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# Land Use

May 04, 2012

May 4 , 2012

Unlike zoning provisions, nuisance and junkyard ordinances held applicable to current uses

In *Soo Township v. Pezzolesi*, (2011 Mich. App LEXIS 1903, Case No. 299359) (unpublished), the Township rezoned an area from commercial to residential, and enacted a nuisance ordinance and a junkyard ordinance. Defendant had operated a "salvage yard" within the rezoned area which became illegal under the newly adopted ordinances. At trial, the Defendant argued, and the trial court agreed, that his salvage yard was an existing use and as such, the new ordinances were inapplicable to his salvage yard operation. On appeal, the Court of Appeals held that the Township's ordinances were "regulatory" in nature because they did not depend on a zoning scheme but rather were intended to regulate conduct, regardless of where it occurred. The Court of Appeals noted that regulatory ordinances, unlike zoning ordinances, are applicable to all current uses because regulatory ordinances enacted under police power do not depend on a zoning or districting scheme, rather they are blanket regulations on activity.

Signage ordinance prohibiting LED signs upheld

In *Sackllah Investments, LLC v. Charter Twp. of Northville*, (2011 Mich. App LEXIS 1452, Case No. 293709) (unpublished), the Court of Appeals upheld a Township Sign Ordinance as "content-neutral" because the ordinance merely prohibited certain styles of signs in the area without any consideration to the content of the signage, leaving open ample alternatives for expression. The ordinance in question prohibited LED or other intrusive signage in a commercial area adjacent to a rural residential area. A developer challenged the ordinance as a content-based restriction on his free speech rights. The Court of Appeals held that the ordinance was narrowly tailored to achieve a significant government interest of maintaining the integrity and character of the rural neighborhood.

Denial of zoning change not arbitrary and capricious

In *DF Land Development, LLC v. Charter Twp. of Ann Arbor*, (2011 Mich. App. LEXIS 2028, Case No. 298858) (unpublished), the Court of Appeals affirmed a lower court's decision denying Plaintiff's Due Process "takings" claim. Plaintiff sought a zoning change on 54 acres of land it wished to redevelop from agricultural or single family use, to multi-family high density residential use. The Township denied the request, citing the need to preserve the natural features and rural character of that particular area of the community. The Court of Appeals upheld the lower court's ruling that denying the zoning change furthered the Township's legitimate governmental interest of preserving the rural character, natural features and availability of open areas in the community. The court also rejected Plaintiff's argument that the Township's refusal to rezone precluded the area's most economically viable use. The court noted that "property need not be zoned for its most lucrative use." Furthermore, the court ruled that because the denial of the requested zoning change was consistent with the tract of land's historical use, such a denial was not arbitrary and capricious.

## Freedom of Information Act

Police department ticket-quota policy not exempt from FOIA

In *Lawrence v. City of Troy*, (2012 Mich. App. LEXIS 592, Case No. 300478) (unpublished), the Michigan Court of Appeals determined a number of FOIA related issues. The case arose as a FOIA request for information related to a traffic ticket. First, the court ruled that a purported "ticket quota" policy of Defendant's police department was not exempt from disclosure, because the policy involved the inner workings of the government, and by its terms, FOIA favors disclosure. Second, the court determined that Defendant's internal police disciplinary records were exempt from disclosure, but that any records of lawsuits filed for official misconduct against Defendant's officers were not, because the public interest of disclosure outweighed any interest in nondisclosure. Finally, the court found that Defendant's denial of the FOIA request because it was related to a civil infraction was arbitrary and capricious, entitling Plaintiff to a punitive damage award.

Confidential sources exempt from FOIA

In *Jersevic v Dist Health Dept No 2*, (2012 Mich. App. LEXIS 581, Case No. 306659) (unpublished), the Court of Appeals ruled that the Defendant Health Department was exempt from disclosing the identity of a confidential informant that complained of Plaintiff violating the state's prohibition of smoking in bars and restaurants. FOIA allows a public body to exempt confidential sources from disclosure but it does not define the phrase. The court determined that a confidential source is one that discloses information to a public body with the understanding that his or her identity will remain confidential.

Records of information relating to civil action exempt during action

In *Katkowsky v Michigan State Police*, (2012 Mich. App. LEXIS 763, Case No. 303246) (unpublished), the Michigan State Police denied Plaintiff's request for information relating to the State Police's receipt of federal funding for a motorcycle safety program. The request was made during the pendency of litigation involving the State Police's enforcement of Michigan's motorcycle helmet law. The State Police denied the request as information relating to litigation in which both the requestor and public body were parties. Shortly after the request was denied, the State Police was removed from the litigation and in-turn produced the documents requested. Plaintiff argued at the court of appeals that the State Police acted arbitrarily and capriciously in denying, then producing the records. The court held that the Plaintiff was not entitled to the records during the pending lawsuit, and the initial denial was not

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arbitrary and capricious, but was a reasonable interpretation of FOIA.

### **Open Meetings Act**

18-hour notice requirement for emergency sessions

House Bill 5459 would amend the Open Meetings Act to provide a procedure a public body must follow if it meets in an emergency session without first giving the requisite 18-hour advance notice. The legislation would require that if the public body had to meet in an emergency session without giving 18 hours notice, it would be required to send a notice to the Secretary of State describing the reasons for failing to meet the 18-hour notice requirement. The legislation also provides that the notice to the Secretary of State would not constitute a defense to any violation of the Act. House Bill 5459 is currently awaiting consideration in the House Committee on Oversight, Ethics and Reform.

Prohibition of the use of video or teleconferencing technology

House Bill 5335, which is currently under review in the Senate Committee on Local Government and Elections, would amend the OMA to clarify that members of public bodies must be physically present to vote on an issue before the body. It also would require that deliberations occurring at the meeting shall occur only when a quorum of members are physically present. The legislation is aimed at preventing members from voting using video or teleconferencing technology.

### **Special Assessments**

Village ordinance expanding on state law definition upheld

In *Newell v. Village of Otter Lake*, (2011 Mich. App. LEXIS 2020, Case No. 299543) (unpublished), the Village enacted a resolution creating a special assessment district for a sanitary sewage system and subsequently enacted an ordinance defining a public sanitary sewer system as a system "located in a right of way, easement, highway, street, or public way which crosses, adjoins, or abuts a parcel upon which a structure is located." The ordinance's definition expands that of the Public Health Code, MCL 333.12751(c), which limits the system's location to "not more than 200 feet at the nearest point from a structure in which sanitary sewage originates." The Plaintiffs challenged the Village's assessment because of the perceived conflict between the ordinance and state law. The Court of Appeals found there to be no conflict because the ordinance was not inconsistent with state law, but merely expanded the definition of the public health code, subjecting sewer systems to more regulation than state law did. Accordingly, the court held that the Village did not attempt to authorize what state law had forbidden.

Attorney fees awarded after failed challenge to special assessment

*Arath IV, Inc v Kent Co Drain Comm'n*, (2012 Mich. App. LEXIS 692, Case No 298873) (awaiting publication), involved a challenge to a special assessment levied to finance drain improvements. The probate court denied the challenge. On appeal to the circuit court, the challenge was again denied and the Plaintiffs were ordered to pay the county drain commissioners' attorney fees and compensate members of a board of review charged with reviewing the special assessment apportionment. The Court of Appeals held that the drain code required the appellant challenging an assessment apportionment to pay "the whole costs and expenses" of the challenge, as determined by the probate judge. The court noted that while the code did not expressly authorize the awarding of attorney fees, the Michigan Supreme Court had previously held that such an award was appropriate.

### **Park Bench Advertising**

*Bench Billboard Co v City of Cincinnati*, (2012 U.S. App. LEXIS 7119, Docket No 12a0098p.06) (awaiting official publication) involved a lengthy series of court cases regarding the City of Cincinnati's regulations on park-bench and other outdoor advertising. Plaintiff had a number of advertising benches placed in public rights-of-way throughout the City. After a series of amendments to the City's outdoor advertising regulations, the City settled on a comprehensive regulatory scheme that allowed outdoor advertisements to be placed on preexisting bus stop shelters but did not allow the advertising benches to be placed in public places and rights-of-way. The ordinance also levied different permit fee amounts for the two types of advertisements. Plaintiff challenged the ordinance as a violation of the First Amendment and the Equal Protection Clause because the City treated the two types of advertisements differently. The Sixth Circuit Court of Appeals found that having distinct regulatory and fee structures for the two types of advertisements was a permissible way to defray the costs of regulating the advertisements.

### **Medical Marihuana**

ACLU Drops court battle over Livonia ordinance

The ACLU has ended its battle over a Livonia City zoning ordinance banning marihuana growth. The zoning ordinance banned any activity that was contrary to federal, state or local law. Marihuana growth, as a federally prohibited practice, was thus banned under Livonia's zoning ordinance. In December 2010, the ACLU filed suit against Livonia alleging that its outright ban of marihuana growth was preempted by the Michigan Medical Marihuana Act. After lengthy litigation the ACLU has dropped its case challenging the ordinance.

Senate Bill 17

Senate Bill 17, which was passed from the Senate Health Policy Committee and is currently awaiting consideration before the full Senate, would amend

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the Public Health Code to prohibit a person from organizing or operating a marihuana club or bar. The legislation's prohibitions do not include licensed hospices, nursing homes or property where marihuana is legally dispensed.

#### House Bill 4661

House Bill 4661 provides that the "enclosed, locked facility" that medical marihuana may be stored in must not be located within 500 feet of a "church or other house of worship; school or day care facility." The prohibition applies to both qualifying patients and primary care givers. House Bill 4661 is currently in the House Committee on Judiciary.

#### Senate Bill 504

Senate Bill 504 would prohibit the transfer of marihuana under the MMMA from occurring less than 1000 feet from a "clearly identified church or other house of worship, or a school, other than a home school" unless that transfer occurs inside the home of a qualified patient in possession of a registration card. Senate Bill 504 was passed by the Senate Judiciary Committee and is currently awaiting consideration before the full Senate.

#### House Bill 4850

House Bill 4850 clarifies that a registered primary caregiver may receive compensation for costs associated with their care only if he or she is connected to the patient through the registration process. HB 4850 also clarifies that a holder of a medical marihuana registry card is ineligible to assert the defenses to prosecution outlined in the MMMA if the individual transfers or receives marihuana from any person other than their registered primary caregiver. House Bill 4850 is pending before the House Committee on Judiciary.

#### House Bill 4854

House Bill 4854, which is currently pending in the House Committee on Judiciary, makes advertising primary care services, or offering the sale or transfer of marihuana a misdemeanor. The legislation provides exceptions to the prohibitions for those acting in good faith, without knowledge of the legislation's prohibitions.

### **Michigan Vehicle Code Enforcement**

Public Acts 7 through 11 of 2012 allow local units of government (Cities, Charter Townships, Townships, and Villages) to adopt ordinances and prescribe penalties for violations and to adopt by reference the Michigan Vehicle Code. The Acts allow local governments to enact ordinances adopting by reference provisions of the Michigan Vehicle Code that provide for penalties for "super drunk" drivers (those with blood alcohol content greater than 0.17). The penalty for an ordinance violation is required to be the same as that provided under the Vehicle Code, which is 180 days in jail, fine of not less than \$200 or more than \$700, community service for up to 360 hours.

### **Governmental Immunity - "Two-Inch Rule"**

2012 PA 50 amended the state's governmental immunity statute to address the liability of a municipality for defects in a sidewalk. PA 50 creates a presumption that a municipality had adequately maintained a sidewalk, which may be rebutted only by evidence that a cause of any injury was a "vertical discontinuity defect" of two inches or more in the sidewalk. PA 50 also provides that a municipality is not liable for failing to maintain a sidewalk unless the injured person proves that at least 30 days before the occurrence of the injury, the municipality knew or should have known of the defect.

### **Liquor Control Code Amendment**

Public Act 82 of 2012 amended the Michigan Liquor Control Code to allow a local legislative body to request that the Liquor Control Commission revoke a liquor license for a licensee that sold alcohol to a minor on three occasions in a 12-month period. Prior to this amendment, the law was limited to three sales in a calendar year, meaning if a licensee sold alcohol to a minor twice in December, and once in January, revocation was not authorized. The act took effect immediately upon the Governor's signature.

### **Incompatible Offices**

2011 PA 196 amended section 2 of Public Act 566 of 1978, which prohibits a public officer from holding incompatible offices, to provide that the ban would not prohibit a public officer or public employee of a city, village, township or county with a population under 3,000 from serving as a fire chief in that local unit of government with or without compensation. The change takes effect immediately.

### **Emergency Vehicles**

2011 PA 231 amended the Michigan Vehicle Code to include in the definition of "authorized emergency vehicle" the privately owned vehicles of volunteer members of an emergency rescue unit, if authorized by the local fire chief, county sheriff or director of the Michigan State Police.

### **Inmate Reimbursement to Municipalities**

Senate Bill 393 would amend the Inmate to Municipalities Reimbursement Act to allow any municipality to seek reimbursement from a convicted inmate for the expenses of incarceration. As the Act is currently written, a "municipality" means a city, village or township located in a county with a population

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exceeding 500,000. Senate Bill 393 eliminates the population requirement, allowing any municipality to seek reimbursement. The legislation is currently pending before the full House of Representatives.

#### **Landlocked Cemeteries**

House Bill 5404 would amend the Land Division Act to prohibit a land division or land plat that isolates a cemetery so that it is not "accessible" as defined in the Act. "Accessible" under the Act generally means the plat has driveway access to an existing street and meets applicable governmental standards, or has an easement granting access to an existing street thereby effectively serving as a driveway. The legislation would prohibit any land division that would allow for a landlocked cemetery. House Bill 5404 is currently awaiting consideration before the full House of Representatives.

#### **Construction Contract Indemnity**

House Bill 5466 would amend state law regarding construction contract indemnity clauses to provide that when certain conditions are met, a construction agreement between a public entity, including municipalities, and a contractor would be void and unenforceable. Those conditions are: the agreement is in connection to the design, construction, alteration, repair or maintenance of a structure; the agreement would require the contractor to either defend a party other than the municipality, or assume any liability or indemnify the municipality for an amount greater than an amount determined based on the degree of fault of the contractor. The legislation is currently pending in the House Committee on Judiciary.

#### **Beach Warning System Legislation**

Senate Bill 818 creates a uniform beach condition warning system on Great Lakes beaches. SB 818, which is under consideration in the Senate Committee on Outdoor Recreation and Tourism, would create a color coded flag system to alert beachgoers of water conditions. The legislation requires municipalities operating beaches to install, maintain and monitor the flag systems but does not provide funding.

If you have any questions regarding any of the above information please contact your Clark Hill municipal attorney.