



Michigan Municipal League Legal Defense Fund



The Top 25 Cases 25 Years of Excellence!



Michigan Municipal League Legal Defense Fund

Its genesis and function

The Michigan Municipal League Legal Defense Fund (LDF) was formed in 1983 as an advocacy program for Michigan's municipalities in the state and federal appellate courts. The LDF provides support and assistance to member municipalities and their attorneys in cases where the issues have a broad impact on both the municipality involved in the case and on other municipalities throughout the state.

The LDF is governed by a board consisting of the president and the executive director of the Michigan Municipal League and the eleven member board of directors of the Michigan Association of Municipal Attorneys, which includes the League's General Counsel who serves as the LDF Fund Administrator.

The LDF has experienced a steady growth in membership from 88 in its first year to 440 in 2008, its 25th year. Nearly 85 percent of League members are members of the LDF. Each year approximately 24 cases are considered for action by the LDF. In its 25-year history, the LDF has reviewed over 370 cases.

Typically, *amicus curiae* briefs are filed on behalf of the Michigan Municipal League in state and federal courts and financed in whole or in part by the LDF. *Amicus curiae* briefs are, literally, *friend of the court* briefs. Generally, *amicus* briefs may only be filed by an *amicus* party with a court if that court grants permission for the *amicus* party to do so. From time to time, the Michigan Supreme Court has on its own specifically invited the League to file an *amicus* brief. In 2007 alone, the Court requested that the League file *amicus* briefs in six cases. And, in 2008, in an unprecedented act, the Court requested that the League's *amicus* counsel participate in oral argument in a case involving municipal labor law issues.

In order to give you, the reader, a "feel" for the types of municipal issues that are litigated in the courts, the current board of directors selected 25 of the most significant cases in which the LDF has participated in the past 25 years. Not all of the results were necessarily favorable to municipalities. But the majority of cases either resulted in a victory for municipalities or provided a catalyst for subsequent legislative action when appropriate. The board then ranked the 25 cases by importance. The cases are presented in this summary by category. Significantly, there are more cases dealing with governmental immunity/liability and the exceptions to immunity than any other category. Other "popular" issues include billboards, taxation, and zoning.

We are proud to provide this booklet—a tribute to the efforts and importance of the Michigan Municipal League's Legal Defense Fund on its 25th anniversary!

**Municipal Litigation Center
Legal Affairs Department**

Michigan Municipal League

Legal Defense Fund Milestones in the Michigan Supreme Court

Michigan Supreme Court invites the League to file an *amicus* brief

<i>Bivens v City of Grand Rapids</i>	1993
<i>Azzar v City of Grand Rapids</i>	2006
<i>Wolf v City of Ferndale</i>	2006
<i>Renny v Michigan Department of Transportation</i>	2006
<i>Goldstone v Bloomfield Township</i>	2007
<i>Omdahl v West Iron County Board of Education</i>	2007
<i>Detroit Firefighters Association v City of Detroit</i>	2007
<i>City of South Haven v Van Buren County</i>	2007
<i>Koulta v City of Centerline</i>	2007
<i>Pontiac Fire Fighters Union Local 376 v City of Pontiac</i>	2007
<i>Odom v Kelly</i>	2008

Michigan Supreme Court invites the League to participate at oral argument

<i>Detroit Firefighters Association v City of Detroit</i>	2006
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The Top 25 Cases by Importance and Issue

- 1 **Li v Feldt**
If the governmental body engages in conduct that substantially endangers health/life and constitutes a nuisance, is the governmental body subject to liability?
- 2 **County of Wayne v Hathcock**
Does the Michigan Constitution permit the use of eminent domain for economic development purposes?
- 3 **Bolt v City of Lansing**
When is a charge by a governmental body a fee and not a tax subject to the Headlee Amendment to the Michigan Constitution?
- 4 **Paragon Properties v City of Novi**
What steps must be taken before a zoning decision is ripe for review?
- 5 **Robinson v City of Detroit**
What conduct during a police pursuit subjects the governmental agency to liability under the motor vehicle exception to governmental immunity?
- 6 **WPW Acquisition Company v City of Troy**
What is an *addition* under the Real Property Tax Act?
- 7 **City of Taylor v Detroit Edison**
What constitutes reasonable control by a local unit of government of its rights of way under the Michigan Constitution?
- 8 **City of Jackson v Jackson Fire Fighters Association**
Is minimum staffing a mandatory subject of bargaining?
- 9 **Adams Outdoor Advertising v City of Holland**
Does a city have the right to regulate billboards within its jurisdiction?
- 10 **Outdoor Systems Inc v City of Clawson**
Does a city have the right to prohibit billboards within its jurisdiction?
- 11 **Mayor of City of Lansing v Public Service Commission**
Is municipal consent required for a pipeline project within its right of way under MCL 247.183?
- 12 **Azzar v City of Grand Rapids**
Is a local property maintenance code preempted by the Single State Construction Code Act?
- 13 **Greater Bible Way Temple v City of Jackson**
Does a rezoning request implicate the federal Religious Land Use and Institutionalized Persons Act (RLUIPA)?

- 14 **Henkey v City of Grand Rapids**
What conditions expose a governmental body to liability under the public building exception to governmental immunity?
- 15 **Township of Casco v Secretary of State (City of Richmond)**
Fillmore Township v Secretary of State (City of Holland)
May multiple townships file a single petition and vote as a unit in a proceeding to detach land from a city?
- 16 **City of Mount Pleasant v State Tax Commission**
Is city-owned property that is held for economic development purposes tax exempt under the Real Property Tax Act?
- 17 **Adams v City of East Lansing**
When does the regulation of billboards by a city result in an unconstitutional taking requiring compensation to the owner of the billboards?
- 18 **Ewing v City of Detroit**
What conduct during a police pursuit subjects the governmental agency to liability under the motor vehicle exception to governmental immunity?
- 19 **City of Dearborn v Comcast**
What authority does a local unit of government have with respect to public, educational, and government (PEG) channels under the state and federal cable acts?
- 20 **Glancy v City of Roseville**
Under what conditions is a local unit of government liable for sidewalk defects?
- 21 **Herald Newspapers v City of Bay City**
Does the delegation of authority by a council to a manager in a fire chief selection process implicate the Michigan Open Meetings Act and the Michigan Freedom of Information Act?
- 22 **Living Water Church of God v Meridian Township**
Is the denial of a special use permit by a governmental body a violation of the RLUIPA?
- 23 **White v Beasley**
Does the public duty doctrine exist in the state of Michigan?
- 24 **City of Lansing v Wolverine Pipeline**
What constitutes consent by a local unit of government to the use of its rights of way under the Michigan Constitution?
- 25 **Papadelis v City of Troy**
Under what circumstances does the Right to Farm Act preempt a local unit of government's zoning power?

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Adams Outdoor Advertising v City of Holland

463 Mich 675 (2001)

Issue: Authority to regulate billboards

Background:

Adams Outdoor Advertising applied for a permit to construct a new billboard on a right of way in Holland. The city rejected the application saying that billboards were not permitted under two new sections of its zoning ordinance. Adams sued the city challenging the provisions as invalid under the Home Rule City Act (HRCA) and the City and Village Zoning Act (CVZA).

The first section of Holland's ordinance provides that "billboards and advertising signs are not permitted." The second states that "nonconforming signs, billboards or advertising signs may not be expanded, enlarged, or extended; however, said signs may be maintained and repaired so as to continue the useful life of the signs." The circuit court found that the provisions violated both the HRCA and the CVZA. Section 4i(f) of the HRCA indicates that a city may provide in its charter for the "licensing, regulating, restricting, and limiting the number and locations of billboards within the city." Section 4i(c) authorizes a city to provide zoning powers in its charter. Section 12 of the CVZA prohibits exclusionary zoning. The Michigan Court of Appeals reversed the decision of the circuit court and found in favor of Holland.

Why did the LDF get involved?

At issue was the extent to which a city may exclude new billboards within its jurisdiction.

What action did the LDF take?

Filed an *amicus* brief with the Michigan Supreme Court

What was the outcome?

The Michigan Supreme Court reasoned that because the ordinance provisions did not completely ban billboards, they were not invalid under the CVZA. The Court found that the sections were valid as enacted under the CVZA. The Court did not address the claim under the HRCA. As a result, the city's ordinance was upheld.

Who prepared the *amicus* brief?

Gerald A. Fisher (Secrest, Wardle, Lynch, Hampton, Truex and Morley)

Thomas R. Schultz (Secrest, Wardle, Lynch, Hampton, Truex and Morley)



Outdoor Systems v City of Clawson

262 Mich App 716 (2004)

Issue: Prohibition of billboards

Background:

The city of Clawson adopted a zoning ordinance regulating signs and specifically prohibiting billboards. Its ordinance allows large outdoor signage in certain zoning districts. The ordinance, however, prohibits “billboards” which it defined as a “non-accessory sign” on which the display is readily changed. A non-accessory sign is defined as a sign that does not pertain to the principal use of the premises on which the sign is located.

Outdoor Systems engaged in outdoor advertising, erecting, and maintaining billboards on property that it owns or leases and selling advertising space. Outdoor Systems applied for building permits to erect billboards on several locations. The city denied the requests on the basis that its ordinance prohibited billboards. Outdoor Systems alleged that the total prohibition violated the City and Village Zoning Act (CVZA) (i.e. was an act of unlawful exclusionary zoning) and the free speech protection of the First Amendment of the federal Constitution.

Why did the LDF get involved?

The League recognized the importance of upholding the home rule authority of a city to regulate billboards as provided by the Michigan Constitution, the Home Rule City Act and the CVZA. In addition, Michigan jurisprudence had never before applied the concept of exclusionary zoning to billboards.

What action did the LDF take?

Filed an *amicus* brief with Michigan Court of Appeals

What was the outcome?

The circuit court held that the total prohibition was not an exercise of exclusionary zoning and did not violate the First Amendment. The Court of Appeals reversed, holding that Outdoor Systems had not met its burden to show that there was a public demand for new billboards in order to establish a claim of exclusionary zoning. However, the court found that by banning billboards (which it had defined as readily changeable), the ordinance violated Outdoor Systems’ right of free speech since the ordinance was not narrowly drawn to advance a legitimate governmental interest.

Who prepared the *amicus* brief?

Andrew J. Mulder (Cunningham Dalman, P.C.)



Adams Outdoor Advertising v City of East Lansing

463 Mich 17 (2000)

Issue: Billboards - taking

Background:

In 1975 the city of East Lansing adopted a sign code which prohibited rooftop signs. The code's amortization provision required removal of any rooftop sign by Nov. 1, 1987. Adams Outdoor Advertising sued, alleging that the city lacked statutory authority to adopt the amortization provision. The circuit court ruled in favor of Adams; the Michigan Court of Appeals affirmed. The Michigan Supreme Court reversed, finding that the Home Rule City Act's grant of authority to the city to regulate signs included the ability to include an amortization provision.

When the case was sent back to the circuit court, however, the court found that the application of the sign code to the rooftop signs effected a taking. Courts have found that land use regulations can constitute a taking in two general situations: 1) when they fail to substantially advance a legitimate governmental interest or 2) when they deny an owner economically viable use of the land.

The second type of taking has been further subdivided into either a so-called "categorical" taking, where the owner is deprived of all economically beneficial or productive use of the property, or a taking based on the application of a balancing test. The Court of Appeals affirmed that East Lansing's ordinance resulted in a taking. The city appealed to the Michigan Supreme Court.

Why did the LDF get involved?

At issue was whether a validly enacted, legally enforceable police power ordinance that requires the removal, after a specified amortization period, of existing off-premises advertising billboards effects a taking requiring compensation. The case presented the opportunity for Michigan to join the great majority of jurisdictions that have addressed the question and found that no taking results as long as the amortization period is reasonable.

What action did the LDF take?

Filed an *amicus* brief with the Michigan Court of Appeals

Filed an *amicus* brief with the Michigan Supreme Court

What was the outcome?

The Michigan Supreme Court found that the sign code prohibiting rooftop billboards was not a regulatory taking and, accordingly, the city was not required to pay compensation to Adams Outdoor Advertising.

Who prepared the *amicus* briefs?

Michelle Thomas (Sullivan, Ward, Bone, Tyler, Fist and Asher)

(Michigan Court of Appeals)

Gerald A. Fisher (Secrest, Wardle, Lynch, Hampton, Truex and Morley)

(Michigan Supreme Court)

Thomas R. Schultz (Secrest, Wardle, Lynch, Hampton, Truex and Morley)

(Michigan Supreme Court)



City of Dearborn v Comcast of Michigan

Case No: 08—10156 (2008)



Issue: Local control of PEG channels under the Michigan and federal cable laws

Background:

Comcast announced late in 2007 that it would move public, educational, and government (PEG) channels from the basic tier cable service to a digital 900 series of channels on January 15, 2008. By making the change, there would be over 400,000 basic subscribers in the state who would not be able to have access to local government meetings, sports, and school events on their PEG channels without additional equipment.

Under the federal Cable Act, local government franchising authorities may require cable operators to designate channel capacity for PEG channels. Separate cable franchise agreements were entered into between Comcast and Meridian Charter Township, Bloomfield Township and the cities of Dearborn and Warren requiring that PEG channels be provided to township and city customers. Meridian Charter Township and the city of Dearborn filed a complaint in federal court claiming that the proposed actions of Comcast violated federal law and their franchise agreements. They requested that an injunction be ordered by the court preventing Comcast from making the conversion. Comcast countered that Michigan's Uniform Video Services Local Franchise Act of 2006 invalidated relevant provisions of the franchise agreements. Bloomfield and Warren subsequently joined the suit.

Why did the LDF get involved?

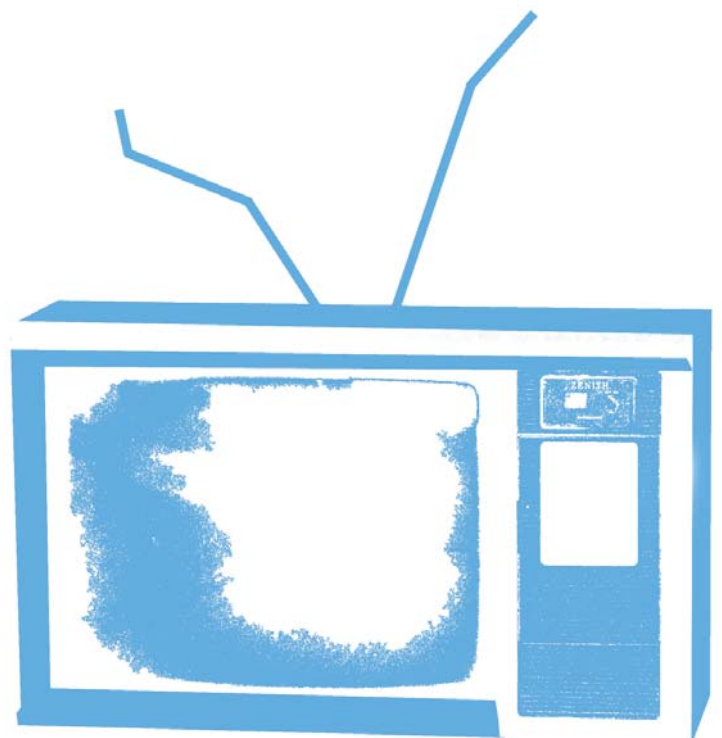
The proposed actions of Comcast violated federal law and local franchise provisions.

What action did the LDF take?

The LDF authorized financial assistance to Meridian Charter Township and Dearborn in their efforts to prevent Comcast from moving the PEG channels.

What was the outcome?

The United States District Court for the Eastern District of Michigan, Southern Division, granted the township's and city's motions for a temporary restraining order and preliminary injunction prohibiting Comcast, without the permission of the court, from moving the PEG channels from their current location or changing the format in which they are delivered to subscribers preserving availability of these PEG channels for all subscribers.



Township of Casco v Secretary of State Township of Fillmore v City of Holland

472 Mich 566 (2005)



Issue: Detachment—single petition and vote by multiple townships

Background:

(*Casco*) Two adjacent townships—Casco and Columbus—and residents of those townships wanted to detach territory from the city of Richmond. The territory that sought to be detached was territory that previously had been annexed to the city. The townships presented the ballot issue covering both townships in a single petition, which, in essence, would have allowed residents of one township to vote not only on the return of property to their township but also the return of property to a township in which they did not reside. The Secretary of State refused to approve the election since residents of one township could vote on, and possibly determine, a change in the boundaries of another township in which they did not reside. The townships asked the circuit court to enter an order compelling the Secretary of State to approve the ballot.

(*Fillmore*) The city of Holland was the subject of proposals to detach four parts of city territory to four townships in one petition circulated in all five political jurisdictions. The single petition requested that various portions of the city be detached to four different townships that surrounded the city. The townships argued that language in the state statute that provides for territory to be detached “by proceedings originating by petition therefore signed by qualified electors who are freeholders residing within the cities, villages, or townships to be affected thereby” (MCL 117.6) permitted the use of one petition so that votes in the four townships could be combined and counted in favor of all four proposals for detachment. The township filed a complaint for mandamus directly with the Michigan Court of Appeals.

Why did the LDF get involved?

At risk was a critical interpretation of the provisions in the Home Rule City Act governing detachment. The townships argued that the statute in question supported the filing of a single petition and a single vote on multiple detachments. Such an interpretation, if upheld, would have created an advantage for those seeking detachment of city territory.

What action did the LDF take?

Filed *amicus* briefs with the Michigan Court of Appeals in both cases

Filed an *amicus* brief with the Michigan Supreme Court (consolidated case)

What was the outcome?

The Michigan Supreme Court held that the Home Rule City Act does not allow a single petition and a single vote to encompass detachment of territory from a city and addition of that territory to multiple townships. The court found the language in the Home Rule City Act to be unambiguous.

Who prepared the *amicus* briefs?

Eric D. Williams

(Michigan Court of Appeals)

William B. Beach (Miller, Canfield, Paddock and Stone, P.L.C.)

(Michigan Supreme Court)

County of Wayne v Hathcock

471 Mich 445 (2004)



Issue: Eminent domain—Michigan Constitution

Background:

Wayne County wanted to acquire property adjacent to the Detroit Metropolitan Wayne County Airport for development as an “aeropark” with facilities and services for business, technology, industry and conferences. Known as the Pinnacle Project, the aeropark was expected to have a significant economic effect in Wayne County, providing thousands of jobs and millions of dollars in tax revenue. The vast majority of the property owners sold their land to Wayne County voluntarily. Several landowners whose property represented approximately 2 percent of the total acreage, however, refused to sell their property. As a practical matter, that land could not be excluded from the Pinnacle Project. Wayne County intended to transfer the condemned properties to private parties for development of the project.

Wayne County then began condemnation procedures by adopting a resolution of necessity and a declaration of taking of the property. Wayne County justified its use of condemnation to transfer property to a private entity to achieve the public purposes of economic development i.e., job creation, property tax base expansion, and tax base diversification. The property owners challenged the use of eminent domain as exceeding constitutional authority.

Why did the LDF get involved?

The Michigan Supreme Court had previously upheld the use of eminent domain by a municipality for transfer to a third party in its decision of *Poletown Neighborhood Council v Detroit* (1981). Municipalities had relied upon the decision which permitted the use of eminent domain for public purposes such as economic development. The challenge to the Pinnacle Project threatened municipalities’ continued use of eminent domain for those purposes.

What action did the LDF take?

Filed an *amicus* brief with the Michigan Supreme Court

What was the outcome?

The Michigan Supreme Court looked to art 10, sec 2 of the 1963 Michigan Constitution which states that private property shall not be taken for public use without just compensation. Stated in the affirmative, property may only be taken if it is for a “public use” and if “just compensation” is provided. In this case, the Court’s interpretation of what is a “public use” was the critical element. The Court indicated that condemned property transferred to a private entity could meet the public use test in only one of three ways:

- 1) if public necessity of an extreme sort requires collective action;
- 2) the property remains subject to public control after transfer; or
- 3) the reason for choosing the particular property is based on independent significance that it would serve the public good (such as elimination of blight).

The Court did not find that any of the exceptions applied to the Pinnacle Project.

It should be noted that Michigan voters, in reaction to the U.S. Supreme Court decision of *Kelo v City of New London* (2005), restricted the use of eminent domain even further by virtue of a constitutional amendment in 2006.

Who prepared the *amicus* briefs?

Thomas C. Phillips
(Miller, Canfield, Paddock and Stone, P.L.C.)
Clifford T. Flood
(Miller, Canfield, Paddock and Stone, P.L.C.)

Comment

Governmental immunity/liability

Clearly, there are more cases in the Top LDF 25 addressing issues of governmental immunity/liability than any other single category of cases. The reason is obvious: although municipalities are generally immune from tort (negligence) liability when they are engaged in a governmental function, those situations that “fall outside” of the general rule can be costly. One adverse court decision can lead to a string of “bad” decisions with disastrous impact on the municipal community. The LDF has acted very aggressively when it appears that a particular case could lead to bad results for many other municipalities.

The Governmental Tort Liability Act, enacted in 1964, was amended extensively in 1986 with substantial involvement of the League’s legislative advocates. The amendments helped clarify a number of liability/immunity issues in favor of governmental agencies.

Exceptions to governmental immunity

Since 1986, most of the governmental immunity cases have been focused on the major exceptions to governmental immunity—failure to keep highways in reasonable repair, the negligent operation of government-owned motor vehicles, and dangerous or defective conditions in public buildings.

The apparent influence of LDF amicus briefs is particularly interesting in the so-called police pursuit cases in the context of the motor vehicle exception to governmental immunity.

In the past several years, the Michigan Supreme Court has narrowed the liability of municipalities in the police pursuit cases. Persons who have suffered injuries or death during a police pursuit have sued municipalities under the motor vehicle exception to the Governmental Tort Liability Act. The motor vehicle exception states that a governmental agency is liable for injury and damage resulting from the negligent operation of its vehicle. The following two police pursuit cases highlight the restrictions made by the Court in its interpretation of the Act.

In 1998, the Supreme Court’s decision in *Ewing v Detroit* permitted a jury to decide whether the municipality could be liable to the injured driver of an “innocent” vehicle struck by a vehicle pursued by police. In that case, LDF *amicus* counsel argued that the “negligent operation” of a vehicle should be limited to the physical act of driving and that police pursuit is not a proximate cause of the pursued driver’s flight and injuries resulting from the flight.

In 2000, Mary Massaron Ross, the LDF *amicus* counsel in the *Ewing* case, made similar arguments, this time as outside counsel for Detroit in *Robinson v City of Detroit*. Fortunately, in contrast to its earlier decision, the Michigan Supreme Court found in favor of municipalities, restricting the parameters of liability in police pursuit cases and overruling the result in *Ewing*. Rosalind Rochkind prepared the LDF *amicus* brief in the *Robinson* case. By allowing such cases to be decided by a judge, prior to a jury trial, the potential for local government liability is greatly reduced.

Ewing v City of Detroit (Rogers v City of Detroit)

457 Mich 125 (1998)

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Issue: Governmental immunity—motor vehicle exception—police pursuit

Background:

Deborah Ewing was driving in her residential neighborhood in northwest Detroit. Her van was broadsided by a pickup truck traveling at a high rate of speed in an attempt to flee police officers. Ewing was severely injured. The chase took place across major city streets in densely populated residential areas. Ewing sued the city, the police department, and its police officers, pleading negligent operation of a government vehicle and gross negligence on the part of the individual police officers. The circuit court found in favor of all municipal defendants. The Michigan Court of Appeals reversed on the issue of whether the city and the department were liable.

Why did the LDF get involved?

At issue was the interpretation and application of the motor vehicle exception to governmental immunity—that is, under what circumstances may a local government be liable for injuries or death if a police pursuit is involved. In *Fiser v Ann Arbor*, the Michigan Supreme Court had held that a high-speed police chase through a residential neighborhood that ended when the fleeing suspect struck and injured the driver of an innocent vehicle could subject the municipality to liability under the motor vehicle exception to governmental immunity.

What action did the LDF take?

Filed a co-*amicus* brief with the Michigan Municipal League Liability and Property Pool with the Michigan Supreme Court

What was the outcome?

The Michigan Supreme Court affirmed the decision finding the city liable, following the rationale of the *Fiser* decision. The Court found that Ewing had plead facts sufficient to have a jury decide whether the city and the department were causes in fact of injuries suffered by Ewing as a result of a collision with the vehicle pursued.

Who prepared the *amicus* brief?

Mary Massaron Ross (Plunkett & Cooney)
Christine D. Oldani (Plunkett & Cooney)

COMMENT: See *Robinson v City of Detroit* which overruled the *Ewing* decision.



Robinson v City of Detroit

462 Mich 439 (2000)

Issue: Governmental immunity—motor vehicle exception—police pursuit

Background:

In two separate cases, voluntary passengers in vehicles pursued by Detroit police officers were injured or died when the vehicles were involved in accidents. The passengers sued the officers and the city claiming that the police negligently pursued the vehicles. In these cases, the police cars did not hit the fleeing car or physically cause another vehicle or object to hit the vehicle that was being chased or physically force the vehicle off the road or into another vehicle or object.

Why did the LDF get involved?

At issue was a line of cases (*Fiser* and *Ewing/Rogers*) in which a police pursuit was considered a negligent use of a motor vehicle under the motor vehicle exception to the Michigan Governmental Tort Liability Act. The motor vehicle exception states that a governmental agency is liable for injury and damage resulting from the negligent operation of its vehicle. Also at issue was whether the phrase “resulting from” should be construed as meaning a direct or immediate connection between the negligent operation of the vehicle and the injury.

What action did the LDF take?

Filed a co-*amicus* brief with the Michigan Municipal League Liability and Property Pool with the Michigan Supreme Court

What was the outcome?

The Michigan Supreme Court held that police owe a duty to innocent passengers but owe no duty to passengers who are themselves wrongdoers whether or not they help bring about the pursuit or encourage flight. The Court also held that, under the facts of these cases, the city was not liable under a narrow reading of the motor vehicle exception on the basis that the injuries did not result from the operation of the police vehicles.

The Court further held that the decision to pursue does not constitute the negligent operation of a motor vehicle. The court overruled two previous decisions, *Fiser v Ann Arbor* and *Rogers v Detroit* (*Ewing v Detroit*).

Finally, the Court held that the individual officers were immune from liability because their actions were not “the proximate cause” of the injuries, i.e., the most immediate, efficient, and direct cause preceding an injury, overruling *Dedes v Asch*.

Who prepared the *amicus* brief?

Rosalind Rockkind
(Garan, Lucow, Miller & Seward, P.C.)



Li v Feldt

439 Mich 457 (1992)

Issue: Governmental immunity—nuisance exception

Background:

Chen Li was injured when a vehicle in which she was a passenger ran a red light and collided with a vehicle proceeding under a green light. Li sued Ann Arbor, alleging that her injury was caused, in part, by an improperly timed traffic light. The city claimed that it was governmentally immune. Li claimed that the traffic light was a nuisance and that a nuisance is an exception to governmental immunity.

A nuisance is generally an activity or condition that substantially interferes with the reasonable use of property or endangers health and life. Ultimately, the Michigan Supreme Court framed the issue as to whether public nuisance is an exception to the Governmental Tort Liability Act. A nuisance per se is generally an activity or condition which constitutes a nuisance at all times and under all circumstances, without regard to the care with which it is conducted or maintained. The Act does not contain a provision indicating that nuisance is an exception to governmental immunity.

Why did the LDF get involved?

At issue was the viability of a legal principle historically relied upon by Michigan municipalities, i.e., public nuisance is *not* an exception to governmental immunity. The Michigan Governmental Tort Liability Act (GTLA) was enacted in Michigan in 1964. The GTLA basically provides that a governmental agency is immune from tort liability if the agency is engaged in a governmental function. The GTLA also contains a provision that it does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965. Li argued that a nuisance exception existed prior to July 1, 1965. If Li were to prevail, municipalities would be vulnerable to claims that their acts constituted a public nuisance.

What action did the LDF take?

Filed an *amicus* brief with the Michigan Supreme Court

What was the outcome?

The Michigan Supreme Court upheld the municipal viewpoint that public nuisance did not exist as an exception to governmental immunity prior to the adoption of the GTLA.

Who prepared the *amicus* brief?

Jerold Lax (Bodman, Longley & Dahling)

COMMENT: The issue of whether trespass nuisance was an exception to governmental immunity in sewer backup cases came to a head in *CS&P v City of Midland*, 229 Mich App 141. In that case, Midland was found liable for damages to private landowners caused by sewer backups. The Michigan Supreme Court granted leave but later issued an order denying leave as improvidently granted.

In 2002, the Michigan Supreme Court, in *Pohutski v City of Allen Park*, ruled that the second provision of the GTLA applies only to the state and not other governmental agencies. This ruling in essence closed the door for analyses such as those expressed in the *Li* case. While *Pohutski* was pending before the Court, legislation was passed which allowed, but narrowly limited, the liability of a local unit of government in sewer backup cases. 2001 PA 222. Because of this legislative enactment, the *Pohutski* Court limited the effect of its decision so that it would apply only to future cases.



Henkey v City of Grand Rapids

440 Mich 867 (1992)



Issue: Governmental immunity—public building exception

Background:

Robert Henkey slipped on some snow and ice and fell on the sidewalk immediately adjacent to the entryway of a Grand Rapids' public building. Henkey sued the city; the city claimed immunity under the Michigan Governmental Tort Liability Act (GTLA). Henkey claimed that the city was liable under the public building exception of the GTLA. The circuit court held that the public building exception did not apply to injuries suffered by Henkey when he slipped on snow and ice and that the natural accumulation of ice and snow did not constitute a dangerous condition of the building.

The circuit court also held that a sidewalk adjacent to a public building does not fall within the public building exception. The Court of Appeals reversed, finding that the public building exception applies to areas immediately adjacent to the building and that the exception also applies to dangerous conditions arising from the accumulation of foreign substances on the floors of public buildings.

Why did the LDF get involved?

At risk was the principle that the natural accumulation of ice and snow does not constitute a defective condition of a public building for purposes of the public building exception to governmental immunity. In addition, at risk was the principle that areas immediately adjacent to a building are not part of a building for purposes of the exception.

What action did the LDF take?

Filed an *amicus* brief with the Michigan Supreme Court

What was the outcome?

The Michigan Supreme Court reversed the Court of Appeals and reinstated the circuit court decision, finding that Henkey had not stated an actionable claim in avoidance of governmental immunity. The Court upheld the principles that snow and ice on a sidewalk are not a defect of a building and that location immediately adjacent to a building are not part "of" a building for purposes of the exception.

Who prepared the *amicus* brief?

James S. Brady
(Miller, Johnson, Snell & Cummiskey)

Glancy v City of Roseville

440 Mich 867 (1992)

Issue: Governmental immunity—sidewalks

Background:

Fred Glancy sued Roseville alleging that he slipped and fell on a defective sidewalk that was nearly one and one-half inches higher than the surrounding sidewalk. The city claimed that it was immune on the basis that the 1964 Michigan Governmental Tort Liability Act (GTLA) had preserved the so-called two-inch rule.

Why did the LDF get involved?

The defective highway exception to governmental immunity under the GTLA requires a governmental agency having jurisdiction over any highway to maintain that highway in reasonable repair. Sidewalks are construed to be a part of the highway in cases involving a municipal defendant.

In 1972, the Michigan Supreme Court abandoned the two-inch rule which basically provided that any alleged condition that is less than two inches in depth would not render a municipality liable for damages related to an accident caused by the condition. In *Glancy*, the Court of Appeals held that the two-inch rule had not been preserved by the GTLA. The LDF wanted the Supreme Court to adopt a bright line test with respect to whether or not the municipality had maintained the sidewalk in reasonable repair.



What action did the LDF take?

Filed an *amicus* brief with the Michigan Supreme Court

What was the outcome?

The Michigan Supreme Court refused to find that the two-inch rule had been retained by virtue of language in the GTLA. The Court said that the two-inch rule was a negligence rule rather than a principle of governmental immunity. The court also indicated that adopting the two-inch rule as a bright line test was a matter left to the Legislature.

Who prepared the *amicus* brief?

Marcia L. Howe (Johnson, Rosati, Galica, LaBarge, Aseltyn & Field, P.C.)

COMMENT: In 1999, the state Legislature acted upon the challenge by the Michigan Supreme Court. It modified the GTLA by providing that cities, villages, and townships have no duty to repair or maintain and would not be liable for injuries arising from a portion of county highway outside of the improved portion of the highway designed for vehicular travel, including a sidewalk, trailway, crosswalk, or other installation unless, at least 30 days before the injury, the municipality knew or should have known of the existence of a defect and that the defect was the proximate cause of the injury. In addition, the legislation partially restored the two-inch rule by enacting a provision that a defect of less than two inches creates a rebuttable inference that the municipality has maintained the sidewalk in reasonable repair. (MCL 691.1402a)

White v Beasley

453 Mich 308 (1996)

Issue: Public duty doctrine

Background:

Detroit Police Officer Keith Beasley was dispatched to Phoebe Obleton's home after neighbors had contacted 911 regarding an apparent assault on Obleton by her husband. Beasley and another officer arrived, but did not enter the building and never talked with Obleton. Four hours later, Obleton's husband called the police department to report that he had murdered his wife. Sheila White, the personal representative of Obleton's estate, sued the city and various individuals, including Beasley.

The city was dismissed from the lawsuit on the basis of governmental immunity. White claimed that Beasley was grossly negligent when he responded to the telephone call requesting aid on behalf of Obleton. Beasley claimed that he was not liable on the basis of the public duty doctrine.

The public duty doctrine insulates officers from tort liability for the negligent failure to provide police protection unless an individual plaintiff establishes that a special relationship exists between the police officers and the individual. Generally that relationship requires that several elements need to exist including an assumption of an affirmative duty by the municipality (governmental body) to act in the assistance of the injured person and reliance by the injured person on the municipality's action.

Why did the LDF get involved?

Historically, throughout the country, the public duty doctrine has been recognized as common law (judge-made law) in contrast to law enacted by a legislative body. Although other Michigan appellate courts had recognized the doctrine, the Michigan Supreme Court had not specifically recognized the public duty doctrine. The recognition of the doctrine was of extreme importance to local units of government.

What action did the LDF take?

Filed a co-*amicus* brief with the Michigan Municipal League Liability and Property Pool with the Michigan Supreme Court

What was the outcome?

The Michigan Supreme Court concluded that the public duty doctrine remains valid in Michigan as applied to police officers. The Court also outlined the parameters of the special-relationship exception to the public duty doctrine as articulated by the New York Court of Appeals in *Cuffy v City of New York*, 505 NE2d (1987).

Who prepared the *amicus* brief?

Julie McCann-O'Connor
(O'Connor, DeGrazia & Tamm, P.C.)
James I. DeGrazia
(O'Connor, DeGrazia & Tamm, P.C.)



City of Jackson v Jackson Fire Fighters Association

227 Mich App 520 (1998)

Issue: Minimum staffing—mandatory subject of bargaining

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Background:

Several cases were consolidated to determine whether the issue of minimum staffing of fire fighters was a mandatory subject of bargaining. Unfair labor practice claims were brought by the parties. Section 15 of the Public Employee Relations Act (PERA) provides that a public employer must collectively bargain on mandatory subjects of bargaining. Act 312 deals with particular problems of labor disputes with police and fire personnel. The Michigan Employment Relations Commission (MERC) and an Act 312 arbitration panel had issued contrary rulings on whether minimum staffing was a mandatory subject of bargaining. The union argued (and the Act 312 panel concurred) that the city's proposed reduction in per-shift manning would adversely affect fire fighter safety and that the Act 312 panel could determine and distinguish mandatory and permissive subjects of bargaining.

The Court of Appeals followed well-settled law and found that MERC has authority to implement PERA and has exclusive jurisdiction over unfair labor practice charges. The court vacated the decision of the arbitration panel. The court also found that the provision in question governed the number of fire fighters on duty per shift, not the number actually assembled at a fire scene and therefore was not a mandatory subject of bargaining.

Why did the LDF get involved?

Departure from well-settled law for bargaining units subject to Act 312 arbitration would create uncertainty and confusion for hundreds of municipal contracts for fire and police protection throughout the state.

What action did the LDF take?

Initially, the Michigan Supreme Court denied the union leave to appeal in June 1998. The union then filed a motion for reconsideration which the Court granted in December 1998. The city also filed a motion for reconsideration, requesting that the Court reinstate its initial order denying the case on the merits. The union then filed a motion to dismiss stating that the issue was moot since the parties had settled their differences. At this juncture of the case, the LDF was requested to file an *amicus* brief explaining that the union's appeal lacked merit.

What was the outcome?

Prior to submission of the *amicus* brief by the LDF, the Michigan Supreme Court vacated its December 1998 order on the basis that the Court did not believe that the issues presented should be reviewed. Consequently, the favorable decision of the Court of Appeals remained in place.



Azzar v City of Grand Rapids

2005 WL 2327076



Issue: Local property maintenance code

Background:

The city of Grand Rapids cited Azzar for violating its local Building Maintenance Code. Azzar's subsequent prosecution for Building Maintenance Code violations resulted in an acquittal as Azzar had corrected the violations. Nonetheless, Azzar asserted that the Stille-DeRossett-Hale Single State Construction Code Act and the State Construction Code specifically preempted the Grand Rapids Building Maintenance Code. In a separate civil action filed by Azzar, the circuit court found that the Grand Rapids Building Maintenance Code was not preempted by state law. The Michigan Court of Appeals also specifically found that the state law did not preempt the local Building Maintenance Code.

Why did the LDF get involved?

Despite conflicting information provided by the state construction code office, many municipalities had taken the position, based on a reading of the Home Rule City Act and the state constitution, that the Act and the Code did not preclude enforcement of local building maintenance codes. The LDF filed an *amicus* brief to buttress the home rule arguments made by Grand Rapids and also to put to rest the conflicting information being generated by the state construction code office.

What action did the LDF take?

Filed an *amicus* brief with the Michigan Supreme Court

What was the outcome?

The Michigan Supreme Court initially granted leave to appeal in 2006. However, after briefing and oral argument, the Michigan Supreme Court vacated its earlier order and denied leave to appeal the Court of Appeals' decision in 2007. The Court let stand the Court of Appeals' favorable decision which held that the Act and the Code did not preempt the Grand Rapids Building Maintenance Code.

Who prepared the *amicus* brief?

Dennis E. McGinty (McGinty, Hitch, Housefield, Person, Yeadon and Anderson, PC)

Greater Bible Way Temple v City of Jackson

478 Mich 373 (2007)



Issue: RLUIPA—rezoning request

Background:

The Greater Bible Way Temple of Jackson wanted to build an apartment complex across the street from its church on property that it owned in Jackson. The property consisted of eight lots and was zoned single-family residential. The Greater Bible Way Temple petitioned the city to change the zoning of the property to multiple-family residential so that it could construct an apartment complex. The city denied the rezoning request.

The Greater Bible Way Temple sued, claiming that the city's zoning decision was a violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). RLUIPA is a federal statute which bars the imposition of land use regulations in a manner that imposes a substantial burden on a person's right to exercise his/her religion unless the government can show that the regulation is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. RLUIPA has been held to apply when a substantial burden has been imposed in the implementation of land use regulation under which the government is permitted to make an individualized assessment of the proposed uses for the property involved. The Greater Bible Way Temple argued that RLUIPA applied on the basis that the city's refusal to rezone was an individualized assessment.

Why did the LDF get involved?

The case put all municipalities with zoning power at risk of violating RLUIPA whenever a religious assembly requested rezoning for a proposed use of the land.

What action did the LDF take?

Filed an *amicus* brief with the Michigan Supreme Court

What was the outcome?

In a very decisive victory for the city, the Michigan Supreme Court held that the city's response to the rezoning request was not an "individualized assessment" for purposes of an action under RLUIPA. The Court also ruled that even if RLUIPA applied, building an apartment complex did not constitute a "religious exercise." And, further, even if it did, the Court held that the city's refusal to rezone did not constitute a substantial burden on that religious exercise. The Court held that there did not appear to be any less restrictive means of furthering the governmental interest. In a final blow to the church's claims, the United States Supreme Court denied certiorari to an appeal from the Michigan Supreme Court.

Who prepared the *amicus* brief?

William J. Danhof
(Miller, Canfield, Paddock and Stone, P.L.C.)
Bree Popp Woodruff
(Miller, Canfield, Paddock and Stone, P.L.C.)

Living Water Church of God v Meridian Township

Case No: 05—2309 (2007)

Issue: RLUIPA—special use permit

Background:

Living Water is a growing congregation with educational and daycare facilities in Meridian Township. Living Water owned a six-acre parcel, zoned single-family residential. The township's zoning ordinance permitted a religious or educational institution in a residential zone only if the institution received a special use permit. In addition, a separate permit was required if the building to be constructed exceeded 25,000 square feet.

In 1994 Living Water received a special use permit for a building of less than 25,000 square feet to be used as a sanctuary and daycare center. In 2000, Living Water received a permit for a 28,500 square-foot elementary school; however, the permit expired in 2001. A special use permit application submitted in 2003 for a building totaling 34,989 square feet was ultimately denied. Living Water claimed that the township's denial was a violation of RLUIPA.

The federal district court held that the township's denial imposed a substantial burden on Living Water's religious exercise, that the denial did not further a compelling governmental interest, and that it was not the least restrictive means of furthering a compelling governmental interest.

Why did the LDF get involved?

If Living Water's argument prevailed, a precedent would have been established that would undermine local land use authority to the detriment of the general public and property owners. At stake was the standard to be imposed by courts in determining what constitutes a "substantial burden" on religious exercise and whether Living Water, in this case, would be able to show that the denial of its special use permit satisfies that standard.

What action did the LDF take?

Filed a co-*amicus* brief with the Michigan Townships Association with the Sixth Circuit Court of Appeals

What was the outcome?

The Sixth Circuit Court of Appeals reversed in favor of the township. The Court found that the township's denial did not place a substantial burden on Living Water in violation of its religious beliefs or effectively bar it from using the property in the exercise of its religion.

Who prepared the *amicus* brief?

Kenneth C. Sparks
(Bauckham, Sparks, Rolfe, Lohrstorfer & Thall, P.C.)



Mayor of the City of Lansing v Michigan Public Service Commission

470 Mich 154 (2004)



Issue: Right-of-way control—statutory interpretation

Background:

Wolverine Pipe Line Company wanted to construct a liquid petroleum pipeline along the I-96 corridor within the right of way of the interstate highway. Although the land is under the jurisdiction of the state's Department of Transportation, several miles of the highway were within the city limits. Wolverine filed an application with the Michigan Public Service Commission (PSC) for approval of the plan. The city intervened, arguing that the PSC had no jurisdiction since the city had not consented to the application as required by MCL 247.183. The PSC, nonetheless, denied the city's motion and authorized the project. The city appealed to the Court of Appeals which held that the statute did require local consent before construction began, but not before the applicant sought PSC approval. On appeal, Wolverine and the PSC asserted that no local approval is required; the city argued that approval is required during the application stage.

Why did the LDF get involved?

The control of their rights of way has long been of great concern to municipalities. Wolverine's position that no consent was required clearly was counter to the statute then in effect. The LDF also wanted the Michigan Supreme Court to recognize that the basis of MCL 247.183 was the so-called consent clause found in the Michigan Constitution, i.e., art 7, sec 29.

What action did the LDF take?

Filed an *amicus* brief with the Michigan Supreme Court

What was the outcome?

The Michigan Supreme Court affirmed the decision of the Court of Appeals, finding that the city was correct in its interpretation that MCL 247.183 required Wolverine to obtain local consent before work was begun on the project, but not necessarily at the time of application to the PSC.

Who prepared the *amicus* brief?

Dean M. Altobelli
(Miller, Canfield, Paddock and Stone, P.L.C.)

COMMENT: As a result of the favorable decision for municipalities, extensive lobbying by the oil industry resulted in subsequent amendments to the statute by the Legislature eliminating the requirement of consent.

City of Taylor v Detroit Edison

475 Mich 109 (2006)



Issue: Right-of-way control—interpretation of reasonable control provision of Michigan Constitution

Background:

Taylor began a major reconstruction project along the portion of Telegraph Road passing through the city. As part of the project, an ordinance was passed directing all persons owning or leasing overhead lines, wires, and poles to relocate the facilities underground and remove all above-ground facilities. The ordinance stated that the relocation was to be done at the expense of the persons owning or leasing the lines. The Detroit Edison Company maintained that it was not obligated to pay the costs of relocation. The city sued. Detroit Edison argued that 1) the Michigan Public Service Commission (PSC) had primary jurisdiction of the case (MCL 460.6(1); 2) the ordinance exceeded the city's right of reasonable control over its rights of way under Const 1963, art 7, sec 29; and 3) the ordinance was preempted. The Court of Appeals found in favor of the city on all issues.

Why did the LDF get involved?

The underlying issues of the case were of great significance to municipalities. There were no reported cases in Michigan deciding the issue of whether a municipality could require relocation of lines and equipment at the utility's expense. Furthermore, there was no authority upholding Detroit Edison's position regarding the jurisdiction of the PSC.

What action did the LDF take?

Filed an *amicus* brief with the Michigan Supreme Court

What was the outcome?

The Michigan Supreme Court reversed the Court of Appeals and held that the authority reserved to local units of government to exercise reasonable control over rights of way is explicitly made subject to other constitutional provisions and that a municipality cannot regulate "in a manner inconsistent with state law." The Court essentially found that the reasonable control provision was subject to rules promulgated by the PSC pursuant to state statutes. The Court noted with approval its 1915 decision of *People v McGraw* which interpreted similarly worded language of reasonable control as requiring that the exercise of the city's right be consistent with and not conflict with state law. The Court also found that broad regulatory authority over public utilities was granted to the PSC in 1939. The rules promulgated by the PSC pursuant to statutory authority covered the same subject matter as, and seemingly conflicted with, Taylor's ordinance. According to the Court, that conflict needed to be resolved by the PSC.

Who prepared the *amicus* brief?

David W. Centner
(Law, Weathers & Richardson, P.C.)
Ann E. Liefer
(Law, Weathers & Richardson, P.C.)

City of Lansing v Wolverine Pipeline

275 Mich App 423 (2007)

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Issue: Right-of-way control—interpretation of consent clause of Michigan Constitution

Background:

This case is a continuation of the battle by the city of Lansing to exercise control of its rights of way with respect to Wolverine Pipeline's proposed installation of a liquid petroleum pipeline underneath five city streets. See case no. 11. In that case, the city refused to consent to Wolverine's proposed pipeline. Ultimately, the Michigan Supreme Court held that the city's consent was required pursuant to state statute before construction of the pipeline could be begun. As a result of that ruling, Wolverine and its oil industry companions lobbied for—and got—legislative modification of the statute eliminating the obligation to obtain local consent.

Following the Legislature's amendment of the Act, this action was filed by the city in circuit court on the basis that the Michigan Constitution required Wolverine to obtain consent from the city. The circuit judge ruled that the city's ability to withhold its consent under Const 1963, art 7, sec 29 was weakened by the Michigan Supreme Court's decision in *City of Taylor v Detroit Edison*. See case no. 7. Lansing appealed, arguing that the Taylor decision addressed the reasonable control clause of art 7, sec 29 of the Michigan Constitution and did not address the municipal consent clause of the same section. The consent clause basically provides that no public utility shall have the right to use a right of way located within a municipality without its consent.

Why did the LDF get involved?

The issue of control of the rights of way within a municipality is of ultimate concern to a municipality and directly relates to its ability to regulate public safety, health, and welfare. Although the *Taylor* decision eroded a municipality's ability to exercise control under the so-called reasonable

control clause of art 7, sec 29, Lansing was now challenging Wolverine's actions under a separate provision of art 7, sec 29, i.e., the so-called utility consent clause.

What action did the LDF take?

Filed an *amicus* brief with the Michigan Court of Appeals

Filed an *amicus* brief with the Michigan Supreme Court

What was the outcome?

The Michigan Court of Appeals interpreted the consent provision of the Constitution to require reasonableness, i.e. consent could not be withheld arbitrarily. The court further reasoned that since a municipality can only exercise its consent through a resolution or ordinance, art 7, sec 22 of the Constitution applied. That provision states that cities are granted the power to adopt resolutions and ordinances "subject to the constitution and law." As a result, the court found that the Legislature has the authority to limit the manner and circumstances under which a city may grant or withhold consent under sec 29.

The Michigan Supreme Court denied the city's request for an appeal.

Who prepared the *amicus* briefs?

William J. Danhof (Miller, Canfield, Paddock and Stone, P.L.C.)

(Michigan Court of Appeals and Michigan Supreme Court)

Bree Popp Woodruff (Miller, Canfield, Paddock and Stone, P.L.C.)

(Michigan Court of Appeals)

Jeffrey S. Aronoff (Miller, Canfield, Paddock and Stone, P.L.C.)

(Michigan Supreme Court)

Herald Newspapers v City of Bay City

463 Mich 111 (2000)



Issue: Open Meetings Act (OMA) and Freedom of Information Act (FOIA)

Background:

Bay City's charter provided that the city commission shall appoint a fire chief upon the recommendation of the city manager. When the fire chief position became vacant, the city manager appointed a five-person committee to assist him in making his recommendation to the commission. The committee screened the candidates and narrowed the pool to nine. Two withdrew and the committee interviewed seven and recommended three for second interviews with the city manager. The city manager interviewed the three final candidates and made a recommendation of one to the commission. That candidate was hired by the commission. None of the meetings and interviews of the manager's committee were conducted as open meetings.

The local newspaper sued, claiming that actions of the city manager and his committee were required to be conducted in public under the OMA. (The paper also claimed that the city violated the FOIA for failing to release the identities and other information of the seven finalists.) The circuit court held for the city; the Court of Appeals reversed, finding that the city commission and the city manager, acting together, constituted a public body for OMA purposes.

Why did the LDF get involved?

The Court of Appeals' decision that the city manager is a public body under the OMA when making recommendations to the commission would have disastrous consequences for local government.

What action did the LDF take?

Filed an *amicus* brief with the Michigan Court of Appeals

Filed an *amicus* brief with the Michigan Supreme Court

What was the outcome?

The Michigan Supreme Court held that an individual executive such as a city manager acting in an executive capacity is not a public body for purposes of the OMA, nor was the committee that the manager formed. The Court also found that, in this particular situation, the city commission had not delegated the city manager the responsibility to make a recommendation since that authority was given directly to the city manager by the charter. (The Court also held that disclosure of the information requested about the final candidates would serve the policy underlying the FOIA.)

Who prepared the *amicus* briefs?

Don M. Schmidt
(Miller, Canfield, Paddock and Stone, P.L.C.)

Bolt v City of Lansing

459 Mich 152 (1998)

Issue: Fee/tax

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Background:

A property owner challenged Lansing's newly imposed stormwater utility fee, arguing that the fee was a tax levied without voter approval in violation of the Headlee Amendment to the Michigan Constitution (Mich Const 1963, art 9, sections 25 and 31). Lansing had imposed the stormwater fee on virtually all properties in the city to pay for the city's stormwater and sanitary sewer separation project costs as permitted under state statute.

Why did the LDF get involved?

At issue was whether municipalities could fund certain costs as a fee imposed as a regulation or as a tax requiring voter approval under the Headlee Amendment.

What action did the LDF take?

Filed an *amicus* brief with the Attorney General's Office

Filed an *amicus* brief with the Michigan Court of Appeals

Filed an *amicus* brief with the Michigan Supreme Court

What was the outcome?

The Michigan Supreme Court ruled that the stormwater service charge imposed by Lansing was unconstitutional and void on the basis that it was a tax for which voter approval was required and not a valid use fee. The Court established three criteria for distinguishing between a fee and a tax: 1) a user fee must serve a regulatory purpose rather than a revenue-raising purpose; 2) a user fee must be proportionate to the necessary costs of the service; and 3) a user fee must be voluntary—property owners must be able to refuse or limit their use of the commodity or service. The Court found that the charge failed to satisfy the first and second criteria.

Who prepared the *amicus* briefs?

R. Bruce Laidlaw
Abigail Elias



WPW Acquisition Company v City of Troy

466 Mich 117 (2002)

Issue: Taxation—definition of *additions*

Background:

Proposal A of 1994 was a part of a package of related constitutional and statutory amendments which changed the state's system of school finance and its property tax. It contained a provision that required the Legislature to provide a cap on assessment increases in taxable value to the lesser of 5 percent or inflation, with the exception that adjustments to taxable value for additions and losses were also required to be provided.

Pre-Proposal A legislation defined *additions* to include all increases in value caused by new construction or a physical addition of equipment and furnishings.

Subsequent to the passage of Proposal A, the Legislature subsequently passed amendments to the statute that provided for several adjustments for additions and also provided for corresponding adjustments for losses. One of the adjustments for additions to taxable value provided that an increase in value caused by an increase in occupancy was an addition if the value attributable to the occupancy rate had been previously allowed as a loss due to a decrease in occupancy. MCL 211.34d(1)(b)(vii).

WPW owned taxable rental property in the city of Troy. It received a reduction in a previous assessment based on a loss of occupancy. The occupancy then increased and the assessed value and taxable value were increased accordingly. The taxable value was increased 13.6 percent, exceeding the cap imposed by Proposal A. WPW asserted that the statute was unconstitutional in purporting to define *additions* in a way that was inconsistent with the established meaning of that term at the time that it was added by virtue of the passage of Proposal A.



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Why did the LDF get involved?

At issue was the constitutionality of an amendment to a statute enacted after Proposal A that allowed for increases in the value of property because of increased occupancy by tenants as an *addition*.

What action did the LDF take?

Filed an *amicus* brief with the Michigan Supreme Court

What was the outcome?

The Michigan Supreme Court ruled in favor of the taxpayer and ruled the amended statute unconstitutional. As a result of the unfavorable decision by the Court, the Michigan Municipal League has lobbied extensively for a revision to the Act and has focused most recently on eliminating the mandate to reduce taxable value as a result of decreases in occupancy.

Who prepared the *amicus* brief?

Robert F. Rhoades
(Miller, Canfield, Paddock and Stone, P.L.C.)

City of Mount Pleasant v State Tax Commission

477 Mich 50 (2007)



Issue: Tax status of city-owned property

Background:

In 1990, the city of Mount Pleasant embarked on a land acquisition project designed to increase its tax base, create jobs, and spur economic development in the city. It purchased and then annexed approximately 320 acres of vacant land adjacent to its boundaries. After it acquired the property and laid out the streets, the city platted, marketed, developed, and sold parcels of the property to various developers, investors, and government agencies. By 2002, the city's efforts resulted in five subdivisions, one condominium development, three apartment developments, a soccer field and park, a county emergency center, a state police post, an industrial park, and several commercial uses. When the city first acquired the property it was listed as exempt pursuant to MCL 211.7m. Under MCL 211.7m, city-owned land held for a public purpose is tax exempt.

After the city platted two small subdivisions, the subdivisions were placed on the tax rolls on the advice of the Michigan State Tax Commission (STC). Ultimately, the STC decided that all remaining properties acquired and owned by the city should be placed on the rolls. The STC argued that the property was not "presently used for a public purpose" and not entitled to an exemption.

After receiving unfavorable decisions at the Michigan Tax Tribunal and the Court of Appeals, the city appealed to the Michigan Supreme Court. It was argued that the Michigan Supreme Court had specifically held, just three years earlier, in *Wayne County v Hathcock* (see case no. 2) that the acquisition of land to increase a tax base and create jobs was a public purpose.

Why did the LDF get involved?

All municipal-owned properties held for economic development purposes were at risk for being placed on tax rolls throughout the state.

What action did the LDF take?

Filed an *amicus* brief with the Michigan Tax Tribunal

Filed an *amicus* brief with the Michigan Court of Appeals

Filed an *amicus* brief with the Michigan Supreme Court

What was the outcome?

In a unanimous decision, the Michigan Supreme Court held that "economic development constitutes a *public purpose*." The Court further found that the numerous activities of the city lead to the conclusion that the city used the land for a public purpose. The Court did not overrule a prior decision, however, that held that merely owning land without making any use of it may not qualify a municipality for an exemption.

Who prepared the *amicus* briefs?

Richard J. Figura
(Simen, Figura & Parker, P.L.C.)
(Tax Tribunal)

William J. Danhof
(Miller, Canfield, Paddock and Stone, P.L.C.)
(Michigan Court of Appeals and Michigan Supreme Court)

Bree Popp Woodruff
(Miller, Canfield, Paddock and Stone, P.L.C.)
(Michigan Supreme Court)

Paragon Properties v City of Novi

452 Mich 568 (1996)

Issue: Ripeness of review of zoning decision

Background:

Paragon Properties purchased a 75-acre parcel in 1980. The property was vacant, unimproved, and not served by city water or sewer. The property was zoned for large-lot, single-family residential use. In 1984, Paragon submitted a request to Novi's planning board to rezone the property to a mobile home district. After a hearing, the board recommended against the rezoning request and the city council denied the request.

Paragon sued for damages in circuit court, claiming, in part, that the ordinance unconstitutionally deprived Paragon of its property in violation of its due process rights. The circuit court ruled in favor of Paragon finding that the zoning ordinance as applied constituted an unconstitutional taking. The Court of Appeals reversed on the grounds that Paragon's constitutional claim was not ripe for review since Paragon had not first asked for a variance from the zoning board of appeals and had not brought an inverse condemnation action.

Why did the LDF get involved?

At stake was the issue of whether a property owner could challenge the constitutionality of a zoning ordinance without, first, having requested a variance from a zoning board of appeals.

What action did the LDF take?

Filed an *amicus* brief with the Michigan Supreme Court

What was the outcome?

The Michigan Supreme Court affirmed the Court of Appeals and held that, because the plaintiff failed to obtain a final decision from which an actual or concrete injury can be determined, its constitutional claim was not ripe for review.



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The Court noted that the discretionary authority to enact a zoning ordinance and to adopt a zoning map rests with the legislative body of a city or village by amending the wording of an ordinance or by rezoning. Novi's zoning ordinance also authorized a zoning board of appeals to grant a land use variance. A land use variance essentially is a license to use property in a way not permitted under an ordinance.

According to the Court, although the police power allows the government to regulate land use, the Fifth Amendment requires that compensation be paid if a government regulation unreasonably shifts social costs to an individual. A challenge to the validity of a zoning ordinance as applied is subject to the rule of finality, requiring that a landowner who challenges the constitutionality of a zoning ordinance obtain a final decision from which an actual and concrete injury can be determined and pursue a state inverse condemnation claim before the claim will mature. The request was not a final decision because, absent a request for a variance, there was no information regarding the potential uses of the property that might have been permitted, nor information regarding the extent of the injury Paragon may have suffered.

Who prepared the *amicus* briefs?

Carol Rosati (Johnson, Rosati, Galica, Shifman, LaBarge, Aseltyne, Sugameli & Field, P.C.)
Marcia Howe (Johnson, Rosati, Galica, Shifman, LaBarge, Aseltyne, Sugameli & Field, P.C.)

Papadelis v City of Troy

478 Mich 934 (2007)

Issue: Right to Farm Act

Background:

The Papadelis family owned two parcels of land in Troy, both of which were zoned one-family residential. Papadelis has operated a retail nursery business on the south parcel. Although the use was not permitted, a previous court decision allowed Papadelis to continue the business on the south parcel as a nonconforming use. A ruling in that decision also indicated that Papadelis could not use the north parcel for any use other than that allowed on residential property. Papadelis then acquired additional land on the north totaling more than five acres.

Troy's zoning ordinance provided that agricultural uses are permitted on residentially zoned parcels that exceed five acres. In 2003, Papadelis erected two large greenhouses and a pole barn on the north parcel without obtaining a permit claiming that they were exempt from doing so under the Single State Construction Code Act and Michigan's Right to Farm Act (RTFA). The trial court and the Court of Appeals broadly interpreted the RTFA, essentially precluding the enforcement of any municipal land use ordinance against an agricultural operation unless there was a direct violation of a provision of the RTFA or any published generally accepted agricultural and management practice (GAAMP).

Why did the LDF get involved?

If left unchallenged, the decision, together with other recent Court of Appeals' decisions construing the RTFA, would place municipalities throughout the state in a position of having no authority to enforce local zoning in situations involving commercial operations that meet the broad definition of a farm under the RTFA.

What action did the LDF take?

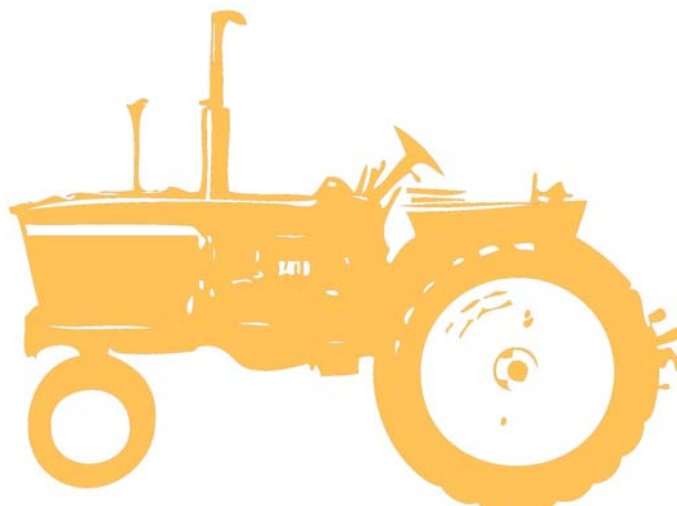
Filed an *amicus* brief with the Michigan Supreme Court

What was the outcome?

The Michigan Supreme Court found in favor of Troy and reversed the decision of the Court of Appeals, clarifying that municipal ordinances are only preempted under the RTFA if they directly conflict with a provision of the RTFA or published GAAMP. The Court also ruled that the greenhouses and pole barn were not used for purposes "incidental to the use for agricultural purposes of the land on which the building is located."

Who prepared the *amicus* brief?

Eric D. Williams



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