

Public Corporation Law Quarterly

Using Michigan's Environmental Laws to Protect Municipal Interests

By Jeffrey L. Jocks, Olson, Bzdok & Howard, PC

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Introduction

Water, natural resources, and public recreation areas are some of Michigan's most valuable assets. They offer places of recreation, reflection, and rejuvenation to tourists and to local citizens alike. However, Michigan municipalities often face threats to the water, natural resources, and recreation areas within their boundaries. These threats are significant because Michigan has been losing industry and manufacturing jobs, leaving many municipalities with the majority of dollars coming from tourism and recreation. In fact, Michigan's tourism economy trails only manufacturing and agriculture as the third-largest in the state.¹

However, Michigan's municipalities may feel helpless to prevent actions that will have harmful impacts on their natural resources and recreation areas. In addition, some of these areas are simply state treasures that should be protected. The problem arises because industry and state agencies are not always aware that their actions could affect those tourism and recreation areas. Consequently, state agencies approve projects that will cause harm to water, natural resources, and recreation areas within municipal boundaries that will result in loss of recreation dollars.

Michigan municipalities need not accept at face value the decisions of these unconnected state agencies. The Michigan Environmental Protection Act² ("MEPA"), Michigan administrative law,³ and Michigan common law still allow municipalities the ability to stop projects harmful to their natural resources and recreation areas. This article will describe the tools some Michigan citizens used in order to protect the headwaters of Michigan's famed Au Sable River and explain how municipalities can also be stewards and use these tools to protect their natural or public treasures.

The Background

While this local and statewide issue started in Otsego County, similar issues can arise anywhere in Michigan.⁴ Shell⁵ Western Oil Company owned a series of oil wells and central production facilities⁶ in Otsego County from the early 1970's through 2004. During that time, at least one of those facilities, the Hayes 22 CPF, had significant leaks and contaminated the nearby groundwater. In 2004, Shell sold the Hayes 22 CPF to Merit Energy Company, and as part of that sale, the Michigan Department of Environmental Quality ("MDEQ") required Merit to remediate the groundwater contamination. Merit and the MDEQ Office of Geological Survey

Chairperson's Corner

By William B. Beach, Miller Canfield

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Taking over the chair of a board manned (womaned?) by a bunch of “unfee’d” lawyers attempting to preserve the realm from Jake Cade and his quest for “free food and drink, plentiful beer, and the abolition of money” should be interesting this year, especially when that year is an election year in which entire spectrums of the economy are attempting to exempt themselves from any local control.

It seems as if we just swore in Jeff Sluggett and his term is already up. His quiet, dogged approach, keeping the PCLS abreast of all new State legislation, proposed amendments to court rules, and cases affecting public corporations will be sorely missed. I am humbled by his year of service, which included the land use seminar in the fall and the introduction to St. John’s Inn mid-winter with topics covering intergovernmental agreements, police investigations, land use, and great *hors d’oeuvres*. And then there was Drummond Island. This seminar could be best described as a quaint, woodsy, and relaxed event—so relaxed guys were streaming out of the dining room before the normally formal dinner with a Supreme Court justice, ditching their ties and coats. It seemed Justice Weaver appeared attired in a Hawaiian blouse. The seminar proved to be an extremely productive gathering among the few of us who found it and “survived” the experience. My hat is off to Jeff and all who helped make the year a successful one.

We have started off this year already with the September meeting under our belt. The conference phone wires burned up with discussions on whether to write amicus briefs for two cases. The Court of Appeals had held in *Hoff v Spoelstra* that two members of Marquette City Council were guilty of misdemeanors for violating the Open Meetings Act. Their crime was to meet and discuss the firing of the city attorney in violation of the Act. *Kyser v Kasson Township* was the second case. It concerned whether the “no very serious consequences rule” of *Silva v Township of Ada* was overruled by the exclusionary zoning rule of 78 PA 637. Professor Fisher stepped up to the podium and convinced us to support both after much lively discussion.

Please keep February 7, 2009 open for the PCLS winter seminar at St. John’s Inn and June 27-29 for the summer seminar on Mackinac Island. The topics for both and the speakers will come from suggestions made by the membership. So, if there is an issue that is or will be of interest to you, please suggest it to any member of the board or simply direct it to me. Looking forward to a great year. Help the board and me make it one. 🍷

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staff⁶ met and devised a plan to remediate the groundwater contamination by first partially cleaning the water and then discharging it into surface water.

The public had very little knowledge of the proposal until after MDEQ had approved the remediation plan and the required discharge permit. As it turned out, the Hayes 22 CPF contamination had created a 4,000-foot contamination plume. The plume is in the Manistee watershed and flows southwest towards Frenchman's Creek.⁷ The remediation plan called for the pumping of the contaminated groundwater to the surface and treating it at the Hayes 22 CPF. Merit would then pump the partially treated water 1.3 miles west into the Au Sable River watershed and discharge it into a surface water body named Kolke Creek.

Kolke Creek is a small stream that forms the headwaters of the Au Sable River. Early on in the process, MDEQ staff found that Kolke Creek's flow was so minimal near the discharge point that it did not qualify as a stream under the Michigan Inland Lakes and Streams Act.⁸ Nonetheless, the remediation plan called for the discharge of 1.15 million gallons of partially treated water per day, which equals a flow of 1.8 cubic feet per second—the size of a creek six feet wide and one foot deep—for more than 10 years. The discharge would contain chlorides and BTEX.⁹ MDEQ issued statements that Merit had no feasible and prudent alternatives to the discharge to Kolke Creek and that the discharge would not harm Kolke Creek. The MDEQ Geological Survey staff approved Merit's remediation plan, and the MDEQ Water Bureau staff approved a NPDES (National Pollutant Discharge Elimination System) surface water discharge permit.¹⁰

Once discovered, the landowners along the Creek and an Au Sable River advocacy group became very concerned. Kolke Creek itself is a top quality fishery. It flows into and forms Lynn Lake a short distance from the proposed discharge point. Lynn Lake is a privately owned lake currently in an oligotrophic state, which is the highest classification for water quality, indicating healthy diverse aquatic organisms, invertebrates, and native brook trout reproduction. Kolke Creek then flows out of Lynn Lake and converges with Bradford Creek to form the main branch of the Au Sable River. The Michigan DNR has designated the Au Sable River a "blue ribbon" trout stream and natural river under the Natural Rivers Act.¹¹

The concerned landowners own the land along Kolke Creek and around Lynn Lake downstream from the proposed discharge point. The Au Sable River advocacy group is known as the Anglers of the Au Sable, Inc. and has long been concerned with impacts on the health of the system and its famed trout fishery.¹² Both groups hired their own legal counsel, who teamed up to fight the proposed discharge.



The Legal Battle¹³

The plaintiffs¹³ utilized all of the legal tools available to them in the administrative, statutory, and common law realms. They first filed a contested case with the MDEQ seeking to reverse the approval of the NPDES permit issued for the discharge to Kolke Creek. They then filed an appeal of that decision in Otsego County Circuit Court. At the same time, they filed a civil suit under MEPA and common law counts of riparian violations, trespass, and nuisance. In order to prove their cases, they hired four scientific experts covering the fields of hydrogeology, hydrology, wetlands, ecology, aquatic ecology (limnology, stream ecology, aquatic invertebrates, fisheries biology, and aquatic toxicology), subsurface characterization, and groundwater contamination remediation.

The Administrative Hearing

Under Part 31 of the Natural Resources and Environmental Protection Act, a person aggrieved by the MDEQ's issuance of a NPDES permit can file a contested case.¹⁴ The plaintiffs filed a contested case challenging whether the MDEQ had properly issued Merit its NPDES permit.¹⁵ Merit and MDEQ challenged the standing of plaintiffs with a motion for summary disposition, but the administrative law judge ruled that plaintiffs had standing by virtue of their land ownership interests and their members' uses of Kolke Creek and the Au Sable River.¹⁶ Then, in a second round of motions for summary disposition, the administrative law judge ruled against plaintiffs, finding that MDEQ properly issued Merit's NPDES as a matter of law. Plaintiffs¹⁷ appealed this decision to the Otsego County Circuit Court.

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The Civil Action and the Appeal to Circuit Court

The plaintiffs filed a civil action that included MEPA claims and common law claims along with their appeal from the MDEQ tribunal's ruling. The trial court separated the case into two separate actions—the civil case and the administrative appeal.¹⁸

The Civil Action. Plaintiffs brought their civil suit under MEPA and common law counts of riparian violations, trespass, and nuisance, and sought a preliminary injunction to prevent the consequences of a discharge pending trial. All claims basically focused on the impacts of Merit's proposed discharge into Kolke Creek. Plaintiffs' experts had come to the conclusion that the discharge would cause irreparable harm from the increases in flows and levels which would cause flooding, as well as erosion, sedimentation, and turbidity that would harm aquatic life.

Merit estimated from a DEQ website that the increase in flow from the continuous creek-sized discharge would be insignificant. But real world measurements of Kolke Creek's flows revealed that its flows downstream from Merit's proposed discharge point ranged between .14 and .47 cubic feet per second. Merit's proposed discharge of 1.8 cubic feet per second would increase Kolke Creek's average flow by nearly 1300 percent. Given the nature of the stream system, plaintiffs' hydrology and hydrogeology experts concluded that such a drastic increase in flow would cause significant erosion, sedimentation, flooding, and impairment of water quality.

Plaintiffs' aquatic ecology experts then concluded that the erosion, sedimentation, and resulting turbidity would have significant impacts on aquatic insect and fish life. In addition, they concluded that the chlorides in Merit's discharged water would harm aquatic life. Overall, plaintiffs' experts concluded that Merit's proposed discharge would have long-term impacts and change the fundamental nature of Kolke Creek and Lynn Lake.

MEPA. Part 17 of the Natural Resources and Environmental Protection Act is commonly referred to as the Michigan Environmental Protection Act ("MEPA").¹⁹ Under MEPA, "any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur, for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction."²⁰ When a plaintiff makes out a prima facie MEPA case, the burden shifts to the defendant to rebut with contrary evidence.²¹ The defendant may also argue the affirmative defense that there are "no feasible and prudent al-

ternatives to defendant's conduct and that his or her conduct is consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment, or destruction."²²

Plaintiffs argued Merit had violated MEPA in three separate ways, and each created a prima facie MEPA violation. The first was a factual MEPA violation because Merit's proposed discharge would cause actual or likely pollution, impairment, or destruction of the natural resources.²³ The second was a MEPA violation for failure to get the proper permits under a pollution standard statute.²⁴ The third was MEPA violation for environmental impairment standards. Environmental statutes may "serve as aids to the trial court when establishing a common-law impairment standard for the resources at issue."²⁵

Ultimately, the circuit court found that plaintiffs' experts were more reliable and established a prima facie factual MEPA violation based on the likely pollution, impairment, and destruction of Kolke Creek and Lynn Lake.²⁶ The circuit court found that Merit did not rebut the prima facie MEPA violation.²⁷ It then found that Merit had feasible and prudent alternatives to its proposed Kolke Creek discharge.²⁸ Therefore, it enjoined Merit from any discharge into Kolke Creek.

Common Law. Plaintiffs argued that Merit's proposed discharge would violate riparian law because Merit had no riparian rights to discharge to Kolke Creek, and even if it did, its discharge would not be a reasonable use of Kolke Creek.²⁹ Merit proposed to discharge from state owned property, but plaintiffs argued that Merit had never been granted riparian rights to do so and could not even acquire those rights.³⁰ In addition, plaintiffs argued that the impacts from Merit's proposed discharge would be so great that, even if it had riparian rights, its discharge would be unreasonable because of the erosion, sedimentation, turbidity, flooding, and harm to aquatic life.³¹

Plaintiffs argued that Merit's proposed discharge would be a trespass because it would increase the flow and levels of Kolke Creek and Lynn Lake and cause flooding.³² Plaintiffs also argued that Merit's proposed discharge would be a nuisance because the impacts caused by the increase in flow, volume, sedimentation, erosion, and turbidity of Kolke Creek and Lynn Lake would interfere with plaintiffs' use and enjoyment of their properties.³³

Ultimately, the circuit court utilized the Court of Appeals' reasonable use balancing test as set out in the *MCWC* case.³⁴ However, it also ruled that Merit did not have riparian rights to discharge into Kolke Creek and that if it were to gain riparian rights, its discharge of 1.15 million gallons per day would be unreasonable under the balancing test.³⁵ Therefore, the cir-



cuit court enjoined Merit from any discharge into Kolke Creek under riparian law as well.

The Administrative Appeal

Plaintiffs maintained their administrative appeal to the Otsego County Circuit Court even after succeeding in their civil action. Although successful, the circuit court had left the door open for Merit to return and demonstrate that a lower discharge rate may be allowed under MEPA and riparian law.³⁶ Plaintiffs again argued to the circuit court that the MDEQ did not have the authority to issue the NPDES permit. The circuit court ruled that plaintiffs were correct, reversed the MDEQ, and vacated Merit's permit.³⁷ Therefore, prior to asking the circuit court to allow a lesser discharge into Kolke Creek, Merit would have to return to the MDEQ and ask for a new individual NPDES permit.

Use by Municipalities

Michigan municipalities should be looked at as the stewards of the water, natural resources, and recreation areas within their boundaries. They have what some would consider a public trust or fiduciary obligation to protect them. With that in mind, Michigan municipalities can take advantage of the approach and claims made in the Kolke Creek case when faced with threatened harm to local water, natural resources, or recreation areas.

Both MEPA and the Administrative Procedures Act define "person" to include a municipality and therefore allow municipalities to litigate these issues.³⁸ There would be little to no difference in the litigation process or strategy if a municipality were a plaintiff. Similarly, a municipality often owns land with riparian rights, wetlands, or other water resources that would give rise to common law actions arising out of the threatened interference or harms to the quality, quantity, or public use and enjoyment of those resources.

The key for the administrative case is to determine what permits were required and to carefully examine the statutory and rule requirements for any violations. Generally, those are found in the Natural Resources and Environmental Protection Act ("NREPA") and its accompanying rules.³⁹ The right to a contested case is generally set out in the applicable part of NREPA and Administrative Procedures Act.⁴⁰

The key for a MEPA and riparian or other water law case is to demonstrate that the proposed project will have significant impacts sufficient to trigger a prima facie MEPA case and/or demonstrate that it will be unreasonable under riparian law. In addition, for MEPA, the plaintiff must be prepared to address feasible and prudent alternatives. The best strategy is to have experts that can put forward actual feasible and prudent alternatives.

For a municipality, there may be additional hurdles to overcome. Standing is likely the largest hurdle. In *Coldsprings Township v Kalkaska County Zoning Board*, the Court of Appeals recently ruled that Coldsprings Township did not have standing to bring an appeal of the Kalkaska County Zoning Board's grant of a variance.⁴¹ Coldsprings Township had argued that it had standing because its citizens faced harm from the variance.⁴² The Court of Appeals ruled that Coldsprings Township was alleging standing under *parens patriae* which political subdivisions such as townships cannot use to establish standing.⁴³ The Court ruled that instead, Coldsprings Township was required to show traditional standing as an individual plaintiff by alleging first that it

Suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly...traceable to the challenged action of the defendant, and not... the result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.⁴⁴

The Court of Appeals ruled that Coldsprings Township did not present evidence to demonstrate any specific injury or that it "owned, used, or had access to the lake or that it 'enjoyed a recreational, aesthetic, or economic interest' in the lake," and therefore lacked standing.⁴⁵

There are likely many cases where a local municipality would have standing. If the potential harm is to a lake or river of any significance, there may be parks, beaches, boat launches, marinas, or perhaps even road ends that would give a

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municipality standing. If the potential harm is to groundwater, then the municipality may be able to show impact to a municipal water supply or a water supply that serves municipal offices. If the potential or probable harm is to actual surface property, then the municipality may be able to show impact to some adjacent property or that it actually owns the property. In *Coldsprings Township*, an affected property interest appears to be key to municipal standing.⁴⁶

A second hurdle is likely cost. Lawsuits involving complicated scientific issues require experts that will cost significant sums of money. However, there are at least two possible, if only partial, solutions. First, if the issue is significant, then there will likely be others that are interested as well. Sometimes citizens will form nonprofit groups that can raise money, become co-plaintiffs, and share the costs.⁴⁷ Sometimes individual neighbors will become co-plaintiffs and share the costs.⁴⁸ Parties with shared interests can establish agreements to preserve confidentiality and work toward a common legal interest. These options should be explored in the early stages of consideration.

The second possibility should not be relied upon, but may be available if the municipality is successful in its litigation. MEPA allows for costs to “be apportioned to the parties if the interests of justice require.”⁴⁹ The RJA also allows for expert witness costs for matters of opinion to be awarded and taxed as taxable costs.⁵⁰ In the *Kolke Creek* case, the circuit court awarded plaintiffs their expert witness fees and some other minor costs under both MEPA and the RJA.⁵¹ Although the courts have held that neither of these allow attorney fees, they nonetheless can help with some of the major costs of this type of litigation.

Conclusion

Considering the issues facing Michigan, municipalities would be wise to protect the natural assets that are within their boundaries. Municipalities do have tools to protect these assets and should seriously consider investing the resources to do so. The discussion above is a framework that can be used to address nearly any of these threats. Of course, the devil is in the details, and as with any litigation, each case must be examined carefully by legal counsel to determine the best path to take. Nonetheless, if Michigan's municipalities begin to take a grassroots-style stewardship position in protecting their water, natural resources, and recreation areas, then the entire state and its citizens will benefit for generations. 🏡

Endnotes

1 “Michigan citizens spend millions of dollars every year on travel outside of our two peninsulas. With so much to see and do right here in

our own backyard, we have thousands of reasons to spend those dollars here at home.” - Governor Jennifer M. Granholm. <http://www.michigan.gov/som/0,1607,7-192-29907---,00.html>; http://blog.mlive.com/bc-times/2008/03/touristdependent_business_owne.html.

2 MCL 324.1701 *et seq.*

3 MCL 24.201 *et seq.*

4 Some examples may be: 1) remediation of groundwater contamination caused by gas stations and any former or active industrial sites, 2) discharges of waste water into surface water bodies, 3) erosion or sedimentation into surface waters, 4) disposal of wastes that may leach into groundwater, or 5) any other environmental impacts.

5 A central production facility is usually located near wells. It receives oil or gas pumped nearby and does preliminary refining.

6 MDEQ Office of Geological Survey had jurisdiction over the remediation under MCL 324.61501 *et seq.*

7 Frenchman's Creek is a headwater stream for the Manistee River.

8 MCL 324.30101 *et seq.* Had it been big enough to be a stream, it would have required a permit under this section.

9 BTEX is benzene, toluene, ethylbenzene and xylene.

10 MCL 324.3101 *et seq.*

11 MCL 324.30505, *et seq.*

12 The Anglers of the Au Sable are also involved in a lawsuit to prevent proposed drilling near the “Mason Tract” along the Au Sable River. www.AuSableAnglers.org.

13 The landowners and Anglers of the Au Sable, Inc. will be referred to as plaintiffs hereinafter unless specifically named.

14 MCL 324.3112(5); MCL 24.201 *et seq.*

15 More specifically, MDEQ issued Merit's NPDES permit as a “certificate of coverage” under a “general permit.” A certificate of coverage requires less notice than a standard NPDES permit, but can only be issued if the proposed discharge to surface water fits within the general permit. Plaintiffs' major argument was that MDEQ could not issue Merit a certificate of coverage because the general permit did not cover the type of discharge Merit was proposing.

16 See *National Wildlife Federation v Cleveland Cliffs*, 471 Mich 608; 684 NW2d 800 (2004); *Trout Unlimited, Muskegon White River Chapter v White Cloud*, 195 Mich App 343, 348; 489 NW2d 188 (1992).

17 MCL 24.301

18 There is nothing in the law that requires that a civil lawsuit and an administrative appeal must be brought together, but at the time the unpublished case of *Houdini Properties, LLC v City of Romulus* led towards the proposition that all claims, including appeals, must be brought together. Unpublished opinion per curiam of the Court of Appeals, issued June 13, 2006 (Docket No 266338). However, the Supreme Court has since issued an order in *Houdini* that reversed the Court of Appeals and leads towards the proposition that a civil case and an appeal can be brought separately without fear of res judicata. 480 Mich 1022; 734 NW2d 198 (2008).

19 MCL 324.1701 *et seq.*

20 MCL 324.1701(1).

- 21 MCL 324.1703(1); *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc*, 269 Mich App 25, 89; 709 NW2d 174 (2005).
- 22 *Id.*
- 23 *Ray v Mason County Drain Comm'r*, 393 Mich 294, 309-10; 224 NW2d 883 (1975); *Michigan Citizens for Water Conservation, supra* at 88.
- 24 *Preserve the Dunes Inc v Dep't of Environmental Quality*, 471 Mich 508, 516; 684 NW2d 847 (2004); *Nemeth v Abonmarche Development Inc*, 457 Mich 16, 36; 576 NW2d 641 (1998).
- 25 *Michigan Citizens for Water Conservation, supra*, at 97.
- 26 *Anglers of the Au Sable, Inc et al v Michigan Department of Environmental Quality et al*, Otsego County Circuit Court, issued May 29, 2007 (Case No 06-11697-CE).
- 27 *Id.*
- 28 *Id.* The Court ruled that Merit had sufficient land available to utilize either infiltration basins or injection wells (or a combination of both) to dispose of its waste water. *Id.*
- 29 See *Thompson v Enz*, 379 Mich 667, 677-78; 154 NW2d 473 (1967); *People v Hulbert*, 131 Mich 156; 91 NW 211 (1902); *Thies v Howland*, 424 Mich 282, 288, n 3; 380 NW2d 463 (1985); *White Lake Improvement Ass'n v Whitehall*, 22 Mich App 262, 272, n 11; 177 NW2d 473 (1970).
- 30 *Thompson, supra* at 677-78; *Kernen v Homestead Development Co*, 232 Mich App 503, 510; 591 NW2d 369 (1998).
- 31 *Id.*
- 32 *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 195; 540 NW2d 297 (1995).
- 33 *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 72; 602 NW2d 215 (1999).
- 34 *Anglers of the Au Sable, Inc et al v Michigan Department of Environmental Quality et al*, Otsego County Circuit Court, issued May 29, 2007 (Case No 06-11697-CE).
- 35 *Id.* Plaintiffs are appealing the use of MCWC's reasonable use balancing test for a strict riparian case.
- 36 *Anglers of the Au Sable, Inc et al v Michigan Department of Environmental Quality et al*, Otsego County Circuit Court, issued May 29, 2007 (Case No 06-11697-CE).
- 37 *Anglers of the Au Sable, Inc et al v Michigan Department of Environmental Quality et al*, Otsego County Circuit Court, issued Jan 31, 2008 (Case No 07-12072-AA).
- 38 MCL 324.301(h); MCL 24.205(7).
- 39 MCL 324.101 *et seq.*
- 40 *Id.*; MCL 24.201 *et seq.* In addition, the MDEQ has issued rules for its administrative hearings. R 324.1 *et seq.*
- 41 279 Mich App 25; ___NW2d__(2008).
- 42 *Coldsprings Twp, supra* at *2.
- 43 *Id.* at *2.
- 44 *Id.* quoting *Michigan Citizens for Water Conservation v Nestle Waters North America, Inc*, 479 Mich 280, 294-95; 737 NW2d 447 (2007).
- 45 *Id.* at *3. It is important to note that *Coldsprings Township* was a general law township and as such the Court of Appeals' decision is applicable only to general law townships. Arguably, other municipalities may be able to assert some representational standing. See, *e.g.*, MCL 42.17, MCL 91.1, MCL 117.4h & j.
- 46 *Id.*
- 47 Although *Anglers of the Au Sable, Inc.* was an already established advocacy group, it fits this profile.
- 48 The individual landowners concerned with their property fit this profile.
- 49 MCL 324.1703(3).
- 50 MCL 600.2164.
- 51 *Anglers of the Au Sable, Inc et al v Michigan Department of Environmental Quality et al*, Otsego County Circuit Court, issued August 8, 2008 (Case No 06-11697-CE).



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Limits on Political Statements by Public Bodies

State law penalizes government speech that rises to the level of electioneering

By Jason C. Miller, University of Michigan JD candidate, 2009

Editor's Note: Occasionally, the Quarterly publishes articles prepared by non-lawyers. This article, by a law student at the University of Michigan, contains a good summary of Michigan's Campaign Finance Laws relating to the expenditure of public funds, and seemed very timely given the upcoming November elections. Do not overlook the endnotes, which contain some pretty useful information.

Every election raises the question: what exactly can local governments say about ballot questions? Although high-profile state-wide matters—like school vouchers, affirmative action, and embryonic stem cell research—are placed on the November general election ballot, state law permits voting on local issues at almost any time of any year.

Local governments may be more interested in speaking out on issues that receive less media coverage—especially when the subject matter is of direct concern to the entity making the statement. However, public bodies must walk a fine line when they speak out on election topics. Public corporation or municipal attorneys can help public bodies avoid problems by proactively making them aware of what they can and cannot do. Public employees do not lose their free speech rights by virtue of their employment status, but state law limits the use of government resources to communicating factual information. This information is most helpful when it concerns a local election.

The Michigan Campaign Finance Act defines a “public body” to include a “county, city, township, village, intercounty, intercity, or regional governing body; a council, school district, special district, or municipal corporation; or a board, department, commission, or council or an agency of a board, department, commission, or council.”² Public bodies cannot use or authorize “funds, personnel, office space, computer hardware or software, property, stationery, postage, vehicles, equipment, supplies, or other public resources” to support or oppose ballot questions or candidates for public office.³

Violating this campaign provision is a misdemeanor that carries up to a one-year term of imprisonment and a fine of \$1,000 for individuals or \$20,000 or more, up to the amount of the illegal expenditure, against the public body.⁴ Employees of public bodies do not lose their rights to speak out on issues just because they work for a government entity. The statute specifically allows for certain actions, such as:

- The expression of views by an elected or appointed public official who has policy-making responsibilities.
- The production or dissemination of factual information concerning issues relevant to the function of the public body.

- The use of a public facility owned or leased by, or on behalf of, a public body if any candidate or committee has an equal opportunity to use the public facility.
- An elected or appointed public official or an employee of a public body who, when not acting for a public body but is on his or her own personal time, is expressing his or her own personal views, is expending his or her own personal funds, or is providing his or her own personal volunteer services.

The case law in this area is not robust, perhaps in part because there is no private right of action for these violations to generate cases.⁶ However, the secretary of state can still investigate, and the attorney general can still prosecute these offenses. Given the possibility of large fines and jail time, public bodies should pay attention to the limitations imposed on their speech by campaign finance and other applicable laws.

Public bodies may occasionally use intermediaries, funded in part with public money, to generate campaign speech. Almost 30 years ago, Attorney General Frank Kelley held that “the Michigan Municipal League, as a nonprofit corporation, may...expend funds of the corporation in connection with the passage or defeat of a ballot question.”⁷ This allowed the municipal governments to do an “end-around” certain campaign finance provisions. Nonprofits like the Michigan Municipal League (“MML”) are prohibited from contributing to candidates, but they can contribute and make expenditures on behalf of referenda.⁸ On issues that attract a nonprofit corporation’s interest, public bodies can partner with an ally to make expenditures they otherwise could not.

However, this prospect rests on shaky ground. In 2000, a group filed a challenge to this practice by the MML, charging that it was an end-around the campaign finance laws.⁹ The court refused to issue a substantive ruling in the case because the plaintiff had failed to exhaust its remedies by going through the secretary of state’s complaint process.

The current Michigan attorney general may look less favorably on government expenditures for campaign purposes through the MML (or any other applicable intermediary) than the previous attorney general. In 2006, Attorney General Mike

Cox ruled that government units cannot collect check-off donations from unionized employees to be given to the union's political action committee, even if the union reimburses the public body for the public body's administrative costs.¹⁰ A future challenge may eliminate the ability of public bodies to generate campaign speech through dues or donations paid to nonprofit corporations like the MML.

As a basic rule of thumb, an employee or official speaking out on his or her own time is fine, but when public resources or staff time are being used, the action should be limited to producing and disseminating factual information. It is acceptable to produce and distribute factual information on a millage (what the total revenue raised will be, the tax impact on a homeowner, how and where the money will be spent, etc.) and to describe the effects a proposed ordinance, law, or state constitution change might have.¹¹

When a public body chooses to speak on a ballot issue, it must constrain itself to factual information. This means, of course, avoiding "action words" like requesting that the electorate "vote for" or "support" a particular measure. One can look to the educational materials that 501(c)(3) nonprofits distribute in the course of elections to see how they avoid using action words.¹² However, many of these advertisements are really aimed at skirting the law and influencing voters. When distributing information, it would be better to look at examples of the bill analysis provided by the state House and Senate fiscal agencies, which often include information both for and against a bill, as explained by its supporters and opponents.¹³

Where the public body is not doing the speaking, but is simply allowing its facilities to be used in a way that does not show favoritism, it does not violate the Michigan Campaign Finance Act. Local meeting hall use for debates or cable access station candidate interviews does not constitute violations.¹⁴

Michigan law also limits political activities of state civil service employees and the public employees of local government subdivisions.¹⁵ Government employees may not "coerce, attempt to coerce, or command another public employee" to contribute to or support a candidate or ballot initiative.¹⁶ Employees are still permitted to engage in campaign and political activities on their own time,¹⁷ but cannot do so while at work.¹⁸ Federal law places similar restrictions on local government units that receive federal funding, with the additional caveat that individuals principally employed in a position that receives any amount of federal funding may not run for partisan office even on his or her own time.¹⁹ Violation of those federal restrictions can cause the covered entity to lose federal funds.

Public bodies can avoid some of these problems by affirmatively taking steps to inform employees of their rights and limitations. Periodic reminders of these limitations, especially close to elections and filing deadlines for elected offices, may be helpful. One of the areas that most frequently get employees in trouble is use of government computers and e-mail.

Public bodies should include an explanation in any computer use policy that computers, e-mail, and Internet accounts cannot be used to advance partisan political purposes, campaigns, or ballots questions. This will remind employees to engage in political activities at home and on their own time.

The use of public money to influence elections is a frightening prospect. Even during times of tight budgets, the resources of the State and its subdivisions could dwarf the voice of any political opponent. If those in power can use the taxpayers' funds to move the taxpayers to vote as they wish, then political corruption at best and outright despotism at worst, follows.²¹ These rules exist to protect the public and the integrity of elected government. At the same time, on obscure local issues, there may be no political actors interested in speaking out one way or the other. A proposal to amend a city charter provision could be very controversial, or it could draw almost no interest except from those tasked with administering the provision. An absolutely uninformed electorate is similarly unhealthy. It is important for local governments to explain arcane but necessary administrative changes to the electorate so that they do not vote in ignorance.

Public bodies must stay out of ballot fights while still sufficiently informing the electorate, such as when a public corporation chooses to remain silent on a major state-wide issue where there are already many speakers and a total mix of information available to the voters. When the issue is local and has been the subject of little or no media coverage or political debate, then the public body's desire (or even its duty) to speak out and explain the issue should be greatest. By being cognizant of the need for balance, attorneys can help public bodies to walk this fine line. 🏠

Endnotes

- 1 Elections may be held in February, May, August, and November. MCL 168.641.
- 2 MCL 169.211(6). It also includes state agencies, the legislative branch, and any body created by government authority that is funded primarily with government funds and exercises a governmental function.
- 3 MCL 169.257(1).
- 4 MCL 169.257(2).
- 5 MCL 169.257(1).
- 6 *Forster v Delton School Dist*, 176 Mich App 582, 585; 440 NW2d 421 (1989). ("The campaign financing act does not allow for enforcement by private individuals.")
- 7 OAG, 1981-1982, No 5882, p 137, 139 (April 22, 1981). But see Michigan Secretary of State, 1-98-CI (August 4, 1998) (Cahill). (University of Michigan may not distribute student fee revenue to ballot question committee).
- 8 MCL 169.254.

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Limits . . .

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- 9 *Citizens for Common Sense in Government v Attorney General*, 243 Mich App 43, 57; 620 NW2d 546 (2000).
- 10 OAG, 2006-2007, No 7187. Cox also cited OAG, 1965-1966, No 4291, p 1 (January 4, 1965) (school district could not spend public funds to advocate a favorable vote on a tax and bond ballot proposal); OAG, 1979-1980, No 5597, p 482 (November 28, 1979) (State Civil Rights Commission could not use public funds “to urge the electorate to support or oppose a particular candidate or ballot proposal”); OAG, 1987-1988, No 6423, pp 33, 35 (February 24, 1987); OAG, 1991-1992, No 6710, pp 125, 127 (February 13, 1992); OAG, 1993-1994, No 6763, p 45 (August 4, 1993) (“School districts may not permit their offices and phone equipment to be used in a restrictive manner for advocacy of one side of a ballot issue School districts may not endorse a particular candidate or ballot proposal”); OAG, 1993-1994, No 6785, p 102 (February 1, 1994). See also OAG, 1991-1992, No 6709, p 124 (February 11, 1992) (state agency cannot use public funds to lobby unless authorized by law to do so), and *Mosier v Wayne County Bd of Auditors*, 295 Mich 27, 31; 294 NW 85 (1940) (addressing county board’s lack of authority to expend county resources for political purpose). See also Michigan Secretary of State, 2-05-CD (October 31, 2005) (Harty).
- 11 Local governments may adopt a resolution supporting or opposing an initiative because the mere act of adopting the resolution does not expend public resources. Michigan Secretary of State, 1-00-CI (August 17, 2000) (Daunt). However, linking to a campaign site or e-mailing the resolution may constitute an illicit expenditure. Michigan Secretary of State, 1-05-CI (October 31, 2005) (Murley).
- 12 Tax-deductible nonprofit corporations are restricted by Section 501(c)3 of the Internal Revenue Code from engaging in substantial amounts of lobbying.
- 13 See examples at <http://www.legislature.mi.gov>.
- 14 Michigan Secretary of State, 1-96-CI (September 3, 1996) (Byrum).
- 15 MCL 15.401 et seq.
- 16 MCL 15.405.
- 17 MCL 15.403.
- 18 MCL 15.404.
- 19 5 USC §§ 1501-1508. Michigan law is not as restrictive on civil servants running for public office. See MCL 15.403.
- 20 Scott Bloch, “The Judgment of History: Faction, Political Machines, and the Hatch Act,” 7 U Pa J Lab & Emp L 225, 244-246 (2005).
- 21 The actual reason the legislature adopted § 57 of the Act appears to be preventing school districts from spending taxpayer money to lobby taxpayers in support of district millages. Michigan Secretary of State, 1-00-CI (August 17, 2000) (Daunt) (discussing legislative history of § 57).

Insider Insight

Editor's note: A regular feature from the perspective of the practitioner involved in a case or other matter. This month's feature is prepared by *Raymond O. Howd, Assistant Attorney General*.

Developments in Michigan's Eminent Domain Law: *Dept. of Transportation v Tomkins*

On June 11, 2008, the Michigan Supreme Court issued its decision in *Michigan Department of Transportation v Tomkins*.¹ At issue was the constitutionality of MCL 213.70(2), § 70(2) of the Uniform Condemnation Procedures Act (UCPA)² in partial taking condemnation actions. That section, added by 1996 PA 474, prohibits the consideration of the general effects of a project for which property is taken as part of just compensation:

The general effects of a project for which property is taken, whether actual or anticipated, that in varying degrees are experienced by the general public or by property owners from whom no property is taken, shall not be considered in determining just compensation. A special effect of the project on the owner's property that, standing alone, would constitute a taking of private property under Section 2 of Article X of the State Constitution of 1963 shall be considered in determining just compensation.

The Court of Appeals held that the statute was unconstitutional because it limited the amount of just compensation to which an owner was entitled in a direct, partial-taking condemnation contrary to the established meaning of just compensation.³ A divided Michigan Supreme Court reversed the Court of Appeals, holding that the statute was constitutional based on principles of statutory and constitutional construction. The majority found that there was no clear indication that “just compensation” included “general effects” damages before the 1963 Constitution was ratified, and therefore, the legislature was free to act to effectuate the policy of this state.⁴

In most partial-taking cases, trial courts should have no difficulty applying the plain language of § 70(2) to a particular item of damage to determine whether it is a “general” or “special” effect of the project. But, since “the formula to calculate the fair market value of the remainder parcel must account for the fact that damages will vary from case to case, depending on the unique circumstances of each taking,”⁵ trial courts are occasionally confronted with a complex partial-taking case

where it is difficult to determine whether a particular damage is general or special.

Where application of the plain language of § 70(2) leaves any doubt about the compensability of a project effect, the Supreme Court's analysis of pre-1963 caselaw and secondary sources concerning non-compensable damages in *Tomkins* will provide additional guidance. This article will examine the Court's majority opinion for the underlying legal principles that may be used when applying and interpreting § 70(2) in partial-taking condemnation cases.

Facts of *Tomkins*

In the late 1990s, MDOT began acquiring property from hundreds of property owners for construction of the M-6 South Beltline Freeway. This was a 20-mile highway project connecting I-96 with US-131, bypassing Grand Rapids to the south. As part of the project, MDOT needed to construct various bridges to continue certain county roads over the new freeway.

In order to construct an elevated bridge to continue Kenowa Avenue over the freeway, MDOT acquired a strip of land from the owners' two-acre parcel on which their residence was located. The taking measured approximately 49' by 120' along Kenowa Avenue. The parties stipulated that the value of the land taken was \$3,800. But the owners claimed additional damages to their remaining property attributable to the proximity of the new freeway to their home. The owners' appraiser called these damages "highway effects," referring to the dust, dirt, noise, vibration, and smell that would result from the new freeway. The appraiser further explained that the property would be going through a dramatic transformation—from a peaceful, bucolic setting to a heavily-traveled expressway right next door.

The trial court granted MDOT's motion to exclude these general effects under § 70(2). Since the parties had agreed to just compensation for the part taken, and the trial court granted MDOT's motion to exclude damages for the general effects of the project, the trial court granted MDOT's motion for summary disposition.

On appeal to the Court of Appeals, the owners claimed that the statute was unconstitutional because it impermissibly conflicted with the established meaning of just compensation, which (they argued) must include all factors that would tend to affect the market value of the remaining property. The Court of Appeals agreed and held that MCL 213.70(2) was unconstitutional. The appellate court reasoned that just compensation must put the owner in as good a position as he would have been in had the taking not occurred. Since the proper amount of just compensation must take into account all factors relevant to market value, the limitation on general damages set forth in § 70(2), as applied to partial-taking cases, impermissibly conflicts with the established constitutional meaning of "just compensation."⁶

The Michigan Supreme Court granted MDOT's application for leave to appeal. The Michigan Association of Drain Commissioners, Michigan Municipal League, Michigan Association of Counties, Michigan Townships Association, County Roads Association of Michigan, and the Michigan Municipal Electricity Association filed Amicus briefs supporting MDOT's position. Ackerman, Ackerman and Dynkowski, on behalf of affected landowners represented by its firm, and the Mackinac Center for Public Policy filed Amicus briefs in support of the owners' position.

The Supreme Court's Opinion

On June 11, 2008, the Supreme Court issued its opinion. The majority opinion was authored by Justice Young and joined by Justices Taylor, Corrigan, and Markman. That opinion upheld the constitutionality of MCL 213.70(2). Justice Weaver filed a dissenting opinion, joined by Justices Cavanagh and Kelly. Their opinion would hold that the legislature, by enacting §70(2) and imposing limits on what compensation a property owner could receive upon a partial direct taking, violated Michigan's constitutional guarantee of "just compensation." The dissent would further hold that the proper process for determining just compensation should be left for the trier of fact.⁷

All further discussion of the Supreme Court's decision refers to the majority opinion. The Court analyzed § 70(2) under principles of constitutional and statutory construction and concluded that the legislature was not precluded from effectuating a policy decision that the general effects of a project may not be considered as part of just compensation.

In reaching that conclusion, the Court first determined whether those sophisticated in this area of law when the 1963 Constitution was ratified understood the meaning of "just compensation" to include damages for the general effects of the project. This analysis required the Court to examine pre-1963 Michigan caselaw to determine whether those sophisticated in the law before 1963 believed that this highly technical term of art included general effects damages in a "just compensation" award.⁸

The Court found, however, that there was a paucity of pre-1963 Michigan case law that definitively answers that question. It found that while there is no indication in any reported case that "general effects" damages were ever awarded before 1963, there was some evidence pointing to the opposite conclusion. When reviewing the constitutionality of a statute, the Court stated the standard it must follow:⁹

Statutes are presumed constitutional, and this court exercises the power to declare a law unconstitutional with extreme caution, never exercising it where serious doubt exists with regard to the conflict.

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In the absence of any definitive pre-1963 caselaw that “general effects” damages were part of just compensation as understood by the ratifiers of the 1963 Constitution, and because there was some evidence pointing to the opposite conclusion, the Court concluded that there was insufficient evidence to overcome the presumption of MCL 213.70(2)’s constitutionality.

The Court’s analysis of pre-1963 caselaw provides useful guidance in developing principles for the proper application of MCL 213.70(2), where courts are presented with difficult valuation issues and the plain language of the statute does not readily resolve the dispute.

First, the Court noted that the pre-1963 caselaw cited by the owners and their supporting *amici* did not explicitly endorse the principle that general effects damages are compensable in a partial taking. Instead, those cases appeared to focus on diminution or severance damages that were specific and unique to the remaining parcel, and not felt generally by the public.¹⁰ The principle to be gleaned from the Court’s statement is that severance damages that are specific and unique to the remaining property—and not the kind experienced by the general public or by others from whom no property is taken—are not general effects, and therefore, should be considered as part of just compensation. That principle is consistent with the language of the statute.

Spiek v Dep’t of Transportation

Next, the Court disagreed with the Court of Appeals’ interpretation of *Spiek v Dept. of Transportation*.¹¹ *Spiek* involved an inverse condemnation case, not a direct, partial taking condemnation case. The *Spiek* Court held that the decrease in market value caused by the noise, dust, vibration, and fumes experienced by owners of property along an interstate freeway does not constitute the taking of a recognized property interest. An owner must show that such damages are unique, special, or peculiar, or in some way different in kind or character from the effects experienced by all owners who reside adjacent to freeways or other busy highways.¹²

The Court of Appeals in *Tomkins* held that *Spiek* does not apply in cases involving partial takings and that a landowner in such case does not need to demonstrate that his damages to the remaining land are special or “different in kind” from those suffered by other nearby landowners.¹³ The Court noted that a different rule applies in partial-takings cases than the rule for determining liability in an inverse condemnation case.

The Supreme Court noted that while *Spiek* only addressed inverse condemnation claims, that did not mean that those sophisticated in the law before 1963 applied a separate rule of damages for an actual partial taking. To the contrary, the Court

pointed out that the rule of damages in *Spiek* was not limited solely to inverse condemnation cases.¹⁴ While the Court stated that it was not necessarily relying on *Spiek* to uphold the constitutionality of MCL 213.70(2), it disagreed with the Court of Appeals’ conclusion that the rule of *Spiek* does not apply to partial takings.¹⁵

This statement supports the use of *Spiek*’s principles when considering whether damages to the remainder are noncompensable “general effects” of the project or compensable “special effects.” Trial courts should consider whether the owner’s damages are different in kind or character from the effects experienced by all owners living in proximity to a busy highway. If not, they are non-compensable project effects. The holding in *Spiek* is consistent with the express language in MCL 213.70(2):¹⁶

Taking all of plaintiff’s factual allegations as true, the complaint fails to allege an essential element of their cause of action: that the damage to their property is of a unique or peculiar character different from the effects experienced by all other similarly situated property owners. In other words, plaintiffs fail to allege an injury unlike that experienced by all who live in proximity to a highway. Thus their case is barred by the well-accepted rule that property owners are not entitled to compensation for highway noise that is necessarily incident to proximity to a highway.

Consistent with *Spiek*, the statute embodies the principle that a property owner should be placed in as good a position as if the taking had not occurred, but not in a better position monetarily than his neighbor, from whom no property was taken, but who experiences the same project effects. If an owner from whom no property is taken would be unable to state a claim in an inverse condemnation action for the project effects, then neither is an owner in a partial taking action entitled to compensation for those project effects.

State Hwy Comm’r v Busch

Unlike the Court of Appeals, the Supreme Court found *State Hwy Comm’r v Busch*¹⁷ helpful in answering whether § 70(2) is a constitutional limitation on damages in a partial-taking case. The *Busch* Court held that just compensation does not include the diminution in value caused by the acquisition of the adjoining lands of others for the same undertaking. The Supreme Court noted that to the extent that § 70(2) precludes “general effects” damages in a partial taking arising from the acquisition of neighboring property for the new M-6 freeway, it is entirely consistent with the pre-1963 common understanding of just compensation informed by *Busch*.¹⁸

This statement is also instructive for trial courts applying the statute. A property owner is not entitled to just compensation for decreases in value caused by the acquisition of the adjoining lands of others for the same undertaking. For example, an owner would not be entitled to just compensation attributable to the cutting of trees, land balancing and other changes to the character of surrounding land, or the construction of roads, guard rails, bridges, or utility poles on property acquired from others for the same undertaking. Such damages would be incidental general effects of the project.

State Hwy Comm'r v Watt

In determining whether § 70(2) was constitutional, the Supreme Court was also persuaded by *State Hwy Comm'r v Watt*.¹⁹ In that case, a specific type of “general effect” damage—diminution in value attributable to the diversion of traffic—was held to be noncompensable under the 1908 Constitution. The *Watt* Court held that a change in traffic flow is not a taking or damaging of a property right. In comparing the noncompensable damages resulting from diversion of traffic in *Watt* to the Tomkins’ damage claim for the “dust, dirt, noise, vibration, and smell” caused by a highway, the Supreme Court commented that “[b]oth are ‘general effects’ damages felt by the general public that are incidental to the building of a highway.”²⁰

Justice Cooley’s Treatises

The Supreme Court’s analysis of secondary legal sources provides additional guidance in applying § 70(2) to a particular partial taking. Citing Justice Cooley’s scholarly writings on this subject, the Court commented that, in a partial taking, those incidental injuries felt generally by the public are to be excluded altogether from the computation of just compensation.²¹ In his treatise *Constitutional Limitations*, Justice Cooley elaborated that just compensation does not include those incidental injuries to other property “such as would not give to other persons a right to compensation, while allowing those which directly affect the value of the remainder of the land not taken; such as the necessity for increased fencing and the like.”²²

The Supreme Court’s reference to Justice Cooley’s writings provides trial courts with further guidance when the application of § 70(2) is challenged in a particular takings case. If the item of damage is an incidental injury felt generally by the public, it is to be excluded from the just compensation award. Where a person has no right to compensation for incidental injuries when none of his property is taken, then neither is an owner entitled to compensation for those same kinds of incidental or project effects in a partial taking action. This principle is expressly articulated in the language of § 70(2) and is consistent with the underlying principles in *Spiek*.

Conclusion

The *Tomkins* decision upheld the constitutionality of § 70(2) of the UCPA. Based on the plain language of the statute, as part of its “gatekeeper” function, a court shall not allow the jury to consider the “general effects of a project for which property is taken, whether actual or anticipated” in determining just compensation. The statute describes “general effects of a project” as those “that in varying degrees are experienced by the general public or by property owners from whom no property is taken.”

While the statute should be applied according to its plain language, inevitably there will be disputes about whether a particular project effect is “general” or “special.” In a partial taking, the formula to calculate the fair market value of the remainder parcel must account for the fact that damages will vary in each case depending on the unique circumstances of each taking. When questions arise concerning the proper application of MCL 213.70(2) to the unique circumstances in a partial taking condemnation case, the Supreme Court’s analysis of pre-1963 caselaw and secondary sources will provide useful principles to guide trial courts in their rulings. Those principles are in harmony with the clear language and intent of the statute. 🏠

Endnotes

- 1 *Michigan Dep’t of Transportation v Tomkins*, 481 Mich 184; 949 NW2d 716 (2008).
- 2 MCL 213.51 *et seq.*
- 3 *Michigan Dep’t of Transportation v Tomkins*, 270 Mich App 153; 715 NW2d 363 (2006).
- 4 481 Mich at 212.
- 5 481 Mich at 198.
- 6 270 Mich App at 158.
- 7 481 Mich at 212.
- 8 481 Mich at 211-212.
- 9 481 Mich at 190, citing *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004).
- 10 481 Mich at 200, fn 45.
- 11 *Spiek v Dep’t of Transportation*, 456 Mich 331; 572 NW2d 201 (1998).
- 12 *Spiek*, 456 Mich at 333, 339.
- 13 270 Mich App at 162-163.
- 14 481 Mich at 202-203, fn 49-50.
- 15 481 Mich at 203-204.
- 16 *Spiek*, 456 Mich at 339.

Time is of the Essence, and Home Addresses and Telephone Numbers are Exempt from FOIA Disclosure

By Peter A. Letzmann, Lowell Michigan

On July 16, 2008, the Michigan Supreme Court rendered two opinions interpreting the Michigan Freedom of Information Act (MCL 15.230 et seq.), i.e., FOIA.

The first case, in order of release, is *Michigan Federation of Teachers and School Related Personnel, AFT, AFL-CIO v University of Michigan*, 481 Mich 657; 753 NW2d 28 (2008). It held that the home addresses and the home telephone numbers of state university employees were of a personal nature, and disclosure would constitute a clearly unwarranted invasion of personal privacy. Such information was, therefore, found to be exempt from disclosure under the FOIA. It reversed the Court of Appeals and reinstated the circuit court order granting summary disposition in favor of the defendant.

The second case, *State News v Michigan State University*, 481 Mich 692; 753 NW2d 20 (2008), limited its ruling to hold that the passage of time and subsequent events have no bearing on the analysis of whether a record is exempt or partially exempt from disclosure. The Court in *dicta* discussed techniques that may help the practitioner in dealing with FOIA cases.

Michigan Federation of Teachers, et al. v. University of Michigan

The plaintiff unions requested information regarding the defendant's, over 37,000, university employees. Among other things, the plaintiffs wanted the home addresses and home telephone numbers of the University's employees. The University provided 20,812—those employees who had no objection. It denied 16,407—those employees who did object. The plaintiffs sued, and cross-motions for summary disposition were filed. Affidavits of six individuals delineating the harm for

such a release were considered. The circuit court granted summary disposition for the defendant, ruling that the employees' home addresses and telephone numbers were information of a personal nature and that the addresses and telephone numbers did not contribute significantly to public understanding of the operation or activities of the government.

The Court of Appeals, in an unpublished *per curiam* opinion, reversed. Relying on *Bradley v Saranac Board of Education*, 455 Mich 285; 565 NW2d (1997), it held that the home addresses and telephone numbers were not "information of a personal nature."

The Supreme Court began its analysis by stating that the Supreme Court has struggled, since the adoption of the FOIA, in reaching consensus regarding interpretation of the Act. It then discussed the history of the address and telephone number disclosure and the privacy exemption cases. The Supreme Court identified *Bradley* as the central case under consideration in the present appeal. In *Bradley*, the Supreme Court affirmed a two-element test for this exemption: first, that the information sought is "of a personal nature," and second, that the disclosure of the information would be a "clearly unwarranted invasion of privacy."

In its analysis the Court asked whether address and telephone numbers in this case are information of a personal nature. It tweaked this prong of the test and concluded, "private or confidential information relating to a person, in addition to embarrassing or intimate details," is "information of a personal nature." The Court then asked "whether employees' home addresses and telephone numbers reveal embarrassing, intimate, private, or confidential details about those employees." Citing the Michigan Identity Theft Protection Act, MCL 445.61, *et*

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17 *State Hwy Comm'r v Busch*, 326 Mich 183; 40 NW2d 111 (1949).

18 481 Mich at 204.

19 *State Hwy Comm'r v Watt*, 374 Mich 300; 132 NW2d 113 (1965).

20 481 Mich at 206.

21 481 Mich at 207, citing 1 *Cooley*, "The General Principles of Constitutional Law in America" (1880), pp 337-338.

22 481 Mich at 207-208, citing 1 *Cooley*, "Constitutional Limitations" (1st Ed.), pp 569-570.

seq., and a long list of similar statutes, the Court held that it does.

For the second prong, the Court asked whether “public disclosure of the information would constitute a clearly unwarranted invasion of an individual’s privacy.” Citing *Mager v Dep’t of State Police*, 460 Mich134; 331 NW2d (1999), the Court said that disclosure of this information would be a clearly unwarranted invasion of an individual’s privacy. In this regard, it looked at the purpose of the request and said, “simply put, disclosure of employees’ home addresses and telephone numbers to plaintiff would reveal ‘little or nothing’ about a governmental agency’s conduct, nor would it further the stated public policy undergirding the Michigan FOIA.” Accordingly, the Court answered the second-prong question in the affirmative.

Five members of the Court held that the information satisfied the two-pronged *Bradley/Mager* test and therefore reinstated the circuit court’s order granting summary disposition for the defendant. Justices Kelly and Weaver filed a separate opinion concurring in part and dissenting in part.

State News v Michigan State University

In this case, the plaintiff sought the police report regarding alleged crimes committed in a Michigan State University dormitory. The circuit court partially based its opinion on the affidavits of the University’s chief of police and the county’s chief assistant prosecutor. It found that the police report in totality was exempt pursuant to the unwarranted invasion of personal privacy exemption and the interference with law enforcement purposes exemption. From the bench, the court granted summary disposition to the defendant.

The Court of Appeals ruled that the disclosure of the identities of the suspects and the other disclosures over time changed the composition of the case, and a court should take such events into consideration. The Court of Appeals remanded the case to the circuit court for further proceedings.

With unusual unanimity (Justice Weaver concurring with the majority, noting that the plaintiff could file a subsequent FOIA, and that would move the date of consideration by the defendant), the Supreme Court held “that unless the FOIA exemption provides otherwise, [footnote omitted] the appropriate time to measure whether a public record is exempt under a particular FOIA exemption is the time when the public body asserts the exemption.” (Page 11 of the slip opinion). The Court went on to say, “The denial of a FOIA request occurs at a definite point in time....The determinative legal question for a judicial body reviewing the denial is whether the public body erred because the FOIA exemption applied *when it denied the request*.”

In *dicta* the Court discussed, and note should be taken of, the *in camera* inspection of the documents (apparently *sue sponte*), the reliance on affidavits, and the particularizing and segregating of exempt and non-exempt materials in a document.

Conclusion

With these two cases, the Michigan Supreme Court has broadened and clarified the exemptions to the disclosure requirements of the FOIA. The cases should bring a smile to those attorneys defending against FOIA challenges. It gives some practice tips to FOIA litigators and demonstrates the value of *amicus curiae* briefs. I would encourage the full reading of these two cases. 🏠

About the Author

Peter Letzmann is a past chair of the Public Corporation Law Section. He currently is a sole practitioner, who exclusively represents local units of government. He also is a court approved mediator and an adjunct professor at Grand Valley State University’s School of Public and Nonprofit Administration.

Volunteers Needed for Cultural Awareness Project

Michigan’s ethnically and racially diverse population — 75 ethnic groups from 150 countries, and the need to better understand and serve these groups in the legal system, has prompted the State Bar of Michigan to revive the Cultural Awareness Project.

The project is a joint endeavor of the Bar’s Equal Access and Criminal Issues Initiatives. It seeks to collect and provide information online, initiate dialogue through a statewide symposium, and develop a core of experts in local communities who can advise and help bridge the behavioral norms of ethnically and racially diverse individuals and our justice system.

As ministers of justice, fairness, and equality, attorneys and others in the legal system, including members of the

public are encouraged to volunteer their help. Volunteers are needed with expertise in the following areas:

- Recognizing and addressing cultural issues in civil and criminal proceedings
- Language barriers and the use of interpreters
- Juvenile justice issues
- Family law issues

Volunteer opportunities are available at all levels of commitment and range from editing to drafting information to be included as a part of a dynamic resource. Please contact SBM staff member Dionnie Wynter at dwynter@mail.michbar.org or (800) 968-1442 ext. 6412 for more information.

Federal Law Update

By Marcia L. Howe, Carlito H. Young, Rebekah Page-Gourley, and Marcelyn A. Stepanski, Johnson, Rosati, LeBarge, Aseityne & Field, Farmington Hills; and Phil Erickson and Michael Bogren, Plunkett Cooney

United States Supreme Court

Age Discrimination

Meacham v Knolls Atomic Power Laboratory, No. 06-1505,
US Supreme Court
(Issued June 19, 2008)

A group of laid-off workers claimed that defendant Knolls Atomic Power Laboratory's buyout offer had a disparate impact on older workers, thus violating the Age Discrimination in Employment Act. The Second Circuit dismissed the case, holding that the workers had the burden of proving that the defendant's decision was *not* based on "reasonable factors other than age." Reversing the Second Circuit, the United States Supreme Court held that the employer has the burden of proof with respect to the "reasonable factors other than age" defense because it is an affirmative defense. The Court's holding makes it more difficult for employers to defend against age discrimination claims under the ADEA.

CBOCS West, Inc. v. Humphries, 128 S.Ct. 1951 (Issued May 27, 2008)

The Supreme Court held that plaintiffs may bring claims for retaliation based on race under Section 1981 of the Civil Rights Act of 1866, as well as Title VII of the Civil Rights Act of 1964. Title VII imposes damage caps and requires initial submission of claims to the EEOC, while Section 1981 has none of these requirements. Importantly, the Sixth Circuit recently held that no independent cause of action exists against municipalities under Section 1981, so the *CBOCS West* holding does not broaden the available bases for retaliation claims against municipal defendants. *Arendale v City of Memphis*, 519 F.3d 587 (6th Cir. 2008).

Second Amendment, Gun Control Ordinances

District of Columbia v. Heller, 128 S.Ct 2783 (2008)

The District of Columbia instituted laws that prohibited handgun possession by making it a crime to carry an unregistered firearm and prohibiting the registration of handguns. The laws at issue also required residents to keep lawfully-owned firearms unloaded, disassembled, and/or bound by trigger lock or similar device at home. *Heller* filed suit claiming the laws violated his Second Amendment right to bear firearms.

In its ruling supporting plaintiff's claim, the Supreme Court found the Second Amendment not only protects an individual's right to possess a firearm unconnected with service in a militia, but to use that arm for traditionally lawful purposes, such as self-defense within the home. However, this right is not absolute, and should not cast doubt on a municipality's longstanding prohibition on felons and/or mentally unstable individuals possessing firearms. It further found its ruling should not limit a municipality's powers to limit firearms in sensitive areas such as schools or government buildings.

As to the District of Columbia, the Court found its laws exceeded the permissible scope of government regulation. In particular, the District's total ban on handgun possession erroneously amounted to a prohibition on an entire class of weapons Americans selected for self-defense. Furthermore, the Court similarly found the District's requirement that any lawfully owned weapons must be disassembled inside a home made it equally impossible for citizens to exercise their constitutional right to bear arms for self-defense purposes.

United States Court of Appeals, Sixth Circuit

Due Process—Denial of Access to Medical Care

Ford v Grand Traverse County,
Case No. 07-1062 (August 5, 2008)

Plaintiff fell and broke her hip during a seizure while in jail. She had been arrested on a Sunday morning and had not taken her epilepsy medicine. Plaintiff alleged and the jury found that the County's policy on weekend medical care exhibited deliberate indifference to and was the proximate cause of plaintiff's injuries. On appeal, the court found that the County had waived its strongest legal argument—that the policy did not constitute deliberate indifference to plaintiff's serious medical needs—by failing to raise the issue on appeal. Instead, the County asserted that that plaintiff did not prove a causal link between the policy and plaintiff's injuries, but the Court found that there was sufficient evidence such that it would not "disrupt the jury's verdict."

Due Process—Denial of Access to Medical Care—Qualified Immunity

Phillips v Roane County, Tennessee, Case Nos. 07-5405/07-5407 (6th Cir. July 25, 2008)

Plaintiffs decedent died in jail from untreated diabetes while awaiting trial for the murder of her infant child. Plaintiff filed suit alleging a violation of the due process clause from the failure to provide access to medical care pursuant to 42 USC § 1983. The Court stated that in order to prove a claim of deliberate indifference to a prisoners serious medical needs, the plaintiff must show both an objective and a subjective component. Plaintiffs decedent had requested medical attention and was seen to have vomited and/or passed out on a number of occasions prior to her death. The Court found that this evidence was sufficient to objectively show that she had a serious medical condition which was so obvious that even a layperson would easily recognize the necessity for a doctors attention. Turning to the subjective component, the Court found that the correctional officers in the prison, a paramedic and a doctor who had examined plaintiff in the prison on two occasions prior to her death, would have to stand trial as a genuine issue of fact existed as to whether they subjectively knew of and disregarded the serious medical condition.

Excessive Force—Qualified Immunity

Kirby, et al v St. Clair County, et al, Case No. 06-1976 (6th Cir. June 27, 2008)

Defendant officers fatally shot plaintiff's decedent after he was stopped on an arrest warrant. The Court found an issue of fact regarding whether the officers were placed in jeopardy of serious bodily harm from plaintiff's decedent's vehicle at the time they shot plaintiff. The Court found that it was clearly established that deadly force could not be used against a non-dangerous fleeing felon, and therefore qualified immunity was properly denied where an issue of fact existed as to whether plaintiff's decedent was a non-dangerous fleeing felon.

False Arrest—False Imprisonment

Parsons v City of Pontiac, et al, Case No. 07-2299 (6th Cir. July 22, 2008)

Plaintiff was a former probationary employee of the Pontiac Fire Department. About 1½ months after plaintiff was terminated, a firefighter named Arthur Frantz was shot and killed at the department at approximately 6:50 a.m. Plaintiff was arrested for the murder at approximately 12:45 p.m. the same day. At the time of the arrest, the Court found that the arresting officers had the following information:

(1) Information from Parson's ex-girlfriend that (a) she thought it might be Parsons; (b) Parsons had recently been fired from the fire department and was upset; (c) Parsons had attempted suicide in the past, and he had a plan to try again that she would hear about "on the news"; (d) Parsons had a list of guys at the fire department that he wanted to "punch out"

after his probationary period ended; and (e) Parsons generally carried a gun. (2) A fellow firefighter, Paul Holmes, also initially thought of Parsons as a suspect when he first heard the news that Frantz was shot. (3) Parsons had made no effort to contest his termination from the Pontiac Fire Department, a reaction that the union president found surprising. But there were no eyewitness reports of the shooting, no forensic evidence linking Parsons to the crime, and the police, at that time, had heard only that Frantz was responding to someone banging on the back door of the fire station.

Based upon the foregoing, the Court found that there was an issue of fact regarding whether or not defendants had probable cause to arrest and detain plaintiff.

First Amendment—Political Affiliation

Back v Hall, Schrader, Case Nos. 07-5934/5935 (6th Cir. August 11, 2008)

Plaintiff was appointed to a civil service position in the Kentucky Office of Homeland Security under a Democratic administration. After a Republican administration took power, plaintiff was terminated. She filed suit, alleging a violation of her right to be free from demotion or termination due to her political affiliation under the First Amendment. Defendants appealed the denial of their claim for qualified immunity. The Court found that the right to be free from demotion or termination when in a civil service job has been clearly established for some time. Although the defendants asserted that plaintiff was a probationary employee, the Court stated, "It may well be that a probationary employee, like an at-will employee, may be fired for no reason or for most any reason; she cannot be fired for 'an unconstitutional reason.'" [Citation omitted].

FMLA—Retaliation Claim

Bryant v Dollar General,
Case No. 07-5006 (6th Cir. August 15, 2008)

The court held that both the FMLA statute and its implementing regulations prohibit retaliation for the exercise of FMLA leave.

Sex Discrimination—Evidence of Pretext

White v. Baxter Healthcare Corporation,
Case No. 07-1626; ___ F.3d ___ (6th Cir. July 3, 2008)

In Title VII race discrimination cases, plaintiff has traditionally been able to show pretext in three ways: (1) that the employers stated reason for the adverse employment action has

Continued on next page

Federal Law Update

Continued from page 17

no basis in fact; (2) that it was not the actual reason for the action; or (3) that it is insufficient to explain the employer's actions. In this case, the Court has added a fourth way: plaintiff can offer evidence that challenges the reasonableness of the employer's decision to the extent that it sheds light on whether the stated reason was the actual motivation. The Court also rejected the "business judgment rule."

Sexual Harassment—Affirmative Defense

Thornton v Federal Express Corp., Case No. 07-5116 (6th Cir. June 24, 2008)

The Sixth Circuit found that plaintiff had shown first three elements for hostile environment sexual harassment and put forth evidence showing a genuine fact issue regarding whether harassment was sufficiently severe and pervasive. However, the Court found that defendant was entitled to the affirmative defense articulated by the United States Supreme Court in *Burlington Industries v Ellerth*, 524 US 742 (1998) and *Fara-gher v City of Boca Raton*, 524 US 775 (1998), where Federal Express had distributed a facially effective sexual harassment policy, and plaintiff's failure to take advantage of preventive and corrective measures was unreasonable.

Uniformed Services Employment and Reemployment Rights Act

Petty v Metropolitan Government of Nashville—Davidson County, Case No. 07-5649 (6th Cir. August 18, 2008)

Plaintiff was employed by defendant Metro as a patrol sergeant in the police department prior to being deployed to Kuwait. While in Kuwait, he was charged with violation of a lawful order and conduct unbecoming an officer in connection with making wine in his tent and sharing it with enlisted personnel (nurses just like on M*A*S*H). Prior to his court martial, plaintiff was allowed to resign for the good of the service. His discharge papers stated as under honorable conditions (generally). When plaintiff sought to return to work for defendant, they delayed his return, refused to reinstate him as a sergeant, and conducted two separate investigations regarding his military service and whether he was truthful about it. The Court found that defendant violated several provisions of USERRA. Defendant violated Section 4312 by delaying plaintiff's reemployment. Defendant violated section 4313 by not reemploying plaintiff in a proper position. And the Court remanded for findings as to whether defendant discriminated against plaintiff in violation of section 4311 through its investigations. 38 USC §§ 4311-4313.

Fourth Amendment—Excessive Force

Slusher v. Carson, 2008 WL 4006687 (C.A.6 (Mich.))

Defendant officers were dispatched to execute an order reclaiming ownership of property as part of a citizen's divorce judgment. The order required the officers to enter the citizen's neighbor's property to reclaim some of the goods. Plaintiff owned the property upon which the officers entered.

An issue arose regarding the scope of the officers' permissible area to search on plaintiff's property. As tensions escalated, plaintiff refused to return the order granting the officers permission to be on her property, despite numerous requests by one of the officers for the same. Eventually, an officer grabbed plaintiff's hand to retrieve the order, as she pulled it away from the officer's grasp. Plaintiff claimed the officer's conduct caused her severe injuries to her hand.

In its ruling affirming the Eastern District's dismissal of plaintiff's claims, the Sixth Circuit found while the officer's conduct did in fact constitute a seizure under the Fourth Amendment, his use of force was not unreasonable under the circumstances. Specifically, the Court found once plaintiff became agitated and pulled the order away from the officer, it was reasonable for him to conclude a brief show of force was necessary to retrieve the document. Finally, the Court found the means by which the officer retrieved the order—pressing his thumb into her palm and twisting her hand—was not improper. This was especially true in light of the fact that the officer had absolutely no knowledge of plaintiff's prior medical problems with her hand before exercising the use of force.

United States District Court—Eastern District

Fourth Amendment—Excessive Force

Jefferson v. City of Flint, 2008 WL 3200655 (E.D. Mich.)

An officer responded to a call of shots fired in plaintiff's neighborhood. During this time, he detained three individuals in front of plaintiff's home, all of whom were in the vicinity of the area in which he believed the shots were fired. Plaintiff attempted to exit the home during the detainment of the other individuals, but the officer instructed her to go back inside. Subsequently, the officer observed plaintiff open the side door of the house, as well as the detained men move towards the doorway. He also saw what he believed to be a weapon in plaintiff's hand. The officer fired at plaintiff in response to what he believed was her aggressive movement toward him. It

was undisputed that plaintiff was unarmed at the time. Furthermore, she had a dramatically different recollection of the events immediately prior to the shooting than the officer.

In its ruling denying the officer's motion for summary judgment, the District Court found the record, viewed in a light most favorable to plaintiff, indicated the officer shot an unarmed woman who did not threaten him from close range. Because of this, dismissing the case would be improper. The Court held that, where the legal question of liability in Fourth Amendment case turns upon which version of the facts one accepts, the jury, not the Court, must decide the issue.

Sign Regulation

Marras v City of Livonia, 2008 WL 3843533 (ED Mich)

The Court held that the plaintiffs had standing under the First Amendment to challenge sections of a sign ordinance, both facially and as applied, for which they suffered an injury, but they lacked standing to challenge remaining ordinance provisions which did not inflict an injury. The plaintiffs could advance facial and as applied challenges relating to flashing signs, portable signs, and parking of a vehicle displaying advertising material where the plaintiffs received a citation for allegedly violating the portable signs ordinance, they received warnings for various other violations, and the plaintiff store owner was required to park his personal vehicle such that it was not observed from adjoining streets because it displayed information regarding his business.

The Court went on to hold that the defendant city's restrictions on flashing, moving, and portable signs were legitimate and constitutional time, manner, and place restrictions. It also held that these restrictions were not unconstitutionally vague. However, the Court determined that the City failed to show how its regulation on vehicles advanced traffic safety and aesthetics or would do so in a direct and material way. The ordinance targeted only vehicles containing commercial speech,

permitting vehicles containing bumper stickers or other non-commercial messages to be parked anywhere. The Court also opined that even if the defendant could demonstrate that the regulation directly and materially advanced its interests in safety and aesthetics, it failed the narrowly-tailored requirement where it was overly broad, preventing some vehicles from being parked anywhere but garages or back alleys. It also interfered with an individual's right to place a "for sale" sign in or on his vehicle. As such, the regulation on vehicles was deemed an unconstitutional restriction on commercial speech.

Procedural Due Process

Davis v City of Ecorse, 2008 WL 2478329 (ED Mich)

The Court granted summary judgment of the plaintiff's procedural due process claim against the City. The plaintiff purchased property that had nonconforming status that was grandfathered under the zoning ordinance. However, she failed to apply for a certificate of occupancy for five years after she purchased it. When she finally applied, she was advised that the property was in extreme disrepair and had been vacant for more than six months. Although the City's zoning ordinance authorized a loss of nonconforming status because of vacancy, the plaintiff never requested a hearing on that issue, nor was there evidence that she contested such a finding.

The Court held that in the absence of a dispute, the absence of an appeal process was immaterial. The Court also held that the plaintiff had the opportunity to dispute the City's denial of her request for a certificate of occupancy. The City afforded the plaintiff the opportunity to obtain an occupancy permit provided she made needed repairs, and it allowed three separate hearings to facilitate the procurement of a building permit. The plaintiff was asked to submit signed agreements of licensed contractors, but failed to do so. The Court concluded that there was no evidence to demonstrate a constitutional violation. 🏠

"Tips and Tools for a Successful Practice" Slated for November 5

The State Bar of Michigan will present a one-day seminar designed to strengthen and streamline legal practices. The workshop, titled "Tips and Tools for a Successful Practice," will take place from 9:00 a.m.- 4:30 p.m. on Wednesday, November 5, 2008, at the State Bar building in downtown Lansing.

Highlights include presentations about maintaining mutually beneficial client relationships, drafting effective fee agreements, managing trust and business accounts, and law office management. Scheduled speakers represent a variety of legal organizations, private law firms, and management consultants.

The cost to attend the seminar is \$100, and registration and payment must be received by Wednesday, October 29,

2008. Participants can reserve their spot by signing up online at <http://e.michbar.org> after October 1, faxing the registration form to the State Bar at (517) 346-6365, or mailing the form with check or credit card payment to:

ATTN: Tips and Tools for a Successful Practice Workshop
State Bar of Michigan
306 Townsend Street
Lansing, MI 48933-2012

For more information on the workshop, contact Karen Spohn in the SBM Professional Standards Division at (517) 346-6309 or e-mail kspohn@mail.michbar.org.

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/lag.

Charter Schools

State school aid "per pupil funding" paid to charter schools upon expiration of authorizing contract

A public school academy may continue to receive its current fiscal year allotment of state school aid "per-pupil funding" after the contract issued by the authorizing body expires if the public school academy has provided the required minimum hours of pupil instruction prior to the expiration of the contract. Eligibility to receive funding is to be determined in accordance with the facts existing at the time the contract expires and consistent with Section 101 of the State School Aid Act, MCL 388.1701.

Opinion No. 7218
August 12, 2008

Crime Victim's Rights Fund Act

Purposes for which revenues in the Crime Victim's Rights Fund may be used

Const 1963, art 1, § 24 does not create a constitutionally dedicated fund or itself restrict the purposes for which monies in the Crime Victim's Rights Fund created under the Crime Victim's Rights Fund Act, 1989 PA 196, MCL 780.901 et seq, may be used. Standing alone, art 1, § 24 does not prevent the legislature from using revenues in excess of those needed to pay for crime victim rights, for other purposes. However, the legislature should be aware of the limitations imposed by

Const 1963, art 8, § 9, which requires that fines assessed for any breach of the penal laws be used to support libraries. If excess revenue in the Crime Victim's Rights Fund is used for purposes other than to enforce and pay for the crime victim rights enumerated in art 1, § 24, the use could face scrutiny to determine if the assessments conflict with art 8, § 9 or other constitutional provisions.

Opinion No. 7217
July 8, 2008

Electric Transmission Line Certification Act

Requirement to obtain certificate of public convenience and necessity before commencing condemnation under Electric Transmission Line Certification Act

An electric utility company wishing to construct a transmission line must obtain a certificate of public convenience and necessity from the Michigan Public Service Commission before instituting condemnation proceedings if, under the particular circumstances, a certificate is required by 1929 PA 69, MCL 460.501 et seq, or the Electric Transmission Line Certification Act, 1995 PA 30, MCL 460.561 et seq. Thus, a company must obtain a certificate from the Commission before commencing condemnation proceedings if:

1. An electric utility has 50,000 or more residential customers in this state or is an affiliated transmission company or an independent transmission company, and the line is a "major transmission line;"



Section Mission:

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

2. An electric utility company of any size, an affiliated transmission company, or an independent transmission company voluntarily applies for a certificate for a non-major transmission line; or
3. The construction of the transmission line falls within Section 2 of 1929 PA 69, MCL 460.502.

Section 5 of 1923 PA 238, MCL 486.255, requires an independent transmission company or an affiliated transmission company to exercise its power of condemnation in accordance with applicable provisions of the Electric Transmission Line Certification Act, 1995 PA 30, MCL 460.561 et seq, and the Uniform Condemnation Procedures Act, 1980 PA 87, MCL 213.51 et seq. To the extent a company is required by the Electric Transmission Line Certification Act to obtain a certificate of public convenience and necessity before commencing condemnation proceedings, Section 3(2) of 1923 PA 238, MCL 486.253(2), requires it to do so.

A company may seek a limited license to conduct preconstruction activity on property in accordance with the terms of Section 11 of the Electric Transmission Line Certification Act, MCL 460.571, and Section 4 of the Uniform Condemnation Procedures Act, MCL 213.54, even though it has not yet applied to the Michigan Public Service Commission for a certificate of public convenience and necessity under the Electric Transmission Line Certification Act.

Opinion No. 7216
June 30, 2008

Sheriffs

Constitutional requirement that county officer have principal office at county seat

A county sheriff's principal office must be maintained at the county seat as required by Const 1963, art 7, § 5. The mere designation of one of several offices throughout the county as the principal office is not sufficient to meet this requirement. To satisfy the constitutional requirement, the office must, in fact, serve as the sheriff's principal or primary office.

Opinion No. 7215
June 30, 2008

Legislative Update

By Kester K. So, 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

- **DDA Amendments. SB 970, PA 225.** Provides for "retail business incubators." Amends Section 1 of 1975 PA 197 (MCL 125.1651).
- **Neighborhood Enterprise Zone. SB 975, PA 204.** Allows a neighborhood enterprise zone located in a qualified downtown revitalization district to contain fewer than 10 platted parcels if the platted parcels together contained 10 or more facilities. Amends Section 3 of 1992 PA 147 (MCL 207.773).
- **DDA Amendments. SB 972, PA 226.** Allows DDA's to fund improvements for existing buildings located in a downtown district in order to make them marketable for sale or lease. Amends Section 7 of 1975 PA 197 (MCL 125.1657).
- **Commercial Redevelopment Act Amendments. SB 974, PA 277.** Allows new tax exemptions to be granted for a new or replacement facility in a redevelopment district on property zoned for mixed use located in a qualified downtown revitalization district. Amends Sections 3, 4, 12, and 18 of and adds Section 12a to 1978 PA 255 (MCL 207.653, 654, 662 and 668).
- **Neighborhood Enterprise Zones. SB 976, PA 228.** Includes in the definition of "new facility" a new structure or a portion of a new structure that is rented or leased or is available for rent or lease, is a mixed-use building, or located in a mixed-use building that contains retail business space on the street level floor and is located in a qualified downtown revitalization district. Amends Section 2 of 1992 PA 147 (MCL 207.772).
- **Plant Rehabilitation Amendments. SB 867, PA 170.** Includes the operation of a major distribution and logistics facility within the definition of "industrial property." Amends Sections 2, 9, and 15 of 1974 PA 198 (MCL 207.552, 559 and 565).
- **Renaissance Zone Amendments. SB 1206, PA 242.** Allows the Michigan Strategic Fund Board to choose a beginning date of January 1 for a renaissance zone designation up to five years after the designation of certain renaissance zones. Amends Sections 6 and 10 of 1996 PA 376 (MCL 125.2686 and 2690).
- **Renaissance Zone Amendments. HB 4950, PA 217.** Extends the definition of "renewable energy facility." Amends Section 3 of 1996 PA 376 (MCL 125.2683).

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Legislative Update

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Bills Passed by the Senate

- **Plant Rehabilitation Amendment. SB 218** (Senate substitute for House substitute). Allows an industrial facilities exemption certificate to be approved for a facility located in an industrial development district that had received approval from the board of the Michigan Strategic Fund and the State Tax Commission, and that met requirements other than procedural requirements. Amends Section 9 of 1974 PA 198 (MCL 207.559).
- **Election Law Amendments. SB 1379**. Provides that the Board of Election Inspectors may transmit statement of returns to the county clerk after the polls are closed on election night by telephone, facsimile machine, or modem. Amends Sections 809, 821, and adds Section 806b of 1954 PA 116 (MCL 168.809, 821 and 806b).
- **Plant Rehabilitation Amendment. SB 1376**. Includes convention and trade centers over 100,000 square feet in size (rather than over 250,000 square feet in size) in the definition of “industrial property.” Amends Section 2 of 1974 PA 198 (MCL 207.550).

Bills Passed by the House of Representatives

- **Neighborhood Enterprise Zone Amendments. HB 6032** (substitute). Transfers the authority to approve “homestead facilities” located within residential neighborhood enterprise zones from the State Tax Commission to the assessors of the local governmental units within which the homestead facilities are located. Amends Sections 2, 4, 5, 6, 7, 11, and 16 (MCL 207.772, 774, 775, 776, 777, 781, and 786).
- **Incompatible Offices. HB 6243** (substitute). Allows a public officer or employee to serve on any of several authorities or districts that have been created by law. Amends Section 3 of 1978 PA 566 (MCL 15.183).

Bills Introduced by the House of Representatives

- **Investment of Funds. HB 6298**. Authorizes the investments of funds in certain kinds of certificates of deposit. Amends Section 1 of 1943 PA 20 (MCL 129.91). 🏠

State Law Update

By Sarah J. Gabis, Foster, Swift, Collins & Smith, PC

Michigan Supreme Court

County’s Outdoor Shooting Range Subject to
Township Zoning Ordinance

Herman v Co of Berrien, 481 Mich 352 (Issued June 18, 2008)

In this Supreme Court case, Berrien County leased land located in Coloma Township to build a firearms training facility for law enforcement agencies. The County intended to construct a building at the center of the property for a training and support building, and with it also build a parking lot, outdoor lighting, driveway, and several outdoor shooting ranges. Neighboring landowners sued to stop the project, claiming it violated the Township zoning ordinance and noise ordinance. The County asserted that it was not subject to the Township’s ordinances, given the County Commissioners Act (CCA) and the Michigan Supreme Court’s decision in *Pittsfield Charter Twp v Washtenaw Cty*, 468 Mich 702 (2003), which held that the CCA gives counties priority over local regulations in citing buildings.

The Michigan Supreme Court held that the outdoor shooting range was, in fact, subject to the Township’s ordinances. The Court reasoned that *Pittsfield Twp* did not address whether the CCA gives a county priority regarding a County’s land uses—such as the outdoor shooting ranges here—that are ancillary to a County building. The Court explained that the test in evaluating whether County ancillary land uses are subject to local regulations is this: is the ancillary use indispensable to a County building’s normal use? If the answer is “yes,” then the County is not subject to local regulation; if the answer is “no,” then the County’s ancillary use is subject to local regulation. Applying that test, the Court noted that the parking lot, lights, and driveway were ancillary but indispensable uses. On the other hand, the outdoor shooting range was an ancillary use that was not indispensable since the normal use of the building was for classroom—i.e., indoor—training. For those reasons, the Court concluded that the County’s outdoor shooting range was subject to the Township’s ordinances.

Passage of Time Does Not Affect Review of
Public Body’s Denial of FOIA Request

State News v Michigan State University,
481 Mich 692 (Issued July 16, 2008)

Following an assault that took place in a dormitory on Michi-

gan State University's campus, the State News ("Newspaper") submitted a FOIA request to the University seeking disclosure of the police incident report. The University denied the request, citing the privacy and law enforcement purposes exemptions of the FOIA. MCL 15.243(1)(a) and (1)(b)(i)-(iii). The Newspaper sued, and the circuit court determined that the entire police report was exempt from disclosure under both exemptions. The Court of Appeals remanded to the circuit court for further review, and stated that "the subsequent availability of information as a result of later court proceedings in the criminal justice system may well strengthen or weaken the arguments of the parties to a FOIA dispute" relating to the privacy and law-enforcement exemptions. The Court noted that the circuit court could take judicial notice of the fact that certain information had become publicly known, which might weaken the University's position.

The Supreme Court, in granting the appeal, limited the issue to whether the Court of Appeals erred in instructing the circuit court that the passage of time could affect its analysis of whether the privacy and law enforcement exemptions applied. The Court stated that "unless the FOIA exemption provides otherwise, the appropriate time to measure whether a public record is exempt under a particular FOIA exemption is the time when the public body asserts the exemption." The Court noted that public bodies can only rely on information that is available at the time a FOIA decision is made. Any subsequent developments are irrelevant to whether the record was exempt at the time the public body made its decision. As a result, the Court reversed the Court of Appeals and instructed the circuit court to disregard the passage of time and course of events in determining whether the University properly denied the FOIA request.

Employees' Home Addresses and Phone Numbers Fall Under FOIA Privacy Exemption

Michigan Federation of Teachers v University of Michigan,
481 Mich 657 (Issued July 16, 2008)

Plaintiff submitted a FOIA request to the University seeking disclosure of information regarding all of the University's employees. The information requested included first and last name, job title, compensation rate, work address and phone number, and home address and phone number. The University disclosed much of the information requested. With respect to the home addresses and phone numbers, the Uni-

versity only disclosed those where the employee had granted permission to publish the same in the University faculty and staff directory. As to the 16,406 employees that withheld permission to publish that information in the directory, the University denied the FOIA request, citing the privacy exemption. Plaintiff sued, and the circuit court granted summary disposition for the University, finding that home addresses and phone numbers were information of a personal nature. The Court of Appeals reversed, relying on *Bradley v Saranac Community Schools Bd of Ed*, 455 Mich 285 (1997). The Court stated that the information was not personal because, under *Bradley*, it did not reveal intimate or embarrassing details about a person's private life.

The Supreme Court reversed, finding that the *Bradley* definition of "personal" information was too narrow. The Court noted that there are two prongs to the privacy exemption: (1) the information must be of a "personal nature"; and (2) public disclosure of the information "would constitute a clearly unwarranted invasion of an individual's privacy." Under the first prong, the Court reiterated that "intimate" or "embarrassing" details constitute information of a personal nature. The Court went further, however, to hold that "private" and "confidential" information is also included within that definition. Thus, the question is whether the information is "of an embarrassing, intimate, private, or confidential nature." The Court held that the employees' home addresses and phone numbers fall "squarely within the plain meaning of this definition." Even if a person has released that information in a different context, that disclosure "does not automatically remove the protection of the privacy exemption and subject it to disclosure in every other circumstance."

With respect to the second prong of the test, the Court applied the analysis set forth in *Mager v Dep't of State Police*, 460 Mich 134 (1999), which has been described as the "core purpose test." Under that analysis, the Court looks at the extent to which disclosure "would serve the core purposes of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government." The Court ruled that disclosure of the employees' home addresses and phone numbers would reveal "little or nothing" about the government's conduct, and would not further the policy supporting the FOIA. When weighed against the privacy interests involved, disclosure would result in a "clearly unwarranted" invasion of privacy. Therefore, the Court held that the information was exempt under FOIA. 🏠

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

I Can't Believe It's Not B. . .

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

The following was reported in the January/February, 2004 edition of *Michigan History* magazine:

*The smuggling had gone on for years between Michigan and Wisconsin. Every week, hundreds of people clandestinely acquired the illegal substance in Upper Peninsula border towns and then bootlegged it south of the state line, secreted in their cars, where outlaw badgers eagerly consumed it.*¹

What was this substance that was obviously controlled and prohibited in Wisconsin, but uncontrolled and freely and legally available in the freewheeling state of Michigan? What dangerous concoction was this that caused the legislature of the great state of Wisconsin to outlaw its sale and use? What addictive elixir could have such an appeal that ordinary citizens would risk life, limb, and freedom to smuggle it across state lines? This was the 1960s, so it couldn't be *demon rum*. No, ma'am. It was that bane of all healthy, God-fearing, and law-abiding people—yellow-colored margarine! (A/k/a in Wisconsin as “the M word.”)

In France, in 1869, in response to an offer from Napoleon III of a cash prize to any person who could produce a replacement for butter that would be less expensive and have a longer shelf life, a French chemist, Hippolyte Mege-Mouries, developed a product that won the prize. The formula for the winning product used *margaric acid*, and so the product was called “margarine.”

Margarine was made from purified beef fat² instead of cow's milk, and a patent for its production and use in this country was sold to the United States Dairy Company in 1873.

As the years went on, producers of margarine developed a product that became more and more like butter in “taste, odor, texture, spreadability, melting point, and general appearance,” and, thus, “it became more and more difficult for the consumer to tell if the grocer was serving up butter or a cheaper synthetic surrogate.”³

Because of its far lesser cost, margarine began having an adverse affect on the sale of butter. This became a concern for dairymen, and several attempts were made to deal with this economic advantage. Those attempts included the imposition of a federal tax upon oleo and the passage of a law in Michigan

in 1887 which provided that all proprietors of stores selling the substitute spread—or keepers of hotels, eateries, or boarding houses where it was served—must place on their outside doors and “on the walls of any store or room where food is sold or furnished, a white placard on which is printed . . . the words ‘Oleomargarine Sold or Used Here.’”

In 1891, the Michigan legislature declared, “that the use of oleomargarine . . . or any other substitute for butter in any of the public institutions of this state . . . is hereby prohibited.” A few years later, the legislature prohibited the manufacturing and/or sale of any product which “shall be in imitation of yellow butter.” Violators were subject to a fine of up to \$500⁴ and/or imprisonment for up to three (that's right, 3) years.

Enforcement of these laws was assigned to the Michigan dairy and food commissioner, but the commissioner found that all too often local prosecutors were reluctant to prosecute their fellow citizens because of their choice of bread spread. In fact, the dairy and food commissioner observed in 1900 that “in the city of Detroit the prejudice against all oleomargarine legislation is so pronounced and the environment of the city



In France, in 1869, in response to an offer from Napoleon III of a cash prize to any person who could produce a replacement for butter that would be less expensive and have a longer shelf life, a French chemist, Hippolyte Mege-Mouries, developed a product that won the prize. The formula for the winning product used *margaric acid*, and so the product was called “margarine.”

so unfavorable that it is almost impossible to secure convictions." A little later, he complained that "I have more trouble and more court work with oleomargarine dealers than all the rest put together."⁵

Prosecutors who were willing to press charges for margarine law violations often encountered reluctant judges. Take, for example, the case of Frank Lafer. In May 1912, Mr. Lafer's store in Cadillac Square in Detroit had a large sign in front that said, "Try Our Butter." All of the one-pound packages displayed in the store window, however, were oleomargarine. Mr. Lafer was prosecuted for displaying a sign which read, "Reduce your butter bill 35%...by using Double C Oleomargarine." It took local prosecutors two trips to the Michigan Supreme Court to get a favorable ruling directing local judges to proceed with the charges against Mr. Lafer.

In the first case, *Shepherd v. Judge of The Recorder's Court of The City of Detroit*, 175 Mich 113 (1913), the Supreme Court denied the Wayne County prosecutor's application for a writ of mandamus ordering the recorder's court judge to proceed with Lafer's criminal prosecution. The Supreme Court denied the request due to the overly broad language in the title of the bill, which stated, "An act in relation to the manufacture and sale of oleomargarine or imitation butter."

The second case, *Jasnowski v. Judge of Recorder's Court of The City of Detroit*, 192 Mich 139 (1915), came after a charge under a new act entitled, "An act to regulate and prohibit false, deceptive, fraudulent and misleading advertising in newspapers, periodicals or other publications, or by circulars or hand bills." Addressing another challenge to the title of the act, this time the court upheld the statute and ordered the prosecution of Mr. Lafer to proceed.

Eventually, margarine manufacturers changed the composition of their product relying more and more on domestic vegetable fats, thereby giving them strong allies in their legislative battles. Throughout these battles, one of the most critical issues with margarine was the manufactured yellow color. The more it looked like butter, the greater the opposition it faced. Likewise, the more it looked like butter, the more of it was sold. In fact, at the beginning of the twentieth century, some oleo manufacturers gave little dye containers to those who purchased their raw products so that consumers could use them to tint their oleo to look like the real thing.⁶

The popularity of margarine increased even more during the Great Depression. This was evidenced by the fate of a Michigan law enacted in 1931. The law, as proposed in the state legislature "would require anyone manufacturing, sell-

ing or serving margarine (except in the case of one's family) to purchase from the Department of Agriculture an annual license. The measure also forbade the peddling of oleo from any vehicle. The electorate of Michigan was allowed to vote on the wisdom of these ideas in 1932 and rejected them by a 2 to 1 majority."⁷

Oleomargarine became even more accepted during World War II when butter was in short supply. As a result, legislative controls over the manufacture and sale of oleomargarine, including prohibitions against coloring it yellow in the factory, were lifted, but it took time. It wasn't until 1985, for example, that the restriction against serving margarine in state institutions and facilities was repealed.

There still is, however, a section of the Penal Code [MCL 750.25] which makes it a crime to sell as butter a product which is "adulterated." A product is adulterated if: (a) the fat content is not exclusively derived from cow's milk; or (b) the butter contains less than 80 percent milk fat.

And Wisconsin? Our neighboring state finally saw the light in 1967 and lifted its ban on margarine, thereby ending the oleo bootlegging activity along its border with Michigan's U.P. and adversely impacting the profits of many Michigan grocers—and gas stations, which sold oleomargarine to Wisconsin residents along with gas and oil. 🏠

Author's Note

For more detail on the history of the butter-margarine wars, go to <http://www.michiganhistorymagazine.com/extral/barnett/butterwars.pdf>

Endnotes

- 1 *Michigan History*, January/February 2004, p. 46.
- 2 The Latin word for beef is *oleum*, from which came the word "oleo."
- 3 *Michigan History*, January/February 2004, p. 47.
- 4 *Michigan History*, January/February 2004, p. 47.
- 5 *Michigan History*, January/February 2004, p. 48.
- 6 *Michigan History*, January/February 2004, p. 50.
- 7 *Michigan History*, January/February 2004, p. 51.