

# Public Corporation Law Quarterly

## Amending Michigan's Constitution, The Constitutional Convention Option

Fall 2010, No. 4

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*By Gary L. Dove of Secrest Wardle*

### Introduction

After casting their votes for candidates to run our state and local governments at the general election on November 2, 2010, Michigan voters will be asked if the constitutional rules under which Michigan governments operate should be changed. The first ballot question we will see will be whether a general revision of the State's Constitution should be considered through the convening of a constitutional convention.<sup>1</sup>

The Michigan Constitution of 1963 identifies three ways in which it may be amended. One can not be a regular voter and not be familiar with the first two options which are by the legislature with voter approval<sup>2</sup> and the petition process followed by voter approval.<sup>3</sup> Under those "piecemeal" options, 52 sections of the constitution have been amended or added since 1963 by voter approval in 1968, 1970, 1972, 1978, 1982, 1988, 1992, 1994, 1996, 1998, 2002, 2004, 2006, and 2008. The third option for amending the State Constitution provides for an entirely different approach.

According to Article XII, Section 3 of the Michigan Constitution of 1963,<sup>4</sup> beginning in 1978 and each 16<sup>th</sup> year after that, the question of a general revision of the Constitution is to be submitted to the electors of the state, with the actual question presented being to decide in favor of a convention for that purpose. Michigan's Constitution of 1963 was approved by voters in April of 1963 after the constitutional convention process and took effect January 1, 1964. It is only the fourth Constitution for the state, the prior versions having been approved in 1835, 1850 and 1908. The mandatory, periodic constitutional revision ballot question has been in the Michigan Constitution since 1850, with 14 other states having similar requirements. Five states will have a general constitutional revision question on the 2010 ballot.

That constitutional convention question failed by margins of approximately 70% to 30% in 1978 and 1994. With the depressed state economy and what some might say has been a dismal performance by state government, a closer vote might be expected this year. This article is not intended to advocate a yes or no vote come No-

# Chairperson's Corner

By Eric D. Williams of City of Big Rapids

## Public Corporation Law Quarterly

The *Public Corporation Law Quarterly* is published by the Public Corporation Law Section of the State Bar of Michigan, Michael Franck Building, 306 Townsend Street, Lansing, Michigan 48933-2083.

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The views expressed in the publication do not necessarily reflect those of the Public Corporation Law Section or the State Bar of Michigan. Their publication does not constitute an endorsement of the views.

The Public Corporation Law Section Council met for the first time with its new slate of officers on September 11, 2010, at the Miller-Canfield office in Lansing. We reviewed the summer seminar held on Mackinac Island, which was presented jointly by PCLS and MAMA (Michigan Association of Municipal Attorneys). The two day summer seminar will be held at the Grand Hotel on Mackinac Island in 2011, and at Boyne Highlands in 2012. The annual PCLS meeting will be held in conjunction with the summer seminar, and there is no charge for PCLS members to attend the annual meeting. This fall we are planning for the February winter seminar. PCLS members can submit suggestions for seminar topics to me, Vice Chairperson Phil Erickson, or Secretary-Treasurer Catherine Mish. With the public and private sectors facing financial stress, we are considering one or two presentations on bankruptcy and financial emergency measures for public corporations. Medical marijuana continues to generate legal issues and questions for counties, universities, cities, villages, and townships, so another presentation on it may be in order. Requests for amicus curiae briefs continue to come to the PCLS Council, which keep the Section involved in the development of the law affecting public corporations. 🏰

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Amending. . .

*Continued from page 1*

vember 2, 2010. Rather, it outlines what we will be voting on in terms of the process and issues that may arise, summarizes pending convention implementation legislation<sup>5</sup> and surveys some of the issues a constitutional convention might take up if it were convened.

## Constitutional Convention Basics and Process

The process and provisions for a convention found in the Article XII, Section 3 of the Michigan Constitution of 1963, and observations and implementation issues regarding that provision include the following:

- The question on holding a convention for a general revision of the Constitution must be approved by a majority of the electors voting on that question.
- The constitutional convention would have 148 delegates (one for each State House and Senate District).
- The election for convention delegates must be held no later than six months after November 2, 2010. The regular election date on May 3, 2011 would just satisfy this requirement.<sup>6</sup>
- The convention delegate election is to be a partisan election. In all likelihood, the regular February election date of February 22, 2011 would be the date for the convention delegate primary.<sup>7</sup> While the Constitution makes no reference to nominating petitions or primaries, those are typical requirements in partisan elections,<sup>8</sup> with pending legislation confirming and providing details for those requirements.<sup>9</sup>
- Amazingly, the Constitution contains no eligibility requirements for convention delegates. Pending legislation would require US citizenship and being a qualified and registered elector of the district.
- Neither the Constitution nor existing or pending legislation prohibits a legislator from being a convention delegate. It would seem that questions could arise under the Incompatible Offices Act if a legislator was actually elected as a convention delegate.<sup>10</sup>
- The convention is to convene at the seat of government on October 4, 2011 or an earlier date established by the legislature.
- The convention chooses its own officers and determines the rules of its proceedings.
- The convention is to judge the qualifications, elections and returns of its members. Considering the lack of delegate eligibility requirements in the constitution itself and partisan nature of the process, this provision could be the source of difficulty. Pending legislation would provide for Board of Canvasser determination and Secretary of State and County Clerk recognition and certification of elected convention delegates.<sup>11</sup>
- Convention delegate vacancies are to be filled by Governor appointments of qualified(?) residents of the same district and political party.
- The convention is given the power to appoint and fix compensation of officers, employees and assistants and to provide for printing and distribution of information. I have seen estimates of \$28 million to \$45 million for the cost of a constitutional convention. With the convention convening just after the beginning of a new state fiscal year, the authority of the convention to fix compensation and incur costs and expenses could become a source of difficulty in the context of legislative budget appropriations.
- Convention delegates are to receive compensation for services as provided by law. Currently that is \$500 semi-monthly, with a \$1,000 minimum and \$7,500 maximum plus mileage at 10¢ per mile for one round trip per month from home to the state capital.<sup>12</sup> Pending legislation would change the compensation to \$1 per month plus mileage at the IRS rate for the one round trip per month from home to the state capital.<sup>13</sup>
- For a new or amended constitution to be adopted by the convention for submittal to the voters requires approval by majority of the delegates selected and serving. The convention is to identify the manner and time for that vote (not less than 90 days after the convention adjourns) and when the constitution or amendments will take effect if approved by the voters.
- Voter/elector approval of a constitution or amendments adopted by the convention is by majority of the qualified electors voting on that question.

## Possible Timing Issues

Not addressed in the above summary are problems that could arise with implementing the timetable mandated by Article XII, Section 3 of the Michigan Constitution of 1963. While the question of convening a constitutional convention will be voted on at the November 2, 2010 election, the actual results are determined by the Board of State Canvassers, which has until the 20<sup>th</sup> day after the election (November 22) to meet for that purpose, and may adjourn from time-to-time, with the deadline for determining the results being no later than the 40<sup>th</sup> day after the election (December 12, 2010).<sup>14</sup> If the partisan election of convention delegates requires a primary preceded by nominating petitions, the 12<sup>th</sup> Tuesday before a February 22, 2011 convention delegate primary would be November 30, 2010.<sup>15</sup> Recounts may be requested by any elector for specified reasons within two days after final certification of a vote<sup>16</sup>, and must be conducted if the state-wide vote differential is 2000 or less.<sup>17</sup>

While a delayed or extended Board of Canvassers' determination and/or recount would be the proverbial "perfect storm," the effect could be to eliminate the ability to utilize the regular February and May election dates<sup>18</sup> in satisfying the constitutional requirement that convention delegates be elected no later than six months after the ballot proposal is certified as approved.<sup>19</sup> Even without a delayed or extended Board of Canvassers determination or recount proceedings, there is a current lack of legislative guidance on implementing the partisan election described in the constitution.

## Pending Legislation

In an April 16, 2009 press release, the Secretary of State announced she was proposing legislation to establish procedures for the possible constitutional convention, indicating she would work with lawmakers to have the legislation introduced once drafting was completed.<sup>20</sup> On June 1, 2010, Senate Bills 1355-1360, possibly being the legislation referenced more than a year earlier by the Secretary of State, were introduced and referred to the Committee on Campaign and Election Oversight. As of September 22, 2010, the Michigan Legislature's website reflected no change in that status. Considering the lack of movement and with the campaign season upon us, there would appear to be the possibility that any legislation to implement a constitutional convention could wind up being approved in a hurry by a "lame duck" legislature and governor.

As already noted, Senate Bill 1360 would reduce convention delegate compensation to \$1.00 per month. Senate Bills 1358 and 1359 would amend the Michigan Campaign Finance Act to apply to constitutional convention delegate candidates and contributions to them. Senate Bill 1357 contains rather detailed and extensive financial reporting requirements for constitutional convention delegates which the Secretary of

State would be required to post on the internet, with substantial late filing fees and misdemeanor penalties provided for.

Senate Bill 1355 calls for an 11-member constitutional convention preparatory commission comprised of appointees by the Governor and State Senate and House leaders to be in place by January 30, 2011. The tasks of that commission would be to find a suitable location for the convention, provide staff, equipment and supplies needed to prepare for it, and provide the necessary means to conduct the convention in a virtual or web-based format.

Senate Bill 1356 seems directed at answering some of the questions under the constitutional language itself. For instance, it would require convention delegate candidates to be U.S. citizens and qualified/registered electors of the district in which they are a candidate. Use of the February regular election date for a state-wide primary and the May regular election date would be confirmed. Regarding nominating petitions, the filing deadline would be the 10<sup>th</sup> Tuesday before the February primary (December 14, 2010), with an interesting twist. In lieu of filing a nominating petition, a non-refundable filing fee of \$100 could be paid.

Senate Bill 1356 also contains detailed provisions and procedures for candidate withdrawal and vacancies and for the resignation, removal, vacancy and replacement of elected convention delegate candidates. At least from my reading, some of those provisions seem to go well beyond addressing omissions in the constitutional language.

## The Constitutional Convention Question

With an internet search on Michigan Constitutional Convention, anyone interested will find an abundance of articles and information on this subject, including the pros and cons for holding a constitutional convention and the organizations that have lined up on either side of the issue. Such a survey would identify the following arguments against holding a convention:

- A convention opens the entire Constitution to review and possible change.
- It is a partisan process.
- Possible out-of-state financing and influences.
- There is no time limit on the length of a convention and resultant costs.
- Correcting existing constitutional provisions that have been invalidated by the courts is not a sufficient reason, by itself, to hold a convention.
- Potential futility of the process if revisions recommended by a convention are not approved by the voters.

Aside from a broken and/or outdated system in need of a major overhaul that is not suited to piecemeal amendments, the arguments in favor of a constitutional convention can be expected to be based on dissatisfaction with one or more of the current provisions of the constitution. As illustrated by the following constitutional shopping list, there should be something for just about everyone:

- Legislative and congressional reapportionment.
- Governor appointments of department directors.
- Appointed judges and college governing boards.
- Abortion rights
- Term limits.
- Unicameral legislature.
- Part time legislature.
- Death penalty prohibition repeal.
- Sales tax cap.
- Graduated income tax prohibition.
- Headlee tax limitations and mandates.
- Governor appointment of Secretary of State and Attorney General
- School district consolidation.
- Eliminate township government.
- Restore affirmative action by state and public universities.
- Remove same sex marriage ban.
- Stem cell research.
- Allow physician assisted suicide.
- Drug legalization.
- Remove prohibition on public aid to non-public education.
- School funding and equity.
- Gambling.
- Right of privacy.

- Parental notification rights.
- Recall.
- State budget process.

Obviously, the smorgasbord of offerings for a constitutional convention to sample could be rather large. Keeping in mind that whatever constitutional revisions approved by a convention would also require voter approval, a real danger under this option is putting more on the constitutional plate than the voters are willing and able to digest and vote for. Of course if that were to occur, at least some of us could do it all again in 16 years! 🗳️

## Endnotes

- 1 MCL 168.474a(2)(a)
- 2 Const. 1963, Art. XII, Sec. 1
- 3 Const. 1963, Art. XII, Sec. 2
- 4 Const. 1963, Art. XII, Sec. 3
- 5 2010 Senate Bills 1355 - 1360
- 6 MCL 168.641(1)(b)
- 7 MCL 168.641(1)(a)
- 8 MCL 168.531 – 168.558
- 9 2010 Senate Bill 1356
- 10 MCL 15.181 et seq
- 11 2010 Senate Bill 1356
- 12 MCL 2.51 – 2.54
- 13 2010 Senate Bill 1360
- 14 MCL 168.841, 168.842(1)
- 15 MCL 168.551
- 16 MCL 168.880
- 17 MCL 168.880a
- 18 MCL 168.641(1)
- 19 Const. 1963, Art. XII, Sec. 3
- 20 [www.michigan.gov/sos](http://www.michigan.gov/sos)

# FCC Shot Clock Order: Summary, Risks and Concerns

By John Pestle of Varnum LLP

In November 2009 the Federal Communications Commission (FCC) issued its Order<sup>1</sup> creating “shot clocks” for cellular zoning applications and in August 2010 rejected a Petition for Reconsideration<sup>2</sup> of the Order filed by the National League of Cities and others. This article summarizes the shot clock provisions of the Order and Reconsideration Order and the major risks and concerns they create for municipalities.

## The Order

The Order is a declaratory ruling<sup>3</sup> in response to a Petition by the cellular industry.<sup>4</sup> In it, the FCC first ruled that it had the authority to set time frames for local action on zoning requests. Municipal groups had argued that the FCC lacked such authority due to the provision in 47 USC § 332(c)(7) (A) that “[e]xcept as provided in this paragraph, nothing in this Act shall limit or affect” local authority on cellular zoning matters.<sup>5</sup>

However, the FCC held it had authority under the general provisions of the Federal Communications Act to interpret ambiguous sections of Section 332(c) as long as it imposed no “new limitations” on local zoning.<sup>6</sup>

The FCC thus concluded that it could set “presumptively reasonable”<sup>7</sup> time frames for local action on cellular zoning requests, which under Section 332(c)(7) gives providers 30 days to go to federal court if such time frames are exceeded. This jurisdictional issue and whether the FCC has violated Section 332(c)(7) by imposing new limitations “limiting or affecting” local zoning will be a central issue in the pending appeals of the Order and Reconsideration Order.<sup>8</sup>

On substance<sup>9</sup> the FCC ruled that (a) because requests to co-locate a cellular antenna on an existing structure were relatively simple, that 90 days was a “presumptively reasonable” time for local action on such zoning requests, (b) 150 days was the corresponding time period for new towers, and (c) a municipality and applicant could agree to extend these time periods.<sup>10</sup>

The FCC then addressed incomplete applications, ruling that “When applications are incomplete as filed” the 90/150 timeframes do not include the time for the applicant to respond to “a request for additional information” but “only if” the local government “notifies the applicant within the first 30 days that its application is incomplete.”<sup>11</sup>

The FCC rejected the request in the Petition that a violation of the shot clocks would result in an application being automatically deemed granted. It said its ruling allowed an applicant to go to federal court which will “determine whether the delay was in fact unreasonable under all the circumstances of the case” and fashion an appropriate remedy.<sup>12</sup>

## Major Risk

Municipalities should *not* rely the Order’s rejection of the request that violations of the shot clocks automatically lead to applications being “deemed granted,” and leave the remedy to the courts.

This is because cellular companies uniformly argue—and courts very often agree—that the remedy for violations of Section 332 is an injunction *granting the zoning application as applied for*.<sup>13</sup> See, for example, the Chattanooga case where (1) the court ordered six cellular towers approved as applied for, (2) due to the lack of timely action by the City.<sup>14</sup> Providers will likely make the same claim for shot clock violations—that the only appropriate remedy for such “abuses” harming broadband rollout is an order approving the cellular zoning application.<sup>15</sup> There is thus a significant risk that the remedy for a violation of the shot clocks will not be a remand but an order granting the applications as applied for.

## Incomplete Applications, Additional Information

The Order’s provisions on incomplete applications, requests for additional information and lack of tolling provisions for delays outside local control are major causes for concern, on which the National League of Cities, NATOA, et al. filed a Petition for Reconsideration.<sup>16</sup> The concerns are (1) the provisions in the Order and Reconsideration Order<sup>17</sup> that requests for additional information don’t toll the shot clocks unless the applicant is notified within the first 30 days that the application is incomplete, (2) that providers will argue these provisions mean that there can only be one such request for additional information, or (3) that they will argue that after 30 days they have no obligation to supply additional information!<sup>18</sup>

Some of the problems with these provisions are that (1) the need for additional information can and does come up at any time in the zoning process, regardless of whether the application was complete, (2) this is especially true of difficult,

controversial applications, such as new towers in residential areas, and (3) tolling is needed for *all* requests for information (not just those made within the first 30 days) due to providers' notorious delays (often several months) in responding to such requests.

Unfortunately the FCC rejected the Petition for Reconsideration, as noted above, so the concerns and problems remain.

So as it currently stands, municipalities can face the Hobson's choice of (1) having to act within 90/150 days on zoning requests which are known to be incomplete or contain erroneous information, or (2) taking their chances in court on a suit for violating the shot clocks (or improperly denying the application, if that is done to meet the shot clock). The latter risk is exacerbated because providers have only 30 days from the expiration of the shot clock to file suit.<sup>19</sup>

## Delays Outside Local Control

A related point is the need to toll the shot clocks for delays outside a municipality's control. For example, many municipalities' zoning procedures require input from federal, state, or local agencies over whom the municipality has little or no control and who can take long periods of time to respond. Examples include the DEQ or other environmental agencies, historical review commissions/the State Historical Preservation Officer, or any airport authorities or military bases which are located near a proposed tower.

Another example is that many Michigan municipalities allow administrative appeals (such as to a Zoning Board of Appeals or City Council sitting as a Board of Zoning Appeals) of initial zoning decisions. Whether there is such an appeal is obviously outside a municipality's control.

In this regard, one of the most frequent questions we have gotten in the several seminars we have conducted on the shot clock order is whether or not the shot clocks continue to run or are tolled during the pendency of such an internal administrative appeal. We addressed this issue last January in comments which we filed with the FCC on behalf of the International Municipal Lawyers Association ("IMLA"). We stressed that tolling during such appeals is *required* by the express language of Section 332(c)(7), which carefully distinguishes between a municipality's *initial* and *final* action on cellular zoning requests, such that the shot clocks can only apply to a municipality's *initial* zoning decision.<sup>20</sup>

In the Reconsideration Order the FCC declined to address this issue.<sup>21</sup> This leaves it open for individual municipalities with administrative appeals to raise if they are sued for violations of the shot clock order, such as by contending that the provider's suit is time-barred by the Federal 30 day statute of limitations in 47 U.S.C. 332(c)(7), which started to run when the municipality made its *initial* zoning decision.

## Conclusion

The shot clock Order and Reconsideration Order create potentially difficult problems for municipalities, particularly on difficult or controversial cell tower zoning applications. Hopefully agreements between providers and municipalities to extend the shot clocks can minimize or prevent problems. A decision in the pending court appeals may address, clarify or change the situation on issues of concern to municipalities. 🏠

## About the Author

*John Pestle is a Partner and Chair of the Telecommunications Group with Varnum LLP in Grand Rapids and represents municipalities across the country on telecommunications matters. He is a graduate of Harvard College, Yale Graduate School and the University of Michigan Law School and is a former Chair of the Public Corporation Law Section.*

## Endnotes

- 1 In the Matter of Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, *Declaratory Ruling*, FCC 09-99, WT Docket No. 08-165 (Nov. 18, 2009) ("Order"). The Order is available, [inter alia](http://www.varnumlaw.com/celltower) at [www.varnumlaw.com/celltower](http://www.varnumlaw.com/celltower) and the FCC web site.
- 2 In the Matter of Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, FCC 10-144, WT Docket No. 08-165 (Aug. 3, 2010) ("Reconsideration Order"). The Reconsideration Order is also available at [www.varnumlaw.com/celltower](http://www.varnumlaw.com/celltower) and the FCC web site.
- 3 It does not adopt a "rule" such as would appear in the Code of Federal Regulations.
- 4 The Petition principally asked the FCC to eliminate an ambiguity which it contended existed in 47 U.S.C. 332(c)(7) - - the cell tower zoning section of the Federal Communications Act of 1934 - - by clarifying the time period in which a State or local zoning authority will be deemed to have "failed to act" on a wireless facility siting application. It argued this was necessary because Section 332(c)(7) gives a provider only 30 days from any "final action or failure to act" on an application to go to court. The Petition thus contended that the FCC needed to set a "shot clock" interpreting Section 332(c)(7)'s requirement for municipalities to act on applications "within a reasonable period of time" so that providers would know when the 30 days would start to run.
- 5 The legislative history reinforces this provision, such as by directing the FCC to terminate a then pending rulemaking (when Section 332(c) was enacted in 1996) to preempt local zoning of cellular towers.
- 6 See, e.g. Order, ¶ 25. For this conclusion the FCC relied on *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008), *cert. denied*, 129 S.Ct. 2821 (2009) ("*ACM*"), which municipal attorneys may recall is the case where the Sixth Circuit upheld the Commission's establishment of timeframes for municipalities to act on applications by a new, competing provider (almost always a phone company) for a cable franchise. Basically the FCC was saying that just as in *ACM* it could interpret what was an "unreasonable failure to award" a second cable franchise by

failing to act on an application for it, so here it could interpret what was a “reasonable period of time” to act on a cellular zoning request.

- 7 See, e.g. Order ¶ 34, fn. 111.
- 8 In January 2010, the City of Arlington, Texas appealed the Order to the Fifth Circuit, and in September 2010 the City of San Antonio, Texas appealed the Reconsideration Order. The appeals are expected to be consolidated, and briefs are expected to be filed in the appeals in late 2010 (briefing had been stayed while the Petition for Reconsideration (discussed below) was pending, but the stay will be lifted now that the FCC has issued the Reconsideration Order).
- 9 The Order basically accepts at face value the allegations in the Petition of long delays in cell tower zoning decisions which were delaying the expansion of broadband service. The FCC did this even though (1) the bulk of the examples given by the cellular industry were anonymous (neither the provider nor the municipality were named), and (2) where identifying information was provided, municipal comments refuted the claims of municipal delay, such as by showing that the delays in fact were caused by the provider.
- 10 The Order also set forth transitional provisions for zoning applications pending in late 2009 when the Order was issued.
- 11 Order, ¶¶ 52-53 and Reconsideration Order, ¶¶ 9-19.
- 12 See, e.g. Order, ¶¶ 4 and 32 fn. 99. Other portions of the Order purport to overturn decisions of the Fourth Circuit Court of Appeals (and some other circuits) allowing a municipality to deny a cellular zoning request *solely* because *another* cellular provider provides service in the area in question, even if the proposed tower is needed to fill a “gap” in the applicant’s coverage in that area. Here the FCC relied on the U.S. Supreme Court’s “Brand X” decision, *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 982-984 (2005), to the effect that the FCC is the “expert agency” on telecommunications matters and that its interpretation of the Communications Act trumps that of the Federal Courts of Appeal. The FCC also rejected the Petition’s request to preempt zoning ordinances where in some or all cases cell tower applications are granted by variance.
- 13 Courts ordering the application approved (e.g., issuing mandamus or injunction that local permission be given) do so based on Section 332(c)(7)’s directive to courts to decide such cases “on an expedited basis” and perceived statutory goal of expediting relief, and/or because “remand would serve no useful purpose.” See, e.g., *Cellular Telephone Company*

*v. Town of Oyster Bay*, 166 F.3d 490, 497 (2d Cir. 1999); *Omnipoint v. Pine Grove Township*, 181 F.3d 403, 409 (3d Cir. 1999) and cases cited therein, *Tennessee ex rel. Wireless Income Properties v. City of Chattanooga*, 403 F.3d 392 (6th Cir. 2005) (“*Chattanooga*”) approving six cellular towers as applied for due to lack of timely action by the City.

- 14 *Chattanooga*, *supra*.
- 15 There are other cases remanding the matter to the municipality and not ordering a tower approved as applied for based on items such as procedural vs substantive violations, the court’s view that it lacked authority under Section 332(c)(7) to order approval and the inapplicability of the Federal mandamus statute to state officials. Cases on remedies are collected at pages 44-45 of our 60 page paper on cell tower zoning (and all the major cases under the cell tower zoning provisions of Federal law), available at [www.varnumlaw.com/celltower](http://www.varnumlaw.com/celltower) or upon request to [jwpestle@varnumlaw.com](mailto:jwpestle@varnumlaw.com).
- 16 In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, *Petition for Reconsideration or Clarification*, WT Docket No. 08-165, filed Dec. 17, 2009. The FCC promptly requested comments and reply comments, which were filed by early February. We filed comments on behalf of IMLA supporting the Reconsideration Petition, as discussed below.
- 17 See footnote 12, *supra*.
- 18 This is in addition to such provisions violating the Order’s own conclusion that it cannot impose “new limitations” on local zoning.
- 19 Although as noted above the Order states that parties can agree to extend the shot clocks.
- 20 Section 332(c)(7) requires municipalities to “act” within a reasonable time period on cellular zoning requests but as to court appeals, uses different language, namely that a party aggrieved “by any *final action*” or failure to act has 30 days to appeal to the courts. Congress thus distinguished between initial and final action by municipalities on cellular zoning requests and did not require a municipality to take “final action” within a reasonable period of time, although it could have done so. The shot clocks thus can only apply to a municipality’s initial zoning decision and must be tolled during any administrative appeals.
- 21 Reconsideration Order, ¶ 22.



## Tripped Up By The Two-Inch Rule?

By Edward D. Plato of Johnson, Rosati, LaBarge, Aseltyne & Field, PC

The two-inch wooden planks, each about six feet long, were laid lengthwise in the sidewalk and nailed to boards crosswise beneath them. Mrs. Weisse was walking with her daughter on this wooden sidewalk at the intersection of Porter and 23rd Streets in Detroit, when she stumbled and fell after her boot caught on the end of a plank that was raised about one and one-half to two inches above the plank which joined it. She subsequently sued the City of Detroit to recover for her injuries. The year was 1895, the year that ice hockey was invented and Babe Ruth was born. The first “horseless carriage” with a gasoline engine had been built just two years before and street cars ran along more than a dozen Detroit streets including Michigan Avenue, Grand River, Woodward, Gratiot, Congress and Jefferson.

The state statute in effect at the time simply required, similar to the current highway liability statute, that:

“It is hereby made the duty of townships, villages, cities or corporations to keep in reasonable repair, so that they will be reasonably safe and convenient for public travel, all public highways, cross walks and culverts that are within the jurisdiction and under their care and control and which are open to public travel.”<sup>1</sup>

In an analysis that could be equally applicable to sidewalk defects and municipality liability today, the Supreme Court in *Weisse v City of Detroit*, 105 Mich 482 (1895), noted:

“Can we say, as a matter of law, that this walk was reasonably safe and convenient for public travel? It would be a great burden upon townships, villages, and cities if it be held that every slight rise in a walk makes it not reasonably safe and convenient for public travel. In the present case the rise was from one and one-half to two inches.....The legislature.....intended that the walks should be kept reasonably safe, and not absolutely safe. In cities having many miles of walks it would be an utter impossibility to make these walks absolutely safe, and the legislature did not intend to impose that duty upon municipalities by this Act.....It would require an army of men in the City of Detroit to do this.” Weisse at 484.

Accordingly, the Supreme Court found, as a matter of law, that a cross walk containing a loose plank, the end of which was raised about two inches above level of the walk, was “reasonably safe” within the meaning of the statute “which makes it the duty of municipal corporations to keep crosswalks in reasonably safe condition for public travel.” Id.<sup>2</sup>

Thus was the origin of the “two-inch rule” for sidewalk liability in Michigan. The supporting Supreme Court case of *Yotter v City of Detroit*, 107 Mich 4 (1895), which also involved a trip and fall on a wooden sidewalk, came along only five months later.<sup>3</sup>

The two-inch rule developed in *Weisse*, supra, was a “bright-line rule stating that defects of two inches or less constituted ‘reasonable repair’ as a matter of law.” *Glancy v City of Roseville*, 457 Mich 580 at 586-587 (1998). The common-law rule absolutely prohibited recovery for injuries caused by sidewalk defects less than two inches deep. *Harris v City of Detroit*, 367 Mich 526 at 528 (1962).

And so the common-law “two-inch rule” continued to exist for a period of seventy-seven years until it was entirely abrogated in *Rule v Bay City*, 387 Mich 281 (1972). In its one page opinion, the Supreme Court in *Rule* noted, “for the reasons stated by Mr. Justice Adams in his dissent in *Harris v City of Detroit*, 367 Mich 526 at 529 (1962), we do not regard it as desirable to continue to enforce the ‘two-inch rule’.” Justice Adams, in his dissent in *Harris*, had noted that the two-inch rule had “gradually hardened into a rule of law that where a defect in a walk was less than two inches in depth, the walk would be considered to be safe and the city free from negligence.” *Harris* at 531. He went on to conclude that he thought it improper to use an arbitrary measurement to determine whether a municipality was negligent or not. As later noted by the Supreme Court in *Glancy v City of Roseville*, supra; “thus the two-inch rule was not a rule of common-law immunity; rather, it was a common-law threshold for negligence, based on the ‘reasonable repair’ standard of care of the statutory highway exception.” *Glancy* at 588.

From 1972 until 1998, Michigan did not recognize a “two-inch rule,” nor any other specific standard pertaining to sidewalk defects to limit a municipality’s liability for sidewalk defects as a matter of law. Instead, municipalities were subject to liability for sidewalk defects based simply on a “reasonableness” of repair negligence standard. Then, in 1998, two cases

that arose out of falls on sidewalks with defects of less than two inches were presented to the Supreme Court in *Glancy v City of Roseville*, supra. The Defendant municipalities argued that the Governmental Tort Liability Act, specifically MCL §691.1407(1), had codified the “two-inch rule” for municipal liability related to sidewalk defects because that section of the statute provided:

“Except as otherwise provided in this Act, this Act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.”

Accordingly, the defendants in *Glancy* argued that since MCL §691.1407(1) affirmed governmental immunity as it existed before July 1, 1965, and because the “two-inch rule” was not abrogated by the Supreme Court until 1972 in *Rule v Bay City*, the Governmental Tort Liability Act had essentially codified and renewed the “two-inch rule” regarding municipal liability for sidewalk defects. However, the *Glancy* Court held that the two-inch rule was a “negligence rule” rather than a principle of governmental immunity and therefore, Section 7(1) of the Governmental Tort Liability Act could not reinstate the two-inch rule. The *Glancy* court further refused to adopt the two-inch rule as a threshold for lack of “reasonable repair,” stating that the legislature was in a much better position than the judiciary to consider such policy arguments and make such policy choices.

In immediate response to *Glancy v City of Roseville*, the Michigan Legislature in 1999 did codify a version of the “two-inch rule” in MCL §691.1402a(2). That statute provides:

“(2) A discontinuity defect of less than two inches creates a rebuttable inference that the municipal corporation maintained the sidewalk, railway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel in reasonable repair.”<sup>4</sup>

This statute, although a lesser standard than the common law absolute rule of no liability for defects that did not exceed two inches, grants a municipality a “presumption” or “inference” of reasonable repair of a public sidewalk<sup>5</sup> where the “discontinuity defect” in the public sidewalk is “less than two inches.”

Over the next decade, while there were no published cases discussing MCL 691.1402a(2), there were nine unpublished decisions of the Michigan Court of Appeals, all of which held that where the defect was less than two inches, the plaintiff had failed to provide evidence to rebut the inference that the sidewalk was maintained in reasonable repair. In each case, the Court of Appeals found that summary disposition in favor the

City was the appropriate remedy.<sup>6</sup> Very simply, from 1999 until 2009, there were no appellate decisions which had found that a defendant municipality was not entitled to governmental immunity where the alleged defect in the sidewalk was less than two inches.

Then, in January 2009, in opposition to the nine unpublished decisions that had preceded it, the Court of Appeals issued a published decision in *Gadigian v City of Taylor*, 282 Mich App 179 (2008).<sup>7</sup> In *Gadigian*, the Court of Appeals held that the term “inference” as used in MCL 691.1402a(2), did *not* equate with a “presumption.” The Court found that “a presumption operates differently than an inference” and that a “presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption,” whereas “an inference does not carry a corresponding obligation to find a certain fact.” *Gadigian* at 186. The Court specifically noted:

“... an *inference* of negligence - standing alone - does not support summary disposition because the jury is still free to accept or reject the inference. We likewise conclude that while the ‘rebuttable inference’ described in MCL 691.1402a(2) allows the trier of fact to conclude that a municipality has properly maintained its sidewalk when a ‘discontinuity defect of less than two inches’ exists, it does not compel the trier of fact to do so.” *Gadigian*, at 186.

The Court then concluded that an affidavit by the plaintiff’s expert, which merely opined that the raised sidewalk slab “was a trip hazard” was sufficient evidence to nullify the statutory inference that the city’s sidewalk was in reasonable repair when the plaintiff fell. The sidewalk in *Gadigian* contained a fairly innocuous discontinuity and was otherwise in rather pristine condition. By virtue of its ruling, the Court of Appeals in *Gadigian* nullified the “two-inch rule” and returned municipalities to a broad “reasonableness” standard to determine whether a sidewalk was in reasonable repair to avoid liability. As another panel of the Court of Appeals subsequently noted in *Castellanos v City of Pontiac*, unpublished Court of Appeals opinion, dated December 29, 2009 (Docket No. 286865):

“*Gadigian* suggests that the evidentiary burden for a plaintiff to survive summary disposition in the face of an inference, standing alone, is fairly minimal, given that the jury would be permitted to completely ignore the inference if it chose to do so.”

One of the key problems with the Court of Appeals Opinion in *Gadigian* is that it ignores Michigan law which requires a presumption of governmental immunity and a strict construction of exceptions to governmental immunity.<sup>8</sup> The

Court of Appeals in *Gadigian* further seemed to ignore that the word “inference” is preceded in the statute by the word “rebuttable.” The term “rebut” means “to refute by offering opposing evidence or arguments.”<sup>9</sup> Therefore, it is clear that the legislative intent of a “rebuttable inference that the municipal corporation maintain the sidewalk . . . in reasonable repair,” was to infer the conclusion of reasonable repair which must be rebutted.

On November 19, 2009, the Michigan Supreme Court granted leave to appeal in *Gadigian* and requested the parties to include among the issues to be briefed, “(1) whether the Court of Appeals correctly interpreted MCL 691.1402a(2); and (2) what evidence a plaintiff must present to rebut the inference of reasonable repair.” These issues were thoroughly briefed and the Supreme Court scheduled oral argument in *Gadigian* for April 13, 2010.

However, oral arguments in *Gadigian* were never presented because on April 8, 2010, the Supreme Court contacted the author to advise that it had just issued an opinion in *Robinson v City of Lansing*, 486 Mich 1 (2010), in which the Court had decided that the two-inch rule of MCL 691.1402a(2) applies *only* to sidewalks adjacent to county highways, and not to sidewalks adjacent to state highways or city streets.<sup>10</sup> Accordingly, on the eve of April 13, 2010, the Supreme Court canceled the oral arguments in *Gadigian* because there was no dispute in *Gadigian* that plaintiff’s fall had occurred on a sidewalk adjacent to a city street. The Supreme Court subsequently issued an order on May 28, 2010, in light of its decision in *Robinson*, stating: “We thus vacate the opinion of the Court of Appeals (in *Gadigian*) because its analysis is dictum given our determination in *Robinson* that MCL 691.1402a applies only to ‘county’ highways.”<sup>11</sup>

Therefore, the landscape regarding limiting municipal liability for sidewalk defects has dramatically changed. Presently, municipalities defending sidewalk liability claims are faced with the following state of the law:

(1) MCL 691.1402a, including the two-inch rule, applies *only* to sidewalks adjacent to county roads, and municipal liability for sidewalks adjacent to city and state roads has no applicable two-inch rule.<sup>12</sup>

(2) If the injury is proximately caused by a defect in a sidewalk adjacent to a state highway or a city street, the issue will be whether the sidewalk was maintained “in reasonable repair” under an ordinary negligence standard.

(3) If the injury was proximately caused by a defect in a sidewalk adjacent to a county road, there will

be a legal issue as to the interpretation of the phrase “rebuttable inference” in MCL 691.1402a(2), i.e., is it a “presumption” or an “inference”.<sup>13</sup>

(4) If the injury was proximately caused by a defect in a sidewalk adjacent to a county road, there will be a legal issue of what evidence a plaintiff must present to rebut the inference of reasonable repair.

Legislation is currently being introduced in both the Michigan Senate and the House to address the above issues in response to the Supreme Court’s ruling in *Robinson*,<sup>14</sup> and the Court of Appeals’ ruling in *Gadigian*.


At a time when municipalities are financially hemorrhaging with increased costs for providing services and infrastructure while municipal revenue has been substantially reduced due to major decreases in state revenue sharing and declining property values, these recent dramatic changes in the legal standard for determining liability for the thousands of miles of sidewalks in Michigan will have drastic budgetary consequences for municipalities. In order to compensate for the payment of these additional sidewalk claims, it is the public that will suffer because the money to pay for these additional claims will have to come from either increased taxes or decreased services provided in communities. Because of the extreme weather conditions in Michigan and the fact that sidewalks are not constructed below the frost line, sidewalks in this state regularly develop discontinuities between sidewalk slabs and there is no such thing as a perfectly level sidewalk.

A key point that must not be lost is the foundation of governmental immunity. As the Supreme Court confirmed in *Nawrocki, supra*, at 156-157:

“Government cannot merely be liable as private persons are for public entities are fundamentally different from private persons. . . . only public entities are required to build and maintain thousands of miles of streets, sidewalks and highways. Unlike many private persons, a public entity cannot often reduce its risk of potential liability by refusing to engage in a particular activity, for government must continue to govern and is required to furnish services that cannot be adequately provided by any other agency.”

Our Supreme Court has further noted that a “central purpose” of governmental immunity is “to prevent a drain on the State’s financial resources, by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity.” *Mack v City of Detroit*, 467 Mich 186, 203 n. 18 (2002).<sup>15</sup>

Our Supreme Court got it right 115 years ago when it concluded:

“It would be a great burden upon townships, villages, and cities if it be held that every slight rise in a walk makes it not reasonably safe and convenient for public travel. . . . In cities having many miles of walks it would be an utter impossibility to make these walks absolutely safe, and the legislature did not intend to impose that duty upon municipalities by this Act.” *Weisse* supra, at 484. 

## About the Author

*Edward Plato, of the law firm of Johnson Rosati, has represented numerous municipalities for over 25 years as liability defense counsel and as city/township attorney. He represented the defendant municipality in three of the cases cited in this article; Gadigian v City of Taylor, Roby v City of Mt. Clemens, and Baine v City of Inkster.*

## Endnotes

- 1 Section 1446e 3 How. Ann. St. (Section 3, Act 264, Public Acts 1887).
  - 2 Conversely, in 1899, in *Urtel v City of Flint*, 122 Mich 65 (1899), the Supreme Court held that where a plank would sink three to four inches below the sidewalk when stepped on, it was a question for the jury as to whether the sidewalk was “reasonably safe and fit for travel.” Similarly see *Williams v West Bay City*, 126 Mich 156 (1901).
  - 3 The first published case involving a cement sidewalk appears to be *Jackson v City of Lansing*, 121 Mich 279 (1899), which followed the rule in *Weisse* and *Yotter*.
  - 4 Section (2)(a) was added by Public Act 1999, No. 205, effective December 21, 1999.
  - 5 The term “sidewalk” is not defined in the statute. However, case law has defined “sidewalk” as being “a paved way that runs alongside and adjacent to a public roadway intended for the use of pedestrians.” See *Roby v City of Mt. Clemens*, 274 Mich App 26 at 29 (2006) citing *Hatch v Grand Haven Charter Twp.*, 461 Mich 457 at 462-465 (2000) and *Stabley v Huron-Clinton Metro. Park Auth.*, 228 Mich App 363 at 369 (1998). Furthermore, although a “paved way must be located adjacent to a highway to be considered a sidewalk, such proximity does not necessarily make it a sidewalk, and a court will take into account the character of the paved way and its intended use.” *Roby*, supra, citing *Hatch*, supra, at 464-465.
  - 6 See *Bates v Village of Addison*, unpublished opinion of the Court of Appeals, decided October 4, 2005, Docket No. 253374 (Plaintiff tripped over a three-quarter-inch rise in the sidewalk); *Jones v City of Flint*, unpublished opinion of the Court of Appeals, decided November 17, 2005, Docket No. 263036 (Plaintiff tripped on a height discontinuity of less than one-inch, and plaintiff’s expert opined that the differential posed a tripping hazard); *Smith v City of Warren*, unpublished opinion of the Court of Appeals, decided February 23, 2006, Docket No. 255004 (Plaintiff tripped over a water shut-off valve that protruded less than two inches from within and above the sidewalk); *Allgaier v City of Warren*, unpublished opinion of the Court of Appeals, decided August 22, 2006, Docket No. 268102, lv den’d 477 Mich 993 (2007) (Plaintiff, who was legally blind, tripped over a height differential between adjoining sidewalk slabs of approximately one and one-half inches); *Griffin v City of Pontiac*, unpublished opinion of the Court of Appeals, decided October 26, 2006, Docket No. 269988 (68-year-old plaintiff fell when her foot caught on broken sidewalk with height discontinuities of less than two inches); *Ledbetter v City of Warren*, unpublished opinion of the Court of Appeals, decided October 31, 2006, Docket No. 269758 (City engineer testified he knew of discontinuity defect that was less than two inches, which caused plaintiff’s fall); *Horowitz v City of Southfield*, unpublished opinion of the Court of Appeals, decided March 27, 2007, Docket No. 272902 (Three years after accident, sidewalk was found to have a vertical differential of less than half an inch); *Gutierrez v City of Saginaw*, unpublished opinion of the Court of Appeals, decided March 29, 2007, Docket No. 272619 (Sidewalk slab raised from three-quarter to one-inch high, alleged to be undetectable due to the darkness of night); and *Baine v City of Inkster*, unpublished opinion of the Court of Appeals, decided April 26, 2007, Docket No. 274261 (height differential between two flags of concrete was less than two inches).
  - 7 *Gadigian* was initially issued as an unpublished decision on November 20, 2008, but was subsequently approved for publication on January 27, 2009.
  - 8 In *Lash v City of Traverse City*, 479 Mich 180 at 195 (2007), the Supreme Court cited *Mack v City of Detroit*, 467 Mich 186, at 195 (2002), for the proposition that a governmental entity is immune from tort liability “unless the Legislature has pulled back the veil of immunity and allowed suit by citizens against the government.” In *Nawrocki v Macomb Co Rd Comm’n*, 463 Mich 143, 156-158 (2000), the Supreme Court noted: “There is one basic principle that must guide our decision today: the immunity conferred upon government agencies is broad, and the statutory exceptions thereto are to be narrowly construed.”
  - 9 *American Heritage Dictionary* (4<sup>th</sup> Ed 2004).
  - 10 It was undisputed in *Robinson* that the raised portion of the sidewalk which caused plaintiff to trip was less than two inches and that the City of Lansing had maintained the sidewalk. The *Robinson* Court held: “To summarize, MCL 691.1402a(1) limits a municipality’s liability with regard to county highways, MCL 691.1402a(2) codifies the two-inch rule with regard to county highways, and MCL 691.1402a(3) limits a municipality’s liability with regard to county highways and off-road vehicles. In other words, Subsection (1) sets forth in clear terms the general rule regarding a municipality’s liability for defective sidewalks adjacent to county highways, Subsection (2) adopts a statutory two-inch rule for those sidewalks, and Subsection (3) provides an exception to liability for these same sidewalks. This establishes a fully-rational and coherent legislative scheme. MCL 691.1402a does not apply to sidewalks adjacent to highways other than county highways, such as sidewalks adjacent to state highways. Therefore, the two-inch rule of MCL 691.1402a(2) does not apply to the latter.”
- In *Listanski v Canton Twp*, 452 Mich 678, at 684, 686-687 (1996), the Supreme Court noted that cities and townships are responsible and liable for sidewalks along state and county roads. See also, *Jones v Ypsilanti*, 26 Mich App 574 (1970).
- 11 *Gadigian v City of Taylor*, 486 Mich 936 (2010). Although the Court of Appeals opinion in *Gadigian* has now been vacated, it will likely still be relied upon by claimants and requesting a circuit court judge to ignore this vacated opinion would probably be akin to instructing a jury to ignore the inadmissible evidence that it just heard.

12 Under the present state of the law, an individual walking on a sidewalk adjacent to a city street will have one legal standard for “reasonable repair” applicable to the sidewalk but if he turns the corner onto a sidewalk adjacent to a county road, he will have a substantially different standard for “reasonable repair” applicable to that sidewalk. This flies in the face of the stated purpose of the Governmental Tort Liability Act which is to “make uniform the liability of municipal corporations, political subdivisions, and the state....when engaged in the exercise or discharge of a governmental function.” (See *Robinson v Lansing*, supra, at page 6, stating that “political subdivision” includes “a municipal corporation, county, and road commission.”) See also *Li v Feldt* (After Remand) 434 Mich 584, at 592-593 (1990).

13 Judge Gleicher wrote the opinion in *Gadigian*, in which she attempts to carefully distinguish between an “inference” and a “presumption.” Ironically, in two very recent Court of Appeals’ Opinions, the court continues to refer to the two-inch standard in MCL 691.1402(a) as a “presumption” of reasonable repair, rather than an “inference” of reasonable repair. See *Bongiovanni v City of Clawson*, unpublished Court of Appeals’ opinion, dated September 23, 2010 and *Larochelle v City of Warren*, unpublished Court of Appeals’ opinion, dated September 23, 2010, in which Judge Gleicher was on the panel.

14 Both Justice Robert Young and Justice Elizabeth Weaver concurred with the majority opinion in *Robinson*, and further noted that, “To the extent that the majority opinion in this case has adopted an incorrect interpretation of this statute (MCL 691.1402a), I urge the Legislature to clarify its intent with regard to the scope of the ‘two-inch rule’ of the highway exception to governmental immunity.”

In *Glancy v City of Roseville*, supra, at 590, the Supreme Court noted “alternatively, defendants argue that even if subsection 7(1) did not codify the two-inch rule, this Court should adopt the two-inch rule as a threshold for lack of ‘reasonable repair’ under subsection 2(1). . . . The Legislature, with its ability to consider testimony from a variety of sources and make compromised decisions, is much better positioned than the judiciary to consider such policy arguments and make policy choices. . . . Policy arguments regarding adoption of a bright-line rule that defects of two inches or less do not constitute a lack of ‘reasonable repair’ under subsection 2(1), should be directed to the Legislature.”

15 See also, *Costa v Community Medical Services, Inc*, 475 Mich 403 at 410 (2006).

## Opinions of Attorney General Mike Cox

*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](http://www.mi.gov/ag).*

### Medical Marihuana Act

**Authority of Michigan Department of Community Health to enter into an agreement with a private or public contractor for the purpose of administering the Medical Marihuana Program.**

The Michigan Medical Marihuana Act, Initiated Law 1 of 2008, MCL 333.26421 *et seq*, does not prohibit the Department of Community Health from entering into an agreement or contract with an outside vendor to assist the department in processing applications, eligibility determinations, and the issuance of identification cards to patients and caregivers, if the Department of Community Health retains its authority to approve or deny issuance of registry identification cards.

2009 AACRS, R 333.121(2) promulgated by the Department of Community Health under the Michigan Medical Marihuana Act, Initiated Law 1 of 2008, MCL 333.26421 *et seq*, which provides that the confidential information “may only be accessed or released to authorized employees of the department,” prevents the Department of Community Health from entering into a contract with an outside vendor to process registry applications or renewals.

Opinion No. 7250  
August 31, 2010

### Public Employment Relations Act

#### School District Contracts For Noninstructional Support Services

Under section 15(3)(f) of the Public Employment Relations Act, MCL 423.215(3)(f), as amended by 2009 PA 201, if, and only if, the public school employer decides that the bargaining unit that represents employees providing noninstructional support services will be given an opportunity to bid on a third-party contract for those services on an equal basis as other bidders, the subjects of (1) the decision of whether to contract with a third party for one or more noninstructional support services, (2) the procedures for obtaining the contract for noninstructional support services, (3) the identity of the third party, and (4) the impact of the contract on individual employees or the bargaining unit, are prohibited subjects of collective bargaining. Section 15(3)(f) does not, however, prohibit collective bargaining over the ability of the bargaining unit to have an opportunity to bid on a contract for those services on an equal basis as other bidders, should the public school employer decide to contract with a third party for one or more noninstructional support services.

Opinion No. 7249  
June 15, 2010

# Remembering Milton Firestone 1927 – 2010

*By George M. Elworth, Assistant Attorney General*

Milton I. Firestone, a Public Corporation Law Section (PCLS) member and municipal finance law expert, passed away on October 1, 2010. Milt, as he was known to his friends and colleagues, received the PCLS's Distinguished Service Award in 1997. He was dedicated to promoting the section as an ongoing forum for attorneys representing the whole spectrum of Michigan government units – local units, state agencies, and authorities - where these attorneys could share their expertise and keep up with challenges and developments that would be generally applicable to Michigan public corporations.

Milt was a member of an exclusive circle of Michigan attorneys who served as the chairperson of three state bar sections – PCLS (1975), Administrative Law (1977), and Legal Economics (1987). In order to keep his professional skills up to date, he was a regular participant in the American Bar Association's activities – bringing back to the office the latest materials from the Urban, State, and Local Government Section's annual meetings.

He was a WWII veteran who served in Germany with the U.S. Army. After the war, he obtained his undergraduate and law degrees from Wayne State University. After gaining experience as an attorney in private law practice and as a Livonia Assistant City Attorney, Milt joined the staff of Attorney General Frank J. Kelley in 1965. In the course of his work, Milt headed a number of divisions dealing with municipal affairs and finance, as well as social services and health law. He handled or supervised the handling of the legal issues for countless state and state authority bond issues and appeared in over 50 reported appellate cases. He was also the designated representative of Attorney General Kelley on three state retirement boards that include the Attorney General as a statutory board member – the State Employee's Retirement, the Judge's Retirement Board, and the State Police Retirement Board. From 1995 until his retirement from state service in 1997, he served as the Chairperson of the State Police Retirement Board.

In the late 1960's, Milt had a key role in representing the Michigan State Housing Development Authority (MSHDA) in its initial bond issue. MSHDA was the prototype for the many state financing authorities that were subsequently launched, including the Hospital Finance Authority, the Higher Education Student Loan Authority, the Higher Education Facili-

ties Authority, the Job Development Authority, the Economic Development Authority, and the State Building Authority. His constitutional arguments led to the favorable Michigan Supreme Court advisory opinion as to proposed activities of the State Building Authority in 400 Mich 311 (1977), over the vigorous dissent of Justice Ryan, at a time when the funding of the State Building Authority was crucial to the state balancing its budget. Around 1981, Milt represented the state in negotiating the legal issues involved in the state's obtaining a \$500 million letter of credit from a consortium of Japanese banks securing the state's short-term note issue in the depths of a major recession.

Milt was as an adjunct faculty member at Cooley Law School. He developed and taught a pioneering course on the law of municipal finance. He was a great guide and mentor to both students and attorneys who looked to him for insight and perspective. He was easy to approach and always generous with his time in helping others.

For many years, a regular feature of the PCLS summer conference was its golf outing that was named in his honor as the Firestone Closed Tournament – as distinguished from the more widely-know Firestone Open on the PGA Tournament circuit.

From the age of 60 on, Milt struggled with multiple sclerosis. Throughout that time, he was resilient in meeting its challenges and set backs. After his retirement from state service in 1997, he was a board member of the Michigan Chapter of the National Multiple Sclerosis Society, serving as the chair of its government relations group. His advocacy on behalf of those with multiple sclerosis and their families was recognized by both the Multiple Sclerosis Society and Governor Granholm.

While the PCLS has lost a great colleague and supporter, we recall with fondness his contributions to our field of law, his puns and sense of humor, and extend our condolences to his wife, Renee; to his son Joe Firestone and daughter-in-law Liliana Ciccodicola and their two daughters Leah and Eliza; and to his daughter Karen Firestone Rossen and son-in-law Chuck Rossen and their daughter Celia. 🕊️

## About the Author

*George M. Elworth is a PCLS section member who worked for, and learned from, Milt Firestone from 1980 to 1997.*

# State Law Update

By Ronald D. Richards, Jr. of Foster, Swift, Collins & Smith, PC

## MDEQ Lacks Power To Require A Township To Install A Public Sewer System If Private Septic Systems Fail – Where the Township Is Not The Cause of the Failure

*MDEQ v Twp of Worth* \_\_\_ Mich App \_\_\_ (published decision of August 17, 2010)

The MDEQ lacks the power to require a township to install a sanitary sewer system where there is widespread failure of private septic systems resulting in contamination of lake waters. This case involved a dispute between the MDEQ and a township located along Lake Huron and which does not operate a public sewer system. All residences and businesses in the township rely on private septic systems. A number of those private septic systems began to fail, causing effluent being discharged into Lake Huron. When the MDEQ pushed the township to install a public sewer system, the township concluded it was not financially feasible and refused. The MDEQ then sued to compel the township to install a public sewer system. The trial court sided with the MDEQ, requiring the township to design, construct, and operate a sewer project to remedy the failing system and resulting discharges. The trial court also imposed a \$60,000 fine and awarded attorney fees.

The Court of Appeals reversed, and held in favor of the township. The Court reasoned that the controlling statutes presume that a discharge of sewage into state waters is a violation by the “municipality in which the discharge originated.” But the statutes further state that the “municipality” is not responsible if it has not accepted responsibility in writing for the private system. The Court interpreted the statutes to impose liability on the “municipality” in which the discharge occurred only if the discharge occurred due to actions of the municipality.

The Court added that there was no evidence that the township was the source of the discharge since it did not operate a sanitary system. It viewed this as overcoming the presumption in the controlling statutes, meaning the township could not be penalized for the discharge. And the Court noted that under the controlling statutes, if the MDEQ were to prevail, the township could counter-claim against the MDEQ and prevail in a claim seeking to require the MDEQ to install the sewer system – since the State is also the “municipality in which the discharge originated” and, so, bears as much responsibility for

the unauthorized discharges at issue as does the township.

The dissenting judge would have upheld the trial court’s finding.

## Zoning Ordinance Must List Uses Eligible for Special Use Permit Specifically – Listing Merely Categories of Uses Such as “Commercial” Uses Is Not Sufficient

*Whitman v Galien Twp*, unpublished per curiam opinion of the Michigan Court of Appeals  
(Docket No. 287991, dec’d 6/10/10)

A zoning ordinance that merely lists uses eligible for a special use permit (SUP) in general form does not comply with Michigan zoning law. Rather, the ordinance must list those eligible uses very specifically. In *Whitman*, the township’s SUP provisions in its zoning ordinance provided that the following uses were eligible for a SUP in an agricultural zoning district: “establishments for the conducting of commercial or industrial activities.” Under this ordinance, the township granted a special use permit that allowed some permit applicants to construct and operate a snowmobile, dirt bike, and racetrack on some property in the township. The plaintiffs, neighbors, appealed the township board’s decision. The trial court upheld the SUP, opining that the township may authorize a special use permit even if the proposed use is not specifically enumerated in the applicable zoning ordinance.

The Court of Appeals reversed, and held that the ordinance allowed all commercial or industrial activities. The ordinance did not specify the special land uses and activities as required. The Court first noted the controlling provision of the Michigan Zoning Enabling Act (MZEA): “zoning ordinance shall specify . . . the special land uses and activities eligible for approval . . .” MCL 125.3502 (1). The Court stated that the ordinance’s general statement that “commercial or industrial activities” are eligible for a SUP was not specific enough to satisfy the MZEA. The township’s ordinance did not specify the special land uses and activities eligible for approval, but rather identified general categories of uses or activities. Since the zoning ordinance violated the MZEA, the Court found that the township board’s decision to grant the SUP was invalid. The Court therefore vacated the SUP.

### No Exclusionary Zoning Where Township Once Had Land Use But That Use Is Not in the Township Due to City Annexation

*DF Land Development, LLC v Charter Twp of Ann Arbor*, unpublished per curiam opinion of the Court of Appeals (Docket No. 291362, dec'd 7/13/02)

The Court of Appeals has rejected a claim that a township excludes commercial uses where there are many commercial uses in the neighboring city and some of those uses were formerly in the township before the city annexed the land on which they exist. This rezoning dispute involved the plaintiff developer seeking rezoning from single-family residential and research and development, to commercial. The township denied the request as inconsistent with the township's master plan. The developer sued, claiming the township committed exclusionary zoning since there was no commercial zoning anywhere in the township. The trial court granted the township summary disposition.

The Court of Appeals affirmed, and held that the trial court properly rejected the developer's exclusionary zoning claim. The Court also noted that the township's zoning map does include two small areas zoned commercial, albeit in areas completely surrounded by the City of Ann Arbor. The Court also rejected the developer's reliance on case law that predated MCL 125.297a and *Kropf v City of Sterling Heights*, 391 Mich 139 (1974); those authorities make clear that the exclusion must be "total." The Court found no total exclusion, noting that there is a considerable amount of commercial uses within very close proximity to the township. The Court noted that much of the township has been annexed to the City of Ann Arbor, and there is much commercial land in what was formerly part of the township. Thus, there is ample commercial use "within close geographical proximity of everywhere in the township."

### Court Clarifies When Governments Have A Duty to Disclose Information As Part of Public Bidding Process

*Levine v Monroe County Emergency Medical Auth*, unpublished per curiam opinion of the Court of Appeals (Docket No. 288844, dec'd 7/29/10).

The Michigan Court of Appeals has recently issued some clarification on when governmental entities must disclose information during the bidding process. There, the plaintiffs ran a medical emergency service (EMS) in the defendant county. The defendant county commissioned a study of a comprehensive strategic plan to improve its EMS services. The study audited the delivery of EMS in the county, and gave recommendations for developing a comprehensive EMS plan and design for an EMS delivery system and training. The study also evaluated the financial status of the county's current EMS

provider. Later, after an RFP process in which the study was not disclosed, the county selected the plaintiff's company. But after providing services, the plaintiff's company suffered severe financial problems. When it learned of the study, the plaintiffs sued the defendant county entities.

The trial court granted summary disposition for the defendant county and county medical authority, ruling it had no duty to disclose the audit as part of the bid process.

The Court of Appeals affirmed, and held that the defendants had no liability under tort or contract law. The Court first noted that controlling case law regarding the duty to disclose information to bidders for a contract does not require disclosure of the type of information in the study. Controlling Michigan Supreme Court authority does provide that a government organization or other entity requesting bids has a duty to release pertinent information in its possession that would not otherwise be available to those submitting bids on the contract. But those decisions concern disclosure of soil conditions not known to contractors bidding on public projects. The Court then reviewed other appellate decisions relating to the subject, and concluded that a party need not disclose "all relevant information on the project in its possession." Instead, a party need only disclose "natural conditions" that are unchanging. Applying that rule, the Court determined that the undisclosed study information contained opinions, projections, and statistics that would change over time. As a result, the study information was not automatically required to be disclosed.

The Court then addressed whether, despite the lack of an automatic disclosure requirement, the county nevertheless had a common law duty to disclose the information. It concluded that the county had no common law duty. It noted that much of the audit was not relevant to bidders preparing bids for an EMS contract. 🏠



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# Federal Law Update

By Crystal L. Morgan of Law Weathers and Marcia Howe, Dan Klemptner, Holly Battersby and Carlito Young of Johnson, Rosati, LaBarge, Aseelyne & Field, PC

## Sixth Circuit Court of Appeals and Western District of Michigan

### Tax vs. Fee; Lien for Unpaid Electric Charges

*Brown Bark I, LP v Traverse City Light & Power Department*  
 \_\_\_ F Supp 2d \_\_\_ (WD Mich, September 07, 2010)  
 2010 WL 3470182

The developer of a 15-acre parcel of property intended to develop the property as a 13-unit condominium. The developer's property owners' association ("Association") contracted with the Defendant Traverse City Light and Power Department ("TCLP"), a department of the City of Traverse City, for the construction and installation of a street-lighting system on the property ("Lighting Agreement"). When the Lighting Agreement was executed, TCLP had two alternative policies in place to provide outdoor lighting on customers' land: (1) establishment of a special assessment district ("SAD") or (2) adding charges to the customer's monthly electric bill based on the wattage of the lighting installed. The Lighting Agreement did not provide for either a SAD or for a monthly rate recovery, nor did it specify any rate or other terms for TCLP's future sale of electricity to the developer, the Association, or the condominium unit owners. It did, however, establish a 10-year schedule for the Association to repay the amount advanced by TCLP to install the lighting.

In connection with the Lighting Agreement, the developer simultaneously executed a separate "Consent to Imposition of Tax Lien" with regard to each of the condominium units, authorizing TCLP to impose a lien on the property "in accordance with MCL 141.121" in the event that the developer did not pay TCLP for the lighting system. (Under MCL 141.121(3), unpaid qualified charges for services furnished by a public improvement constitute a lien on the subject property until they are paid.) The Consents further provided that each lien "shall be a tax lien enforceable by [TCLP] and all taxing jurisdictions."

Plaintiff ("BBI") purchased the property at a foreclosure sale. Thereafter, it initiated an action alleging, in part, that no tax lien was ever created under Michigan law and, alter-

natively, that even if TCLP acquired a valid tax lien under the Consents, the lien was extinguished by the foreclosure proceedings. In response, TCLP argued, in part, that the Tax Injunction Act of 1937 ("TIA"), 28 USC § 1341, divested the court of subject matter jurisdiction. The court first discussed the "longstanding distinction...between taxes and ordinary debts" and concluded that under the standard enunciated in *ACLU of Tennessee v Bredesen*, 441 F3d 370 (6th Cir, 2006) (holding that an extra charge for a "Choose Life" license plate was not a "tax"), the charges at issue were "manifestly not a tax for purposes of the TIA." First, the unpaid electrical lighting charges were not imposed on BBI and its predecessor against their will, but were voluntarily incurred pursuant to a contractual agreement. "[T]he lighting charges became a debt due and payable to TCLP by virtue of a voluntary contract which Traverse City entered in its corporate or proprietary capacity, not its sovereign capacity." Further, the charges "were not an instance of some burden generally imposed on some class of individuals, corporations, or landowners for the purpose of supporting the Traverse City government generally, nor even for the purpose of supporting some public-improvement project mandated by Traverse City, Grand Traverse County, or the State of Michigan." The charges were voluntarily incurred and agreed to only by the developer, and in turn, by foreclosure buyer, to pay for a specific project undertaken primarily for the benefit of a limited number of private individuals. The court further held that the charges could not be transformed into taxes merely because a contract authorized another party to collect the charges through means ordinarily reserved for the collection of taxes.

Nonetheless, the court concluded that, by operation of law, TCLP acquired an automatic lien for the unpaid charges under the Revenue Bond Act (and the City's implementing ordinance). Further, the lien was a "preferred or first claim" against the property, meaning that the lien was not extinguished by the mortgage foreclosure. MCL 141.121(3); MCL 211.60a(4). Thus, the court held that TCLP was "entitled to collect all delinquent Lighting Agreement charges as if they were delinquent property taxes."

42 USC § 1983

*Heyerman v Calhoun Co Prosecutor's Office*, 2010 WL 3505789 (WD Mich, 2010):

The plaintiff sought money damages based upon the violation of his Sixth Amendment right to a speedy trial. The court granted summary judgment in favor of the defendants, concluding that the prosecutor was entitled to absolute immunity in her individual capacity, and that the plaintiff failed to present evidence of any County policy or practice that caused his harm.

*Mitchell v County of Ottawa*, 2010 WL 3430790 (WD Mich, 2010): The plaintiff sought damages alleging that the defendant failed to appropriately treat his deteriorating medical condition while incarcerated. The court dismissed the claim because the plaintiff was unable to identify any policy or custom that caused him injury.

*Ranshaw v City of Lansing*, 2010 WL 3199659 (WD Mich, 2010): The plaintiffs sought damages arising out of the City's response to repeated noise complaints about the bar operated by the Plaintiffs, including the City's adoption of a "zero tolerance policy" regarding noise violations. The court granted summary disposition in favor of the City, finding no deprivation of any protected property or liberty interest.

Employment - First Amendment Retaliation Claim

*Paige v Conyer*  
614 F3d 273 (6th Cir., 2010)

Panel: Judges Gilman, Boggs and MaCalla

In this case, plaintiff Martha Paige, filed suit under 42 USC §1983 against the Director of the Warren County Office of Economic Development, Kimberly Conyer, the Warren County Port Authority and the Warren County Board of Commissioners. Paige alleged that all three defendants retaliated against her after she articulated her concerns about a proposed interstate-highway project during a public meeting held by the Warren County Port Authority. Paige claimed that after the meeting, Conyer called her employer, Bunnell Hill, and falsely represented that Paige had identified herself as a Bunnell Hill employee before speaking negatively about the establishment of the Warren County Port Authority. Bunnell Hill was involved in developing commercial properties in the county. Three days after the alleged phone call, Bunnell Hill fired Paige, specifically referencing that Paige had identified herself as a Bunnell Hill employee in opposing the interstate-highway project.

Paige's §1983 claim was based on the defendants' alleged retaliation against Paige for exercising his First Amendment rights. All three defendants argued that they were not state actors for purposes of a §1983 claim because they could not

control the actions of Bunnell Hill, a private employer. The defendants asserted that the trial court's application of *Blum*, requiring Paige to meet either the nexus test or the state-compulsion test, was proper.

The Michigan Court of Appeals concluded that *Blum* was distinguishable because Paige was claiming that Conyer's phone call was the state action taken in retaliation for her exercise of her First Amendment rights. The court noted that *Blum* had traditionally been applied only where a §1983 claim was asserted against a *private entity*. In this case, Paige was alleging the claim based on a state action, i.e. Conyer's phone call. The *Paige* Court held that "the proper test for the scope of responsibility for events flowing from that action is "reasonable foreseeability", not "how close the nexus is between the private actors and the state actors" and that the lower court erred in applying *Blum*.

As to the merit of Paige's First Amendment retaliation claim under *Bloch v. Ribar*, the court held that Paige was clearly engaged in a constitutionally protected activity in speaking in public about matters such as a proposed interstate project. Rather, the second part of the adverse action element, i.e. causation, was "the closest issue in the case." But here, Paige had "alleged sufficient facts to establish as plausible that, 'but for' Conyer's call, she would not have been terminated" by her employer.

Because of strong similarities between this case and *Harris*, proximate cause was present. Although it was Bunnell Hill, who took the most direct action injuring Plaintiff, not Conyer was not insulated from liability if the result was a reasonably foreseeable consequence of her phone call. Here, a jury could find that Conyer's actions were at least partially motivated by Paige's opposition to the proposed project. Thus, Paige had alleged sufficient facts to survive a Rule 12(b)(6) motion to dismiss.

Employment Discrimination

*Younis v. Pinnacle Airlines, Inc.*  
610 F3d 359 (6th Cir 2010)

Panel: Daughtrey, Gilman, and Sutton

Plaintiff filed an action under Title VII of the Civil Rights Act for disparate impact employment discrimination, and hostile workplace retaliation, which was dismissed and appealed. The Plaintiff, who is an Arab-American and Muslim that began working as a pilot in September 2002, was promoted to captain in 2004. But when he was terminated in September 2005 for poor performance, he filed a complaint with the EEOC alleging religious and national origin discrimination. Because several coworkers and subordinates made offensive remarks to him during his employment, he claimed a hostile work environment existed and his discharge was retaliatory.

Plaintiff's EEOC charge, however, did not sufficiently apprise his employer of a claim for hostile work environment where he cited to only three or four isolated comments by his peers during a three-year-plus period.

To the degree the allegations in his civil lawsuit exceeded the scope of his EEOC charge, Plaintiff failed to exhaust his administrative remedies on his hostile-work environment claim. Likewise, his administrative remedies were not exhausted on his retaliation claim where he failed to mark a box on the EEOC form indicating "retaliation", and the EEOC narrative failed to contain language putting the EEOC or Defendant on notice of such retaliation allegations. Thus, this decision stands for the proposition that a discrete act (or acts) cited in an EEOC charge as evidence to support a claim of disparate treatment, will not, standing alone, also support a subsequent, uncharged claim of hostile work environment "unless the allegations in the complaint can be reasonably inferred from the facts alleged in the charge."

#### Police Officers' Denied Qualified Immunity - lack of probable cause

*McKenna v. Edgell and Honsowetz*

\_\_\_ F.3d \_\_\_, 2010 WL 3220018 (6<sup>th</sup> Cir., Mich).

Panel: Karen Nelson Moore, Gibson, & Rogers (dissent)

Plaintiff suffered a seizure while at home. The Defendant Officers responded to Plaintiff's daughter's 911 call regarding her father's medical condition. When the Officers arrived, the Plaintiff refused to cooperate. According to the Officers, Plaintiff did not respond to their verbal questions, and became increasingly aggressive towards the Officers. Conversely,

Plaintiff's daughter claimed her father started struggling with the Officers only after they handcuffed him. The Officers also asked Plaintiff and his daughter several questions regarding his drug use and criminal record during the interaction.

In its decision affirming the trial court's denial of qualified immunity as to the Officers, the Sixth Circuit first had to determine whether the Officers responded to the 911 call in a "law enforcement capacity" (4<sup>th</sup> Amendment analysis) or in an "emergency-medical response capacity" (medical malpractice/ negligence analysis). Based upon an objective analysis, the Officers' conduct must be analyzed as a medical responder. But, the Officers' questioning of the Plaintiff's daughter on her father's drug use or whether he insulted her was indicative of law enforcement behavior rather than that of a medical responder. Likewise, the Officers' handcuffing and subduing of the Plaintiff in addition to running a check on his license plate was indicative of law enforcement tactics, rather than not medical assistance. In short, the Officers' overall treatment of Plaintiff was consistent with the treatment of criminal suspect believed to have abused illegal drugs. As such, the Fourth Amendment analysis would be applicable even though the Officers were responding to a 911 medical request for assistance requiring an "emergency-medical response." Thus, because the Officers lacked probable cause to seize Plaintiff or search his home for a violation of law clearly established, cognizable constitutional violation even though the Plaintiff was either unconscious during his entire interaction with the Officers or had no memory of the incident. As to the former, the Court found the record did contain affirmative facts showing Plaintiff was conscious during the ordeal. Plaintiff's lack of memory could not create a genuine, material issue of fact. 🏠

## Economics of Law Practice Survey October 31 Deadline

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# Legislative Update

By Kester K. So and Wendy R. Underwood of 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

- **Plant Rehabilitation. SB 500** amends the Plant Rehabilitation and Industrial Development Districts Act by modifying the definition of speculative building to include certain existing facilities. Amends sections 3 and 15 of 1974 PA 198, MCL 207.553 and 207.565.
- **Local Development Financing. SB 1139** amends the Local Development Financing Act by modifying the application procedure for treasury approval. Amends section 11b of 1986 PA 281, MCL 125.2161b.
- **Federal Bond Limitations. SB 1324** creates a new act to provide for the procedure for allocation, reallocation and waiver of federal bond limitations under certain bond programs, and to prescribe certain powers and duties of certain state agencies and public officers. Creates 2010 PA 153, MCL 125.1291 *et. seq.*
- **Local Roads. HB 4848** amends the State Trunk Line Highway System Act to allow a county road commission to spend 50% of primary road funds on the county local road system. Amends section 12 of 1951 PA 51, MCL 247.662.
- **Blighted Property. HB 6203** amends the Obsolete Property Rehabilitation Act to extend the deadline for granting new exemptions from December 31, 2010 to December 31, 2016. Amends sections 6 and 16 of 2000 PA 146, MCL 125.2786 and 125.2796.

## Bills Passed by the Senate

- **Land Banks. SB 979** would amend the Land Bank Fast Track Act to modify certain jointly operated land bank authorities. Amends sections 3, 4 and 23 of 2003 PA 258, MCL 124.753 *et. seq.*

## Bills Passed by the House of Representatives

- **Brownfield Redevelopment Authority. HB 6129** would amend the Brownfield Redevelopment

Financing Act to modify the filing deadline for certain tax capture under a brownfield redevelopment authority. Amends section 15a of 1996 PA 381, MCL 125.2665a.

## Bills Introduced in the Senate

- **School Bonds. SB 1385** would amend the State Loans To School Districts Act by providing for disposition of bond proceeds from school loan revolving fund bonds by the State Administrative Board. Amends sections 1, 2 and 4 of 1961 PA 112, MCL 388.981 *et. seq.*
- **School Bonds. SB 1386** would amend the Shared Credit Rating Act to modify the provision relating to the purchase of qualified bonds of a school district. Amends sections 7 and 8 of 1985 PA 227, MCL 141.1057 and 141.1058.
- **School Bonds. SB 1387** would amend various sections of the School Bond Qualification, Approval, and Loan Act. Amends sections 3, 4, 5, 6, 7, 8, 9, 11, 13, 16 and 18 of 2005 PA 92, MCL 388.1923 *et. seq.*

## Bills Introduced in the House of Representatives

- **Downtown Development Authority Refinancing. HB 6251** would amend the Downtown Development Authority Act to allow refinancing of certain qualified refunding obligations by downtown development authorities. Amends section 1 of 1975 PA 197, MCL 125.1651.
- **Municipal Pensions. HB 6274** would amend the Home Rule City Act by providing that large cities with retirement systems could allow through their charters or otherwise a portion of the assets of their retirement systems to be available for bond issuance. Amends 1909 PA 279, MCL 117.1 to 117.38, by adding section 4s.

- **Pension Funds.** **HB 6275** would amend the Public Employee Retirement System Investment Act to authorize certain investment fiduciaries of pension systems to invest described amounts in certain investments and provides for certain standards if the investments are in municipal bonds. Amends sections 20d and 20g of 1965 PA 314, MCL 38.1140d and 38.1140g.
- **Transportation Funding.** **HB 6342** would amend the State Trunk Line Highway System Act to establish funding for road projects. Amends section 10o of 1951 PA 51, MCL 247.660o.
- **Smart Zones.** **HB 6345** would amend the Local Development Financing Act by allowing the Michigan Economic Development Corporation to designate two additional certified technology parks after June 1, 2010 and before April 1, 2011. Amends section 12a of 1986 PA 281, MCL 125.2162a.
- **Revenue Sharing.** **HB 6355** would amend the General Property Tax Act by modifying the distribution of revenue sharing reserve fund and allowing for any capital project. Amends section 44a of 1893 PA 206, MCL 211.44a. 🏠

## I'll Bet You Didn't Know (or maybe you forgot): The Russians are Coming, The Russians are Coming—Who's in Charge?

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

I have frequently been asked what got me interested in writing articles on old, antiquated or scarcely known laws. Well, it started the way you might suspect. I would be researching an issue and, in doing so, would accidentally come across some entirely unrelated item that I would find particularly interesting. I started saving those interesting items in a separate file and, eventually, I had enough material to start writing about them.

I was inspired to do this by a now deceased columnist, Sydney J. Harris. Sydney J. Harris was an American journalist for the Chicago Daily News and later the Chicago Sun-Times. His column, "Strictly Personal," was syndicated in many newspapers throughout the United States and Canada.<sup>1</sup> I read him religiously and one of my favorites was a recurring column in which he described things he had discovered while looking up something else. Like all of his columns, these were witty and informative. Sydney J. Harris was an extremely interesting columnist who died following heart surgery in 1986 at a much too young 69 years of age. But there will be more about him in a future article.

Inspired as I was by my favorite columnist, and having collected a number of curious facts, the first article I wrote on an unusual law was back in the late 1970s or early 1980s. That was before computers, of course, and I no longer have

that article saved anywhere. In any event, while researching a long forgotten item at that time, I came across a state statute entitled the Emergency Interim Local Succession Act, 1959 PA 203 [MCL 31.101 et seq]. The statute was a legislative reaction to the fears of impending nuclear disaster which prevailed during the Cold War between the United States and the Soviet Union following World War II.

The statute provided for the designation, qualifications, removal and replacement, privileges, and exercises of powers of "emergency interim successors" in the event of an emergency resulting from a disaster occurring in the state caused by an enemy attack upon the United States. It provided that, within 3 days after taking office, every officer of a political subdivision (other than a judge) had to designate *five* emergency interim successors. The local public officer had to list in order of priority the successors who would assume the officer's duties if necessary. The act further required the public officer to file the titles of his or her emergency interim successors with the clerk of the political subdivision and with the county clerk.

If, due to a disaster caused by enemy attack upon the United States, the public officer was unable to exercise the powers and to discharge the duties of his or her office, the legally authorized deputy was required to exercise those powers and discharge the duties. If the deputy was unable to discharge

the duties of the office, then the available emergency interim successor highest in order of succession was required to assume those duties.

Then, in the year 2000, a much smarter, more worldly legislature enacted Public Act 303 which did two things. First, it amended the Emergency Interim Local Succession Act to require the public officer to designate only *one* emergency interim successor, instead of five, but that still had to be done within 3 days after taking office. That part of the act became immediately effective on October 16, 2000.

The second thing 2000 PA 303 did was repeal the Emergency Interim Local Succession Act entirely, effective December 31, 2000. I have been unable to find out why the Legislature went to the trouble of first amending the statute, making the amendment immediately effective on October 16 and then repealing it as of December 31 of the same year. In any event, the fears of nuclear attack which were ever present during the Cold War from the 1950s into the early 1980s had been greatly reduced by the year 2000, nearly a decade after the former Union of Soviet Socialist Republics broke up and reconstituted themselves as republics comprising the Commonwealth of Independent States (CIS).

Now, I am one of those persons old enough to have represented municipalities in the 70s, 80s and 90s, and I can tell you from my own experience that I am unaware of any local public officer who complied with the requirements of the Emergency Interim Local Succession Act. I do, however, remember mentioning it to a couple of officials during that time only to have them respond with a chuckle and say something like, “well, yeah, I’ll get right on that.” I even went to our local county clerk’s office one day and asked to see the lists of successors that had been filed there as required by law. The clerk gave me a puzzled look and then said, “You’re joking - right?”

And what about the Russians? Well, as Sydney J. Harris said, “Enemies, as well as lovers, come to resemble each other over a period of time.” 🗑️

## Endnotes

- 1 [http://en.wikipedia.org/wiki/Sydney\\_J.\\_Harris](http://en.wikipedia.org/wiki/Sydney_J._Harris)



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