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Overview of Recent Michigan Supreme Court and Court of Appeals Decisions of Significance to Local Government Management

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CASE NAME:	**Rajaj v City of Romulus and Romulus Police Department**
COURT:	**Court of Appeals**
DECIDED:	**September 23, 2014**
ISSUE/TOPIC:	**THE FOIA – THE "INVASION OF PRIVACY" EXEMPTION IN THE FOIA.**

The plaintiff, an attorney, learned that a Romulus Police Officer had assaulted an unnamed arrestee, at the Romulus Police Department and that the assault was captured on video. A copy of the video and all records pertaining to the assault were requested under the Freedom of Information Act (FOIA).

The request was granted in part and denied in part. The Police Department provided a copy of the incident report with all names, addresses and dates of birth redacted, and refused to provide the video. The name and identity of the assaulted person was redacted and the video was not provided, at the assaulted person's request. Included in the Police Department's partial disclosure was a letter from the assaulted person (with name redacted). The letter asked that the video not be released because its release would jeopardize the person's job and his/her personal safety. The letter acknowledged that the reports and video showed that the assaulted person had spit on a police officer and had used racial slurs.

The trial court sided with the Police Department, finding that unredacted reports and the video was information of a personal nature, the disclosure of which would constitute a "clearly unwarranted invasion of privacy" and was, therefore, exempt from disclosure under the FOIA. (MCL 15.243(1)(a)). The Court of Appeals reversed, citing the public policy behind the FOIA and Supreme Court precedent to the effect that the FOIA is a "pro-disclosure statute" that "must be interpreted broadly to ensure public access."

Case law defines information of a "personal nature" as "intimate," "embarrassing," "private," or "confidential." The court recognized that a video showing a person spitting on a police officer and using racial slurs "could well be considered 'embarrassing.'" But, the court held, whether disclosure of such information "would constitute a clearly and warranted invasion of an individual's privacy" is balanced against "the public interest in disclosure."

The court concluded that, notwithstanding the embarrassing information apparently depicted on the video recording, "we conclude that the video would shed light on the operations of the RPD and, in particular, its treatment of those arrested and detained by its officers." On that basis, disclosure was ordered and the case was remanded to the trial court for the assessment of reasonable attorney fees to be paid by the City of Romulus to the prevailing plaintiff.

Based on precedent, including rulings that arrest "mug shots" are subject to disclosure in spite of their embarrassing nature, the ruling in this case is not surprising. What was unique in this case was the private citizen's written request that information not be released because its release would jeopardize his/her employment and threaten his/her safety. Even in the face of such a request and the possible negative impact on one citizen, the public policy behind the FOIA prevailed, again demonstrating the scope of the FOIA and that all exemptions to disclosure are, as the Court said, "narrowly construed."

CASE NAME:	**Amberg v City of Dearborn and Dearborn Police Department**
COURT:	**Michigan Supreme Court**
DECIDED:	**December 16, 2014**
ISSUE/TOPIC:	**THE FOIA – THE DEFINITION OF "PUBLIC RECORD" – A RECORD USED "IN PERFORMANCE OF AN OFFICIAL FUNCTION."**

This FOIA request was for copies of video surveillance recordings, created by private business, but acquired by the police department in the course of a pending misdemeanor case. The trial court and the Court of Appeals ruled that the videos were not public records. The Supreme Court unanimously disagreed and reversed and remanded the case to the trial court for a determination of reasonable costs and attorney fees to be awarded to the plaintiff.

The court began by restating the purpose of the FOIA – to provide to the people of Michigan "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees," thereby allowing them to "fully participate in the democratic process." (MCL 15.231(2)) The court further noted that a public record is defined as "a writing prepared, owned, used, in the possession of, or retained by a public body *in the performance of an official function*, from the time it is created ..." (emphasis added). "Writing," in turn, is defined as any "means of recording," including "pictures" and "sounds ... or combinations thereof ..."

The parties did not dispute that the videos are writings within the meaning of the FOIA and did not dispute that the videos were in the possession of and retained by the defendants. The dispute in the case centered on whether the videos were in the possession of the police "in the performance of an official function." The Court of Appeals, in a split decision, reasoned that the videos were not used in the performance of an official function because they were acquired after the decision had been made to issue the misdemeanor citation.

The Supreme Court rejected this reasoning. Because the misdemeanor case remained pending when the videos were acquired and were collected as evidence in support of the decision to issue the citation, they were, the Court held, possessed and retained "in performance of an official function."

Thus, additional take-aways from the case are: the mere possession of a writing, as defined by the FOIA, is not sufficient to make the writings public records. And, writings or recordings created by a private entity does not necessarily insulate the records from release under the FOIA.

Finally, the case was remanded for a determination of reasonable attorney fees to be awarded to the plaintiff. The city argued that the request for fees was rendered moot by the city's release of the videos as the FOIA case was pending. The Supreme Court disagreed. The Court said that, fees are to be awarded to a plaintiff who "prevails" in an FOIA suit. A plaintiff prevails in an FOIA suit if "the action was reasonably necessary to compel the disclosure of public records, and [that] the action had a substantial causative effect on the delivery of the information to the plaintiff."

CASE NAMES:	**Gowdy v City of Flint, McCarthy v City of Trenton, McLean v City of Dearborn, and, Watts v City of Flint**
COURT:	**Michigan Court of Appeals**
DECIDED:	**11/25/14, 9/18/14, 8/1/13 and 1/17/13, respectively**
ISSUE/TOPIC:	**DEFECTIVE SIDEWALK CLAIM – HIGHWAY EXCEPTION TO GTLA – 120-DAY NOTICE REQUIREMENT.**

This line of cases, in 2013 and 2014, address the same issues and solidly confirm that a claimant's failure to strictly comply with both the substance and procedural requirements of the 120-day notice statute will be fatal to a claim against a municipality.

The Governmental Tort Liability Act (GTLA) provides that governmental agencies are generally immune from tort liability when engaged in the exercise of a governmental function. Under the "highway exception" to governmental immunity, a governmental agency having jurisdiction over a highway is subject to suit for a breach of its duty to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." A sidewalk is included in the definition of "highway."

In order to assert the highway exception to governmental immunity, a plaintiff must timely notify a governmental defendant of his or her claim. (MCL 691.1401) The statute requires that this notice "shall specify the exact location and nature of the defect, the injuries sustained and the name of the witnesses known at the time" by the complainant, and that the notice "may" be served upon any individual who may lawfully be served with civil process "by personal service or certified mail, return receipt requested." Civil process on a city is made by serving the mayor, the city clerk, or the city attorney.

In *Watts,* the plaintiff sent her notice to the city clerk by first class mail. In *McLean,* the notice was served by first class mail in two parts – one part sent to the city, the other sent to the city's third-party claims administrator. Likewise, in *McCarthy,* the notice was mailed in two parts, one part to the city and the other sent to the city's insurer. In *Gowdy,* a notice that contained all of the required elements of the notice was sent by mail only.

In each case, the plaintiff's suit was dismissed. In each case, the Court of Appeals ruled that the words of the notice statute control and because those words do not allow for any other form of notice or means of service, any suit followed by a notice that does not precisely satisfy each element of the statute, will be dismissed, regardless of whether the municipality has suffered prejudice as a result of the defective notice.

The plaintiff in *Gowdy,* the most recent in this line of cases, argued that, because the statute says the notice "may" be served by personal service or certified mail, the provision is "permissive," not mandatory. The court rejected this argument. Reading the statute as a whole, including the statute's mandatory requirements as to the content of the notice, the court ruled that the methods of service provided for in the statute are mandatory.

CASE NAME: Petipren v Jaskowski (Chief of Police, Village of Port Sanilac)
COURT: Michigan Supreme Court
DECIDED: June 20, 2013
ISSUE/TOPIC: THE SCOPE OF "EXECUTIVE AUTHORITY" UNDER THE GTLA.

In July 2008, the Village of Port Sanilac held its annual "Bark Shanty Festival," an outdoor fundraising event, including a beer tent and several musical acts. A band called "HI8US" was one of the acts. Soon after HI8US started to perform, patrons and volunteers began to complain that the music was offensive and not appropriate for the crowd. Attendees, including families, began to leave the festival. The controversy quickly escalated and the Village's Fire Chief anticipated trouble between the band's supporters and other festival attendees and reported his concerns to the Chief of Police, Rodney Jaskowski.

Jankowski went to the festival site and, in conjunction with other officials, agreed to stop the festival and all musical acts. In the process, Thomas Petipren, the drummer for HI8US was arrested by Jankowski with each man offering wildly differing versions of why and how the arrest occurred. The drummer testified he was playing his drums when Jankowski angrily approached him, knocked over his drums, grabbed and threw his drum sticks on the ground, grabbed him by the collar, pushed him off the stage onto the ground, yelled at him to stop resisting, and handcuffed him behind his back. Jankowski testified that Petipren swore at him, punched him in the jaw, and resisted arrest. He arrested him for assault, disorderly conduct and resisting arrest.

The prosecutor ultimately declined to press any charges against Petipren. Petipren filed his civil suit against Jankowski and the Village and Jankowski filed a civil suit against Petipren for assault and battery. The issue in each case was whether Jankowski enjoyed absolute immunity under the Governmental Tort Liability Act (GTLA). As it applies to this case, the GTLA provides that the "highest appointive executive official of all levels of government are immune from tort liability… if he or she is acting within the scope of his or her… executive authority." MCL 691.1407(5) In the end, therefore, the case did not decide between the competing versions of events. The case turned on the question of whether Jankowski acted within the scope of his "executive authority" when he performed the duties of an ordinary police officer when he arrested Petipren.

The trial court and the Court of Appeals held that Jankowski did not enjoy absolute immunity; that "executive authority" was limited to "policy, procedure, administrative and personnel matters," not the duties of a lower-level governmental employee such as a police officer.

The Supreme Court disagreed. The Supreme Court found that "executive authority" encompasses all authority vested in the highest executive official by virtue of his role in the executive branch, including the authority to engage in tasks that might also be performed by low-level employees.

CASE NAME: **Beydoun v City of Detroit & Wills**
COURT: **Michigan Court of Appeals**
DECIDED: **May 21, 2013**
ISSUE/TOPIC: **POLICE CAR ACCIDENT – MOTOR VEHICLE EXCEPTION TO GTLA – RULES FOR EMERGENCY VEHICLE PASSING THROUGH A RED LIGHT.**

Charles Wills, while on duty as a City of Detroit police officer, ran a red light and struck Michael Beydoun's car, injuring Beydoun. Beydoun, 50 years old, a construction worker, was seriously injured and unable to return to full-time work. He sued the City and a jury returned a verdict of $250,000 in future non-economic damages, $542,405 in past economic damages, and $1,493,250 in future economic damages (lost wages).

The City and its police officer asserted the defense of governmental immunity. The Court of Appeals correctly ruled, however, that the broad immunity from liability enjoyed by the government under the governmental immunity statute is limited by several narrowly drawn statutory exceptions. One of these exceptions is the motor-vehicle exception, which provides that "governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer… of a governmental agency, of a motor vehicle of which the governmental agency is owner…"

In addition, a state statute provides that emergency vehicles may "proceed past a red light or stop sign, but only after slowing down as may be necessary for safe operation" and only if the operator of the vehicle activates both "audible" signals (bell, siren, air horn) and "a flashing oscillating, or rotating red or blue light."

The evidence was conflicting. The officer testified that he used his siren and flashing lights. But, other witnesses testified otherwise. Thus, the court held, there was enough evidence for the jury to conclude that Wills ran the red light without using his emergency vehicle warning signals.

CASE NAME: **Maple BPA v Charter Township of Bloomfield**
COURT: **Michigan Court of Appeals**
DECIDED: **September 19, 2013**
ISSUE/TOPIC: **WHEN STATE LAW PREEMPTS A LOCAL ORDINANCE – "CONFLICT" PREEMPTION AND "FIELD" PREEMPTION.**

Maple BPA, a convenience store with fuel pumps, applied for and was denied a beer and wine license by the Michigan Liquor Control Commission (LCC). The denial was, in part, based on the applicant's failure to be at least 2,640 feet from another retail package liquor store, which was a requirement of Bloomfield Township's zoning ordinance. Subsequently, the Township amended its ordinance to permit automobile service stations to sell alcoholic beverages if they met certain standards, including no drive-thru operations, among similar regulations. Maple BP filed suit claiming, in part, that state law preempts this local ordinance. The trial court and the Court of Appeals held that state law did not preempt the local ordinance.

State law preempts a local regulation if: (1) the local regulation directly conflicts with a state statute ("conflict preemption"); or, (2) the state law completely occupies the field that the local regulation attempts to regulate ("field preemption").

Conflict Preemption

A direct conflict exists between a local regulation and state statute when the local regulation permits what the statute prohibits or prohibits what the statute permits. There was no direct conflict here because Bloomfield Township's zoning ordinance is not more restrictive than state law. The ordinance mirrors state law and does not provide further constraint or prohibit what the statute permits. Thus, there was no conflict preemption of the state law over the local ordinance in this case.

Field Preemption

A state statute completely occupies a field: (1) where the state law expressly states that the state's authority to regulate in a specified field is exclusive; (2) preemption of a field may be implied upon an examination of legislative history; (3) the pervasiveness of state regulatory scheme may support a finding of preemption, but this is only one factor to consider; or, (4) the nature of the regulated field may demand exclusive state regulation to achieve necessary uniformity.

There is no field preemption in this area of state regulation. The Liquor Control Code provides that an application for a liquor license "shall be denied if the Commission is notified, in writing, that the application does not meet all appropriate … local … zoning … ordinances … ." And, in earlier precedent, the Court of Appeals found that the Michigan legislature did not intend to preempt the field of liquor control because "it has long been recognized that local communities possess 'extremely broad' powers to regulate alcoholic beverage traffic within their bounds through the exercise of general police powers, subject to the authority of the Commission when a conflict arises."

CASE NAME:	**Dream Nite Club v City of Ann Arbor, et al.**
COURT:	**Michigan Court of Appeals**
DECIDED:	**December 19, 2013 (Unpublished)**
ISSUE/TOPIC:	**LOCAL CONTROL OF LCC LICENSED BARS AND TAVERNS AND THE REQUIREMENT OF "DUE PROCESS" IN LOCAL ENFORCEMENT PROCEDURES.**

The Dream Nite Club (night club) had a long history of liquor license violations, including 162 calls for police assistance in a three-year period. On that basis, the City's Liquor Review Committee, voted to recommend non-renewal of the night club's liquor license and the City Council resolved to accept this recommendation. However, a liquor license owner possesses a "property interest" in the license and is, therefore, entitled to "rudimentary due process" protections in municipal proceedings relative to the license.

Consistent with that constitutional requirement, an Ann Arbor City ordinance requires an administrative hearing before the City may send a non-renewal recommendation to the Michigan Liquor Control Commission. On March 7, 2012, the City notified the night club of the City's non-renewal objections and that an administrative hearing would be held 12 days later. That hearing was held as scheduled, with a member of the Liquor Review Committee and the City Council serving as the administrative hearing officer.

The night club appeared at the hearing, represented by counsel. The City presented numerous witnesses and exhibits that established the club's history of disturbances and illegal activity. The club's attorneys were permitted to cross examine the witnesses, challenge exhibits, make arguments and had the opportunity to present witnesses. After the hearing, the hearing officer made findings and recommended that the license not be renewed. That recommendation was made to the City Council and that same night, at a regularly scheduled Council meeting, the City Council adopted a resolution, immediately forwarded to the Michigan Liquor Control Commission, objecting to renewal of the night club's license. (The license was not renewed and was suspended by the Michigan Liquor Control Commission.)

The focus of the case in the appellate court was rudimentary due process. Citing earlier case law, the court articulated the elements of rudimentary due process in such an administrative proceeding: (1) timely written notice setting out the reasons for the proposed administrative action; (2) an opportunity to defend by confronting adverse witnesses and to present witnesses, evidence and arguments; (3) a hearing examiner other than the person who made the determination under review; and, (4) a written, although relatively informal, statement of findings.

Even though this case was heard only 12 days after the hearing notice, the Court of Appeals found that the City provided the night club with rudimentary due process at the hearing. The court also noted that prior case law established that it is not a due process violation when a member of the local legislative body serves as the hearing officer and that the local legislative body itself may conduct such a hearing.

CASE NAME:	**Ter Beek v City of Wyoming**
COURT:	**Michigan Supreme Court**
DECIDED:	**February 6, 2014**
ISSUE/TOPIC:	**THE MEDICAL MARIJUANA ACT – DOES IT PREEMPT LOCAL ORDINANCES? – IS IT PREEMPTED BY FEDERAL LAW?**

A Major and Significant Case for Michigan municipalities and a rare unanimous decision from the Michigan Supreme Court.

John Ter Beek is a qualifying patient and has a medical marijuana card ("registry identification card") under Michigan's Medical Marijuana Act (MMMA). He planned to grow and use marijuana for medical purposes in his home in the City of Wyoming. These facts set up apparent conflicts between a local zoning ordinance, the MMMA, and the federal controlled substances act (CSA).

The Local Ordinance.

The local zoning ordinance prohibits uses of property that are contrary to federal law, state law or local ordinance, and permitted punishment by civil sanctions for a violation of the ordinance.

The MMMA

The MMMA provides, in part, that registered qualifying patients shall not be subject to arrest, prosecution, or penalty in any manner for certain medical use of marijuana in accordance with the Act.

The CSA

The Federal Controlled Substances Act prohibits the use, manufacture or cultivation of marijuana.

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Ter Beek's position was that, because the federal statute prohibited the use and cultivation of marijuana, and because the local ordinance prohibited conduct contrary to federal law, the local ordinance is in conflict with and is preempted by the MMMA.

The City's position was that the federal law, the CSA, preempted the MMMA.

The trial court ruled in favor of the City. The Court of Appeals reversed that ruling, concluding that the local ordinance conflicted with the MMMA and that the CSA did not preempt the MMMA.

In a unanimous and anxiously awaited opinion, the Supreme Court held that: **The federal controlled substances act does not preempt Michigan's medical marijuana law, but the medical marijuana law preempts the local zoning ordinance because the ordinance is in direct conflict with the State law.**

In summary, the Supreme Court found and ruled as follows:

1. The Supremacy Clause of the United States Constitution invalidates state laws that interfere with or are contrary to federal law and the CSA itself specifically addresses the CSA's preemption of state statutes. Under that part of the CSA, the relevant questions are: Is it impossible to comply with both the federal and the state requirements? And, does the state law stand as an obstacle to accomplishment and execution of the full purposes and objectives of the federal law?

   a. It is not impossible to comply with both the CSA and the MMMA. This is so, because the CSA makes it a crime to manufacture and possess marijuana but the MMMA does not require commission of that offense and does not prohibit punishment under federal law. The MMMA grants nothing more than limited state-law immunity from arrest and prosecution for MMMA compliant use of marijuana and does not prohibit federal criminalization of that conduct.

   b. The MMMA is not an obstacle to the accomplishment and execution of the purpose and objectives of the CSA. Michigan, too, designates marijuana as a controlled substance and possession, manufacturer and delivery remain crimes in Michigan. The MMMA differs from the CSA regarding only the scope of acceptable medical use of marijuana and only for a limited class of properly registered individuals. While the CSA and the MMA differ with respect to the medical use of marijuana, the limited state-law immunity under the Michigan law does not frustrate the CSA's operation or purpose. The MMMA's state-law immunity does not alter the CSA's criminalization of marijuana or undermine the federal government's enforcement of that prohibition.

2. Under Michigan's Constitution, a municipality's power to adopt ordinances is subject to the Constitution and state law. A municipality is precluded from enacting an ordinance if: the ordinance directly conflicts with a state statutory scheme; or, the state statutory scheme occupies a field of regulation that the municipality seeks to enter, even if there is no direct conflict between the two schemes of regulation. A direct conflict exists when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits. That is the case with the Wyoming zoning ordinance and the MMMA. Because the ordinance permits the imposition of a civil penalty for the use and manufacturer of marijuana by a registered qualifying patient, which is expressly prohibited by the MMMA, a direct conflict exists between the two laws. Therefore, the MMMA preempts the subject local zoning ordinance.

The trial court's ruling in favor of the City was reversed, the Court of Appeals' decision was affirmed and the case was remanded to the trial court for entry of summary disposition in favor of Mr. Ter Beek.

CASE NAME:	**Huron Development, LLC v City of Lansing**
COURT:	**Michigan Court of Appeals**
DECIDED:	**Decided September 19, 2013**
ISSUE/TOPIC:	**THE PRESUMPTION THAT SPECIAL ASSESSMENTS ARE VALID - THE STANDARD REQUIRED TO REBUT THE PRESUMPTION.**

The City of Lansing financed a road widening and curb, gutter and storm sewer improvements by special assessments. The assessments were over $48,000 for a 50 acre parcel and apartment complex, developed in 1979. The owner of the complex filed a petition with the Tax Tribunal challenging the assessments which were upheld by the Tribunal after a two-day hearing.

On appeal, the Court of Appeals recognized that municipal decisions regarding special assessments are presumed valid, and generally should be upheld, and that a petitioner has the burden of presenting credible evidence showing the assessment is invalid.

The Court of Appeals also addressed the similarity between an assessment and a tax, stating "although a special assessment resembles a tax, it is not a tax." "Rather," the court said, "a special assessment is imposed to defray the cost of specific local improvements rather than to raise revenue for general governmental purposes." As a result, a special assessment is proper only when the "value of the property in the special assessment district is enhanced by the improvement … ."

Accordingly, "special assessments are permissible only when the improvements result in an increase in the value of the land specially assessed" and there is "some proportionality between the amount of the special assessment and the benefits derived."

In this case, the petitioner failed to offer credible evidence to rebut the presumption of validity. The petitioner failed to present appraisals of the property, both with and without the special assessment improvements, and failed to show a substantial or unreasonable disproportionality between the amount assessed and the value accrued to the land as a result of the improvements.

CASE NAME: **Landon v City of Flint**
COURT: **Court of Appeals**
DECIDED: **July 25, 2013 (Unpublished Opinion)**
ISSUE/TOPIC: **THE PRESUMPTION THAT A LOCAL ORDINANCE IS CONSTITUTIONAL – THE LEGALITY OF "LATE FEES."**

This case recalls the rule that an ordinance is presumed constitutional unless clearly shown to be unconstitutional and also addresses the legality of "late fees" imposed by ordinance.

Flint requires inspection of rental properties every 3 years. The inspection fee is $100. The plaintiff owns rental property in the city and did not timely arrange a 3-year inspection or pay the inspection fee. As a result, the city refused to turn the water on at one of plaintiff's rental properties. The plaintiff paid the fee and the city then informed him of a $300 late fee. The plaintiff refused to pay the late fee and filed suit contending the fee was exorbitant, a disguised revenue generator, a tool for harassment, and that the ordinance itself was illegal.

The Court upheld the ordinance. The Court agreed with the plaintiff/property owner that there is intuitive merit to the contention that a $300 late fee on a $100 inspection fee seems unreasonably high. "Nevertheless," the court said, "it is plaintiff's burden to prove that it is disproportionate" and nothing in the record showed that the $300 dollar fee was unrelated to the cost incurred by the City to arrange and complete a late inspection. Therefore, the property owner had not satisfied his burden of proof. He had not overcome the presumption that the ordinance was legal and constitution, a presumption enjoyed by all local ordinances at the outset of any challenge.

In addition, the court said, even if grossly disproportionate, the fee is not necessarily illegal because late fees also serve the purpose of deterring a citizen from failing to comply with an ordinance. Even if a late fee is not a true fee, it may be a permissible "fine."

CASE NAME: **County of Jackson v City of Jackson**
COURT: **Michigan Court of Appeals**
DECIDED: **August 1, 2013 (Unpublished Opinion)**
ISSUE/TOPIC: **A "FEE" OR A "TAX?" – THE *BOLT* CASE REVISITED.**

This is a "fee" vs "tax" case, remarkably similar to the major Michigan Supreme Court decision of *Bolt v Lansing* decided in 1998. In *Bolt,* the Court addressed the distinction between a tax and a fee under the Headlee Amendment to the Michigan Constitution. Generally, that amendment provides that a city may not impose a new "tax" without a vote of the city's electorate. The *Bolt* court recognized that there is no "bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." "Generally," the Court said, "a fee is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A tax, conversely, is designed to raise revenue." After considering multiple factors, the *Bolt* Court held that the primary criteria of a fee are: (1) a fee serves a regulatory purpose; (2) a fee is proportionate to the necessary costs of the services; and, (3) a fee is voluntary.

The City of Jackson adopted an ordinance creating a stormwater utility and imposed a stormwater management charge on ALL property owners within the City to generate revenue to pay for the services provided by the utility. These included, among others, street sweeping, catch basin cleaning, and leaf pickup and mulching. Before, the City had paid for these pre-existing services from tax revenues in its general fund and road budget. The City's new stormwater manual expressly acknowledged this and noted that "municipalities across the country are changing" this typical tax revenue funding for storm water management to "user fee" systems, not unlike user fees for water and sanitary wastewater utility charges and fees.

In spite of the reasonableness of charging a fee for stormwater management services, the Court found that the new stormwater fee was more of a tax than a fee and was, therefore, unconstitutional. The Court found that the fee, which replaced tax revenue and paid for pre-existing services, served a minimal regulatory purpose and was primarily a revenue raising ordinance; the charge imposed did not confer a particularized user benefit but conferred a benefit on the general public; the charge was not reasonably proportionate to the direct and indirect cost of providing the service; and, the charge was effectively compulsory rather than voluntary.

The case, therefore, demonstrates the difficulty of designing and implementing "user charge" systems in the face of declining municipal tax revenues and reminds us of the *Bolt* Court's admonition:

> "The danger to the taxpayer of this burgeoning phenomenon [the imposition of mandatory user fees] is as clear as are its attractions to local units of government. The "mandatory user fee" has all the compulsory attributes of a tax, in that it must be paid by law without regard to the usage of a service, and becomes a tax lien on the property. However, it escapes the constitutional protections afforded voters for taxes. It can be increased any time, without limit. This is precisely the sort of abuse from which the Headlee Amendment was intended to protect taxpayers."

CASE NAME:	**Whitman v City of Burton**
COURT:	**Michigan Supreme Court**
DECIDED:	**May 1, 2013**
ISSUE/TOPIC:	**THE WHISTLE BLOWER'S PROTECTION ACT – DOES THE WHISTLE BLOWER'S "MOTIVATION" MATTER?**

During his tenure as Burton's Chief of Police, Mr. Whitman repeatedly complained to the Mayor about the City's failure to pay his accumulated unused sick and personal leave time. The City eventually paid the accumulated time to the Police Chief and to others that had requested payment. The Chief was on the job for 5 years until the Mayor did not reappointment him in 2007. The Chief filed suit under the WPA, claiming that the Mayor decided not to reappointment him because of his repeated complaints over nonpayment of the unused accumulated leave time. After trial, the jury awarded the plaintiff $232,000 in total damages.

The Court of Appeals reversed the trial court verdict, holding that the WPA protected conduct that was motivated by "a desire to inform the public on matters of public concern" and did not protect conduct of a public employee acting "entirely on his own behalf."

The City argued that, in order to assert a WPA claim, an employee's primary motivation for engaging in protected conduct must be a desire to inform the public on matters of public concern.

The Supreme Court, looking to the language of the WPA only, found that the Act does not address an employee's "primary motivation" and further noted that the WPA's plain language does not "suggest or imply that any motivation must be proved as a prerequisite for bringing a claim." On that basis, the Supreme Court reversed the Court of Appeals and held that "as long as a plaintiff demonstrates a causal connection between the protected activity and the adverse employment action, the plaintiff's subjective motivation… is not relevant to whether the plaintiff may recover under the WPA."

CASE NAME: **Town of Greece vs Galloway**
COURT: **United States Supreme Court**
DECIDED: **May 5, 2014**
ISSUE/TOPIC: **THE ROLE OF RELIGION AT MUNICIPAL BOARD AND COUNCIL MEETINGS.**

INTRODUCTION

Earlier this month the United States Supreme Court issued a decision that addresses the role of religion in local government. The Court ruled that, within limits, the United States Constitution allows town boards to start monthly meetings with sectarian prayers – prayers that explicitly invoke or endorse one religion. In this case, that religion was Christianity, and the prayers in question invoked the name of "Jesus" and made reference to Christian holidays, including, for example, Easter, and Jesus' death and resurrection.

In a 5 – 4 ruling, the Court held that such prayers, invited and arranged by the Town of Greece, New York, did not run afoul of the Establishment Clause of the United States Constitution. That clause, part of the First Amendment and the Bill of Rights, which are applicable to the states and local governmental entities, provides that "Congress shall make no law respecting an establishment of religion." *U.S. Const., Amdt. 1.*

INTERESTING HISTORY AND CASE FACTS

In 1999, the town of Greece (NY) began inviting local clergy to the front of the town board's meeting room to deliver an invocation at the beginning of each meeting. The clergy who did so, and they did so at every monthly meeting for ten years, were designated the town's "chaplain for the month."

The "chaplain for the month," was selected by an employee in the town's office of constituent services. This employee randomly called congregations listed in a local directory until a minister available and willing was located for the next meeting. All the congregations were Christian. There are no non-Christian houses of worship in Greece, except for a Buddhist temple not listed in the Community Guide.

Greece did not review the prayers in advance and did not provide guidance as to their content. The resulting prayers were both civic and religious. Typical were invocations that asked the divinity to be present at the meeting and bless the community. But, some of the ministers spoke in a distinctly Christian idiom; and a minority invoked religious holidays, scripture or doctrines.

> "Lord, God of all creation, we give you thanks and praise for your presence and action in the world. We look with anticipation to the celebration of Holy Week and Easter. It is in the solemn events of next week that we find the very heart and center of our Christian faith. We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength, vitality and confidence from his resurrection at Easter ... Praise and glory be yours, O Lord now and forever more. Amen."

All prayer givers came to the front of the room and faced the several citizens typically in attendance and some asked those present to stand and "pray." As the dissenting justices pointed out, the prayers often concluded with the town officials making the sign of the cross and everyone saying, "Amen."

No effort was ever made to find and invite someone of non-Christian beliefs to be the "chaplain for the month." As a result, every prayer, month after month, year after year, was delivered by a Christian, until two citizens complained. These two (Susan Galloway and Linda Stephens) objected that Christian themes pervaded the prayers to the exclusion of citizens who did not share those beliefs. At one meeting, Galloway told the Board that she found the prayers "offensive," "intolerable" and an affront to a "diverse community." After these complaints, the town invited a Jewish layman and the chairman of the local Baha'i temple to deliver prayers. A Wiccan priestess, who had read newspaper reports about the prayer controversy, requested and was granted an opportunity to give the invocation at one meeting.

Galloway and Stephens filed suit alleging an Establishment Clause violation by preferring Christian over other prayer givers and by sponsoring sectarian prayers, such as those given "in Jesus' name." They did not seek an end to the prayers. They requested a court order (injunction) requiring the town to limit the prayers to "inclusive and ecumenical prayers" that referred to a "generic God," and did not associate the government with any one faith or belief.

This complaint was dismissed in the federal trial court on a finding of no violation of the Establishment Clause. On appeal to the federal circuit court of appeals, the trail court was reversed. The intermediate appellate court (2nd Circuit) found that, viewed in totality, the facts equated to the town's endorsement of Christianity to the exclusion of all other faiths.

<u>THE SUPREME COURT'S RULING</u>

On a 5 – 4 vote, the Court sided with the Town of Greece. In doing so, the Court addressed the issue of prayer at meetings of a <u>local</u> legislative body for the first time. Prior precedent approved prayer, including sectarian prayer, at the beginning of United States congressional sessions and state legislative sessions.

As the Supreme Court explained, history demonstrates that the founding fathers did not believe that the Establishment Clause prevented prayer, even sectarian prayer, at the outset of federal legislative sessions and meetings. The first prayer delivered to the Continental Congress in 1774 was distinctly Christian.

> "Be thou present O God of Wisdom and direct the counsel of this Honorable Assembly; enable them to settle all things on the best and surest foundation … Preserve the health of their bodies and the vigor of their minds … and crown them with Everlasting Glory, in the world to come. All this we ask in the name and through the merits of Jesus Christ thy Son and our Savior, Amen."

The practice continued after the Revolution ended, a new Constitution was adopted, and to this day. The Court recited this history in some detail. One of the first actions of the new Congress when it convened in 1789 was the appointment of chaplains. The first Senate chaplain was appointed April 25, and the first House chaplain was appointed May 1, 1789. No more than three days later, James Madison announced his intent to introduce ten amendments to the Constitution to protect individual rights. On June 8, 1789, the Bill of Rights, including the limit that "Congress shall make no law respecting an establishment of religion," was introduced. On September 26, 1789, the Bill of Rights was approved for ratification by the states. Ever since, prayers from a variety of faith traditions have opened House and Senate sessions.

As the majority of the Court said, with no disagreement from the dissenting justices, the prayer program in Greece must be evaluated against this practice of legislative prayer in the United States that "has become a part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of 'God Save the United States and this Honorable Court'" at the opening of every session of the Supreme Court itself.

In a concurring opinion, Justice Alito, acknowledged that the United States House and Senate now advise guest chaplains to keep in mind that, when they open a session of the legislative body, they will address members from a variety of faith traditions. This more recent practice, which Alito said "had much to recommended it," is not, however, constitutionally required and "any argument that nonsectarian prayer is constitutionally required, runs head-long into a long history of contrary congressional practice," he wrote. As the majority opinion said, insistence on nonsectarian prayer "as a single, fixed standard is not consistent" with tradition, past and present.

Supreme Court precedent from 1983 played a significant role in the analysis offered by both the majority and dissent. In *Marsh v Chambers*, the Nebraska legislature's practice of opening its sessions with a prayer delivered by a chaplain paid from state funds was challenged and found to be constitutional and not in conflict with the Establishment Clause.

The Rules of *Greece*

Both the majority and the dissent in Greece recognized a difference between congressional or state legislatures and local town board or council meetings. Unlike congressional and state legislative sessions, citizens come to town, city, village and township meetings to make public comments on issues of local concern, to seek redress on matters of individual concern such a parking regulations, zoning variances, the appointment of the police chief, the expenditure of public funds, the condition of local roads and sidewalks, and the like.

This distinction between local meetings and sessions of state legislative bodies was a significant difference, the dissent argued, and was one reason why prayers at the local level may not be "predominantly sectarian in content." This argument was dismissed by the majority as wholly inconsistent with history and tradition and as unworkable. Requiring nonsectarian, generic prayer, the Court held, would place town boards in the position of supervisors and censors of religious speech. It would involve government in religious matters to a far greater

degree than necessary and it is doubtful that the law and the courts can draw the line for each specific prayer between what qualifies as generic and nonsectarian.

The Court said, such ceremonial prayers are directed to the elected officials and, in this country, it is presumed that the reasonable observer is acquainted with the tradition and understands that its purpose is to lend gravity to the proceeding, not to afford government the opportunity to coerce truant constituents into the pews.

Still, the majority opinion of the Court repeatedly cautions that some prayer schemes might cross the Constitutional line. The court said, "the course and practice over time must show that the invocations denigrate non-believers or religious minorities, threaten damnation, or preach conversion" before they are unconstitutional. At another point, the court rephrases the issue as being whether there is "a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose."

Addressing the issue of coercion, the Court held that there might be a problem "if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decision might be influenced by a person's acquiescence in the prayer opportunity."

Some commentators question whether these several statements provide a common core or touchstone by which local legislative bodies may be guided in the future. That criticism is understandable. On multiple other issues, the Court has been more precise in its statement of a constitutional rule. Be that as it may, considering prior precedent and the particular facts of this case, a constitutional prayer practice certainly can be devised and implemented, in consultation with local counsel.

Such a practice in Michigan must also comport with the Establishment Clause of the Michigan Constitution, which provides that, "No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose. The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious beliefs." *Const. 1963, Art. I, § 4.*

To date, there is no Michigan case that addresses application of the Michigan Establishment Clause to facts like those addressed by the U.S. Supreme Court in *Greece.* Michigan's Establishment Clause has been addressed under other facts on only a few occasions and Michigan courts have ruled that the federal and Michigan Establishment Clauses are subject to similar interpretation.

CASE NAME:	**Township of Brooks v Hadley, et al.** **Everett Township v Skowronski, et al.**
COURT:	**Court of Appeals**
DECIDED:	**September 2, 2014**
ISSUE/TOPIC:	**THE STATUTORY AND LOCAL ORDINANCE OBLIGATION TO CONNECT TO A SEWER SYSTEM.**

In these consolidated cases, the defendants own property within the boundaries of townships in Newago County. The townships, a utility authority, and Newago County constructed a joint sanitary sewer system. At the same time, each township adopted an identical ordinance requiring, among other things, that property owners who meet certain criteria must connect to the sewer system. Multiple property owners refused to connect to the sewer system. The townships filed suit seeking injunctive relief requiring the defendants to connect and to pay the townships' expenses of the litigation, including reasonable attorney fees.

Among other claims, the homeowner/defendants argued that *equity* should excuse them from connecting to the sewer system "because of incompetent installation of the system," and because "their septic systems were perfectly functional," a claim with which the trial judge agreed.

In response to the idea that property owners may refuse to connect to a public sewer system because the system had structural problems (which was true in this case), the Court of Appeals noted that the State of Michigan has determined "in absolute terms that converting from septic systems to sanitary sewer systems is in the public interest" and that it is not the role of the courts to interfere with policy set by the Legislature. State statute, applicable at the time of this case, mandated that "structures in which sanitary sewage originates lying within the limits of a city, village or township shall be connected to an available public sanitary sewer ... if required by the city, village or township," affording no exceptions for "defective" sewer systems. (MCL 333.12753(1)). The court's ruling against the homeowner/defendants was also based on the facts that, if the sewer system was improperly installed, the townships are responsible for future repairs, and because the "sewage disposal system event" statute provides a legal remedy to any homeowner damaged as a result of defects in a public sewer system.

Finally, the townships' mandatory-connection ordinances provided that property owners who fail to connect, shall pay a civil penalty and costs incurred by the township in enforcing the ordinance, including attorney fees. Because the township ordinances unambiguously provided for an assessment of civil penalties, costs and attorney fees, they were enforceable cost-shifting laws. Thus, the Court remanded to the trial court for assessment of civil penalties, costs and attorney fees, to be paid to the townships.

CASE NAME:	**Fingerle v City of Ann Arbor**
COURT:	**Michigan Court of Appeals**
DECIDED:	**December 2, 2014**
ISSUE/TOPIC:	**RAIN – EVENT FLOODING AND THE "SEWAGE DISPOSAL SYSTEM EVENT" EXCEPTION TO THE GTLA – AND A CITATION TO THE BIBLE.**

The plaintiff's home is in an Ann Arbor neighborhood historically known for flooding during significant rain events. In response, the City built a relief storm-water system. But, rain-caused flooding continued to occur, including on the occasion of an intense rain storm in the summer of 2010, leading to water in the plaintiff's finished basement that entered the basement through a large egress window that the plaintiff had installed.

The plaintiff filed suit under what the Court of Appeals called the "Sewage Act;" the statute that provides for an exception to governmental immunity in cases where damage is suffered as the result of a "sewage disposal system event," as the term is defined in the Act. (MCL 691.1416-1419)

The plaintiff's case, in great part, focused on the fact that the capacity of the storm-water sewer system was less than the capacity recommended by the City's outside engineers. The City's engineers recommended and designed a system that would collect up to 3.25 inches of rainfall (a ten-year storm), but the system constructed did not have that much capacity. This was one of the alleged "defects" in the system cited by the homeowner under the Sewage Act, which requires proof of a defect, known to the City, that the City failed to correct in a reasonable amount of time.

In a published opinion, the Court of Appeals dismissed the case on the City's motion to dismiss. The case is significant and will receive more than the normal level of attention for several reasons. First, the decision was a 2-1 decision with competing opinions that can fairly be described as vigorous, in substance and in tone.

In addition, the majority opinion rests on the ruling that, even though the plaintiff's case was expressly pled under the Sewage Act, the claim was a claim for breach of contract or breach of promise, i.e., the City represented that it would build a system of a certain size and did not do so. Thus, the court said, the Sewage Act was "simply inapplicable to his lawsuit." The Act was inapplicable because it provides for limited "*tort* liability for *sewage*-related events, not *contract*-based liability for natural *rain water* flooding."

The court went on to explain, in a footnote, that it "is doubtful" the Sewage Act "applies to events involving rainwater at all," because the Act expressly applies to sewers "used or useful in connection with the collection, treatment and disposal of *sewage and industrial wastes*." (emphasis added) This is not precedent, however, and was not a basis for the court's decision because the court immediately added that "notwithstanding the statute's apparent total inapplicability to rainwater, we need not address this issue because plaintiff's claim fails for other reasons."

This point drew a strong response from the dissenting judge, who noted that the majority had failed to address the fact that the Sewage Act also states that "sewage disposal system" includes sewers and "a storm water drainage system under the jurisdiction and control of a governmental agency." The dissent agreed with the trial court that the plaintiff had presented enough evidence to create genuine issues of fact, to be decided by a jury, on every element of a cause of action under the Sewage Act.

Significantly, the majority opinion gave great weight to the fact that the City was not required, legally or otherwise, to construct the drainage system in the first place. As the court found, "no law has ever imposed an obligation (and thus, liability) upon government to protect private property owners from acts of God or consequences of severe weather." Indeed, state statute provides that a city council "may" construct and maintain sewers and drains. In this regard, the court characterized the plaintiff's claim as follows: "Had Ann Arbor built its drainage infrastructure to the size it said it would, the rain would not have flooded and damaged" my basement. Adopting such a theory of liability, the court ruled, without any obligation to construct the drain in the first place, "would impose unlimited and unprecedented liability, and create the potential for financially crippling damage awards against cities – and ultimately, their tax-paying citizens – never seen in American or Michigan law."

Interestingly, one member of the Court's three-member panel, offered that, "the only faultless rain management system in history was constructed according to design specifications given in cubits, not in cubic feet," citing *Genesis* 6:15. (It is at that verse in *Genesis* that God instructs Noah on the size of the Ark, "This is how you shall make it: the length of the Ark three hundred cubits, its breadth fifty cubits, and its height thirty cubits.")

An application for leave to appeal has been filed in the Supreme Court.