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DICKINSON WRIGHT'S

Municipal LEGALNEWS

DICKINSON WRIGHT WELCOMES EMILY RYSBERG AND ERIC MCGLOTHLIN

Emily Rysberg joins Dickinson Wright's Municipal Law & Finance group with experience in the areas of municipal law and litigation. Emily has experience with municipal litigation, including extensive experience with ordinance enforcement, and has successfully argued a wide range of motion practice. Emily has successfully conducted evidentiary hearings, motions to dismiss and suppress, and has a demonstrated track record of success in her trial practice, obtaining guilty verdicts in numerous jury and bench trials for local municipalities. Emily also has extensive experience assisting municipalities with ordinance drafting and amendment, contract negotiations, employment matters, Freedom of Information Act requests, and has worked to successfully uphold the ordinances of local municipalities against constitutional challenges both at the trial court and appellate level. Emily also enjoys fishing, traveling, and participating on the planning committee for the annual Women vs. Lawyers Charity Softball game benefitting the YWCA of West Michigan.

Eric McGlothlin also joins Dickinson Wright's Municipal Law & Finance group focusing his practice in the areas of public finance, municipal law and education law. Eric has particular expertise in advising governmental entities, underwriters and 501(c)(3) borrowers on complex financial transactions involving the issuance of tax-exempt and taxable debt and on related tax and securities law matters. In addition, Eric advises governmental entities on all matters affecting daily operations including open meetings and public records, procurement law, elections and utility matters. Eric is a member of the National Association of Bond Lawyers and is recognized as a "Rising Star" by Southwest Super Lawyers®.

MAJOR FREEDOM OF INFORMATION ACT ("FOIA") AMENDMENTS

Public Act 563 of 2014 ("Act 563") amends the FOIA to impose a number of new regulations on public bodies. All municipalities will need to review their FOIA practices and procedures to ensure compliance with Act 563 before it takes effect on July 1, 2015. This article summarizes some of the more significant changes to current law.

Act 563 requires public bodies to itemize FOIA fees on a written invoice, detailing why each fee is reasonable and within one of following authorized categories: (1) labor costs for finding records; (2) labor costs for redacting exempt material; (3) costs for transferring material to electronic media; (4) costs of paper copying; (5) labor costs

for copying; and 6) mailing costs. Act 563 also limits the amount of fees charged for contract labor involving the separation and exclusion of exempt material (including attorney review of exemptions) to six times the state minimum hourly rate. It further requires that fees be charged in increments of 15 minutes or more with partial increments rounded down.

There are also new regulations regarding government websites. Any public body that maintains a website must post a summary of its FOIA procedures and guidelines online. Further, if a FOIA requester asks for a record that is accessible on the website, the public body is required to inform the requester of that fact and is prohibited from charging a fee pertaining to the record.

Other notable features include:

- A maximum fee of 10 cents per page for copying costs.
- A requirement that any communication that conveys a request for information and includes a legal citation to the FOIA or the words "information," "FOIA," or "copy" must be construed as a FOIA request.
- An expansion of the $20 fee waiver (which currently applies only to indigent individuals) to organizations designated by the state to assist persons with disabilities and mental illnesses.
- A requirement that a municipality reduce the amount of fees charged if it does not timely respond to a request.
- An increase in the fine for arbitrary denials from $500 to $1,000, and a new fine of $500 for excessive fees.

RETHINKING TEXT MESSAGING BETWEEN GOVERNMENT EMPLOYEES

Local governments need to be aware that all forms of social media and digital communication (for example, text messaging, Twitter, and Facebook) used in the performance of official duties may be viewed as correspondence subject to public records retention and FOIA requirements under state law. Before using, or authorizing the use of text messaging or other similar communications, local government agencies should first consider the retention period and disclosure requirements for their particular agency, whether or not compliance with the required retention period is practical, and ensure that these types of communications are properly retained and stored if the municipality elects to use social media and other forms of digital communication.

The applicable retention period varies according to numerous factors, including the type of communication, the substantive content, and the persons communicating. For example, general correspondence between government employees typically has a minimum retention period of 2 years or more. Similarly, government employees should be wary of using their personal phones to send work-related text messages. Doing so likely makes all of the contents of the phone subject to subpoena or examination by a department's FOIA coordinator.

Unfortunately, despite widespread use of social media and digital communication, the proper interpretation of the state's retention policies remains somewhat unclear. Until more guidance is provided, government agencies may want to avoid the use of social media and text messaging, or implement other policies to ensure compliance.

ENCROACHMENTS ONTO PUBLIC STREETS: IS THE "RACE TO THE COURTHOUSE" OVER?

Haynes v Village of Beulah,[1] a recent decision from the Michigan Court of Appeals, protects municipalities from losing certain public rights-of-ways to claims of adverse possession and acquiescence. There are a number of statutes that protect municipalities from these claims, and it was once thought that all municipal property was immune from them. That changed in 2009, when *Mason v City of Menominee*[2] held that the protection in MCL 600.5821 only applies if the municipality files a lawsuit to reclaim its interest in property ***before*** the party-in-use files a lawsuit of its own. The *Mason* decision — which was based on odd wording in the statute — meant that a municipality could jeopardize its property rights by attempting to negotiate with the party-in-use rather than "racing to the courthouse."

The *Haynes* decision makes clear that a separate statute (MCL 247.190) protects public highways from adverse possession and acquiescence claims regardless of which party files suit first. It also specifically holds that the term "highway" is broad enough to include platted village streets, rather than being limited to state trunk-line highways. This ruling restores significant protections that were undermined by *Mason*, but it is too early to tell exactly how far the scope of the "highway" protection extends.

WINDFARMS, ZONING, AND THE POLICE POWER

The Court of Appeals' recent decision in *Forest Hill Energy-Fowler Farms, LLC v Township of Bengal*[3] makes clear that municipalities cannot evade the procedural requirements in the Zoning Enabling Act by exercising the zoning power under the guise of the general police power. The case involved a situation where a county had issued zoning permits for wind farm development in townships that lacked their own zoning ordinances. While the applications for those permits were pending, the townships enacted ordinances under their general police power that imposed stricter height, setback, noise, and shadow-flicker requirments than the county zoning ordinance. The Court of Appeals held that the townships' ordinances were preempted by the county's, because they constituted procedurally improper uses of the zoning power. The Court specifically explained that a zoning ordinance is "one that regulates the use of land and buildings according to districts, locations, or areas." Because the construction of energy facilities is a

permanent use of land, and is explicitly listed in the Zoning Enabling Act as being a subject of zoning, it can only be regulated through validly enacted zoning ordinances.

CHANGES IMPACTING RIGHTS OF AN ADDITIONAL NAMED INSURED

Municipalities will no longer be able to rely on their "Additional Named Insured Status" as a means to ensure they receive notification of cancellation of an insurance policy and will instead need to obtain an endorsement setting forth their rights (including notice of cancellation) in the underlying insurance policy. This change comes as a result of Public Act 271 of 2014 amending the Michigan Insurance Code to prohibit insurance carriers from issuing certificates of insurance that purport to modify or expand the policy coverage. Specifically, the amendment provides that an "additional named insured" can no longer require a notice of cancellation provision in a certificate of insurance because the provision would modify or expand the terms of the policy without the insurer's authorization.

OTHER NOTEWORTHY LEGISLATIVE AND REGULATORY DEVELOPMENTS

- **Attachment of Liens for Township Special Assessments, 2014 PA 561**. Provides that when a township levies a special assessment under Public Act 188 of 1954 ("PA 188") to be paid in installments, the lien for each individual installment does not attach until it comes due.

- **Delinquent Property Tax Installment Plans, 2014 PA 499**. Allows a foreclosing governmental unit to create a delinquent property tax installment payment plan for financially distressed persons in danger of losing their homes to tax foreclosure.

- **Extended Sunset for OPEB bonding, 2014 PA 297.** Extends until December 31, 2015, the time period for communities assigned credit ratings within the category of AA or higher to issue bonds to pay the costs of unfunded pension liability or unfunded accrued health care liability.

- **Firefighter Employment at Multiple Departments, 2014 PA 323.** Allows firefighters to volunteer or work for multiple fire departments if doing so does not conflict with the firefighters' original employment. The ability to work for multiple fire departments cannot be limited by local regulation and is a prohibited subject of collective bargaining.

- **Limitations on Tax Foreclosure Bidders, 2014 PA 501.** Prohibits an individual from bidding on property at a foreclosure sale if the individual previously owned the property within a certain time period or has unpaid fines for blight or nuisance violations.

- **Next Michigan Development Act, 2014 PA 446-447.** Authorizes the Michigan Strategic Fund to create new Next Michigan Development Corporations, and requires it to give preference to certain areas in the Upper Peninsula and Detroit-metro area when doing so.

- **Tax Collecting Agreements with County Treasurers, 2014 PA 568.** Authorizes a city, village, or township to contract with the county to have tax collection services performed by the county treasurer.

- **Uncapping of Taxable Value, 2014 PA 310.** Provides that the taxable value of a parcel is not uncapped during certain family-to-family transfers involving trusts.

- **Zoning Regulation of Amateur Radio Equipment, 2014 PA 556.** Prohibits local governments from precluding amateur radio antenna structures erected at certain minimal heights and dimensions.

Please contact the Municipal Law & Finance group at Dickinson Wright with your questions and concerns regarding any of these recent developments.

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[1] *Haynes v Vill of Beulah*, No. 317391, 2014 WL 5364190 (Mich Ct App Oct. 21, 2014) (approved for publication).
[2] *Mason v City of Menominee*, 282 Mich App 525 (2009).
[3] *Forest Hill Energy-Fowler Farms, LLC v Twp of Bengal*, No. 319134, 2014 WL 6861254, at *1 (Mich. Ct. App. Dec. 4, 2014).

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