery locations, and restricts a micro brewer that manufactures more than 30,000 barrels per year from selling its beer for on premise consumption to only 3 licensed micro brewery locations. Effective 3/24/14.

Wine Laws

Senate Bill 79; Act 100 of Public Acts of 2013

Created a Farmers Market Permit, which allows a Small Wine Maker or an out of state winery that manufactures or bottles no more than 5,000 gallons of wine per year, to conduct tastings and sell wine produced by the Small Wine Maker for off-premise consumption. The tasting and sales area must be confined in an exclusive, clearly defined area of a farmers market approved by the farmer's market manager, and the police department with jurisdiction over the farmers market. The number of Farmers Market Permits available for a particular farmers market, are limited by quota to 1 Farmers Market Permit for every 1,500 persons living in the county where the farmers market is located. A Small Wine Marker can only hold five Farmers Market Permits at a given time. A licensed Wine Maker, which may produce up to 50,000 gallons of wine per year, is not eligible to obtain a Farmers Market Permit. Effective 8/31/13.

House Bill 5046; Act 235 of 2013

Authorizes an on premise licensee, which is defined as "a person who is licensed by the commission to sell alcoholic liquor at retail for consumption on the licensed premises", to allow a consumer to bring wine into the licensed premises for consumption on the licensed premises by the consumer. The licensee may charge a corkage fee for each bottle of the consumer's wine opened on the licensed premises by the licensee's clerk, agent or employee. Effective 3/14/14.

Promotion and Advertising Laws

Senate Bill 505; Act 47 of Public Acts of 2014

Provides exceptions to the "secondary use" rule, which provides that a manufacturer or wholesaler may not provide another vendor, and a retailer may not accept from a manufacturer or wholesaler, advertising items that promote the brands and prices of alcoholic liquor produced by the manufacturer, if the item has any use or value beyond the actual advertising of the brands and prices of alcoholic liquor. The act allows a manufacturer or wholesaler to provide the following items to another vendor: (a) alcoholic liquor recipes literature, (b) calendars and matchbooks, (c) removable tap markers and signs, (d) table tents, (e) shelf talkers, (f) bottle stickers, (g) cooler stickers, (h) buttons, blinking and non-blinking, (i) menu clip-ons, (j) mirrors, (k) napkin holders, (l) spirit cold shot tap machines, and (m) alcoholic liquor drink menus.

The act also provides that a retailer may possess and use brand logoed barware that advertises spirits, beer or wine provided that the barware is purchased from a barware retailer. Barware is defined in the act as the following brand logoed items: (i) trays, (ii) coasters, (iii) napkins, (iv) shirts, (v) hats, (vi) pitchers, (vii) drinkware that is intended to be reused, (ix) buckets, (x) bottle openers, (xi) stir rods, (xii) patio umbrellas, and (xiii) any packaging used to hold and deliver the alcoholic liquor purchased by the retailer. The act allows the MLCC to add or remove items to the list of approved brand logoed barware, but prohibits refrigerator systems, draft systems, or furniture from ever being added to the definition of barware. Effective 3/25/14.

Request for Rulemaking:
MLCC Administrative Rule 436.1321

The Michigan Restaurant Association and the Michigan Licensed Beverage Association filed a request with the Office of Regulatory Reinvention in December 2013 to have subsections (2), (3) and (8) of MLCC Administrative Rule 436.1321 removed. This rule change would: (i) remove the provision that requires MLCC approval of advertising of spirits on the premises of a retail licensee, (ii) remove the provision that requires MLCC approval of advertising of alcoholic liquor on anything which has value, use or purpose other than actual advertising value, (iii) remove the provision that requires MLCC approval to use, sell, furnish or give specialty items displaying alcoholic beverage brand logos at on premise licensed establishments, and (iv) allow retailers to purchase and use point of sale advertising materials, advertising specialty items, and equipment without obtaining prior written approval of the MLCC. A public hearing on this request was held on March 19, 2014, and the request is currently pending formal certification from the Legislative Services Bureau.

continued on next page

Tied House Laws

Senate Bill 329; Act 45 of Public Acts of 2014

Allows a Brewer, Wine Maker, Distiller, Brandy Manufacturer, or parent, subsidiary or an affiliate of any such licensed entity, to acquire, develop, sell, lease, finance, maintain, operate or promote real property occupied by another vendor, except a wholesaler. Such an arrangement must be approved by the MLCC, and the legislative body with jurisdiction over the subject property, must certify to the MLCC that the property is in an urban, commercial or community redevelopment area. A Brewer, Wine Maker, Distiller, or Brandy Manufacturer may not own more than seven (7) properties occupied by another vendor, and the MLCC may deny, revoke or suspend the license of a party to an arrangement subject to this act if a party violates the rules promulgated under the act. A Brewer, Wine Maker, Distiller, or Brandy Manufacturer's direct or indirect influence over the brand of alcoholic liquor sold by the vendor at the subject property is prohibited under the act. Effective 3/25/14.

Miscellaneous Laws

Senate Bill 504; Act 46 of Public Acts of 2014

Adds a severability provision to the Michigan Liquor Control Code, which provides that "if any provision of this act is found to be unconstitutional by a court of competent jurisdiction and all rights of appeal have expired or been exhausted, the offending provision shall be severed and shall not affect the remaining provisions of the act." Effective 3/25/14.

Senate Bill 506; Act 47 of Public Acts of 2014

Beginning on February 1, 2015, the tax on all beer manufactured outside of the state, shall now be paid by the wholesaler assigned to distribute the beer in Michigan. Effective 3/25/14.

Senate Bill 507; Act 47 of Public Acts of 2014

Beginning on February 1, 2015, the tax on all wine or mixed spirit drinks manufactured outside of the state, shall now be paid by the wholesaler assigned to distribute the wine or mixed spirit drinks in Michigan. Effective 3/25/14.

Senate Bill 556; Public Act 194 of 2013 & House Bill 5014; Act 197 of 2013

Act 194 Authorizes the Michigan Department of Human Services to create a program that will block access to cash benefits from Michigan bridge cards at point of sale machines, or ATM machines located in casinos, establishments that hold an SDD liquor license, or adult entertainment establishments. Act 197 requires financial institutions that own, operate or manage point of sale machines, or ATM machines located in casinos, establishments that hold an SDD liquor license, or adult entertainment establishments, to work with the Michigan Department of Human Services to block access to cash benefits from Michigan bridge cards. Effective 2/1/14.

House Bill 4360; Act 55 of 2013

Creates penalty of suspension or revocation of license if a licensee is convicted of accepting Food Assistance Program benefits in exchange for the sale of beer, wine or spirits. Effective 9/10/13.

Conclusion

The Section Council would like to thank the Michigan Liquor Control Commissioners for participating in our annual MLCC Luncheon this past spring. The event was well attended by Section members, and many of the topics covered herein were addressed by the Commissioners. Section members are also reminded that the MLCC moved its offices to Constitution Hall in downtown Lansing on June 16, 2014. Although the MLCC mailing address has not changed, the physical address and general phone number have changed to the following: 525 W. Allegan, Lansing, MI 48933; phone 866-813-0011.

Recent Administrative Law Case Activity

By Ronald Richards

U.S. Court of Appeals - Sixth Circuit

Party Seeking Non-Monetary Relief from the United States Need Not Satisfy APA Sec. 704 Before Sovereign Immunity Is Waived

In an issue of first impression, the Sixth Circuit Court of Appeals joined other Circuits in concluding that plaintiffs who seek nonmonetary relief from the United States are not required to also satisfy the requirements of the Administrative Procedures Act's ("APA") Section 704 before there is a waiver of sovereign immunity. *Muniz-Muniz v US Border Patrol*, 741 F3d 668 (6th Cir 2013). The case arose out of a claim that individuals were illegally stopped, searched, and detained by officers of the United States Border Patrol for an Ohio Bay Station (monitoring the border between Ohio and Canada), based on their Hispanic appearance, race, and ethnicity. Two organizational plaintiffs, who advocate for migrant workers, sued the United States Border Patrol, the Department of Homeland Security, and individual Border Patrol officers. The plaintiffs sued, seeking equitable relief and monetary damages. They later amended their complaint to add the APA, 5 USC Sec. 702, as an additional basis for subject matter jurisdiction. The federal defendants moved to dismiss for lack of standing and lack of subject matter jurisdiction, arguing that a plaintiff can only challenge "final agency actions for which there is no adequate remedy in a court" and that the APA does not waive sovereign immunity as to constitutional torts or negligence actions. The district court granted the federal defendants' motion to dismiss, finding it lacked subject matter jurisdiction since the plaintiffs did not show a waiver of sovereign immunity. It did not address the standing issue.

On appeal, the Sixth Circuit reversed and remanded. It noted that the federal defendants may not be sued without a waiver of their sovereign immunity. It also noted that the Sixth Circuit "has not previously addressed specifically the interplay between Sec. 702 and Sec. 704 of the APA." But it "joined its sister circuits who have done so in holding that Section 702's waiver of sovereign immunity extends to all non-monetary claims against federal agencies and their officers who are sued in their official capacity, regardless of whether a plaintiff seeks review of 'agency action' or 'final agency action' as set forth in Section 704." Therefore, a plaintiff who seeks non-monetary relief against the United States need not also satisfy the requirements of Sec. 704 of the APA before there is a waiver of sovereign immunity. For those reasons, the Sixth Circuit Court determined that the district court erred when it concluded that it lacked subject matter jurisdiction over the plaintiffs' claims.

Michigan Court of Appeals - Published Decision

Court Upholds MPSC's Order Allowing ITC to Alter Its Proposed Transmission Project Route

The Michigan Court of Appeals issued a published decision in the continuing saga involving International Transmission Company's ("ITC") request for an expedited siting certificate to construct, operate, and maintain a 140-mile long, double circuit, transmission line. *In re Application of International Transmission Company for Expedited Siting Certificate*, 304 Mich App 561 (2014). The last edition of this Administrative Law Journal noted some of the prior history in this prolonged debate involving the Michigan Public Service Commission's ("MPSC") Order approving ITC's proposed project to build a transmission line to transmit energy generated from wind power in the thumb area of Michigan. Those disputes and the instant case arise out of the MPSC's February 25, 2011 Order (the 2011 Order), in which it approved ITC's proposed route for the project and granted an expedited siting certificate for it. That decision is not the subject of the instant case, but was affirmed in separate appeals. See 298 Mich App 338 (2012), rev'd in part, 493 Mich 947 (2013).

The instant dispute related to ITC's request to revise the route that the Commission's 2011 Order approved. Specifically, a wind turbine was built on the intervenor's property in the path of the approved route per the 2011 Order. ITC determined that the route would need to be modified to allow for the turbine. However, the intervenor and ITC were unable to agree on a modification of the route. ITC then brought a condemnation case against the intervenor in circuit court in February 2013, seeking an easement across the intervenor's property. The intervenor moved to dismiss; ITC

moved to stay proceedings based on the MPSC's primary jurisdiction. The circuit court stayed the proceedings, and the parties then proceeded before the MPSC. Later, ITC asked the MPSC to clarify its 2011 Order and sought approval to modify the route the MPSC's 2011 Order approved to allow for the turbine.

The intervenor did not object to the route across its land as originally proposed. But the day after ITC moved to clarify, the intervenor petitioned the MPSC to intervene in response to ITC's plan to change the location of the route. The MPSC ultimately approved the requested modification. It explained that the modified route was no greater than 700 feet at its widest, resulting in a line that is considerably shorter than the approved line on the intervenor's property, and avoids cutting a 200-foot swath through a large stand of trees on the property. The MPSC concluded that the route adjustment was within the scope of minor adjustments that the 2011 Order contemplated. The MPSC issued an Order approving the modified route as proposed.

The Michigan Court of Appeals affirmed the decision to modify the route. It first rejected the intervenor's claim of improper notice, reasoning that the intervenor never suggested that its failure to intervene earlier was due to improper notice. Next, the Court rejected the intervenor's arguments that the MPSC lacked subject matter jurisdiction over ITC's request to clarify. The Court acknowledged that ITC's request to clarify came two years after the MPSC's 2011 Order approved a transmission line route, which had become final through the appellate process. But it ultimately ruled that the MPSC's decision allowing the modification was lawful and ruled that the MPSC did not abuse its discretion in deciding the matter before it without opening a new contested case. The MPSC's 2013 order was not an impermissible delegation of legislative authority.

Michigan Court of Appeals - Unpublished Decisions

Fractured Wells Are Not Subject to MDEQ Environmental Rule

The Court of Appeals has ruled that the term "injection well" does not include wells completed using hydraulic fracking. *Hughes v MDEQ*, unpublished per curiam opinion of the Michigan Court of Appeals, issued February 11, 2014 (Docket No. 312902). In *Hughes*, the plaintiffs sought a declaratory ruling from the MDEQ that Rule 324.102(x), which defines "injection well", includes wells completed using hydraulic fracking. The plaintiffs claimed that a fractured well is an injection well and, therefore, subject to environmental regulations that apply to injection wells. The MDEQ rejected plaintiffs interpretation of the rule. The MDEQ determined that a fractured well is not an injection well under Rule 324.102(x) because a fractured well injects fluids for the "initial stimulation" of oil or gas, whereas Rule 324.102(x) limits injection wells to wells that are used for disposal, storage, or secondary recovery of oil or gas. Though the plaintiffs later sought to nullify that ruling on the ground that the MDEQ's ruling came 62 days after the request was emailed in. The trial court dismissed the plaintiffs' challenges and granted summary disposition for the MDEQ.

The Court of Appeals affirmed. On the central issue in the case – the construction of Rule 324.102(x) – the Court upheld the trial court's and MDEQ's interpretations. Reading the plain language of Rule 324.102(x), the Court of Appeals stated that an "injection well" is either a "well used to dispose of … waste fluids" or "a well-used to inject … fluids for the purpose of increasing the ultimate recovery of hydrocarbons from a reservoir or for the storage of hydrocarbons." There was no contention that a fractured well is not used to dispose of waste fluids or that it involves the storage of hydrocarbons. Therefore, the Court framed the issue as whether a fractured well is "a well-used to inject … fluids for the purpose of *increasing* the ultimate recovery of hydrocarbons." On that notion, the Court found the Rule unambiguous. It was undisputed that the fractured wells at issue were not used for the purpose of recovering hydrocarbons before the injection of fluid. A newly constructed fractured well does not add to or enlarge the recovery of hydrocarbons. Rather, it initiates the recovery of hydrocarbons when recovery was non-existent. As such, the Court was compelled to read the Rule consistent with the way the MDEQ did. It noted, further, that had the Rule been intended to encompass *all* recovery of hydrocarbons – not merely to encompass the *increased* recovery of hydrocarbons – the Rule could have simply been drafted to state, in relevant part, "for the purpose of the recovery of hydrocarbons" or "the purpose of recovering hydrocarbons." But the Rule does not say that. It says, "for the purpose of increasing the ultimate recovery of hydrocarbons from a reservoir or for the storage of hydrocarbons." Accordingly, because a newly-constructed fractured well does not involve the continuing recovery of hydrocarbons but rather the initial recovery of hydrocarbons when recovery was nonexistent, the wells at issue did not fall within the scope of Rule 324.102(x).

The Court also rejected the plaintiffs' other challenges. It upheld the MDEQ's ruling despite being issued beyond the statutory time period to issue such a ruling. It explained that the 60-day period was not triggered because Rule 324.81(2) refers to the "receipt of the request," not the sending of the request. Further, even if triggered, the statutory time period is not mandatory – it is instead directory. Generally speaking, a directory statutory time period does not compel a

certain outcome. The Court determined that Rule 324.81 is directory because it does not contain any language compelling or prohibiting a certain outcome on a request for declaratory ruling when the defendant does not take action on the request within the statutory time period.

Trial Court Decision is Reversed For Grossly Misapplying Substantial Evidence Test

The Court of Appeals reversed a trial court ruling for "grossly misapplying" the substantial evidence test. *Kirsch v Superintendent of Public Instruction*, unpublished per curiam opinion of the Michigan Court of Appeals, issued November 19, 2013 (Docket No. 311121). In *Kirsch*, there was evidence that the plaintiff teacher submitted an altered or fraudulent test score report to support her application for an initial provisional teacher certificate. The defendant Superintendent of Public Instruction and the Michigan Department of Education revoked the petitioner's provisional teaching certificate. The circuit court reversed that order and directed the defendant Department of Education to process the petitioner's provisional teaching certificate renewal application.

The Court of Appeals reversed the circuit court's order and reinstated the Superintendent's revocation order. The Court first determined that the circuit court misapplied the substantial evidence test for the following reasons:

1. Although the circuit court agreed that the evidence showed that the test report submitted to Wayne State University (WSU) was altered, it found that there was no evidence regarding who did the alteration.
2. It appeared that the circuit court did not consider the ample circumstantial evidence produced at the hearing that petitioner was responsible for the alteration, and so the trial court improperly required proof of the alleged fraud be established by direct evidence.
3. An administrative agency may make factual findings based on circumstantial evidence, and noted that it is well established that fraud and misrepresentation may be proven circumstantially.
4. The record showed ample circumstantial evidence to support the Superintendent's finding that the petitioner knowingly provided WSU with an altered test score report in support of her application for an initial provisional teacher certificate.
5. Additional evidence was presented that refuted the petitioner's allegation that the differences in the test score reports were due to computer error.
6. Evidence showed the petitioner's possible motivation to submit an altered report.

Based on the above, it was clear that the circuit court misapplied the substantial evidence test. The only reasonable explanation for the altered report being submitted was that the test score report the petitioner submitted was somehow altered to misrepresent her actual test score. Therefore, the Court held that the circuit court erred in reversing the Superintendent's decision to revoke the petitioner's certificate.

About the Author

Ronald Richards *is a shareholder with the law firm of Foster, Swift, Collins & Smith, P.C., in its Lansing office.*