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MUNICIPAL LAW News

Foster Swift Administrative & Municipal Group

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BOND COUNSEL CORNER

Pending Legislative Relief for Delinquent Special Assessment Bonds

by Frank G. Seyferth

A pending bill in the Michigan Legislature may offer some relief to municipalities with outstanding bonds payable from special assessments that have not been paid. If enacted in its current form, HB 6181 would create a Delinquent Special Assessment Revolving Loan Fund within the Michigan Department of Treasury, purportedly to be funded initially by a $5 million appropriation from the State general fund. This money could be loaned to eligible units of local government to assist them to make payments on certain troubled special assessment bonds.

The new Loan Fund would be limited to loans to a township, city, village, or county to pay bonds that were issued to construct infrastructure improvements and which were to be repaid from special assessment payments that have been delinquent more than 6 months. This aid is intended primarily for governmental units that were experiencing rapid growth that has since stalled.

If HB 6181 is enacted in its current form, the appropriated $5 million would be loaned on a "first-come, first-served" basis. Thus, it is imperative that local finance officials who could be impacted pay close attention to the progress of this pending bill in the Michigan Legislature.

The pending bill would require the Department of Treasury to provide an application form, and approve or reject each application within 30 days after receipt. Loan amounts would be limited to a maximum of one year's bond debt service, and each loan would bear interest at a rate set by the Department and be due not later than five years after the final bond maturity date. A defaulting municipal borrower's delinquent loan repayments would be withheld from its future State revenue sharing payments.

The foregoing is a summary of some but not all aspects of the pending legislation, which should be closely tracked by municipal officials who serve potential borrowers from the new Loan Fund. There can be no assurance that HB 6181 will be enacted in its current form or at all.

If you would like additional information from us regarding this topic, please contact a member of Foster Swift's Municipal Team or our principal bond tax lawyer, Frank Seyferth at 248-538-6328 or fseyferth@fosterswift.com.

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

by Ronald D. Richards Jr.

A zoning ordinance that merely lists uses eligible for a special use permit (SUP) generally does not comply with Michigan zoning laws. Rather, the ordinance must list those eligible uses very specifically. *Whitman v Galien Twp*, unpublished per curiam opinion of the Michigan Court of Appeals (2010). In *Whitman*, the township's SUP provisions in its zoning ordinance provided that the following uses were eligible for a SUP: "establishments for the conducting of commercial or industrial activities." Under this ordinance, the township granted a SUP that allowed some permit applicants to construct and operate a snowmobile, dirt bike, and racetrack. The plaintiffs, neighbors, appealed the township board's decision. The trial court upheld the SUP, opining that the township may authorize SUP even if the proposed use is not specifically enumerated in the applicable zoning ordinance.

The Court of Appeals reversed, and held that the ordinance violated zoning law by being too general. 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.

Municipalities should take special note of *Whitman* and review their SUP provisions to ensure that those provisions do not suffer from the flaws the Court identified in *Whitman*.

Foster Swift's municipal department has extensive experience in SUP matters and zoning ordinance drafting. If you have questions about *Whitman*, SUP matters, or zoning ordinance drafting, please feel free to contact us.

Binding Arbitration Amendments May Actually Increase Costs to Local Municipalities

by Michael R. Blum & Cole M. Young

Public employee unions have existed in Michigan since the 1930s, but beginning in 1947, were prohibited from striking upon passage of the Hutchinson Act, which imposed serious penalties on strikers. In 1965, Michigan passed the Public Employment Relations Act (PERA), which encouraged unionization and established a state agency to administer and enforce new rules that were implemented for collective bargaining. Although the PERA preserved the prohibition against strikes, it removed all penalties for engaging in illegal strikes.

By keeping strikes illegal yet removing the penalties, there existed a "de facto right to strike." Among the rash of strikes that followed were strikes by police and fire employees. This led to Public Act 312 of 1969, 312 MCL 423.231 *et seq*., which provides for compulsory arbitration of labor disputes involving municipal police, fire and emergency service personnel. If negotiations are not successful, Act 312 provides for state-appointed arbitrators to decide the terms of a labor contract. Act 312 has been successful in eliminating police and fire strikes, but it has made negotiations with police and fire unions very difficult.

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Since passage of Act 312, the experience of most municipalities is that binding arbitration results in unfair and unaffordable settlements against municipalities. Some claim the process is too long, the arbitrators are insufficiently trained, and costs of arbitration are unfairly incurred by the government. However, the most critical problem with Act 312 arbitration is that arbitrators have generally given too much weight to one of the factors Act 312 requires they consider: the comparison of benefits with those provided by other employers. While this is only one of nine factors in the law, it appears to be the one relied upon most by arbitrators.

Early this year, the Michigan Senate introduced SB 1072 in an effort to address some of these concerns. As written, SB 1072 would amend Act 312 to, among other things, limit the arbitration hearing to a list of issues prepared by the mediator, limit the duration of the arbitration process, and establish training requirements for arbitrators. These provisions seemingly would make the process more efficient. However, SB 1072 would also shift the State's share of the cost of the arbitration proceeding to local units of government and the labor union, so it would likely actually increase local expenditures.

SB 1070 also fails to address the primary issue espoused by local governments: the ability to pay. A key amendment to Senate Bill 1072, the "Patterson amendment," would have required arbitrators to look closer at city finances before awarding police and fire union raises. If it had become law, the Patterson amendment would have directed arbitrators to look at the financial impact of any awards for five years, consider the financial climate of the region and make sure the city is not deficit spending. However, the Patterson amendment was rejected on a voice vote.

Critics claim that without the Patterson amendment, SB 1072 will not result in the savings local government need in police and fire salaries and benefits. Worse, SB 1072 would expand the entities covered by Act 312 to include police, fire, EMS, and dispatch employees of any authority, district, board, or other entity created wholly or partially by resolution, delegation, or any other mechanism. This means that any covered entity, such as a park or airport authority, that employs fire or police personnel, may now be forced into compulsory arbitration.

SB 1072 was passed by the Senate on February 10, 2010, and by the House on June 24, 2010. As of the writing of this article, the Bill has been sent to the Senate for enrollment and then ultimately to the Governor for signature, which may occur soon. Once signed, local entities that have never been through the mandatory binding arbitration process may find themselves scrambling to comply with the new amendments. Attorneys in the Administrative and Municipal Practice Group are monitoring these develops and will be available to provide assistance if this Bill becomes law.

If you have questions regarding Senate Bill 1072, please contact Michael Blum or Cole Young in the firm's Farmington Hills office (248.539.9900).

Michigan's New Texting Ban Effective July 1, 2010

by Patricia Scott & Nichole Jongsma Derks

As you may know, Michigan's new texting ban went into effect July 1, 2010.[1] The new law prohibits reading, manually typing, or sending a text message or email on a "wireless 2-way communication device" located in a person's hand or lap while operating a motor vehicle that is moving on a Michigan highway or street.

A "wireless 2-way communication device" does not include navigation or global positioning systems affixed to the motor vehicle, but does include a cell phone.

Because the text ban is incorporated into the motor vehicle code, it is automatically adopted by most municipalities,

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so although it is possible there is likely no need to create a new ordinance. Importantly, the law states "[t]his section supersedes all local ordinances regulating the use of a communications device while operating a motor vehicle in motion on a highway or street, except that a unit of local government may adopt an ordinance or enforce an existing ordinance substantially corresponding to this section."[2]

Additionally, there are several exceptions to the ban. The following activities are allowed according to the new law:

1. reporting a traffic accident, medical emergency, or serious road hazard;
2. reporting a situation in which the individual believes his or her personal safety is at risk;
3. reporting or averting the commission of a crime; and
4. carrying out official duties as a police officer, law enforcement official, member of the fire department, or operator of an emergency vehicle.

A violation is a civil infraction. The penalty for a first offense carries a $100 fine, and a $200 fine is assessed for any subsequent offenses.

Currently, it is unknown how the ban will be enforced. As a practical matter, given the economic climate, it may be difficult to collect the steep fines. Police officers may have difficulty proving that a driver was in fact reading or sending a text message given how many functions and features a cell phone offers. This raises legal questions about the police's ability to search one's cell phone.

If you have questions about the texting ban, feel free to contact Patricia Scott or Nichole Derks in the Lansing office (517-371-8100).

[1]MCL 257.620b.
[2]*Id.*

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