



Municipal Law News

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COURT LIMITS ROAD COMMISSION AUTHORITY TO RESOLVE INTER-TOWNSHIP ROADWAY DISPUTES

-Karl W. Butterer

Until recently, if a township thought that a neighboring township's truck route ordinance unfairly pushed commercial truck traffic into it, then the township could ask the county road commission to approve or void the truck route. The Michigan Court of Appeals recently limited road commissions' authority to referee these disagreements, and questioned whether the Legislature had violated the state constitution when it gave road commissions the obligation to resolve these disputes.

Townships have a state constitutional right to "reasonable control" over roads. Townships also have the statutory right to adopt truck route ordinances. What happens if one township's truck route ordinance effectively pushes commercial traffic into a neighboring township? What happens if the neighboring township passes an ordinance to push the commercial traffic back? Since at least 1982, Michigan courts have recognized that neighboring townships may pass competing ordinances which create a non-contiguous and "chaotic patchwork" of truck routes.

In 2008, the Michigan Legislature adopted MCL 257.726(3), which obligated road commissions to resolve these inter-township truck route disputes. Specifically, the Legislature stated that road commissions must either "approve" or "void" a township truck route ordinance if a neighboring township objected to the ordinance.

In *Oshtemo Charter Township v Kalamazoo County Road Commission*, the road commission "voided" an Oshtemo

Charter Township truck route ordinance after two neighboring townships objected that the ordinance had the effect of diverting commercial traffic onto the neighboring townships' roads. Oshtemo challenged the decision up to the Court of Appeals. The Court struck down the road commission's decision on the grounds that the road commission had not made a finding that the Oshtemo ordinance was "unreasonable." The statute that required road commissions to resolve these disputes did not instruct road commissions to determine whether the ordinance was reasonable or unreasonable, rather only to "approve" or "void" the ordinance. Nevertheless, the Court held that the Michigan Constitution prohibits road commissions from voiding township ordinances unless the ordinance is found to be "unreasonable." The Court further suggested that - even if the road commission had actually stated that the ordinance was "unreasonable" - the statute may violate the Michigan Constitution anyway, because it did not provide road commissions enough guidance or standards to either "approve" or "void" an ordinance.

A road commission still has a statutory obligation to resolve inter-township truck route disputes. However, a road commission may now only void an ordinance if it finds the ordinance to be "unreasonable." The *Oshtemo* court strongly suggested, without deciding, that road commission authority to do even that is unconstitutional.

For more information about road law or governmental law, please contact Karl W. Butterer at kbutterer@fosterswift.com.

MAINTAINING ATTORNEY-CLIENT PRIVILEGE IN PUBLIC MEETINGS

- Anne M. Seurync

Generally, meetings of public bodies must be open to the public according to the requirements of the Open Meetings Act ("OMA"), 1976 PA 267. So, how can a public body maintain the confidentiality of attorney-client privileged information that must be discussed by the board, council or commission? The OMA provides exemptions to allow public bodies to go into closed session to discuss certain specific types of legal advice.

A. WRITTEN OPINIONS

A public body may go into closed session to consider legal advice presented in a **written** legal opinion. However, looking at the express exemptions contained in Section 8 of the OMA, there is no specific mention of written legal opinions. The authority comes from Section 8(h) of the OMA, which states a public body may meet in a closed session to "consider material exempt from discussion or disclosure by state or federal statute." MCL 15.268(h). Material subject to the attorney-client privilege is exempt according to Section 13(1)(g) of the Michigan Freedom of Information Act ("FOIA"). MCL 15.243(1)(g). Because FOIA deals with public records, only written legal opinions may be discussed in closed session. This exemption does not allow for the discussion of merely oral opinions from an attorney.

Michigan Courts have confirmed that a public body may go into closed session to consider written material subject to attorney-client privilege. See *Booth Newspapers, Inc v Wyoming City Council*. However, the closed session must be limited to the consideration of confidential legal advice presented in a written legal opinion. The Court of Appeals in *People v Whitney* explained the exemption as follows:

"It would be illogical to construe the attorney-client privilege exemption as authorizing a public body to evade the open meeting requirements of the OMA merely by involving a written opinion from an attorney in the substantive discussion of a matter of public policy for which no other exemption in the OMA would allow a closed meeting. To avoid this illogical result, we conclude that proper discussion of a written legal opinion at a closed meeting is, with regard to the attorney-client privilege, limited to the meaning of any strictly legal advice presented in the written opinion. The attorney-client-privilege exemption does not extend to matters other than the provision of strictly legal advice."

Thus, a public body must not discuss any incidental, non-legal matters outside the legal advice presented in the opinion. Moreover, any "decision" may not be made in the closed session.

In order to move into closed session under Section 8(h), a Board must conduct a 2/3 roll call vote of members elected or appointed and serving. MCL 15.267(1). For example, with a seven member board or council, at least five members must approve the motion to go into closed session. So, if five of the seven members appear at the meeting but only four members vote to approve the closed session, there will not be enough votes to call a closed session. The roll call vote and the purpose for calling the closed session must be entered into the meeting minutes. MCL 15.267(1). The public body should make it clear that the discussion involves a written legal opinion.

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B. SPECIFIC PENDING LITIGATION

A public body may also meet in closed session to “consult with its attorney regarding trial or settlement strategy in connection with specific pending litigation, but only if an open meeting would have a detrimental financial effect on the litigating or settlement position of the public body.” MCL 15.268(e). As the statute requires, there must be specific pending litigation. The threat of litigation or settlement negotiations are not sufficient. See *People v Whitney; supra*. Similarly, if a consent judgment has been entered or a settlement agreement reached, a public body may not use this exemption to discuss the execution of the judgment or agreement. There must be specific unresolved issues in the litigation. See *Detroit News, Inc v City of Detroit*.

In addition, to qualify for the exemption, an open, public discussion must have a detrimental financial effect on the public body. Please note that the attorney representing the public body in the closed session does not have to be the actual attorney litigating the matter. Any attorney who has an attorney-client relationship with the public body would suffice. *Manning v East Tawas*.

Like the written legal opinion exemption, the public body must conduct a 2/3 roll call vote of members elected or appointed and serving. Again, the roll call vote and the purpose for calling the closed session must be entered into the meeting minutes.

We recommend consulting an attorney about the content of the motion in advance of the meeting to ensure the language of the motion complies with FOIA.

“MICHIGAN CAMPAIGN FINANCE” BOOK RELEASED

Foster Swift Attorney Eric Doster released his book “Michigan Campaign Finance.” The book is a useful reference manual including chapters on applicability of the Michigan Campaign Finance Act, fundraising events, reporting requirements and offenses and penalties.

Doster represents many of Michigan’s largest trade associations, corporations, and political organizations in complex and precedent-setting election law matters.

He is ranked AV® Preeminent™ by Martindale-Hubbell and was recognized by *Best Lawyers in America®* for Government Relations Law. He graduated from Wayne State University Law School *cum laude* and received his bachelor’s degree from the University of Michigan.

The book is available online through Amazon.com.

For more information, please contact Eric E. Doster at edoster@fosterswift.com.

WEBINAR ON THIS TOPIC:

Doster will be presenting a webinar titled “What Municipalities need to know about Michigan Campaign Finance Law.” This free webinar will take place on Tuesday, **October 8** from 10:30 a.m. to 11:30 a.m.

The webinar will cover the basics of Michigan campaign finance law. For a complete description and to register: <https://www1.gotomeeting.com/register/640415496>



UPCOMING SPEAKING ENGAGEMENTS

Anne Seuryncck will be presenting at the Michigan Municipal League’s annual convention Tuesday, September 17. Have questions about the Open Meetings Act and Freedom of Information Act? Her presentation is titled “Most Common OMA & FOIA Mistakes and How to Avoid Them.” Both Acts are filled with nuances that can easily lead to innocent missteps—which can then result in time-consuming headaches, bad publicity and even costly and potentially damaging litigation.

Michael Homier will be speaking at the Michigan Municipal League’s annual convention Wednesday, September 18. His presentation entitled “What’s all the stink about? Managing Water and Sewer Service,” examines concerns Michigan communities face over the provision of water and sewer services. The session will focus on different options for providing water and sewer service, including intergovernmental agreements.

WATCH WEBINAR RECORDINGS

Did you miss some of the Foster Swift webinar series for new officials? If so, don’t worry. We’ve got you covered. Each webinar was recorded and is posted on fosterswift.com. Watch all 6 webinars on-demand. Just follow this link: <http://bit.ly/19Pmprn>

- Ten Things to Know before your Municipality Borrows Money
- Public Sector Employment Law - the Basics
- Avoid Common Freedom of Information Act Mistakes
- Zoning and Land Use: What you Need to Know
- Top 10 most Common Municipal Ethics Mistakes - and How to Avoid them
- Nuts & Bolts of the Michigan Open Meetings Act

DO YOU HAVE WEBINAR IDEAS?

Are there topics you want more information on? We have some ideas, but we want to know the topics most important to you.

If you have ideas, please let us know. Send your suggestions to info@fosterswift.com. We appreciate your feedback.

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