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Mediation and the Public Body Client

By Richard J. Figura, Simen, Figura & Parker, PLC

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c o n t e n t s

In August, 2000, the Michigan Supreme Court adopted amendments to the Michigan Court Rules to provide for various alternative dispute resolution processes that could be included in a court's ADR plan, should the court choose to adopt one. Pursuant to MCR 2.410, alternative dispute resolution (ADR) means "any process designed to resolve a legal dispute in the place of court adjudication, and includes settlement conferences ordered under MCR 2.401; case evaluation under MCR 2.403; mediation under MCR 2.411; domestic relations mediation under MCR 3.216; and other procedures provided by local court rule or ordered on stipulation of the parties." These amendments added a new facilitative process known as mediation to the court rules,[1] and what was formerly called "mediation" became "case evaluation."

Ever since the adoption of these amendments, an increasing number of trial courts have adopted ADR plans which have implemented mediation practices. As a result, in many circuits today most civil lawsuits are referred to mediation with the mediation required to be completed before the final pre-trial conference. While there are some practitioners out there who view court ordered mediation as just one more obstacle to get past on the way to trial, the majority recognize it as a cost effective opportunity to resolve a dispute in a manner acceptable to the client, thereby saving the costs of litigation, including the damaged goodwill of the litigants as well as their out of pocket dollar costs.

Recognizing that any civil litigation in which your public body client is involved is likely to go to mediation, this article will address what you, as counsel, can do to ensure your client is adequately prepared to participate in the mediation process and to increase the likelihood that your and your client's efforts will result in an acceptable settlement.

Mediation Confidentiality and the Open Meetings Act

Pursuant to MCR 2.410, the court can direct (and it always does) that the parties, their agents, representatives, insurance carriers, and others, attend the ADR proceeding and that the persons attending "have information and authority adequate for responsible and effective participation in the conference for all purposes, *including settlement*." (Emphasis supplied).

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Chairperson's Corner

By William B. Beach, Miller Canfield

The annual report summarizing the activities of the Public Corporation Law Section during the year commencing June 27, 2008 through June 25, 2009, was submitted to the State Bar as follows:

> The Public Corporation Law Section ("PCLS") held its annual meeting on Friday, June 27, 2008, in the rustic surroundings of Drummond Island Resort. Council members were elected for their respective terms. Officers were elected to serve until the next annual meeting, June 26, 2009. The section meeting followed, at which goals for the year were established and a council committee schedule was determined for the coming year. The locations were set, and the number of conference call meetings was increased to reduce hazardous driving during the winter.
>
> The Annual PCLS meeting was held in conjunction with the 10th Annual Summer Education Conference. Heady topics such as municipal finance, labor law, governmental immunity, legislative updates from both Lansing and Washington, D.C., and the tricks of holding and making a record at public hearings were discussed. Justice Weaver regaled the group with stories from the Supreme Court bench, and bocce ball was the sport of choice.
>
> Several council members attended the State Bar Annual Meeting in the fall, and several others participated both as speakers and registrants in the joint Real Property Law & PCLS annual Land Use Seminar.

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PCLS joined with the Administrative Law section to produce a seminar on tax appeals before the State Tax Tribunal in January, which was well attended.

The PCLS winter seminar was held on Friday, February 6, 2009, at St. John's Inn. It focused on giving practical advice to public agency attorneys in the contracting economy. Frank Audia, from Plante & Moran, started out by scaring everyone with doomsday predictions. The AIA construction contracts were then dissected and taken apart to make them owner-friendly. The day was capped off with ADA and retirement issues for public entities.

On March 11, PCLS participated in a new State Bar-sponsored 2009 Law School for Legislators. Eight PCLS members spent two hours lecturing on local government topics to two legislative aides, someone from MSU Extension Services, and a man with a brown paper bag. No legislators.

The *Public Corporation Law Quarterly* became an Internet paper ahead of its time. Most section members now receive it via e-mail. It tackled scholarly subjects such as government speech, home addresses and telephone numbers under FOIA, and many, many others.

The 11th Annual Summer Educational Conference will again be co-sponsored by PCLS and the Michigan Association of Municipal Attorneys at the Grand Hotel on Mackinac Island on June 26-27, 2009. The Annual meeting will be held on June 26.

It has been my pleasure to serve with a great group of very talented public law attorneys over the past year. Council members include in-house and out-house attorneys, big firms and small firms. I invite suggestions and inquiries about the section's activities and ask for volunteers to serve on our publication, legislative, educational, and website (and other) committees.

Bill Beach, Chair

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This can present a problem for counties, cities, villages, townships, and other public bodies governed by a legislative body, because in those cases it is only the legislative body which has the authority to approve a settlement. Literal compliance with this rule would require a quorum of the legislative body to participate in the mediation. That, however, would require the mediation session to be open to the public under the Michigan Open Meetings Act (OMA).[2] Under the OMA, all decisions of a public body shall be made at a meeting open to the public.[3] A meeting is "the convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy…."[4]

Since the attendance of a quorum of a public body at a mediation would require the mediation be open to the public, that would be out of compliance with the confidentiality requirement of MCR 2.411 which provides that, "Any communications between the parties or counsel and the mediator relating to a mediation are confidential and shall not be disclosed without the written consent of all parties." Getting such written consent is highly unlikely and, in any event, a mediation conducted in full view of the public would undermine the willingness of the parties to speak with candor, one of the main purposes of mediation confidentiality.

A better option which is followed in one form or another in many circuits is for the public body to be represented at the mediation by representatives of the legislative body numbering less than a quorum along with the chief administrative officer, if there is one, and other persons with information important to the issues being mediated.

Since they do not constitute a quorum, the representatives of the public body can comply with the court rule's confidentiality requirements and meet in a mediation session which is not subject to the OMA. Those representatives will not, however, be able to enter into a binding agreement, since legislative body approval is required, and that approval (or decision) can only occur at a meeting open to the public.

They can, however, enter into a settlement agreement which is specifically made subject to approval of the legislative body. In that regard, it helps to have the mediation scheduled so that a regular or special meeting of the legislative body will be held shortly after the mediation (usually one week or less). This is important for two reasons. First, if the agreement is not approved by the legislative body, the parties and the court's ADR clerk need to know that as soon as possible because of the court's various scheduling deadlines and trial schedule. Second, the longer the time between the mediation and the meeting, the greater likelihood that "buyer's remorse" might set in, causing the representatives at the mediation to change

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their mind about recommending the settlement to the public body, and possibly even voting against it.

Choosing the Mediation Team

You, as counsel, need to consider who should be on the mediation team. Sometimes your hands are tied because, due to time constraints, only certain members of the legislative body may be available for the mediation session. Nevertheless, you should strive to have a team consisting of those members who are likely to reflect, or at least be aware of, the majority view of the public body. Additionally, the members selected should be those who have the respect of their colleagues so that any recommendation they make, if there is a settlement, will likely be approved.

It could be a waste of time, for example, if the governing body was represented at the mediation by two of its members who are always on the short end of a 5–2 vote. While you can never accurately predict what action the body will take on a recommendation made by one or more of its members, by carefully choosing who will participate in the mediation you can minimize the likelihood that a proposed settlement will be rejected by the public body.

Additionally, as pointed out below, you should also discuss which members of the team will be the primary spokespersons for the public body during the mediation.

Preparing the Public Body for Mediation

Experience shows that most legislative bodies and their members are unfamiliar with mediation. You, as legal counsel, should take the time to carefully explain the process to them. This explanation should include several points.

1. *Explaining the process*. Some education as to what the mediation process is all about is desirable where the body has had no experience with it or when there are new members on that body. This can be done in a closed session under the OMA as part of consulting with legal counsel regarding settlement strategy in the particular case. It can also be done in an open meeting. The public body may want the public to also learn about mediation to have a better understanding of the process and the public body's obligations when participating in that process.

   Whether it's done in an open or closed session, some concepts that should be explained include the following:
   - The mediator is a facilitator and has no decision-making power. Therefore, the mediator will not be deciding which party is right or wrong; nor will he or she be imposing a settlement on the parties.
   - The mediation is confidential. Statements made during the mediation, including statements made in written submissions, may not be used in any other proceedings, including trial.
   - If the mediation is successful, it will result in a signed mediation agreement which is binding on the parties (subject, of course, to approval by the legislative body).

2. *Preparing for the mediation.* Along with helping the legislative body decide who will serve on its mediation team, counsel should discuss with the public body the issues in the pending litigation, potential settlement strategies, and the method of addressing those issues in the mediation. This can be done in a closed session under the OMA as part of consulting with legal counsel regarding settlement strategy. This discussion should cover several items.
   - Discuss the strengths and weaknesses of all parties in the case and have them focus on those things on which they may be willing to agree. Remind them that the mediation process is an empowering one and gives the parties an opportunity to craft a settlement which meets their specific requirements rather than having a judgment imposed on them by the court.
   - If the lawsuit involves a claim for damages, discuss how much, if anything, the public body might be willing to pay, and the conditions under which it might be willing to do so. Having this discussion before the mediation will enable better use of the time spent in mediation.
   - If the lawsuit involves a dispute with a party with whom the public body will have a continuing relationship, such as a dispute between a city and an adjoining township, consider developing settlement proposals which will not only end the current dispute, but also lead to better future relations between the two entities.
   - Think outside the box. There can be times when a settlement can be reached by the parties discussing other matters not directly involved in the pending litigation. For example, is there something your client can do for the other party that

he didn't ask for, but which may make him more amenable to settling on terms acceptable to your client? If so, prepare your team to raise these issues at mediation.

- Discuss who the primary spokesperson for the public body will be and what role each member of the mediation team will play during the mediation. Often, it is better if the lawyers take a back seat and let the parties talk directly to each other as much as possible. After all, these are the persons who will have to accept responsibility for any settlement.
- Prepare them to expect little or no progress at the beginning of the mediation. Tell them not to get discouraged and give up, but to exercise patience. Often it takes hours for parties who appear hopelessly deadlocked to suddenly find agreement on some point which begins the process of reaching settlement.
- Remind them that SCAO statistics show each year that approximately 98 to 99 percent of all circuit court civil cases are resolved without a trial. Since there is a 98 to 99 percent chance that their case will not go to trial and that there will be a settlement some day, why not get it settled earlier rather than later—before incurring extensive attorneys fees and costs.[5]

During the Mediation

In your role as legal counsel, there are certain things you will be responsible for during the mediation. You can play a key role in getting the dispute settled. Following are some of the things you should do to assist your clients in reaching a settlement.

1. *Take off the litigator hat.* As a mediator, I always ask legal counsel to take off their litigator hats during the mediation and use their skills to help me get their clients to focus on finding a common ground on which settlement building can start. Finding the common ground is a primary goal of mediation, and that goal can't be reached if counsel for the parties are drawing lines in the sand and insisting that their position is unassailable. You and your clients are not bound by anything said in the mediation, so help your client find that middle ground by encouraging him to move in that direction.
2. *Keep the train on track*. Often clients will focus on the perceived correctness and righteousness of their position and get their dander up when they hear the other party criticize them and/or their legal stance. Keep them focused on the things they share in common with the other side. Don't let them get angry or allow their anger to dictate what they are or are not willing to agree to. Keep them on the path of seeking an acceptable settlement.
3. There may be times when your team needs to meet privately, either with or without the mediator, to discuss an issue. Assist the mediator by letting him or her know when you think a private caucus is necessary. Conversely, help the mediator find those things which your clients need to say to the other side in a joint session. Mediation is not the time to hold back on ideas and positions. Lay your cards out on the table. Remember, it's a confidential proceeding, and nothing said at the mediation can be used in any subsequent proceedings.
4. Remind the other party that your mediation team cannot bind the public body, and that any agreement will have to be approved by the public body's legislative body. At the same time, offer whatever assurances you and your team can offer to the other side that you believe an agreement will likely be approved.

The Agreement

If an agreement is reached, it should be reduced to writing at the mediation session. The agreement should specifically provide that it is not binding unless and until it is approved by the legislative body. In that regard, it is recommended that a regular or special meeting of the public body be scheduled within a day or two (no less than a week) following the mediation for purposes of having the body consider the proposed settlement.

It is recommended that the agreement contain specific provisions requiring the public body's representatives at the mediation to not only see that the settlement is placed before the public body for consideration, but that they will support approval of the settlement. Not too long ago, two township board representatives participating in a mediation on behalf of a township in Grand Traverse County reached an agreement with the plaintiff. When the proposed settlement came before the township board for approval, however, the two board members who participated in the mediation argued against the settlement they had reached and joined the majority in voting it down. The circuit court was not pleased with the officials' conduct and imposed costs and sanctions against the township.

This can be avoided if the agreement contains provisions binding the signers to support the proposed settlement. In cases where I serve as a mediator, the final agreement usually contains one or more provisions similar to the following which came from a settlement agreement involving a township defendant.

1. The participants of the Township in the mediation who are members of the Township's Board of Trustees

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agree to place this settlement before said Board for its consideration at a special meeting to be held no later than _____.

2. At said meeting, the participants of the Township in the mediation who are members of the Township's Board of Trustees agree to recommend approval of this settlement.
3. The participants of the Township in the mediation who are not members of the Township's Board of Trustees, if asked to participate in any way by said Board, agree to support the recommendation to the Board that this settlement be approved
4. The representatives of the plaintiff in the mediation, if asked by the Township to provide any information or assistance in their efforts to seek Board approval of this settlement, agree to provide such information or assistance.
5. If this settlement is not approved by the Township's Board of Trustees, the parties agree to notify the mediator of same forthwith and further agree to reconvene at a date and time mutually convenient and as determined by the mediator.

   Because of the time gap between the mediation and the meeting of the legislative body, I also usually include a special confidentiality provision as well. The purpose of the provision is to maintain the confidentiality of the mediation and the settlement agreement until such time as the legislative body can consider the proposed agreement. Following is a sample of such a provision.
6. CONFIDENTIALITY. The parties acknowledge that, pursuant to Michigan Court Rule 2.411(C)(5), this mediation proceeding is confidential and no participant shall disclose any of the discussions that took place in the mediation proceeding and no party shall disclose the terms and conditions of this agreement or any exhibit thereto until such time as the Board of Trustees considers this settlement agreement and votes upon it in an open meeting; provided, however, that the parties agree that this agreement and the exhibits attached hereto, as well as any discussion had during the mediation, may be disclosed to the members of the Township Board of Trustees upon the members thereof agreeing to the confidentiality of such communications.

Conclusion

Conducting a mediation in which a public body is a participant can present issues and challenges not present in mediations involving non-public parties. The final settlement decision must be made by a majority of a board, council, or commission. That decision must be made at a meeting open to the public, but the mediation itself has to comply with confidentiality requirements. With a little effort and careful planning by counsel for the public body, the obligations imposed by the OMA and the court rules can be met and there can be a successful mediation.

If counsel also takes the time to educate the client as to the mediation process and to prepare the client for its participation in the mediation proceeding, the chances of a successful mediation are increased dramatically. This takes on added importance in these days of shrinking public revenues and tightening budgets. Settlement of disputes on terms reached by the parties themselves can go a long way toward preserving public funds and other valuable resources.

Endnotes

1 MCR 2.411.

2 MCL 15.261 et seq.

3 MCL 15.263(2).

4 MCL 15.262(b).

5 Of the 48,628 civil cases disposed of by the state circuit courts in 2008, 305 were disposed of by jury verdict and 437 by bench verdict. *Annual Report of the Michigan Supreme Court, 2008.*

New Medical Marijuana Law Presents Legal Challenges to Michigan Municipalities

By Michael D. Homier and Laura J. Garlinghouse, Foster, Swift, Collins & Smith, PC

In 2008, Michigan became the 13th state to legalize medical marijuana. Now, municipalities are faced with determining if, and how, they can regulate the use of medical marijuana at the local level. For example, some municipalities may be considering regulating the location of marijuana dispensaries. Others may wish to regulate the locations where marijuana may be grown—allow in all districts, or only in the business zoning district? And there may be interest in regulating the number of marijuana plants that a grower may grow for other "patients." Supporters of medical marijuana who oppose municipal regulations could raise legal challenges against enforcement of local regulation. This article addresses two possible challenges: preemption by state law and protection under the Michigan Right to Farm Act.

Michigan Medical Marihuana Act

The Michigan Medical Marihuana [sic] Act, MCL 333.26421 *et seq.* (the "Act"), was enacted in December 2008 after Michigan voters approved a medical marijuana ballot initiative. The Act allows a "qualifying patient" who has been issued and who possesses a registry identification card to possess up to 2.5 ounces of usable marijuana. MCL 333.26424(a). If the patient has not specified that a primary caregiver will cultivate marijuana for the patient, then the patient also may keep up to 12 marijuana plants in an "enclosed, locked facility." MCL 333.26424(a). A "qualifying patient" is a person who has been diagnosed by a physician as having a debilitating medical condition as defined in the Act. MCL 333.26423(h).

The Act also permits a "primary caregiver" who has been issued and who possesses a registry identification card to possess up to 2.5 ounces of usable marijuana for each qualifying patient and to keep up to 12 marijuana plants for each qualifying patient who has specified the primary caregiver in the registration process. MCL 333.26424(b). Each caregiver may assist up to five qualifying patients. MCL 333.26426(d). A registered caregiver may receive compensation for the costs associated with providing marijuana to a qualifying patient. MCL 333.26424(e).

Now that the Act is in effect, municipalities are either considering or have adopted ordinances regulating how marijuana is used and distributed. These local regulations are not without controversy. Some members of the public want local governments to regulate medical marijuana because they are concerned about children gaining access to marijuana and about the potential impact on neighborhoods. Other members of the public object to local governments placing additional restrictions on the use of marijuana, arguing that the Act helps terminally ill people who are unable to grow medical marijuana on their own.

Municipalities have responded to the public debate in various ways. However, the critical threshold question is whether local governments have the authority to regulate medical marijuana through police power ordinances or through zoning.

Municipal Authority to Regulate Medical Marijuana

Preemption

Neither the Act nor the administrative rules expressly preempt or limit municipal regulation of medical marijuana. However, a municipal ordinance may be preempted if it is in direct conflict with the Act or if the Act occupies the same field of regulation to the exclusion of the ordinance.

Generally, the mere fact that the State has regulated a subject does not prevent a municipality from adopting additional requirements. *City of Detroit v Qualls*, 434 Mich 340, 362; 454 NW2d 374 (1990). Thus, if the State prohibits certain conduct, a municipality may go further in its own prohibition. *Id.* However, a municipality may not authorize what the State has prohibited, nor may it prohibit what the State has expressly licensed or authorized. *Id.* Such a direct conflict will invalidate the municipal ordinance.

The Michigan Court of Appeals addressed this issue in the context of cigarette smoking in restaurants. In *Michigan Restaurant Ass'n v City of Marquette*, 245 Mich App 63, 64; 626

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NW2d 418 (2001), a city adopted an ordinance banning smoking in all restaurants. A state statute prescribed the maximum number of smoking seats that a restaurant could maintain. *Id.* at 65. Thus, the city ordinance was more stringent than the state statute. *Id.*

In determining whether the ordinance was valid, the Court first considered whether the ordinance and the statute were in direct conflict. *Id.* at 66. That is, the Court looked at whether the ordinance prohibited what state law permitted. *Id.* The Court found that a conflict existed. In so finding, the court focused on whether the area regulated by the ordinance was local in nature or whether it was a statewide issue, and it concluded that smoking was *not* a local issue because the dangers of secondhand smoke were not unique to that city. *Id.* at 66-68. The Court also considered whether the ordinance was "merely an extension of state law." *Id.* at 67. The Court noted that the City could properly *extend* the state law by creating a higher percentage of non-smoking tables. *Id.* Prohibiting smoking altogether, however, constitutes more than a mere expansion of state law. *Id.*

In light of *Michigan Restaurant Ass'n*, a person challenging an ordinance could argue that a municipality may not adopt a blanket prohibition on medical marijuana because doing so would prohibit what state law permits. *Id.* at 66. In other words, an ordinance prohibiting medical marijuana would directly conflict with the Act and would likely be preempted.

Whether a municipality may regulate (rather than prohibit) medical marijuana is a more difficult question. The Court in *Michigan Restaurant Ass'n* suggested that a municipality may "extend" a state law. The court noted by way of example that a city could create a higher percentage of nonsmoking tables in restaurants, but it could not impose an outright ban on smoking. The court's opinion at least opens the door to municipal regulation of medical marijuana. However, municipalities and their legal counsel should closely examine whether a particular ordinance merely extends the Act or whether the ordinance prohibits something that the Act expressly authorizes.

Furthermore, the Act provides that a qualifying patient or primary caregiver who uses medical marijuana in compliance with the Act "shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau." MCL 333.26424(a), (b). If an ordinance imposes stricter prohibitions on medical marijuana use, then a person might comply with the Act but violate the ordinance. This is yet another issue that municipalities and their legal counsel should consider in drafting an ordinance regulating marijuana use.

If a court finds an ordinance is preempted by state law, it may hold that the ordinance is unenforceable.

Additionally, the ordinance may be preempted if the Act occupies the same field of regulation to the exclusion of the ordinance. This type of preemption may occur even if the ordinance and statute do not directly conflict. *People v Llewellyn*, 401 Mich 314, 322; 257 NW2d 902 (1977). Courts look to the pervasiveness of the state regulatory scheme and whether the nature of the regulated subject matter requires uniform, statewide treatment or whether it calls for regulations that are adapted to local conditions. *Id.* at 323-328.

The pervasiveness of the Act is a subjective inquiry that would require a court to evaluate the scope of the Act and determine whether the legislature has regulated medical marijuana exclusively. As to the nature of the subject matter, medical marijuana is likely a statewide issue, not a local issue. In other words, the benefits and risks of medical marijuana are not unique to municipalities of certain sizes or in certain parts of the state.

If a court finds an ordinance is preempted by state law, it may hold that the ordinance is unenforceable. Municipalities should consult with their legal counsel regarding this risk when deciding whether to adopt an ordinance regulating medical marijuana.

Right to Farm Act

Proponents of medical marijuana have argued that the Michigan Right to Farm Act, MCL 286.471 *et seq.* (the "RFA"), precludes municipalities from imposing zoning or other regulations on the use of medical marijuana if those regulations conflict with the RFA.

The RFA protects farms and farm operations that conform to generally accepted agricultural and management practices, which are defined by the Michigan Commission of Agriculture. MCL 286.473; MCL 286.472(d). Conforming farms and farm operations generally cannot be deemed public or private nuisances. MCL 286.473.

The RFA expressly preempts "any local ordinance, regulation, or resolution that purports to extend or revise in any manner the provisions of this act or generally accepted agricultural and management practices developed under this act." MCL 286.474(6). Furthermore, local units of government "shall not enact, maintain, or enforce an ordinance, regulation, or resolution that conflicts in any manner with this act or generally accepted agricultural and management practices developed under this act." *Id.* Consequently, any municipal ordinance (including a zoning ordinance) is unenforceable to the extent that it prohibits conduct that is protected by the RFA. *Charter Tp of Shelby v Papesh*, 267 Mich App 92, 107; 704 NW2d 92 (2005).

Because medical marijuana is new to Michigan's legal landscape, the courts have not yet addressed whether it is affected by the RFA. A person challenging an ordinance could argue that the RFA restricts a municipality's ability to regulate medical marijuana because the cultivation of marijuana qualifies as a "farm" or "farm operation." The RFA defines those terms as follows in relevant part:

a. "Farm" means the land, plants, animals, buildings, structures, including ponds used for agricultural or aquacultural activities, machinery, equipment, and other appurtenances used in the commercial production of farm products.

b. "Farm operation" means the operation and management of a farm or a condition or activity that occurs at any time as necessary on a farm in connection with the commercial production, harvesting, and storage of farm products, and includes, but is not limited to:

   i. Marketing produce at roadside stands or farm markets.

   * * *

c. "Farm product" means those plants and animals useful to human beings produced by agriculture and includes, but is not limited to, forages and sod crops; grains and feed crops; field crops; dairy and dairy products; poultry and poultry products; cervidae; livestock, including breeding and grazing, equine, fish, and other aquacultural products; bees and bee products; berries; herbs; fruits; vegetables; flowers; seeds; grasses; nursery stock; trees and tree products; mushrooms and other similar products; or any other product which incorporates the use of food, feed, fiber, or fur, as determined by the Michigan Commission of Agriculture.

MCL 286.472.

A person challenging an ordinance could argue that marijuana is a "farm product" because it is a plant that is useful to human beings. The legislature has determined that the marijuana has "beneficial uses" because it can be used to treat or alleviate pain. MCL 333.26422(a). Further, it is produced by agriculture. "Agriculture" is not defined in the RFA, but it is defined in the dictionary as "the science, art, or practice of cultivating the soil, producing crops, and raising livestock and in varying degrees the preparation and marketing of the resulting products." *Merriam-Webster Online Dictionary* (2009). Marijuana plants are a crop that can be produced and would therefore qualify as a plant produced by agriculture. Thus, a plain reading of the RFA suggests that marijuana qualifies as a "farm product."

The next inquiry is whether a person who grows marijuana in accordance with the Act is maintaining a "farm" or a "farm operation" under the RFA. Both of these terms require the "commercial production" of farm products. The Michigan Court of Appeals has defined "commercial production" as "the act of producing or manufacturing an item intended to be marketed and sold at a profit." *Charter Tp of Shelby v Papesh*, 267 Mich App 92, 101; 704 NW2d 92 (2005). There is "no minimum level of sale that must be reached[.]" *Id.* at n 4.

Because the RFA may protect the commercial production of marijuana, municipalities should consult with their legal counsel to evaluate the enforceability of any ordinances regulating medical marijuana.

Conclusion

In light of the public debate about medical marijuana, many municipalities are considering adopting an ordinance that regulates its use. However, municipalities should carefully consider the specific subject of the proposed ordinance, and weigh the risk that such an ordinance may be challenged on the grounds of preemption or the Michigan Right to Farm Act. Perhaps more than ever, it is important for municipalities to carefully evaluate the enforceability of any ordinance regulating marijuana before adopting it.

***Mettler Walloon L.L.C. v Melrose Township* and *Cummins v Robinson Township*:**

Are Michigan Courts Moving Toward a "Shocks the Conscience" Standard for Land Use Claims Brought Under State Substantive Due Process?

By Drew W. Broaddus, O'Connor, DeGrazia, Tamm & O'Connor, PC, Bloomfield Hills

Introduction

Substantive due process has been described as an "amorphous" constitutional doctrine[1] which, in the eyes of many federal judges, has little, if any, application in the land use context.[2] This view is reflected in Sixth Circuit decisions which have applied the demanding "shocks the conscience" standard to land use claims brought under U.S. Constitution's substantive due process protections; federal courts frequently dismiss such claims on summary judgment.[3]

Michigan courts, however, have been slightly more inclined to allow similar claims, pled under the State Constitution, to survive summary disposition. This is because Michigan courts have historically applied an analysis which is less demanding than the "shocks the conscience" standard.[4] However, two recent, published decisions of the Michigan Court of Appeals suggest that "shocks the conscience" may soon also be the standard for land use claims pled under the Michigan Constitution's substantive due process principles.

In *Mettler Walloon, LLC v Melrose Township,*[5] the court noted - in affirming the dismissal of a substantive due process challenge to the denial of a Planned Unit Development (PUD) - that "[s]undry decisions, both federal and state, including those involving land use planning, apply the shocks-the-conscience standard." The court went on to discuss several decisions in support of this proposition, citing opinions interpreting the Michigan and U.S. Constitutions without drawing any distinction between the two.[6] Although *Mettler Walloon* involved a claim brought only under the U.S. Constitution, the Court of Appeals subsequently relied upon *Mettler Walloon*, and applied the "shocks the conscience" standard to a substantive due process claim pled under both the Michigan and U.S. Constitutions in *Cummins v Robinson Township*.[7]

These two recent decisions, when read together, suggest that the Michigan Court of Appeals may be moving toward the "shocks the conscience" standard for all substantive process claims in the land use context, even those pled only under the Michigan Constitution. This would be a significant development; land use claimants often choose to plead their claims under state substantive due process for a number of reasons that will be discussed below. Given the currency of this issue,[8] a closer look at the concept of substantive due process generally, and these two cases in particular, is warranted.

Development of Substantive Due Process

The Fourteenth Amendment to the U.S. Constitution and Michigan's Const 1963, art 1, § 17 guarantee that no state shall deprive any person of "life, liberty or property, without due process of law."[9] "Textually, only procedural due process is guaranteed by the Fourteenth Amendment; however, under the aegis of substantive due process, individual liberty interests likewise have been protected against certain government actions regardless of the fairness of the procedures used to implement them."[10]

The term "substantive due process" is commonly used in two ways: first to identify a particular line of cases, and second to signify a particular attitude toward judicial review under the Due Process Clause.[11] According to at least one constitutional scholar, the term "substantive due process" began to take form in 1930's legal casebooks as a categorical distinction of selected due process cases, and by 1950 had been mentioned twice in Supreme Court opinions.[12] However, Justice Antonin Scalia has opined that the U.S. Supreme Court may have applied the concept as early as 1857.[13]

Irrespective of any controversy surrounding when the doctrine came into being, the existence of substantive due process,

as a doctrine distinct from procedural due process, was clearly established in state and federal decisional law by the time of Michigan's 1961 Constitutional Convention.[14] The Michigan Supreme Court has since held that the protections afforded by the two Due Process Clauses are coextensive.[15]

In interpreting the U.S. Constitution, the Supreme Court first articulated the "shocks the conscience" standard for substantive due process claims in *Rochin v California,*[16] where the Court found that the forced pumping of a suspect's stomach enough to offend due process as conduct "that shocks the conscience" and violates the "decencies of civilized conduct."[17] In the intervening years "[the Court] repeatedly adhered to *Rochin's* benchmark[,] ... [finding] that the substantive component of the Due Process Clause is violated by executive action only when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense. While the measure of what is conscience-shocking is no calibrated yard stick, it does ... point the way."[18]

Although initially articulated as a limitation on the exercise of *executive* power (and in particular, cases involving the use of force),[19] the "shocks the conscience" standard was later applied in federal land use cases as well, with a particularly thorough analysis coming from the Eastern District of Michigan and Sixth Circuit's opinions in *Pearson v Grand Blanc.*[20] In affirming the trial court's dismissal of a substantive due process claim which arose out of "the routine denial of a zoning change," the U.S. Court of Appeals for the Sixth Circuit court noted: "Although the 'shocks the conscience' terminology ... is more apt for cases involving physical force, it is useful in the zoning context too, to emphasize the degree of arbitrariness required to set aside a zoning decision by a local authority--and to underscore the overriding precept that 'arbitrary and capricious' in the federal substantive due process context means something far different than in state administrative law."[21] Applying the "shocks the conscience" standard proved to be fatal to many land use claims brought under federal substantive due process, as reflected in *Warren v City of Athens, Ohio*,[22] where the Sixth Circuit observed that its prior decisions "cast a dim light on the prospect that ... substantive due process should have any place in" land use cases.[23]

Although Michigan courts have likewise recognized substantive due process protections under Const 1963, art 1, § 17, they have not historically applied the "shocks the conscience" standard in the land use context. Under Michigan law, to establish that a zoning regulation violates plaintiffs' substantive due process rights, plaintiff must show either (1) that there is no reasonable governmental interest being advanced by the present zoning classification or (2) that an ordinance is unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of other types of legitimate land use from the area in question.[24] When a substantive due process challenge is brought under the Michigan Constitution, courts have noted that the "ordinance is presumed valid," and "the challenger has the burden of proving that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of the property; that the provision in question is an arbitrary fiat, a whimsical ipse dixit; and that there is not room for a legitimate difference of opinion concerning its reasonableness...."[25]

Some decisions interpreting the Michigan Constitution state that, in order to show that an ordinance is not rationally related to a legitimate government interest, a challenger must "negative every conceivable basis" which might support the ordinance or show that the ordinance is based "solely on reasons totally unrelated to the pursuit of the State's goals."[26] This language appears to have been adopted from federal case law.[27]

Applying the "shocks the conscience" standard proved to be fatal to many land use claims brought under federal substantive due process . . .

Although Michigan courts have not applied "shocks the conscience" terminology, substantive due process claims have nonetheless been difficult to maintain under Const 1963, art 1, § 17, in large part because the definition of a legitimate governmental interest is broad under Michigan law. A legitimate governmental purpose is grounded in the police power, and has been defined as including "protection of the safety, health, morals, prosperity, comfort, convenience and welfare of the public, or any substantial part of the public."[28] "Ordinances having for their purpose regulated municipal development, the security of home life, the preservation of a favorable environment in which to rear children, the protection of morals and health, the safeguarding of the economic structure upon which the public good depends, the stabilization of the use and value of property, the attraction of desirable citizenship and fostering its permanency are within the proper ambit of the police power."[29] Many land use decisions are especially difficult to challenge under state substantive due process because preservation of community character has specifically been recognized as a legitimate governmental interest, and an ordinance that is rationally related to the preservation of community character is not an unreasonable restriction.[30]

Under the Michigan Constitution, substantive due process claims in the land use context are subject to rational basis review.[31] Under the rational basis test, the "means selected must have a real and substantial relationship to the object sought to be attained."[32] Michigan's Supreme Court has held that "[r]ational basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with 'mathematical nicety,' or even whether it results in some inequity when put into practice."[33] "Rather, it tests only

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whether the legislation is reasonably related to a legitimate governmental purpose. The legislation will pass constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable."[34]

One important difference between Michigan's substantive due process guarantee and its federal counterpart must also be noted: the Michigan Supreme Court has held that an alleged violation of Const 1963, art 1, § 17's substantive due process guarantee cannot, as a matter of law, provide the basis for a money damages action against a municipality.[35] While our Supreme Court recognized a "constitutional tort" concept in *Smith v. Dep't of Public Health*,[36] the Court subsequently made clear that *Smith* only allows for a direct cause of action under the Michigan Constitution against the State: "We agree with the Court of Appeals majority that our decision in *Smith* provides no support for inferring a damage remedy for a violation of the Michigan Constitution in an action against a municipality or an individual government employee."[37]

Thus, a land use claimant cannot bring a direct constitutional claim for damages against a unit of local government or its officials; such a claim must fall under a statutory exception. The reasoning for this holding lies in the fact that other remedies exist against municipalities and their officials which do not exist against the State (and its officials when sued in their official capacities) in light of the Eleventh Amendment and the inapplicability of 42 U.S.C. § 1983 to States.[38] Despite this limitation, many land use claimants still plead their claims under state substantive due process. This may, in part, be because a substantive due process claim pled solely under Const 1963, art 1, § 17 - unlike its federal counterpart - does not give the defendant the option of removing the case to federal court.[39] Additionally, the existence of local procedures (i.e., notice and opportunity to be heard) and/or the availability of an appeal to circuit court are not fatal to a substantive due process claim, as it would be to a procedural due process claim.[40]

Mettler Walloon L.L.C. v Melrose Township

As noted above, substantive due process claims under the Michigan Constitution – although difficult to maintain – have not historically been held to the "shocks the conscience" test that has more recently been applied by the Sixth Circuit to federal substantive due process claims in the land use context. However, the Court of Appeals' reasoning in *Mettler Walloon* – issued on October 2, 2008 – suggests that "shocks the conscience" may be the applicable standard for all substantive due process land use claims.

Mettler Walloon involved a developer's attempts to use several lakeside parcels for boathouses with living spaces above them. The developer also planned to use one of the parcels for the sale of antique boats. Plaintiff initially planned to develop his property as a planned unit development (PUD).[41] The lakeside parcels in question were zoned C-3 (village commercial) at all relevant times; a dispute arose between the developer and the township regarding whether the proposed use would be permissible under the C-3 classification. Ultimately, the township (through its ZBA) took the position that, although a boathouse is a use permitted by right in the C-3 zone - and "boathouse" is not defined in the ordinance – the term "boathouse" to meant "a building or shed, usually built partly over water, for sheltering a boat or boats, but which excludes any residential use."[42]

After numerous attempts to get the plan approved by the township, plaintiff filed suit under § 1983, based upon alleged violations of substantive and procedural due process. Facilitative mediation resulted in a partial consent judgment, allowing development to proceed under a revised development plan containing new commercial elements.[43] However, the partial consent judgment did not resolve plaintiff's damages claims. Thus, following facilitation, defendants filed a dispositive motion concerning the remaining damages claims. The trial court denied it. The parties then participated in a bench trial regarding the damages claims. The trial court eventually held that there was no cause of action, and plaintiff appealed.

Of particular interest here is the Court of Appeals' treatment of plaintiff's substantive due process claim. The court began its analysis by noting that, despite US Const, Am XIV, § 1's "reference to process, the U.S. Supreme Court has interpreted this clause to guarantee more than fair process, and to cover a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them."[44] Again referring to U.S. Supreme Court decisions, the court held: "In disputes over municipal actions, the focus is on whether there was egregious or arbitrary governmental conduct. … Thus, when evaluating municipal conduct vis-á-vis a substantive due process claim, only the most egregious official conduct can be said to be arbitrary in the constitutional sense. To sustain a substantive due process claim against municipal actors, the governmental conduct must be so arbitrary and capricious as to shock the conscience."[45] The court then engaged in a detailed analysis of cases "dealing with abusive executive action" in order to define the contours of what "shocks the conscience."[46]

Because the claim was apparently only pled under § 1983[47] and in turn, only the U.S. Constitution's substantive due process protections were implicated,[48] this discussion of U.S. Su-

preme Court decisions would have seemingly been sufficient to establish the proper standard. However, the court went to note that "the shocks-the-conscience test has been applied in Michigan to a substantive due process claim. Michigan courts have acknowledged that the essence of a substantive due process claim is the *arbitrary* deprivation of liberty or property interests."[49]

In support of this proposition, the *Mettler Walloon* panel relied upon two decisions, *Butler v Detroit*[50] and *Landon Holdings, Inc v Grattan Twp*.[51] In *Butler,* plaintiff's decedent died in a fatal shooting involving the police, and, in addition to state-law tort claims, the plaintiff brought a § 1983 claim for deprivation of life without substantive due process. The jury found in the plaintiff's favor on all counts and awarded compensatory and punitive damages on the § 1983 claim, but the Court of Appeals held that the plaintiff failed to adequately prove a substantive due process violation under the "shocks the conscience" test.[52] Thus, of the two cases cited in support of the assertion "the shocks-the conscience test has been applied in Michigan to a substantive due process claim," only one – *Landon Holdings* – is a land use decision. However, the term "shocks the conscience" does not appear in the *Landon Holdings* opinion. Moreover, that the court chose to cite *Landon Holdings* in a § 1983 action is interesting because the substantive due process claim presented in *Landon Holdings* was analyzed solely under the Michigan Constitution.[53]

The *Mettler Walloon* panel then noted: "Sundry decisions, both federal and state, including those involving land use planning, apply the shocks-the-conscience standard."[54] For this proposition, the court cited several decisions from the U.S. Court of Appeals for the 1st Circuit, as well as numerous decisions from the 3rd, 6th, 8th, 10th Circuits, all of which indicated that "shocks the conscience" is the appropriate standard for substantive due process claims brought under the U.S. Constitution in the land use context.[55] The court further noted that there "are decisions from sister states applying the 'shocks the conscience' test to land use planning disputes,"[56] although the court's discussion of these decisions did not always clarify whether they were cases brought under §1983 or whether the outcomes turned upon state constitutions. After a lengthy discussion of these decisions, the court held that here, plaintiff had "not presented evidence of any conduct by township officials that is so outrageous or arbitrary as to shock the conscience. Rather, the evidence indicated conduct intended to further the legitimate land use planning interests of the township (maintaining the integrity of the commercial zone in the village, and furthering the vitality of the village's commercial center). Therefore, the trial court did not err in rejecting the substantive due process claim."[57]

Cummins v Robinson Township

On May 12, 2009, the Court of Appeals issued its published decision in *Cummins v Robinson Township*. *Cummins* involved "consolidated cases in which plaintiffs are residents of Van Lopik and Limberlost subdivisions in Robinson Township who assert tort claims and constitutional violations against the township, its board members (Berens, Frye, Clark, Kuyers, Mulligan, Korving, Kuncaitis, Masko, Rayla, Stille, Harmon), its building officials (Easterling & Forner), and others, after the Grand River flooded in the area of their homes in May 2004 and January 2005."[58] Plaintiffs brought numerous tort and constitutional claims based upon this event, including a substantive due process claim which appears to have been pled under both the Michigan and U.S. Constitutions.[59] Although the trial court dismissed several of plaintiffs' claims, it found that a fact question prevented summary disposition as to the substantive due process claim.[60] Defendants appealed, and the Court of Appeals held, among other things, that defendants were improperly denied summary disposition as to the substantive due process claim.[61]

Although perhaps more of a trespass-nuisance claim than a land use case *per se*, *Cummins* is significant here to the extent that, in deciding the substantive due process issue, it relied in large part upon *Mettler Walloon*. The court in *Cummins* analyzed the substantive due process claim as follows:

> Both the Fourteenth Amendment to the United States Constitution and Const 1963, art 1, § 17 guarantee that no state shall deprive any person of life, liberty or property, without due process of law. These constitutional provisions guarantee more than procedural fairness but have a substantive component that protects individual liberty and property interests against 'certain government actions regardless of the fairness of the procedures used to implement them. ....
>
> In general, the test to determine whether a law or its enforcement violates substantive due process is whether the law is rationally related to a legitimate governmental purpose. In the context of individual government actions or actors, however, to establish a substantive due process violation, the governmental conduct must be so arbitrary and capricious as to shock the conscience. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 198; ___ NW2d ___ (2008). In disputes over municipal actions ... only the most egregious official conduct can be considered arbitrary in the constitutional sense. ....
>
> This Court in *Mettler Walloon* surveyed numerous federal decisions that addressed substantive due process claims in the context of enforcement of land-use regulations and concluded, "under federal law,

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even a violation of state law in the land use planning process does not amount to a federal substantive due process violation." One of the federal cases the *Mettler Walloon* Court reviewed was *Mongeau v City of Marlborough*, 492 F3d 14, 20 (CA 1, 2007), in which the plaintiff Eugene Mongeau asserted that the city building official Stephen Reid had violated Mongeau's substantive due process rights in part by "wrongly charg[ing] or demand[ing] too much for his building permit." The federal court noted, in essence, that even if this were true, "'[Mongeau] may find recourse in other laws, but not in the substantive component of the Due Process Clause of the Fourteenth Amendment.'" Similarly, [*Mettler Walloon*] quoted *Koscielski v City of Minneapolis*, 435 F3d 898 (CA 8, 2006) ... opining that "[d]ue process claims involving local land use decisions must demonstrate the 'government action complained of is truly irrational, that is something more than . . . arbitrary, capricious, or in violation of state law.'" In sum, [*Mettler Walloon* held that] the "Due Process Clause is not a guarantee against incorrect or ill-advised [governmental] decisions."

Here, plaintiffs' primary allegation against defendants is the strict enforcement of building code provisions requiring flood-resistant construction when plaintiffs claim they should have been allowed to utilize cheaper (and less flood resistant) rebuilding methods and materials. But even if defendants' application of the building code to plaintiffs' circumstance were erroneous, their enforcement of flood-resistant building code requirements still advanced legitimate state interests in protecting the health, safety, and welfare of the public, and protected property located in flood-prone areas. ... These allegations do not state conscience-shocking conduct. To state a cognizable substantive due process claim, the plaintiff must allege "conduct intended to injure in some way unjustifiable by *any* government interest *and* that is conscience-shocking in nature." *Mettler Walloon*, *supra* at 201-202.... Consequently, even if defendants' application of the flood-resistant building code requirements to plaintiffs' situation were erroneous, it still furthered legitimate state interests, and, therefore, could not be characterized as conscience shocking. ... Even assuming defendants were motivated to further a township flood-mitigation plan, their subjective motivation does not alter the legal conclusion that applying flood-resistant building code provisions to property situated in a flood plain, which had suffered repeated flood damage over the years, furthered legitimate state interests, and therefore, is not egregious, conscience-shocking conduct. *Mettler Walloon*, *supra.*[62]

In dismissing the substantive due process claim pursuant to *Mettler Walloon*, the *Cummins* panel likewise failed to draw a distinction between substantive due process claims brought under Michigan's Const 1963, art 1, § 17 as opposed to those interpreting US Const, Am XIV, § 1.

Conclusion

Whether Michigan courts should, or should not, adopt the "shocks the conscience" standard for land use claims pled under state substantive due process is beyond the scope of this article. There are strong arguments for and against such a rule. For example, applying the standard developed by federal courts, in interpreting the U.S. Constitution, would be consistent with the principle, espoused by the Michigan Supreme Court, that the due process protections provided by the Michigan and U.S. Constitutions are coextensive.[63] On the other hand, applying a standard that was initially articulated as a limitation upon *executive* power[64] is problematic in the land use context because, under Michigan law, most municipal land use decisions are *legislative* acts.[65] Moreover, the federal judiciary's application of the "shocks the conscience" standard in this context appears, at least in part, to be based upon federalism concerns and a general sense that land use disputes, which are inherently local in nature, should not be adjudicated in federal court at all.[66]

The foregoing discussion does not seek to settle this debate but rather, to suggest that such a debate should take place, as adopting a "shocks the conscience" for land use claims brought under *state* substantive due process would be a significant departure from precedent. The *Mettler Walloon* panel appears to have inadvertently advocated a "shocks the conscience" standard under the state constitution by failing to appreciate the distinction between precedents interpreting Const 1963, art 1, § 17 as opposed to those interpreting US Const, Am XIV, § 1, whereas the *Cummins* panel appears to have relied upon *Mettler Walloon* without thoroughly analyzing the source of the law upon which the substantive due process claims in that case were pled. If Michigan courts are in fact moving toward a "shocks the conscience" standard for land use claims brought under state substantive due process, it is an important enough development

to warrant a more complete explanation than either *Mettler Walloon* or *Cummins* provide. Indeed, further clarification from the Michigan Supreme Court may be necessary.

Endnotes

1 *Tun v. Whitticker*, 398 F.3d 899, 902 (7th Cir. 2005). See also Parna A. Mehrbani, Comment, *Substantive Due Process Claims in the Land-Use Context: The Need for a Simple and Intelligent Standard of Review*, 35 Envtl. L. 209, 231 (2005).

2 See, e.g., *Warren v City of Athens, Ohio*, 411 F.3d 697, 705-06 (6th Cir. 2005); *Pearson v. Grand Blanc*, 756 F.Supp. 314, 316 (E.D.M.I. 1991), *aff'd* 961 F.2d 1211, 1222 (6th Cir. 1992).

3 *Pearson, supra* at 317.

4 See, e.g., *Frericks v Highland Twp*, 228 Mich App 575, 594; 579 NW2d 441 (1998), citing *Kropf v Sterling Heights*, 391 Mich 139, 158; 215 NW2d 179 (1974). Under the analysis articulated in these cases, land use claimants may proceed under a state substantive due process theory where either (1) there is no reasonable governmental interest being advanced by the present zoning classification, or (2) an ordinance is unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of other types of legitimate land use from the area in question.

5 281 Mich App 184, 201; 761 NW2d 293 (2008), *lv den* 483 Mich 895; 760 NW2d 500 (2009).

6 *Id.*, citing, among other cases, *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 176; 667 NW2d 93 (2003), a decision which addressed a substantive due process claim brought under the Michigan Constitution only.

7 __ Mich App __; _ _NW2d __ (2009) (Court of Appeals Docket Nos. 279020, 279064, 279088).

8 The Court of Appeals released its published opinion in *Cummins* on May 12, 2009, whereas the Michigan Supreme Court denied leave in *Mettler Walloon* on February 24, 2009.

9 *People v Sierb*, 456 Mich 519, 522-523; 581 NW2d 219 (1998).

10 *Id.,* citing *Collins v City of Harker Heights*, 503 US 115, 125; 112 S Ct 1061 (1992) and *Daniels v Williams*, 474US 327, 331; 106 S Ct 662 (1986).

11 G. Edward White, *The Constitution and the New Deal* (Cambridge, MA: Harvard University Press, 2000), pp. 244-46.

12 *Id.*, p. 259.

13 *Planned Parenthood v Casey*. 505 US 833, 998; 112 S Ct 2791 (1992) (Scalia, J., concurring in part and dissenting in part), citing *Dred Scott v. Sandford*, 60 US (19 How) 393, 15 L Ed 691 (1857).

14 See, e.g., *Rochin v. California*, 342 US 165; 72 S Ct 205 (1952).

15 *People v Sierb, supra* at 522-523: "The defendant has failed to distinguish between the Michigan and federal due process provisions and has not argued that the Michigan provision should be interpreted differently from its federal counterpart. We interpret the state provision as coextensive with the federal provision for purposes of this appeal. Absent definitive differences in the text of the state and federal provision, common-law history that dictates different treatment, or other matters of particular state or local interest, courts should reject the unprincipled creation of state constitutional rights that exceed their federal counterparts."

16 *Rochin, supra* at 172-173.

17 *Sacramento v Lewis*, 523 US 833, 849; 118 S Ct 1708 (1998), discussing *Rochin, supra* at 172-173.

18 *Sacramento v Lewis, supra* at 850 (internal citations and quotations omitted).

19 *Id.*

20 756 F.Supp. 314 (E.D.M.I. 1991), *aff'd* 961 F.2d 1211, 1222 (6th Cir. 1992).

21 *Pearson,* 961 F.2d at 1211-1212.

22 411 F.3d 697, 705-706 (6th Cir. 2005).

23 *Id.* (citations omitted).

24 *Frericks, supra* at 594; *Kropf, supra* at 158.

25 *Frericks, supra* at 594.

26 *Conlin v Scio Township*, 262 Mich App 379, 391; 686 NW2d 16 (2004), quoting *Muskegon Area Rental Ass'n v City of Muskegon,* 244 Mich App 45, 51; 624 NW2d 496 (2000), *rev'd on other grounds* 465 Mich 456; 636 NW2d 751 (2001).

27 See 37712, Inc. v. Ohio Dep't of Liquor Control, 113 F.3d 614, 620 (6th Cir. 1997) ("If any conceivable legitimate governmental interest supports the contested [decision], that measure . . . cannot offend substantive due process norms.").

28 *Hecht v. Nile Twp*, 173 Mich App 453, 461; 434 NW2d 156 (1988).

29 *People v McKendrick*, 188 Mich App 128, 138; 468 NW2d 903 (1991), quoting *Cady v Detroit*, 289 Mich 499, 514; 286 NW 805 (1939).

30 *Norman Corp. v. City Of East Tawas*, 263 Mich App 194, 201-202; 687 NW2d 861 (2004) (holding that a sign ordinance which was adopted "to protect the ... character of the various neighborhoods and the City generally" furthered "a legitimate governmental interest").

31 *Conlin, supra*, citing *Muskegon Area Rental Ass'n, supra*. While the Supreme Court in *Muskegon Rental* was addressing equal protection, not substantive due process, the Court of Appeals has held that, where there are no suspect classifications or fundamental rights involved, and the ordinance does not completely exclude a particular use, the substantive due process and equal protection tests are essentially the same. *Conlin, supra* at n. 2 ,citing *Landon Holdings, supra.*

32 C*onlin, supra*, quoting *Muskegon Rental, supra* at 53. See also *Delta Charter Twp v. Dinolfo*, 419 Mich 253, 270; 351 NW2d 831 (1984).

33 *Crego v Coleman*, 463 Mich 248, 260; 615 NW2d 218 (2000).

34 *Id.* at 259-260. See also *Conlin, supra*.

35 *Jones v. Powell,* 462 Mich 329, 335; 612 NW2d 423 (2000); *Velting v Cascade Charter Twp*., unpublished opinion per curiam of the Michigan Court of Appeals, decided May 5, 2005 (No. 250946).

36 428 Mich 540; 410 NW2d 749 (1987). 37 *Jones, supra* at 335.

38 *Id.* at 337 ("*Smith* recognized a narrow remedy against the state on the basis of the unavailability of any other remedy. Those concerns are inapplicable to actions against a municipality or an individual defendant.").

39 See 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); 28 U.S.C. § 1441(a) & (b) ("Except as other-

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Update To The Pre-Suit Notice Requirement In Public Building Exception Cases:

Supreme Court Order On Reconsideration Now Suggests Internal Incident Report Suffices

By Ronald Richards Jr. and Helen Mills, of Foster, Swift, Collins & Smith, PC

The Spring 2009 edition of the *Public Corporation Law Quarterly* contained an article reporting on the pre-suit notice requirement of the public building exception to governmental immunity in MCL 691.1406.[1] That article noted that, at that time, several decisions in late 2008 construed the pre-suit notice requirement and established certain principles that provided an agency a basis to attack those notices as deficient and get out of a lawsuit quickly. For example, as of the December 2008 Michigan Supreme Court decision in *Chambers v Wayne County Airport Authority*,[2] an internal accident report that a governmental agency's employee prepared was very likely insufficient to meet the pre-suit notice requirement – particularly where the plaintiff merely verbally gave only general information about the incident to that employee who then completed the agency's own internal accident report form.

However, those "settled" principles and tools helpful to agencies evaporated on June 12, 2009. That is the date that the Michigan Supreme Court – following a change in composition given the November 2008 election results – issued a three-sentence, one-paragraph Order on reconsideration in *Chambers v Wayne County Airport Authority*.[3] As explained below, that June 2009 Order reversed course completely as to what suffices – internal incident reports generated from verbal information a plaintiff gives any agency employee *now likely suffice* – under the pre-suit notice requirement in MCL 691.1406. Moreover, since the highway exception in MCL 691.1404 has essentially the identical notice provision as in MCL 691.1406, the decision in *Chambers (On Reconsideration)* may very well also impact the notice required under highway exception cases too.

Still, there is some good news for agencies and their counsel. There are still some legal bases to challenge pre-suit notice requirements – even despite the decision in *Chambers (On Reconsideration)*. This article summarizes the history of *Chambers (On Reconsideration)* and its implications on agencies (and their counsel) in public building and highway exception cases.

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wise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants.… Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties."); *Wagner v Higgins*, 754 F.2d 186, 190-191 (6th Cir.1985) (holding that a search which allegedly violated the state constitution could not support a cause of action under § 1983).

40 *Mettler Walloon, supra* at 214-215 (finding no procedural due process cause of action where plaintiff had the opportunity to present its position to the planning commission and later the zoning board of appeals). See also *People v McKendrick, supra* at 139-140.

41 *Mettler Walloon, supra* at 186.

42 *Id.* at 187-188.

43 *Id.* at 194. The consent judgment required that the boathouses be available for rent to the general public, and be rented for periods not longer than two years. The marina's commercial space (4,000 square feet) was required to be maintained as commercial in perpetuity. *Id.*

44 *Id.*, quoting, among other cases, *Washington v Glucksberg*, 521 US 702, 719; 117 S Ct 2258 (1997) and *Sacramento v Lewis, supra* at 850.

45 *Mettler Walloon, supra* at 197-198 (citations omitted).

46 *Id.* at 198-199, quoting *Sacramento v Lewis, supra* at 845-847 and *Collins, supra* at 129.

47 See *Mettler Walloon, supra* at 195.

48 See *Wagner, supra* at 190-191.

49 See *Mettler Walloon, supra* at 200-201 (emphasis in original).

50 149 Mich App 708, 721-722; 386 NW2d 645 (1986).

51 257 Mich App 154, 176; 667 NW2d 93 (2003).

52 *Mettler Walloon, supra* at 200, discussing *Butler, supra* at 721-722.

MCL 691.1406's Pre-Suit Notice Mandate in Public Building Exception Cases

To fully understand where the current pre-suit notice requirement caselaw stands now, it is helpful to both understand the actual language in MCL 691.1406 as well as the entire twisted history of *Chambers*.[4]

The pre-suit notice requirement for public building exception cases is found in MCL 691.1406. That statute and the notice requirement provide relevantly as follows:

> "Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition. . . . *As a condition to any recovery for injuries sustained by reason of any dangerous or defective public building, the injured person*, within 120 days from the time the injury occurred, *shall serve a notice on the responsible governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant*. *The notice may be served upon any individual*, either personally, or by certified mail, return receipt requested, *who may lawfully be served with civil process directed against the responsible governmental agency*, anything to the contrary in the charter of any municipal corporation notwithstanding. . . ."[5]

Chambers v Wayne Co Airport Auth: The Twisted Saga

The June 2008 Court of Appeals Majority Decision – Internal Incident Report Satisfies the Pre-Suit Notice Requirement.

As discussed in the Spring 2009 edition of this newsletter, *Chambers*' twisted saga began with the Court of Appeals decision in June 2008.[6] There, the majority of that panel held that an internal incident report (that an Airport Authority officer employee completed after the plaintiff allegedly fell in a puddle of water in the airport terminal) was sufficient to meet the pre-suit notice requirement. The Court opined that the notice requirement should be construed liberally: "particularly where demanded of an average citizen for the benefit of a governmental entity, [the notice] need only be understandable and sufficient to bring to the defendant's attention the important facts."[7] Noting that its interpretation avoids penalizing an inexpert layman for a technical difficulty, the Court then gave two other reasons for its conclusion: (1) the plaintiff verbally gave the Airport Authority's employee information that was used to create the report; and (2) the report was transmitted upward in the defendant's chain of management.[8]

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53 See *Landon Holdings, supra* at 173-175.

54 *Mettler Walloon, supra* at 201.

55 *Id.* at 201-207 (citations omitted).

56 *Id.* at 207-208 (citations omitted).

57 *Id.* at 213.

58 *Cummins,* Slip Op. at 3.

59 *Id.* at 5 ("Plaintiffs alleged in count II of their complaint that defendants violated plaintiffs' rights under the Fifth and Fourteenth Amendments of the United States Constitution and Const 1963, art 1, § 17. The trial court viewed this count as stating a claim based on both procedural and substantive due process.").

60 *Id.* at 6.

61 *Id.*

62 *Id.* at 11-12 (internal citations and quotations omitted).

63 See, for example, *People v Sierb, supra* at 522-523.

64 See *Sacramento v* Lewis, supra at 849, discussing *Rochin, supra* at 172-173.

65 See MCL125.3102(o); MCL 125.3201. See also *Schwartz v. City of Flint*, 426 Mich 295, 307; 395 NW2d 678 (1986), where the Michigan Supreme Court noted that "[z]oning is a legislative function…."

66 "It has long been recognized that federal courts 'were not created to be the Grand Mufti of local zoning boards nor do they sit as super zoning boards or zoning boards of appeals.'" *T-Mobile Central, LLC v. Grand Rapids*, 2007 WL 1287739 (WD MI 2007), citing, among other cases, *Murphy v. New Milford Zoning Commission*, 402 F3d 342, 348-49 (2d Cir 2005); *Sprint Spectrum, L.P. v. City of Carmel, Indiana*, 361 F3d 998, 1002 (7th Cir 2004), and *Carpinteria Valley Farms, Ltd. v. County of Santa Barbara*, 344 F3d 822, 832 n.5 (9th Cir 2003).

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The June 2008 Court of Appeals Dissent: Internal Incident Report Does Not Satisfy the Pre-Suit Notice Requirement

Judge Murray dissented and opined that the internal incident report was insufficient, for several reasons. First, the report could not constitute *plaintiff's* personal service of the written report on the Airport Authority, because it was the Authority employee who actually filled out the written form. Second, even assuming the plaintiff personally served the report, the plaintiff did not show that the employee he gave it to could properly receive civil process on the Authority's behalf under MCR 2.105(G)-(H). Third, the plaintiff could show neither *his* service of notice to higher-ranking Authority employees (although they were notified by the report's preparer), nor that the informed higher-ranking employees could lawfully be served with notice directed at the Authority. Fourth, it was not relevant that the invalid pre-suit notice did not prejudice the Authority. Fifth, there existed prior Supreme Court precedent construing the nearly-identical highway exception pre-suit notice requirement in MCL 691.1404 that held that failure to comply with the notice provisions are fatal to a plaintiff's claim.[9]

The December 2008 Michigan Supreme Court Order: Internal Incident Report Does Not Satisfy the Pre-Suit Notice Requirement

In December 2008, the Michigan Supreme Court heard oral argument on the *Chambers* plaintiff's application for leave to appeal. Thereafter, in a one-paragraph Order, the Court reversed the Court of Appeals majority decision in *Chambers* "for the reasons stated in the Court of Appeals dissenting opinion."[10]

Justice Cavanagh dissented from that one-paragraph Order. He opined that the Court of Appeals dissenting opinion contained two analytical errors: (1) it assumed MCL 691.1406 required written notice, yet that statute does not expressly require that notice be written; and (2) it assumed MCL 691.1406 requires notice be made by formal service of process, yet the section of MCL 691.1406 addressing service of process appears discretionary. He then found fault with the Court of Appeals dissent's reliance on *Rowland v Washtenaw Co Rd Comm*,[11] believing that case was both distinguishable (since the notice in *Rowland* was given after the statutory notice period lapsed) and "contrary to the longstanding jurisprudence of this Court on what constitutes sufficient notice under a statute such as MCL 691.1406."[12]

The June 2009 Michigan Supreme Court Order (On Reconsideration): Internal Incident Report Satisfies the Pre-Suit Notice Requirement

After the December 2008 decision in *Chambers*, then, it appeared settled that an internal incident report was not sufficient notice. It also appeared settled that any notice must be given in writing and by the plaintiff and to a person who could receive service under MCR 2.105.

However, the *Chambers* plaintiff later filed a motion for reconsideration of the Supreme Court's December 2008 decision. A perhaps fortuitous circumstance then occurred – in January 2009 and due to the November 2008 election results where she defeated former-Chief Justice Clifford Taylor, Justice Hathaway was sworn in as a Justice on the Court.

The Majority's Order. On June 12, 2009, the Michigan Supreme Court granted the *Chambers'* plaintiff's motion for reconsideration and, on reconsideration, vacated its December 2008 Order.[13] The Court then denied the application for leave to appeal the Court of Appeals June 5, 2008 decision. In effect, then, the June 2009 decision in *Chambers (On Reconsideration)* reinstated the June 2008 Court of Appeals majority decision.

The Dissents. Justices Corrigan and Young dissented from *Chambers (On Reconsideration)*, criticizing the majority's Order from a legal and practical perspective. Justice Corrigan noted that the majority's decision allows any routine police or incident report that the government itself creates to now be deemed a notice to the government of a potential lawsuit. She opined that this is a "complete distortion" of MCL 691.1406 and "subverts our Legislature's clearly expressed mandate that 'the injured person' must serve a notice on the government as a 'condition' to recovery.'" Because in her view the plaintiff did not serve any notice at all, Justice Corrigan concluded that the plaintiff's claim should be barred.[14]

Justice Young opined that the majority's Order was contrary to the Court's historically-broad application of governmental immunity and would promote suits against the government. He predicted future attacks by the majority on all statutes of limitation, notice, tolling, and a Legislature's expressly-defined parameters of a cause of action.[15]

Lessons In Light of *Chambers* (On Reconsideration)

New Principles Regarding What Satisfies the Pre-Suit Notice Requirement

There is no doubt that the decision in *Chambers (On Reconsideration)* changed the rules as to what meets the pre-suit

notice requirement in MCL 691.1406 in a few ways. First, for example, it now appears that an internal police or incident report that a governmental agency employee prepares may now very well satisfy MCL 691.1406. Indeed, that is the result of the decision in *Chambers (On Reconsideration)*.

Second, an internal incident report may suffice *even if* the plaintiff only gave general information about the incident to an employee *verbally*. In other words, a plaintiff's verbal relaying of information about an incident to an agency employee likely now meets the "shall serve a notice" requirement in MCL 691.1406.

Third, it no longer appears necessary that the plaintiff serve notice on "any individual . . . who may lawfully be served with civil process directed against the responsible governmental agency." Rather, it now appears that a plaintiff has the choice: either serve notice on a person who may lawfully accept service for the governmental agency at issue, or serve someone else within that agency – such as the governmental agency employee who fills out the police or incident report. This interpretation seems consistent with Justice Cavanagh's dissent to the Michigan Supreme Court's December 2008 Order in *Chambers*.

There Are Still Remaining Bases to Challenge a Pre-Suit Notice

Chambers (On Reconsideration) does not eliminate every basis to challenge a pre-suit notice requirement. For example, it did not – nor could it – eliminate the requirement in MCL 691.1406 that "[t]he notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant."[16] Presumably, then, a plaintiff's failure to meet these mandates opens the door to attack. This may still be an area that practitioners representing governmental agencies can attack in challenging a pre-suit verbal notice – particularly given the well-settled principles that the grant of immunity afforded governmental agencies in the governmental immunity act is broad, and the statutory exceptions to that immunity are to be narrowly construed.[17]

Also, it is uncertain what weight, if any, a court will give to an agency's showing that the plaintiff's failure to follow all aspects of MCL 691.1406 actually prejudiced the agency. *Rowland* held that a plaintiff must provide notice to the agency it seeks to sue within 120 days of injuries, no matter how much prejudice was actually suffered.[18] However, in the December 2008 Supreme Court Order in *Chambers*,[19] Justices Cavanagh and Kelly both dissented and appeared inclined to avoid following *Rowland* in the future.[20]

Practical Implications to Governmental Agencies Going Forward

The new "rules of the game" from *Chambers (On Reconsideration*) likely means that a governmental agency must be more diligent than ever whenever an internal police or incident report is created. Although perhaps cumbersome, an agency might construe every routine internal incident report as alerting the governmental agency's risk managers that the injured person is contemplating a potential claim.

Governmental agencies also now face tough decisions whenever an incident occurs. The principal purposes of the pre-suit notice requirement include to "provide the governmental agency with an opportunity to investigate the claim while the evidentiary [trail] is still fresh."[21] An agency may now have to investigate numerous other incidents to determine if the incident will lead to a lawsuit. Agencies may therefore have to decide whether to assume every internal incident report is notice of a potential suit and therefore investigate the incident immediately, or choose not to investigate at that time thereby running the risk of being surprised with a suit later and have done no post-incident investigation.[22]

Impact on Future Highway Exception Cases

Chambers (On Reconsideration) may impact future claims filed under the separate highway exception in MCL 691.1404 too. This is because the highway exception has essentially the identical pre-suit notice requirement as in MCL 691.1406.[23] Thus, if an internal incident report is now considered "notice" from "the injured person" under the public building exception, it is reasonable to assume that a routine police report of a seemingly routine traffic accident or pedestrian fall could also constitute a notice for the purpose of the highway exception.[24]

Conclusion

The Michigan Supreme Court's most recent *Chambers* decision has altered the dynamics of handling public building exception cases – and perhaps highway exception cases. Agencies would now do well to carefully consider all internal incident reports and have choices to make about whether to regard them as potential suits. This may impact agencies' ability to conserve limited resources of time and money, something prior interpretations of the pre-suit notice requirement had previously helped agencies manage. Nevertheless, the decision in *Chambers (On Reconsideration)* – coupled with the plain language of MCL 691.1406 and MCL 691.1404 –leave the door open to challenging an alleged pre-suit notice in a few

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respects. Such an effort is likely worth pursuing given the reward if successful: getting an agency out of a lawsuit quickly and efficiently to minimize costs and preserve resources.

About the Author

Mr. Richards is a shareholder with Foster, Swift, PC. He represents municipalities state-wide in various matters, from litigation to ordinance drafting. Mrs. Mills is a summer associate with the same law firm and currently a third-year student at the Thomas M. Cooley Law School.

Endnotes

1 Ronald Richards Jr., *The Pre-suit Notice Requirement in Public Building Exception to Municipal Immunity: Courts Give New Lessons on What Does-and Does Not-Meet the Requirement*, Pub Corp L Quarterly (Spring 2009).

2 *Chambers v Wayne Co Airport Auth*, ___ Mich ____; 758 NW2d 302 (Docket No. 136900, dec'd 12/19/08).

3 *Chambers v Wayne Co Airport Auth*, ___ Mich ___; ___ NW2d___ (Docket No. 136900, dec'd 6/12/09).

4 The Spring 2009 article on this subject also summarized the Court of Appeals decision in *Ward v Michigan State University*, unpublished opinion per curiam of the Court of Appeals (Docket No. 281087, dec'd 1/27/09). That decision found – expressly based on the Supreme Court's December 2008 Order in *Chambers* – that an internal incident report was insufficient to meet the pre-suit notice requirement in MCL 691.1406. Not surprisingly, the *Ward* plaintiff has filed an application for leave to appeal with the Supreme Court. As of the date of this article, that application remains pending.

5 MCL 691.1406 (emphasis added).

6 *Chambers v Wayne Co Airport Auth,* unpublished opinion per curiam of the Court of Appeals (Docket No. 277900, dec'd 6/5/08); 2008 WL 2313099.

7 See *id.*

8 See *id.*

9 See *id.* (Murray, J., dissenting) (citing *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007)).

10 *Chambers v Wayne Co Airport Auth*, ___ Mich ____; 758 NW2d 302 (Docket No. 136900, dec'd 12/19/08).

11 477 Mich 197; 731 NW2d 41 (2007).

12 *Chambers v Wayne Co Airport Auth*, ___ Mich ____; 758 NW2d 302 (Docket No. 136900, dec'd 12/19/08) (Cavanagh, J., dissenting). Justice Cavanagh dissented in *Rowland* as well. Justice Kelly dissented from the December 2008 Order as well, and would have granted leave to appeal to reconsider *Rowland*.

13 *Chambers v Wayne Co Airport Auth*, ___ Mich ___; ___ NW2d___ (Docket No. 136900, dec'd 6/12/09).

14 See *id.* (Corrigan, J., dissenting).

15 See *id.* (Young, J., dissenting).

16 MCL 691.1406.

17 See e.g., *Curtis v Flint,* 253 Mich App 555 (2002); *Robinson v City of Detroit*, 462 Mich 439 (2000).

18 477 Mich 197, 200-201; 731 NW2d 41 (2007).

19 *Chambers v Wayne Co Airport Auth*, ___ Mich ____; 758 NW2d 302 (Docket No. 136900, dec'd 12/19/08).

20 See *id.* (where Justice Cavanagh's dissent stated he would not extend *Rowland* beyond its facts, and opined it was contrary to "longstanding jurisprudence" of the Supreme Court, and Justice Kelly stated she would have granted leave to reconsider *Rowland*).

21 *Burise v Pontiac,* 282 Mich App 646 (2009).

22 *Chambers v Wayne Co Airport Auth*, ___ Mich ___; ___ NW2d___ (Docket No. 136900, dec'd 6/12/09) (Corrigan, J., dissenting).

23 See MCL 691.1404.

24 *Chambers v Wayne Co Airport Auth*, ___ Mich ___; ___ NW2d___ (Docket No. 136900, dec'd 6/12/09) (Corrigan, J., dissenting); see also *Chambers v Wayne Co Airport Auth,* unpublished opinion per curiam of the Court of Appeals (Docket No. 277900, dec'd 6/5/08); 2008 WL 2313099 (noting that MCL 691.1406 and MCL 691.1404 have "substantively identical" pre-suit notice requirements that "should therefore be interpreted identically").

State Law Update

By Ronald D. Richards Jr. and Helen Mills, Foster, Swift, Collins & Smith, PC

Taking Claim Based on Municipality's Application of Building Code Fails

Cummins v Robinson Township
___ Mich App ___; ___NW2d __ (2009)

In these consolidated cases, the plaintiffs were residents of a subdivision located in a flood plain in Robinson Township. After their homes suffered damage in a flood, they sought to rebuild. Township building officials determined that as the flood damage would exceed 50 percent of the pre-flood fair market value of the home, the flood-resistant building code requirements of the Michigan Residential Code applied. The plaintiffs claimed that this would impose a great hardship on them, as they claimed they were required to either abandon their homes or rebuild at costs far exceeding the homes' values. Some plaintiffs sought relief from the Township's construction board of appeals (CBA), arguing that the 50 percent threshold was not met; other plaintiffs did not. The CBA granted relief to those plaintiffs who sought it from the CBA. Thereafter, the plaintiffs sued the Township, alleging takings and substantive due process claims, challenging the application of the flood-resistant building code requirements to their situation and claiming the requirements were economically impractical.

The Court of Appeals first determined that those plaintiffs who did not first seek relief from the Township CBA did not have ripe claims. The Court explained that the CBA has authority to review and grant relief if the building officials improperly applied the code, and could also grant variances from code requirements. The Court then rejected the notion that pursuing relief from the CBA would be futile on the ground that the CBA cannot award money damages. As the Court noted, a plaintiff may seek money damages only if he first obtained a final regulatory decision, including pursuing available administrative remedies for a variance from the regulations he asserts caused him harm. Until a final decision is reached, the claim is not ripe.

The Court then rejected the takings claims for those plaintiffs who did pursue relief from the CBA. As to them, the Court first rejected the claim of a "de facto" taking. It explained that there was no evidence of a causal connection between any deliberate actions of the defendants and the decline in market value of their property. Although the Township enforced the state building code when the plaintiffs sought to rebuild their home, there was no logical connection between compliance with building code requirements and any decline in the plaintiffs' homes' fair market value.

Next, the Court rejected the plaintiffs' categorical takings claims. The facts showed that the plaintiffs twice chose to build their home after it was severely damaged by flooding. The Court noted that the plaintiffs were challenging the Township's enforcement of state law (building code requirements), yet a municipality may not be held liable for a taking when it is merely enforcing state law. Further, even with negative equity, the plaintiffs were still able to use their property as a residence, and the property still retains some value even though its market value has declined.

Next, the Court rejected the plaintiffs' temporary regulatory taking claim predicated on delays in gaining approval under the building code and in their repairing and reoccupying their homes. The Court explained that there was no evidence of extraordinary delay in the permit review process. Rather, the evidence showed that it was the expense of complying with flood-resistant building code requirements and the plaintiffs' own delay in pursuing relief from the CBA that delayed the repair and reoccupation of their homes. The Court then noted that the building code requirements were applied to all property owners similarly; landowners are not entitled to choose the least costly building materials or methods to repair or rebuild property damaged in a flood; and there were no investment-backed expectations—since the plaintiffs' homes are in a flood plain that experiences frequent flooding, the plaintiffs could have no reasonable expectation that their property would not experience flood damage necessitating costly repairs.

For those reasons, the Court reversed and remanded for entry of summary disposition in favor of defendants on all claims.

Court Rejects Nuisance Claims Against Nightclub Located in City's Business District

Capitol Properties Group, LLC v 1247 Center Street, LLC and Thomas Donall d/b/a X-Cel,
___ Mich App ___; ___NW2d __ (2009)

The plaintiff, owner of a building with residential and commercial units that was located in property zoned business in the city of Lansing, sued the owner of the adjacent building in which a nightclub operated. The plaintiff alleged that the nightclub created private and public nuisances by playing music that exceeds the City of Lansing's ordinances. The trial court dismissed both nuisance claims.

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The Court of Appeals affirmed. It first explained that the plaintiff's private nuisance claim failed because irrespective of the noise, the plaintiff had known the neighbors operated a nightclub, the plaintiff was still able to rent the residential units adjacent to the nightclub property, and the nightclub's noise levels were not unreasonable in the business district. Thus, the plaintiff demonstrated neither significant harm nor unreasonable interference—so it could not maintain a private nuisance suit.

Next, the Court explained that the public nuisance claim also failed. That claim failed for two primary reasons. First, the area was zoned for business use. Second, the nightclub attracted the public—it did not repel the public in a way that a public nuisance might. As such, the Court upheld the trial court's decision to dismiss the nuisance claims.

Court Upholds Ordinance Requiring Abandoned Structure Owners to Pay Monitoring Fee

Kenefick v City of Battle Creek
___ Mich App ___; ___NW2d __ (2009)

This case arose after the City of Battle Creek passed an ordinance regulating abandoned structures. In short, the ordinance requires that owners of abandoned residential structures pay a monitoring fee. The ordinance defined an "abandoned structure" as a structure that has become vacant or abandoned for a given period of time and which meets one of 12 enumerated conditions in the ordinance, including being a vacant or abandoned structure that poses a potential hazard or danger to persons. The plaintiff challenged the ordinance on constitutional grounds. The trial court dismissed the suit.

The Court of Appeals affirmed. It first explained the reasons for which the plaintiff's challenge on vagueness grounds failed. The plaintiff claimed the ordinance was vague because (a) it failed to provide fair notice of regulated conduct, and (b) its enforcement was arbitrary because of the level of discretion permitted the City. The Court of Appeals disagreed. Utilizing a common dictionary and relying on the ordinance's stated purpose of eliminating dangerous, unsightly blight, the Court explained that the challenged words ("abandoned," "vacant," and "potential hazard or danger to persons") rationally conveyed to a person of ordinary intelligence that the ordinance applies to any empty, unoccupied, or deserted residential structure that poses a risk of peril, harm, or injury, or is otherwise a menace. The Court also reasoned that the ordinance's mandatory language ("shall") and lack of evidence of arbitrary application both demonstrated that the ordinance could not be applied at defendant's absolute discretion. Thus, the vagueness challenge lacked merit.

The Court also rejected the plaintiff's equal protection challenge to the ordinance. The Court first noted that the ordinance sought to protect aesthetics—a legitimate governmental interest—by overcoming the "detrimental affects of neighborhood blight and reduce enforcement costs associated with the blight." It then found that the ordinance advanced another legitimate government interest, reducing crime—a matter that history and experience showed was a common by-product of vacant, abandoned residential structures. Since the ordinance furthered legitimate government interests by reducing neighborhood blight and reducing crime, the equal protection challenge failed.

Municipality is Subject to Adverse Possession on Privately-Dedicated Property

Beach v Township of Lima
___ Mich App ___; ___NW2d __ (2009)

The plaintiffs sued to quiet title to platted streets that were privately dedicated to Lima Township in 1835. The plaintiffs claimed a superior interest by virtue of adverse possession since the late 1960s. Specifically, the plaintiffs claimed they had title to the platted streets because the streets were never opened, used, or accepted by the lot owner (the Township), and they used the property for several years. The trial court granted plaintiffs' motion for summary disposition, and the Court of Appeals affirmed.

The Court of Appeals first addressed whether the trial court lacked jurisdiction to alter or revise a plat under a quiet title action. The Court rejected the Township's claim that changes to a plat can only occur under the Land Division Act (LDA), because the private dedication to the Township occurred in 1835—well before the LDA took effect in 1968. The private dedication therefore conveyed an irrevocable easement in the dedicated land. Relatedly, the Court also rejected the Township's argument that allowing an adverse possession claim against an irrevocable easement constituted an invasion of legally protected property interest. It explained that all adverse possession claims involve such "invasion" because the record owner of the interest is stripped of legal protection.

The Court then clarified another reason that quiet title actions could be brought separately from an LDA claim. The LDA is the vehicle used to obtain legal recognition of a change in property interests such that any modification simply reflects accurate property interests. It is a court's decision on the underlying dispute (such as an adverse possession claim)—not altering a plat—that actually changes rights.

Finally, the Court of Appeals upheld the finding below that the plaintiffs had established the elements of adverse possession of the easement. It first found MCL 600.5821(2) irrel-

evant to the adverse possession claim. As the Court explained, the Township's rights derived from a *private* dedication of *private* streets; because of this and because the streets were never opened to the public, MCL 600.5821(2) did not apply. Together with the passage of nearly 30 years of use, the plaintiffs satisfied the elements of adverse possession.

Court Greatly Reduces FOIA Attorney Fee Award

Coblentz v City of Novi
___ Mich App ___; ___NW2d __ (2009)

At the end of a FOIA enforcement case with the defendant city, the plaintiffs sought attorney fees and costs. Specifically, plaintiffs sought $408,310.00 for attorney fees and $11,326.74 for costs. The plaintiffs attributed costs to pre-complaint activities, litigation activities, and post-judgment pursuit of the fees. The trial court granted the motion for fees but limited the hourly rate to $165, and limited the hours spent in post-judgment proceedings to 60 hours. The Court of Appeals upheld the trial court's decision without exception.

The Court of Appeals first determined that the trial court's decision to cut the hourly fee to $165 an hour, rather than the almost double hourly rate sought, was reasonable. It relied on several facts. First, the plaintiffs offered only two examples of attorneys on a FOIA case who requested $380 and $275 hourly fees, without proof of whether those rates were actually awarded. Second, they offered no evidence of the fee customarily charged in their locality for similar FOIA matters. Third, the City provided qualified expert testimony that highlighted the plaintiffs' normal rate, that FOIA claims are not the plaintiffs' specialty, and that the plaintiffs did not prevail on all claims. Fourth, the duration and volume of the plaintiffs' work and the awareness that a portion of the case reached the Michigan Supreme Court were not dispositive, because they resulted from the plaintiffs' own redundant efforts to obtain the same documents (some of which did not even exist). Fifth, there appeared to be no fee agreement between the plaintiffs and their counsel.

The Court also rejected a challenge to the decision to deny the plaintiffs' fee request for pre-complaint activities and to limit fees to 60 hours of participation in the post-judgment pursuit of attorneys' fees. Denial of hours attributable to pre-complaint activities was proper because FOIA allows recovery of attorneys' fees only for fees spent on existing FOIA litigation. Likewise, the trial court's decision to limit fees for post-judgment activities to 60 hours was appropriate given evidence that the plaintiffs extended the post-judgment evidentiary proceedings by personally testifying at length (nearly five days), filling about 500 pages of transcripts by cross-examining the City's two expert witnesses, and frequently seeking to introduce redundant and irrelevant testimony.

Federal Law Update

By Marcia L. Howe
Johnson, Rosati, LeBarge, Aseltyne & Field

Fourth Amendment, Unreasonable Searches, Vehicle Searches

Arizona v Gant, ___S.Ct. ___, 2009 WL 1045962 (U.S. Ariz.)

Officers arrested Gant for driving on a suspended license. They handcuffed him and locked him in a patrol car before deciding to search his car. During the search, the officers found cocaine in a jacket pocket located in the car. The Arizona trial court denied Gant's motion to suppress the evidence, and convicted him for drug offenses.

In its decision reversing the trial court decision, the Supreme Court held police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest. Additionally, the Court's ruling overturned *New York v Belton*, 453 U.S. 454, which held that police may search the passenger compartment of a vehicle and any containers therein as a contemporaneous incident of a recent occupant's lawful arrest. Per the Court, the factors which justified the *Belton* decision, i.e., preservation of evidence and safety, did not apply to situations such as *Gant*, where the officers already secured the scene and the suspect did not have any possibility of reaching the vehicle being searched.

Sixth Amendment, Informant Statements, Impeachment

Kansas v Ventris, ___S.Ct. ___, 2009 WL 1138842 (U.S.Kan.)

An informant planted in Ventris's cell heard him admit to shooting and robbing the victim, the crime upon which Ventris was awaiting trial. At trial, Ventris testified another individual committed the crimes. When the State sought to call the informant to testify to his contradictory statement, Ventris objected. The State conceded that Ventris's Sixth Amendment right to counsel had likely been violated, but argued that the statement was admissible for impeachment purposes. The trial court allowed the testimony, and a jury convicted Ventris of aggravated burglary and aggravated robbery. Reversing, the Kansas Supreme Court held that the informant's statements were not admissible for any reason, including impeachment.

In its decision reversing the state court, the Supreme Court held Ventris's statement to the informant was admissible for impeachment purposes, even if it was elicited in violation of

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Ventris's Sixth Amendment rights. According to the Court, the Sixth Amendment interests safeguarded by excluding tainted evidence for impeachment purposes are "outweighed by the need to prevent perjury and to assure the integrity of the trial process."

Halabicky v University of MI, U.S. District Court Eastern District of Michigan, Judge Lawson
March 30, 2009

Plaintiffs, a putative class of all female nurse practitioners (NP's) employed by defendant, University of Michigan Health Care System, brought this action under Michigan's Elliott-Larsen Civil Rights Act (ELCRA) and the federal Equal Pay Act alleging gender discrimination. They claimed that they received less pay than their male coworkers, despite having identical duties and responsibilities. However, none of the suggested male counterparts were NP's. The males were physician's assistant (PA), an entirely different job classification, which required other qualifications, licensure, and training, and most importantly was governed by another compensation schedule.

Defendant opposed plaintiffs' motion for class certification of their Elliott-Larsen claim. The Court held that because plaintiffs did not establish that their claims were common or typical of the claims within the putative class, and individualized issues predominated, that plaintiffs did not meet the requirements for class certification found in FRCP 23(a)(2), (3), or (4). Since there existed no system setting PA compensation between departments (as opposed to NP compensation governed by a CBA), the Court found that there was point of comparison on a class-wide basis between the two job classifications. The Court explained that the factors listed in *Bacon v Honda of America Manufacturing., Inc.*, 370 F.3d 565 (6th Cir. 2004)[1] mitigated against a finding of "commonality." Further, plaintiffs could not establish "typicality" because they did not claim that any defendants' alleged discrimination was against them as a class. Specifically, even though some NPs argued that their work was comparable to certain higher-compensated men working as PA's, the Court reasoned that such a claim would require more individualized proofs not typical from one plaintiff to another or to the class of plaintiffs as a whole.

Ysursa v Pocatello Educational Association
129 SCt 1093 (2009)
U.S. Supreme Court—Majority: Roberts, Scalia, Kennedy, Thomas, and Alito
Argued November 3, 2008; Decided February 24, 2009

Several Idaho public employee unions (respondents) alleged First and Fourteenth Amendment violations arising out of Idaho's Right to Work Act (RWA) which allows public em-

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State Bar Launches "A Lawyer Helps" Program to Celebrate and Support Attorneys' Contributions to Society

"A Lawyer Helps" — and the State Bar of Michigan wants everyone to know just how much.

The Bar, in cooperation with a host of partners including civil legal aid agencies, bar associations, law schools, law firms and the Michigan State Bar Foundation, has launched a program to celebrate and support lawyers' public service.

"A Lawyer Helps" has two goals: recognizing how lawyers make a difference everyday for people and society and providing tools for them to continue doing so.

"Thousands of Michigan lawyers contribute pro bono or free legal services to low-income people every year, and thousands more give generous financial support for legal aid. They also give time by volunteering in their local communities," said Ed Pappas, president of the State Bar of Michigan. "We are extremely proud of that record, and 'A Lawyer Helps' will shine a light on their efforts."

"A Lawyer Helps" focuses on the legal profession's priority of pro bono free legal help for the poor and financial donations to help nonprofit legal aid agencies, and it recognizes that many lawyers also provide other community service. These volunteer efforts will be featured extensively in State Bar publications including the May issue of the Michigan Bar Journal, and on a new website at www.alawyerhelps.org. Attorneys interested in getting involved in pro bono and community service opportunities can seek information at that website, and lawyers can also find a link to donate online to the Access to Justice Fund for the statewide endowment or for a local legal aid program. In addition, the website provides information on how to obtain "A Lawyer Helps" gear such as t-shirts, aprons, or buttons to wear while volunteering and ways to recognize lawyer volunteers.

Opinions of Attorney General Mike Cox

By George M. Elworth, Assistant Attorney General

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

Counties

Responsibility for costs associated with mental health treatment provided to inmates at county jails

The costs incurred providing mental health services to an inmate incarcerated in a county jail are ultimately the responsibility of the county under MCL 801.4. The community mental health program serving the county in which that jail is located must nevertheless seek to obtain payment from available insurance or other sources before resorting to the county for payment in accordance with MCL 801.4(2). The costs incurred in providing mental health services to an inmate in a county jail rests with the county, regardless of the type of treatment or mental health service being delivered.

Opinion No. 7231
May 27, 2009

Incompatibility

Whether person serving as township supervisor and city police officer holds incompatible offices

A person holding positions as an elected township supervisor and a city police officer does not violate the Incompatible Public Offices Act, MCL 15.181 *et seq*, unless: 1) the township and the city have or are negotiating a contract for police services; or 2) other particularized facts are present that demonstrate the individual cannot faithfully perform the duties of a city police officer and township supervisor in a manner that protects, advances, or promotes the interests of both offices simultaneously.

Opinion No. 7226
March 11, 2009

Incompatibility of offices of general law township trustee and fire chief of a jointly administered fire department

A trustee of a township with a population less than 25,000 that is a party to an intergovernmental agreement creating a joint fire department may not simultaneously serve as the fire chief of the joint fire department.

Opinion No. 7232
May 27, 2009

Law Enforcement

Application of the Sex Offenders Registration Act's Student Safety Zone Exception to Prisoners

For purposes of the exception in section 35(3)(c) of the Sex Offenders Registration Act, MCL 28.735(3)(c), a person who was confined in prison on January 1, 2006, is regarded as "residing within" the prison on that date.

Opinion No. 7228
April 13, 2009

Open Meetings Act

Legality of proxy voting under the Open Meetings Act

A provision in the bylaws of a city's downtown development authority that allows board members to vote by proxy violates the Michigan Open Meetings Act, MCL 15.261 *et seq*, because proxy voting fails to make the important deliberative aspects of the absent board member's decision-making process open to the public when rendering a decision that effectuates public policy.

Opinion No. 7227
March 19, 2009

Summer Resort Owners Corporation Act

Voting rights of members of a summer resort owners corporation created under 1929 PA 137

A summer resort owners corporation created under 1929 PA 137, MCL 455.201 *et seq*, affords each owner of a freehold interest in property subject to the corporation's jurisdiction membership in the corporation and the right to vote in all its elections. Freeholders include all those holding a fee title or a life estate in real property. Because a member's right to vote is conditioned on ownership of a freehold interest in lands, a summer resort owners corporation may not through adoption of a bylaw deny or limit that right of suffrage based upon the nonpayment of assessments or dues. A bylaw disenfranchising members for nonpayment of assessments is unenforceable.

Continued on next page

Opinions of the Attorney General *Continued from page 24*

Each freeholder holding lands within the corporate jurisdiction of a summer resort owners corporation created under 1929 PA 137 is entitled to one vote in elections held under that act. An association bylaw allowing other than one vote per member freeholder is unenforceable.

1929 PA 137, MCL 455.201 *et seq*, does not authorize summer resort owner corporations formed under that act to withdraw the status of membership and deny the right to vote based on a member's failure to pay dues or levied assessments or comply with other bylaw requirements.

Opinion No. 7230
May 27, 2009

Federal Law Update
Continued from page 24

ployees to authorize payroll deductions for general union dues, but prohibits the deductions for union political activities. The Court held that the ban on political payroll deductions, as applied to local governmental units, did not infringe upon the unions' First Amendment rights.

The Court stated that although content-based restrictions on speech are presumptively invalid and subject to strict scrutiny, the First Amendment does not impose an obligation on the government to subsidize speech. The Court reasoned that Idaho's public employee unions are free to engage in speech that they see fit because respondents are only barred from enlisting State support in the speech. Since the State's decision to limit public employee payroll deductions has not infringed upon the unions' First Amendment rights, petitioner only had to demonstrate a rational basis to justify the ban. The law furthered the State's proffered interest in avoiding the reality or appearance of government favoritism or entanglement with partisan politics. See, e.g., *Civil Service Comm'n* v *Letter Carriers*, 413 US 548, 565. Therefore, the Court ultimately ruled that the law did not restrict political speech, but only declined to promote that speech by allowing public employee "checkoffs" for political activities.

14 Penn Plaza LLC v Pyett, 129 S. Ct. 1456(2009)
U.S. Supreme Court—Majority: Roberts, Scalia, Kennedy, Thomas, and Alito
Argued December 1, 2008; Decided April 1, 2009

Respondents were a group of long-tenured employees who are members of the Service Employees International Union, Local. The individuals worked in a commercial office building and were reassigned from "night watchmen" positions to the less favorable job classification of either "night porters" or "light duty cleaners." After the reassignment, respondents sued, alleging several state law claims, as well as one federal count under the Age Discrimination in Employment Act (ADEA). Petitioners, the employer and owner of the building, filed a motion to compel arbitration in accordance with the union's collective bargaining agreement (CBA).

Pursuant to the National Labor Relations Act, the union is the exclusive bargaining representative of employees within the building-services industry in New York City, which includes building cleaners, porters, and doorpersons. The union has exclusive authority to bargain on behalf of its members over their "rates of pay, wages, hours of employment, or other conditions of employment," 29 USC §159(a), and engages in industry-wide collective bargaining with the Realty Advisory Board on Labor Relations, Inc. (RAB), a multi-employer bargaining association for the New York City real-estate industry. The agreement between the union and the RAB is embodied in the CBA for the Contractors and Building Owners. The CBA requires union members to submit all claims of employment discrimination to binding arbitration under the CBA's grievance and dispute resolution procedures. The Court held that "a provision in a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law."

Endnotes

1 (i) the nature of the alleged unlawful employment practice genuinely had a class-wide impact;

(ii) employment practices affecting the class were uniform or diverse, given factors such as size of the work force, number of plants involved; range of employment conditions, occupations, and work activities; geographic dispersion of the employees and extent of intra-company employee transfers;

(iii) members' treatment would be likely to involve common questions;

(iv) relevant employment and personnel policies and practices were centralized and uniform; and

(v) similar conditions prevailed throughout the time period covered by the allegations. *Bacon*, 370 F.3d at 570.

Legislative Update

By Kester K. So and Christina Piña, 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

- Credit Unions. **SB 195** allows public corporations including cities, counties, villages, and townships to invest in certificates of deposit issued by insured credit unions that participate in programs like the Certificate of Deposit Account Registry Service program. Amends section 1 of 1943 PA 20, MCL 129.91.
- Education Investment. **HB 4397** amends the Revised School Code to allow school districts and intermediate school districts to invest in certificates of deposit issued by credit unions. Amends sections 622 and 1223 of 1976 PA 451, MCL 380.622 and MCL 380.1223.
- Neighborhood Enterprise Zones. **HB 4045** amends the Neighborhood Enterprise Zone Act, which requires an owner or developer to apply for a NEZ certificate before a building permit is issued. The amendment adds to the exceptions and provides that the application can be filed after the building permit is issued if the area that the building is located in has been designated as a NEZ by the local governing body on July 1, 2005 and the permit was issued between April 5, 2005 and May 1, 2007. Amends section 4 of 1992 PA 147, MCL 207.774.
- School Bonds. **SB 416** amends the School Bond Qualification, Approval, and Loan Act by revising the loan interest rate. Amends section 9 of 2005 PA 92, MCL 388.1929.
- Road Commission Reorganization. **HB 4830** amends the County Road Law by allowing road commissioners to be reorganized by charter counties. Amends section 6 of Chapter IV of 1909 PA 283, MCL 224.6.

Bills Passed by the Senate

- Eligible Brownfield Property. **SB 323** would amend the Brownfield Redevelopment Financing Act to change the definition of eligible property to include property that is designated as property with a major redevelopment project by the Michigan Economic Growth Authority, which project must have new construction investment of $50M or include at least one multilevel parking facility, create at least 300 permanent jobs, and which benefits the state/region. Amends section 2 of 1996 PA 381, MCL 125.2652.
- Worker Eligibility and Requirements. **HB 4083, 4089, 4092** would provide that beginning July 1, 2009, each of the listed governing bodies shall only approve projects of applicants that state in writing that they will use Michigan residents, unless the expertise of a nonresident is needed or federal law requires otherwise due to the use of federal funds. Amends section 11 of the Michigan Strategic Fund Act, 1984 PA 270, MCL 125.2011; amends sections 8 and 10 of the Michigan Economic Growth Authority Act, 1995 PA 24, MCL 207.808 and MCL 207.810; and adds section 5a to the Industrial Revenue Bond Act, 1963 PA 62, MCL 125.1251 *et seq.*
- Smart Zones. **SB 358** would amend the Local Development Financing Act to allow the Michigan Economic Development Corporation to designate two additional certified technology parks between June 1, 2009, and December 31, 2009. Amends section 12a of 1986 PA 281, MCL 125.2162a.
- Cobo. **SB 585** would amend the Regional Convention Facility Authority Act to allow the legislative body of a qualified city (Detroit) to disapprove the transfer of a qualified convention facility (Cobo Hall) to a regional convention facility authority after May 1, 2009, and before July 1, 2009, and dissolves the regional convention facility authority if the legislative body disapproves the transfer. Amends sections 5 and 19 of 2008 PA 554, MCL 141.1355 and 141.1369. See also **SB 586**, **587,** and **588,** which amend the Health and Safety Fund Act, the State Convention Facility Development Act, and the Michigan Trust Fund Act for other portions of the package.

Bills Passed by the House of Representatives

- Recreational Authorities. **HB 4700** would amend the Recreational Authorities Act to allow school districts

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Legislative Update
Continued from page 27

and local government officials to cooperate in setting up recreational facilities. Amends section 3 of 2000 PA 321, MCL 123.1133.

- Worker Eligibility and Requirements. **SB 290 and 293** would amend various statutes in a similar manner to the bills recently passed by the Senate described above.
- Employee Benefits. **HB 4795** would amend the Michigan Employee Security Act by extending benefits to individuals enrolled in a state-approved job training program; amends sections 27 and 28 of 1936 (Ex Sess) PA 1, MCL 421.27 and 421.28.
- Renaissance Zones. **HB 4723** would amend the Renaissance Zoning Act by designating border crossings as renaissance zones. Amends section 8a of 1996 PA 376, MCL 125.2688a.
- Cobo. **HB 4998** would amend the Regional Convention Facility Authority Act to provide for a period of time during which a qualified city (Detroit) may disapprove a lease of the qualifying convention facility (Cobo Hall) to a regional convention facility authority and dissolves the regional convention facility authority if the lease is disapproved within the period provided. Amends sections 5, 7, 11, and 19 of 2008 PA 554, MCL 141.1355, MCL 141.1357, MCL 141.1361, and MCL 141.1369. The House also passed a House substitute for SB 587, which amends the State Convention Facility Development Act.

Bills Introduced in the Senate

- Economic Development. **SB 428** would amend the Local Development Financing Act by modifying local development financing decision-making authority to Strategic Fund. Amends sections 2, 3, 12, and 12a and adds section 12c to 1986 PA 281, MCL 125.2152 *et seq.*

Bills Introduced in the House of Representatives

- Graduated Income Tax. **HJR R** would amend the Constitution to allow the state to have a graduated income tax, but local governments could not. Amends Article IX sec. 7 of the state Constitution.
- Special Assessment. **HB 4753** would allow local government bodies to levy special assessments on property in the local government unit to defray the costs associated with community centers and providing public safety services. If the proposal to levy special assessments is approved, the local government body can borrow money and issue bonds, subject to 2001 PA 34, MCL 141.2101 to 141.2821.
- Road Projects. **HB 5072** would modify allocation for economic development road projects in any targeted industries. Amends section 11 of 1987 PA 231, MCL 247.911.
- Cobo. **HB 5115, 5116, 5117, and 5118** would amend the Regional Conventional Facility Act to validate the transfer of a qualified conventional facility. Amends sections 5, 19, and 29 of 2008 PA 554, MCL 141.1369, MCL 141.1355, MCL 141.1379, and section 5 of 1987 PA 264, MCL 141.475.

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

The Wild Animals of Ludington

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

Public Act 248 of 1879 [MCL 433.51 et seq] makes it unlawful for various animals to run at large. Specifically, MCL 433.51 provides, in part, "*That it shall not be lawful for any cattle, horses, mules, sheep, swine, or goats to run at large in any public street, lane, alley, park, place, or highway, in any city or village within this state having a population of 7,000 or more inhabitants*; . . . ."

The act also requires cities and villages to provide pounds and pound masters for the detention, care, and feeding of such animals. MCL 433.57 provides that the pound master "*shall purchase all necessary supplies for the sustenance of all animals impounded, and all animals impounded or seized under this act shall be supplied with suitable food and drink for their sustenance*."

It also provides that the pound master *"shall keep a record in a book kept for that purpose and which shall at all reasonable times be open for public inspection, of the time when each animal was received into such pound, and the time when discharged therefrom, and of the name of the person to whom the same was delivered, and also a record of all moneys paid to him."*

Other provisions of the act deal with demands by owners for return of their animals, appeals, etc. What is most interesting, however, is that the beautiful lakeside city of Ludington is specifically exempt from the act. MCL 433.51, cited above, states, *"Provided, the City of Ludington be exempt from the operations of this act."*[1]

Obviously, one wonders what it is about the City of Ludington that would cause the legislature to provide such an exemption. Why would one want to allow cattle, horses, mules, sheep, swine, or goats to run at large in such a beautiful lakeside city?

I thought that perhaps a quick review of Ludington's history would provide a clue, so I visited the Wikipedia.org website. There I learned that Ludington is located at the mouth of the Pere Marquette River, named after the French missionary Jacques Marquette, who died and was laid to rest in what is now Ludington, in 1675.

In 1845, one Burr Caswell moved to the area near the mouth of the Pere Marquette River as a location for trapping and fishing. In July 1847 he brought his family to live there as well and began a small community known as Pere Marquette Village. Two years later they built a two-story wood-framed house on their farm. After the organization of Mason County in 1855, the first floor of this building was converted into the county's first courthouse. The structure stands today as a part of White Pine Village, a museum consisting of several restored and replica Mason County buildings.

Ludington was originally named Pere Marquette, then later named after the industrialist James Ludington, who owned some of the logging operations in the late 19th century. The area boomed in the late 1800s due to these sawmills and also the discovery of salt deposits. Since the legislation exempting Ludington from the prohibition against allowing cattle, horses, mules, sheep, swine, or goats to run at large was enacted in 1879, one wonders if there was some connection between that exemption and the thriving lumber business. Alas, I can think of none.

In 1897, the Pere Marquette Railroad constructed a fleet of ferries to continue its rail cargo across Lake Michigan to Manitowoc, Wisconsin. The fleet was also expanded to carry cars and passengers across the lake. By the mid-1950s, Ludington had become the largest car ferry port in the world. Unfortunately, due to disuse and declining industry, this fleet eventually dwindled. Currently only one car ferry, the *SS Bad-*

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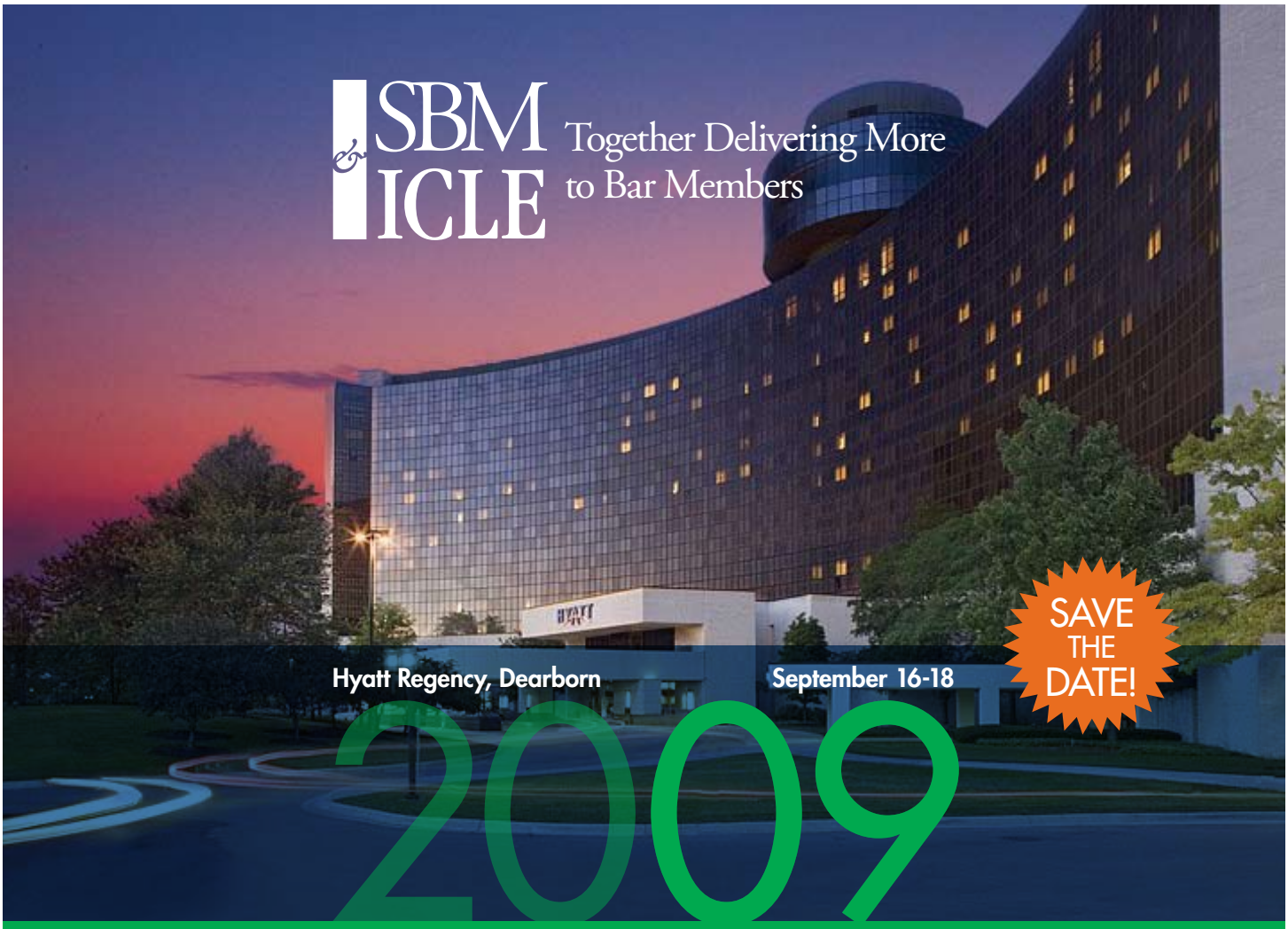

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I'll Bet . . .
Continued from page 29

ger, makes regular trips across the lake from Ludington, one of only two lake-crossing car ferries on Lake Michigan. I must admit, for a split second I thought the name *Badger* was a tribute to those wild animals of Ludington, but immediately realized it was named for the University of Wisconsin mascot. (A companion ship named *Spartan* still sits at the same port, but is now used solely for parts).

Since my research revealed no clues as to why Ludington would be exempted from the sate law, I invite our colleagues from the Ludington area to provide an explanation for this exemption. Was the governor at that time from Ludington? Was there a strong farm animal owners lobby based there? Was it the home of a religious cult that treated cattle, horses, mules, sheep, swine, and/or goats as deities? Or was there a fear that local officials would use the statute to make arrests at toga parties in local fraternity houses? Who knows?

There is one other part of that act I have not mentioned, but would be of interest to all city attorneys. Section 12 of the act requires the local city attorney to represent the people of the state in a proceeding under the act. MCL 433.12 provides, *"In all criminal matters under this act, it shall be the duty of the city attorney to appear before the magistrate entering [entertaining] the complaint and act as counsel on behalf of the people of this state, and in case of his absence, neglect, or refusal to so act on request of the magistrate, any attorney at law, on request of such magistrate, may act as such counsel for the people."*

This leaves one most important question unanswered: to whom do you send your bill?

Author's note: My thanks to Richard M. Wilson, Jr., Esq. of Gockerman, Wilson, Saylor & Hessin, PC, Manistee, Michigan for calling this unusual exemption to my attention. I actually thought I had written about it once before, but could not find the article anywhere in my archives.

Endnotes

1 The current population of Ludington is approximately 8,500. What it was in 1879, I either never knew, or don't remember.