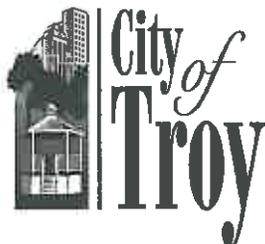


TO: Members of the Troy City Council
FROM: Lori Grigg Bluhm, City Attorney *LG*
 Allan T. Motzny, Assistant City Attorney *ATM*
 Susan M. Lancaster, Assistant City Attorney *SNL*
 Julie Quinlan Dufrane, Assistant City Attorney *JQD*
DATE: January 5, 2012
SUBJECT: 2011 Fourth Quarter Litigation Report



The following is the quarterly report of pending litigation and other matters of interest. **Developments during the FOURTH quarter of 2011 are in bold.**

A. ANATOMY OF THE CASE

Once a lawsuit has been filed against the City or City employees, the City Attorney's office prepares a memo regarding the allegations in the complaint. At that time, our office requests authority from Council to represent the City and/or the employees. Our office then engages in the discovery process, which generally lasts for several months, and involves interrogatories, requests for documents, and depositions. After discovery, almost all cases are required to go through case evaluation (also called mediation). In this process, three attorneys evaluate the potential damages, and render an award. This award can be accepted by both parties, and will conclude the case. However, if either party rejects a case evaluation award, there are potential sanctions if the trial result is not as favorable as the mediation award. In many cases, a motion for summary disposition will be filed at the conclusion of discovery. In all motions for summary disposition, the Plaintiff's version of the facts are accepted as true, and if the Plaintiff still has failed to set forth a viable claim against the City, then dismissal will be granted. It generally takes at least a year before a case will be presented to a jury. It also takes approximately two years before a case will be finalized in the Michigan Court of Appeals and/or the Michigan Supreme Court.

B. ZONING CASES

These are cases where the property owner has sued for a use other than that for which the land is currently zoned and/or the City is suing a property owner to require compliance with the existing zoning provisions.

1. Grand Sakwa v. City of Troy- Grand Sakwa filed this case, seeking relief from the Court, which had jurisdiction of the matter based on a Consent Judgment that allowed for the highly intense commercial and residential development on approximately 77 acres of property known as Midtown. The Consent Judgment provided that a small parcel to the rear of the shopping center was donated to the City for transportation center purposes. The Consent Judgment required the transportation center to be "funded" on or before June 2, 2010. If this condition was

not satisfied, then the property would revert to Grand Sakwa. Shortly after the June 2, 2010 date, Grand Sakwa filed this action, seeking a Court ordered reversion of the property. Grand Sakwa argued that the transit center was not funded by June 2, 2010, as required by the Consent Judgment. The City countered by relying on the City's budgetary allocations since 2006, and also the federal funding, where 8.4 million dollars was awarded under the American Recovery Reinvestment Recovery Act of 2009- High Speed Intercity Passenger Rail Program (HSIPR) and 1.3 million dollars was appropriated in the December 16, 2009 Transportation, Housing and Urban Development Appropriations Act, Bus and Bus Facility Program. The City also argued that the language of the consent judgment did not require "full funding" or "irrevocable funding" or preclude the use of a reimbursable grant in satisfaction of the terms of the judgment. On May 25, 2011, the Oakland County Circuit Court entered an order in favor of the City, and denied Grand Sakwa's request for a reversion of property. On June 15, 2011, Grand Sakwa filed a Motion for Reconsideration. The Court ordered the City to file a response to the Motion for Reconsideration. On September 22, 2011, the Court denied the Plaintiff's Motion for Reconsideration. On September 29, 2011, Plaintiff filed an appeal with the Michigan Court of Appeals. **On October 11, 2011, the Michigan Court of Appeals dismissed the claim of appeal, since there is no appeal of right from a post-judgment order. Grand Sakwa filed a Motion for Reconsideration on October 28, 2011, which was denied by the Court of Appeals on December 8, 2011. Prior to receiving this decision, Grand Sakwa also filed a Delayed Application for Leave to Appeal on November 22, 2011. The parties are now waiting for a decision from the Michigan Court of Appeals.**

2. Lamar Advertising v. City of Troy. Plaintiff Lamar Advertising unsuccessfully requested variances from the Troy Building Code Board of Appeals, in order to allow the erection of two separate billboards along I-75. Plaintiff has filed an appeal of the Building Code Board of Appeals decision and a simultaneous lawsuit, arguing that Troy's ordinances are unconstitutional. The City has timely supplied the record to the Court for the appeal. The Court has scheduled the date for oral argument on the appeal for February 1, 2011. Discovery has commenced on the remaining claims. **Plaintiffs filed a motion for summary disposition, asking the Court to preclude the City from relying on its affirmative defenses. The City filed a response, asking the Court for a dismissal of the Plaintiff's lawsuit. Instead of ruling on these particular motions, the Court dismissed the lawsuit on November 10, 2011, on the basis that it was improper to file the lawsuit in connection with the appeal. The dismissal is without prejudice, which means Plaintiff could re-file its other claims but it would have to do so as in a separate civil action. Plaintiffs subsequently re-filed their lawsuit in federal court (see below).**
3. Lamar Advertising v City of Troy (Federal Court). After the Oakland County Circuit Court dismissed Lamar Advertising's lawsuit that was combined with an appeal, based on procedural errors, Plaintiff filed a new

lawsuit in the U.S. District Court, challenging Troy's sign ordinance. In the lawsuit, Plaintiff claims the City's sign ordinance prohibits off-premises billboard advertising, is unconstitutional and also violates the Home Rule Cities Act. The City has filed a Motion to Dismiss the Case as its first responsive pleading. Judge Sean Cox is expected to set a hearing date for this motion.

C. EMINENT DOMAIN CASES

These are cases in which the City wishes to acquire property for a public improvement and the property owner wishes to contest either the necessity or the compensation offered. In cases where only the compensation is challenged, the City obtains possession of the property almost immediately, which allows for major projects to be completed.

There are no pending condemnation cases for this quarter.

D. CIVIL RIGHTS CASES

These are cases that are generally filed in the federal courts, under 42 U.S.C. Section 1983. In these cases, the Plaintiffs argue that the City and/or police officers of the City of Troy somehow violated their civil rights.

- 1. M. Amelia (Neal) Jermano v City of Troy Police Department - Plaintiff M. Amelia (Neal) Jermano filed a lawsuit against the City of Troy Police Department and individual officers, as well as Troy Civil Service Commission Member David Cannon (improperly identified in the lawsuit as the Troy Police Commissioner) and several other individuals and entities from other jurisdictions. The Plaintiff is not represented by an attorney. The lawsuit alleges 25 separate counts based on various legal theories. Her claims against Troy all relate to a valid arrest made on February 20, 2009 after a traffic stop on Coolidge Road near Big Beaver Road. Plaintiff was arrested after the officers received verification of a felony warrant out of Oak Park for Plaintiff's arrest on the charge of aggravated stalking. Essentially, Plaintiff's claims against Troy are based on an allegation the arrest was improper and that she was threatened and harassed by Troy Police officers. The case was filed in the United States District Court for the Eastern District of Michigan and assigned to Judge Avern Cohn. The City has filed a motion to dismiss and/or summary judgment as its first responsive pleading. The Court ordered the Plaintiff to file a response to the motion by July 5, 2011. Plaintiff failed to timely file her response. The parties are waiting for further direction from the Court. **The parties are still waiting for the Court to rule on the motion to dismiss and/or summary judgment.****
- 2. Alan A. May, as Personal Representative of the Estate of Jesus Gillard v. Bloomfield Township, Troy, et. al – Plaintiff, Alan A. May, is the personal representative of the estate for the deceased Jesus Gillard. Gillard was**

involved in a police pursuit that was initiated in Bloomfield Township by its police officers. The pursuit ended in the City of Troy at the intersection of Big Beaver Road and Adams Road when Gillard's van collided with an SUV driven by a civilian. After the collision, Gillard continued to attempt to flee and elude police officers from both Bloomfield Township and Troy. He actively resisted the officers' attempts to subdue him and place him under arrest. At some time after Gillard was handcuffed, he stopped breathing. The defendants in the lawsuit are the City of Troy and individual officers from the police department as well as Bloomfield Township and individual officers from its police department. This wrongful death lawsuit alleges constitutional violations against the defendants, including failure to train and deliberate indifference to a serious medical need. The case was filed in the United States District Court for the Eastern District of Michigan and assigned to the Honorable Judge Robert Cleland.

E. PERSONAL INJURY AND DAMAGE CASES

These are cases in which the Plaintiff claims that the City or City employees were negligent in some manner that caused injuries and/or property damage. The City enjoys governmental immunity from ordinary negligence, unless the case falls within one of four exceptions to governmental immunity: a) defective highway exception, which includes sidewalks and road way claims; b) public building exception, which imposes liability only when injuries are caused by a defect in a public building; c) motor vehicle exception, which imposes liability when an employee is negligent when operating their vehicle; d) proprietary exception, where liability is imposed when an activity is conducted primarily to create a profit, and the activity somehow causes injury or damage to another; e) trespass nuisance exception, which imposes liability for the flooding cases.

1. *Robert and Michelle Riddle v. City of Troy*. Plaintiff Robert Riddle alleges that he fell off his bicycle when the tires got caught in a gap in the sidewalk in front of Firefighter's Park. He alleges injuries to his left shoulder, left hand and his elbow and wrists. His wife, Michelle Riddle, claims damages for loss of Robert Riddle's services, companionship and consortium. The City has filed an Answer and Affirmative Defenses, and have commenced discovery. The case is in the discovery phase. **Discovery continues.**
2. *Margaret and Robert Black v. City of Troy*. Plaintiff Margaret Black alleges that she tripped and fell on a raised portion of sidewalk at 4637 Fairmont injuring her left shoulder, right hip and lumbar spine. Robert Black is claiming damages for loss of Margaret Black's services, companionship and consortium. This lawsuit is filed under the defective highway exception to governmental immunity. The parties are requesting discovery. **Discovery continues.**

F. MISCELLANEOUS CASES

1. Frank Lawrence v City of Troy – Mr. Lawrence is the brother of Thomas Lawrence who was issued two civil infraction traffic citations on October 4, 2008 for “no proof of insurance” and “failure to change address on driver’s license”. Frank Lawrence filed a FOIA request with Troy Police Department asking for a number of items, including but not limited to: all video recordings, radio transmissions, records and the officer’s disciplinary file (if any), and the police policy on issuing “quota’ tickets. Under Michigan Court Rule 2.303 (A)(3) discovery is not permitted in civil infraction actions. Additionally, FOIA does not require the release of information which would constitute an unwarranted invasion of personal privacy or law enforcement information such a, but not limited to, disciplinary files of police officers, personal telephone numbers, and operational manuals. Mr. Lawrence’s FOIA was denied for these reasons. Instead of filing an appeal of the FOIA denial to the City Manager, Mr. Lawrence appealed the denial to the Oakland County Circuit Court. Mr. Lawrence filed a Motion for Summary Disposition and the City responded. Without requiring oral arguments, Judge Steven Andrews denied Mr. Lawrence’s Motion for Summary Disposition in an Opinion and Order dated December 1, 2008. Judge Andrews also granted Summary Disposition in the City’s favor. Mr. Lawrence filed a Claim of Appeal with the Michigan Court of Appeals on December 22, 2008. The Court of Appeals in an unpublished opinion partially reversed the trial court, and remanded the matter for further proceedings including a determination by the trial court of whether or not specific documents are exempt from disclosure. The parties are waiting for the Court to schedule a court date. The Court held an evidentiary hearing on June 17, 2010, and has indicated that a written opinion will be issued. The Court granted in part, denied in part Plaintiff’s request for information. Plaintiff also filed a Motion for Reconsideration, which the Court denied. The Court entered a final order, which was appealed by Plaintiff to the Michigan Court of Appeals. The parties have filed appellate briefs, and are now waiting for an oral argument date. Oral argument was held on August 3, 2011. The parties are now waiting for the Court’s opinion. **The Court of Appeals has not yet decided this matter.**
2. Sean Steven Seyler v. City of Troy and Troy Police Department. Mr. Seyler filed this Freedom of Information Act case against the City, seeking the police report and his lab test results, which were also simultaneously requested as criminal discovery within 48 hours of Mr. Seyler’s drunk driving arrest. The City has filed a Motion for Summary Disposition, arguing that the documents requested were either already provided as criminal discovery or are otherwise exempt from disclosure. The Court will issue a scheduling order setting the date for oral argument. The Court entertained oral arguments on March 24, 2010, and granted our motion for dismissal. The Plaintiff filed an application for leave to appeal with the Michigan Court of Appeals on April 14, 2010. The parties are waiting for the Michigan Court of Appeals to schedule the date for oral argument. The Court heard oral argument on June 14, 2011, and is expected to issue a written decision. The parties are still waiting for the

Court's decision. **The Court issued its decision on November 8, 2011, remanding the case to the Oakland County Circuit Court.**

3. *Michigan Association of Home Builders; Associated Builders and Contractors of Michigan; and Michigan Plumbing and Mechanical Contractors Association v. City of Troy* – The Plaintiffs filed a complaint for Declaratory and Injunctive Relief in the Oakland County Circuit. On the date of filing the Plaintiffs also filed a Motion for Preliminary Injunction and Order to Show Cause. The Plaintiffs allege that the City of Troy has violated Section 22 of Michigan's Stille-DeRossett Hale Single State Construction Code Act by collecting fees for building department services that are not reasonably related to the cost of providing building department services. They are alleging that the City of Troy has illegally entered into a contract with Safe Built of Michigan, Inc. for building services that provides that 20% of each building permit fee be returned to the City to cover services that are not "reasonably related to the cost of building department services," as required by state statute. The Plaintiffs also assert a violation of the Headlee Amendment, arguing that the 20% returned to the City is a disguised tax that was not approved by voters. The Plaintiffs are asking for a declaratory judgment, as well as a return of any "surplus" building department service funds collected to date. Plaintiffs also request an order requiring the City to reduce its building department fees. The City of Troy was served with the Complaint and the Motion for Preliminary Injunction and Order for Show Cause on Wednesday, December 15, 2010. The parties were required to appear at Court on Wednesday, December 22, 2010, but the Court did not take any action at that time. Instead, the Court adjourned the matter to January 19, 2011. In the interim, the parties may engage in preliminary discovery in an attempt to resolve this matter. The parties are conducting discovery. The parties have completed discovery. Trial in this matter is scheduled for January 30, 2012. **After being presented with motions for summary disposition, the Court ordered the parties to engage in mediation with a neutral municipal audit professional.**

4. *T.R. Pieperzak v. City of Troy*. This case has been filed by the successful bidder for the Section 9 water main replacement contract, seeking approximately \$900,000 over the contract bid for alleged additional work, unanticipated conditions and delays that Plaintiff attributes to the City of Troy. Plaintiff filed a Motion for Partial Summary Disposition, which the City responded to. Argument on this Motion is scheduled for July 6, 2011. The Court denied Plaintiff's Motion for Partial Summary Disposition. The case is now in discovery. **Case evaluation for the case took place on November 17, 2011.**

5. *CitiMortgage, Inc. v. RBS Citizens and City of Troy et. al.* In this lawsuit, the Plaintiff, CitiMortgage, is seeking clarity as to the property rights of the City, the Mortgage companies, and individuals in the property at 650 Quill Creek Drive, in the City of Troy. Plaintiff filed a Motion for Partial Summary Disposition and a Motion for Preliminary Injunction, which were denied by the Court on June 29, 2011. The parties are now seeking discovery. **Witness and exhibit lists were**

filed in this case. A dispositive motion will be filed prior to the cutoff date in February.

G. CRIMINAL APPEALS

These are cases involving an appeal from a decision of the 52-4 District Court in an ordinance prosecution case.

1. *People v Steve Habib*. The Defendant is charged with operating a motor vehicle while intoxicated. The Defendant filed a motion in the District Court to suppress evidence and dismiss the case. The Defendant claimed that there was no valid reason for the traffic stop. Additionally, the Defendant claimed his due process rights were violated because the in car video that he was provided showed only a portion of the defendant's driving, as observed by the police officer. After an evidentiary hearing, the District Court Judge granted the Defendant's motion and dismissed the case. The City has filed a claim of appeal. The City has filed its Brief on Appeal. The case is scheduled for oral argument on October 12, 2011. **The Circuit Court ruled in the City's favor on appeal and reversed the decision of the District Court and the charge against the Defendant was reinstated. The Defendant filed an application for leave to appeal the Circuit Court decision with the Michigan Court of Appeals, which was denied on December 12, 2011.**
2. *People v. Michael Maluzhinsky*. The Defendant is charged with operation of a motor vehicle while intoxicated. The Defendant filed a motion in the District Court to suppress evidence and dismiss the case. The Defendant claimed that there was no valid reason for the traffic stop and the field sobriety tests, including the preliminary breath test, should be excluded as improperly performed. After an evidentiary hearing, the District Court Judge granted the Defendant's motion in part, suppressing the preliminary breath test and some of the field sobriety tests. Although the Judge found that there was probable cause for the stop of the vehicle, the Judge held that there was no evidence to establish reasonable suspicion for an arrest for operating while intoxicated and dismissed the case. The City appealed the decision of the court to the Oakland County Circuit Court. The Court scheduled oral argument for October 5, 2011. **The Judge remanded the case, giving the District Court Judge an opportunity to clarify the record.**
3. *People v John Haggarty*. The Defendant was arrested for operating while intoxicated after he was found in a parked vehicle with its engine running near the vacuum stations at a car wash. Police investigation revealed the Defendant was intoxicated. The Defendant filed a motion to dismiss, claiming there was insufficient evidence the Defendant operated the vehicle on a public road or any place open to the general public or generally accessible to motor vehicles. After an evidentiary hearing, District Court Judge Bolle denied the Defendant's motion, allowing the criminal case to proceed to a jury trial. The Defendant appealed that

decision to the Oakland County Circuit Court. The assigned judge, Judge Rae Lee Chabot, denied Defendant's requested relief on July 20, 2011. The Defendant has now filed an Application for Leave to Appeal in the Michigan Court of Appeals. The City timely filed its response by the September 27, 2011 deadline. **The parties are now waiting for the Michigan Court of Appeals to decide whether to allow the requested appeal.**

4. *People v Richard Pedigo*. The Defendant was arrested and charged with possession of marijuana. The Defendant filed a motion to suppress evidence claiming the marijuana that was found on his person was seized as the result of an unlawful search. After an evidentiary hearing, District Court Judge Bolle denied the Defendant's motion. The Defendant has filed an application for leave to appeal in Oakland County Circuit Court, which is assigned to Judge Nanci J. Grant. At the initial hearing of July 20, 2011, the Court adjourned the matter so that the evidentiary hearing transcript could be reviewed. The Court, after reviewing the transcript, remanded the case to allow the Court to provide additional detail as to the basis for its ruling. **The District Court entered an Order clarifying the basis for its ruling. The case is now back in Circuit Court and a hearing on the appeal is scheduled for November 23, 2011. The Circuit Court granted Defendant's Application for Leave to Appeal. The parties must now submit appellate briefs, and the Court will schedule the case for oral argument.**

ADMINISTRATIVE PROCEEDINGS

1. *In the matter of the Petitions on National Pollution Discharge Elimination Systems (NPDES Phase II General Permits)*. The City has joined several other municipalities in challenging several of the mandates in the NPDES Phase II General Permit, which was recently issued by the MDEQ. The new NPDES permit requires some storm water management techniques that exceed the federal mandates, and/or are not justified, based on the high cost of the mandate, in relation to the nominal environmental benefits. A status conference for the parties is set for October 1, 2008. The municipalities are currently exploring the coordination of efforts with other parties. Community representatives are meeting with representatives from the MDEQ to discuss possible resolutions of this matter without the necessity of a full blown administrative hearing. The parties are continuing to negotiate with the MDEQ. The City of Riverview filed a class action complaint in the Ingham County Circuit Court, challenging the permit requirements as unfunded mandates. The petitioners to the NPDES permit administrative proceeding are named as participants in the proposed class action lawsuit. As a result, the class action determination may have an impact on the administrative proceeding. The motion for class certification is scheduled for October 15, 2009. Class certification was granted. Hearings regarding the procedure for the new class action are set for

January 2010. The Court granted class action status, and the administrative proceedings are now being delayed. Status reports have been filed and reviewed, and we continue to monitor any new developments. On October 14, 2010, the Michigan Court of Appeals reversed the order granting a stay of the contested cases. On November 19, 2010, the Ingham County Circuit Court (the class action lawsuit) entered an order granting in part the dismissal of some of the claims. The remaining claims, including a Headlee claim, will be decided by the Court. Subsequently, the Assistant Attorney General, on behalf of the Michigan Department of Natural Resources and Environment (MDNRE) attempted to withdraw all of the remaining NPDES permits, which would mean that the whole process would need to be started from scratch. Since this action would likely result in a significant delay and a duplication of all efforts to date, several municipalities filed objections to this unilateral action. The MDNRE was given until December 22, 2010 to file a formal motion seeking a dismissal of the remaining NPDES permits. On August 9, 2011, the Administrative Law Judge held the case in abeyance, due to pending case at the Michigan Court of Appeals. The parties will continue to provide status reports in the interim.

If you have any questions concerning these cases, please let us know.